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Administrative Law News

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Williamsburg, Virginia

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Are Public Written Comments Admissible as Evidence?

By Cody T. Murphey

Introduction

Virginia law requires that proceedings before the State Corporation Commission ("SCC" or "Commission"), along with its findings, decisions, and judgments, be open to the public.[1] Providing the public with an opportunity to participate in regulatory proceedings before the SCC is a central part of due process. Interested persons or entities may participate in these proceedings by submitting written comments, testifying at the hearing, or becoming a respondent. The Commission, however, treats each form of public participation differently. For instance, written comments are, by definition, hearsay and are not considered evidence. On the other hand, public witness testimony is, as the name suggests, testimony, and comes into the evidentiary record.

This article intends to explore the use of written comments and public witness testimony in regulatory proceedings before the SCC, and argues that written comments can be admitted into evidence for limited purposes. Once admitted into the evidentiary record, however, the Commission will give the written comments whatever weight it deems necessary.

Public Participation

Public participation in matters before the SCC is grounded in statute and regulation. The Virginia Administrative Code states:

> Any person or entity not participating in a matter pursuant to subsection A or B of this section may make known their position in any regulatory proceeding by filing written comments in advance of the hearing if provided for by commission order or by attending the hearing, noting an appearance in the manner

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ABOUT THE EDITOR James G. Ritter is an associate in the Energy and Telecommunications practice group at Christian & Barton, LLP in Richmond. He focuses on regulatory matters before state and federal administrative entities involving electric, natural gas, and water utilities and cable companies. He also has experience working on behalf of telecommunications providers and local governments in Virginia. He earned his law degree from Washington & Lee University School of Law and his undergraduate degree from the University of Virginia.

Message from the Chair

In June I will roll off as the Chair of the Administrative Law Section and I am grateful for the privilege and for the fact that I could maintain the position after abandoning active practice. We are an active Section and have done a remarkable job of tapping Board Members who are both capable and willing. The Section has consistently delivered quality programs for our members, and the tradition continues this year.

As you are aware from targeted blast emails, the 2017 National Regulatory Conference will be held on May 18th and 19th at the College of William & Mary's Marshall-Wythe School of Law in Williamsburg, and marks the Administrative Law Section's 35th annual conference. (Also 35: Prince William and Ben Roethlisberger.) The Conference theme is *35 Years and Still Going Strong: The More Things Change, the More Things…*, and the panel discussions will address the legal and regulatory topics of generation subsidies, public-private partnerships, natural gas supply and production, capital market access for utilities, and renewable resource development. The esteemed NRC Planning Committee – chaired this year by Philip "Duke" de Haas – has lined up expert panelists to explore these issues and generate thoughtful and lively debate. The NRC has been approved for nine hours of CLE credit, including two hours of ethics. The NRC is a great opportunity for the Virginia regulatory community of introverts and certain outliers to socialize with regulators and other members of the Section, and all participants are invited to attend the Commissioners' reception on Thursday evening after the ethics presentation by Tom Spahn. Registration is now open and available online at www.vsb.org/site/sections/administrativelaw/nrc. I hope you will all be joining us in Williamsburg. If you would like additional information, please contact Margaret Sacks (Margaret.Sacks@scc.virginia.gov).

In addition to the National Regulatory Conference, the Section held its annual Brown Bag CLE lunch meeting on May 3 at the Virginia State Bar's offices in Richmond. This year's program was entitled "Trials and Tribulations: Practice Tips for Administrative Practitioners," and featured Alexander F. Skirpan, Senior Hearing Examiner at the State Corporation Commission; J. Patrick Griffin, Director of Hearings, Appeals & Judicial Services for the Virginia ABC; and Courtney M. Malveaux, Principal with JacksonLewis. The panelists provided valuable perspective on regulatory litigation practice, including insights into what makes for effective advocacy.

Please also consider attending the Virginia State Bar Annual Meeting in Virginia Beach June 16-18. Registration will be available in April through the VSB page at www.vsb.org/site/events.

As the year progresses, please do not hesitate to contact any of the members of our Section's Board of Governors with thoughts or ideas you may have. We are always open to suggestions about how the Section can provide value to its members and welcome your active participation. Further, we strongly encourage you to contribute to the newsletter. If you'd like to submit an article, contact our editor, Jamie Ritter (jritter@cblaw.com).

~ Charlotte McAfee

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Public Interest Groups Challenge Executive Order Curtailing Regulations

By Christian Tucker

On February 8, 2017, Public Citizen, the Natural Resources Defense Council, and the Communications Workers of American, AFL-CIO ("Plaintiffs") filed suit in the U.S. District Court for the District of Columbia challenging President Donald Trump's "two for one" Executive Order seeking a declaratory judgment that the Executive Order is unconstitutional and to enjoin its implementation.[1]

Among other things, the Executive Order requires (1) "that for every one new regulation issued, at least two prior regulations be identified for elimination" and (2) "that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law."[2] Interim guidance from the Office of Management and Budget ("OMB") states that the Order applies to "significant regulatory actions," which includes final regulations that have an annual effect on the economy of $100 million or more or "adversely affect in a material way the economy, jobs, the environment, public health or safety, or State, local or tribal governments or communities, or that raise novel legal or policy issues."[3]

The Plaintiffs claim five causes of action. First, that the Executive Order violates the separation of powers. Second, that the Executive Order violates the Take Care Clause of the Constitution. Third, that the Executive Order mandates agencies to exercise their delegated authority in a way that is contrary to their governing statutes. Fourth, that the implementation of the Executive Order by the OMB is unlawful. Fifth, that the OMB's interim guidance violates the Administrative Procedure Act. This article will give a brief overview of these arguments and the complaint.

The Structure of the Complaint and Plaintiffs' Arguments for Standing

Before discussing the causes of action, it is worth noting how Plaintiffs have chosen to organize the Complaint to argue that each Plaintiff has standing and to support their causes of action. Plaintiffs have identified ten statutes[4] which generally (1) mandate the implementing agency to promulgate regulations and (2) mandate a specific standard that must be met in the promulgation of the regulations. In addition, the identified statutes all protect public health and safety in some way, from automobile safety, to occupational health, to air pollution.

Plaintiffs devote nearly half of their Complaint to the discussion of these statutes,[5] and each aims to establish three points for each statute discussed. First, Plaintiffs note that each statute prescribes a specific standard that the agency must meet when promulgating regulations. The statutes that Plaintiffs cite either require the implementing agency not to consider costs when promulgating regulations, or they require the agency to consider costs and benefits when promulgating regulations.

Second, Plaintiffs assert that the Executive Order impermissibly requires that agencies consider factors outside of these statutory mandates. For example, the Endangered Species Act does not permit agencies to consider costs when determining if a species is threatened or endangered, but requires costs and benefits to be considered when designating critical habitat.[6] Plaintiffs argue that the Executive Order's zero-incremental-cost-increase provision requires agencies to consider solely the costs and ignore the benefits of critical habitat designation, and to consider those costs in relation to other regulations.[7] Plaintiffs contend that in order to comply with the Executive Order, agencies would have to violate the Endangered Species Act and consider factors outside of the exclusive factors in the statute.[8]

Third, Plaintiffs argue that because the Executive Order changes how these statutes are implemented, Plaintiffs or their individual members will be injured. For example, Plaintiffs argue that Public Citizen, a group which advocates for strong health and safety regulations, and its members will be injured by the Executive Order because the Order requires federal agencies to reduce existing protections under the Motor Vehicle Safety Act and the Motor Carrier Safety Act.[9]

— *continued on page 7*

Public Written Comments *(continued)*

> prescribed by the commission, and giving oral testimony. Public witnesses may not otherwise participate in the proceeding, be included in the service list, or be considered a party to the proceeding.[2]

The Commission's Order for Notice and Hearing often dictates the terms in which persons or entities may participate. Further, the SCC website provides a list of pending cases for which the Commission has invited comments.[3]

Analysis

The Commission's Order for Notice and Hearing typically directs interested persons to file written comments electronically, participate at the hearing by providing testimony, or participate as a respondent. Some parties, however, may wish to offer public written comments into the evidentiary record, without the author present at the hearing. This creates an evidentiary issue, which was recently brought to light in a 2015 proceeding before the Commission.

The Greensville County Power Station Case

In Virginia Electric and Power Company's ("VEPCO") application for approval of its Greensville County Power Station, the issue of admitting written comments into the evidentiary record was raised. At the hearing, counsel for the Environmental Respondents attempted to introduce into evidence public comments of the PJM Power Providers Group during cross-examination of a Commission Staff witness. The public comments had already been filed as part of the case. Counsel for VEPCO objected to the introduction of the written comments, arguing that PJM Power Providers had either the option of participating at the hearing or filing written comments.

In responding to the objection, an SCC Commissioner elaborated on the difference between public comment and public witnesses. He stated, "Public comment is part of the record, there's no question about it[,]"[4] however, "public comment is not evidence in terms of the evidentiary record."[5] Public comments "are not evidence unless they are offered at a hearing and admitted as evidence."[6] The Commission is aware of, takes note of, and listens to public comment. But the Commission has recognized that it could be reversible error to base a factual finding on public comment that is not in the evidentiary record.

On the other hand, public witnesses offer evidence when testifying at a public hearing. They are sworn in on the stand and provide testimony, which is admitted into evidence subject to cross-examination.

The Virginia Administrative Code supports differentiating between written comments and live public witness testimony at the hearing. Public witnesses "may make known their position in any regulatory proceeding by filing written comments . . . [or] giving oral *testimony*."[7] In other words, the regulation makes clear that public witnesses provide evidence in the form of testimony at the hearing.[8] Written comments, by contrast, are not considered testimony. And although written comments are not typically made part of the evidentiary record, they may be admitted into evidence under certain situations.

Hearsay and the Admissibility of Public Written Comments

In comparing written comments and public comments, the Commission has discussed the rules of evidence, and in particular, the hearsay rule providing that an out-of-court statement is hearsay if it is offered for the truth of the matter asserted and the author is not available to be cross-examined.[9] The Commission must follow the rules of evidence when sitting as a court of record.[10] Specifically, the Code states:

> The Commission, on hearing of all complaints, proceedings, contests or controversies, in which it shall be called upon to decide or render judgment in its capacity as a court of record, shall observe and administer the common and statute law rules of evidence as observed and administered by the courts of the Commonwealth.[11]

The Commission, in its Rules of Practice and Procedure, further clarifies § 12.1-30 by stating,

"In other proceedings, evidentiary rules shall not be unreasonably used to prevent the receipt of evidence having substantial probative effect."[12] Therefore, when the Commission presides over a rate proceeding, such rules of evidence need not be strictly followed.[13]

This does not mean to suggest that the Commission will disregard the rules of evidence. The Commission stated in a 1926 rate case:

> But though the Commission is not bound in such cases by the strict rules of evidence and procedure applicable to judicial cases, good practice suggests, and it is the practice of the Commission, so far as is practicable and appears to be conducive to doing justice to both the public utility and the public, to follow, generally, the rules of procedure and evidence applicable to judicial cases.[14]

In other words, the Commission may follow the rules of evidence in legislative proceedings even though it is not bound by such rules.

Written comments offered as evidence in regulatory proceedings are hearsay. The rules of evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[15] Written comments offered at the hearing are made by members of the public. Nonetheless, written comments should not be considered hearsay if used "to prove some other extraneous fact, such as . . . notice or knowledge."[16]

The Commission invoked this rule of non-hearsay during the Greensville County Power Station proceeding. In that case, counsel for Environmental Respondents attempted to introduce the written comments into evidence to demonstrate that an SCC Staff witness had knowledge of the comments. The Staff witness stated in his testimony that no public comments existed contesting the conclusion that Greensville County Power Station was a better option than third-party market alternatives.[17] The written comments in question had challenged that conclusion, contradicting the Staff witness's statement. Therefore, the written comments were allowed into the evidentiary record because they were not introduced "to prove the truth of the matter asserted[,]"[18] but rather as evidence that such a contradictory statement had in fact been made.

Even if written comments are admitted into evidence, the Commission may not give such comments the same weight as public witness testimony. Trial courts in the Commonwealth, when admitting non-hearsay statements, "must instruct the jury that they are to consider the evidence for the specific limited purpose."[19] The Commission recognizes a similar principle and often admits hearsay statements with "whatever weight to them [it] think[s] they deserve."[20] The Commission admitted the written comments at issue in the Greensville County Power Station case along with the same caveat.[21] The Commission, "oftentimes . . . will admit something which is, of course, hearsay because in a legislative proceeding we have a very liberal standing on what we admit."[22]

Not only does the Commission have a "very liberal standing" on what it admits, but the Supreme Court of Virginia gives the Commission broad discretion in determining the weight of evidence.[23] Such discretion is "axiomatic" due to the Commission's duty to ensure just and reasonable rates.[24] The Commission "may consider all relevant testimony and evidence that is of assistance and helpful to it . . . [s]o long as the evidence received and acted upon is substantial and of such character and weight as to enable it to ascertain and fix upon fair rates and charges."[25] That being said, written comments may not carry the same weight as testimony provided at the hearing. Similarly, if written comments are admitted over an objection, the Commission will review such comments "in light of specific and general objections."[26]

Conclusion

In sum, written comments, while already part of the record, may be admitted as non-hearsay statements. It is unclear whether the Commission gives more weight to written comments admitted into evidence for limited purposes over written comments in the record. However, it seems unlikely that written comments admitted into the evidentiary record as non-hearsay statements would be given the same weight as public or respondent testimony, especially if admitted over an objection. Nevertheless,

written comments can be admitted into evidence for limited purposes and could potentially be a useful tool during cross-examination. ❋

(About the Author) *Cody T. Murphey is an Assistant Attorney General in the Office of the Attorney General of Virginia, where he works primarily on electric and natural gas utility matters. Before joining the Attorney General's Office, he clerked for the Honorable Joi Jeter Taylor and the Honorable W. Reilly Marchant in the Richmond Circuit Court. Cody holds a B.A. from Hampden-Sydney College and a J.D. from the West Virginia University College of Law.*

(Endnotes)

1. Va. Code § 12.1-26.
2. 5 VAC 5-20-80 C.
3. Case Information: Public Comments/Notices, STATE CORPORATION COMMISSION, https://www.scc.virginia.gov/case/PublicComments.aspx (last visited Mar. 24, 2017).
4. *Application of Virginia Electric and Power Company, For approval and certification of the proposed Greensville County Power Station electric generation and related transmission facilities under §§ 56-580 D, 56-265.2 and 56-46.1 of the Code of Virginia and for approval of a rate adjustment clause, designated Rider GV, under § 56-585.1 A 6 of the Code of Virginia*, Case No. PUE-2015-00075, Transcript at 316 (January 13, 2016) (hereinafter "Rider GV Tr.").
5. *Id.*
6. *Id.* at 314.
7. 5 VAC 5-20-80 C (emphasis added).
8. "Testimony" is defined as "[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition." BLACK'S LAW DICTIONARY (9th ed. 2010).
9. Rider GV Tr. at 313.
10. *See* Va. Code § 12.1-30; 5 VAC 5-20-190; *see also Nat'l Home Ins. Co. v. State Corp. Comm'n*, 838 F. Supp. 1104, 1116 (E.D. Va. 1993) ("In all complaints, proceedings, contests or controversies in which the SCC decides or renders judgment in its capacity as a court of record, the SCC must follow the common law and statutory rules of evidence observed and administered by Virginia courts.").
11. Va. Code § 12.1-30.
12. 5 VAC 5-20-190.
13. *Paging, Inc. v. Afton*, 221 Va. 704, 707 (1981) ("As the presiding commissioner pointed out, the proceeding below was a legislative responsibility of the Commission and therefore the Commission was not bound by the strict rules of evidence as would be a court of record.") (citations omitted).
14. *Ex Parte: Commonwealth of Virginia, ex rel. Chesapeake and Potomac Telephone Company of Virginia, a Virginia Corporation*, Case No. 9626, Opinion of Commissioner Hooker (July 20, 1950) (quoting *Re Chesapeake & Potomac Telephone Co. of Virginia*, P.U.R. 1926-E, 481).
15. Va. Sup. Ct. R. 2:801(c).
16. *Hanson v. Commonwealth*, 14 Va. App. 173, 187 (Va. Ct. App. 1992).
17. Rider GV Tr. at 311–12.
18. Va. Sup. Ct. R. 2:801(c).
19. *Hanson*, 14 Va. App. at 187.
20. Rider GV Tr. at 315.
21. *Id.* at 318.
22. *Id.* at 314.
23. *See City of Norfolk v. Chesapeake & Potomac Tel. Co. of Va.*, 192 Va. 292, 304–05 (1951).
24. *Id.*
25. *Id.*
26. *Application of The Chesapeake and Potomac Telephone Company of Virginia, For an increase in rates*, Case No. PUC-80-0011, Order (June 13, 1980) (The Commission admitted rebuttal testimony over specific and general objections, and stated "that some portions of the evidence appear to be more argument and opinion than hard facts, [which] will go to the weight of such testimony.").

Public Interest Groups *(continued)*

Plaintiffs' Causes of Action

Plaintiff's first cause of action claims that the Executive Order violates the separation of powers.[10] Plaintiffs claim that requiring federal agencies to withhold final regulatory action based on factors that are not contained in the agency's governing statutes exceeds the President's Article II authority and usurps Congress's authority under Article I.[11] This claim rests on the argument that the Order impermissibly exercises powers exclusively reserved in Congress by unilaterally amending federal statutes. The Plaintiffs seek a declaration that the Executive Order is an unconstitutional violation of the separation of powers.[12]

Second, Plaintiffs claim that the Executive Order violates the Take Care Clause of the Constitution.[13] Article II, § 3 confers a duty to the President to "take Care that the Laws be faithfully executed," but Plaintiffs claim that the Order directs agencies to take action which is directly contrary to their respective governing statutes.[14] In support of the contention that the "Take Care Clause" is enforceable against this kind of presidential action, Plaintiffs cite *Angelus Milling Co. v. Commissioner of Internal Revenue and Kendall v. Stokes*.[15]

Angelus Milling did not involve a challenge to an executive order but a challenge to the disallowance of a tax refund.[16] The court held that Treasury officials cannot dispense with and must comply with explicit statutory requirements.[17] Plaintiffs quote from this section of the opinion but alter the quote to apply this principle to the entire executive branch.[18] It is also interesting to note that *Angelus Milling* seems to be rarely cited outside of the taxation context.

Kendall involved a dispute over the appointment of a postmaster general.[19] The Supreme Court expressly rejected the contention that the president's duty to faithfully execute the laws implied a power to forbid their execution.[20] The Plaintiffs seek a declaration that the Executive Order violates the "Take Care Clause."[21]

Third, Plaintiffs claim that the Executive Order mandates that agencies exercise their delegated authority in ways that are directly contrary to their governing statutes.[22] In this way, Plaintiffs claim that the Executive Order directs agencies to violate the law. Plaintiffs contend that because of this, there is no way a federal agency could implement the Executive Order without the action being arbitrary, capricious, or contrary to law. Plaintiffs seek a declaration that the Executive Order has no force and seek to enjoin compliance with the Order.[23]

The fourth and fifth causes of action shift the focus from the president to the OMB. Both causes of action claim that because the Executive Order is an unlawful exercise of the authority by the president, any implementation by the OMB and the Interim Guidance published by the OMB is arbitrary, capricious and contrary to law.[24] The Plaintiffs seek an injunction on the implementation of the Executive Order.

This will be an interesting docket to track. This case presents interesting questions of executive authority and legislative supremacy, as well as an opportunity to understand how the new administration views those issues. ❋

(About the Author) *Christian Tucker graduated from the University of Richmond T.C. Williams School of Law in May 2017. His work experience has focused on administrative and environmental issues.*

(Endnotes)

1. *Public Citizen Inc. v. Trump*, No. 1:17-CV-00253-RDM, Complaint at 1 (D.D.C. Feb. 8, 2017) ("Complaint").
2. Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017).
3. Complaint at 14.
4. The Complaint identifies the Motor Vehicle Safety Act; Motor Carrier Safety Act; Occupational Safety and Health Act; Mine Safety and Health Act; Toxic Substance Control Act; Hazardous Materials Transportation Act; Federal Railroad Safety Act; Federal Water Pollution Control Act; Energy Policy and Conservation Act; Endangered Species Act; and the Clean Air Act. Complaint at 18, 19, 22, 25, 28, 30, 33, 36, 40.
5. Twenty-four of the Complaint's forty-nine pages are devoted to the discussion of these individual statutes.
6. *Id.* at 37.
7. *Id.*
8. *Id.*
9. *Id.* at 22.
10. *Id.* at 43.
11. *Id.*
12. *Id.* at 44.

— continued on page 11

Thanks to Gorsuch, the Spotlight Falls on *Chevron*

By James G. Ritter

Is *Chevron* about to become a household name?[1] Could "the most famous case in administrative law" become something the public not only knows about, but cares about and understands?[2] Some commentators seem to think it could happen, and the reason has to do with Neil Gorsuch, the former Tenth Circuit judge who in April became the ninth justice of the U.S. Supreme Court. In an opinion last year, Gorsuch waged a full-scale attack on *Chevron* and arguably called for it to be overruled, and now observers wonder what his presence on the court might mean for *Chevron*'s future.

Already, the mainstream media has turned its spotlight on *Chevron* and the enormous role it plays in administrative law. Regulatory lawyers have to admit: some of the coverage is a little amusing. "It may sound rather innocuous and bland," wrote the New York Times, "but [*Chevron*] speaks to separation-of-power issues, as well as how much power we want to give the administrative state."[3] "Dry as it may sound," echoed Bloomberg, "the principle is in fact the subject of heated debate among scholars."[4] The Associated Press made sure readers knew that *Chevron* deference "is not about letting someone ahead of you in line at the gas station."[5] Even BuzzFeed has taken notice.[6]

The Icon

Named for the Supreme Court's 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, the *Chevron* doctrine requires courts to defer to administrative agencies' interpretations of federal law when the law is ambiguous and the agency's interpretation is reasonable.[7] Judges tasked with reviewing agency interpretations are instructed to apply *Chevron*'s famous two-step framework.[8] At the first step, a court asks whether Congress has "directly spoken to the precise question at issue" using clear statutory language.[9] If not—if the statute is ambiguous—the court moves to the second step, where it asks whether the agency's interpretation is reasonable.[10] If it is, then the court is bound to accept it, even when the court itself would have read the law differently.[11]

By all accounts, *Chevron* has earned its place as "one of the most important decisions in the history of administrative law."[12] According to one prominent scholar, "the decision has become foundational, even a quasi-constitutional text—the starting point for any assessment of the allocation of authority between federal courts and administrative agencies."[13] It has had a significant impact on "countless" areas of law, ranging from taxation, immigration, and environmental protection to banking, highway safety, and food and drug regulation.[14] *Chevron* has been cited in roughly 14,600 opinions and 10,700 law review articles,[15] and each year it adds about 1,000 new judicial citations to its tally.[16] Few cases are invoked with greater frequency, and the ones that are have names like *Erie* and *Twombly*.[17]

The Opposition

Hostility toward *Chevron* has been around almost as long as the case itself. The fundamental argument against it is that it violates the separation of powers, because it allows the executive to exercise power that the Constitution vests in the judiciary. Judges, the argument goes, have a duty under Article III to interpret the law and declare what it means, but *Chevron* takes that responsibility and transfers it to agency administrators.[18] Legal scholars like to describe it as a kind of "*Marbury* for the administrative state," and that seems like a pretty good analogy.[19] After all, the message of *Chevron* appears to be that, in cases involving statutory ambiguity, "it is emphatically the province and duty of the *administrative* department to say what the law is."[20]

Chevron critics also raise other legal arguments. One popular line of attack is that the deference rule conflicts with the Administrative Procedure Act, which gives courts the power to "interpret … statutory provisions" and set aside inconsistent agency actions.[21] Even Justice Scalia—who was always one of *Chevron*'s most ardent supporters—recognized this tension.[22] Another common complaint is that *Chevron* raises various due process concerns. For example, a recent article contends that deference creates an unconstitutional bias in favor of the government, because when judges defer in their

cases, they are adopting the legal position of one party and rejecting the positions of other parties.[23]

There are practical criticisms, as well. Some scholars point out that courts have never really figured out how to apply the *Chevron* framework, because it raises numerous questions: How "clear" does a statute have to be at step one? What does "reasonable" mean under step two? Are there really two steps, or just one? Could there be three? What kinds of legal interpretations are reviewed under *Chevron*? What standard applies when *Chevron* does not? Does an agency deserve the same level of deference when it reverses its interpretation?[24] The Supreme Court's cases, these critics say, have only complicated matters.[25]

More troubling, empirical analysis shows that personal policy preferences have a considerable influence on how judges apply *Chevron*. For instance, a study of Supreme Court voting patterns between 1984 and 2006 found that the justices were inconsistent in applying *Chevron*, in part because they were "significantly less deferential toward agency policies with which they disagree."[26] According to other studies, party affiliation plays a significant role in how judges vote in *Chevron* cases.[27]

The Behemoth, Faced

Justice Gorsuch's frustration with *Chevron* came to a head last year in an immigration case called *Gutierrez-Brizuela v. Lynch*.[28] After the Board of Immigration Appeals (BIA) declared him ineligible to apply for lawful resident status, Mr. Gutierrez-Brizuela petitioned for review in the Tenth Circuit. The outcome of his case depended upon two conflicting statutes. Under the first law, Mr. Gutierrez-Brizuela was indeed eligible to apply for lawful residency, and the Attorney General had the discretion to award it. But under the second law, he was "categorically prohibited" from becoming a lawful resident unless he first served a ten-year "waiting period" outside American borders.[29]

By the time the case arrived at the Tenth Circuit, the court already had a long history with this statutory scheme. In *Padilla-Caldera v. Gonzales* in 2005, the court construed the two statutes and held that the first provision was controlling.[30] But rather than accept that interpretation, the BIA announced in 2007 that it believed the statutory conflict should be resolved in favor of the second provision—the opposite conclusion the court had.[31] When the BIA later returned to the Tenth Circuit and sought to apply its new interpretation, the court agreed that the statutory provisions were ambiguous, and acknowledged that it was required under *Chevron* to defer to the BIA's position.[32] In the end, then, the court had to reverse its own precedent in favor of an agency's contrary legal interpretation.[33]

Gutierrez-Brizuela involved a slightly different issue. Although Mr. Gutierrez-Brizuela had applied for lawful residency before the BIA's interpretation became legally effective, the BIA argued that the interpretation applied retroactively. A unanimous panel rejected that view, with then-Judge Gorsuch writing the opinion. "*Chevron* step two and *Brand X* may mean that agencies exercising delegated legislative power can effectively overrule judicial precedents," he said, "[b]ut that does not necessarily mean their decisions must or should presumptively apply retroactively."[34]

Judge Gorsuch could have ended the case right there (his colleagues did). But instead he went a step further, and wrote his own concurring opinion challenging *Chevron*'s constitutionality. The opinion began like this:

> There's an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth.[35]

Judge Gorsuch devoted most of his attention to the separation of powers issue. He discussed how the framers worried what might happen if the political branches could decide what the law means, and how they created an independent judiciary precisely to avoid that possibility. But *Chevron*, he argued, invites the very dangers that the framers tried to prevent:

> *Chevron* invests the power to decide the meaning of the law, and to do so with

> legislative policy goals in mind, in the very entity charged with enforcing the law. Under its terms, an administrative agency may set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive). Add to this the fact that today many administrative agencies "wield vast power" and are overseen by political appointees (but often receive little effective oversight from the chief executive to whom they nominally report), and you have a pretty potent mix.[36]

In this sense, "*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty."[37]

Illustrating the point with an example, Judge Gorsuch recounted the Tenth Circuit's experience in *Padilla-Caldera*. "[A]fter this court declared the [immigration] statutes' meaning and issued a final decision [in *Padilla-Caldera*], an executive agency was permitted to (and did) tell us to reverse our decision like some sort of super court of appeals," Gorsuch explained.[38] "If that doesn't qualify as an unconstitutional revision of a declaration of the law by a political branch, I confess I begin to wonder whether we've forgotten what might."[39]

In the opinion's final sentences, Gorsuch offered a strong hint as to what he might like to see happen. "We managed to live with the administrative state before *Chevron*," he wrote. "We could do it again."[40]

The Future

When asked during his confirmation hearings if he would overturn *Chevron*, Gorsuch was predictably diplomatic (some people prefer evasive) in his answers. Still, with his move to the Supreme Court now complete, observers are understandably wondering whether enough justices might actually be willing to abandon *Chevron*, or at least scale back its reach.

This article will leave it to others to attempt those predictions, but there does appear to be a consensus that the justices have grown suspicious of *Chevron* in recent years.[41] In *Michigan v. EPA* in 2015, Justice Thomas wrote that "*Chevron* deference raises serious separation-of-powers questions" because it "wrests from Courts the ultimate interpretative authority to say what the law is and hands it over to the Executive."[42] He pressed the court to "stop to consider [the Constitution] before blithely giving the force of law to any other agency 'interpretations' of federal statutes."[43] In *City of Arlington v. FCC*, Chief Justice Roberts warned that "the danger posed by the growing power of the administrative state cannot be dismissed,"[44] and in upholding the Affordable Care Act's federal subsidies scheme in *King v. Burwell*, his majority opinion refused to award *Chevron* deference on questions of "deep 'economic and political significance.'"[45] Other members of the court have voiced concerns from time to time. Just a couple months ago, during oral argument in *Esquivel-Quintana v. Sessions*, the justices questioned whether *Chevron* should apply to statutes having both civil and criminal applications, and two in particular (Breyer and Kennedy) appeared to favor a limitation on agency deference.[46]

So perhaps the case can be made that *Chevron* "is under attack and on the decline."[47] Either way, the fact that an outspoken *Chevron* skeptic has joined the court is significant, and the administrative law community will want to pay close attention in the future when the justices take up cases involving statutory interpretations by administrative agencies. ❋

(Endnotes)

1. *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).
2. Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187 (2006) (abstract).
3. Steven Davidoff Solomon, *Should Agencies Decide Law? Doctrine May Be Tested at Gorsuch Hearing*, New York Times (Mar. 14, 2017), https://www.nytimes.com/2017/03/14/business/dealbook/neil-gorsuch-chevron-deference.html?_r=0.
4. Noah Feldman, *Get Ready, Supreme Court Fans. Brush Up on Your Chevron Doctrine*, Bloomberg (Feb. 3, 2017), https://www.bloomberg.com/view/articles/2017-02-03/get-ready-supreme-court-fans-brush-up-on-your-chevron-doctrine.
5. Mark Sherman, *AP Explains: The Doctrine Sure to Emerge in Gorsuch Hearings*, Associated Press (Mar. 17, 2017), http://bigstory.ap.org/article/09506499439149fdb84817bec22109a5/ap-explains-doctrine-sure-emerge-gorsuch-hearings.
6. Zoe Tillman, *Neil Gorsuch Wants the Supreme Court to Rethink Agency Power—and That Could Hurt Trump*, BuzzFeed (Feb. 15, 2017), https://www.buzzfeed.com/amphtml/zoetillman/neil-gorsuch-wants-the-supreme-court-to-rethink-agency-power.

Chevron *(continued)*

7. *Chevron*, 467 U.S. at 843.
8. *Id.* at 842.
9. *Id.*
10. *Id.* at 843.
11. *Id.* at 844 (stating that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency").
12. Richard J. Pierce, Jr., 1 Administrative Law Treatise 140 (5th ed. 2010).
13. Sunstein, *supra* note 2, at 188.
14. *Id.* at 189-90.
15. Kristin E. Hickman & Nicholas R. Bednar, Chevron's *Inevitability*, 85 Geo. Wash. L. Rev. (forthcoming 2017).
16. Thomas W. Merrill, *Justice Stevens and the* Chevron *Puzzle*, 106 Nw. U. L. Rev. 551, 552 (2012).
17. *Id.* (referring to *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).
18. *See, e.g.*, Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187, 1189 (2016).
19. *E.g.*, Sunstein, *supra* note 2, at 189.
20. *Id.* (referring to *Marbury v. Madison*, 5 U.S. 137, 177 (1803)) (emphasis in original).
21. 5 U.S.C. § 706.
22. Hickman & Bednar, *supra* note 15 (quoting *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1211-12 (2015) (Scalia, J., concurring)).
23. Hamburger, *supra* note 18, at 1189.
24. Jeffrey A. Pojanowski, *Without Deference*, 81 Mo. L. Rev. 1075, 1077 (2016) (comparing cases).
25. *Id.*
26. Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 Colum. L. Rev. 1727, 1734 (2010).
27. Sunstein, *supra* note 2, at 189 n.3 (citing studies).
28. 834 F.3d 1142 (10th Cir. 2016).
29. *Id.* at 1144 (discussing 8 U.S.C. §§ 1255(i)(2)(A), 1182(a)(9)(C)(i)(I)).
30. *Id.* (referring to *Padilla-Caldera v. Gonzales*, 426 F.3d 1294 (10th Cir. 2005)).
31. *Id.*
32. *Id.* (referring to *Padilla-Caldera v. Holder*, 637 F.3d 1140 (10th Cir. 2011)).
33. *Id.*
34. *Id.* at 1148 (referring to *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)).
35. *Id.* at 1149 (Gorsuch, J., concurring).
36. *Id.* at 1155 (Gorsuch, J., concurring) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010).
37. *Id.* at 1152 (Gorsuch, J., concurring).
38. *Id.* at 1150 (Gorsuch, J., concurring).
39. *Id.* (Gorsuch, J., concurring).
40. *Id.* at 1158 (Gorsuch, J., concurring).
41. *E.g.*, Hickman & Bednar, *supra* note 15 ("[A] reasonable case can be made that *Chevron* is under attack and on the decline.").
42. 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (internal citation and quotation marks omitted).
43. *Id.* at 2714 (Thomas, J., concurring).
44. 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting).
45. 135 S. Ct. 2480, 2488-89 (2015) (citing *Util. Air. Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).
46. *See* Transcript of Oral Argument, *Esquivel-Quintana v. Sessions*, No. 16-54 (Feb. 27, 2017); Trevor W. Ezell, *No, Gorsuch Is Not a Radical on* Chevron, National Review (Apr. 3, 2017), http://www.nationalreview.com/bench-memos/446369/neil-gorsuch-chevron-deference-not-radical.
47. *E.g.*, Hickman & Bednar, *supra* note 15.

Public Interest Groups *(continued)*

13. *Id.*
14. *Id.* at 45.
15. *Id.* at 44 (citing *Angelus Milling Co. v. Comm'r of Internal Revenue*, 325 U.S. 293 (1945), and *Kendall v. Stokes*, 37 U.S. 524 (1838)).
16. *Angelus Milling*, 325 U.S. at 295.
17. *Id.* at 296.
18. *Compare* Complaint at 44 ("Insofar as Congress has made explicit statutory requirements, they must be observed and are beyond the dispensing power of [the executive branch]."), *with Angelus Milling*, 325 U.S. at 296 ("Insofar as Congress has made explicit statutory requirements, they must be observed and are beyond the dispensing power of Treasury officials.").
19. *Kendall*, 37 U.S. at 527.
20. *Id.* at 613.
21. Complaint at 45.
22. *Id.* at 46.
23. *Id.*
24. *Id.* at 47, 48.

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