



Pat Smith quoted in Tax Notes on Kennedy concurrence calling for reexamining Chevron

PRACTICE AREAS

Tax

June 26, 2018

Ivins attorney Pat Smith was quoted in a *Tax Notes* article on Justice Kennedy's concurring opinion last week in *Pereira v. Sessions*, in which he called for a reexamination of the *Chevron* doctrine giving deference to agency regulations. *After Killing Quill, Kennedy Eyes Scaling Back Deference.*

Patrick J. Smith of Ivins, Phillips & Barker Chtd. said that while it's clear Kennedy, Thomas, and Gorsuch are willing to entertain a *Chevron* challenge, he isn't sure Chief Justice John Roberts will go along. Smith said Roberts views his role as Chief Justice as being the protector of the institution of the Court, and since *Chevron* has been such a widely cited case, Roberts may only be prepared to cut it back substantially without outright eliminating it.

Smith pointed to Roberts's dissenting opinion in *City of Arlington v. Federal Communications Commission*, 133 S. Ct. 1863 (2013), in which he disputed whether an agency is even entitled to deference on the scope of the agency's authority. Roberts said courts defer to an agency's interpretation of the law when and because Congress has conferred on the agency interpretive authority over the question at issue, but that it is the role of the courts to decide whether Congress has, in fact, given the agency that authority.

"An agency cannot exercise interpretive authority until it has it," Roberts said, noting that the question whether an agency has that authority is up to the courts. In a similar vein is Roberts's opinion in *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015), in which he concluded that the question at issue in the case was far too significant to conclude that Congress intended to leave

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the resolution to the IRS.

Smith noted that if the Court did do away with *Chevron*, taxpayer challenges to regulations would multiply because it would be so much easier for them to win.