Aaron L. Nielson

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Current Positions

Professor, J. Reuben Clark Law School, Brigham Young University (associate professor 2013–2019)

Of Counsel, Kirkland & Ellis, LLP, Salt Lake City, UT and Washington, D.C. Offices (2015–present)

Chair of Administration and Management Committee and Public Member,

Administrative Conference of the United States (became Public Member in 2017 and Chair in 2018)

Council, American Bar Association's Section of Administrative Law & Regulatory Practice (2020–present)

Board, Utah Chapter of Federal Bar Association (2020-present)

Permanent Commentator, Notice & Comment, Yale Journal on Regulation (2015–present)

Education

Harvard Law School, J.D., magna cum laude, 2007

Awarded a Harvard Law School Post-Graduate Research Fellowship

University of Cambridge Faculty of Law, LL.M., with First Class Honors, 2006 Bateman Scholar of Trinity Hall

University of Pennsylvania, B.A. in Economics & Political Science, *summa cum laude*, 2003 Recipient of the Robert Holtz Memorial Award as Most Outstanding Political Science Graduate

Judicial Clerkships

Law Clerk, Justice Samuel A. Alito, Jr., United States Supreme Court (OT 2014)

Law Clerk, Judge Janice Rogers Brown, U.S. Court of Appeals for the D.C. Circuit (2008–09)

Law Clerk, Judge Jerry E. Smith, U.S. Court of Appeals for the Fifth Circuit (2007–08)

Law Review Articles (Submitted)

Congress's Anti-Removal Power, 76 VANDERBILT LAW REVIEW ___ (2022) (with Christopher Walker)

Gaming Certiorari, 170 UNIVERSITY OF PENNSYLVANIA LAW REVIEW ___ (2022) (with Paul Stancil)

Narrowing Chevron's Domain, 70 DUKE LAW JOURNAL 931 (2021) (with Kristin Hickman)

The Minor Questions Doctrine, 169 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1181 (2021)

Qualified Immunity and Federalism, 109 GEORGETOWN LAW JOURNAL 229 (2020) (with Christopher Walker)

Sticky Regulations, 85 UNIVERSITY OF CHICAGO LAW REVIEW 85 (2018)

Clarence Thomas the Questioner, 111 NORTHWESTERN LAW REVIEW 1185 (2017);

111 NORTHWESTERN LAW REVIEW ONLINE 197 (2017) (with RonNell Andersen Jones)

Beyond Seminole Rock, 105 GEORGETOWN LAW JOURNAL 943 (2017)

Chevron Step One-and-a-Half, 84 UNIVERSITY OF CHICAGO LAW REVIEW 757 (2017) (with Daniel Hemel)

Strategic Immunity, 66 EMORY LAW JOURNAL 55 (2016) (with Christopher Walker)

The New Qualified Immunity, 89 SOUTHERN CALIFORNIA LAW REVIEW 1 (2015) (with Christopher Walker)

Visualizing Change in Administrative Law, 49 GEORGIA LAW REVIEW 757 (2015)

In Defense of Formal Rulemaking, 75 OHIO STATE LAW JOURNAL 237 (2014)

Reflections on the End of the Federal Law Clerks Hiring Plan,

112 MICHIGAN LAW REVIEW FIRST IMPRESSIONS 22 (2013)

Erie as Nondelegation, 72 OHIO STATE LAW JOURNAL 239 (2011)

Hiding Nondelegation in Mouseholes, 62 ADMINISTRATIVE LAW REVIEW 19 (2010) (with Jacob Loshin)

Law Review Articles (Solicited and Call for Papers)

Qualified Immunity's 51 Imperfect Solutions, 17 DUKE J. OF CONSTITUTIONAL LAW & PUBLIC POLICY __ (2022) (with Christopher Walker)

Civil Rights Litigation in the Lower Courts, 112 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 145 (2022) (with Paul Stancil)

Three Wrong Turns in Agency Adjudication, 28 GEORGE MASON LAW REVIEW 657 (2021)

Foreword: The Future of Chevron Deference, 70 DUKE LAW JOURNAL 1015 (2021) (with Kristin Hickman)

Three Views of the Administrative State: Lessons from Collins v. Yellen, 2020-2021 CATO SUPREME COURT REVIEW 141 (2021)

Sticky Regulations and Net Neutrality Internet Freedom, 71 HASTINGS LAW JOURNAL 1208 (2020)

Policing Prosecutors: Lessons From Administrative Law?, 123 DICKINSON LAW REVIEW 713 (2019)

A(nother) New Plan for Clerkship Hiring, 102 JUDICATURE 70 (2018) (point/counterpoint debate with Chief Judge Diane Wood)

A Qualified Defense of Qualified Immunity, 93 NOTRE DAME LAW REVIEW 1853 (2018) (with Christopher Walker)

Optimal Ossification, 86 GEORGE WASHINGTON LAW REVIEW 1209 (2018)

How Agencies Choose Whether to Enforce the Law, 93 NOTRE DAME LAW REVIEW 1517 (2018)

Nonenforcement and the Dangers of Leveraging, 3 JOURNAL OF REGULATORY COMPLIANCE 19 (2018)

The Paradox of Discretionary Competition Law, 2 European Competition and Regulatory Law Review 156 (2018)

Confessions of an Anti-Administrativist, 131 HARVARD LAW REVIEW FORUM 1 (2017) (solicited response to the annual Harvard Law Review Foreword)

Cf. Auer v. Robbins, 21 TEXAS REVIEW OF LAW & POLITICS 304 (2017)

The Future of Law Clerk Hiring, 98 MARQUETTE LAW REVIEW 181 (2014)

The Death of the Supreme Court's Certified Question Jurisdiction, 59 CATHOLIC UNIVERSITY LAW REVIEW 483 (2010)

Other Publications

Deconstruction, Not Destruction, 150(3) DÆDALUS: THE JOURNAL OF THE AMERICAN ACADEMY OF ARTS & SCIENCES 143 (2021)

Public Identification of Agency Officials, THE REGULATORY REVIEW (2020) (with Bobby Ochoa)

Pandemic Proves Justice Thomas Does Have Something To Say, THE HILL (May 7, 2020) (with RonNell Andersen Jones)

State Court Docket Watch: Indiana Dep't of Natural Resources v. Prosser, FEDERALIST SOCIETY (2020)

Accessing Agency Procedure, THE REGULATORY REVIEW (2019)

How Agencies Should Use Waivers and Exemptions, THE REGULATORY REVIEW (2019) (with Jennifer Nou) Judge Kavanaugh and Justiciability, SCOTUSBLOG (2018)

Reflections on Seminole Rock: The Past, Present, and Future of Deference to Agency Regulatory Interpretations, Online Symposium, Notice & Comment, the Yale Journal of Regulation (organizer & contributor)

Developments in Administrative Law & Regulatory Practice 2015: Antitrust, American Bar Association (2015) (with Marin Boney & Varnitha Siva)

Rethinking Formal Rulemaking, MERCATUS RESEARCH PAPER (May 2014) (peer reviewed)

Developments in Administrative Law & Regulatory Practice 2014: Antitrust, American Bar Association (2014) (with Marin Boney & Brad Masters)

The Law Clerk Hiring Plan is Dead, NATIONAL LAW JOURNAL (Feb. 11, 2013)

Whither Harmonization? India's Draft Combination Regulations, CPI ANTITRUST CHRONICLE (2011) (with Christine Wilson & Ellen M. Jakovic)

An Indirect Argument for Limiting Domestic Presidential Power, 30 HARV. J.L. & PUB. POL'Y 727 (2007) (student book review)

Granholm v. Heald, *Good History, Good Law (and by Coincidence Good Policy Too)*, 29 HARV. J.L. & PUB. POL'Y 743 (2006) (student comment)

No More 'Cherry-Picking': The Real History of the Twenty-first Amendment, 28 HARV. J.L. & PUB. POL'Y 281 (2004) (student note)

Works in Progress

Probabilism (demonstrating how traditional legal analysis misunderstands multi-step analysis)

Saving Agency Adjudication (explaining how Congress can better preserve agency adjudication)

Research Interests

Administrative law concepts applied in both administrative law and non-administrative law contexts, especially federal courts, civil procedure, and antitrust. Regulatory design and procedure.

Teaching Experience

Administrative Law (2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021) Civil Procedure (2013, 2014, 2016, 2017, 2018, 2019, 2021, 2022) Federal Courts (2013, 2016, 2017, 2018, 2019, 2020, 2021, 2022)

Scholarly Presentations

Co-Presenter, "Congress's Anti-Removal Power," 2022 National Conference of Constitutional Law Scholars, On-Line, February 2022.

Presenter, "Litigating Administrative Law Cases in the Roberts Court," 2021 American Bar Association Section of Administrative Law and Regulatory Practice's Annual Administrative Law Conference, On-Line, November 2021.

Presenter, "Congress's Anti-Removal Power," 2021 Midwestern Law & Economics Association Annual Conference, Provo, Utah, October 2021.

Presenter, "Three Views of the Administrative State: Lessons from *Collins v. Yellen*," 2021 Cato Institute Constitution Day Symposium, Washington, D.C., September 2021.

Presenter, "Supervision by the Executive: Appointments Clause and Removal Constraints after *Collins & Arthrex*," American Bar Association Section of Administrative Law and Regulatory Practice, National Teleforum, July 2021.

Presenter, "Three Wrong Turns in Agency Adjudication," George Mason Law Review Symposium, Arlington, Virginia, June 2021.

Presenter, "Narrowing Chevron's Domain," Duke Law Journal Symposium, On-Line, January 2021.

Moderator, "The Future of Deference in the U.S. Supreme Court," 2020 American Bar Association Section of Administrative Law and Regulatory Practice's Annual Administrative Law Conference, On-Line, November 2020.

Presenter, "Discussion on Deference," U.S. Department of Labor Benefits Review Board, On-Line Staff Discussion, Washington, D.C., July 2020.

Presenter, "Sticky Regulations and Net Neutrality Internet Freedom," Hastings Law Journal Symposium, San Francisco, California, February 2020.

Presenter, "A Primer on FTC Rulemaking: Non-Compete Clauses in the Workplace," Federal Trade Commission Workshop on Non-Compete Clauses, Washington, D.C. January 2020.

Presenter, "Thoughts on Modernizing the Administrative Procedure Act," U.S. Department of Justice, Summit on Modernizing the Administrative Procedure Act, Washington, D.C., December 2019.

Moderator, "Reconsidering the Qualified Immunity Defense," 2019 American Bar Association Section of Administrative Law and Regulatory Practice's Annual Administrative Law Conference, Washington, D.C., November 2019.

Moderator, "How Administrative Law Differs Across the U.S. Courts of Appeals: Perspectives from Circuit Court Judges," 2019 American Bar Association Section of Administrative Law and Regulatory Practice's Annual Administrative Law Conference, Washington, D.C., November 2019.

Moderator, "Regulatory Budgeting: Historical Insights and Current Practice," 2019 American Bar Association Section of Administrative Law and Regulatory Practice's Annual Administrative Law Conference, Washington, D.C., November 2019.

Presenter, "Deconstructing the Administrative State: A Conservative Vision," American Academy of Arts & Sciences Roundtable on Future of the Administrative Law, Cambridge, Massachusetts, June 2019.

Presenter, "Lessons From the D.C. Circuit," Yale Journal on Regulation Conference on Administrative Law, New Haven, Connecticut, March 2019.

Presenter, "Policing Prosecutors: Lessons From Administrative Law?," Dickinson Law Review Symposium, Carlisle, Pennsylvania, March 2019.

Presenter, "Beyond Seminole Rock," Georgetown Law School, Federalist Society Presentation, Washington, D.C., February 2019.

Presenter, "Kisor v. Wilkie: A Supreme Court Case Challenge to Auer and Seminole Rock Deference," American Bar Association Section of Administrative Law and Regulatory Practice, National Teleforum, January 2019.

Presenter, "The Upside of Ossification," University of Chicago Law School, Federalist Society Presentation, Chicago, Illinois, January 2019.

Presenter, "Improving Regulation for Businesses: The Need, the Means, and the Challenges," 2018 American Bar Association Section of Administrative Law and Regulatory Practice's Annual Administrative Law Conference, Washington, D.C., November 2018.

Moderator, "Oyez, Oyez: Tips From the Bench on How to Effectively Litigate Administrative Law Cases," 2018 American Bar Association Section of Administrative Law and Regulatory Practice's Annual Administrative Law Conference, Washington, D.C., November 2018.

Presenter, "The Past and Future of Administrative Law?," Augusta Federalist Society, August, Georgia, November 2018.

Presenter, "Regulation In The Courts: Previewing The Year Ahead In The Supreme Court And Circuits," Hoover Institution, Washington, D.C., September 2018.

Moderator, "Public Rights and Private Rights After Oil States," George Mason Law Review Symposium, Arlington, Virginia, September 2018.

Presenter, "Chevron and the Administrative State," discussion with Professor Gillian Metzger, Annual National Association of Attorneys General's State Solicitors General and Appellate Chiefs Conference, Portland, Oregon, June 2018.

Presenter, "Pearson Discretion," panel on "Trends in Qualified Immunity Post Pearson v. Callahan," Federal Bar Association, U.S. District Court for the District of Utah, Salt Lake City, Utah, March 2018.

Presenter, "The Paradox of Discretionary Competition Law," 2018 Annual Scientific Seminar on the Economics, Law and Policy of Communications and Media, The Robert Schuman Centre for Advanced Studies, European University Institute, Florence, Italy, March 2018.

Presenter, "Nonenforcement and the Danger of Leveraging," 2018 Symposium on Regulatory Compliance, Loyola Chicago Center for Compliance Studies, Loyola University Chicago School of Law, Chicago, Illinois, February 2018.

Presenter, "How Agencies Choose Whether to Enforce the Law," 2017 Center for the Study of the Administrative State's Public Policy Conference on Administrative Law Beyond Deference, George Mason University School of Law, Arlington, Virginia, December 2017.

Presenter, "Visualizing Change in Administrative Law," 2017 Center for the Study of the Administrative State's Public Policy Conference on Administrative Law Beyond Deference, George Mason University School of Law, Arlington, Virginia, December 2017.

Presenter, "How Agencies Choose Whether to Enforce the Law," Notre Dame Law Review Symposium, Notre Dame Law School, South Bend, Indiana, November 2017.

Moderator, "The ACA and Appropriations: Does the Administration Have the Authority?," Federalist Society, National Teleforum, November 2017.

Presenter, "Optimal Ossification," 2017 American Bar Association Section of Administrative Law and Regulatory Practice's Annual Administrative Law Conference, Washington, D.C., October 2017.

Moderator, "Now What? Academic Thoughts on Judicial Remedies in Administrative Law," 2017 American Bar Association Section of Administrative Law and Regulatory Practice's Annual Administrative Law Conference, Washington, D.C., October 2017.

Presenter, "The Year Ahead In The Supreme Court And Circuits," Hoover Institution, Washington, D.C., September 25, 2018.

Moderator, "Revisiting Yesterday's Rules," American Bar Association Section of Administrative Law and Regulatory Practice, National Teleforum, September 2017.

Presenter, "Visualizing Change in Administrative Law," Government and Administrative Law Conference, Utah Bar Association, Salt Lake City, Utah, May 2017.

Moderator, "Retrospective Review, Really," 2017 American Bar Association Section of Administrative Law and Regulatory Practice's Annual Administrative Law Practice Institute, Washington, D.C., May 2017.

Presenter, "Sticky Regulations," 2017 Center for the Study of the Administrative State's Public Policy Conference on Administrative Due Process, George Mason University School of Law, Arlington, Virginia, April 2017.

Presenter, "The Past and Future of Deference: From Justice Scalia to Justice Gorsuch," University of Chicago Law School, Federalist Society Presentation, April 26, 2017.

Moderator, "Rulemaking in the Trump Administration," American Bar Association Section of Administrative Law and Regulatory Practice, National Teleforum, February 2017.

Presenter, "Sticky Regulations," 2017 J. Reuben Clark Law Society, San Francisco, California, January 2017.

Presenter, "Chevron Step One-and-a-Half," 2017 Federalist Society Faculty Conference: New Scholars Program, San Francisco, California, January 2017.

Presenter, "Beyond *Seminole Rock*," 2016 American Bar Association Section of Administrative Law and Regulatory Practice's Annual Administrative Law Conference, Washington, D.C., December 2016.

Presenter, "Justice Scalia and *Seminole Rock* Deference," 2016 Annual Texas Federalist Society Conference, Austin, Texas, September 2016.

Presenter, "The Past and Future of Administrative Law," 2016 Annual National Administrative Law Judge Conference, Salt Lake City, Utah, September 2016.

Presenter, "Chevron Step One-and-a-Half," Works in Progress Series, Moritz College of Law, The Ohio State University, Columbus, Ohio, August 2016.

Presenter, "Beyond *Seminole Rock*," First Annual Administrative Law Junior Scholars Panel, Michigan State University College of Law, East Lansing, Michigan, June 2016.

Presenter, "Beyond *Seminole Rock*," 2016 Center for the Study of the Administrative State's Public Policy Conference on Rethinking Judicial Deference: History, Structure, and Accountability, George Mason University School of Law, Arlington, Virginia, June 2016.

Moderator, "New Life for the Congressional Review Act?," American Bar Association Section of Administrative Law and Regulatory Practice, National Teleforum, May 2016.

Presenter, "Strategic Immunity," 2016 Association of American Law Schools Annual Meeting: New Voices Program, New York City, New York, January 2016.

Presenter, "Strategic Immunity," 2016 J. Reuben Clark Law Society, New York City, New York, January 2016.

Moderator, "The Real OIRA: Understanding the White House's Office of Information and Regulatory Affairs," American Bar Association Section of Administrative Law and Regulatory Practice, National Teleforum, November 2015.

Presenter, "In Defense of Formal Rulemaking," 2015 American Bar Association Section of Administrative Law and Regulatory Practice's Annual Administrative Law Conference, Washington, D.C., October 2015.

Presenter, "Strategic Immunity," 2015 Rocky Mountain Junior Scholars Forum, BYU Law School, Provo, Utah, September 2015.

Presenter, "The New Qualified Immunity," 2015 Federalist Society Faculty Conference: Work In Progress Series, Washington, D.C., January 2015.

Presenter, "The Rise and Inevitable Fall of the Federal Law Clerk Hiring Plan," 2014 Annual Utah Appellate Court Retreat, Park City, Utah, May 2014

Presenter, "The Past and Future of Administrative Law," 2014 Annual Utah Administrative Law Judge Conference, Salt Lake City, Utah, May 2014.

Discussant, Conference on Administrative Discretion, George Mason University School of Law, Arlington, Virginia, May 2014.

Presenter, "Future of Law Clerk Hiring," Marquette Law Review Symposium: Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks, Marquette University Law School, Milwaukee, Wisconsin, April 2014.

Presenter, "The New Qualified Immunity," Junior Scholars Retreat, University of Utah and Brigham Young University School, Draper, Utah, April 2014.

Presenter, "In Defense of Formal Rulemaking," 2014 Association of American Law Schools Annual Meeting: New Voices Program, New York City, New York, January 2014.

Presenter, "In Defense of Formal Rulemaking," 2014 Federalist Society Faculty Conference: New Scholars Program, New York City, New York, January 2014.

Presenter, "Visualizing Change in Administrative Law," 2013 Rocky Mountain Junior Scholars Forum, BYU Law School, Provo, Utah, November 2013.

Presenter, "In Defense of Formal Rulemaking," Junior Scholars Workshop, University of Iowa College of Law, Iowa City, Iowa, August 2013.

Other Experience

Executive Committee, Administrative Law Practice Group, The Federalist Society, 2018–2021

Co-Chair, Rulemaking Committee, American Bar Association's Section of Administrative Law & Regulatory Practice, Washington, D.C., 2015 to 2020

Of Counsel, Kirkland & Ellis, LLP, Washington, D.C., 2013 to 2014

Partner and Associate, Kirkland & Ellis, LLP, Washington, D.C., 2007, 2009 to 2012 (partner in 2012)

Chair, Antitrust & Trade Regulation Committee, American Bar Association's Section of Administrative Law & Regulatory Practice, Washington, D.C., 2013 to 2015

Member, Department & Agency Review, Romney/Ryan Transition Team, Washington, D.C., 2012

Visiting Attorney, The Church of Jesus Christ of Latter-day Saints, General Counsel, Fall 2009

Intern, U.S. Attorney's Office for the District of Arizona, Summer 2006

Intern, U.S. Senate Judiciary Committee, Washington, D.C., Summer 2006

Intern, U.S. Department of Justice, Office of Legal Policy, Washington, D.C., Winter 2005

Summer Associate, Kirkland & Ellis, LLP, Washington, D.C., Summer 2005

Intern, Office of Counsel to the President, Washington, D.C., Summer 2005

Intern, Federal Trade Commission, Office of Policy Planning, Washington, D.C., Summer 2004

Special Assistant, The Better Business Bureau of Central, Northern & Western Arizona, Phoenix, AZ Summer 2003; Summer 2002 (intern)

Representative Litigation Experience

Collins v. Yellen, 141 S. Ct. 1761 (2021): appointed by the U.S. Supreme Court to brief and argue in defense of the constitutionality of the Federal Housing Finance Agency Director's "for cause" tenure protection

United States v. Harra, 985 F.3d 196 (3d Cir. 2021): co-author of white collar brief that led to reversal of criminal convictions for executives convicted of securities fraud

BP Exploration & Prod., Inc. v. Claimant ID 100246928, 775 F. App'x 144 (5th Cir. 2019): principal author of brief defending denial of multi-million award sought by a professional football franchise

In re Rembrandt Techs. LP Patent Litig., 899 F.3d 1254 (Fed Cir. 2018): part of team that successfully defended a notable "exceptional case" determination in patent litigation

UBS Securities LLC v. Highland Capital Management, No. 650097/09 (N.Y. 1st App. Div., Mar. 27, 2018): obtained decision granting rehearing and revising decision in complex securities case

Claimant ID 100236236 v. BP Exploration & Prod., Inc., 699 F. App'x 308 (5th Cir. 2017): successfully argued in defense of the district court's denial of a Deepwater Horizon business economic loss claim

Horne v. Dep't of Agriculture, 133 S. Ct. 2053 (2013): part of team that obtained unanimous decision allowing raisin farmers to challenge the constitutionality of a federal marketing order

PLIVA, Inc. v. Mensing, 131 S. Ct. 2567 (2011): part of team that obtained decision holding that the Hatch-Waxman Act preempts state-law tort claims targeting generic pharmaceutical products

Dow AgroSciences LLC v. National Marine Fisheries Serv., 707 F.3d 462 (4th Cir. 2013): part of team that secured decision vacating an agency's Biological Opinion as arbitrary and capricious

Eatoni Ergonomics, Inc. v. Research In Motion Corp., 826 F. Supp. 2d 705 (S.D.N.Y. 2011), aff'd 486 F. App'x 186 (2d Cir. 2012): part of team that obtained decision dismissing alleged monopolization

Dow AgroSciences LLC v. National Marine Fisheries Serv., 637 F.3d 259 (4th Cir. 2011): part of team that obtained reversal of district court decision refusing to exercise jurisdiction

Apotex, Inc. v. Sebelius, 384 F. App'x 4 (D.C. Cir. 2010), cert. denied (Jan. 18, 2011): part of team that intervened and defended 180-day marketing exclusivity under the Hatch-Waxman Act

Teva Pharms. USA, Inc. v. Sebelius, 595 F.3d 1303 (D.C. Cir. 2010): part of team that obtained preenforcement review and secured injunctive relief precluding FDA from denying 180-day exclusivity

Miscellaneous

Member of the bars of Utah, the District of Columbia, Arizona (inactive), the U.S. Supreme Court, and the U.S. Court of Appeals for the Third, Fourth, Fifth, Sixth, Ninth, Eleventh, D.C., and Federal Circuits, and U.S. District Courts for Utah and the District of Columbia

Member of A. Sherman Christensen American Inn of Court (Utah)

Joseph Story Award, Federalist Society (2021)

Brigham Young University Law Alumni Association Teacher of the Year (2019)

Volunteer of the Year, American Bar Association's Section of Administrative Law (2019) Brigham Young University Young Scholar Award (2017) Security Clearance with FBI Background Check (2008)