

## Supreme Court Appointment Threatens Long-Standing Chevron Doctrine

By Alisha Mahalingam, J.D. Candidate 2018 | February 22, 2017

Agency law is having a moment in the spotlight. With the nomination of Judge Neil M. Gorsuch to the Supreme Court, attention is being drawn to issues where his vote stands to make an impact. One such issue is Chevron deference, a long-standing agency law doctrine followed by the Supreme Court for over thirty years. Chevron deference has been cited in decisions affecting numerous agencies ranging from the EPA to the SEC.

Given the doctrine's previously quiet existence, its newfound fame begs the question – what exactly is [Chevron deference](#)? It arises when an agency is required to apply a law or statute that is ambiguous. Chevron deference explains that an agency should have the first crack at interpreting and courts should defer to their expertise. In *Chevron v. National Resources Defense Council*, the case that gave birth to the doctrine, Justice Stevens laid out a two-prong test that must be met for deference to apply. First, the court must determine if the law or statute in question is actually ambiguous. If so, the court then asks if the agency interpretation is reasonable – a question that has rarely been answered in the negative. Underpinned by a belief in the expertise of bureaucrats, Chevron essentially allows the court to grant agencies interpretive discretion, a move Gorsuch characterizes as “judicial abdication”.

Unlike Justice Stevens, Judge Gorsuch believes that Chevron has given agencies unconstitutional authority that violates the separation of powers. In [Gutierrez-Brizuela v. Lynch](#), a case he heard as a judge for the Tenth Circuit Court of Appeals, Gorsuch opined that Chevron permits “executive bureaucracies to swallow huge amounts of core judicial and legislative power ... in a way that seems more than a little difficult to square with the Constitution of the framers' design.” From this language, there appears to be no question in the Judge's mind as to Chevron's constitutionality. His solution? Kill it.

The reality of how this could unfold before the Supreme Court is uncertain, but it is unlikely to happen any time soon. Judge Gorsuch has yet to obtain senate confirmation and the Court must also grant certiorari to a case raising a Chevron question. By that time, Chevron may not even be a question for the Supreme Court if the representatives behind the recently proposed [Regulatory Accountability Act](#) have their way. The act includes a provision entitled “The Separation of Powers Restoration Act” requiring courts to interpret statutes without consideration of an agency's pre-existing interpretation – a clear rejection of Chevron. The bill passed the House last month, and is currently before the Senate. With multiple avenues primed for Chevron's demise, Gorsuch has provided little assurance: “very little would change,” he says “except perhaps the most important things.”