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Legal Sidebar

Notable Administrative Law Developments from 2018

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Last year featured a host of significant developments in the realm of administrative law, from the Trump Administration's continued deregulatory efforts to one (now former) Supreme Court Justice's call to reconsider the foundational *Chevron* doctrine. Some developments from 2018, however, may be of particular interest to Congress, especially those involving such foundational concepts as the separation of powers and the boundaries of presidential and agency authority. Such developments include (1) the Supreme Court's treatment of agency deference doctrines, most notably the Court's consistently narrow application of the *Chevron* doctrine last term; (2) the Court's decision in *Lucia v. SEC* and related consequences stemming from it for the federal administrative adjudicatory system; (3) federal lower court decisions concerning whether the Consumer Financial Protection Bureau (CFPB) and Federal Housing Finance Agency (FHFA) are structured in a constitutionally permissible way; (4) the fate of the Trump Administration's rule-delay initiatives in the federal courts; and (5) Congress's regulatory reform initiatives. This Sidebar offers a brief overview of these developments.

1. The Supreme Court and Judicial Deference to Agency Legal Interpretations

In recent years, there has been significant interest in whether the Supreme Court would reexamine precedent concerning the degree of judicial deference given to agencies' interpretations of the statutes and regulations they administer. This interest seems likely to grow in response to Court activity in 2018, which might affect the future application and vitality of two important doctrines governing judicial deference to agency legal interpretations: the *Chevron* and *Auer* (or *Seminole Rock*) doctrines.

The *Chevron* doctrine—articulated by the Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*—requires courts to defer to an agency's reasonable interpretation of an ambiguous statute it administers in certain instances. If *Chevron* applies, courts engage in a two-step analysis. First, a reviewing court determines whether the underlying statute being interpreted is silent or ambiguous on the particular issue (*Chevron* Step One). If it is not, then "the court . . . must give effect to the unambiguously expressed intent of Congress." But if the statute *is* silent or ambiguous, the court moves to the second step (*Chevron* Step Two), and will defer to the agency's interpretation, so long as it is a "permissible" (or "reasonable") construction of the statute. Several Justices have criticized *Chevron* in judicial opinions or

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other contexts, both with regard to the doctrine's application in specific situations (such as when an agency is interpreting the extent of its own authority under an authorizing statute) and more broadly as potentially violating separation-of-powers principles. (See this Sidebar for a more extensive discussion of judicial criticisms of *Chevron*.)

While some commentators have speculated about *Chevron*'s future, the Court's recent treatment of the doctrine has focused less upon its continued existence than whether a statute is sufficiently ambiguous to trigger review of an agency's interpretation under *Chevron* Step Two. In each of the five cases decided in 2018 in which *Chevron* deference was potentially relevant, the Court did not reach *Chevron* Step Two. Notably, while Justice Gorsuch—who has expressed broad, foundational concerns with *Chevron*—authored three of the five decisions from last year, the remaining two were written by Justices Ginsburg and Sotomayor, who have not raised the same fundamental doubts about the doctrine's constitutionality. Although the controlling opinions in each of these cases did not call *Chevron* into question, some have suggested the Court's engagement in a more searching (or "muscular") inquiry under *Chevron*'s Step One may effectively narrow the scope of the doctrine, as determining a statute is unambiguous under *Chevron* Step One means that the reviewing court does not reach the question of whether to defer to an agency's interpretation under Step Two.

Some judges, including Justice Kavanaugh, have stated they are more likely than other judges to conclude that a statute is clear under *Chevron* Step One and therefore are less likely to defer under *Chevron* Step Two. With the ascension to the High Court of Justice Kavanaugh —a jurist who generally favors a circumscribed role for *Chevron*—it seems possible that the Court may continue its trend of engaging in a searching *Chevron* Step One inquiry, meaning that the deferential standard of review involved in Step Two is less likely to come into play, all without formally limiting the doctrine's applicability.

The past year was also significant in setting the stage for the Court to consider the continued vitality of the *Auer* (or *Seminole Rock*) doctrine this term. *Auer* instructs courts to defer to an agency's interpretation of its own ambiguous regulation (as opposed to a statute) "unless it is plainly erroneous or inconsistent with the regulation." Some Justices and commentators have expressed unease with the doctrine based on separation-of-powers and other concerns; Chief Justice Roberts and Justices Thomas and Alito have all written opinions expressing a willingness or desire to reconsider *Auer*, and Justice Gorsuch joined Justice Thomas's dissent from the denial of a petition for certiorari last year that asked the Court to overrule *Auer*. The Justices will soon have a chance to reassess the doctrine. Shortly after Justice Kavanaugh joined the Court in October 2018, it granted certiorari in *Kisor v. Wilkie* to consider "[w]hether the Court should overrule *Auer* and *Seminole Rock*." However, while the newest Member of the Court once predicted favorably that the Court would one day overrule *Auer*, it is an open question whether the Court will do so in *Kisor*. Oral argument in *Kisor* has been scheduled for March 27, 2019.

2. Lucia v. SEC *and the Status of Agency Adjudicators under the Appointments Clause*

Another significant administrative law development from 2018 was the Supreme Court's decision in *Lucia v. SEC*, in which the Court held that the Securities and Exchange Commission's (SEC's) administrative law judges (ALJs) were "Officers of the United States" under the Constitution's Appointments Clause. Under the Appointments Clause, Congress may authorize "the President," "the Courts of Law," or "the Heads of Departments" to appoint a subset of officers called "inferior Officers" to positions within the federal government. The Supreme Court has held that an individual who "exercise[s] significant authority pursuant to the laws of the United States" and holds a "'continuing' position established by law" is an officer pursuant to the Clause. At issue in *Lucia* was whether the SEC's ALJs were inferior officers and, therefore, required to be appointed by the Commission (i.e., the relevant department head) as opposed to members of the SEC staff.

The critical question in *Lucia* was whether the SEC's ALJs exercised "significant authority." Although the Court acknowledged that the "significant authority" standard is "no doubt framed in general terms," it declined to expand on the standard's meaning. Instead, the Court concluded that the SEC ALJs were "near-carbon copies" of adjudicators whom the Court had previously held were officers—the special trial judges of the U.S. Tax Court. After ruling that the SEC ALJs were officers under the Appointments Clause, the Court then addressed the petitioner's remedy. Noting that he had raised a "timely" Appointments Clause challenge before the Commission, the Court held that the appropriate remedy for the petitioner was a new hearing before a different (and properly appointed) adjudicator.

Although the *Lucia* decision concerns SEC ALJs, it has raised legal questions regarding the constitutional status of ALJs in other agencies and other non-ALJ adjudicators employed by the federal government. Several agencies, either prior to or in the aftermath of the *Lucia* decision, have had their department heads ratify the appointment of their ALJs or issued guidance on how to respond to Appointments Clause challenges. In addition, on July 10, 2018, the President issued an executive order changing the selection procedures for ALJs throughout the executive branch, citing concerns about constraints on agency heads' discretion in selecting candidates.

The *Lucia* decision is also potentially consequential for the questions the Court *declined* to answer, including what constitutes a "timely" Appointments Clause challenge and the effect of a department head's ratification of an official's appointment. *Lucia* also left for another day the question of whether the dual layers of removal protections enjoyed by SEC ALJs—who, like all ALJs, may only be removed "for good cause established and determined by" the Merit Systems Protection Board, whose members are also protected from at-will removal—are constitutional. This latter question is significant in light of the Supreme Court's 2010 decision holding that the dual for-cause removal protections enjoyed by the Public Company Accounting Oversight Board unconstitutionally "impaired" the President's authority under Article II of the Constitution to "hold[] his subordinates accountable for their conduct" and "subvert[ed] [his] ability to ensure that the laws are faithfully executed."

3. Constitutionality of the CFPB and FHFA

One of the most notable judicial developments of 2018 did not emanate from the Supreme Court, but rather from several lower federal courts faced with assessing the constitutionality of two executive branch agencies charged with regulating important aspects of the U.S. economy: the CFPB and FHFA. Both entities are "independent" agencies—that is, they are federal agencies imbued with certain statutorily prescribed indicia of independence from executive branch control. Among other features, both agencies are led by a single Director (as opposed to a multi-member board or commission) who may only be removed by the President "for cause." A line of Supreme Court decisions holds that while Article II of the Constitution confers upon the President the ability to remove certain executive branch officers at-will, for-cause removal protections may be appropriate for officials of certain independent agencies, so long as such protections do not "impede the President's ability to perform his constitutional duty." A central question in decisions evaluating the CFPB and FHFA's structural features of independence, therefore, is whether such features unconstitutionally constrain the President's powers under Article II.

Three decisions issued by two federal courts of appeals and a federal district court last year involving the CFPB and FHFA are of particular note. In January 2018, the en banc U.S. Court of Appeals for the D.C. Circuit held in *PHH Corp. v. CFPB* that the CFPB was structured in a constitutionally permissible manner, determining, among other things, that the CFPB Director's for-cause removal protections were "squarely within the bounds of [] precedent and history." However, in June 2018, a judge for the U.S. District Court for the Southern District of New York reached the opposite conclusion in *CFPB v. RD Legal Funding, LLC*. In that case, the judge adopted the portion of then-Judge Kavanaugh's dissent from the D.C. Circuit's en banc *PHH Corp.* decision, which argued that the agency "'is unconstitutionally structured because it is an independent agency that exercises substantial executive power and is headed by

a single Director.'" And roughly a month later, the U.S. Court of Appeals for the Fifth Circuit entered the fray in *Collins v. Mnuchin*, where a three-judge panel held that the "combined effect" of the FHFA Director's for-cause removal protection and the agency's other features of independence (e.g., single-director leadership, independent funding stream) unconstitutionally "insulated the FHFA to the point where the Executive Branch cannot control the [agency] or hold it accountable."

With several courts of appeals poised to render additional decisions on this topic in 2019, the decisions from 2018 will play a significant role in the continued development and, perhaps, eventual resolution of the important separation-of-powers questions these cases present.

4. Judicial Treatment of the Trump Administration's Rule-Delay Attempts

A theme from 2018 that carried over from 2017 was continued litigation over the Trump Administration's efforts to delay or suspend regulations originally issued by the previous administration. A list maintained by one organization which displays the results of court challenges to the administration's deregulatory actions indicates that all of the rule-delays challenged in court in 2017 were either struck down or voluntarily rescinded by the relevant agency. Similarly, in 2018, at least one study indicated that the majority of courts rendering decisions on challenges to rule-delays concluded that the administration's efforts were not in accordance with governing legal requirements. Such decisions generally held that agencies engaging in rule-delays had ignored or acted in excess of their underlying statutory authority or had contravened the Administrative Procedure Act by, for example, failing to adequately explain changes in agency positions from those articulated under the prior administration or engage in notice-and-comment proceedings. That said, not all challenges to the administration's rule-delays were successful last year. The U.S. District Court for the District of Columbia dismissed a challenge to the Environmental Protection Agency's indefinite stay of a rule after the agency issued a final rule ending the stay and imposing updated compliance deadlines.

The decisions from 2017 and 2018 collectively reaffirmed or articulated many important propositions about rule-delays that may inform future agency action. Some courts, for example, held that suspending the effective date of a rule is "tantamount to amending or revoking a rule" and, therefore, generally must be preceded by notice and comment. Courts have also concluded that agencies have no "inherent authority" to delay or suspend rules implementing statutory directives, but instead derive such authority, to the extent they have it, from the governing statute.

5. Congress's Regulatory Reform Initiatives

Not all notable administrative developments in 2018 concerned judicial or agency action. This past year saw a continuing interest by Members of Congress in legislation to reform the administrative state. In 2018, Members of the 115th Congress introduced several bills aimed at reforming administrative law and procedure, continuing a trend from the 115th Congress when a number of high-profile bills were introduced to transform administrative law, including a proposal to eliminate *Chevron* and *Auer* deference. One prominent bill passed by the House in 2018, the Guidance Out of Darkness (GOOD) Act (H.R. 4809), sought to "increase the transparency of agency guidance documents and . . . make [such] documents more readily available to the public." The bill would have obligated agencies to post their guidance documents online. Also notable was S. 3387, which would have reversed the Trump Administration's executive order that changed the selection procedures for ALJs.

The extent to which the 116th Congress will share the previous Congress's interest in reforming or reimagining the administrative state remains to be seen. But given the host of important issues raised by the developments discussed above, there is no shortage of possible topics for legislation or other congressional action.

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