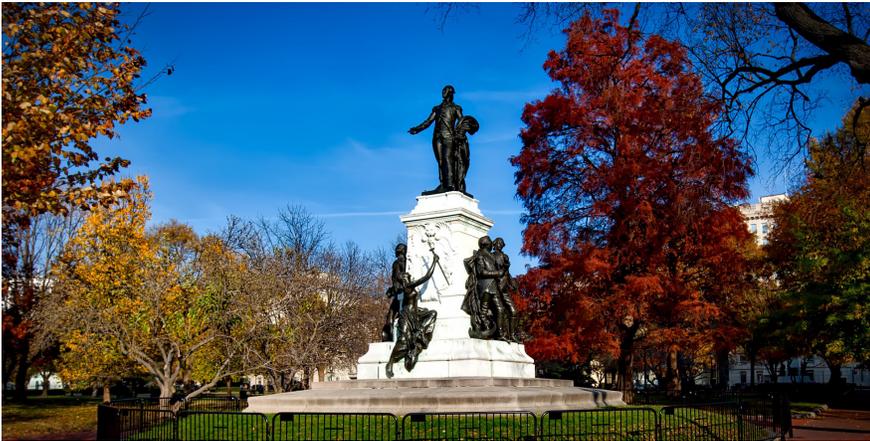


2019 ADMINISTRATIVE LAW CONFERENCE

**NOVEMBER 14-15, 2019 | WALTER E. WASHINGTON CONVENTION CENTER
WASHINGTON, DC**



PROGRAM CO-CHAIRS

ANDREW EMERY

SUSAN PROSNITZ

SECTION CHAIR

LINDA D. JELLUM

**12.5 HOURS OF GENERAL CLE
INCLUDING 1.5 HOURS OF ETHICS CREDIT**

REQUESTED

2019 ADMINISTRATIVE LAW CONFERENCE



AMERICAN BAR ASSOCIATION

Section of Administrative Law & Regulatory Practice

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2019 ADMINISTRATIVE LAW CONFERENCE



Section of Administrative Law & Regulatory Practice

SCHEDULE AT A GLANCE

Thursday November 14, 2019

7:30 AM - 4:30 PM	Refreshments and Registration	East Salon Pre-Function
8:45 AM - 9:00 AM	Welcome from Section Chair Linda Jellum and Program Chairs Andrew Emery and Susan Prosnitz	East Salon ABC, 202 AB, 207 AB
9:00 AM-10:30 AM	The Impact of <i>Kisor</i> on <i>Auer</i> Deference: Affirmation, or Stay of Execution?	East Salon ABC
9:00 AM-10:30 AM	Regulatory Budgeting: Historical Insights and Current Practice	202 AB
9:00 AM-10:30 AM	Regulatory Flexibility Act: Giving Small Businesses a Fair Shake	207 AB
10:30 AM - 10:45 AM	Break & Refreshments	All Rooms
10:45 AM - 12:15 PM	The Nondelegation Doctrine After <i>Gundy</i> : Is the "Intelligible Principle" Standard an Intelligible Principle?	East Salon ABC
10:45 AM - 12:15 PM	The Need for a Central Administrative Court in Light of <i>Lucia v. SEC</i>	202 AB
10:45 AM - 12:15 PM	Multistate Occupational Licensing: Growing Trend and Response to Antitrust Issues	207 AB
12:15 PM - 1:15 PM	Lunch is Served (Boxed lunches available in the East Salon Pre-Function Area) Non-CLE Law Student Panel on Careers in Administrative Law & Federal Honors Programs	202 AB
12:15 PM - 1:15 PM	Non-CLE Thomson Reuters Presentation "New to 2019: Leveraging AI, Analytics and Workflow Solutions to improve your work as a Regulatory and Administrative Law Attorney"	East Salon ABC
1:15 PM - 2:45 PM	Statutory Interpretation and Corpus Linguistics: Enhancing Persuasiveness or Adding Complexity?	East Salon ABC
1:15 PM - 2:45 PM	Funding the Government: The Brave New World of Appropriations: Shutdowns, Budget and Debt Ceiling Battles, & Emergencies	202 AB
1:15 PM - 2:45 PM	Artificial Intelligence in Regulatory Enforcement	207 AB
2:45 PM - 3:00 PM	Break & Refreshments	All Rooms
3:00 PM - 4:30 PM	Reconsidering the Qualified Immunity Defense	East Salon ABC
3:00 PM - 4:30 PM	Navigating the Regulatory Morass to Advance Emerging Technologies	202 AB
3:00 PM - 4:30 PM	Artificial Intelligence in Administrative Adjudication	207 AB
4:30 PM 4:30 PM - 6:30 PM	Day 1 of Conference Adjourns Please join us for a Reception! All Conference attendees welcome.	East Salon Pre-Function Area

Friday November 15, 2019

7:30 AM - 4:30 PM	Refreshments and Registration	East Salon Pre-Function
8:15 AM - 8:25 AM	Welcome from Section Chair Linda Jellum	East Salon ABC
8:30 AM-10:15 AM	Developments in Administrative Law, Part I (Over-flow video feed in room 202 AB)	East Salon ABC
10:15 AM - 10:30 AM	Break and Refreshments	All Rooms
10:30 AM - 12:15 PM	Developments in Administrative Law, Part II (Over-flow video feed in room 202 AB)	East Salon ABC
12:15 PM - 1:15 PM	Lunch is Served (Boxed lunches available in the East Salon Pre-Function Area)	202AB & 207AB
12:15 PM - 1:15 PM	2019 Section Awards Presentation	East Salon ABC
1:15 PM - 2:45 PM	How Administrative Law Differs Across the U.S. Courts of Appeals: Perspectives from Circuit Court Judges	East Salon ABC
1:15 PM - 2:45 PM	Will States Follow <i>Kisor's</i> Lead? <i>Seminole Rock</i> and <i>Auer</i> Deference at the State Level	202 AB
1:15 PM - 2:45 PM	A Litigator's Guide to Understanding, Compiling, and Using an Administrative Record in an Era of Increasing Uncertainty	207 AB
2:45 PM - 3:00 PM	Break and Refreshments	All Rooms
3:00 PM - 4:30 PM	Ethical Government Lawyering (1.5 Hours Ethics Professionalism CLE Credit)	East Salon ABC
3:00 PM - 4:30 PM	Guidance: Lessons Learned for an Evolving Legal Landscape	202 AB
3:00 PM - 4:30 PM	Administrative Agencies and the Courts: The Impact of this Evolving Relationship on Current Approaches to Judicial Challenges of Agency Action	207 AB
4:30 PM	Conference Adjourns	

2019 ADMINISTRATIVE LAW CONFERENCE

Thursday November 14, 2019

7:30 AM - 4:30 PM	Refreshments, Registration & CLE Sign-In
8:45 AM - 9:00 AM East Salon ABC, 202 AB, 207 AB	Welcome from Section Chair Linda Jellum, and Program Chairs Andrew Emery and Susan Prosnitz
9:00 AM - 10:30 AM East Salon ABC	<p>The Impact of <i>Kisor</i> on <i>Auer</i> Deference: Affirmation, or Stay of Execution?</p> <p>Richard W. Parker, Professor of Law, and Policy Director, Center for Energy and Environmental Law, University of Connecticut School of Law (moderator)</p> <p>Ginger D. Anders, Partner, Munger, Tolles & Olson LLP</p> <p>Kristin Hickman, Distinguished McNight University Professor Harlan Albert Rogers Professor of Law, University of Minnesota Law School</p> <p>Allyson Ho, Partner, Gibson Dunn Crutcher LLP</p> <p>Gillian Metzger, Stanley H. Fuld Professor of Law, Columbia Law School (filed amicus brief in support of petitioner in <i>Kisor</i>)</p> <p>One of the most anticipated administrative law cases in recent years, <i>Kisor v Wilkie</i>, decided on June 26, 2019, may also be one of the most contentious Supreme Court decisions ever to be decided by a unanimous vote. The sole question in <i>Kisor</i> was whether the Court should overrule a line of cases which holds that judges should defer to reasonable agency interpretations of their own regulations if those regulations are ambiguous on a particular issue – a doctrine known as “<i>Auer</i> deference” after the landmark case in which the Court employed it. In <i>Kisor</i>, the Court decided not to reject the rule but to “reinforce its limits.” Justice Kagan offered these limits as a clarification of existing practice. But four conservative justices, led by Justice Gorsuch, concurred only in the judgment and opined that the limitations imposed by the majority decision so attenuate <i>Auer</i> deference as to render <i>Kisor</i> more like a “stay of execution” for <i>Auer</i> than a true affirmance. The concurring justices also made clear that they actually would have preferred an execution. Chief Justice Roberts cast the swing vote to not overrule <i>Auer</i>. He did so out of respect for precedent, he explained in his concurrence, and because he agrees with the limits articulated by the majority. What, then, is the impact of <i>Kisor</i> on <i>Auer</i> deference: affirmation, stay of execution, or something in between? This panel of distinguished experts joined by a sitting DC Circuit judge will examine this question, and offer their insights into how courts, agencies, and practitioners should approach the interpretation of agency regulations in the aftermath of <i>Kisor</i>. They will also discuss, in a more speculative vein, what the fault lines evident in the <i>Kisor</i> decision may portend for the future of <i>Chevron</i> deference.</p>

9:00 AM - 10:30 AM
202 AB

Regulatory Budgeting: Historical Insights and Current Practice

Aaron L. Nielson, Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University (moderator)

Alissa Ardito Ashcroft, Acting General Counsel, Congressional Budget Office

Bridget C.E. Dooling, Research Professor, GW Regulatory Studies Center

Connor Raso, Senior Counsel, Securities and Exchange Commission

Regulatory budgeting is now popular, but its meaning remains somewhat unclear. From one angle, regulatory budgeting seems to be a collection of two superficially similar ideas that have scant logical connection. Another look reveals it as a decades old bipartisan idea to bring some order and clarity to the administrative state. If we're not in agreement on the meaning of "regulatory budgeting," the ways in which a regulatory budget should be implemented are also unclear. Should OMB/OIRA involved? How does a regulatory budget relate to cost/benefit analysis? It partakes of vocabulary of the federal budget, but the federal budget process is the product of decades of legislation and agency practice. Does this have anything in common with the work of the Congressional Budget Office in providing "scores" of pending legislation? Noted experts with experience in OIRA, CBO, and the SEC will try to explain what regulatory budgeting is, what it might offer, the challenges involved in putting it into practice, and offer a few thoughts on the current regulatory budget.

9:00 AM - 10:30 AM
207 AB

Regulatory Flexibility Act: Giving Small Businesses a Fair Shake

Major Clark, Acting Chief Counsel, SBA Office of Advocacy (moderator)

Rachel Feinstein, Senior Manager, Government Affairs, Hearth, Patio & Barbecue Association

Bruce Lundegren, Assistant Chief Counsel, SBA Office of Advocacy

Jessica Stone, Director, Office of Regulatory Analysis-Safety, U.S. Department of Labor Occupational Safety and Health Administration

The Regulatory Flexibility Act (RFA) brings the needs of small businesses to the fore in Federal rulemaking. When writing rules, agencies must recognize the impacts on small businesses, consider alternative regulatory strategies, and where applicable, explain why the agency chooses to finalize a rule that doesn't minimize the burden on small businesses. (*continued*)

	<p>This panel, based on the SBA Office of Advocacy training for agency personnel, will provide an overview of what agencies need to do to comply with the RFA and help agency attorneys review proposed and final rules and the accompanying RFA analyses. The panel will also discuss the application of the RFA to recent rulemakings at least two specific agencies, including the IRS and OSHA.</p>
<p>10:30 AM - 10:45 AM</p>	<p>Break and Refreshments</p>
<p>10:45 AM - 12:15 PM East Salon ABC</p>	<p>The Nondelegation Doctrine After <i>Gundy</i>: Is the “Intelligible Principle” Standard an Intelligible Principle?</p> <p>Daniel M. Flores, Chief Counsel – Republican, Subcommittee on Antitrust, Commercial and Antitrust Law, Committee on the Judiciary, U.S. House of Representatives (moderator)</p> <p>Casey Christine Higgins, Senior Policy Advisor, Akin Gump Straus Hauer & Feld LLP</p> <p>Gillian Metzger, Stanley H. Fuld Professor of Law, Faculty Director, Center for Constitutional Governance, Columbia Law School</p> <p>Alan B. Morrison, Lerner Family Associate Dean for Public Interest & Public Service Law, George Washington University Law School</p> <p>Adam White, Director and Assistant Law Professor, George Mason University’s C. Boyden Gray Center for the Study of the Administrative State, Antonin Scalia Law School, George Mason University</p> <p>Several Supreme Court justices in recent cases have expressed their dissatisfaction with and willingness to reconsider administrative law doctrines to curtail agency discretion. One such doctrine is the nondelegation doctrine. Philip Hamburger’s critique of the contemporary administrative state challenged the constitutionality of virtually any statutory grant of authority to agencies to adopt legally-binding regulations—regardless of whether the statute contains an intelligible principle. When the Supreme Court granted certiorari in <i>Gundy v. United States</i> this term, many wondered whether the Court might breathe new life into the nondelegation doctrine. However, it was not to be. A plurality of the Supreme Court upheld the statute despite a delegation challenge by interpreting a feasibility requirement that did not appear in the statute’s text. While the plurality was unwilling to reconsider the intelligible principle standard given the Court’s historical approach to this doctrine, the dissenting justices offered hope to those who wish the Court would apply the doctrine with more (or really any) rigor. (<i>continued</i>)</p>

	<p>The speakers on this panel will discuss how the nondelegation doctrine might develop in light of Gundy, including whether we'll see a reformulation of the constitutional standard or instead a turn to subconstitutional surrogates for nondelegation concerns (and if so, what those surrogates might be). The panelists will also discuss what might happen in future litigation in this area and how that litigation might impact agencies.</p>
<p>10:45 AM - 12:15 PM 202 AB</p>	<p>The Need for a Central Administrative Court in Light of <i>Lucia v. SEC</i></p> <p>Mark A. Perry, Partner, Gibson, Dunn & Crutcher LLP (moderator)</p> <p>Jill E. Family, Commonwealth Professor of Law and Government Director, Law and Government Institute, Widener University, Commonwealth Law School</p> <p>Hon. J. Jeremiah Mahoney, Chief United States Administrative Law Judge, U.S. Department of Housing and Urban Development</p> <p>Richard J. Pierce, Jr., Lyle T. Alverson Professor of Law, The George Washington University Law School</p> <p>Hon. John Vittone, Senior Fellow, Administrative Conference of the United States (formerly Chief Judge, Department of Labor Office of ALJs)</p> <p>The ground is shifting beneath the feet of administrative judges. For 70+ years, ALJs were protected by the appointment and termination provisions of the Administrative Procedure Act. No more. The <i>Lucia v. SEC</i> decision, issued by the Supreme Court in June 2018, found ALJs to be officers of the United States, and thus were required to be appointed by the President, heads of departments, or the courts. Previously, ALJs were typically appointed by Chief ALJs or other officials who were not department heads. In July 2018, the president issued an executive order granting agencies the power to hire ALJs directly rather than through the merits-based system previously conducted by the Office of Personnel Management.</p> <p>Courts are now turning their sights to the ALJ termination process. The APA provides that ALJs may only be removed for "good cause," as determined by the Merit Systems Protection Board. This process, arguably, insulates ALJs from Article II's accountability requirements in that the President would be required to negotiate two or three layers of review before being able to remove an ALJ from his position. The removal issue is now working its way through the federal courts and will likely be decided this year or early next year. Many observers believe that the legal analysis on removal is similar to the appointments analysis and will likely have a similar outcome, i.e., with the APA's removal protections for ALJs being constrained or eliminated entirely. This restructuring will undoubtedly impact immigration judges, administrative judges, and litigants before administrative tribunals, as pressures on decisional independence continue to build. (<i>continued</i>)</p>

This program will spell out the arguments for and against reforming the administrative adjudication system *viz.* the unitary executive rubric. In addition, it will track both paths, both judicial and legislative, where the efforts to support judicial independence are being traversed. We will explore the legislative front, where things remain a crapshoot notwithstanding the bipartisan appeal of the issue of decisional independence for adjudicators. The judicial front offers somewhat more hope for progress since the issue of decisional independence is squarely at issue in cases now reaching the Supreme Court and the federal circuits.

Our expert panelists have literally “written the book,” on federal administrative adjudication and offer a variety of viewpoints, including those of immigration judges, administrative judges, and administrative law judges. Their focus will be on the public interest and due process, which will undoubtedly be the focus of the courts and the Congress as well.

10:45 AM - 12:15 PM
207 AB

Multistate Occupational Licensing: Growing Trend and Response to Antitrust Issues

Jeffrey B. Litwak, Counsel, Columbia River Gorge Commission (moderator)

Nahale Freeland Kalfas, Attorney at Law

Richard L. Masters, Special Counsel, The Council of State Governments

Dan Greenberg, Senior Policy Advisor, Office of the Assistant Secretary for Policy, U.S. Department of Labor

This panel will discuss current interstate compacts creating multistate licensing for several health professions, the growing trend toward interstate compacts for many other professions promoted and supported by the U.S. Department of Labor, and how interstate compacts respond to and address legal issues in *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. ___, 135 S. Ct. 1101 (2015). Since 2012, CSG has been assisting states affiliated with the U.S. Department of Labor’s Occupational Licensure Learning Consortium with issues such as interstate compacts as a means of facilitating the removal of barriers to licensure and facilitation of enhanced employment opportunities, while maintaining regulator ability to more timely and effectively engage in public protection through joint involvement in investigations and discipline and expedited licensure through an integrated data system. *(continued)*

	<p>The Council of State Governments has assisted with the creation of six interstate compacts to handle multistate licensure of medical doctors, nurses, advanced practice nurses, physical therapists, psychologists, and emergency medical technicians. The U.S. Department of Labor’s Occupational Licensure Learning Consortium is promoting interstate compacts as a means to address anti-trust concerns including: lack of uniformity in licensure requirement, the eradication of board member subjectivity with regard to entry into practice, avoiding barriers to licensure portability, as well as statutory and regulatory adjustments which can be helpful in limiting the personal liability exposure faced by board members in the wake of that decision. The FTC has also identified mutual recognition model interstate compacts as a solution to these concerns, as well as a means to promote greater access to care.</p>
<p>12:15 PM - 1:15 PM</p>	<p>Lunch is served (Boxed lunches available in the East Salon Pre-Function Area)</p> <p>Room 207 AB is an open lunch space for attendees.</p> <p>- or -</p> <p>Join us for one of the Non-CLE lunchtime programs below:</p>
<p>12:15 PM - 1:15 PM East Salon ABC</p>	<p>New to 2019: Leveraging AI, Analytics and Workflow Solutions to improve your work as a Regulatory and Administrative Law Attorney (Non-CLE)</p> <p>Thomson Reuters Presentation</p> <p>Matt Amon, Senior Federal Client Manager, Thomson Reuters</p> <p>Chris Schoenbauer, Manager, Westlaw Product Management, Thomson Reuters</p>
<p>12:15 PM - 1:15 PM 202 AB</p>	<p>Careers in Administrative Law and Federal Honors Programs (Non-CLE)</p> <p>For anyone interested in practicing regulatory law, the federal government is a terrific place to begin a career. Attorneys from the Departments of Homeland Security, Interior, Justice, and Transportation will provide information and answer questions about their agencies’ honors programs for new law graduates. Professor Kati Kovacs, who worked at the Department of Justice for twelve years, will moderate the discussion.</p> <p>Kathryn Kovacs, Professor of Law, Rutgers Law School (moderator)</p> <p>Hector O. Huezo, United States Department of Transportation</p> <p>Susan Hutton, United States Department of Labor</p> <p>Amy B. Newman, Attorney-Advisor, Litigation, Supervisory Attorney-Advisor & Program Manager, Honors Attorney Program, United States Department of Homeland Security</p> <p>Jean Williams, Deputy Assistant Attorney General, United States Department of Justice</p>

1:15 PM - 2:45 PM
East Salon ABC

Statutory Interpretation and Corpus Linguistics: Enhancing Persuasiveness or Adding Complexity?

Kristin Hickman, Professor of Law, University of Minnesota Law School (moderator)

Carissa Byrne Hessick, Professor of Law, University of North Carolina School of Law

Stephen C. Mouritsen, Shareholder, Parr Brown Gee & Loveless

Nicole A. Saharsky, Partner, Mayer Brown

Gene Schaerr, Schaerr Jaffe LLP

A growing body of jurisprudence relies on corpus linguistics, utilizing empirical analysis of large electronic collections of naturally occurring language to illuminate constitutional or statutory meaning. This panel will explore how this emerging interpretive tool works, arguments for and against its use, and whether and under what circumstances to utilize it in litigation briefs.

1:15 PM - 2:45 PM
202 AB

The Brave New World of Appropriations: Shutdowns, Budget and Debt Ceiling Battles, & Emergencies

Gillian Metzger, Professor, Columbia Law School (moderator)

Boris Bershteyn, former General Counsel, OMB; acting director, OIRA; Partner, Skadden, Arps, Slate, Meagher & Flom LLP

Eloise Pasachoff, Professor, Georgetown Law

Molly Reynolds, Senior Fellow in Governance Studies, The Brookings Institution

Heideh Shahmoradi, Managing Partner, O’Keeffe Shahmoradi Strategies, former Majority Clerk/Staff Director, Transportation, Housing Urban Development, and Related Agencies Subcommittee, Senate Committee on Appropriations

Increasingly, the appropriations process is taking center stage when it comes to controlling how agencies operate. Difficulties enacting substantive legislation have led Congress to turn to appropriations riders as a means for prohibiting or encouraging specific administrative actions. Last year’s 35-day shutdown over the budget, as well as President Trump’s emergency declaration and fund repurposing, are just the latest battles involving government funding. *(continued)*.

	<p>Given how important appropriations are to how government operates, regulatory lawyers need to understand how the appropriations process operates to advise their clients, and government attorneys need to know how the process will affect their agencies. But the appropriations process is opaque and unknown territory for many.</p> <p>This panel aims to shed some light. It will address recent developments in appropriations practices in both the legislative and executive branches, offering the perspectives of legislative staff, OMB officials, and academics. Panelists will explore how the appropriations process currently operates, how the executive branch prepares for shutdowns, and what funding disputes are likely to arise in the near future.</p>
<p>1:15 PM - 2:45 PM 207 AB</p>	<p>Artificial Intelligence in Regulatory Enforcement</p> <p>Reeve T. Bull, Research Director, Administrative Conference of the United States (moderator)</p> <p>David Freeman Engstrom, Professor of Law, Associate Dean, and Bernard D. Bergreen Faculty Scholar, Stanford Law School</p> <p>Marco Enriquez, Applied Mathematician, Office of Research & Data Services, Securities & Exchange Commission</p> <p>Todd Rubin, Attorney Advisor, Administrative Conference of the United States</p> <p>Catherine M. Sharkey, Crystal Eastman Professor of Law, NYU School of Law</p> <p>This panel will examine a wide array of legal and practical issues associated with agencies' use of artificial intelligence (AI) in regulatory enforcement. Numerous federal agencies (including the SEC, IRS, CMS, CPSC, EPA, and others) are developing or already using AI-based tools to expand their capacity for and refine their approaches to regulatory enforcement. For instance, the SEC has designed algorithms that help identify anomalous trading activity that may be indicative of insider trading. These uses of AI hold great promise, but they also raise a number of challenging legal issues, including questions related to equal protection and outsourcing of inherently governmental functions. In addition, agencies are confronting a number of practical problems, including questions related to the efficiency of trying to develop technical expertise in-house. These challenges are likely to grow more pressing in the future as the use of AI in the private sector expands apace and federal agencies strive to keep up.</p> <p>This panel will draw upon an extensive report that a team of researchers at Stanford and NYU Law Schools are currently preparing for the Administrative Conference of the United States. Several of the professors preparing the report and the agency officials whom they interviewed will participate in both this panel and the companion panel on the use of AI in agency adjudication.</p>

<p>2:45 PM - 3:00 PM</p>	<p>Break and Refreshments</p>
<p>3:00 PM - 4:30 PM East Salon ABC</p>	<p>Reconsidering the Qualified Immunity Defense</p> <p>Aaron L. Nielson, Associate Professor of Law, BYU J. Reuben Clark Law School, Brigham Young University (moderator)</p> <p>H. Thomas Byron, III, Senior Appellate Counsel for National Security, Appellate Staff, Civil Division, U.S. Department of Justice</p> <p>Gillian Flory, Deputy Chief Counsel for Litigation, Transportation Security Administration</p> <p>Clark Neily, Vice President for Criminal Justice, Cato Institute</p> <p>A growing and wide-ranging collection of voices has debated whether the qualified immunity defense has been applied too expansively and whether, or to what extent, it should be curtailed. Though it concerned civil asset forfeiture rather than qualified immunity, the Supreme Court’s decision in <i>Timbs v. Indiana</i> reflects the same sort of thought trend. Although the debate may be inspired more by state government actions and actors, the doctrine applies equally to protect federal officials as well. The panel will consider both theoretical and practical, day-to-day dimensions of the qualified immunity defense.</p>
<p>3:00 PM - 4:30 PM 202 AB</p>	<p>Navigating the Regulatory Morass to Advance Emerging Technologies</p> <p>Anne Bechdolt, Senior Counsel, FedEx Corporation (moderator)</p> <p>Jim Chen, Vice President of Public Policy, Rivian Automotive</p> <p>Carrie Gage, Senior Counsel, Uber Elevate</p> <p>Timothy H. Goodman, Shareholder, Mobility, Transport and Safety Group, Babst Calland Attorneys at Law</p> <p>This panel will explore the regulatory challenges and opportunities that exist in advancing emerging technologies, from export controls standards, safety and security standards, privacy protection, etc. The panel will include representatives from companies creating the technologies, as well as government representatives developing the regulatory framework.</p>

3:00 PM - 4:30 PM
207 AB

Artificial Intelligence in Administrative Adjudication

Matthew Lee Wiener, Vice Chair and Executive Director, Administrative Conference of the United States (moderator)

Cary Coglianese, Edward B. Shils Professor of Law, University of Pennsylvania Law School

Hon. Nancy J. Griswold, Chief Administrative Law Judge, Office Medicare Hearings & Appeals, U.S. Department of Health and Human Services

Daniel E. Ho, William Benjamin Scott and Luna M. Scott Professor of Law, Stanford Law School

Gerald Ray, former Deputy Executive Director of the Office of Appellate Operations, Social Security Administration

Agencies have begun considering how artificial intelligence (AI) can improve the accuracy, consistency, and policy compliance of adjudicative decision-making. Two agencies—the Social Security Administration and the Patent and Trademark Office—have already begun prototyping innovative AI uses for their adjudication programs. Other agencies that adjudicate high volumes of cases, such as HHS’s Office of Medicare Hearings and Appeals and the Board of Veterans Appeals, might draw insights from these prototypes and implement similar innovations in their adjudicative programs. This panel will address, from both a legal and practical perspective, the existing and potential future uses of AI in adjudication. Particular attention will be given to emerging legal issues, among them whether and when different forms of AI are consistent with constitutional due process and other legal norms by which the legitimacy of administrative adjudication are usually evaluated. The panel will draw on an extensive report-in-progress that researchers at Stanford and NYU are preparing for the Administrative Conference of the United States.

4:30 PM

Day 1 of the 2019 Administrative Law Conference Adjourns

4:30 PM - 6:00 PM

Please join us for a reception in the **East Salon Pre-Function area**. All Conference attendees are welcome!

2019 ADMINISTRATIVE LAW CONFERENCE

Friday November 15, 2019

<p>7:30 AM - 4:30 PM</p>	<p>Refreshments, Registration & CLE Sign-In</p>
<p>8:15 AM - 8:25 AM East Salon ABC</p>	<p>Welcome from Section Chair Linda Jellum</p>
<p>8:30 AM - 10:15 AM East Salon ABC</p> <p>Overflow Seating/Video Cast in room 202 AB</p>	<p>Developments in Administrative Law, Part I</p> <p>Robert A. Divis, Principal and Founder, Divis Law, LLC (moderator)</p> <p>Bridget C.E. Dooling, Research Professor, GW Regulatory Studies Center</p> <p>William Funk, Lewis & Clark Distinguished Professor of Law Emeritus, Lewis and Clark Law School</p> <p>Christopher J. Walker, Associate Professor of Law, Mortiz College of Law, The Ohio State University</p> <p>In this signature event of the Administrative Law Section's Fall Conference, scholars will present a comprehensive overview of the most important administrative law developments in the last twelve months. It's all the administrative law news that's fit for discussion and it comes packaged in one fast-paced program that has become a must-attend event for anyone practicing federal administrative law or involved with regulation in Washington. Robert Divis (Moderator) Bridget C.E. Dooling (Rulemaking), William Funk (Constitutional Law), Christopher J. Walker (Adjudication)</p>
<p>10:15 AM - 10:30 AM</p>	<p>Break and Refreshments</p>
<p>10:30 AM - 12:15 PM East Salon ABC</p> <p>Overflow Seating/Video Cast in room 202 AB</p>	<p>Developments in Administrative Law, Part II</p> <p>Robert A. Divis, Principal and Founder, Divis Law, LLC (moderator)</p> <p>Bernard Bell, Professor of Law and Herbert Hanoach Scholar, Rutgers Law School</p> <p>Linda D. Jellum, Ellison C. Palmer Professor of Tax Law, Mercer University School of Law</p> <p>Richard W. Murphy, AT&T Professor of Law, Texas Tech University School of Law <i>(continued)</i></p>

	<p>In this signature event of the Administrative Law Section’s Fall Conference, scholars will present a comprehensive overview of the most important administrative law developments in the last twelve months. It’s all the administrative law news that’s fit for discussion and it comes packaged in one fast-paced program that has become a must-attend event for anyone practicing federal administrative law or involved with regulation in Washington. Robert Divis (Moderator) Bernard Bell (Government Information and Privacy), Linda Jellum (Judicial Review: Scope of Review), Richard Murphy (Judicial Review: Access to the Courts).</p>
<p>12:15 PM</p> <p>12:15 PM - 1:15 PM East Salon ABC</p>	<p>Lunch is Served (Boxed lunches available in the East Salon Pre-Function Area) 2019 Section Awards Presentation</p> <p>ANNUAL AWARD FOR SCHOLARSHIP IN ADMINISTRATIVE LAW</p> <p>Ronald M. Levin, William R. Orthwein Distinguished Professor of Law, Washington University School of Law “Rulemaking and the Guidance Exemption”, <i>70 Administrative Law Review</i> 263 (2018) Presented by Ronald Krotoszynski</p> <p>MARY C. LAWTON AWARD FOR OUTSTANDING GOVERNMENT SERVICE</p> <p>Daniel Cohen, Assistant General Counsel for Legislation, Regulation, & Energy Efficiency, U.S. Department of Energy, Office of General Counsel Presented by Elaine S. Reiss</p> <p>GELLHORN-SARGENTICH LAW STUDENT ESSAY AWARD</p> <p>Ben Miller-Gootnick, Harvard Law School “Boundaries of the Federal Vacancies Reform Act” Presented by Michael Herz</p>

1:15 PM - 2:45 PM
East Salon ABC

How Administrative Law Differs Across the U.S. Courts of Appeals: Perspectives from Circuit Court Judges

Aaron L. Nielson, Associate Professor, J. Reuben Clark Law School, Brigham Young University (moderator)

Judge Jennifer W. Elrod, 5th Circuit Court of Appeals

Judge Ryan Nelson, U.S. Court of Appeals for the 9th Circuit

Judge A. Raymond Randolph, U.S. Court of Appeals for the District of Columbia Circuit

Different federal circuit courts approach administrative law in different ways. This panel will allow federal judges from different circuits to compare and contrast their circuits' approaches to administrative law issues. This information should be useful for agencies and those who litigate administrative law cases.

1:15 PM - 2:45 PM
202 AB

Will States Follow *Kisor's* Lead? *Seminole Rock* and *Auer* Deference at the State Level

Houston Shaner, Associate, Troutman Sanders LLP (moderator)

Andrew Pinson, Solicitor General, State of Georgia

Misha Tseytlin, Partner, Troutman Sanders LLP

Hon. Anuradha Vaitheswaran, Judge, Iowa Court of Appeals

For at least seventy years, federal agencies have enjoyed judicial deference to their interpretations of their own rules, thanks to the landmark decisions in *Seminole Rock* and *Auer*. The Supreme Court is reconsidering that deference in *Kisor v. Wilkie*, argued in late March. While *Kisor* may prove a sea change for federal administrative law, it might signal a new trend in state administrative law, too.

This panel will examine the influence of *Auer* and *Seminole Rock* on state courts' approach to deference, tracing its history in a handful of states and how it became the subject of controversy in two 2019 decisions, *Prokop v. Lower Loup Natural Resources District*, 921 N.W.2d 375 (Neb. 2019), and *City of Guyton v. Barrow*, Nos. S18G0944, -45, -- S.E.2d --, 2019 WL 2167460 (May 20, 2019). These cases raise doubts about the continued viability of state *Auer* analogues after *Kisor* (even if it does not overturn earlier federal decisions), and the panel will discuss whether, or in what form, *Auer* deference can or should continue at the state level. As part of that discussion, the panel will explore key differences between state and federal systems for administrative review.

1:15 PM - 2:45 PM
207 AB

A Litigator’s Guide to Understanding, Compiling, and Using an Administrative Record in an Era of Increasing Uncertainty

Eric Womack, Assistant Director, U.S. Department of Justice, Civil Division, Federal Programs Branch (moderator)

René Browne, Associate General Counsel for Litigation, U.S. Department of Homeland Security

Joel McElvain, Partner, Health Care Group, King & Spalding LLC

Amit Narang, Regulatory Policy Advocate, Public Citizen

Abby Wright, Assistant Director, U.S. Department of Justice, Civil Division, Appellate Staff

The administrative record is an often-overlooked but essential part of any lawsuit under the Administrative Procedure Act. This panel will focus on all aspects of the administrative record, beginning with its development by both the agency and potential litigants at the administrative level through its treatment by federal courts. The panel will discuss such issues as what materials are required to be included in an administrative record, how a potential litigant can help shape the development of that record with an eye towards future litigation, and how courts across the nation have taken such divergent views on these issues. The panelists will include individuals with expertise across the administrative spectrum, including agency counsel with first-hand experience developing an administrative record, counsel from the appellate and trial sections of the Department of Justice with experience litigating these issues, and counsel for plaintiffs who have faced these issues from the other side. In light of this broad range of viewpoints, this panel would be beneficial for government counsel interested in increasing their knowledge of administrative record issues as well as counsel from the private sector who may represent clients dealing with government agencies.

2:45 PM - 3:00 PM

Break and Refreshments

3:00 PM - 4:30 PM
East Salon ABC

1.5 Hours Ethics
Professionalism CLE Credit

Ethical Government Lawyering

Ronald M. Levin, William R. Orthwein Distinguished Professor of Law, Washington University School of Law (moderator)

Rochelle Granat, Former Assistant General Counsel and Designated Agency Ethics Official at U.S. Department of the Treasury

Judith Starr, General Counsel, Pension Benefit Guaranty Corporation

Executive branch lawyers need to be cognizant of a host of ethical standards set forth in statutes, regulations, and rules of professional conduct. In the first instance, an agency needs to train its officials, including political appointees, as to how they can recognize problematic situations under these standards and avoid transgressing them. At times, however, the very nature of the work they do leads government attorneys into ethically challenging territory. For example, lawyers in the executive branch have, throughout history, sometimes faced pressure to approve potentially unlawful decisions. In such situations, difficult questions arise: who is the relevant client (the agency, the President, the public)? How should one proceed when professional obligations appear to conflict? To whom can one turn within the executive branch for additional guidance? This panel brings together ethics experts from within government and academia to discuss the legal, ethical, and practical issues government lawyers face in these and related areas.

3:00 PM - 4:30 PM
202 AB

Guidance: Lessons Learned for an Evolving Legal Landscape

Nina E. Olson, National Taxpayer Advocate, Internal Revenue Service (moderator)

Michael J. Desmond, Chief Counsel, Internal Revenue Service

Blake Emerson, Assistant Professor of Law, UCLA School of Law

Arjun Garg, Chief Counsel, Federal Aviation Administration

Rosario A. Palmieri, Senior Counsel to the Administrator, Office of Information and Regulatory Affairs

Agency use (or overuse) of subregulatory guidance remains a topic of ongoing debate, but an evolving legal landscape has reframed some of the terms of discussion. Office of Information and Regulatory Affairs (OIRA) oversight
(continued)

	<p>of subregulatory guidance has expanded, both through new Office of Management and Budget guidance on Congressional Review Act compliance and a new Memorandum of Agreement with the Treasury Department subjecting tax regulatory actions to OIRA review for the first time. Also, the Administrative Conference of the United States has issued new recommendations regarding interpretative rules and public access to agency guidance documents. This panel will address these changes and how they impact agency use of subregulatory guidance.</p>
<p>3:00 PM - 4:30 PM 207 AB</p>	<p>Administrative Agencies and the Courts: The Impact of this Evolving Relationship on Current Approaches to Judicial Challenges of Agency Action</p> <p>Robert Glicksman, The George Washington University Law School, J.B. and Maurice C. Shapiro Professor of Environmental Law (moderator)</p> <p>Ryan D. Doerfler, Professor of Law, University of Chicago Law School</p> <p>Jacob E. Gersen, Sidley Austin Professor of Law, Harvard Law School</p> <p>Mila Sohoni, Professor of Law, University of San Diego School of Law</p> <p>This panel—comprised of scholars whose works have been accepted for publication in <i>The George Washington Law Review's</i> Vol. 88 <i>Annual Review of Administrative Law</i>—explores the evolving relationship between administrative agencies and the courts, including what approach the courts should take in addressing challenges to agency and executive branch action, the applicable standard of review for such administrative actions, and what relief should be granted when these administrative challenges succeed. In particular, the panelists use historical materials, and modern theories of administrative control to consider how the relationship between administrative agencies and the courts has evolved in recent years and the impact of this evolution on judicial challenges to agency action. The panelists will discuss how their approaches bear on pending suits before the United States Supreme Court as well as suggest ways how to accommodate the evolution of applicable standards now bearing upon the courts. Their presentations will explore current relationships between administrative agencies and the courts and how this constantly changing relationship has defined new standards of review and remedies for administrative challenges.</p>
<p>4:30 PM</p>	<p>Conference Adjourns</p>

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