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# *Shaking Things Up*

The Trump Administration, Regulatory Change,  
and Administrative Law

A NACWA Webinar Presentation

By Allan Gates

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# Administrative Procedure Act – *The Basics*

## Statutory Definitions

- Rulemaking means agency process for formulating, amending or repealing a rule
- Adjudication means agency process for formulating an order
- Rule is an agency of general application and prospective effect
- Order is a final disposition of an agency in a matter other than a rulemaking, but including “licensing”

# Administrative Procedure Act – *The Basics*

## RULEMAKING

Prospective Effect & General Application

Public Notice of Proposed Rulemaking  
Statement of Basis & Purpose

Public Comment Period

Final Rule  
Response to Comments

## ADJUDICATION

Retrospective Effect & Individual Application

Individual Notice  
Service of Process

Discovery & Hearing

Administrative Appeal, if any

Final Order  
Opinion or Record of Decision

# Administrative Procedure Act – *The Basics*

- JUDICIAL REVIEW

- ❑ **Justiciable Controversy?**
  - Standing
  - Mootness
  - Ripeness
  - Advisory Opinion
  - Political Question
- ❑ **Committed to Agency Discretion?**
- ❑ **Finality/Exhaustion of Administrative Remedies?**
- ❑ **Content of Administrative Record?**

# Administrative Procedure Act – *The Basics*

- JUDICIAL REVIEW (Continued)

- **Administrative Procedure Act Standard of Review**

- Proper Procedure Followed?
- Authorized by the Statute?
- Arbitrary & Capricious?
- Supported by Substantial Evidence? (Adjudications Only)
- Permissible Under the Constitution?

- **Deference to Agency Interpretation of Law**

- *Chevron* Deference – Interpretation of Statutes
- *Auer* Deference – Interpretation of Agency’s Own Rules
- *Skidmore* Deference – Agency’s Interpretive “Rules” and Guidance

# The Trump Administration



Intends to Shake Things Up

# Reversing Obama

- Congressional Review Act
- Executive Orders directing Stay or Rescission of Rules
- Executive Order Two for One Requirement
- Changes in Agency Budgets, Priorities & Personnel
- Changes in Agency Policy & Legal Positions

# Countervailing Forces

- Repeal of a Rule Requires a Rulemaking
- Independence of the Judiciary
- Changes in Legal Position Can Generate Skepticism
- Newton's Third Law of Motion
  - Resistance from Outside the Agency
  - Resistance from Within the Agency



# What About Justice Gorsuch?

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  - *TransAm Trucking, Inc. v. Administrative Rev. Bd*, 833 F.3d 1206 (10<sup>th</sup> Cir. 2016) (Gorsuch dissenting)

# What About Justice Gorsuch?

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Kennedy  
Swore In  
Gorsuch  
(Twice)

# Footnote 22 in Scalia's Dissent in *Obergefell v. Hodges*

**22 If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began:**

- *“The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,”*

**I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.**

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- **Thomas – Alito – Gorsuch Voting Bloc Emerging?**

# SCOTUS Agreement with Gorsuch Votes as 10<sup>th</sup> Cir. Judge\*

Thomas Alito	Roberts Kennedy	Breyer Ginsburg	Sotomayor	Kagan
88%	75%	63%	57%	50%

\* SCOTUS decided 28 cases from the 10<sup>th</sup> Cir. during Gorsuch's tenure on the Court of Appeals. Of those, Gorsuch was a panel member or wrote an opinion in 8. Sotomayor was on the Court for only 7, and Kagan only 6 Source: BloombergPolitics

# SCOTUS Voting Patterns

## October Term 2016\*

	AMK	CT	RBG	SGB	SAA	SMS	EK	NMG
JGR	91%	82%	76%	82%	91%	82%	85%	78%
	AMK	77%	80%	88%	86%	85%	88%	82%
		CT	65%	71%	91%	68%	70%	<b>100%</b>
			RBG	86%	68%	93%	90%	65%
				SGB	74%	87%	93%	65%
					SAA	74%	76%	<b>94%</b>
						SMS	91%	59%
							EK	65%
								NMG

\* Source: SCOTUSBlog



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# Gorsuch on *Chevron* Deference

- ***De Niz Robles v. v. Lynch***, 803 F.3d 1165 (10<sup>th</sup> Cir. 2015)
- ***Gutierrez-Brizuela v. Lynch***, 834 F.3d 1142 (10<sup>th</sup> Cir. 2016) (Gorsuch Concurring in Majority Opinion by Gorsuch)

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- **He is not bashful on the bench**

# Gorsuch Is Not Bashful on the Bench

- *Planned Parenthood Assn v. Herbert*, 839 F.3d 1301 (10<sup>th</sup> Cir. 2016) (Gorsuch dissenting from denial of rehearing *en banc*)
- Notably Active as a New Justice

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- **He has a conservative view of the role of federal courts and separation of powers**

## Gorsuch on *Role of Judicial Branch*

- *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE WESTERN L. REV. 905 (2016)
- *Liberals ‘N’ Lawsuits: Too Much Reliance on Litigation is Bad for the Courts and the Dems*, NATIONAL REVIEW (Feb. 7, 2005)

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- **He is conservative on social issues**

## Gorsuch as Conservative on Social Issues

- *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10<sup>th</sup> Cir. 2013)
- *Little Sisters of the Poor Home for the Aged v. Burwell*, 799 F.3d 1315 (10<sup>th</sup> Cir. 2015) (Gorsuch dissent from denial of rehearing *en banc*)
- *Planned Parenthood Assn v. Herbert*, 839 F.3d 1301 (10<sup>th</sup> Cir. 2016) (Gorsuch dissent from denial of rehearing *en banc*)



# Beware All Predictions of Judicial Behavior

- *A.M. v. Holmes*, 830 F.3d 1123 (10<sup>th</sup> Cir. 2016)  
(Gorsuch dissenting):

“If a seventh grader starts trading fake burps for laughs in gym class, what’s a teacher to do? Order extra laps? Detention? A trip to the principal’s office? Maybe. But then again, maybe that’s too old school. Maybe today you call a police officer. And maybe today the officer decides that, instead of just escorting the now compliant thirteen year old to the principal’s office, an arrest would be a better idea. So out come the handcuffs and off goes the child to juvenile detention. My colleagues suggest the law permits exactly this option and they offer ninety-four pages explaining why they think that’s so. Respectfully, I remain unpersuaded.”

# Beware All Predictions of Judicial Behavior

➤ *A.M. v. Holmes*, (Gorsuch dissent, continued):

“Often enough the law can be ‘a ass — a idiot,’ Charles Dickens, *Oliver Twist* 520 — and there is little we judges can do about it, for it is (or should be) emphatically our job to apply, not rewrite, the law enacted by the people’s representatives. Indeed, a judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels. So it is I admire my colleagues today, for no doubt they reach a result they dislike but believe the law demands — and in that I see the best of our profession and much to admire. It’s only that, in this particular case, I don’t believe the law happens to be quite as much of a ass as they do. I respectfully dissent.”

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# Thank You

## Questions?

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