J. Reuben Clark Law School

What The Changing World of "Admin Law" May Mean for Trade Law

Aaron L. Nielson
Professor of Law

Understanding "Admin Law" & Trade: Objective

- Administrative Law cases are particularly important to today's Supreme Court.
- This panel will discuss these changes and address how they may affect the Court of International Trade.
- The panel will address how to frame legal arguments and what direction the Court may take going forward.

Today's Supreme Court is Especially Interested in Administrative Law Cases

Notice & Comment

A blog from the Yale Journal on Regulation and ABA Section of Administrative Law & Regulatory Practice.

Made possible in part by the support of Davis Polk & Wardwell LLP

ABA AMERICAN BAR ASSOCIATION Administrative Law and Regulatory Practice Section

Davis Polk

NOTICE & COMMENT

D.C. Circuit Review – Reviewed: The Supreme (Administrative Law) Court

Aaron L. Nielson – September 8, 2018
D.C. Circuit Review

SHARE:

There is a good chance that the Senate will confirm Judge Kavanaugh to the Supreme Court. If that happens, a plurality (at least*) of the Justices will be alums of the D.C. Circuit: Chief Justice Roberts, and Justices Thomas, Ginsburg, and Kavanaugh. This lopsidedness will not be unprecedented. Before his passing, Justice Scalia sat on the Supreme Court, and he also was a D.C. Circuit alum. Even so, a Supreme Court with Justice Kavanaugh will be new in an important respect: Seven of the Justices will have deep expertise in administrative law.

Subscribe to the Yale Journal on Regulation

Established in 1983, the Yale Journal on Regulation (JREG) is one of the top ten specialized law journals in the United States.

SUBSCRIBE ▸

Topics

Four Justices Sat on DC Circuit
Three More Clerked There

Plus Justice Justice Kagan Was An Administrative Law Professor!

Click to add text

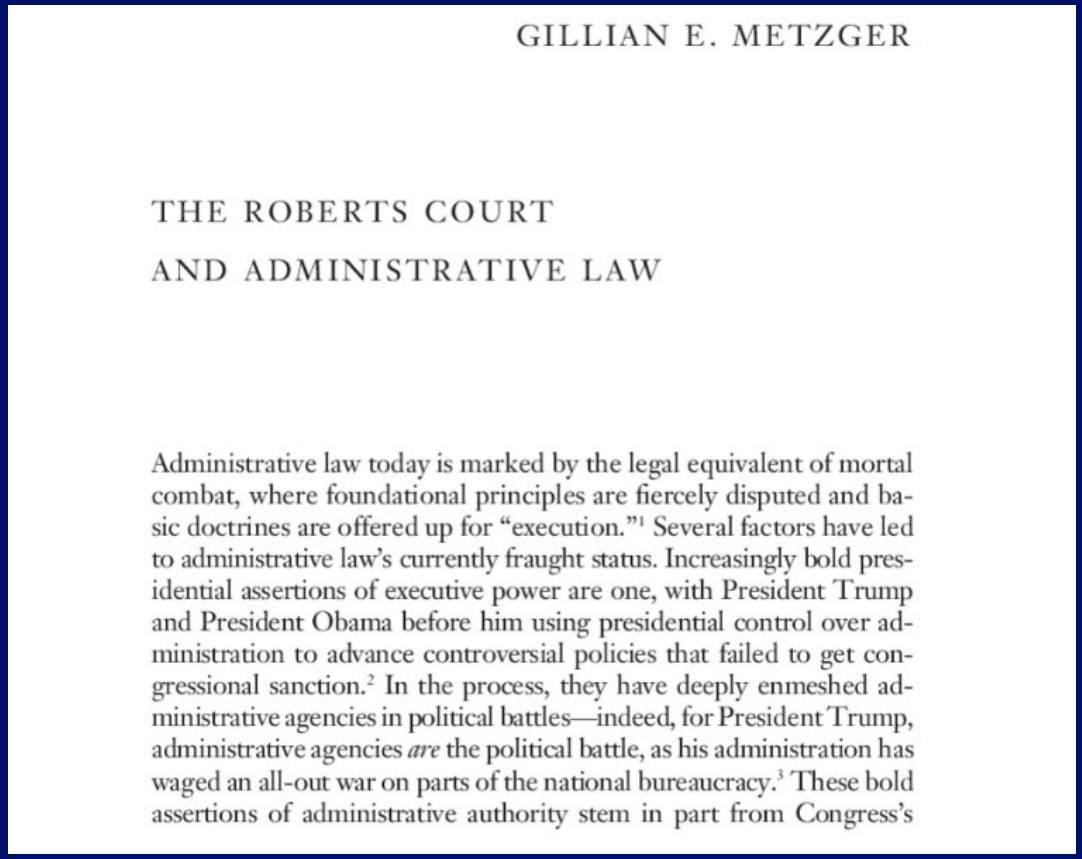
ARTICLE

PRESIDENTIAL ADMINISTRATION

Elena Kagan

TABLE OF CONTENTS

The Supreme Court's Majority Has Strong Views on Administrative Law



GILLIAN E. METZGER

THE ROBERTS COURT
AND ADMINISTRATIVE LAW

Administrative law today is marked by the legal equivalent of mortal combat, where foundational principles are fiercely disputed and basic doctrines are offered up for "execution."[1] Several factors have led to administrative law's currently fraught status. Increasingly bold presidential assertions of executive power are one, with President Trump and President Obama before him using presidential control over administration to advance controversial policies that failed to get congressional sanction.[2] In the process, they have deeply enmeshed administrative agencies in political battles—indeed, for President Trump, administrative agencies *are* the political battle, as his administration has waged an all-out war on parts of the national bureaucracy.[3] These bold assertions of administrative authority stem in part from Congress's

Gillian Metzger, *The Roberts Court and Administrative Law*, 2019 Sup. Ct. Rev. 1 (2020)

Many Speculate About What the Court May Do (and Has Already Started Doing)

VOLUME 131 NOVEMBER 2017 NUMBER 1

HARVARD LAW REVIEW

THE SUPREME COURT
2016 TERM

FOREWORD:
1930s REDUX: THE ADMINISTRATIVE STATE UNDER SIEGE

Gillian E. Metzger

VOLUME 131 NOVEMBER 2017 NUMBER 1

HARVARD LAW REVIEW FORUM

RESPONSES

CONFESSIONS OF AN "ANTI-ADMINISTRATIVIST"†

*Aaron L. Nielson**

You got me, I confess: I'm an "anti-administrativist."[1] Of course, I am not entirely sure what that means, and I certainly do not embrace all criticisms of the administrative state. But I do think administrative law is a work in progress and has its share of problems. From this year's Foreword, I learn that makes me an anti-administrativist. But you know what? You probably are an anti-administrativist too! And if you aren't, well, you should be. The truth is that the administrative state is not "under siege" because some sinister cabal has started singing from old hymnals. Instead, it is because administrative law can be *better* as a matter of procedural fairness, substantive outcomes, and compliance with statutory and constitutional law. Recognizing that the administrative state has value but that it also is fallible and sometimes loses its way is the essence of anti-administrativism — at least the anti-administrativism I confess to.

Notice & Comment

A blog from the Yale Journal on Regulation and ABA Section of Administrative Law & Regulatory Practice.

Made possible in part by the support of Davis Polk & Wardwell LLP

ABA AMERICAN BAR ASSOCIATION
Administrative Law and Regulatory Practice Section

Davis Polk

NOTICE & COMMENT

New Dædalus Issue Exploring the Future of the Administrative State

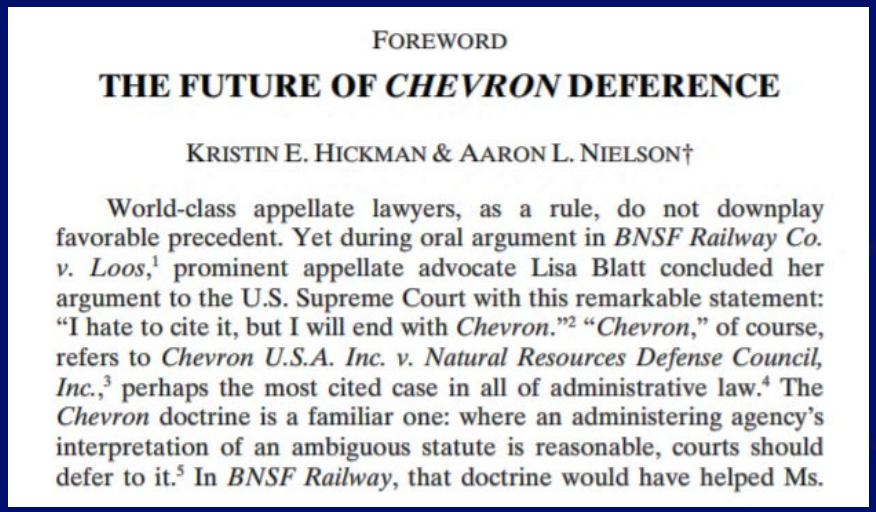
Christopher J. Walker – June 15, 2021

SHARE:

Dædalus, The Journal of the American Academy of Arts and Sciences, just published a fascinating special issue that explores the future of the administrative state. Mark Tushnet organized the issue, and it includes contributions from Bernie Bell, Cary Coglianese, Susan Dudley, Sean Farhang, Jeremy Kessler, David Lewis, Michael Neblo, Aaron Nielson, Beth Simone Noveck, Neomi Rao, Peter Strauss, Cass Sunstein, and Avery White. My contribution is entitled Constraining Bureaucracy Beyond Judicial Review, and is available here. The full issue is available here.

Topics

Chevron *in Retreat?*



FOREWORD

THE FUTURE OF *CHEVRON* DEFERENCE

KRISTIN E. HICKMAN & AARON L. NIELSON†

World-class appellate lawyers, as a rule, do not downplay favorable precedent. Yet during oral argument in *BNSF Railway Co. v. Loos*,[1] prominent appellate advocate Lisa Blatt concluded her argument to the U.S. Supreme Court with this remarkable statement: "I hate to cite it, but I will end with *Chevron*."[2] "*Chevron*," of course, refers to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[3] perhaps the most cited case in all of administrative law.[4] The *Chevron* doctrine is a familiar one: where an administering agency's interpretation of an ambiguous statute is reasonable, courts should defer to it.[5] In *BNSF Railway*, that doctrine would have helped Ms.

Kristin E. Hickman & Aaron L. Nielson, The Future of Chevron Deference, 70 Duke Law Journal 1015 (2021)

OPINION ANALYSIS

In an opinion that shuns Chevron, the court rejects a Medicare cut for hospital drugs

By James Romoser
on Jun 15, 2022 at 2:24 pm

In ***American Hospital Association v. Becerra***, the Supreme Court had a chance to upend the administrative state.

Though the dispute involved a technical Medicare reimbursement formula, business groups and conservative legal organizations had urged the justices to use the case as a vehicle to overhaul — or even overturn — the 38-year-old doctrine known as **Chevron deference**. That doctrine generally calls for courts to honor federal agencies' interpretations of ambiguous laws. Supporters say the doctrine gives agencies breathing room to make policy judgments that carry out their missions. Critics say it hands too much power to unaccountable bureaucrats.

In a **narrow and unanimous opinion** on Wednesday, the court did not overturn the *Chevron* doctrine. Instead, it just ignored it. And in doing so, the court may have portended the future of *Chevron*, which already has been narrowed considerably over the years. Rather than a single, decisive blow or a continued death by a thousand cuts, the court might simply snuff out *Chevron* with the silent treatment.

https://www.scotusblog.com/2022/06/in-an-opinion-that-shuns-chevron-the-court-rejects-a-medicare-cut-for-hospital-drugs/

Major Recent Cases: Deference

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

KISOR *v.* WILKIE, SECRETARY OF VETERANS AFFAIRS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 18–15. Argued March 27, 2019—Decided June 26, 2019

Petitioner James Kisor, a Vietnam War veteran, first sought disability benefits from the Department of Veterans Affairs (VA) in 1982, alleging that he had developed post-traumatic stress disorder from his military service. The agency denied his initial request, but in 2006, Kisor moved to reopen his claim. The VA this time agreed he was eligible for benefits, but it granted those benefits only from the date of his motion to reopen, not (as Kisor had requested) from the date of his first application. The Board of Veterans' Appeals—a part of the VA—affirmed that retroactivity decision, based on its interpretation of an agency rule governing such claims. The Court of Appeals for Veterans Claims affirmed.

The Federal Circuit also affirmed, but it did so by applying a doctrine called *Auer* (or sometimes, *Seminole Rock*) deference. See *Auer* v. *Robbins*, 519 U. S. 452; *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410. Under that doctrine, this Court has long deferred to an agency's reasonable reading of its own genuinely ambiguous regulations. The Court of Appeals concluded that the VA regulation at issue was ambiguous, and it therefore deferred to the Board's interpretation of the rule. Kisor now asks the Court to overrule *Auer*, as well as its predecessor *Seminole Rock*, discarding the deference those decisions give to agencies.

Held: The judgment is vacated and remanded.

869 F. 3d 1360, vacated and remanded.

JUSTICE KAGAN delivered the opinion of the Court with respect to Parts I, II–B, III–B, and IV, holding that *Auer* and *Seminole Rock* are not overruled. Pp. 11–19, 25–29.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WEST VIRGINIA ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20–1530. Argued February 28, 2022—Decided June 30, 2022*

In 2015, the Environmental Protection Agency (EPA) promulgated the Clean Power Plan rule, which addressed carbon dioxide emissions from existing coal- and natural-gas-fired power plants. For authority, the Agency cited Section 111 of the Clean Air Act, which, although known as the *New* Source Performance Standards program, also authorizes regulation of certain pollutants from *existing* sources under Section 111(d). 42 U. S. C. §7411(d). Prior to the Clean Power Plan, EPA had used Section 111(d) only a handful of times since its enactment in 1970. Under that provision, although the States set the actual enforceable rules governing existing sources (such as power plants), EPA determines the emissions limit with which they will have to comply. The Agency derives that limit by determining the "best system of emission reduction . . . that has been adequately demonstrated," or the BSER, for the kind of existing source at issue. §7411(a)(1). The limit then reflects the amount of pollution reduction "achievable through the application of" that system. *Ibid.*

In the Clean Power Plan, EPA determined that the BSER for existing coal and natural gas plants included three types of measures, which the Agency called "building blocks." 80 Fed. Reg. 64667. The first building block was "heat rate improvements" at coal-fired plants—essentially practices such plants could undertake to burn coal

Deference Trends

The Court is cutting back on deference, both formally and informally.

The "Major Questions Doctrine" is part of this. The Court is uncomfortable with the Executive Branch using old delegations for expansive policy issues, especially when it looks like an attempt to evade Congress.

An aside: What About Minor Questions?

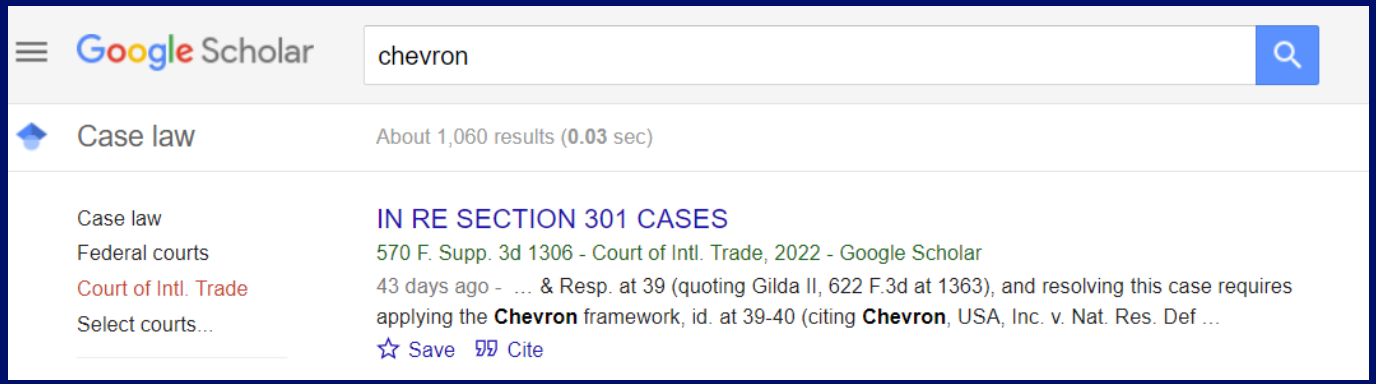
For instance, international trade is another area marked by diffused benefits, concentrated costs, and technical complexity.[170] Revising tariffs or subsidies, therefore, is another place where deference sometimes may negate the emergence of beneficial policy. To the extent that the statute is ambiguous,[171] both Congress and the White House sometimes can benefit the public by revising tariffs or subsidies. Yet figuring out optimal policy on a product-by-product basis is technical and potentially politically costly; reform will anger a concentrated group (resulting in, say, political advertising against the policymaker).[172] Although the White House often has broad authority over trade issues (in part, the theory goes, because it less susceptible to factionalism[173]), it is easy to see why the White House at times may be reluctant to use this authority, especially when doing so will affect a concentrated industry. This pattern is consistent with the notion that when an overall welfare-enhancing policy becomes sufficiently costly for the acting branch, neither branch wants to take the lead, even if it approves of the policy and would not stand in the way if the other wanted to act.

What This Trend May Mean for Trade Law

Trade Law is largely administrative law.

One of the most important deference cases, *United States v. Mead Corp.*, 533 U.S. 218 (2001), is a trade case.

The CIT regularly cites *Chevron*.

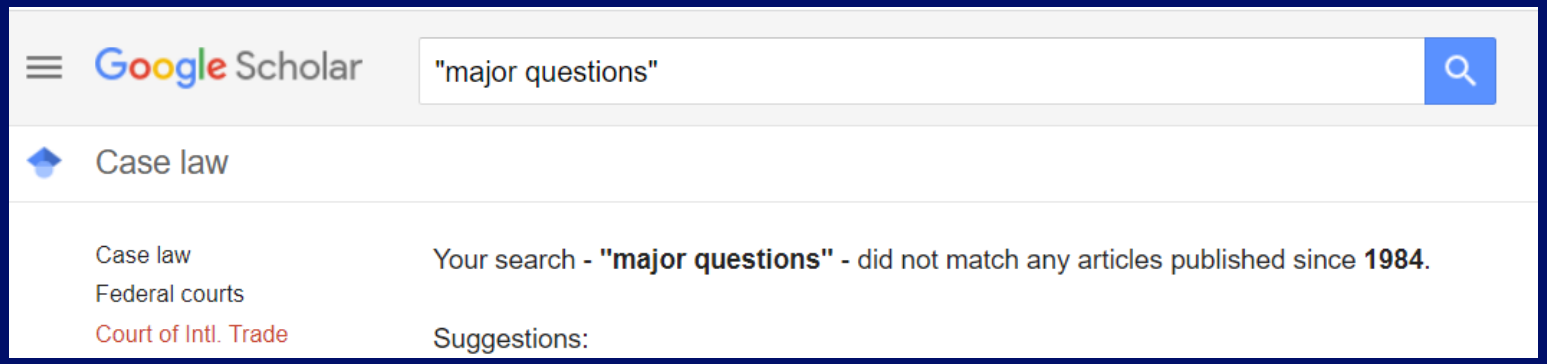


What This Trend May Mean for Trade Law - II

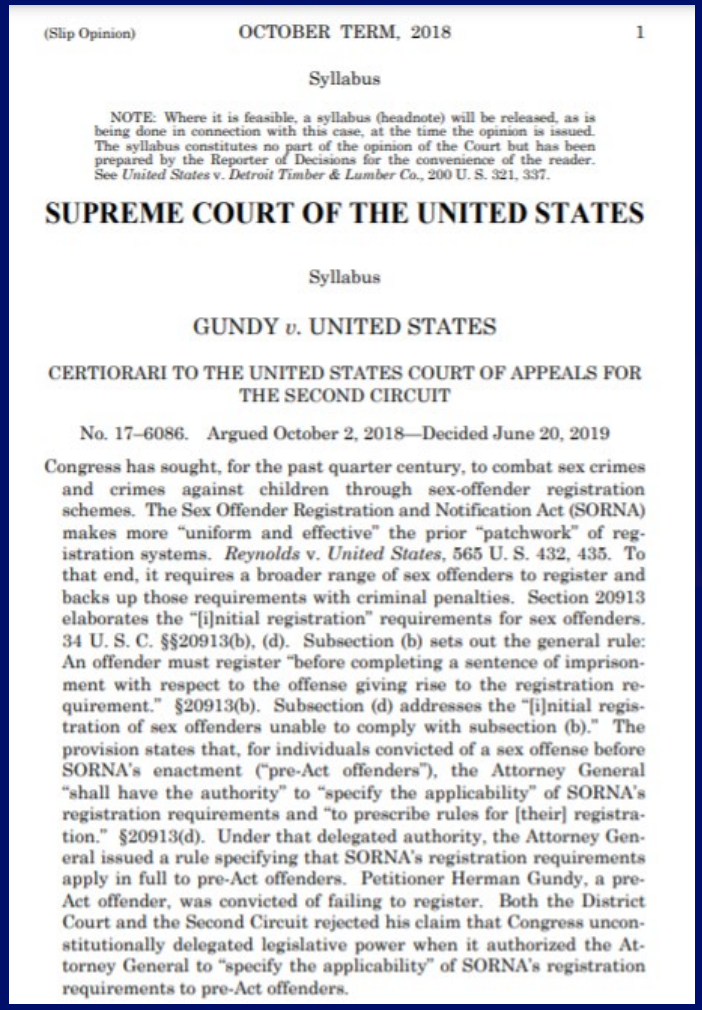
Trade Law is largely administrative law.

One of the most important deference cases, *United States v. Mead Corp.*, 533 U.S. 218 (2001), is a trade case.

The CIT regularly cites *Chevron* ***but has not squarely addressed the major questions doctrine***.



Nondelegation Doctrine Rising?



(Slip Opinion) OCTOBER TERM, 2018 1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

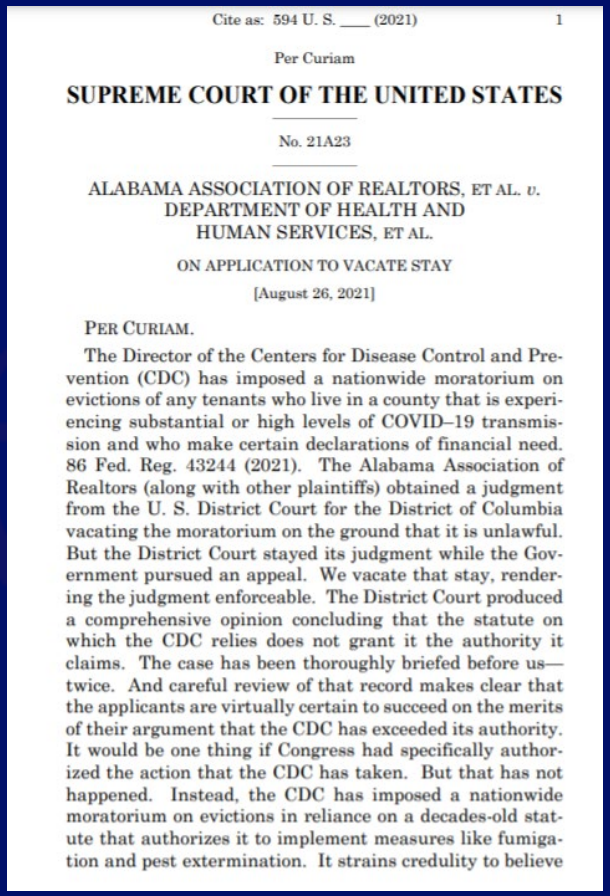
Syllabus

GUNDY *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 17–6086. Argued October 2, 2018—Decided June 20, 2019

Congress has sought, for the past quarter century, to combat sex crimes and crimes against children through sex-offender registration schemes. The Sex Offender Registration and Notification Act (SORNA) makes more "uniform and effective" the prior "patchwork" of registration systems. *Reynolds* v. *United States*, 565 U. S. 432, 435. To that end, it requires a broader range of sex offenders to register and backs up those requirements with criminal penalties. Section 20913 elaborates the "[i]nitial registration" requirements for sex offenders. 34 U. S. C. §§20913(b), (d). Subsection (b) sets out the general rule: An offender must register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement." §20913(b). Subsection (d) addresses the "[i]nitial registration of sex offenders unable to comply with subsection (b)." The provision states that, for individuals convicted of a sex offense before SORNA's enactment ("pre-Act offenders"), the Attorney General "shall have the authority" to "specify the applicability" of SORNA's registration requirements and "to prescribe rules for [their] registration." §20913(d). Under that delegated authority, the Attorney General issued a rule specifying that SORNA's registration requirements apply in full to pre-Act offenders. Petitioner Herman Gundy, a pre-Act offender, was convicted of failing to register. Both the District Court and the Second Circuit rejected his claim that Congress unconstitutionally delegated legislative power when it authorized the Attorney General to "specify the applicability" of SORNA's registration requirements to pre-Act offenders.



Cite as: 594 U. S. ____ (2021) 1

Per Curiam

SUPREME COURT OF THE UNITED STATES

No. 21A23

ALABAMA ASSOCIATION OF REALTORS, ET AL. *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON APPLICATION TO VACATE STAY

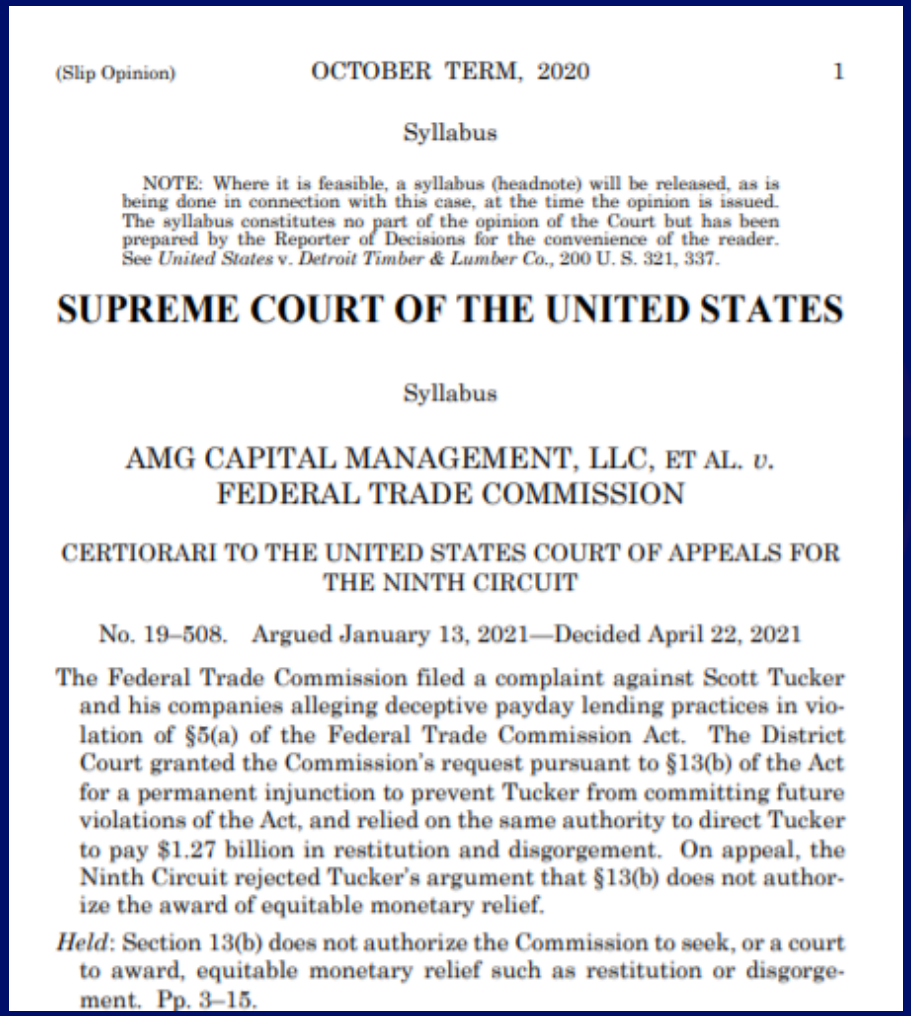
[August 26, 2021]

PER CURIAM.

The Director of the Centers for Disease Control and Prevention (CDC) has imposed a nationwide moratorium on evictions of any tenants who live in a county that is experiencing substantial or high levels of COVID–19 transmission and who make certain declarations of financial need. 86 Fed. Reg. 43244 (2021). The Alabama Association of Realtors (along with other plaintiffs) obtained a judgment from the U. S. District Court for the District of Columbia vacating the moratorium on the ground that it is unlawful. But the District Court stayed its judgment while the Government pursued an appeal. We vacate that stay, rendering the judgment enforceable. The District Court produced a comprehensive opinion concluding that the statute on which the CDC relies does not grant it the authority it claims. The case has been thoroughly briefed before us—twice. And careful review of that record makes clear that the applicants are virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority. It would be one thing if Congress had specifically authorized the action that the CDC has taken. But that has not happened. Instead, the CDC has imposed a nationwide moratorium on evictions in reliance on a decades-old statute that authorizes it to implement measures like fumigation and pest extermination. It strains credulity to believe

Remember "Major Questions Doctrine"

And Don't Forget ….



(Slip Opinion) OCTOBER TERM, 2020 1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

AMG CAPITAL MANAGEMENT, LLC, ET AL. *v.*
FEDERAL TRADE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19–508. Argued January 13, 2021—Decided April 22, 2021

The Federal Trade Commission filed a complaint against Scott Tucker and his companies alleging deceptive payday lending practices in violation of §5(a) of the Federal Trade Commission Act. The District Court granted the Commission's request pursuant to §13(b) of the Act for a permanent injunction to prevent Tucker from committing future violations of the Act, and relied on the same authority to direct Tucker to pay $1.27 billion in restitution and disgorgement. On appeal, the Ninth Circuit rejected Tucker's argument that §13(b) does not authorize the award of equitable monetary relief.

Held: Section 13(b) does not authorize the Commission to seek, or a court to award, equitable monetary relief such as restitution or disgorgement. Pp. 3–15.

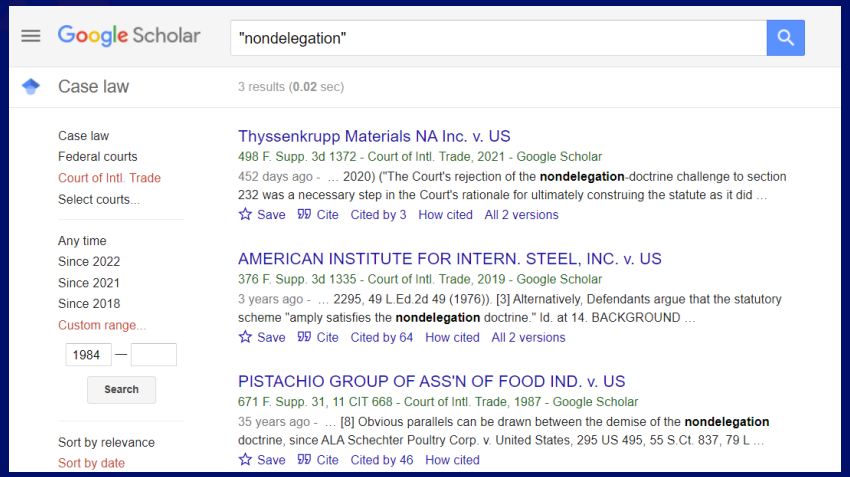
The Court seems reluctant to read broad remedial powers into agency statutes.

What This Trend May Mean for Trade Law

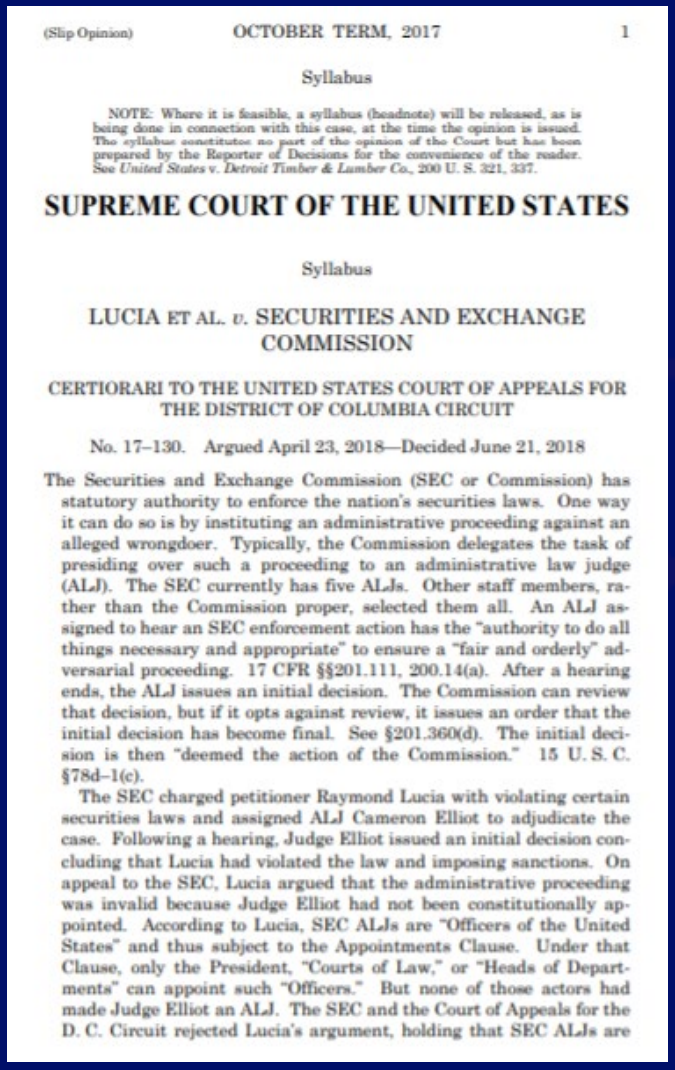
The Fifth Circuit has recently found a nondelegation violation; it is unclear what the en banc court or Supreme Court will do in response.

The CIT already sees nondelegation cases.

It is unlikely that nondelegation will become hugely important, but softer versions might be.



Major Focus on Appointments Clause



(Slip Opinion) OCTOBER TERM, 2017 1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

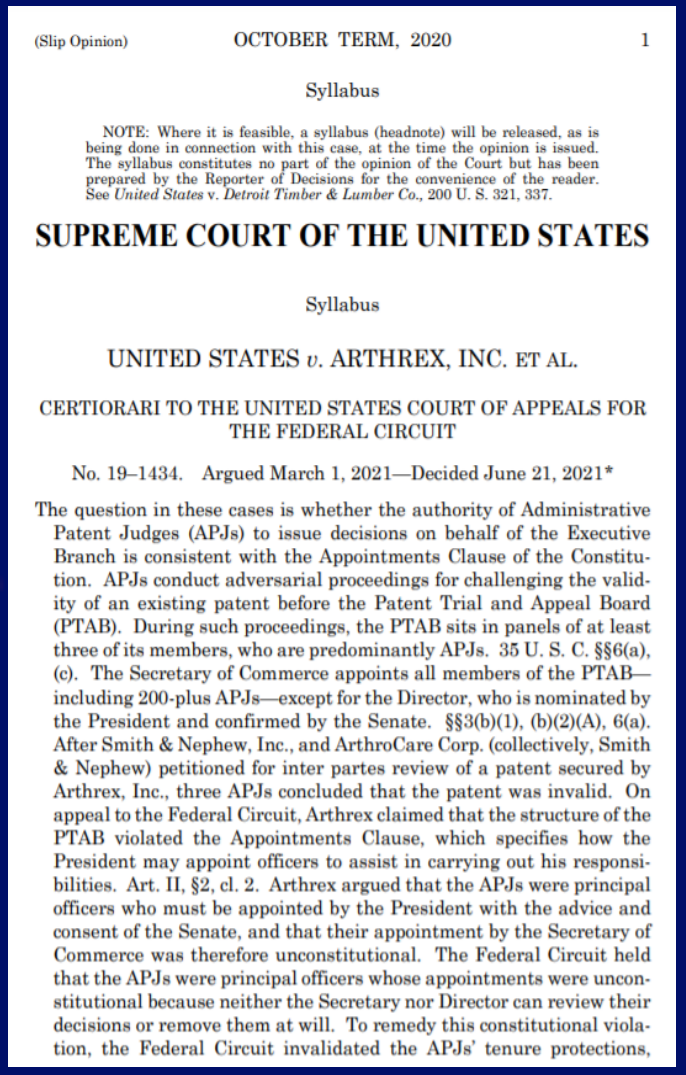
LUCIA ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17–130. Argued April 23, 2018—Decided June 21, 2018

The Securities and Exchange Commission (SEC or Commission) has statutory authority to enforce the nation's securities laws. One way it can do so is by instituting an administrative proceeding against an alleged wrongdoer. Typically, the Commission delegates the task of presiding over such a proceeding to an administrative law judge (ALJ). The SEC currently has five ALJs. Other staff members, rather than the Commission proper, selected them all. An ALJ assigned to hear an SEC enforcement action has the "authority to do all things necessary and appropriate" to ensure a "fair and orderly" adversarial proceeding. 17 CFR §§201.111, 200.14(a). After a hearing ends, the ALJ issues an initial decision. The Commission can review that decision, but if it opts against review, it issues an order that the initial decision has become final. See §201.360(d). The initial decision is then "deemed the action of the Commission." 15 U. S. C. §78d–1(c).

The SEC charged petitioner Raymond Lucia with violating certain securities laws and assigned ALJ Cameron Elliot to adjudicate the case. Following a hearing, Judge Elliot issued an initial decision concluding that Lucia had violated the law and imposing sanctions. On appeal to the SEC, Lucia argued that the administrative proceeding was invalid because Judge Elliot had not been constitutionally appointed. According to Lucia, SEC ALJs are "Officers of the United States" and thus subject to the Appointments Clause. Under that Clause, only the President, "Courts of Law," or "Heads of Departments" can appoint such "Officers." But none of those actors had made Judge Elliot an ALJ. The SEC and the Court of Appeals for the D. C. Circuit rejected Lucia's argument, holding that SEC ALJs are



(Slip Opinion) OCTOBER TERM, 2020 1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* ARTHREX, INC. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 19–1434. Argued March 1, 2021—Decided June 21, 2021*

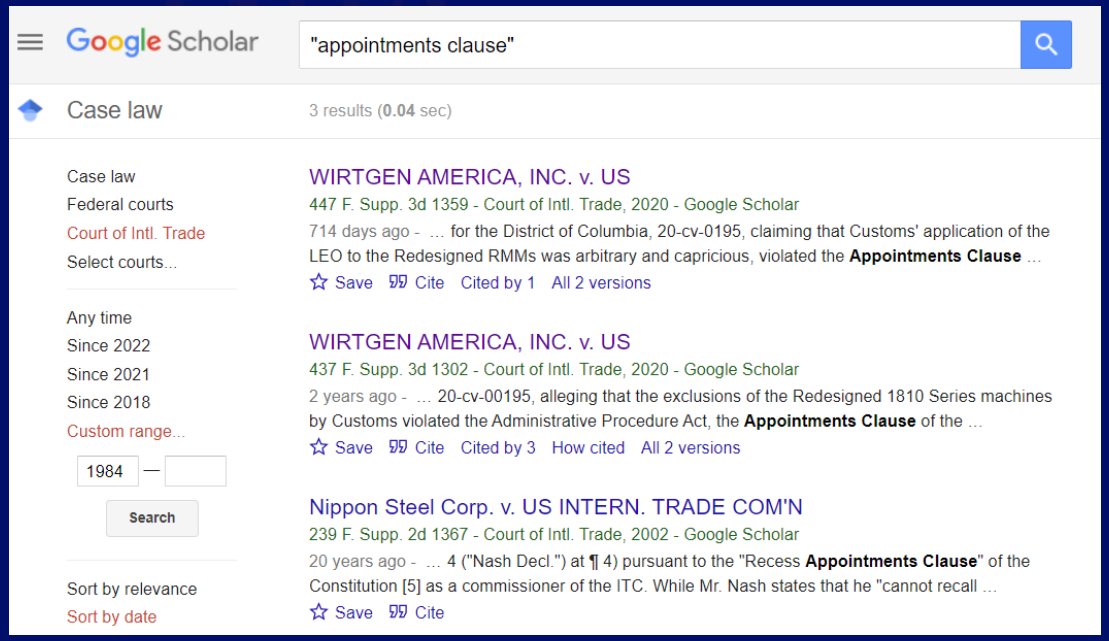
The question in these cases is whether the authority of Administrative Patent Judges (APJs) to issue decisions on behalf of the Executive Branch is consistent with the Appointments Clause of the Constitution. APJs conduct adversarial proceedings for challenging the validity of an existing patent before the Patent Trial and Appeal Board (PTAB). During such proceedings, the PTAB sits in panels of at least three of its members, who are predominantly APJs. 35 U. S. C. §§6(a), (c). The Secretary of Commerce appoints all members of the PTAB—including 200-plus APJs—except for the Director, who is nominated by the President and confirmed by the Senate. §§3(b)(1), (b)(2)(A), 6(a). After Smith & Nephew, Inc., and ArthroCare Corp. (collectively, Smith & Nephew) petitioned for inter partes review of a patent secured by Arthrex, Inc., three APJs concluded that the patent was invalid. On appeal to the Federal Circuit, Arthrex claimed that the structure of the PTAB violated the Appointments Clause, which specifies how the President may appoint officers to assist in carrying out his responsibilities. Art. II, §2, cl. 2. Arthrex argued that the APJs were principal officers who must be appointed by the President with the advice and consent of the Senate, and that their appointment by the Secretary of Commerce was therefore unconstitutional. The Federal Circuit held that the APJs were principal officers whose appointments were unconstitutional because neither the Secretary nor Director can review their decisions or remove them at will. To remedy this constitutional violation, the Federal Circuit invalidated the APJs' tenure protections,

Text of Appointments Clause

"[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

What This Trend May Mean for Trade Law

Unclear! But lawyers may attempt to identify individuals who have not been properly appointed (as is happening in other contexts throughout administrative law).



Focus on Removal – and So Agency Independence

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SEILA LAW LLC *v.* CONSUMER FINANCIAL PROTECTION BUREAU

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19–7. Argued March 3, 2020—Decided June 29, 2020

In the wake of the 2008 financial crisis, Congress established the Consumer Financial Protection Bureau (CFPB), an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent. See Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 124 Stat. 1376. Congress transferred the administration of 18 existing federal statutes to the CFPB, including the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Truth in Lending Act; and Congress enacted a new prohibition on unfair and deceptive practices in the consumer-finance sector. 12 U. S. C. §5536(a)(1)(B). In doing so, Congress gave the CFPB extensive rulemaking, enforcement, and adjudicatory powers, including the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, prosecute civil actions in federal court, and issue binding decisions in administrative proceedings. The CFPB may seek restitution, disgorgement, injunctive relief, and significant civil penalties for violations of the 19 federal statutes under its purview. So far, the agency has obtained over $11 billion in relief for more than 25 million consumers.

Unlike traditional independent agencies headed by multimember boards or commissions, the CFPB is led by a single Director, §5491(b)(1), who is appointed by the President with the advice and consent of the Senate, §5491(b)(2), for a five-year term, during which the President may remove the Director only for "inefficiency, neglect of duty, or malfeasance in office," §§5491(c)(1), (3). The CFPB receives its funding outside the annual appropriations process from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COLLINS ET AL. *v.* YELLEN, SECRETARY OF THE TREASURY, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

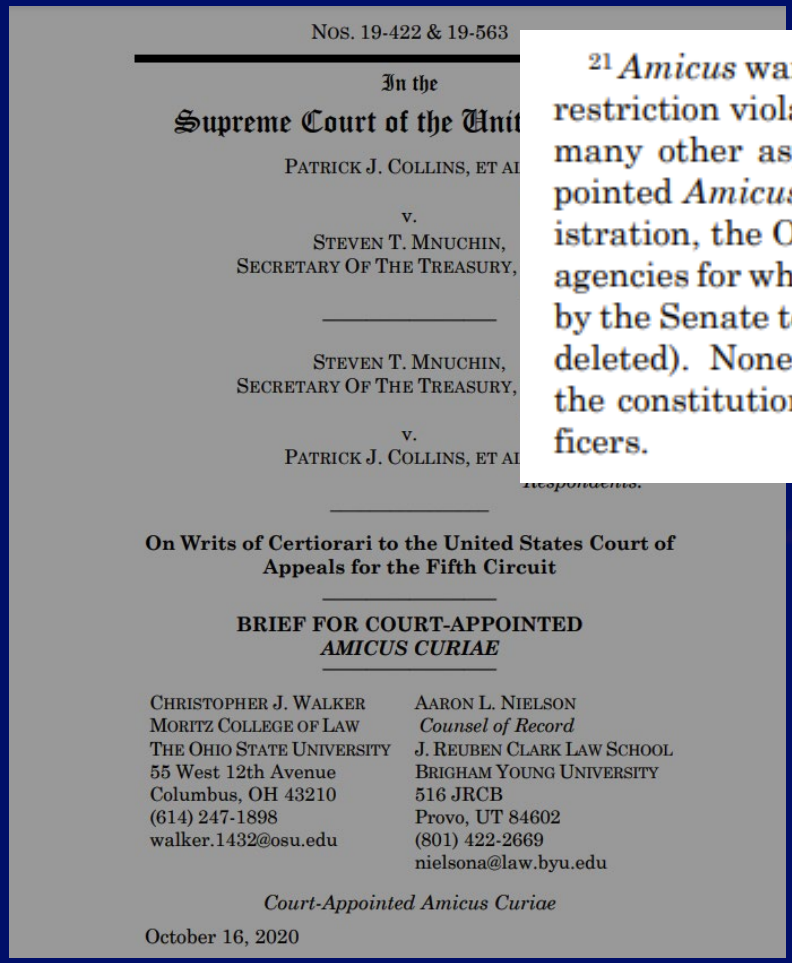
No. 19–422. Argued December 9, 2020—Decided June 23, 2021*

When the national housing bubble burst in 2008, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), two of the Nation's leading sources of mortgage financing, suffered significant losses that many feared would imperil the national economy. To address that concern, Congress enacted the Housing and Economic Recovery Act of 2008 (Recovery Act), which, among other things, created the Federal Housing Finance Agency (FHFA)—an independent agency tasked with regulating the companies and, if necessary, stepping in as their conservator or receiver. See 12 U. S. C. §4501 *et seq.* At the head of the Agency, Congress installed a single Director, removable by the President only "for cause." §§4512(a), (b)(2).

Soon after the FHFA's creation, the Director placed Fannie Mae and Freddie Mac into conservatorship and negotiated agreements for the companies with the Department of Treasury. Under those agreements, Treasury committed to providing each company with up to $100 billion in capital, and in exchange received, among other things, senior preferred shares and quarterly fixed-rate dividends. In the years that followed, the agencies agreed to a number of amendments, the third of which replaced the fixed-rate dividend formula with a variable one that required the companies to make quarterly payments consisting of their entire net worth minus a small specified capital reserve.

A group of the companies' shareholders challenged the third amend-

How Far Will Presidential Removal Go?



Nos. 19-422 & 19-563

In the

Supreme Court of the Unit

PATRICK J. COLLINS, ET AL

v.

STEVEN T. MNUCHIN,
SECRETARY OF THE TREASURY,

STEVEN T. MNUCHIN,
SECRETARY OF THE TREASURY,

v.

PATRICK J. COLLINS, ET AL

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR COURT-APPOINTED *AMICUS CURIAE*

CHRISTOPHER J. WALKER
MORITZ COLLEGE OF LAW
THE OHIO STATE UNIVERSITY
55 West 12th Avenue
Columbus, OH 43210
(614) 247-1898
walker.1432@osu.edu

AARON L. NIELSON
Counsel of Record
J. REUBEN CLARK LAW SCHOOL
BRIGHAM YOUNG UNIVERSITY
516 JRCB
Provo, UT 84602
(801) 422-2669
nielsona@law.byu.edu

Court-Appointed Amicus Curiae

October 16, 2020

[21] *Amicus* warns that if the Court holds that the Recovery Act's removal restriction violates the Constitution, the decision will "call into question many other aspects of the Federal Government." Brief for Court-Appointed *Amicus Curiae* 47. *Amicus* points to the Social Security Administration, the Office of Special Counsel, the Comptroller, "multi-member agencies for which the chair is nominated by the President and confirmed by the Senate to a fixed term," and the Civil Service. *Id.*, at 48 (emphasis deleted). None of these agencies is before us, and we do not comment on the constitutionality of any removal restriction that applies to their officers.

Future of Independent Agencies?

The Future of Independent Agencies After Seila and Collins

The Gray Lecture on the Administrative StateMarch 18, 2022.

YouTube · The C. Boyden Gray Center George Mason University · May 3, 2022

21-86 AXON ENTERPRISE, INC. V. FEDERAL TRADE COMMISSION

DECISION BELOW: 986 F.3d 1173

LOWER COURT CASE NUMBER: 20-15662

QUESTION PRESENTED:

After petitioner acquired an essentially insolvent competitor, it found itself subjected to the review of the Federal Trade Commission (FTC), rather than the Department of Justice (DOJ). While the DOJ route promises early access to judicial review, the FTC track is an altogether different matter. Petitioner faced a series of unreasonable demands from the FTC, and the prospect of "litigating" before administrative law judges insulated by unconstitutional double-for-cause removal restrictions and subject to review by an unaccountable Commission. Rather than resign itself to the ongoing unconstitutional injuries inflicted by the FTC's process, petitioner filed suit in district court seeking to enjoin the unconstitutional FTC proceedings. That lawsuit focused on constitutional issues collateral to the underlying antitrust issues, but the district court nonetheless dismissed it for want of jurisdiction based on implications drawn from a statutory grant of jurisdiction to review the FTC's cease-and-desist orders. A divided Ninth Circuit affirmed, with the majority acknowledging that dismissal "makes little sense," and the dissent contending that dismissal contradicted this Court's precedents.

The questions presented are:

1. Whether Congress impliedly stripped federal district courts of jurisdiction over constitutional challenges to the Federal Trade Commission's structure, procedures, and existence by granting the courts of appeals jurisdiction to "affirm, enforce, modify, or set aside" the Commission's cease-and-desist orders.

2. Whether, on the merits, the structure of the Federal Trade Commission, including the dual-layer for-cause removal protections afforded its administrative law judges, is consistent with the Constitution.

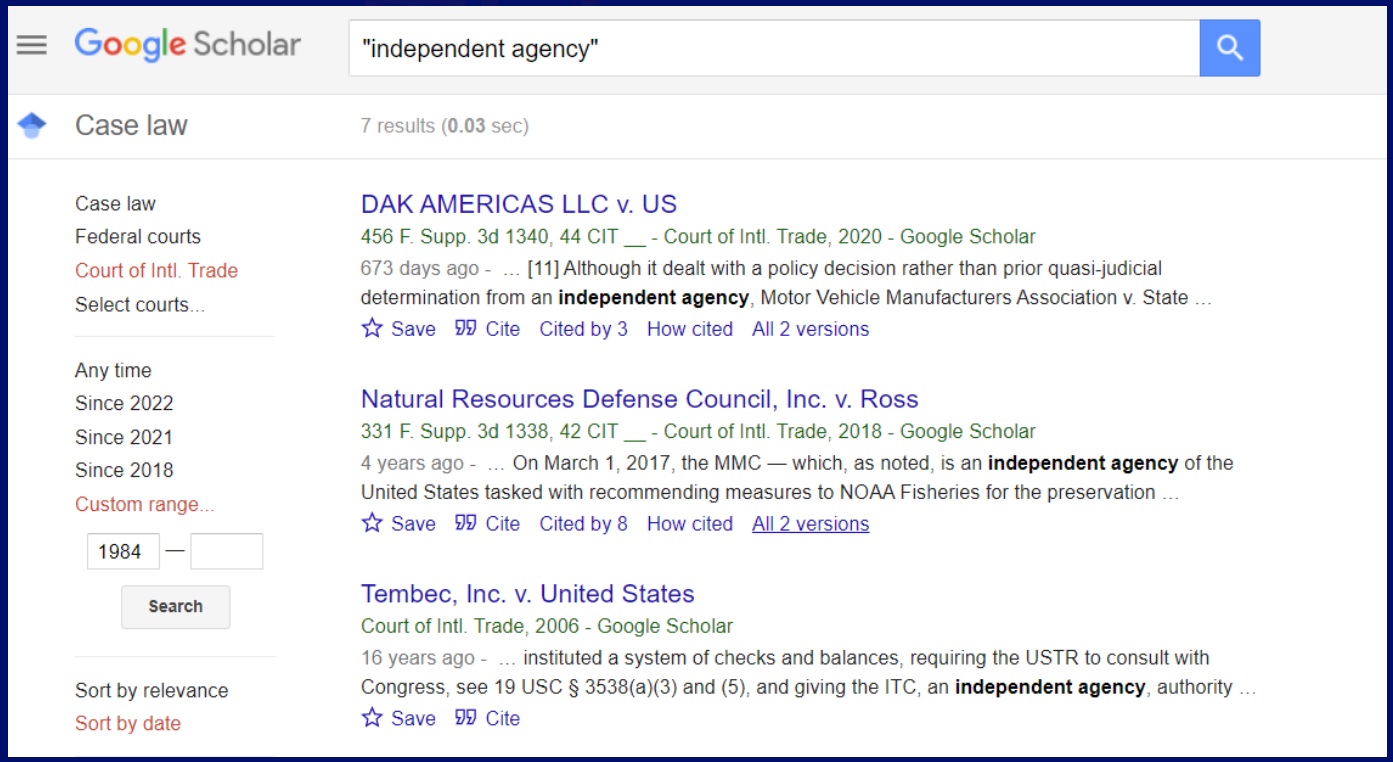
LIMITED TO QUESTION 1 PRESENTED BY THE PETITION

CERT. GRANTED 1/24/2022

There is obvious and significant tension between *Seila Law* and *Collins* and *Humphrey's Executor*. How far will SCOTUS take the principle that the President can fire executive branch officials?

What This Trend May Mean for Trade Law

It depends on what SCOTUS decides to do with multi-member independent commissions and administrative law judges.



What About Arbitrary and Capricious Review?

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DEPARTMENT OF COMMERCE ET AL. *v.* NEW YORK ET AL.

CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 18–966. Argued April 23, 2019—Decided June 27, 2019

In order to apportion congressional representatives among the States, the Constitution requires an "Enumeration" of the population every 10 years, to be made "in such Manner" as Congress "shall by Law direct," Art. I, §2, cl. 3; Amdt. 14, §2. In the Census Act, Congress delegated to the Secretary of Commerce the task of conducting the decennial census "in such form and content as he may determine." 13 U. S. C. §141(a). The Secretary is aided by the Census Bureau, a statistical agency in the Department of Commerce. The population count is also used to allocate federal funds to the States and to draw electoral districts. The census additionally serves as a means of collecting demographic information used for a variety of purposes. There have been 23 decennial censuses since 1790. All but one between 1820 and 2000 asked at least some of the population about their citizenship or place of birth. The question was asked of all households until 1950, and was asked of a fraction of the population on an alternative long-form questionnaire between 1960 and 2000.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* PROMETHEUS RADIO PROJECT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 19–1231. Argued January 19, 2021—Decided April 1, 2021*

Under its broad authority to regulate broadcast media in the public interest, the Federal Communications Commission (FCC) has long maintained several ownership rules that limit the number of radio stations, television stations, and newspapers that a single entity may own in a given market. Section 202(h) of the Telecommunications Act of 1996 directs the FCC to review its media ownership rules every four years and to repeal or modify any rules that no longer serve the public interest.

How Hard is "Hard Look" Review?

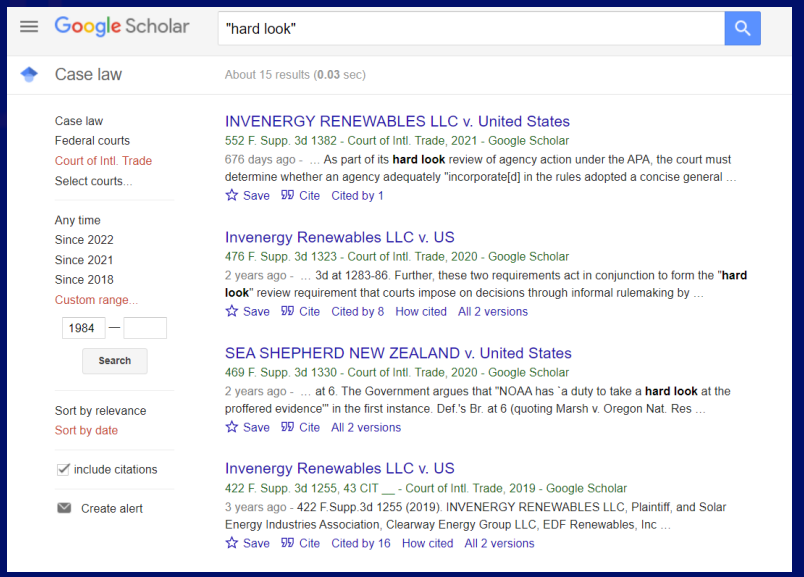
One of the most familiar questions in administrative law concerns just how hard so-called "hard look" review actually is.

The Supreme Court's recent cases on this subject are tricky; sometimes the Court is aggressive, but sometime not.

What This Trend May Mean for Trade Law

The CIT sees many “arbitrary and capricious” challenges.

The more the Supreme Court concerns itself with the standard, the more potential change there is.



The Future?

→ The Court is not necessarily looking to outright overrule cases (at least not too many of them), but the Court is not willing to extend principles it considers faulty. This dynamic matters for numerous issues, including deference, delegation, separation of powers, and other administrative law doctrines.

Why Lawyers Should Care

- The Supreme Court is very active in the "admin law" space right now.
- It looks like the Supreme Court wants less deference, more congressional control, and greater formalism.
- Those involved in regulation need to be aware of where the Supreme Court may be heading.

*Why **Trade Lawyers** Should Care*

- Much of trade law is administrative law, albeit specialized administrative law.
- Broad changes to, say, deference, may affect how trade law is done.
- When trade cases go to the Supreme Court, the Justices may see an “admin law” case, not a “trade” case.