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The End of the Dance? The *Chevron* Two-Step and New Directions for Administrative Law

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President Trump's electoral victory has sparked high drama in all three branches of the federal government and beyond. The central concern of this paper is how the election of President Trump—and particularly the confirmation by a Republican Senate of his Supreme Court nominee, Justice Neil M. Gorsuch—may affect seemingly settled rules governing federal administrative law. The paper also provides an update on significant developments over the past year in the Supreme Court, D.C. Circuit, and the Fifth Circuit. Part I discusses issues of judicial deference to executive interpretations of law. Part II discusses recent Supreme Court decisions that are noteworthy from an administrative-law perspective and highlights important administrative-law questions the Court has already agreed to decide in October Term 2017. Part III identifies similarly important administrative-law cases recently decided by the D.C. Circuit. And finally, Part IV discusses current administrative-law issues specific to the Fifth Circuit.

I. Judicial Deference to Executive Interpretations

Many Americans were understandably troubled to learn that, according to President Trump's first nominee to the Supreme Court, the only thing standing between them and the ever-expanding administrative state that "wields vast power and touches almost every aspect of daily life,"[1] is, as then-Judge Neil Gorsuch put it in a Tenth Circuit concurring opinion last year, "a judge-made doctrine for the abdication of the judicial duty."[2] In *Gutierrez-Brizuela v. Lynch*, Judge Gorsuch explained that "*Chevron*[3] and *Brand X*[4] permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power

[1] *See* Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477 (2010).
[2] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). Notably, then-Judge Gorsuch was the author not only of the much-discussed concurring opinion, but also of the majority opinion itself.
[3] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (requiring judicial deference to certain executive agency statutory interpretations).
[4] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. (*Brand X*), 545 U.S. 967 (2005) (agency statutory interpretation trumps preexisting judicial interpretation, unless the preexisting judicial interpretation found statute to be unambiguous).

in a way that seems more than a little difficult to square with the Constitution of the framers' design."[5]

With that unsettling introduction, non-lawyers across the country became aware for the first time of something that seems so basic to administrative lawyers—the Supreme Court's canonical deference-enforcing decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*. Nor could they know that many administrative-law scholars, who had been debating the doctrine for decades, were at that very moment speculating that *Chevron* may be on its last leg.[6]

Indeed, many believe that the Supreme Court will soon reconsider *Chevron* and (perhaps first) *Auer v. Robbins*, a related precedent that requires courts to defer to an agency's interpretation of its own regulations "unless plainly erroneous or inconsistent with the regulation."[7] Assuming that's right, how might the Court approach the issue? According to a recent story in the Washington Post, at least one Justice will begin by asking, "What would Justice Scalia have done?"[8] Justice Scalia was an expert in administrative law and his influence remains significant; this paper thus begins by tracing the evolution of Justice Scalia's approach to judicial review of executive interpretation.

A. Justice Scalia's growing concerns about deference

As Harvard Law School Dean John Manning put it, the "central grounding for all of Justice Scalia's commitments—not only his affinity for rule-like doctrinal tests, but also, more fundamentally, his commitments to textualism, originalism, and a tradition- or practice-based approach to unenumerated rights"—was "the

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[5] 834 F.3d at 1149 (Gorsuch, J., concurring).

[6] Several Supreme Court Justices have questioned *Chevron* over the years. *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1208 n.4 (2015) (Sotomayor, J.); *id.* at 1211 (Scalia, J., concurring); *id.* at 1213 (Thomas, J., concurring); Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1338-39 (2013) (Roberts, C.J., concurring); *id.* at 1339-42 (Scalia, J., dissenting); Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 67-69 (2011) (Scalia, J., concurring); *see also* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

[7] 518 U.S. 452, 461(1997) (quotation marks omitted).

[8] *See* Andrew Hamm, *Alito Eulogizes Scalia at Federalist Society*, SCOTUSblog (Nov. 17, 2016, 1:55 p.m.), http://www.scotusblog.com/2016/11/alito-eulogizes-scalia-at-federalist-society/ (reporting that, in a speech delivered shortly after Justice Scalia's unexpected death, Justice Alito "expressed concern about the expansion of executive and legislative powers," and referred to the expression "What would Scalia do?" as a once playful and "highly sacrilegious" expression that, after Justice Scalia's death, "takes on new significance and serves as a call to action").

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