

Fall Forum 2023  
*Bracing For Significant Regulatory Changes*

# LESS DEFERENCE TO AGENCY GUIDANCE?

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# THRESHOLD QUESTION:

What guidance is legally binding?

- Statute
- Regulation
- Agency Memoranda?
- Dear Colleague Letter?
- Email?



# ISSUE "ONLY" GOES BACK 236 YEARS

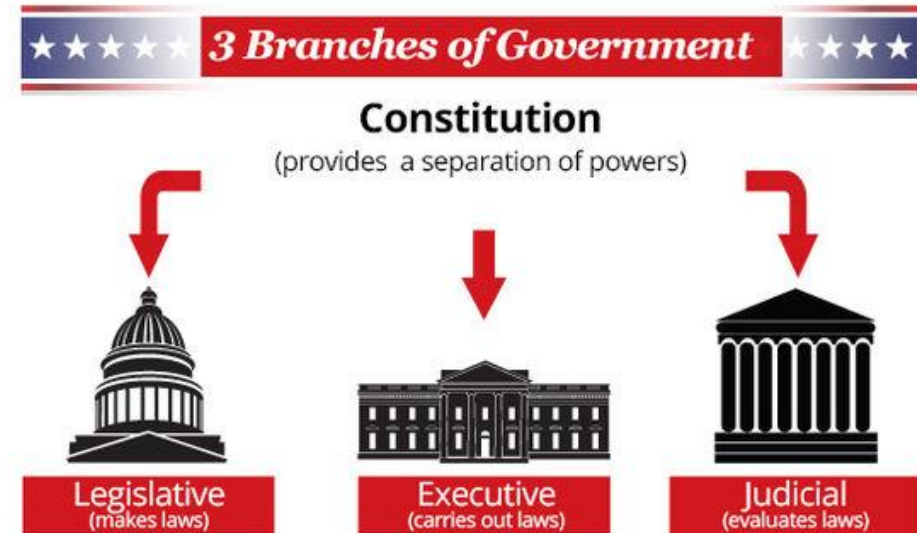
- Constitution – 1787
- No Administrative Agencies





# TRIPARTITE SYSTEM OF GOVERNMENT

- Congress – Passes Laws
- Courts – Interprets Laws
- President – Implements Laws





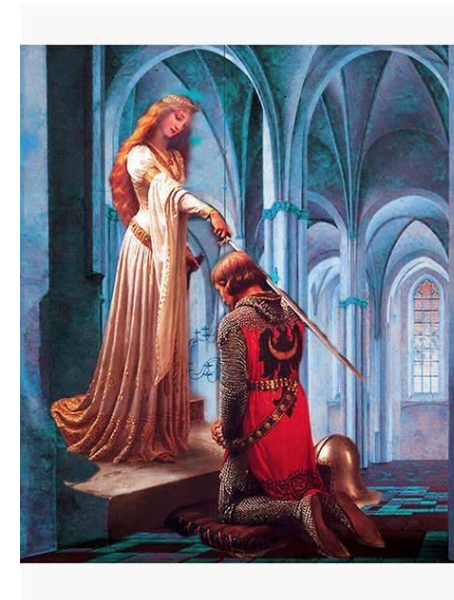
# TRIPARTITE SYSTEM OF GOVERNMENT

- With rise of the modern administrative state, federal agencies came to be seen as an independent 4<sup>th</sup> branch of government



# TRIPARTITE SYSTEM OF GOVERNMENT

- Congress assigned authority to agencies to issue regulations and interpret often ambiguous laws passed by Congress





# GEPA

- 20 USC 1232
  - "A regulation means any generally applicable rule, regulation, guideline, interpretation, or requirement prescribed by the secretary and has legally binding effect."



What latitude does the Secretary have to issue regulations and other guidance?







# Chevron V. Natural Resources Defense Council - 1984





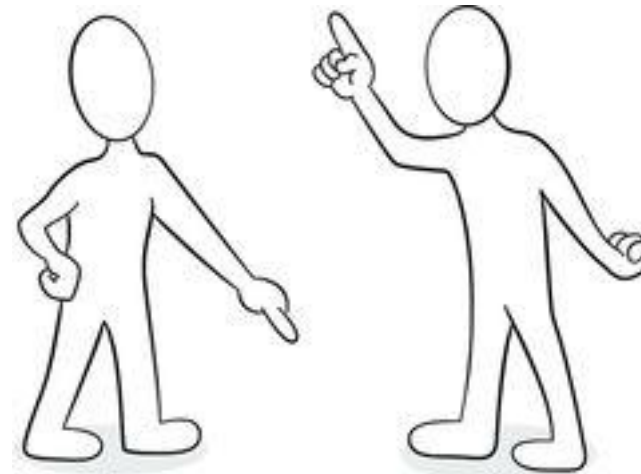
# CHEVRON V. NRDC - 1984

- Court held – If a statute is ambiguous, courts should defer to the relevant agencies' interpretation, provided it is reasonable



# RESULTING DOCTRINE

- Chevron Deference





# COURT THIS TERM CONSIDERING 2 CASES TO OVERTURN CHEVRON

- Loper Bright Enterprises v. Raimondo
- Relentless v. Department of Commerce
  - Argument – If the courts have the constitutional responsibility to say what the law is, why give that responsibility to agencies?
  - Counterargument – Congress intended court to defer to agencies whenever it passed an ambiguous statute



## LAST TERM THE SUPREME COURT RULED IN:

- Axon Enterprise v. FTC
  - Statutory review scheme (appealing agency action to U.S. Court of Appeals) do not extend to all claims
  - Similar to GEPA enforcement



- Parties may proceed directly to federal district court if claim is outside ALJ expertise or if precluding district court jurisdiction forecloses meaningful judicial review



# How will these developments impact ED Guidance???





- Congress enacted 4 broad statutes in the 1960's:
  1. ESEA – 1965
  2. VEA – 1963
  3. HEA - 1965
  4. IDEA - 1966







- Congress assigned HEW the responsibility to issue regulations and administer the programs



## RESULT:

- HEW issued voluminous and detailed regulations, often unrelated to statutory language



## EDUCATION AMENDMENTS OF 1972 (PUBLIC LAW 92-318):

- Reissue All regulations with statutory citation (Section 503)
- Submit all final regulations to the House/Senate 60 days prior to effective date (now part of GEPA 20 USC 1232)





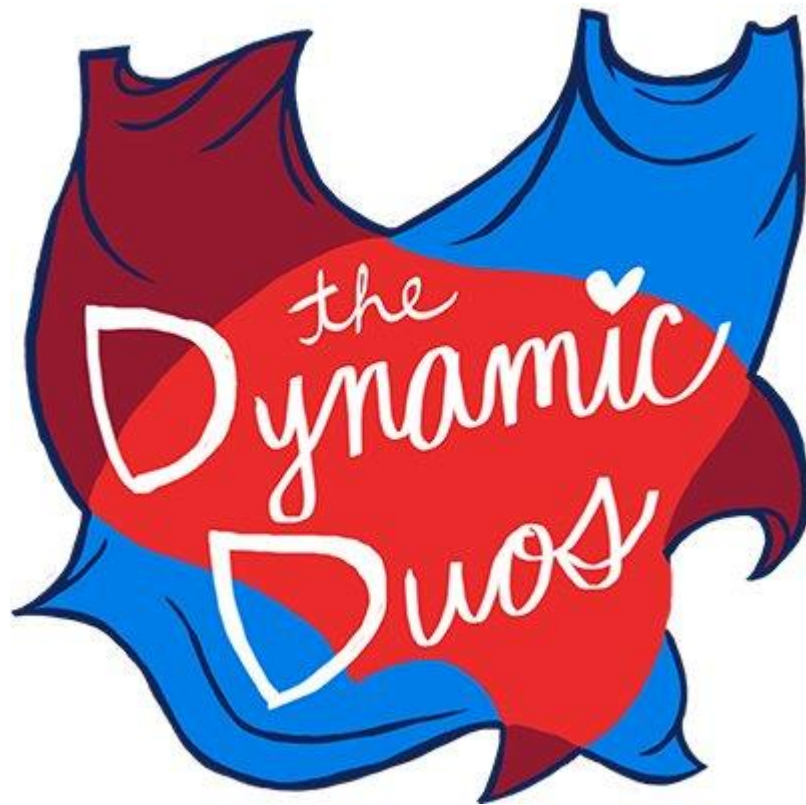
# NIXON, FORD, CARTER, REAGAN, BUSH I, CLINTON, BUSH II, OBAMA, TRUMP, BIDEN ADMINISTRATIONS:

- All issue regulatory simplification initiatives





# MOST SIGNIFICANT INITIATIVES



1. "Reinventing Government" – 1994
2. UGG - 2014



# "REINVENTING GOVERNMENT"

1. Eliminated Approximately 90% of ED regulations
2. Shifted burden to grantees to interpret statutes



Does ED comply with GEPA requirements on Legally Binding  
Guidance?



No



# INFORMAL GUIDANCE

- Dear Colleague Letter
- Agency Memoranda
- Email
- Phone Calls







Does Informal Guidance  
constitute a “safe harbor”  
for Audit Purposes?



WHEN IN DOUBT, USE:

GEPA – Mitigating Circumstance 34 CFR Part 81.33:

90-Day Letter



Continued issuance of Informal Guidance resulted in:

- “Bulletin for Agency Good Guidance Practices”  
- 1.25.2007



# "Good Guidance" v. "Bad Guidance"





## SEVEN YEARS LATER IN 2014:

OMB attempted to bring coherence/consistency/simplification to agency rules on administrative/ cost/ audit functions



UGG



# 2020 AMENDMENTS TO UGG

- 2 CFR 200.105(b)





# IMPOSITION OF REQUIREMENTS ON RECIPIENTS

- Agencies may impose legally binding requirements through notice and public comments through an approved agency process



Does OESE practice of asking the public to comment on draft Guidance satisfy this rule?







Does ED Guidance on food purchases satisfy OMB  
Guidance?



# TAKEAWAYS

1. Informal Guidance is not a safe harbor
2. Absent a 90-Day Letter reliance on Informal Guidance may lead to Audit Exposure
3. Chevron Deference?





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# Save The Date!!!

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