Son of former EPA chief adds to calls for less court deference to agencies

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Like several U.S. Supreme Court justices before him, a federal appeals judge — who also is the son of the first female U.S. EPA head — has argued that the courts should not be so quick to offer so-called "*Chevron* deference" to federal agencies' interpretations of statutory language.

"*Chevron* seems no less than a judge-made doctrine for the abdication of judicial duty," Judge Neil McGill Gorsuch of the U.S. Court of Appeals for the 10th Circuit wrote in an Aug. 23 concurring opinion.

The push for reform is significant, because if courts become more reluctant to defer to federal agencies, the U.S. EPA, FERC and other regulators could have a far more difficult time implementing controversial new rules.

What is the controversy?

Courts traditionally afford federal agencies two similar, but distinct, types of deference. Beginning with the 1945 case *Bowles v. Seminole Rock & Sand*, the courts began deferring to agencies' interpretations of their own regulations in what later came to be known as Auer deference. And grounded in the 1984 case *Chevron v. Natural Resources Defense Council*, agencies' interpretations of ambiguous statutes they are charged with implementing are also granted deference so long as the court finds those interpretations to be "reasonable."

During oral arguments in 2014, in a case involving orders in which the U.S. EPA interpreted its own rules, Supreme Court Justices Antonin Scalia, Elena Kagan and Sonia Sotomayor began expressing unease over the deference routinely grant to federal agencies. In a March 2015 ruling in that case, Scalia and Justices Clarence Thomas and Samuel Alito expressed similar concerns, asserting in separate concurrences that the long-standing precedent raises serious constitutional issues.

The issue of deference arose again in the Supreme Court's June 2015 decision in *King v. Burwell* upholding federal subsidies to help Americans buy health insurance pursuant to the Affordable Care Act. That time, Chief Justice John Roberts raised the issue in writing the majority opinion, which refused to defer to the Internal Revenue Service's interpretation of the law.

Roberts notably also wrote a dissent to the court's 2013 decision in *Arlington v. FCC*. Joined by Justice Anthony Kennedy — who casts the swing vote in many cases — Roberts in his *Arlington* dissent vehemently warned about executive overreach and referred ominously to "the danger posed by the growing power of the administrative state."

Then, in a June 2015 decision in *Michigan v. EPA* penned by Scalia, the court refused to defer to the U.S. EPA's interpretation of the Clean Air Act when deciding to regulate mercury emissions from power plants. In a concurrence, Thomas continued to question the constitutionality of the court deferring to agency interpretations of federal statutes.

Congress has also gotten involved in the discussion. Republican critics of the U.S. EPA sponsored a bill that would limit courts' deference to agencies' interpretations of statutory provisions and their own rules, and that bill passed the U.S. House of Representatives in July in a highly partisan vote. But at least one academic, Professor Jody Freeman of the Harvard Law School, has been sounding alarm bells over courts' seemingly increasing reluctance to defer to agency interpretations.

Gorsuch's take

Gorsuch, the son of Reagan-era U.S. EPA Administrator Anne Gorsuch Burford, has added his voice to the debate.

Diving deep into the issue, Gorsuch took specific aim at what he described as the executive branch's use of *Chevron* deference to overrule judicial precedent when interpreting a congressional statute.

The case before the 10th Circuit — *Gutierrez-Brizuela v. Loretta Lynch* (No. 14-9585) — was complicated, involving the residency of undocumented immigrants and the question of whether an agency can apply its interpretation of the law retrospectively.

"There's an elephant in the room with us today," wrote Gorsuch in his opinion. *Chevron* allows "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," the judge said. "Maybe the time has come to face the behemoth."

Asserting that the country's founders considered the separation of powers to be "a vital guard against governmental encroachment on the people's liberties," Gorsuch said the executive agency involved in the case was allowed to "tell us to reverse our decision like some sort of super court of appeals."

"If that doesn't qualify as an unconstitutional revision of a judicial declaration of the law by a political branch, I confess I begin to wonder whether we've forgotten what might," the judge wrote.

Under the process outlined in the Constitution, the solution when the political branch disagrees with a judicial interpretation of existing law is for Congress to change the law, Gorsuch maintained.

"Admittedly, the legislative process can be an arduous one," the judge continued. "But that's no bug in the constitutional design: it is the very point of the design. The framers sought to ensure that the people may rely on judicial precedent about the meaning of existing law until and unless that precedent is overruled or the purposefully painful process of bicameralism and presentment can be cleared."

Gorsuch also bemoaned that *Chevron* deference does not allow a court to independently decide what the statute means and whether or not it has vested a legal right in a person. "Where *Chevron* applies that job seems to have gone extinct," he wrote.

Touching on an issue raised in several FERC enforcement cases, the judge said transferring the job of interpreting the law from the judiciary to the executive raises the same due process and equal protection concerns the framers knew would arise if the legislative branch intruded on judicial functions.

Gorsuch wrote, "Under *Chevron* the people aren't just charged with awareness of and the duty to conform their conduct to the fairest reading of the law that a detached magistrate can muster. Instead, they are charged with an awareness of *Chevron*; required to guess whether the statute will be declared 'ambiguous' (courts often disagree on what qualifies); and required to guess (again) whether an agency's interpretation will be deemed 'reasonable.'"

"Who can even attempt all that, at least without an army of perfumed lawyers and lobbyists? And, of course, that's not the end of it. Even if the people somehow manage to make it through this far unscathed, they must always remain alert to the possibility that the agency will reverse its current view 180 degrees anytime based merely on the shift of political winds and still prevail."

The judge acknowledged arguments that *Chevron*'s rule of deference is about letting agencies fill legislative voids when Congress passes ambiguous legislation. But, he insisted, the problem remains that courts are not fulfilling their duty "to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them."

Even assuming that Congress intended to delegate its legislative authority to a federal agency, Gorsuch maintained that doing so violates the Constitution.

Gorsuch also questioned why *Chevron*'s presumption of delegation for ambiguous statutes does not apply to criminal statutes and is only sometimes applied to ambiguous civil statutes.

Finally, Gorsuch predicted that if *Chevron*, "this goliath of modern administrative law," were abandoned, "very little would change — except perhaps the most important things." For instance, he said Congress would continue to pass statutes

for executive agencies to enforce, and agencies would continue to offer guidance on how they intend to enforce those statutes.

"The only difference would be that courts would then fulfill their duty to exercise their independent judgment about what the law is ... consult agency views and apply the agency's interpretation when it accords with the best reading of a statute," Gorsuch wrote.

"But de novo judicial review of the law's meaning would limit the ability of an agency to alter and amend existing law. It would avoid the due process and equal protection problems of the kind documented in our decisions. It would promote reliance interests by allowing citizens to organize their affairs with some assurance that the rug will not be pulled from under them tomorrow, the next day, or after the next election. And an agency's recourse for a judicial declaration of the law's meaning that it dislikes would be precisely the recourse the Constitution prescribes — an appeal to higher judicial authority or a new law," Gorsuch concluded.

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