NCLA Ranks the Short List of Candidates to Replace Justice Kennedy

The Trump administration has been candid and emphatic that "shrinking the administrative state" serves as its litmus test for judicial appointments. White House Counsel Donald F. McGahn II, chief architect of the administration's judicial selection process, has said that the administration will continue to identify judicial candidates who oppose the accumulation of power in the federal bureaucracy which now operates as "its own branch of government." Curtailing a federal administrative state that has grown far too large and invasive promises to be one of the most enduring and valuable legacies of this administration. President Trump's first appointment to the U.S. Supreme Court, Justice Gorsuch, fit this mold beautifully.

To help identify another candidate in the same vein, the New Civil Liberties Alliance has taken a hard look at the rumored top contenders, using exclusively the criterion of which judge is most likely to adhere to the Constitution's constraints on the administrative state. NCLA is a nonprofit civil rights organization founded to defend constitutional rights threatened by administrative power. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to live under laws made by the nation's elected lawmakers rather than by bureaucrats, the right to be tried in front of an impartial and independent judge whenever the government brings cases against private parties, and the right to free speech. NCLA's founder and president, Professor Philip Hamburger, authored the 2014 book *Is Administrative Law Unlawful?*, which provides many of the legal arguments undergirding current efforts to cut the administrative state down to size.

The candidates analyzed below are listed by the approximate order in which NCLA believes their opinions and/or scholarship both recognize the threat from unconstitutional administrative power and signal a willingness to uphold the Constitution against depredations from the administrative state. These rankings are necessarily inexact. Some judges—like Kethledge and Kavanaugh—appear to be roughly equal on these issues, and other candidates listed may just be too new to the bench to have had the opportunity to demonstrate an equal level of concern. NCLA encourages President Trump to nominate a candidate who will enforce the Constitution against the administrative state. Justice Gorsuch's appointment already has lower court judges reexamining doctrines like *Chevron* deference. The nomination of another strong candidate on these issues would encourage all federal judges to fearlessly uphold the constitution and apply constraints on administrative power in the years ahead.

Raymond Kethledge

Judge, U.S. Court of Appeals for the Sixth Circuit (Michigan), since 2008
Age: 51, born Summit, New Jersey
Education: University of Michigan; University of Michigan Law School
Clerkships: Ralph Guy, Jr. (6th Circuit); Justice Kennedy

President Bush first nominated Kethledge to the Sixth Circuit on June 28, 2006. Bush renominated him on March 19, 2007, and he was confirmed on June 24, 2008 by voice vote. (His nomination stalled until Bush also appointed then-MI Sen. Levin's cousin's wife Helene White to the court).

Kethledge's Views on the Administrative State. Judge Kethledge gave a speech at his *alma mater* late last year detailing his skeptical views on *Chevron* deference, how judges handle ambiguous statutes, and the use of legislative history. Kethledge's criticism of *Chevron* focuses on separation of powers concerns (not judicial bias), but he also details practical problems with judicial deference: agencies seek interpretations that support policy preferences, judges take the easy way out and find ambiguity instead of figuring out what a statute means, agencies cut corners and become sloppy when counting on deference, and they even distort relevant statutes in their presentations to courts "under cover of deference." Kethledge reports he "never yet had occasion to find a statute ambiguous," which certainly signals antipathy to employing *Chevron* deference.

Judge Kethledge does not support using legislative history to resolve ambiguity. As a former judiciary staffer for Sen. Spence Abraham, Kethledge knows that staffers write legislative history largely unsupervised—"like being a teenager at home while your parents are away for the weekend." Staffers write for "an audience in robes," whereas senators approve legislation, not what is in the legislative history (which many ignore). For Kethledge, "the idea that most statutes are badly written is a myth." He believes the Office of Legislative Counsel has tremendous expertise in writing with clarity. Hence, Kethledge concludes, Scalia and Kagan "are rightly skeptical that legislative history should play some kind of central role in determining the rights and obligations of our citizens."

Several cases demonstrate Judge Kethledge's approach. *Waldman v. Stone* involved a contested fraud judgment in bankruptcy court, with Waldman claiming the judgment did not emanate from a proper article III judge. Kethledge first ruled that the argument was not waived below, because structural constitutional arguments cannot be waived. Then he agreed with Waldman that Congress had diminished a co-equal branch by denying article III protections to bankruptcy judges. The Supreme Court later answered that question differently, but Justices Roberts, Scalia, and Thomas dissented when it did. In *Carpenter v. United States*, Kethledge upheld a decision denying a Fourth Amendment challenge to the collection of cell tower data. The Supreme Court overturned his decision in June, notably over dissents from Justices Kennedy, Thomas, Alito, and Gorsuch.

In *U.S. v. NorCal Tea Party Patriots*, Judge Kethledge castigated the IRS for failing to turn over documents and trying to hide behind taxpayer privacy to avoid accountability for its actions. In *EEOC v. Kaplan Higher Educ. Corp.*, Kethledge ruled against the EEOC over its objection to Kaplan's use of credit checks for certain job applicants. EEOC believed the practice had a disparate impact on African-Americans and lacked a business rationale. Kethledge noted that the

EEOC itself used similar background checks and that they are racially blind. In *U.S. v. Bistline*, Kethledge overturned a district judge who had sentenced a child pornographer to only one night in jail. The district court believed Congress erred by setting the penalty rather than leaving it up to the sentencing commission. Kethledge countered that "defining crimes and fixing penalties are legislative … functions" and that it is a "virtue" when "Congress exercises its power directly."

In *Villegas de la Paz v. Holder*, Judge Kethledge bristled at DHS's efforts to deprive the court of jurisdiction over this immigration removal case (based on DHS's failure to timely notify the illegal immigrant of her removal status). But he also found that because she had reentered the U.S. after a prior order of exclusion, her efforts to prevent being removed from the country could not prevail. These cases, among others, attest to the consistent strong attention Kethledge pays to the structural constraints of the Constitution—even when doing so does not affect the outcome of the case at hand. He has also said a judge must interpret the Constitution according to "the meaning that the citizens bound by the law would have ascribed to it at the time it was approved."

Kethledge's Views on the First Amendment. Judge Kethledge's First Amendment opinions suggest he sees that as another constitutional check on government power. In *Lavin v. Husted*, he invalidated an Ohio law that banned candidates for state prosecutor from accepting contributions from Medicaid providers because the means/end fit of the ban was not good enough for First Amendment purposes. In *Bays v. City of Fairborn*, Kethledge joined an opinion striking down a law under which police challenged festival attendees who were carrying a Christian sign. The festival claimed to ban soliciting causes outside of booths for neutral crowd control reasons, but the court noted that the festival allowed other actions far more likely to draw a crowd. In *Bailey v. Callaghan*, Kethledge applied binding Supreme Court precedent that the First Amendment does not require school districts to provide a payroll deduction mechanism for the teachers' union to collect dues.

Other Publications. Judge Kethledge has received plaudits for his incisive and vibrant writing style. The *Wall Street Journal* editorial board called his *Kaplan* decision the "Opinion of the Year." *The Green Bag*, a legal journal that annually recognizes "good writing" about law has twice recognized his "exemplary legal writing." Kethledge writes his own published opinions noting "the process of writing makes me think so much harder about the subject than just editing does. … [Writing myself brings] more insights about the case or doctrine … [.]" Kethledge co-authored a book on leadership and solitude. It contains a series of biographical vignettes showing the necessity of solitude for making sound decisions. He sometimes retreats to a barn office in the woods of northern Michigan to write, reporting that he "get[s] an extra 20 IQ points from being in that office" and that "lawyers need to find that space for analytical clarity" away from phones, emails, and other interruptions.

Conclusion. If President Trump wishes to appoint another justice who would respect the Constitution and shrink the administrative state, he would have a hard time—perhaps an impossible time—finding a better choice than Judge Ray Kethledge. Pairing a Justice Kethledge with Justice Gorsuch would establish a solid beachhead on the Supreme Court, signaling lower court judges that they can go on record with their views about *Chevron* deference and constitutional constraints on administrative power.

Brett Kavanaugh

Judge, U.S. Court of Appeals for the District of Columbia Circuit, since 2006
Age: 53, born Washington D.C. area
Education: Yale University; Yale Law School
Clerkships: Walter Stapleton (3rd Cir.); Alex Kozinski (9th Cir.); Justice Kennedy

First nominated by George W. Bush to the D.C. Circuit in 2003, Kavanaugh's nomination stalled in the Senate for nearly three years. In 2006, the Senate Judiciary Committee recommended confirmation on a 10-8 party-line vote, and the full Senate confirmed him by a vote of 57-36.

Kavanaugh's Views on the Administrative State. Judge Kavanaugh has expressed grave concerns regarding bureaucratic overreach because independent agencies can (and often do) undermine the Constitution's vital separation of powers. In his 12 years sitting on the D.C. Circuit Court of Appeals, Kavanaugh has developed a consistent, albeit nuanced, approach to adjudicating matters related to the administrative state. Kavanaugh believes agencies cannot regulate outside the boundaries of their statutory authority under *any* circumstance. Independent agencies pose significant constitutional challenges—Judge Kavanaugh has described them as a "headless fourth branch of the U.S. Government." Kavanaugh has warned that since independent agencies exercise "massive power [in] the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of checks and balances." Courts should be wary of regulation adopted by independent agencies because there is a problem of accountability, given the President's inability to supervise their activities. Kavanaugh has suggested that the judiciary is at least partly to blame for the growing concentration of power in independent agencies. Courts have served as enablers to Congress' unconstitutional transfer of its legislative authority to the executive branch.

The *Chevron* doctrine is one way in which the judiciary weakens the separation of powers. Judge Kavanaugh notes that "ambiguity-dependent canons" such as *Chevron* raise particular concern because "the doctrine is so indeterminate—and thus can be antithetical to the neutral, impartial rule of law—because of the initial clarity versus ambiguity decision." He has also expressed concern with *Chevron* because the doctrine "has no basis in the Administrative Procedure Act." Because *Chevron* is "an atextual invention by courts," Kavanaugh asserts that *Chevron* deference "is nothing more than a *judicially orchestrated* shift of power from Congress to the Executive Branch."

Moreover, Judge Kavanaugh's experience in the White House has led him to observe additional practical political problems with *Chevron*. *Chevron* encourages the Executive Branch—regardless of the person or party in control—to be "extremely aggressive" in trying to advance policy through agency action. Kavanaugh sees the Supreme Court's *King v. Burwell* decision as a limitation on *Chevron*'s deference regime though, removing from its ambit the class of cases that pose "question[s] of deep economic and political significance." To Kavanaugh, *Burwell* begs the question: if the major rules doctrine requires a court *not* to apply *Chevron*, why should *Chevron* apply to cases involving less major questions?

Judge Kavanaugh explored that question and the major rules doctrine in *United States Telecom Association v. FCC*, joining Judge Janice Rogers Brown's dissent. Major rules are those policies

promulgated by an agency that are central to the statutory scheme upon which the agency acts. While Kavanaugh would allow agencies to rely on statutory ambiguity to justify the issuance of *ordinary* rules under *Chevron*, he would not allow agencies to rely on statutory ambiguity to issue *major* rules. At its core, Kavanaugh's major rules doctrine supports the separation of powers by presuming that Congress would not divest itself of major lawmaking authority and hand it to the executive branch, and by further presuming that Congress reserves all major policy decisions to itself, unless Congress expressly states otherwise.

Judge Kavanaugh has not been a crusader looking for an excuse to overturn *Chevron* on the D.C. Circuit. In fact, he has said that applying "*Chevron* makes a lot of sense in certain circumstances." Kavanaugh believes that when "Congress delegates the decision to an executive branch agency that makes the policy decision … that the courts should stay out of it for the most part." His principal concern with *Chevron* is not that courts should never defer to agencies, it is that the doctrine is often incorrectly applied to defer to agencies in circumstances that have little to do with the reasonableness of agencies' expressly delegated policy decisions.

Conclusion. Judge Kavanaugh recognizes the constitutional threat posed by the "headless fourth branch of the U.S. Government." He appreciates that the principal threat to individual liberty is the coalescence of legislative, executive, and judicial power in the hands of one or an elite few. To counter such aggregation of power, Kavanaugh takes a balanced approach, employing doctrinal tools to rein in independent agencies' attempts to trample the vital constitutional structure of separation of powers.

Amul Thapar

Judge, U.S. Court of Appeals for the Sixth Circuit (Kentucky), since 2017;
U.S. District Court for the Eastern District of Kentucky, 2008-17
Age: 49, born in Troy, Michigan
Education: Boston College; University of California, Berkeley Law School
Clerkships: Arthur Spiegel (S.D. of Ohio); Nathaniel Jones (6th Circuit)

Nominated by President Trump in 2017, Judge Thapar was confirmed by the Senate in 2017 by a 52-44 vote.

Thapar's Views on the Administrative State. Judge Thapar is new to the appellate bench, having just earned Senate confirmation to the Sixth Circuit on May 25, 2017, but he has over a decade's experience as a district court judge. His decisions, lectures, and writings make it abundantly clear Thapar believes that a fundamental canon of statutory interpretation is that "words of a statute must be read in their context and with a view to their place in the overall statutory scheme."

Crediting Justice Scalia's legacy, Judge Thapar maintains that "we're all textualists now." Moreover, "[t]he governing text and precedent are the common threads constraining federal judges across the United States to treat like cases alike—no matter the judges' divergent conceptions of the common good." Thus, in Thapar's view, textualism and stare decisis go hand in hand as the foundational principles of the American legal system, ensuring the intelligible, efficient, and uniform adjudication of what the law is. Judge Thapar has explained that the truly

pragmatic judge is one whose rulings flow naturally from the governing legal text, the precedents reasonably interpreting that text, and the record of the case in a way that is predictable beforehand and ascertainable thereafter.

On the occasions Judge Thapar has adjudicated administrative law-related cases, he has consistently applied this textual approach within the context of controlling precedent. For instance, where a federal bond hearing statute contained ambiguous language, Thapar employed the *Chevron* doctrine and deferred to the agency's interpretation of the statute because he was convinced that the interpretation was reasonable.

However, in *Hicks v. Colvin*, Judge Thapar rejected the Social Security Administration's argument that *Chevron* should apply to its interpretations that were published in agency manuals or through mere policy statements. Thapar ruled that where an agency's statutory interpretation had not gone through a notice-and-comment process, the agency's interpretation lacked the force of law, warranting "respect," not "*Chevron*-style deference." Perhaps the most interesting aspect of the *Hicks* opinion is a statement buried in the footnotes: "*But see* Charles J. Cooper, *Confronting the Administrative State* ('[O]ur constitutional order has been subverted, perhaps irreversibly … the administrative state has the last word, binding even on the Supreme Court, on what ambiguous statutory provisions mean[.]')."

In a recent law review article, Judge Thapar has also argued directly that "deference to the administrative state" both "disserves litigants" through undermining "stability [and] predictability" in the law, and "sacrifices the legitimacy courts claim from publicly showing their work." For his latter legitimacy argument, Thapar cites NCLA's own Professor Hamburger.

Thus, although Judge Thapar has applied *Chevron* deference in the past, or at least demonstrated a willingness to apply *Chevron* under the prudentially appropriate circumstances, footnote 5 in his *Hicks* opinion and Thapar's academic writing suggest that, were he freed from the bounds of controlling precedent in his jurisdiction, Thapar might be inclined to constrain federal courts' deference to agency rules and interpretations.

Conclusion. Judge Thapar's decisions suggest that he believes that judicial deference to independent agencies has significantly weakened the separation of powers framework of the Constitution. He has avoided applying *Chevron* deference where possible with his textual approach to statutory interpretation, avoiding construing provisions as ambiguous. However, he has been faithful to what he perceives as his obligation to effectuating controlling precedent where a statute is in fact ambiguous and an agency reasonably interprets the ambiguity. Should Thapar be nominated and confirmed to the Supreme Court, he may prove willing to constrain the administrative state and reverse the subversion of the constitutional order to which he alluded in *Hicks*.

Amy Coney Barrett

Judge, U.S. Court of Appeals for the Seventh Circuit (Indiana), since 2017
Age: 46, born in New Orleans, Louisiana
Education: Rhodes College; Notre Dame Law School
Clerkships: Laurence Silberman (D.C. Circuit); Justice Scalia

Barrett was nominated by President Donald Trump in 2017. Barrett was confirmed on a 55-43 vote with three Democratic senators, Joe Donnelly (IN), Tim Kaine (VA) and Joe Manchin (WV) joining 52 Republican senators.

Barrett's Views on the Administrative State. Judge Barrett's writings on Justice Scalia indicate that she shares his commitments to originalism and textualism. One focus of Barrett's academic work has been to question the value of stare decisis. In a 2013 article, Barrett proposed that weakening the force of stare decisis in constitutional cases would promote pluralism on the Supreme Court and foster judicial concord. A 2003 article entitled *Stare Decisis and Due Process* argued that stare decisis violates the due process rights of litigants, denying them the opportunity to litigate the merits of their own claims. Barrett notes that just as the due process clause limits the application of issue preclusion (or collateral estoppel), it should similarly limit the application of stare decisis.

Judge Barrett's *Cornell Law Review* article, entitled "Suspension and Delegation," also demonstrates a commitment to the structural constitution and non-delegation. Its abstract says:

> A suspension of the writ of habeas corpus empowers the President to indefinitely detain those suspected of endangering the public safety. In other words, it works a temporary suspension of civil liberties. Given the gravity of this power, the Suspension Clause narrowly limits the circumstances in which it may be exercised: the writ may be suspended only in cases of "rebellion or invasion" and when "the public Safety may require it." Congress alone can suspend the writ; the Executive cannot declare himself authorized to detain in violation of civil rights. Despite the traditional emphasis on the importance of exclusive legislative authority over suspension, the statutes that Congress has enacted are in tension with it. Each of the suspension statutes has delegated broad authority to the President, permitting him in almost every case to decide whether, when, where, and for how long to exercise emergency power. Indeed, if all these prior statutes are constitutional, Congress could today enact a law authorizing the President to suspend the writ in Guantanamo Bay if he decides at some point in the (perhaps distant) future that the constitutional prerequisites are satisfied. Such a broad delegation undermines the structural benefits that allocating the suspension decision to Congress is designed to achieve. This Article explores whether such delegations are constitutionally permissible. It concludes that while the Suspension Clause does not prohibit Congress from giving the President some responsibility for the suspension decision, it does require Congress to decide the most significant constitutional predicates for itself that an invasion or rebellion has occurred and that protecting the public safety may require the exercise of emergency power. Congress made this determination during the Civil War, but it violated the Suspension Clause in

> every other case by enacting a suspension statute before an invasion or rebellion occurred and, in some instances, before one was even on the horizon.

Most of Judge Barrett's judicial decisions do not address the core issues of interest to NCLA. But in *Akin v Berryhill*, Judge Barrett joined in a *per curiam* decision reversing an administrative law judge's denial of a claimant's social security benefits for several reasons, including that the ALJ gave undue weight to agency physicians who had not reviewed the entire record, that the ALJ impermissibly "played doctor" in purporting to read MRIs without the benefit of a medical opinion, and that the claimant's conservative medical treatment discredited her claim.

Conclusion. Judge Barrett has not authored significant judicial opinions or publications directly on administrative law or the various deference doctrines. Barrett has recognized that the Constitution assigns certain exclusive powers to Congress which it may not divest without violating that document's original design. Further, her criticism of and scholarship on stare decisis suggests that she would not hesitate to overturn a precedent that she considered wrongly decided.

Joan Larsen

Judge, U.S. Court of Appeals for the Sixth Circuit (Michigan), since 2017
Associate Justice, Michigan Supreme Court, 2015-17
Age: 49, born Waterloo/Cedar Falls, Iowa
Education: University of Northern Iowa; Northwestern Law School
Clerkships: David Sentelle (D.C. Circuit); Justice Scalia

President Trump nominated Larsen to the Sixth Circuit on May 8, 2017. Although her home-state senators initially refused to return their blue slips, they did so in August 2017. The Senate confirmed her 60-38, which included Michigan's senators and six other Democrats as 'yes' votes.

Larsen's Views on the Administrative State. As a teacher of both Legislation and Regulation courses at the University of Michigan Law School, Judge Larsen presumably has well-developed views on the administrative state, but she does not have a well-established judicial record on those topics. Nor does her scholarship reveal much aside from a general disposition to respect legislative outcomes. For instance, she has written about a "divide in contemporary constitutional law between liberals' impulse to constitutionalize—and therefore 'judicialize'—every important question and conservatives' impulse to leave every question to ordinary politics."

Likewise, as a Michigan Supreme Court Justice, Larsen did not write many opinions that dealt with administrative issues. No doubt this is in part because Michigan is among the group of state supreme courts that does not defer to administrative agencies in interpreting state law. She joined an opinion in *Clam Lake Township v. Dep't of Licensing*, overturning a state boundary commission's decision, while noting that the agency's views deserve only "respectful consideration." At least a Justice Larsen would know what a post-*Chevron* world could look like.

Judge Larsen's campaign website (justices are elected in Michigan) professed that "judges should interpret the laws according to what they say, not according to what the judges wish they

would say. Judges are supposed to interpret the laws; they are not supposed to make them." In speeches, Larsen has said "originalism typically is quite comfortable with change; its only enemy is change imposed by judges" and that "[j]udges are just not licensed to be the engines of change." She has also contrasted "a Court that searches for the original meaning of the words of the written law and a Court that believes that an all-powerful judiciary is free to rewrite the laws enacted by the People's legislative representatives."

In an op-ed defending President Bush's use of signing statements when he enacted laws, Judge Larsen disputed an American Bar Association resolution criticizing the practice. Her main defense of issuing signing statements was that they "give[] notice of the president's view" and that "giving notice is usually thought to be a good thing" from a rule of law perspective. This coupled with her work at the Office of Legal Counsel (OLC) has caused some liberal groups to ask whether she would be pro-presidential power and not provide an independent check on the Executive Branch.

One opinion she wrote at OLC may shed some light on Judge Larsen's thinking about administrative issues. It addressed a controversy between the Equal Employment Opportunity Commission and the Department of the Navy. At issue was whether EEOC could impose attorney's fees against other federal agencies as a sanction for failure to comply with an EEOC administrative judge's orders. In a very tightly reasoned and well written opinion, Larsen explained that EEOC has no inherent authority to impose such fees, and that no written statutory waiver of sovereign immunity supports permitting such fees to be imposed.

In her brief time on the Sixth Circuit, Judge Larsen has not had much occasion to weigh in on administrative state issues. So, for example, she has written a decision (*Mokbel-Aljahmi v. Commissioner of Social Security*) upholding a Social Security administrative law judge's determination that a claimant did not qualify for benefits. Consistent with circuit precedent, she noted that the court was "limited to determining whether the Commissioner's decision is supported by substantial evidence and was made pursuant to proper legal standards." She held that "we cannot say that the ALJ erred" in making a residual functional capacity determination against the claimant.

It should be noted that Justice Larsen recused herself from two appeals at the Michigan Supreme Court involving presidential candidate Jill Stein's efforts to force a recount in Michigan, stating that her "appearance on the president-elect's list [of potential nominees to the U.S. Supreme Court] and his presence as a party in these cases creates a conflict requiring my disqualification." That decision may bode ill in terms of whether a future Justice Larsen would be willing to weigh in on Trump administration policies or controversies at the U.S. Supreme Court. Having recused herself once over a relatively minor issue, she might be hard pressed not to do so again in the future when the stakes could be far higher.

Conclusion. Judge Larsen does not have the extensive judicial record of Judges Kethledge and Kavanaugh when it comes to administrative state issues. Like other candidates for the Kennedy vacancy on the Supreme Court who have not been on the bench long, she has said many things that could make one hopeful that she would faithfully follow the constitution's teachings on the proper role of the administrative state. However, her sparse academic and judicial record on these topics makes it impossible to predict her likely future stance with any degree of certainty.

Tom Hardiman

Judge, U.S. Court of Appeals for the Third Circuit (Pennsylvania), since 2007
Age: 53, born Winchester, Massachusetts
Education: University of Notre Dame; Georgetown University Law Center

Judge Hardiman was appointed to the District Court by President George W. Bush and confirmed by the Senate by a voice vote. President Bush then nominated Hardiman to the Third Circuit and he was confirmed by the Senate by a vote of 95-0.

Hardiman's Views on the Administrative State. Despite having been a federal judge for nearly 15 years, Judge Hardiman has a limited output concerning administrative power. Of the handful of administrative cases in which he has participated, he has generally applied deference doctrines without comment. Indeed, as one commentator noted when Hardiman was considered a top contender for the seat eventually taken by Justice Gorsuch, his written opinions up to that point contained "no indications that he is anything other than a down-the-middle administrative lawyer when it comes to judicial deference."

Judge Hardiman has occasionally shown flashes of a more nuanced view of administrative power, and one that appears to be developing. For example, in *Valdiviezo-Galdamez v. Attorney Gen. of the United States*, Hardiman wrote a concurring opinion strongly defending the principle of agency deference. In his separate opinion Hardiman went farther than the rest of the panel in defending the principle that the Board of Immigration Appeals was owed deference in the first place and rejected a general suggestion that an inadequately explained change in interpretation would either nullify deference or make agency interpretation unreasonable. Interestingly, despite his strong defense of deference in general, Hardiman harshly questioned the BIA's motives in that case. He argued that the BIA's actions reflected that the agency did "not recognize, or is not being forthright about, the nature of the change its new interpretation effectuates."

After Justice Gorsuch's appointment, Judge Hardiman has written more forcefully challenging administrative authority. In *Duquesne Light Holdings, Inc., v. Comm'r*, Hardiman wrote a dissenting opinion strongly critical of the majority's deference to the Internal Revenue Service's interpretation in an informal guidance document. Hardiman wrote that the guidance document improperly "alter[ed] the plain meaning" of relevant regulations and permitted the agency "to create *de facto* a new regulation through the back door." More fundamentally, Hardiman asked "what authority was the [agency] interpreting to support its view[?]," because established doctrine did not seem to support deference in that case. Hardiman closed by saying: "I am aware of no caselaw that demands (or permits) a court to give such deference to an agency's position regarding the status or strength of judicial precedent. Nor do I see any principled reason to do so. After all, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" (quoting *Marbury v. Madison*).

Conclusion. Judge Hardiman's limited jurisprudence on agency power reveals important, albeit limited, reservations about the full extent of agency power. While he appears inclined to apply deference doctrines, he has also exhibited skepticism about an administrator's motives and basis to rely on such doctrines.