



Administrative Law and Regulatory Update Webinar

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Agenda

- 2:00 p.m. - 2:05 p.m.** Introduction
- 2:05 p.m. - 2:20 p.m.** The Administrative State Under Trump – Were Reports of Its Death “Greatly Exaggerated”?
- 2:20 p.m. - 2:35 p.m.** Modern Agency Adjudication – Post-*Lucia* and APA Trends in Consumer Protection
- 2:35 p.m. - 2:50 p.m.** Where, When, and How – Practical Issues and Strategic Considerations for Litigating APA Challenges
- 2:50 p.m. - 3:05 p.m.** To Defer or Not to Defer – *Chevron* Doctrine in Exhaustion?
- 3:05 p.m. - 3:15 p.m.** Neomi Rao – What We Already Know and What Her Confirmation Could Mean for Future APA Challenges
- 3:15 p.m. - 3:30 p.m.** Questions



The Administrative State Under Trump – Were Reports of Its Death “Greatly Exaggerated”?



Modern Agency Adjudication – Post-*Lucia* and APA Trends in Consumer Protection



Post-*Lucia* Challenges to the Administrative Process

Separation of Powers challenge

- Multiple layers tenure protection of ALJs raises separation of powers issue.
 - ALJs can only be removed for cause with approval of Merit Systems Protection Board (MSPB).
 - SEC Commissioners cannot remove ALJs without approval of MSPB.
 - MSPB and SEC Commissioners can only be removed for good cause.
- Solicitor raised this as an issue in its own briefing to the Supreme Court in *Lucia*, asking the Court to take up the issue in *Lucia*.
- Justice Breyer raised this issue in his opinion in *Lucia*.



Post-*Lucia* Challenges to the Administrative Process

Due Process challenge

- Institutional ALJ bias in favor of agency
- Lack of impartiality – history of ruling in favor of agency



Post-*Lucia* Challenges to the Administrative Process

Equal Protection challenge

- For agencies with authority to bring same cases in administrative forum or in federal court
- Lack of guidance in authorizing statutes and in agency rules as to which cases should be brought in federal court or in administrative forum
- Respondents are arbitrarily deprived of rights they would otherwise have in federal court
 - Right to jury
 - Right to Article III Judge
 - Right to Federal Rules of Civil Procedure and the discovery it affords
 - Right to Federal Rules of Evidence (which do not apply in administrative forum)



Post-*Lucia* Challenges to the Administrative Process

How Will These Challenges Be Brought?

- Offensive action seeking to enjoin agency from proceeding with administrative enforcement action
 - Case law has not been on the defendants' side in these types of actions—have ruled that defendants must exhaust administrative forum
- But in *Free Enterprise v. PCAOB* the courts did find jurisdiction and heard the Separation of Powers Argument—potential avenue given the Supreme Court's finding that ALJs are inferior officers



Where, When, and How – Practical Issues and Strategic Considerations for Litigating APA Challenges



Where, When, and How – Practical Issues and Strategic Considerations for Litigating APA Challenges

Where?

– Court

- District Court vs. Court of Appeals, and the benefits and drawbacks for each

– Forum

- Whether to bring action in D.D.C./DC Cir. or another forum



Where, When, and How – Practical Issues and Strategic Considerations for Litigating APA Challenges

When?

- Combining challenge with a petition for TRO and/or preliminary injunction
- Considerations of finality
 - Appealing when the underlying agency action is not yet final



Where, When, and How – Practical Issues and Strategic Considerations for Litigating APA Challenges

How?

From filing the complaint to challenging the order on appeal:
a step-by-step overview of the process that lies ahead

- Taking discovery
- Introducing extra-record evidence
 - Whether possible and underlying considerations



To Defer or Not to Defer – *Chevron* Doctrine in Exhaustion?



Dancing to the *Chevron* Two-Step:

- Step One: “If the intent of Congress is clear, that is end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).
- Step Two: If ambiguous, the court will uphold the agency’s statutory interpretation, provided that it is reasonable.
 - Statutory ambiguity regarded as Congress’s “express delegation” of power to the agency to “elucidate” the specific provision of the statute. *Id.*, at 844.



Looking Through The *Auer* Glass

- Perceived as the rule-based corollary of the *Chevron* Doctrine
 - *Auer v. Robbins*, 519 U.S. 452, 461 (1997) – Deference should be given to an agency's interpretation of its own regulation "unless 'plainly erroneous or inconsistent with the regulation.'"
 - Justice Scalia – Author of the majority opinion in *Auer* – later expressed regret over the perverse incentives it created for agencies to draft vague regulations.
- Supreme Court narrowed *Auer* in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) – *Auer* deference should not apply where agency's "interpretation of ambiguous regulations [would] impose potentially massive liability on [the covered entity] for conduct that occurred well before that interpretation was announced."
- Empirical studies indicate Circuit Courts are further narrowing *Auer*, and agency win rate has dropped as a result.



Are Courts Putting the *Skidmore* on Agency Deference – Or Are They Merely Pruning?

- *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Giving “weight” to an agency’s statutory interpretation based on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all the factors which give it power to persuade, if lacking power to control.”
 - Regulatory Accountability Act – bipartisan legislative solution.
 - Would replace *Auer* with *Skidmore*, but would leave *Chevron* untouched.
- *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). “[A]dministrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”
- Chevron Step Zero – *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). Eliminating *Chevron* deference for “question[s] of deep ‘economic and political significance’” and perhaps when the implementing agency “has no expertise in crafting [] policy of this sort.”



Chevron* Is Dead, Long Live *Chevron

- *Chevron* will survive because there is no working or palatable alternative – instead the Court will apply various glosses, according to the need and circumstances.
- Even the Court's most vocal critics have authored decisions that uphold the need to analyze agency interpretation under the *Chevron* framework. (*See, e.g., Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (Thomas, J., majority).)
- At the Federal Circuit level, courts have overall upheld agency interpretations 71% of the time, and applied *Chevron* deference 77% of the time.



Neomi Rao – What We Already Know and What Her Confirmation Could Mean for Future APA Challenges



Neomi Rao – Nominee to the D.C. Circuit

- Current administrator of OIRA – Nominated in April 2017
- Nominated to D.C. Circuit in November 2018
- Founding director of the Center for the Study of the Administrative State (CSAS) at George Mason University's Antonin Scalia Law School



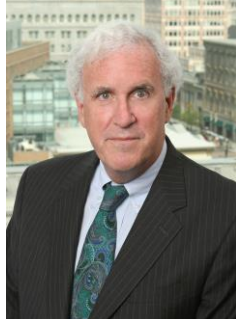
Neomi Rao – What We Know

- Merits-focused and takes a practical approach
- Leading scholar on the limits of constitutional authority of the administrative state
- Judge Kavanaugh's opinion in *PHH v. CFPB* cited to Rao's scholarship – twice
 - Neomi Rao, Removal: Necessary and Sufficient for Presidential Control, 65 *Ala. L. Rev.* 1205, 1215 (2014) (“The text and structure of Article II provide the President with the power to control subordinates within the executive branch.”)

Questions and Closing Observations



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