

2020 ADMINISTRATIVE LAW CONFERENCE

NOVEMBER 19-20, 2020 | VIRTUAL LIVE CLE CONFERENCE



PROGRAM CO-CHAIRS

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SUSAN PROSNITZ

SECTION CHAIR

CHRISTOPHER J. WALKER

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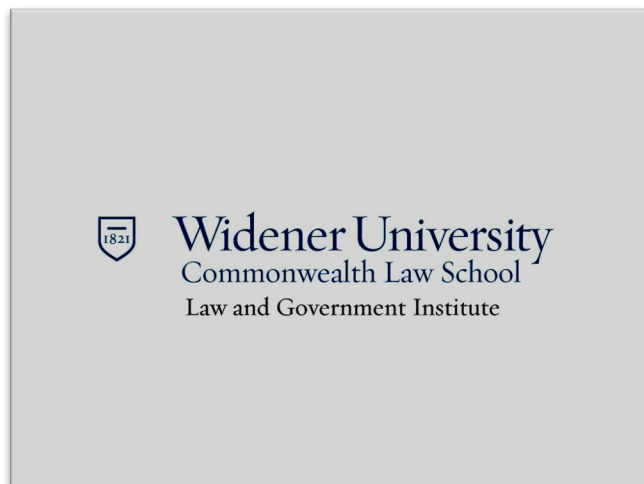
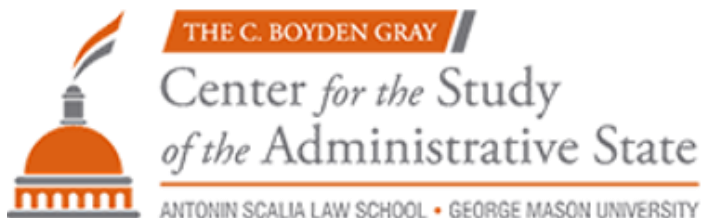
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2020 Administrative Law Conference

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A Message from the Chair Christopher J. Walker

As chair of the ABA's Section of Administrative Law and Regulatory Practice, I am delighted to welcome you to the 2020 Administrative Law Conference. The annual Administrative Law Conference is the Section's signature event each year, as we bring together hundreds of experts in administrative law and regulatory practice to reflect on developments in the field.

This year's conference will be extraordinary. And that is because this year has been an extraordinary one when it comes to administrative law. The U.S. Supreme Court and the lower courts have issued a number of landmark decisions—dealing with, among many other things, the constitutionality of independent agencies and agency adjudicators, the legality of various headline-grabbing executive and regulatory actions, and the scope of Congress's oversight authority. Congress has been busy exercising its oversight powers—even holding an impeachment trial—as well as delegating authority to federal agencies to respond to the current epidemic. The Executive Branch continues to regulate. But it has also sought to change the way it regulates when, for instance, it comes to the use of agency guidance and enforcement discretion and the role of the White House in reviewing proposed regulatory actions. Similar regulatory developments have taken place at the state and local levels.

The world has also had a profound impact on administrative law and regulatory practice. COVID-19 has brought unprecedented challenges for regulators and those they regulate. Practitioners, scholars, and students of administrative law have looked inward to examine how our country's history of slavery and racism affects administrative governance today. After this writing but before the Conference begins, we will also have had a presidential election that will—as presidential elections usually do—likely shape the future of the regulatory state in fundamental ways.

It is against this backdrop that we gather again this year for the ABA's annual Administrative Law Conference. In putting together the program, we have had to respond to these unusual times. For the first (and hopefully last) time ever, the Conference will be completely virtual. Like prior years, you can earn up to 12.5 hours of CLE credit across eight live panels. But unlike prior years, you will be able to access the online recordings for all of the more than twenty panels after the live program concludes (and due to reduced costs, we've been able to cut the registration fee by a third from last year).

We have a terrific program this year. In addition to our signature Developments in Administrative Law Program on Friday morning, we have nearly a dozen panels that address the various hot topics highlighted above, with a particular focus on the effects of COVID-19 and the presidential election on administrative law and regulatory practice. On Thursday, we have created a special “Administrative Law 101” track for younger lawyers and law students (and lawyers looking for a refresher) to be introduced to the fundamentals of agency adjudication, rulemaking, judicial review, and statutory interpretation. Our plenary lunchtime session on Thursday will explore various aspects of racism in administrative law, and our plenary lunchtime session on Friday will present the Section’s annual awards for scholarship and public service.

I want to thank the Conference co-chairs, Andrew Emery and Susan Prosnitz, for all of their work in putting this fabulous program together. The indispensable Anne Kiefer, Section Director, makes the whole thing go, handling the thousands of day-to-day details. And we are most grateful for the crucial financial support provided by our generous sponsors—as of this writing, The Regulatory Transparency Project, American University Washington College of Law, The George Washington University Law School, The C. Boyden Gray Center for the Study of the Administrative State, FedEx, The Center for Regulatory Effectiveness, The Regulatory Group Inc., Widener University Commonwealth Law School Law & Government Institute, Proskauer Rose LLP and The Free State Foundation.

We are proud of the tremendously diverse group of lawyers from government, private practice, and the academy that make up our Section. We enjoy the job we do wrestling with important questions, sharing information and insight, and spending time with the many friends we have made in the process. It makes membership in the Section quite rewarding. If you are not already a member of the Section, we hope, after participating in the ABA’s 2020 Administrative Law Conference, you will join us.

Thank you once again.

Christopher J. Walker

Section Chair

John W. Bricker Professor of Law, The Ohio State University



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**Administrative Law and
Regulatory Practice Section**

Thursday November 19, 2020

8:30 am – 10:00 am ET

- Regulatory Response to COVID
- The Trump Administration's Increasing Use of Emergency and Extraordinary Review at the Supreme Court: Feature or Bug?
- Rulemaking 101: The Rulemaking Process

10:30 am – 12:00 pm ET

- Agency Adjudication During the COVID Pandemic and Beyond
- Mass, Bot, and Fake Comments
- Administrative Record 101: A Litigator's Guide to Understanding, Compiling and Using an Administrative Record in an Era of Increasing Uncertainty

1:00 pm – 2:30 pm ET

- Perspectives on Performance-Based Regulation: Rulemaking, Compliance, and Enforcement
- Addressing the Political Dysfunctions That Threaten the Administrative State
- Statutory Interpretation 101

3:00 pm – 4:30 pm ET

- The Future of Deference in the U.S. Supreme Court
- Prosecutorial Discretion in Enforcement Agencies
- Judicial Review 101: Judicial Review of Rules

Friday November 20, 2020

8:30 am – 10:15 am

- Developments in Administrative Law Part 1

10:30 am – 12:15 pm ET

- Developments in Administrative Law Part 2

12:45 pm – 2:15 pm ET

- Regulation In Transition
- Interim Final Rulemaking and the Implications of Implications of Little Sisters of the Poor v. Pennsylvania
- Recent Developments in Arbitrary & Capricious Review: Insights from Immigration Law

2:45 pm – 4:15 pm ET

- OIRA and Presidential Policy in the Next Presidential Term
- Reassessing Judicial Review of Administrative Actions: the Nondelegation Doctrine, Chevron Deference's Constitutionality, and the Ordinary Remand Rule
- Ethics Panel: Who is the Client? The Challenge for the Government Lawyer

**Virtual Live Administrative Law Conference Agenda
Special Opening Program**



Wednesday November 18, 2020

Recognizing and Addressing Racism in Administrative Law

12:00 pm – 1:30 pm ET

The world has had a profound impact on administrative law and regulatory practice. COVID-19 has brought unprecedented challenges for regulators and those they regulate. Practitioners, scholars, and students of administrative law have looked inward to examine how our country's history of slavery and racism affects administrative governance today. Many of the panels at this year's conference will cover how the regulatory state has responded to COVID-19. In a special kickoff panel on Wednesday, November 18, at noon, the Section has organized a panel entitled Recognizing and Addressing Racism in Administrative Law. This panel will of course be viewable by registered conference attendees, but unlike the rest of the conference the Section has also decided to make the panel free and open to the public as well.

Since the increased public protest activity that emerged during the summer of 2020 regarding the impact of law enforcement actions on people of color, activities of the Section of Administrative Law and Regulatory Practice, sparked by the leadership of Diversity Committee Co-Chair and Council Member Kathryn E. Kovacs, have focused on the subject of Racism and Administrative Law. Specifically, the Section has sponsored a *Symposium on Racism in Administrative Law* in the NOTICE & COMMENT blog that the Section produces in collaboration with the YALE JOURNAL ON REGULATION which attracted commentary from more than two dozen authors on various ways in which race is a factor in administrative agency actions and related law. In addition, the feature articles in the Summer 2020 issue of the Section's quarterly publication, ADMINISTRATIVE & REGULATORY LAW NEWS, explored the same theme. This panel will continue to explore this theme by offering a discussion among distinguished administrative law scholars and practitioners.

Moderator:

Renée M. Landers, Professor of Law, Suffolk University Law School and Faculty Director, Master of Science in Law: Life Sciences and Health and Biomedical Law Concentration.

A former Chair of the ABA Section of Administrative Law and Regulatory Practice, current Co-Chair of the Section's Diversity Committee, and a Public Member of the Administrative Conference of the United States, her contribution to the Section's Symposium on Racism in Administrative Law, *Race (and Other Vulnerabilities) in Healthcare and Administrative Law*, can be found at <https://www.yalejreg.com/nc/race-and-other-vulnerabilities-in-healthcare-and-administrative-law-by-renee-m-landers/>. She is a former Deputy Assistant Attorney General in the Office of Policy Development in the United States Department of Justice and Deputy General Counsel of the U.S. Department of Health and Human Services. Professor Landers also has held numerous positions in Massachusetts state government.

Panelists:

Bernard W. Bell, Professor of Law and Herbert Hanoach Scholar, Rutgers Law School.

Professor Bell is a constitutional law expert who specializes in property and privacy law. He clerked for Judge Amalya L. Kearse of the U.S. Court of Appeals for the Second Circuit and for U.S. Supreme Court

Justice Byron R. White and served as senior litigation counsel and as Assistant U.S. Attorney in the U.S. Attorney's Office for the Southern District of New York. Professor Bell serves as the Dean's representative on the New Jersey Law Revision Commission. He is a former member of the Governing Council of the ABA Section on Administrative Law and Regulatory Practice, former vice-chair of the section's Constitutional Law and Separation of Powers Committee, and currently vice chair of the section's Government Information and Right to Privacy Committee. His contribution to the Section's Symposium on Racism in Administrative Law for the NOTICE & COMMENT BLOG can be found here: <https://www.yalejreg.com/nc/race-and-administrative-law-by-bernard-bell/>.

Steph Tai, Professor of Law, University of Wisconsin Law School

Raised in the South by two chemists, Professor Tai decided to combine their chemistry background with a legal education to improve the use of science in environmental protection. Professor Tai's scholarly research examines the interactions between environmental and health sciences and administrative law. These include the consideration of scientific expertise and environmental justice concerns by administrative and judicial systems, and as well as the role of scientific dialogues in food systems regulation, and the ways in which private governance incorporates scientific research. Teaching interests include administrative law, environmental law, food systems law, environmental justice, risk regulation, contracts (especially private governance and supply chains!), and comparative Asian environmental law.

Professor Tai has also served as a judicial law clerk to the Honorable Ronald Lee Gilman on the U.S. Court of Appeals for the Sixth Circuit. Professor Tai then worked as an appellate attorney in the Environment and Natural Resources Division of the U.S. Department of Justice, briefing and arguing cases involving a range of issues, from the protection of endangered cave species in Texas to the issuance of dredge and fill permits under the Clean Water Act. From 2013-2014, Professor Tai served as a U.S. Supreme Court Fellow as a researcher in the Federal Judicial Center.

Professor Tai's piece, *Is Racism Arbitrary and Capricious? A Look at Agency Grant, Loan and Licensing Decisions*, appears in the Section publication, ADMINISTRATIVE & REGULATORY LAW NEWS. Her contribution to the Symposium on Racism in Administrative Law, *Racism and Informal Agency Adjudicatory Decisions Or Is Racism Arbitrary and Capricious*, can be found here: <https://www.yalejreg.com/nc/racism-and-informal-agency-adjudicatory-decisions-or-is-racism-arbitrary-and-capricious-by-step-h-tai/>.

John M. Taylor, President and a Principal of, Greenleaf Health, Inc.

Greenleaf Health, Inc., is a leading United States Food and Drug Administration (FDA) regulatory consulting firm that provides strategic and technical guidance to pharmaceutical and medical device companies researching, developing and manufacturing innovative solutions to pressing global public health challenges. He has more than 28 years of experience working on food and drug related issues at FDA and in private industry. He currently leads Greenleaf's Compliance & Regulatory Affairs group. Prior to joining Greenleaf in 2014, he served in three positions at FDA from 2009 to 2014: Counselor to the Commissioner; Acting Deputy Principal Commissioner; and Acting Deputy Commissioner for Global Regulatory Operations and Policy.

Mr. Taylor began his career at FDA as an attorney within FDA's Office of the Chief Counsel in 1991. In addition to positions in the private sector, he has served as Senior Advisor for Regulatory Operations and Policy within FDA's Office of the Commissioner, Director of the Center for Drug Evaluation and Research's Office of Compliance, Director of the Office of Enforcement in FDA's Office of Regulatory Affairs (ORA), and Associate Commissioner for Regulatory Affairs.

EVENTS AGENDA

November 19, 2020



12:00 pm – 12:45 pm Awards Presentation

12:00 pm Gellhorn-Sargentich Law Student Essay Award

Presented by Michael Herz, Chair, Fellows Committee, Former Section Chair

Recipient: Jonathan Hall, Duke Law School

The Gorsuch Test: Gundy v. United States, Limiting the Administrative State, the Future of Nondelegation

12:10 pm Award for Scholarship in Administrative Law

Presented by Ronald Krotoszynski, Chair, Awards Committee

Recipient: Miriam Seifter,

Understanding State Agency Independence, 117 Mich. L. Rev. 1537 (2019)

12:30 pm Administrative Law Section Fellow Award

Presented by Christopher Walker, Section Chair

Recipient: The Honorable Judith Boggs, Former Section Chair

12:40 pm Administrative Law Section Volunteer of the Year Award

Presented by Linda Jellum, Past Section Chair

Recipient: David Rubenstein, Editor in Chief of the Administrative & Regulatory Law News



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Administrative Law and
Regulatory Practice Section

EVENTS AGENDA

November 19, 2020

5:00 pm – 6:00 pm Administrative Law Job Opportunities for Young Lawyers

The panel will discuss opportunities for lawyers to find administrative law jobs with the federal government. Panelists will discuss how to find job opening, how to tailor your application to a job opening, and how to best present yourself in an interview. The panel will be focused towards young lawyers and recent graduates but will be applicable to attorneys of all experience levels.

Moderator: Elizabeth A. Carr, Assistant Dean of Career Services, Mercer University School of Law
Elizabeth Carr serves as the Assistant Dean of Career Services at Mercer University School of Law. Ms. Carr is a proud double bear, graduating from Mercer University in 2006 with a B.A. in Political Science and obtaining her J.D. from Mercer Law School in 2010. Before joining the senior staff at Mercer Law School, Ms. Carr worked as an associate at the Law Office of Jeanie K. Tupper P.C. in Albany, Georgia. Her practice focused on family law, social security disability, personal injury, wills and estate planning, and bankruptcy law. Ms. Carr is a member of the National Association for Law Placement (where she serves as Regional Representative), State Bar of Georgia, the Young Lawyers Division of the State Bar of Georgia, Macon Bar-Young Lawyers Division, Georgia Association of Women Lawyers, and she is a graduate of the State Bar of Georgia, Young Lawyers Division Leadership Academy. Additionally, Ms. Carr serves as the permanent treasurer for the South Eastern Minority Job Fair, which serves over 30 schools and over 100 employers from across the country. She is also active in her local church, Ingleside Baptist in Macon, Georgia.

Panelists

Sonya Y. Pass, Consumer Financial Protection Bureau, Senior Legal Counsel to the General Counsel
Sonya Pass is a 20-year veteran of the legal profession. She currently works at the Consumer Financial Protection Bureau (CFPB) as Senior Counsel to the General Counsel and Chief of Staff for the Legal Division. Prior to joining CFPB in January 2017, Sonya practiced in the areas of Federal Labor and Employment law, most recently as Associate Counsel with the Department of Homeland Security, U.S. Citizenship and Immigration Services in Dallas, Texas where she received the Director's Torch Award for excellent legal representation in negotiating a term Collective Bargaining Agreement. Prior to that, she worked at the Department of Treasury, Bureau of Engraving & Printing in Fort, Worth, TX, first as Senior Counsel and then as Manager of the Labor and Employee Relations Division. Sonya began her legal career at the Federal Labor Relations Authority in Washington, DC where she served for 7 years as Attorney-Advisor to then-Chairman Carol Waller Pope, before joining the General Counsel's Office at the United States Patent and Trademark Office in Alexandria, VA.

Sam Wice, U.S. Securities and Exchange Commission, Special Counsel

Sam Wice is a special counsel at the U.S. Securities and Exchange Commission. Previously he was a detailee/policy analyst at the Office of Information and Regulatory Affairs and analyst at the Congressional Budget Office. He graduated from Duke University School of Law and Grinnell College.

Virtual Live Administrative Law Conference Agenda
As of 10/12/20

Thursday November 19, 2020

8:30 am – 10:00 am ET

CLE Session 1

Regulatory Response to COVID

This panel will discuss the range of regulatory-related steps that U.S. Federal agencies have employed to respond to the COVID-19 pandemic. Among other things, the discussion will cover the particular waivers, exemptions, or other unique authorities agencies have used. We will also include a discussion on EO 13924 “Regulatory Relief to Support Economic Recovery” as related to COVID relief, with examples of specific agency actions.

Speakers

- Brenna Jenny, Deputy General Counsel & Chief Legal Officer for the Center for Medicare & Medicaid Services, US Department of Health and Human Services, Washington, DC
- Jonathan Dols, Deputy Assistant General Counsel for Regulation, US Department of Transportation, Washington, DC
- Satya Thallam, Counselor to the Administrator of the Office of Information and Regulatory Affairs, US Office of Management and Budget, Executive Office of the President, Washington, DC
- Jonathan Wolfson, Deputy Assistant Secretary for Policy and Regulatory Reform Officer, US Department of Labor, Washington, DC

Co-Moderators

- Christina E. McDonald, Associate General Counsel for Regulatory Affairs, Office of the General Counsel, US Department of Homeland Security, Washington, DC
- Rebecca Orban, Senior Attorney, US Coast Guard, Office of Regulations and Administrative Law, Washington, DC

Thursday November 19, 2020

8:30 am – 10:00 am ET

CLE Session 2

The Trump Administration’s Increasing Use of Emergency and Extraordinary Review at the Supreme Court: Feature or Bug?

One of the major themes of the Trump administration’s litigation before the Supreme Court has been the frequency with which it has asked the Justices for extraordinary or emergency relief—in cases involving the 2020 census, climate change, the Deferred Action for Childhood Arrivals immigration program, a host of controversial asylum policies, the ban on military service by transgender individuals, and others. In all, the Solicitor General has sought emergency relief 29 times in just over three years—including at least 11 times during the October 2019 Term alone. In contrast, the during the 16 years of the George W. Bush and Obama administrations, it sought extraordinary relief from the court exactly eight times—once every other year. The government has suggested that the uptick in requests for extraordinary relief is a response to the uptick in nationwide injunctions and other hostility from lower-court judges to Trump administration policies.

Hence, it claims, the unusual intervention by the justices is warranted by the unusual interference from district courts. Whatever the merits of that claim, to date, the Justices have largely acquiesced in these requests. The panelists will explore whether this uptick is a feature or a bug, and what it could mean not just for the shape of future government litigation, for but the changing shape of the Supreme Court’s

overall docket. In addition to law professors Jonathan Adler from Case Western and Steve Vladeck from the University of Texas, the panel includes Seth Grossman (the Deputy General Counsel for the Department of Homeland Security during much of the Obama administration) and Sarah Harrington, a partner in private practice and alumna of the Office of the Solicitor General.

Speakers

- Jonathan H. Adler; Johan Verheij Memorial Professor of Law; Director; Coleman P. Burke Center for Environmental Law; Case Western Reserve University School of Law, Cleveland, OH
- Seth Grossman; Vice President of People and External Affairs & Chief of Staff and Counselor the President, Adjunct Professor, Washington College of Law American University, Washington, DC
- Sarah E. Harrington; Partner, Goldstein & Russell, P.C., Bethesda, MD
- Stephen Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law, Austin, TX

Moderator

- Linda D. Jellum; Associate Dean for Faculty Research & Development; Ellison Capers Palmer Sr. Professor of Tax Law; Mercer University School of Law, Macon, GA

Thursday November 19, 2020

8:30 am – 10:00 am ET

CLE Session 3

Rulemaking 101: The Rulemaking Process

This panel will provide an introductory/refresher course on the procedural steps, legal requirements, and practical constraints applicable to issuing rules. The course will be co-taught by a team of lawyers with government and private practice experience, each bringing out considerations most relevant from their particular perspectives. CLE materials provided include a copy of the Document Drafting Handbook Annotated provided by The Regulatory Group Inc.

Speakers

- Andrew Emery, President, The Regulatory Group, Arlington, VA
- Daniel Cohen, Assistant General Counsel for Legislation, Regulation, and Energy Efficiency, US Department of Energy, Office of General Counsel, Washington, DC
- Russell S. Frye, Principal, FryeLaw PLLC, Washington, DC
- Bridget C.E. Dooling, Research Professor, The George Washington University Regulatory Studies Center, Washington, DC

Thursday November 19, 2020

10:30 am – 12:00 pm ET

CLE Session 4

Agency Adjudication During the COVID Pandemic and Beyond

The pandemic has created unprecedented challenges for federal agencies, none more so than promptly adjudicating cases involving benefits, immigration, licensing, regulatory enforcement, and other important matters. This panel will address how agencies have approached that challenge so far and how they might best do so in the future. Topics will include:

- Constitutional, statutory, and regulatory legal issues arising from the use of remote hearings, including agencies' legal authority to compel remote appearances, and the possible effects of remote hearings on case outcomes.
- The shift from paper to electronic processes for filing, discovery, submission of evidence, case management, and the issuance of notices and decisions.

- Modifications of filing deadlines and discovery schedules, as well as waivers of and exceptions to procedural requirements, to account for pandemic-related disruptions.
- Provision of administrative support for agency adjudicators.
- Legally required and best practices for modifying agency procedures in response to the pandemic and providing notice of them to adjudicators, litigants, and the public.

Leading agency officials will offer their perspectives on these and related issues. They will also address whether and what remote-hearing and other practices adopted during the pandemic should be made permanent.

Speakers

- Scott R. Boalick, Chief Administrative Patent Judge, Patent Trial and Appeal Board, U.S. Patent and Trademark Office, Alexandria, VA
- Jeremy Graboyes, Deputy Research Director, Administrative Conference of the United States, Washington, DC
- The Honorable Cheryl Mason, Board of Veterans' Appeals, US Department of Veterans Affairs, Washington, DC
- Jeffrey D. Wedekind, Administrative Law Judge, National Labor Relations Board, Washington, DC

Moderator

- Matthew Lee Wiener, Acting Chairman, Vice Chairman, and Executive Director, Administrative Conference of the United States, Washington, DC

Thursday November 19, 2020

10:30 am – 12:00 pm ET

CLE Session 5

Mass, Bot, and Fake Comments

For several decades, agencies have had to process thousands upon thousands of public comments in certain high-profile rules, many of them identical or nearly identical. This problem has grown more pronounced in the last few years, as e-rulemaking has made it a lot easier for organizations not only to encourage members to submit form comments ("mass comments") but also to write algorithms that submit comments without any human involvement ("bot comments"). And, in some cases, the computers submit comments on behalf of the deceased or living persons who had nothing to do with preparing the comment ("fake comments").

This panel features members of the ACUS research team working on a project titled *Mass, Computer-Generated, and Fraudulent Comments* (currently slated for ACUS's December 2020 Plenary Session) and other experts. Among other things, it will address the following salient issues associated with modern public comment campaigns:

- How big of a problem are mass, bot, and fake comments? Do agencies already have sufficient mechanisms in place to deal with them?
- Are agencies under a legal obligation to consider mass, bot, and/or fake comments? Are they legally permitted to use technologies to help combat such comments (e.g., quarantine all comments suspected of being "fake")?
- Will these problems get worse as technology evolves? Or can agencies use AI to help them separate the wheat from the chaff and process comments?
- To what extent do the numbers of comments received or the opinions expressed in comments even matter? Should agencies just mine comments for relevant data, regardless of whether they're submitted by a real person?
- Should agencies consider mechanisms other than notice and comment to supplement the public participation process? Should Congress consider providing for participatory mechanisms other than notice and comment in certain cases?

Speakers

- Amanda Neely, General Counsel to Senator Rob Portman, Deputy Chief Counsel, Permanent Subcommittee on Investigations, United States Senate, Washington, DC
- Emily Hammond, Glen Earl Weston Research Professor, The George Washington University Law School, Washington, DC
- Michael Herz, Arthur Kaplan Professor of Law, Yeshiva University Benjamin N. Cardozo School of Law, New York, NY
- Michael Livermore, Professor of Law, University of Virginia School of Law, Charlottesville, VA
- Beth Simone Noveck, Professor and Director of Governance Lab at NYU and Chief Innovation Officer of New Jersey, New York, NY

Moderator

- Reeve T. Bull, Research Director, Administrative Conference of the United States, Washington, DC
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Thursday November 19, 2020

10:30 am – 12:00 pm ET

CLE Session 6

Administrative Record 101: A Litigator's Guide to Understanding, Compiling, and Using an Administrative Record in an Era of Increasing Uncertainty

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.

Speakers

- René E. Browne, Associate General Counsel, Legal Counsel Division, Office of the General Counsel, US Department of Homeland Security, Washington, DC
- Thomas Lorenzen, Partner, Environment & Natural Resources, Appellate, and Administrative & Regulatory Practice Groups, Crowell & Moring LLP, Washington, DC
- Brad Rosenberg, Assistant Director, Federal Programs Branch, US Department of Justice, Washington, DC
- Adina Rosenbaum, Attorney, Public Citizen Litigation Group, Washington, DC

Moderator

- H. Thomas Byron III, Senior Appellate Counsel, US Department of Justice, Civil Division, Washington, DC
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Thursday November 19, 2020

1:00 pm – 2:30 pm ET

CLE Session 7

Perspectives on Performance-Based Regulation: Rulemaking, Compliance, and Enforcement

Performance-based standards have been a staple of regulatory theory and reform for some time. Our panel of regulators, academics, and industry attorneys will examine the advantages and challenges presented by these types of regulations, what effect they have had on federal regulations, and their prospects for the future. The panel will be guided by questions along the lines of the following: When do agencies look to develop standards around performance? How have regulators operationalized performance? Where has that succeeded and where has it failed? Where would prescriptive standards have performed better? How have regulated entities viewed these rules? How does it impact enforcement? How will federal agencies approach performance-based regulation going forward? For purposes of this discussion, the panel will draw primarily on examples of regulation from the transportation and environmental contexts.

Speakers

- Prof. Cary Coglianese, Edward B. Shils Professor of Law and Professor of Political Science, University of Pennsylvania Carey Law School, Philadelphia, PA
- Karen Stallings, Associate General Counsel, Gas Transmission & Midstream, Enbridge Inc., Houston, TX
- Rob Benedict, Sr. Dir. of Petrochemicals, Transportation, and Infrastructure, American Fuel & Petrochemical Manufacturers, Washington, DC
- Paul Roberti, Chief Counsel, Pipeline & Hazardous Materials Safety Administration, Washington, DC

Moderators

- Catherine Little, Partner, Troutman Sanders LLP, Atlanta, GA,
- Annie Cook, Partner, Troutman Sanders, LLP, Atlanta, GA

Thursday November 19, 2020

1:00 pm – 2:30 pm ET

CLE Session 8

Addressing the Political Dysfunctions That Threaten the Administrative State

Political polarity has increased to such an extent that Congress has little ability to legislate and the process of appointment of agency officials is performing poorly. These increasingly severe political dysfunctions pose major threats to the continued viability of the administrative state.

All agency power is created by Congress in statutes that delegate power to agencies. Congress has little power to enact, amend or repeal any statute at present. Agencies are attempting to perform missions that Congress did not contemplate when it enacted the statutes that confer power on agencies. Thus, for instance, the FCC is struggling to decide how to regulate the internet through application of the Communications Act of 1934 and the EPA is attempting to address climate change through application of a statute that was enacted in 1990.

Critics of the administrative state argue with considerable justification that agencies are attempting to stretch their statutory grants of power impermissibly to act in ways that Congress never envisioned. They urge the courts to take actions that will preclude agencies from abusing the power that they have been granted by Congress and that will force Congress to take legislative actions that will clarify the permissible scope of agency power. Thus, for instance, last Term the Justices of the Supreme Court engaged in lively and indeterminate debates about whether to reinvigorate the non-delegation doctrine and whether to reduce the extent of the deference that courts confer on agency actions.

Everyone agrees that it would be highly desirable if Congress took legislative actions that clarify the scope of agencies' powers to address serious problems like immigration, regulation of the internet, and mitigation of climate change. The problem is that Congress lacks the capability to take any action in any of these areas.

Increasing political polarity has also created another serious problem. To be effective any agency must have leaders that have been lawfully appointed. As political polarity has increased, the process of appointing officers to agency positions of leadership has fallen apart. In every presidential administration for many decades, the process of nomination and confirmation of officers to head agencies has gotten longer, the number of vacancies has increased, and the number of acting agency heads has increased.

Over the last few years, this problem has become so serious that multi-member agencies often lack the quorum needed to act and many agency leadership functions are being performed by people who are not even eligible to hold a position of leadership on an acting basis. This problem has the potential to become far worse in the future as political polarity increases, particularly during the inevitable periods of time when the President is a member of one party and the Senate is controlled by the other party.

The participants in this panel are actively engaged in efforts to identify and to implement reforms of our broken legislative process and our broken appointment process that will allow both to function effectively. They will describe the problems and their proposed methods of addressing the problems.

Speakers

- Richard J. Pierce, Jr., Lyle T. Alverson Professor of Law, George Washington University School of Law, Washington, DC
- Anne Joseph O'Connell, Adelbert H. Sweet Professor of Law, Stanford University School of Law, Stanford, CA
- William A. Galston, Ezra K. Zilkha Chair, Governance Studies, The Brookings Institution, Washington, DC
- Richard H. Pildes, Sudler Family Professor of Constitutional Law, NYU School of Law, New York, NY

Moderator

- Daniel M. Flores, is Senior Counsel--Republican, House Committee on Oversight and Reform. Washington, DC

Thursday November 19, 2020

1:00 pm – 2:30 pm ET

CLE Session 9

Statutory Interpretation 101

There are many ways to approach the process of interpreting a statute. Textualism is an interpretative approach that relies heavily on the intrinsic sources to determine meaning. Intentionalism is an interpretative approach that relies heavily on extrinsic sources, particularly the legislative history, to discern the enacting legislature's specific intent. Finally, purposivism is an interpretative approach that searches all of the sources to discern the enacting legislature's general intent, or purpose.

With so many different approaches, how does an attorney discern the meaning of language in a statute? This panel will explain the linear approach to interpretation. The linear approach is a step-by-step process that will appeal to textualist, intentionalist, and purposivist judges alike. Taught by the Country's leading expert on statutory interpretation, this panel will help you learn how to effectively argue about and explain a statute's meaning to your client, opposing counsel, and, if necessary, a judge.

Speaker

- Linda Jellum, Ellison Capers Palmer Sr. Professor of Tax Law, Mercer University School of Law, Macon, GA
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Thursday November 19, 2020

3:00 pm – 4:30 pm ET

CLE Session 10

The Future of Deference in the U.S. Supreme Court

The Supreme Court in recent years has increasingly expressed willingness to rethink judicial deference to agency legal interpretations. Indeed, last year in *Kisor v. Wilkie*, the Court narrowed one form of deference and Chief Justice Roberts suggested openness to even revisiting Chevron deference. Likewise, over the past few years, a number of justices and judges have come out in opposition to deference and Supreme Court advocates often appear reluctant to argue for deference. This panel will explore these recent trends to evaluate the future deference in the Supreme Court. The panel will also address whether deference can be changed to alleviate some of the concerns that have been expressed.

Speakers

- Kristin Hickman, Professor, University of Minnesota Law, Minneapolis, MN
- Richard Pierce, Professor, George Washington Law, Washington, DC
- Aditya Bamzai, Professor, University of Virginia Law, Charlottesville, VA
- Allyson Ho, Partner, Gibson Dunn, Dallas, TX

Moderator

- Aaron Nielson, Professor, Brigham Young University Law, Provo, UT
-

Thursday November 19, 2020

3:00 pm – 4:30 pm ET

CLE Session 11

Prosecutorial Discretion in Enforcement Agencies

Agency decisions to investigate, charge, and settle are among the most important phases of an enforcement case. This panel considers the checks and balances appropriate for constraining prosecutorial discretion in agencies that combine enforcement and adjudicatory functions. For example, agency heads must approve a staff decision to charge. Yet the same heads vote whether to uphold an administrative judge's decision when the case return to them. Is this appropriate? Should there be other checks such as the SEC's Wells notice or an opportunity for the target to meet with agency heads before approval of a charging decision? Should agency heads be stripped of prosecutorial power, as in the NLRB? What should be the criteria for exercising prosecutorial discretion? This panel should be of interest to government agency lawyers who are responsible for either enforcement or adjudication as well as private lawyers whose clients are subject to agency enforcement.

Speakers

- Michael Asimow, Dean's Executive Professor, Santa Clara Law School. Consultant, Administrative Conference of the United States, Menlo Park, CA
- Andrew Vollmer, Senior Affiliated Scholar, Mercatus Center at George Mason University, Arlington, Virginia
- Maureen K. Ohlhausen, Commissioner and Acting Chair, Federal Trade Commission 2012-2018; Baker Botts, Annandale, VA

Moderator

- Zachary Price, Harry & Lillian Hastings Research Chair, UC Hastings Law School, San Francisco, CA
-

Thursday November 19, 2020

3:00 pm –4:30 pm ET

CLE Session 12

Rulemaking 101: Judicial Review of Rules

This panel will provide an introductory/refresher course on judicial review of rulemaking. The panel will present government and private practice perspectives on procedural and strategic considerations, legal standards and practical constraints applicable to challenging (or defending) regulations in court.

Speakers

- Samantha Chaifetz, Attorney, Civil Appellate Staff, U.S. Department of Justice, Washington, DC
- Joshua Turner, Partner, Wiley Rein LLP, Washington, DC

Moderator

- Steve Lehotsky, Senior Vice President and Chief Counsel for Regulatory Litigation, the U.S. Chamber of Commerce, National Chamber Litigation Center
-

Friday November 20, 2020

8:30 am – 10:15 am ET

CLE Session 13

Developments in Administrative Law Part 1

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.

Speakers

- Bernard Bell, Professor of Law and Herbert Hanoach Scholar, Rutgers Law School, Newark, New Jersey
(Government Information & Right to Privacy)
- Bridget C.E. Dooling, Research Professor, GW Regulatory Studies Center, Washington, DC; and Bethany Davis Noll, Adjunct Professor of Law, New York University School of Law, New York, NY
(Rulemaking)
- Christopher J. Walker, John W. Bricker Professor of Law, Director Moritz Washington DC Summer Program, Michael E. Moritz College of Law, Columbus, OH, and Chair, ABA Section of Administrative Law & Regulatory Practice; and Matthew Lee Wiener, Acting Chairman, Vice Chairman & Executive Director, The Administrative Conference of the United States (ACUS), Washington, DC
(Adjudication)

Moderator

- Daniel Walters, Assistant Professor of Law, Penn State Law, University Park, PA
-

Friday November 20, 2020

10:30 am – 12:15 pm ET

CLE Session 14

Developments in Administrative Law Part 2

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.

Speakers

- William Funk, Lewis & Clark Distinguished Professor of Law Emeritus, Lewis and Clark Law School, Portland, OR (**Constitutional Law**)
- Linda D. Jellum, Ellison C. Palmer Professor of Tax Law, Mercer University School of Law, Macon, GA (**Judicial Review: Scope of Review**)
- Richard W. Murphy, AT&T Professor of Law, Texas Tech University School of Law, Lubbock, TX (**Judicial Review: Access to the Courts**)

Moderator

- Daniel Walters, Assistant Professor of Law, Penn State Law, University Park, PA
-

Friday November 20, 2020

12:45 pm – 2:15 pm ET

CLE Session 15

Regulation In Transition

No matter who wins the presidential election in November 2020, a transition will occur in January 2021. Whether it is a transition to the second term of the Trump presidency or to a new Biden presidency, the government will face key questions about how to proceed, which regulatory tools to use and which issues to address. This panel will bring together advocates, practitioners, and scholars to discuss regulatory strategy for the transition in a handful of regulatory domains: immigration, healthcare, and environment.

Speakers

- Jonathan H. Adler; Johan Verheij Memorial Professor of Law; Director; Coleman P. Burke Center for Environmental Law; Case Western Reserve University School of Law, Cleveland, OH
- Richard Revesz, Lawrence King Professor of Law, Dean Emeritus, Director, Institute for Policy Integrity, NYU Law School, New York, NY
- Joel McElvain, Partner, Health Care Practice Group, King & Spalding, Washington, DC
- Amit Narang, Regulatory Policy Advocate, Public Citizen, Washington, DC

Moderator

- Gillian Metzger, Harlan Fiske Stone Professor of Constitutional Law, Columbia Law School, New York, NY
-

Friday November 20, 2020

12:45 pm – 2:15 pm ET

CLE Session 16

Interim-Final Rulemaking and the Implications of *Little Sisters of the Poor v. Pennsylvania*

Agencies frequently rely on interim-final rulemaking to address pressing regulatory issues, leaving public notice and opportunity for comment until after legally-binding regulations are published. Although the

practice has been controversial, the Supreme Court recently seemed to endorse it in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*. This panel will explore the pros and cons of interim-final rulemaking, circumstances prompting its use, and the implications of the *Little Sisters* decision for both agency attorneys and private litigants.

Speakers

- Nicholas Bagley, Professor of Law, University of Michigan Law School, Ann Arbor, MI
- Kristin E. Hickman, McKnight Presidential Professor in Law, University of Minnesota Law School, Minneapolis, MN
- Nandan Joshi, Attorney, Public Citizen Litigation Group, Washington, DC
- Rosario Palmieri, Associate Administrator, Office of Information and Regulatory Affairs, Washington, DC

Moderator

- Mark Thomson, Deputy Research Director, Administrative Conference of the United States, Washington, DC

Friday November 20, 2020

12:45 pm – 2:15 pm ET

CLE Session 17

Recent Developments in Arbitrary and Capricious Review: Insights from Immigration Law

Recent challenges to executive action in immigration law offer an opportunity to closely analyze how federal courts conduct arbitrary and capricious review. This panel will consider emerging trends in this area, focusing on recent cases such as the DACA litigation. It will also engage with broader themes surrounding the structure of enforcement discretion and the rule of law in administrative law.

Speakers

- Ava Ayers, Assistant Professor of Law and Director of the Government Law Center, Albany Law School, Albany, NY
- Shruti Rana, Assistant Dean and Professor, Director of the International Law & Institutions Program, Hamilton Lugar School of Global & International Studies, Indiana University Bloomington, IN
- Shalini Bhargava Ray, Assistant Professor of Law, University of Alabama School of Law, Tuscaloosa, AL
- Amer Ahmed, Partner, Gibson Dunn, New York, NY

Friday November 20, 2020

2:45 pm – 4:15 pm ET

CLE Session 18

OIRA and Regulatory Policy in the Next Presidential Term

What does the future of regulatory policy hold in either the second term of the Trump presidency or the first term of a Biden presidency? Former OIRA Administrators from both political parties consider the possibilities in light of the legal and policy changes over the past four years, but also informed by legislative, executive, and judicial actions during prior administrations. This review and analysis of the legal issues surrounding transitions, and the impacts political changes in second terms, will be of great value to all administrative law attorneys.

Speakers

- Susan Dudley, Director, GW Regulatory Studies Center, and Professor, GW Trachtenberg School of Public Policy & Public Administration, Washington DC
- Sally Katzen, Professor, NYU Law, Washington DC
- John Graham, Professor, Indiana University, Bloomington IN
- Howard Shelanski, Professor, Georgetown University, Washington DC,

Moderator

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

Friday November 20, 2020

2:45 pm – 4:15 pm ET

CLE Session 19

Reassessing Judicial Review of Administrative Actions: the Nondelegation Doctrine, Chevron Deference's Constitutionality, and the Ordinary Remand Rule

This panel, comprised of scholars throughout the country whose works have been accepted for publication in *The George Washington Law Review's* Vol. 89 *Annual Review of Administrative Law*, will discuss how recent trends in case law may affect the role of Article III courts' review of administrative actions. Professor Kristin Hickman will examine recent efforts to reinvigorate the nondelegation doctrine. Professor Kent Barnett will consider recent Article III challenges to *Chevron* deference. And Professor Christopher Walker will present the findings of his coauthored empirical study on how courts use remands to communicate with federal agencies and how agencies respond and alter their adjudicative behavior on remand. Judge Gregory G. Katsas of the D.C. Circuit will be moderating the panel. Administrative law scholars, practitioners, and students will gain guidance and perspective on these pressing administrative law issues that they can utilize in their practice and studies.

Speakers

- Kristin E. Hickman, McKnight Presidential Professor in Law, University of Minnesota Law School, Minneapolis, MN; Formerly served as Special Adviser to the Administrator of the Office of Information and Regulatory Affairs from 2018-2019
- Kent Barnett, J. Alton Hosch Associate Professor, University of Georgia School of Law, Athens, GA
- Christopher J. Walker, John W. Bricker Professor of Law, Director of Moritz Washington DC Summer Program, Columbus, OH

Moderator

- Gregory G. Katsas, Judge, United States Court of Appeals, D.C. Circuit, Washington, DC, Former Assistant Attorney General for the Civil Division and Acting Associate Attorney General at the Department of Justice between 2001-2009

Friday November 20, 2020

2:45 pm – 4:15 pm ET

ETHICS CLE Session 20

Who is the Client? The Challenge for the Government Lawyer

This panel discussion will focus on the challenges the government lawyer faces in determining the precise "client" the lawyer represents. The government lawyer is often asked to weigh the interests of the

agency, division, or department for which the lawyer works against concerns for the public and other interested parties. Proper identification of the client represented is essential to being able to effectively adhere to the lawyer's duty of loyalty and competence to the client, as well as for proper conflicts of interests analyses. This panel will provide insights on how to determine the client the government lawyer represents and how to navigate the complex relationships that the government lawyer faces each day.

Speakers

- Francine Kerner, Chief Counsel, Transportation Security Administration, Washington, DC, Chief Ethics Officer
- Roger Alford, Professor of Law, The Law School Notre Dame University, Notre Dame, IN
- Veronica Root Martinez, Professor of Law & Director, Program on Ethics, Compliance, & Inclusion, *Robert & Marion Short Scholar*, Notre Dame Law School, Notre Dame, IN

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