

For the Record

Getting Around the Trump Guidance EOs

In their Spring 2020 article “Regulatory Agencies Get Guidance on ‘Guidance,’” John Cohrssen and Henry Miller discuss two Trump administration executive orders (EOs) intended to prevent the imposition of new requirements by agency “guidance” documents. The authors rightly mention reasons for skepticism that the EOs will solve the problem.

I would add another reason: So long as courts defer to merely “reasonable” agency interpretations under *Chevron* (as to statutes) and *Auer* (as to regulations), the EOs will not solve the problem. Their chief effect will be to drive interpretations underground. Instead of jumping through the EOs’ hoops, agencies will bring prosecutions based on interpretations that first appear in court briefs. And because EOs are not enforceable in court, judges will continue to defer under *Chevron* and *Auer*.

The EOs also lack teeth. For example, one bars agencies from treating a violation of a standard of conduct “announced solely in a guidance document as itself a violation of applicable statutes or regulations.” But no agency will ever think that its guidance document violates that prohibition. All will indulge themselves in the thought that the announced standard of conduct was always to be found somewhere in the statute or regulation being interpreted. That is, after all, what agencies have been doing all along. The source of the problem is judicial deference.

The Trump administration lost an opportunity to fix the problem at its source during the recent *Kisor* litigation in which the Supreme Court considered and by one vote rejected an argument that *Auer* should be overruled. The solicitor general should instead have been instructed to acquiesce in the argument that *Auer* (and implicitly *Chevron*) should be overruled. That might have turned the tide.

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BRIEFLY NOTED



A funeral home worker backs up a hearse to a makeshift morgue trailer outside of Wyckoff Heights Medical Center in Brooklyn.

Sticky Funeral Prices and Rigid Regulations in the COVID-19 Crisis

◆ BY DAVID E. HARRINGTON

Thousands of Brooklynites have lost their lives to COVID-19. Last spring, at the height of the tragedy in New York City, relatives of the deceased were frantically scrambling to find a funeral director to handle arrangements for their loved one. Time was ticking. Hospitals wanted bodies collected as soon as possible. The city’s medical examiner posted online that any bodies left unclaimed for two weeks would be buried on Hart Island, New York City’s potter’s field.

Early on, Brooklynites were calling Amy Cunningham, owner of Fitting Tribute Funeral Services, to ask about prices. Soon, they were only asking whether she would handle their case. Desperate to find help, some Brooklynites called John Quevedo, a funeral director in Yonkers, in the city’s northern suburbs. As he talked to them, he often wondered how many

funeral homes had turned them down, forcing them to look outside the city. Given that there are 256 funeral homes in New York City, there must have been a lot of fruitless phone calls.

The shortage of funeral directors wasn’t surprising. The number of deaths in New York City during the COVID-19 spike was six times higher than normal. What’s more, the spike increased the cost of providing direct cremations. Funeral directors tell harrowing stories of retrieving COVID-19 victims’ bodies from cluttered apartments and disorganized hospital trailers. Soon, funeral directors were turning to outside

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