**2019 AJEI Summit | November 14-17, 2019**

**Grand Hyatt Washington**

**Washington, DC**

**Has Chevron run out of gas? and other good questions:**

 **Judging the administrative estate in 2019**

**Sunday, November 17, 2019**

**8:45 am to 9:45 am**

Panelists: Hon. Geoffrey G. Slaughter, Indiana Supreme Court

 Erin Murphy, Kirkland Ellis

 Donald Verrilli, Munger, Tolles & Olson

Moderator:-Tillman Breckenridge, Pierce Bainbridge

*Panel Summary*

Administrative agencies, including administrative tribunals, perform crucial roles in federal, state, and local governments. Every day, agencies issue new regulations, publish interpretations of existing regulations, initiate enforcement actions and resolve dispute through adjudicative or quasi-adjudicative proceedings.

**Chevron deference**

For as long as administrative agencies have been in existence, disagreements have arisen about how much authority agencies should have and their relationships with the courts. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), the United States Supreme Court was called upon to determine whether the Environmental Protection Agency’s construction of a federal statute was reasonable. The Court stated that if a statute is “silent or ambiguous” with respect to a specific dispute, courts should determine “whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843, 104 S. Ct. at 2782. The Court further explained, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Id.* at 844, 104 S. Ct. at 2782.[[1]](#footnote-1)

The Supreme Court subsequently applied the *Chevron* doctrine of judicial deference to administrative interpretations in other cases, including *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997). State courts have also addressed the issue, with some choosing to implement their own version of the *Chevron* doctrine to govern state and/or local administrative agencies. *See, e.g.*, *Moriarty v. Ind. Dep’t of Nat. Resources*, 113 N.E.3d 614, 619 (Ind. 2019) (“[a]n interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless this interpretation would be inconsistent with the statute itself.”) (internal quotation omitted).

Nevertheless, the *Chevron* doctrine has become more and more controversial over the years, with many defenders and challengers. The United States Supreme Court case of *Kisor v. Wilkie*, 18-15, which will be decided prior to this panel’s presentation, will specifically address whether *Auer* and related cases should be overruled.

**Non-delegation**

Another current administrative law issue is the validity of the delegation doctrine – the principle that Congress can transfer its power to legislate to another branch of government under certain circumstances. The United States Supreme Court case of *Gundy v. United States*, 17-6086, will provide an opportunity for the Court to weigh in on the doctrine and its contours. *See* Trish McCubbin, *Gundy v. U.S.: Will the Supreme Court Revitalize the Nondelegation Doctrine?*, Trends Newsletter, ABA Section of Environment, Energy, and Resources, at [https://www.americanbar.org/groups/environment\_energy\_resources/publications/trends/2018-2019/november-december-2018/gundy-vs-us/(November/December](https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2018-2019/november-december-2018/gundy-vs-us/%28November/December) 2018).

**Administrative guidance**

Another timely topic concerns administrative agencies’ guidance documents – rules and policy statements that purport to interpret regulations. The usefulness, propriety, and validity of such documents is a matter of dispute. *See, e.g.*,Ronald M. Levin, *Unifying the APA Exemptions for Policy Statements and Interpretive Rules*, 43 Admin. & Reg. L. News 4 (2018).

The panel will explore the changing legal landscape for judicial review of agency actions from the viewpoint of appellate judges and appellate practitioners. The panelists will share the latest thinking on the constitutional and policy considerations that underlie *Chevron* deference and other legal standards that pertain to judicial review of executive agency action. The Supreme Court’s decisions in *Kisor* and *Gundy* are expected to play a major role.

*Other Useful Authorities*

*Michigan v. Environmental Protection Agency*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2699, 192 L. Ed. 2d. 674 (2015) (Thomas, J., concurring)

The United States Supreme Court was asked to address whether the Environmental Protection Agency was required to consider cost in imposing regulation on certain power plants. The Court applied the *Chevron* standard to determine whether the agency’s interpretation of statutes was correct. Acknowledging that the *Chevron* standard required some degree of deference to an agency’s interpretation, the Court still concluded that the agency’s view of the statute was incorrect, and the agency should have considered costs to power plant operators when drafting regulations.

Justice Thomas’ concurring opinion raises interesting questions relevant to this panel’s discussion. He argues that *Chevron*, should be reconsidered because he concludes courts should not relinquish their independent judgment in favor of executive branch administrative agencies. In addition, Justice Thomas describes traditional *Chevron* deference as “potentially unconstitutional delegations” of judicial authority. 104 S. Ct. at 2713.

*Guitierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016)

This case also presented questions about *Chevron* and subsequent cases. The Tenth Circuit was asked to determine the effect of a federal agency’s attempts to overrule a judicial decision. Judge (now Justice) Gorsuch, writing for the panel, stated that under the *Chevron* standard, “when a statute is ambiguous and an executive agency’s interpretation is reasonable, the agency may indeed exercise delegated legislative authority to overrule a judicial precedent in favor of the agency's preferred interpretation.” *Id.* at 1143. In an unusual development, Judge Gorsuch wrote a separate concurring decision in which he questioned at length the propriety and value of the *Chevron* doctrine.

*NIPSCO Indus. Group v. N. Ind. Public Service Co.*, 100 N.E.3d 234 (Ind. 2018)

On the merits, this case discusses the interpretation of an Indiana statute that governs a preapproval process for utilities to recover the costs of certain capital improvements. For purposes of this panel, the most relevant part of the decision is the standard of review. The Indiana Supreme Court stated that when reviewing pure questions of law from an administrative tribunal, “[w]e review questions of law de novo . . . and accord the administrative tribunal below no deference.” *Id.* at 241. This standard of review appears to be in tension with the Indiana Supreme Court’s statement of the standard of review as stated in *Moriarty*, 113 N.E.3d at 619.

1. On the other hand, if a given statute is not ambiguous, its plain meaning controls--as determined by the courts. Whether a particular statute is ambiguous is for the courts to decide as a matter of law. *See Littlefield v. U.S. Dep't of the Interior*, 199 F. Supp. 3d 391, 396 (D. Mass. 2016) (according plain meaning to federal statute and rejecting federal agency’s claim that statue was ambiguous: “With respect, this is not a close call: to find ambiguity here would be to find it everywhere.”) [↑](#footnote-ref-1)