



The Honorable Kevin J. McIntyre General Session: **Post-Modern Administrative Law and the Energy Lawyer**

Administrative law is about the division of power between agencies and courts. It shapes how much leeway administrative agencies (like FERC and DOE) enjoy to establish rules within their domains, and how much courts constrain these agencies via their interpretations of the governing substantive statutes and administrative-law principles. This panel will explore the evolution of administrative law over the past year and how that evolution is likely to affect the energy sector.

The panelists will address:

- Recent Supreme Court decisions and whether they presage a revolution in administrative law concerning Congress's authority to delegate broad powers to agencies and judicial deference to agencies.
- Significant Circuit-level developments in administrative law, including, but not limited to, how these decisions have played out in the Circuits over the past year.
- Important administrative-law decisions in the energy sector, with a focus on decisions that may have broad effects beyond the parties to the particular case.

Speakers:

Kathleen Barron, *Senior Vice President, Government and Regulatory Affairs and Public Policy*, Exelon Corp

Eamon P. Joyce, *Partner*, Sidley Austin LLP

Emily Hammond, *Jeffrey and Martha Kohn Senior Associate Dean for Academic Affairs*, George Washington University Law School

Zachary C. Schauf, *Partner*, Jenner & Block

Robert Solomon, *Solicitor*, Federal Energy Regulatory Commission

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Post-Modern Administrative Law and the Energy Lawyer

Leading Recent/Pending Energy Law Cases

Constitutional; Federal v. State

Hughes, Chairman of the Maryland Public Service Commission v. Talen Energy, 136 S. Ct. 1288 (2016) – Maryland subsidy for new generation, requiring participation in federally-regulated wholesale markets, preempted

FERC v. Electric Power Supply Ass’n, 136 S. Ct. 760 (2016) – entry of demand response resources, lowering retail consumption, into federally-regulated wholesale power markets, within federal authority

Coalition for Competitive Electricity v. Zibelman, 906 F.3d 41 (2nd Cir. 2018) – New York zero emissions credit subsidizing nuclear power not preempted by federal wholesale rate authority

Electric Power Supply Association v. Star, 904 F.3d 518 (7th Cir. 2018) – Illinois zero emissions credit not preempted by federal wholesale rate authority

Allegheny Defense Project v. FERC, 932 F.3d 940 (D.C. Cir. 2019) (judgment vacated and rehearing en banc briefing ordered Dec. 5, 2019) (oral argument en banc scheduled Apr. 28, 2020) – due process concerns when eminent domain proceedings initiate, and pipeline construction starts, prior to issuance of final, judicially-reviewable FERC rehearing order

In re PennEast Pipeline Co., 938 F.3d 96 (3rd Cir. 2019) (cert. petition filed Feb. 18, 2020, S. Ct. No. 19-1039) – eminent domain over state lands for purpose of pipeline construction

Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators, Order 841, 162 FERC ¶ 61,127 (2018), *order on reh’g and clar.*, Order 841-A, 167 FERC ¶ 61,154 (2019), *on appeal*, *Nat. Ass’n of Reg. Commissioners, et al. v. FERC*, D.C. Cir. Nos. 19-1142, *et al.* (oral argument scheduled for May 5, 2020) – regulations to remove barriers to the participation of electric storage resources in federal-regulated markets

Relationship between Federal Power Act/Natural Gas Act and other federal statutes

Sierra Club v. FERC, 867 F.3d 1357 (D.C. Cir. 2017) – natural gas pipeline construction; environmental justice and indirect effects (on upstream gas production and downstream emissions) issues

Adorers of the Blood of Christ v. FERC, 897 F.3d 187 (3rd Cir. 2018) -- opposition to FERC-certificated Atlantic Sunrise pipeline on RFRA (religious expression) grounds

Hoopa Valley Tribe v. FERC, 913 F.3d 1099 (D.C. Cir. 2019) -- waiver of state Clean Water Act section 401 authority, when application is withdrawn and resubmitted for period longer than one year

New York Dept. of Envir. Conserv. v. FERC, 884 F.3d 450 (2nd Cir. 2018) -- waiver of state Clean Water Act section 401 authority, when state deems application “complete” more than one year after submission

In re FirstEnergy Solutions Corp., 945 F.3d 431 (6th Cir. 2019) – relationship between bankruptcy law and energy law

FERC v. Powhatan Energy Fund, 949 F.3d 891 (4th Cir. 2020) – statute of limitations to initiate enforcement action

U.S. Fish & Wildlife Service v. Cowpasture River Preservation Ass’n, Supreme Court No. 18-1584 (oral argument heard on Feb. 24, 2020), on petition for certiorari from 911 F.3d 150 (4th Cir. 2018) -- natural gas pipeline under the Appalachian Trail

POST-MODERN ADMINISTRATIVE LAW AND THE ENERGY LAWYER

REVOLUTION IN ADMINISTRATIVE LAW?

Two decades ago, the blackletter administrative law was that Congress has nearly unchecked power to delegate broad lawmaking power to administrative agencies (so long as Congress provided an “intelligible principle”)—and that when Congress has done so, agencies receive broad deference in matters of interpretation. This deference was broad for statutes that an agency administers (under the doctrine of *Chevron v. NRDC*) and even broader for an agency’s interpretation of its own regulations (under *Auer v. Robbins* and *Bowles v. Seminole Rock*). Recently, however, a number of Supreme Court Justices have called into question every aspect of this orthodoxy. A key question will therefore be whether administrative law is poised for a revolution—and if so, what the implications might be for energy law, given the centrality of administrative law in the energy sphere. This handout provides summaries and resources concerning two recent decisions where those issues have come to a head.

NONDELEGATION: *GUNDY V. UNITED STATES* (2019)

The Supreme Court has twice invalidated laws under the “nondelegation doctrine”—which limits Congress’s ability to delegate lawmaking power to administrative agencies. But it has not done so since 1935. And since the New Deal, broad agency delegations have proliferated. The Communications Act empowers the FCC to make rules “as public interest, convenience, or necessity” requires. The Clean Air Act empowers the EPA to set air-quality standards limiting pollution to the level required “to protect the public health.” And the Federal Power Act authorizes FERC to set “just and reasonable” rates. Under current doctrine, all these delegations are valid so long as they provide an “intelligible principle” for agencies to follow.

In *Gundy*, the Supreme Court considered whether to invalidate the first legislation on nondelegation grounds since the 1930s. The Sex Offender Registration and Notification Act (“SORNA”) requires certain sex offenders to register and provides that the Attorney General shall “specify the applicability” of this registration requirement to offenders who committed their crimes before the Act was passed. *Gundy* asked whether that delegation went too far—and because Justice Kavanaugh had yet to be confirmed, an eight-member Court heard the case.

A four-Justice plurality—authored by Justice Kagan and joined by Justices Ginsburg, Breyer, and Sotomayor—avoided the constitutional question by finding in SORNA an implicit and specific command that the Attorney General “must apply SORNA’s registration requirements as soon as feasible to offenders convicted before the statute’s enactment.” Per Justice Kagan, if “SORNA’s delegation is unconstitutional, then most of Government is unconstitutional.”

A three-Justice dissent—authored by Justice Gorsuch and joined by Chief Justice Roberts and Justice Thomas—rejected the plurality’s reading of the statute and would have invalidated SORNA on nondelegation grounds. Citing an article entitled “Is Administrative Law Unlawful?”, Justice Gorsuch would have limited Congress to three types of delegations:

- (1) “[A]s long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to ‘fill up the details.’”

- (2) “[O]nce Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding.”
- (3) If a power is already inherently executive (or judicial), Congress may delegate broad powers to the executive (or judiciary)—*e.g.*, broad executive authority in “foreign-affairs-related statute[s].”

Justice Alito concurred in the judgment to uphold SORNA: “If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.”

Postscript: Concurring in the denial of certiorari in *Paul v. United States* (Nov. 25, 2019), Justice Kavanaugh wrote: “Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.”

DEFERENCE: *KISOR V. WILKIE* (2019)

Kisor raised the question of whether to overrule *Auer* and *Seminole Rock*, which had been construed to provide that an agency’s interpretation of its own regulations carries “controlling weight unless it is plainly erroneous or inconsistent with the regulation.” After oral argument, many thought *Auer* would be overruled—but it survived, albeit in limited form.

The plurality, composed of Justices Kagan, Ginsburg, Breyer, and Sotomayor, argued that *Auer* was correct and important, at least within a particular sphere. Justice Kagan asked readers to consider the following issue:

- “An FDA regulation gives pharmaceutical companies exclusive rights to drug products if they contain ‘no active moiety that has been approved by FDA in any other’ new drug application. 21 CFR §314.108(a) (2010).”
- “Has a company created a new ‘active moiety’ by joining a previously approved moiety to lysine through a non-ester covalent bond?”

Per Justice Kagan, “[i]f you are a judge, you probably have no idea of what the FDA’s rule means, or whether its policy is implicated when a previously approved moiety is connected to lysine through a non-ester covalent bond.” Justice Kagan believed that, at least for this type of issue, agencies should receive deference—though she stressed that “not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference.”

The Chief Justice joined the plurality to uphold *Auer* based on *stare decisis* but imposed several new limits that restricted its application:

- There must be a “genuine ambiguity,” after exhausting all the traditional tools of textual interpretation.
- The interpretation must be “reasonable” (and deference is not *greater* than for statutes).
- The interpretation must reflect the agency’s “authoritative position” (*i.e.*, it cannot come only from a lower-level official).

- The issue must implicate agency expertise.
- The interpretation must reflect the agency’s “fair and considered judgment”—and cannot be merely a litigating position.

Justice Gorsuch, plus Justices Thomas, Alito, and Kavanaugh, dissented and would have overruled *Auer*. He argued that it “should have been easy for the Court to say goodbye to *Auer*.” His core critique was that, in “disputes involving the relationship between the government and the people, *Auer* requires judges to accept an executive agency’s interpretation of its own regulations even when that interpretation doesn’t represent the best and fairest reading.” This rule, Justice Gorsuch believed, “creates a ‘systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else.’” But he noted that, due to the limits imposed by the majority, *Auer* “emerges maimed and enfeebled—in truth, zombified.”

Writing separately, the Chief Justice explained that, while *stare decisis* justified retaining *Auer*, “the distance between the majority and [the dissent] is not as great as it may initially appear.” He suggested that, in many cases, the majority’s limited view of deference would yield the same results as Justice Gorsuch’s no-deference approach. And he stressed that he did “not regard the Court’s decision . . . to touch upon” “judicial deference to agency interpretations of statutes” under *Chevron*.

ADDITIONAL READING:

- Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164 (2019)
- Paul J. Larkin Jr., *Baseball, Legal Doctrines, and Judicial Deference to an Agency's Interpretation of the Law: Kisor v. Wilkie*, CATO SUP. CT. REV., 2018-2019
- Gary Lawson, *"I'm Leavin' It (All) Up to You": Gundy and the (Sort-of) Resurrection of the Subdelegation Doctrine*, CATO SUP. CT. REV., 2018-2019
- Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852 (2020)