



# Administrative Law Conference

**November 1-2, 2018**

**Walter E. Washington Convention Center | Washington, DC**

## **Program Chairs:**

**Andrew Emery**

**Susan Prosnitz**

## **Section Chair:**

**Hon. Judith S. Boggs**

***12.5 Hours of Professional Practice CLE Credit Requested  
Including 1.5 Hours of Ethics Credit***



# Administrative Law Conference

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# Administrative Law Conference Schedule at a Glance

## Thursday November 1, 2018

Time	Session	Ballroom
7:30 – 9:00 AM	Registration, CLE Sign-In, Breakfast	
	<b>Break-Out Session I</b>	
9:00 – 10:30 AM	Regulatory Developments in the Americas Agency Justification Strategies for Regulation and De-Regulation: Battle Grounds and Best Practices	East Salon A/B 202 A/B
9:00 – 10:00 AM	Ethics Essentials: How to Avoid Problems and Pitfalls ( <b>Ethics CLE</b> ) How Artificial Intelligence is Changing Legal Research and Workflow Capabilities for the Regulatory and Administrative Law Attorney ( <b>60 minutes General CLE</b> )	201 East Salon C
10:30 – 10:45 AM	<b>Break</b>	
	<b>Break-Out Session II</b>	
10:45 – 12:15 PM	What's Happening at OIRA? Assessing Year Two of the Trump Regulatory Agenda Oyez, Oyez: Tips from the Bench on How to Effectively Litigate Administrative Law Cases Rewriting Agency DNA – Bringing About Lasting Regulatory Reform	East Salon A/B 202 A/B 201
12:15 – 1:15 PM	<b>Lunch Break &amp; Keynote: OIRA Administrator, Neomi Rao (invited) Non-CLE</b>	East Salon C
	<b>Break-Out Session III</b>	
1:15 – 2:45 PM	Is Agency Guidance Reviewable? (And If So, When?) Fake Views? Fraud and Spam in Public Comments on Proposed Rules Constitutional Constraints on Administrative Power: How History Sheds Light on Contemporary Understandings	East Salon A/B 202 A/B 201
2:45 – 3:00 PM	<b>Break</b>	
	<b>Break-Out Session IV</b>	
3:00 – 4:30 PM	Dueling Canons – Should Supreme Court Canons Trump <i>Chevron</i> or <i>Auer</i> ? Improving Regulation for Businesses: The Need, the Means, and the Challenges Are Those (Presidential) Tweets Part of the Record?	East Salon A/B 202 A/B 201

## Friday November 2, 2018

Time	Session	Ballroom
7:30 – 8:30 AM	Registration, CLE Sign-In, Breakfast	
8:30 – 10:15 AM	Developments in Administrative Law, Part I	East Salon
10:15 – 10:30 AM	<b>Break</b>	
10:30 – 12:15 PM	Developments in Administrative Law, Part II	East Salon
12:15 – 1:15 PM	<b>Lunch Break &amp; Awards Presentation</b>	East Salon
1:15 – 2:45 PM	<b>Break-Out Session V</b>	
	The Administrative Conference and Agency Procedural Reform <i>Lucia's</i> Aftermath: ALJ & AJ Job Security and Independence Deregulation: Past and Present	East Salon 202 A/B 201
2:45 – 3:00 PM	<b>Break</b>	
3:00 – 4:30 PM	<b>Break-Out Session VI</b>	
	Nationwide Injunctions: The Good, the Bad, and the Ugly The Future of the Federal Civil Service: Threats Resistance and Legal Reform The Role of Agencies in Legislative Drafting and Legislative Cleanup	East Salon 202 A/B 201
4:30 PM	<b>Conference Adjourns</b>	
5:00 – 7:00 PM	<b>Awards Reception</b>	



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## Program Faculty

**Andrew Emery**, Program Chair; President, The Regulatory Group, Inc., Arlington, VA

**Susan Prosnitz**, Program Chair; Deputy Chief Counsel, Regulations and Security Standards, Transportation Security Administration (TSA), Arlington, VA

**Hon. Judith S. Boggs**, U.S. Department of Labor Benefits Review Board, Member and Administrative Appeals Judge, Washington, DC

**Loren L. AliKhan**, Solicitor General, Office of the Attorney General for the District of Columbia, Washington, DC

**Matthew Amon**, Senior Federal Client Manager, Thomson Reuters, Washington, DC

**Juan Antonio Dorantes**, Partner, Aguilar y Loera; Deputy Director General, General Bureau of Standards at the Mexican Secretariat of Economy Mexico City, former Director of Regulations and Standardization

**Aditya Bamzai**, Associate Professor of Law, University of Virginia Law School, Charlottesville, VA

**Mary Barnicle**, Managing Director, Regulatory Affairs at United Airlines, Chicago, IL

**Jack M. Beermann**, Professor of Law and Harry Elwood Warren Scholar, Boston University School of Law, Boston, MA

**Bernard Bell**, Professor of Law and Herbert Hanoach Scholar, Rutgers Law School, Newark, NJ

**Joshua Blackman**, Associate Professor of Law, South Texas College of Law Houston, Houston, TX

**Emily S. Bremer**, Associate Professor of Law, University of Notre Dame Law School; former Research Chief, ACUS, Notre Dame, IL

**Sharon Buccino**, Director, Land & Wildlife Program, Natural Resources Defense Council, Washington, DC

**Reeve T. Bull**, Research Director, Administrative Conference of the United States, Washington, DC

**Marcella C. Burke**, Deputy Solicitor for Energy and Natural Resources, U.S. Department of the Interior, Washington, DC

**Kyle Burns**, Senior Director of Regulatory Reviews, Treasury Board of Canada, Ottawa, Canada

**William Buzbee**, Professor of Law, Georgetown University Law Center, Washington, DC

**Ronald A. Cass**, President, Cass & Associates; Dean Emeritus, Boston University School of Law; Member, ACUS Council, Great Falls, VA

**Stephen Cox**, Deputy Associate Attorney General, U.S. Department of Justice, Washington, DC

**Hon. Andre M. Davis**, City Solicitor, Baltimore City Law Department, Baltimore, MD

**J. Kennerly Davis**, Senior Attorney, Hunton Andrews Kurth LLP, Richmond, VA

**Jefferson Decker**, Associate Professor of American Studies, Rutgers University, New Brunswick, NJ

**Christopher DeMuth**, Distinguished Fellow; former Administrator, OIRA, Hudson Institute, Washington, DC

**Robert A. Divis**, Founder, Divis Law LLC, Macon, GA

**Bridget C.E. Dooling**, Research Professor, The George Washington University Regulatory Studies Center, Washington, DC

**Susan Dudley**, Director, GW Regulatory Studies Center, Distinguished Professor of Practice, The George Washington University Trachtenberg School of Public Policy and Public Administration, Washington, DC

**John Duffy**, Samuel H. McCoyll Professor of Law, Elizabeth D. and Richard A. Merrill Professor of Law, University of Virginia Law School, Charlottesville, VA

**Jerri U. Dunston**, Assistant Disciplinary Counsel, District of Columbia Office of Disciplinary Counsel, Washington, DC

**Michael Fitzpatrick**, Head of Regulatory Advocacy, GE Global Law & Policy, General Electric Company, Washington, DC

**William Funk**, Lewis & Clark Distinguished Professor of Law Emeritus, Lewis & Clark Law School, Portland, OR

**Robert L. Glicksman**, J. B. and Maurice C. Shapiro Professor of Environmental Law, The George Washington University Law School, Washington, DC

**Gretchen Goldman**, Research Director, Center for Science and Democracy, Union of Concerned Scientists, Washington, DC

**Brian Griffin**, Deputy Chief Counsel, U.S. Department of Veterans Affairs, Washington, DC

**Emily Hammond**, Glen Earl Weston Research Professor, The George Washington University Law School, Washington, DC

**Karen Harned**, Executive Director, National Federation of Independent Business Small Business Legal Center, Washington, DC

**Michael E. Herz**, Arthur Kaplan Professor of Law, Cardozo School of Law, New York, NY

**Kristin Hickman**, Distinguished McKnight University Professor and Harlan Albert Rogers Professor in Law, University of Minnesota Law School, Minneapolis, MN

**Eric Hostetler**, Senior Counsel for Appellate Matters, Environmental Defense Section, U.S. Department of Justice, Washington, DC

**Philip K. Howard**, Senior Counsel, Covington & Burling LLP; Chair, Common Good, New York, NY



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## Program Faculty (continued)

**Rebecca Ingber**, Associate Professor of Law, Boston University School of Law, Boston, MA

**Michael Jakes**, Partner, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Washington, DC

**Linda D. Jellum**, Ellison C. Palmer Professor of Tax Law, Mercer University School of Law, Macon, GA

**Doris Johnson Hines**, Partner, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Washington, DC

**Matthew G. Kaiser**, Founder, Kaiser Dillon, PLLC, Washington, DC

**Sally Katzen**, Professor of Practice and Distinguished Scholar in Residence, New York University Law School; former Acting Chair and Vice Chair, Administrative Conference of the United States; former Administrator, OIRA, New York, NY

**Francine J. Kerner**, Chief Counsel, Transportation Security Administration, Arlington, VA

**Renée M. Landers**, Professor of Law and Faculty Director, Health and Biomedical Law Concentration, Suffolk University Law School, Boston, MA

**Michael A. Livermore**, Professor of Law, University of Virginia School of Law, Charlottesville, VA

**Jeffrey Lubbers**, Professor of Practice in Administrative Law, Washington College of Law, American University; Special Counsel and former Research Director, ACUS, Washington, DC

**Hon. H. Alexander Manuel**, Administrative Judge, U.S. Department of Housing and Urban Development, Washington, DC

**Marissa Martino Golden**, Associate Professor of Political Science, Bryn Mawr College, Bryn Mawr, PA

**Jennifer L. Mascott**, Assistant Professor of Law, Antonin Scalia Law School at George Mason University

**Christina McDonald**, Associate General Counsel for Regulatory Affairs, U.S. Department of Homeland Security, Washington, DC

**Nina A. Mendelson**, Joseph L. Sax Collegiate Professor of Law, University of Michigan Law School, Ann Arbor, MI

**Hashim M. Mooppan**, Deputy Assistant Attorney General, U.S. Department of Justice, Washington, DC

**Richard W. Murphy**, AT&T Professor of Law, Texas Tech University School of Law, Lubbock, TX

**Amit Narang**, Regulatory Policy Advocate, Public Citizen, Washington, DC

**Aaron Nielson**, Associate Professor of Law, Brigham Young University Law School, Provo, UT

**Jennifer R. Nou**, Professor of Law, The University of Chicago Law School; Member, ACUS, Chicago, IL

**Shu-Yi Oei**, Professor and Dean's Distinguished Scholar, Boston College Law School, Boston, MA

**Leigh Z. Osofsky**, Professor of Law, University of North Carolina Law School, Chapel Hill, NC

**Richard W. Parker**, Professor of Law, University of Connecticut School of Law, Hartford, CT

**Nicholas Parrillo**, Professor of Law, Yale Law School, New Haven, CT

**Mark A. Perry**, Partner, Gibson, Dunn & Crutcher LLP, Washington, DC

**Richard J. Pierce Jr.**, Kyle T. Alverson Professor of Law, The George Washington University Law School, Washington, DC

**Mitchell P. Reich**, Senior Associate, Hogan Lovells, Washington, DC

**James D. Ridgway**, Counsel; Professorial Lecturer in Law, George Washington University Law School, Bergmann & Moore; The George Washington University Law School, Washington, DC

**Hon. David B. Sentelle**, Senior U.S. Circuit Judge, U.S. Court of Appeals for the D.C. Circuit, Washington, DC

**Kate Shaw**, Professor of Law, Cardozo School of Law, New York, NY

**Carol Ann Siciliano**, Associate General Counsel of the Cross-Cutting Issues Law Office, Office of General Counsel, Environmental Protection Agency; Government Member, ACUS, Washington, DC

**Saul J. Singer**, Senior Legal Ethics Counsel, District of Columbia Bar, Washington, DC

**Ganesh Sitaraman**, Chancellor Faculty Fellow, Professor of Law, Director, Program in Law and Government, Vanderbilt Law School, Nashville, TX

**Dana L. Trier**, Counsel; formerly Deputy Assistant Secretary for Tax Policy and Tax Legislative Counsel, Davis Polk & Wardwell, Washington, DC

**Stephen A. Vaden**, Principal Deputy General Counsel, U.S. Department of Agriculture, Washington, DC

**Paul R. Verkuil**, President Emeritus of the College of William & Mary, former Chair of Administrative Conference of the United States, Miami Beach, FL

**Hon. John Vittone**, Retired U.S. Department of Labor's Office of Administrative Law Judges, Chevy Chase, MD

**David Viadeck**, A.B. Chettle, Jr. Professor of Law, Georgetown Law, Washington, DC

**Christopher J. Walker**, Associate Professor of Law; Director, Washington, DC Summer Program, The Ohio State University Moritz College of Law, Columbus, OH



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## Program Faculty (continued)

**Hon. Evan J. Wallach**, U.S. Circuit Judge, U.S. Court of Appeals for the Federal Circuit, Washington, DC

**Jeffery G. Weiss**, Partner, Venable LLP, Washington, DC

**Adam J. White**, Director, and Assistant Professor of Law, George Mason University's Gray Center for the Study of the Administrative State. Arlington, VA

**Matthew L. Wiener**, Vice Chairman and Executive Director, Administrative Law Conference of the United States, Washington, DC

**Hon. Erin Wirth**, Administrative Law Judge, Federal Maritime Commission, Washington, DC

**Daniel Wolff**, Partner, Crowell & Moring LLP, Washington, DC



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## Program Agenda Thursday November 1, 2018

<b>7:30 – 9:00 AM</b>	<b>Registration &amp; CLE Sign-In, Breakfast</b>
<b>9:00 – 10:30 AM</b> <i>Breakout Session I</i>  <b>East Salon A/B</b>	<b>Regulatory Developments in the Americas</b>  <b>Jeffrey G. Weiss (Moderator/Panelist)</b> <b>Kyle Burns, Juan Antonio Dorantes</b>  <p>This panel would provide an overview of recent legal and policy developments in the hemisphere, including: Implementation of Canada’s Red Tape Reduction Act (requiring the cost of each new rule to be offset by repeal of an existing rule), the Canadian Free Trade Agreement, and outlook for the Canada-U.S. Regulatory Cooperation Council; Mexico’s General Law on Regulatory Improvement -- which strengthens Mexico’s central coordinating authority for regulation (COFEMER, now CONAMER) and requires Mexican states and municipalities to implement regulatory improvement policies -- and how it might be implemented by the incoming Mexican administration; ongoing regulatory developments, including in the areas of transparency, regulatory impact assessment (RIA), and retrospective review, in Costa Rica, Colombia, and Peru; and Brazil’s proposed regulatory improvement policy.</p>
<b>9:00 – 10:30 AM</b> <i>Breakout Session I</i>  <b>202 A/B</b>	<b>Agency Justification Strategies for Regulation and De-regulation: Battlegrounds and Best Practices</b>  <b>Richard W. Parker (Moderator)</b> <b>William Buzbee, Gretchen Goldman, Amit Narang, Adam J. White</b>  <p>The first two years of the Trump Administration have witnessed a concerted effort by the White House and multiple agencies to slow the flow of new regulations and roll back existing ones. This panel will survey the legal and analytic strategies used or proposed to further this de-regulatory effort, including: (1) “statutory abnegation” strategies in which the agency avoids policy analysis by reinterpreting its own statute to disavow the agency’s legal authority to enact the regulation at issue; (2) agency regulatory budgets operating as an often-unacknowledged factor in agency rollbacks or refusals to regulate; and (3) controversial proposals (particularly at EPA) to change agency use of science and evidence in rulemaking and/or alter the methodology of cost-benefit analysis. How are these strategies being employed? Are they sound policy, or ploys to rationalize departure from sound policy? Insightful and careful legal and empirical analysis by top experts will accompany a spirited but friendly debate. 2a) This panel will interest agency staff, practitioners, public-interest advocates and academics who follow regulatory matters. 2b) The panel will cover the issues discussed above. 3c) Attendees will gain insight into strategies for developing and supporting, and/or critiquing and challenging agency de-regulatory strategies in the administrative and litigation setting.</p>



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<p>9:00 – 10:30 AM <b>Breakout Session I</b> <b>Ethics CLE</b></p> <p>201</p> 	<p><b>Ethics Essentials: How to Avoid Problems and Pitfalls</b></p> <p><b>Hon. H. Alexander Manuel (Moderator)</b> <b>Matthew Kaiser, Jerri Dunston, Saul J. Singer</b></p> <p>Join esteemed DC ethics lawyers Jerri Dunston, Assistant Disciplinary Counsel, Office of Disciplinary Counsel for DC, and Matt Kaiser, partner at Kaiser Dillon, PLLC and a member of the D.C. Board of Professional Responsibility, as they lead participants through a series of hypotheticals on ethics rules that affect the administrative law practitioner: both agency and private practitioners. Issues presented include: competence (Rule 1.1); diligence (Rule 1.3); communication (Rule 1.4); special conflict rules for former and current government lawyers (Rule 1.11); safekeeping client property (Rule 1.15); withdrawal (Rule 1.16); candor toward the tribunal (Rule 3.3); communication with represented persons (Rule 4.2) and more! Of special note, these speakers will also address ethics “choice of law” issues and compare obligations under the ABA Model Rules of Professional Conduct, the DC Rules of Professional Conduct, and the Virginia Rules of Professional Conduct.</p> <p>Learning objectives: 1. New learners will be provided with the necessary information to understand how ethics rules apply to lawyers who work for and practice before administrative agencies. Rules specific to government lawyers practice (like Rule 1.11 and how Rule 1.9 also applies) will be carefully explored. 2. More experienced practitioners will be provided with new opportunities to practice applying knowledge they may already have to new fact patterns to reinforce prior learning. 3. Because the speakers will address ethics “choice of law” concerns, participants will be able to evaluate their future conduct and determine whether it comports with the requirements of the ABA Model Rules of Professional Conduct, the DC rules, and/or the Virginia rules.</p> <p>This program will provide participants with an interactive look at how the DC Rules of Professional Conduct, the Virginia Rules of Professional Conduct, and the ABA Model Rules of Professional Conduct apply to ethics situations that lawyers in government service and those in private practice before administrative agencies frequently encounter.</p>
<p>9:00 – 10:00 AM <b>Breakout Session I</b> <b>60 Minutes CLE</b></p> <p><b>East Salon C</b></p>	<p><b>How Artificial Intelligence is Changing Legal Research and Workflow Capabilities for the Regulatory and Administrative Law Attorney</b></p> <p><b>Matthew Amon, Thomson Reuters</b></p> <p>Every year federal and state regulators propose thousands of rules. Many of these rules have complex legal ramifications that need to be carefully examined and understood up front. In this 60-minute CLE program, attorney Matthew Amon of Thomson Reuters will explain how Artificial Intelligence and Machine Learning is making inroads in the way regulatory and administrative law attorneys perform their</p>



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	work. He will examine how these technologies are being integrated into legal research and software tools, providing insights previously unavailable and making previously complex and time consuming legal tasks more streamlined, efficient and thorough.
<b>10:30 – 10:45 AM</b>	<b>Break</b>
<b>10:45 AM – 12:15 PM</b> <i>Breakout Session II</i>	<b>What's Happening at OIRA? Assessing Year Two of the Trump Regulatory Agenda</b>
<b>East Salon A/B</b>	<p><b>Michael Fitzpatrick (Moderator)</b> <b>Susan Dudley, Sally Katzen</b></p> <p>Former OIRA leaders will provide their assessment of the Trump Administration's ambitious deregulatory and regulatory reform agendas, including year two of executive orders 13771 and 13777 and the recently signed Memorandum extending OIRA review of Treasury Department tax rules. They will explore the challenges and opportunities in the two-for-one and regulatory budget requirements and assess the impact of deregulatory efforts to date, what lies ahead for OIRA and the agencies, and whether there is a developing affirmative regulatory agenda.</p>
<b>10:45 AM – 12:15 PM</b> <i>Breakout Session II</i>	<b>Oyez, Oyez: Tips from the Bench on How to Effectively Litigate Administrative Law Cases</b>
<b>202 A/B</b>	<p><b>Aaron L. Nielson (Moderator)</b> <b>Hon. Andre M. Davis, Hon. David B. Sentelle, Hon. Evan J. Wallach, Hon. Erin Wirth</b></p> <p>This panel of seasoned judges will identify common errors and how to avoid them, as well as best practices and how to deploy them, in preparing and trying administrative law cases. Tips will address attorney advice in anticipation of litigation, as well as litigation practice and strategy. In the course of this session attendees will learn: common problems to look for and avoid in anticipation of litigation, best practices in preparing for trial, tips for effective brief writing, and tips for effective oral argument.</p>
<b>10:45 AM – 12:15 PM</b> <i>Breakout Session II</i>	<b>Rewriting Agency DNA — Bringing About Lasting Regulatory Reform</b>
<b>201</b>	<p><b>Renée M. Landers (Moderator)</b> <b>Marcella C. Burke, Stephen Cox, Stephen Vaden</b></p> <p>Previous administrations have pushed regulatory reform, but few have been successful in making lasting changes. This panel discusses what's different about this administration's regulatory reform efforts, the challenges of translating the new EOs into long-term change, and generally how the interagency process has worked.</p>



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<p><b>12:15 – 1:15 PM</b> East Salon C</p>	<p><b>Lunch</b> Keynote: OIRA Administrator, Neomi Rao (<i>invited</i>). Non-CLE</p>
<p><b>1:15 – 2:45 PM</b> <i>Breakout Session III</i></p> <p>East Salon A/B</p>	<p><b>Is Agency Guidance Reviewable (And If So, When)?</b></p> <p><b>Daniel Wolff (Moderator)</b> <b>Sharon Buccino, Kristin Hickman, Eric Hostetler</b></p> <p>This panel will look at what the federal courts have said about the reviewability of agency guidance, including the rescission of guidance, both in facial challenges and in the enforcement context. All conference attendees should be interested in this program given the important role of agency guidance and the inconsistent case law on the central question presented. Key issues that will be address will include: (i) the treatment of “guidance” within the Administrative Procedure Act (e.g., statements of policy and interpretative rules); (ii) how the courts have grappled with statements of policy and interpretative rules, including application of the APA’s “final agency action” requirement; (iii) when “guidance” may be regarded as de facto “legislative rulemaking” for purposes of judicial review; and (iv) whether the form of publication (e.g., “demand letter” or enforcement v. generally applicable “policy bulletin” or “letter of interpretation”) and means of publication (e.g., Federal Register, web posting, blast email) affects the question of reviewability, including the subsidiary question of administrative exhaustion. The practical skill attendees will take back to their respective practices after attending this session will be, among other things, a better understanding of the importance to judicial review of how guidance is drafted, i.e., how language is used to communicate the agency’s message and the potential legal consequences of that language.</p>
<p><b>1:15 – 2:45 PM</b> <i>Breakout Session III</i></p> <p>202 A/B</p>	<p><b>Fake Views?: Fraud and Spam in Public Comments on Proposed Rules</b></p> <p><b>Reeve T. Bull (Moderator)</b> <b>Michael E. Herz, Michael A. Livermore, Nina Mendelson, Christina McDonald</b></p> <p>In recent years, federal agencies have received increasing numbers of comments on certain highly salient proposed regulations. However, in some instances, those comments have been submitted fraudulently using another individual’s name or with the aid of technology that facilitates the sending mass quantities of duplicate comments simultaneously. Organized interests already can submit large quantities of nearly identical “mass” comments, and technological advances may soon enable the automatic customization or total fabrication and submission of comments. When confronted with massive quantities of comments, agencies face challenges in ensuring that they adequately consider and address relevant information when finalizing their rules. This panel will explore issues related to how agencies process and evaluate comments during the rulemaking process, focusing on potential problems raised by mass and fake comments. It will seek to define</p>



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	<p>what constitutes a “fake” comment, explore legal concerns associated with mass and fake comments, and consider how agencies might appropriately identify and process mass and fake comments.</p>
<p><b>1:15 – 2:45 PM</b> <i>Breakout Session III</i></p> <p><b>201</b></p>	<p><b>Constitutional Constraints on Administrative Power: How History Sheds Light on Contemporary Understandings</b></p> <p><b>Emily Hammond (Moderator)</b> <b>Aditya Bamzai, John Duffy, Jennifer L. Mascott</b></p> <p>This panel—comprised of scholars whose works have been accepted for publication in <i>The George Washington Law Review's</i> Vol. 87 Annual Review of Administrative Law—explores contemporary understandings of constitutional constraints on administrative power, including the nondelegation doctrine, agency structure, separation of powers, and procedural due process. In particular, the panelists use historical materials, originalist methods, and modern theories of administrative control to consider how constitutional law ought to constrain agencies as tensions rise in the courts between expanding executive power and separation-of-powers principles. The panelists will discuss how their approaches bear on pending suits as well as suggest ways to accommodate these divergent principles going forward. Their presentations will provide important historical context to give practitioners a deeper understanding of modern applications of longstanding constitutional principles.</p>
<p><b>2:45 – 3:00 PM</b></p>	<p><b>Break</b></p>
<p><b>3:00 – 4:30 PM</b> <i>Breakout Session IV</i></p> <p><b>East Salon A/B</b></p>	<p><b>Dueling Canons—Should Supreme Court Canons Trump Chevron or Auer?</b></p> <p><b>Michael Jakes (Moderator)</b> <b>Brian Griffin, Doris Johnson Hines, Jeffrey Lubbers, James Ridgway</b></p> <p>When reviewing an agency interpretation of a statute it administers or one of its own regulations, how should a Court resolve any contradictions among canons of construction, including the <i>Brown v. Gardner</i>, 513 U.S. 115, 118 (1994) (recognizing the rule that interpretive doubt in a statute or regulation providing benefits to veterans is to be resolved in the veteran’s favor), and <i>Chevron U.S.A. Inc. v. Natural Res. Def. Counsel, Inc.</i>, 487 U.S. 837 (1984), and <i>Auer v. Robbins</i>, 519 U.S. 452 (1997) (providing for deference to the agency interpretations of ambiguous statutes and regulations it administers)? The panel will discuss how rules of construction in several areas of law appear to conflict with <i>Chevron</i> and <i>Auer</i>. This program is intended to address the issue of judicial deference to agency interpretations often asserted by administrative agencies and argued during challenges to rulemaking. It should be of interest to administrators, agency counsel, and regulated parties challenging agency actions. Panelists will address whether any apparent conflict</p>



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	<p>can be resolved by applying rules of construction at step one of the Chevron analysis as well as discussing exceptions to Chevron and Auer adopted by courts reviewing some agency interpretations. If canons of construction are applied only at Chevron step two, do the canons have any practical effect?</p>
<p><b>3:00 – 4:30 PM</b> <i>Breakout Session IV</i></p> <p><b>202 A/B</b></p>	<p><b>Improving Regulation for Businesses: The Need, the Means, and the Challenges</b></p> <p><b>Paul R. Verkuil (Moderator)</b> <b>Mary Barnicle, J. Kennerly Davis, Karen Harned, Aaron Nielson</b></p> <p>Agency-issued regulations play a central role in our legal system and the implementation of programs designed to achieve a variety of important policy goals related to public health, safety and welfare. All together, the federal regulatory state is far reaching, exceedingly complex, and often costly for agencies to administer and with which businesses and other regulated entities comply. In such a complex and extensive system, there is always the possibility that the regulatory process will produce inefficiencies in the form of unnecessary costs, legal inconsistencies, and unintended adverse consequences. It is therefore important to work to ensure that regulations, and the processes followed to create them, are effective and cost effective. The panelists will, from their different perspectives outside the public sector, discuss the current regulatory system, how it can be improved, and the challenges that confront those working to improve the current system.</p>
<p><b>3:00 – 4:30 PM</b> <i>Breakout Session IV</i></p> <p><b>201</b></p>	<p><b>Are Those (Presidential) Tweets Part of the Record?</b></p> <p><b>Richard Murphy (Moderator)</b> <b>Josh Blackman, Richard J. Pierce, Mitchell Reich, Kate Shaw</b></p> <p>The President has a habit of making pronouncements, often by tweet, that are not so easy to square with official justifications for his actions—as notably demonstrated by litigation regarding executive orders and a presidential proclamation restricting entry into the country that culminated in the Supreme Court’s decision in <i>Trump v. Hawaii</i>. A member of the counsel team for Hawaii and three leading scholars of administrative law discuss implications and challenges that this practice creates for administrative law both in the specific context of the Hawaii litigation and more generally. For instance, under what circumstances should courts take into consideration communications by government officials that contradict or undermine official justifications for government action? Where courts consider such communications, how should they assess their significance? When can an improper motive block action that is facially reasonable—and perhaps important? Can time, or anything else, cure such problems? The discussion should be of broad interest for administrative lawyers both for its focus on one of the most controversial cases to reach the Supreme Court in recent years and for the light it sheds on how the concept of an “administrative record” may evolve in the age of social media.</p>



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## Program Agenda Friday November 2, 2018

7:30 - 8:30 AM	Registration, CLE Sign-In, Breakfast
8:30 – 10:15 AM  East Salon	<p><b>Developments in Administrative Law, Part I</b></p> <p><b>Robert A. Divis (Moderator)</b>  <b>Bridget C.E. Dooling (Rulemaking), William Funk (Constitutional Law), Christopher J. Walker (Adjudication)</b></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.</p>
10:15 – 10:30 AM	Break
10:30 AM – 12:15 PM  East Salon	<p><b>Developments in Administrative Law, Part II</b></p> <p><b>Robert A. Divis (Moderator)</b>  <b>Bernard Bell (Government Information and Right to Privacy), Linda D. Jellum (Judicial Review – Scope of Review), Richard Murphy (Judicial Review – Access to the Courts)</b></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.</p>
12:15 – 1:15 PM  East Salon	<p><b>Lunch &amp; Awards Presentation</b></p> <p><b><u>Mary C. Lawton Award for Outstanding Government Service</u></b>  <b>Carol Ann Siciliano</b>, Associate General Counsel, Office of General Counsel of the U.S. Environmental Protection Agency</p> <p><b><u>Award for Scholarship in Administrative Law</u></b>  <b>Wendy Wagner, William West, Thomas McGarity, Lisa Peters</b>  “Dynamic Rulemaking”, 92 <i>New York University Law Review</i> 183 (2017).</p> <p><b><u>Gellhorn-Sargentich Law Student Essay Award</u></b>  <b>David Hahn</b>, University of Minnesota Law School  “Late for an Appointment: Balancing Impartiality and Accountability in the IRS Office of Appeals”</p>



# Administrative Law Conference

## Program Agenda Friday November 2, 2018

<p>1:15 – 2:45 PM Breakout Session V</p> <p>East Salon</p>	<p><b>The Administrative Conference and Agency Procedural Reform</b></p> <p><b>Matthew Lee Wiener (Moderator)</b> <b>Emily S. Bremer, Reeve T. Bull, Hon. Ronald Cass, Sally Katzen, Jeffrey Lubbers, Jennifer Nou, Carol Ann Siciliano</b></p> <p>To what administrative-law reform initiatives should the Administrative Conference of the United States (ACUS) give its attention during this period of innovative regulatory reform? How can ACUS best work with agencies, and agencies with ACUS, to improve administrative procedure? Former and current ACUS members and staff—some academics, some agency officials—will address these and related questions during a lively and candid panel discussion.</p>
<p>1:15 – 2:45 PM Breakout Session V</p> <p>202 A/B</p>	<p><b><i>Lucia's Aftermath: ALJ &amp; AJ Job Security and Independence</i></b></p> <p><b>Hon. John Vittone (Moderator)</b> <b>Linda D. Jellum, Jennifer Mascott, Mark Perry, Richard J. Pierce</b></p> <p>When you light fireworks, you look forward to the ensuing explosion. Sometimes, however, all you get is a limp fizzle. Such was the outcome of the highly anticipated case of <i>Lucia v. SEC</i>. That case resolved a potentially game-changing issue: whether SEC ALJs were inferior officers. The outcome was hardly surprising, especially given the solicitor general's decision to switch sides after <i>Lucia's</i> petition was filed in the Supreme Court. Yet the case fizzled, why? Two reasons. First, the majority decided the case on <i>stare decisis</i> grounds and very narrowly. Specifically, the majority refused to clarify the "significant authority" element of officer status. As a result, we have no idea how broadly the decision will apply. Are administrative judges inferior officers? What about non-adjudicator executive employees? Second, while the immediate effects of <i>Lucia</i> will be on the appointment process, a more important issue remains: whether the multiple for-cause removal limitations on SEC ALJs specifically, and on all ALJs generally, violate the U.S. Constitution. <i>Freytag v. Commissioner</i>, 501 U.S. 868 (1991), had held that they did in the context of executive, inferior officers. But what about ALJs and other executive officers? The <i>Lucia</i> majority appropriately refused to address the issue, but there can be little doubt that it will be back before the Court. Lastly, after <i>Lucia</i> was decided, the President issued an executive order removing the Office of Personnel Management (OPM) from the ALJ selection process. While the OPM hiring process was in need of change, is the new process optimal and valid, in light of 5 U.S.C. sec. 5372, which gives OPM the power to determine who is qualified to be an ALJ. OPM has issued rules, which have not yet been amended in anyway. The panelists will explore <i>Lucia's</i> ramifications, specifically, are AJs and others also inferior officers, are ALJ removal protections unconstitutional and, if so, is there any way to prevent the dismantling of the administrative state, and what are the implications of the hiring practices. Audience members will learn what the Court held in <i>Lucia</i> and what that holding may mean for their practice and personal situation.</p>



# Administrative Law Conference

## Program Agenda Friday November 2, 2018

<p><b>1:15 – 2:45 PM</b> <b>Breakout Session V</b></p> <p><b>201</b></p>	<p><b>Deregulation: Past and Present</b></p> <p><b>Nicholas Parrillo (Moderator)</b> <b>Jefferson Decker, Christopher DeMuth, Susan Dudley, Marissa Martino Golden, David Vladeck</b></p> <p>The present administration has seen what many consider the most dramatic effort at deregulation since Ronald Reagan took office in 1981. This panel considers what the proponents and opponents of deregulation – including counsel to regulated firms, government agencies, and advocacy groups – can learn by looking back at deregulation’s history, particularly the Reagan era. What factors have caused some instances of deregulation to become lasting agency policy and be upheld against legal challenge, while other instances have been rolled back by agency action, congressional action, or litigation? This program brings together veterans of the deregulation initiatives and debates of the 1980s with scholars who have begun to produce a rich academic literature on deregulation’s history and what that history means for us today. Among the points to be considered are the divergent trajectories of economic regulation, on the one hand, and health/safety/environmental regulation, on the other; the challenges that government lawyers face when an administration seeks rapid policy change through the administrative process; the ways in which courts have reacted to deregulation; the strategies of pro-regulation advocacy groups in a deregulatory climate; and the roles of Congress and of the career civil service in agencies’ decisions about whether to deregulate and how.</p>
<p><b>2:45 – 3:00 PM</b></p>	<p><b>Break</b></p>
<p><b>3:00 – 4:30 PM</b> <b>Breakout Session VI</b></p> <p><b>East Salon</b></p>	<p><b>Nationwide Injunctions: The Good, the Bad, and the Ugly</b></p> <p><b>Jack M. Beermann (Moderator)</b> <b>Loren L. AliKhan, Hon. Ronald A. Cass, Robert L. Glicksman, Hashim M. Mooppa</b></p> <p>Nationwide injunctions—injunctions extending beyond the immediate parties to litigation and beyond the geographic bounds of the issuing court’s mandate—increasingly are used by lower federal courts to stop, alter, or condition the operation of national government policies. This typically occurs at the request of politically-invested officials and groups, and it targets politically consequential initiatives. The combination of broad remedial impact and politically-significant subjects had made the use of these injunctions highly controversial. Indeed, the House Judiciary Committee recently reported out legislation that would significantly narrow the use of nationwide injunctions by federal courts. This panel looks at questions about these injunctions’ fit with constitutional-structural features of government, traditional limitations on equitable remedies, and concerns about keeping government officials within appropriate bounds. The panel combines academic experts and lawyers with practical experience to discuss and debate these developments.</p>



# Administrative Law Conference

## Program Agenda Friday November 2, 2018

<p><b>3:00 – 4:30 PM</b> <b>Breakout Session VI</b></p> <p><b>202 A/B</b></p>	<p><b>The Future of the Federal Civil Service: Threats, Resistance, and Legal Reform</b></p> <p><b>Christopher J. Walker (Moderator)</b> <b>Philip K. Howard, Rebecca Ingber, Francine Kerner, Jennifer Nou</b></p> <p>With the change in presidential administration last year, we have seen increased attention on the federal civil service, with discussions of the so-called “deep state,” bureaucratic resistance, and internal separation of powers between political appointees and career civil servants. Earlier this year the Trump Administration issued certain executive orders that aim to streamline the firing process for civil servants and significantly curb the influence of federal employee unions. And even more recently, the Supreme Court decided <i>Lucia v. SEC</i>, which held that administrative law judges (ALJs) at the Securities and Exchange Commission are (at least inferior) officers, not employees, under the Appointments Clause and thus unconstitutionally appointed by agency officials who are not the heads of the department. The <i>Lucia</i> Court, however, left for another day questions regarding removal of ALJs and similar agency officials. This panel brings together experts to discuss and debate these developments and the future of the federal civil service.</p>
<p><b>3:00 – 4:30 PM</b> <b>Breakout Session VI</b></p> <p><b>201</b></p>	<p><b>The Role of Agencies in Legislative Drafting and Legislative Cleanup</b></p> <p><b>Leigh Osofsky (Moderator)</b> <b>Shu-Yi Oei, Ganesh Sitaraman, Dana Trier, Matthew Lee Wiener</b></p> <p>This panel will explore how legislation is created and, in particular, the role of agencies in both drafting legislation and addressing problems with the legislation. Panel content will include discussion of: the legislative process from the perspective of those who have worked on the Hill; the role of agencies in the legislative process (including in the case of the recent Tax Cuts and Jobs Act); what can be done, in particular by agencies, regarding legislative drafting mistakes; the Statutory Review Program created by the Administrative Conference of the United States; and how agencies may craft guidance in the wake of unorthodox legislation (including through the example of the recent 199A tax regulations). Agency lawyers, practitioners who work with agencies, congressional staff, and scholars would be interested in the program. Attendees will gain practical insights into the legislative process and what they may expect of agencies generally and ACUS specifically as part of this process.</p>
<p><b>4:30 PM</b></p>	<p><b>Conference Adjourns</b></p>
<p><b>5:00 – 7:00 PM</b></p> <p><b>East Salon</b></p>	<p><b>Awards Reception</b></p> <p><b><u>Volunteer of the Year Award</u></b></p> <p><b>Susan Prosnitz</b>, Deputy Chief Counsel for Regulations and Security Standards, Transportation Security Administration</p>



# Administrative Law Conference

## Program Agenda Friday November 2, 2018

**Outgoing Section Chair Award**

**John F. Cooney**, Partner, Venable LLP

**Section Fellow**

**Renée M. Landers**, Professor of Law and Director Health Law  
Concentration, Suffolk University Law School

**Section Senior Fellow**

**Hon. H. Russell Frisby, Jr.**, Partner, Stinson Leonard Street LLP

**Conference Concludes**

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