# Developments in Administrative Law and Regulatory Practice 2015


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# Additional Chapters

The 2015 *Developments* eBook version includes both the four core Administrative Process Committees chapters contained here as well as three additional chapters devoted to substantive areas of practice and listed below. The eBook is available for download from the ABA's website, *http://www.americanbar.org/groups/administrative_law/publications.html*.

1. Education
2. Government Information and Privacy
3. Intergovernmental Relations

# Editor's Foreword

This is the seventeenth edition of *Developments*, an annual publication intended to assist administrative lawyers in staying abreast of developments in the field—in cross-cutting areas of Administrative Law and in related areas of specialization that might bear on their own practice areas. Chapters in *Developments* are written by experts in the field, who are members of the Section of Administrative Law and Regulatory Practice (Section), and in most cases, Committee chairs and vice-chairs in their areas of expertise. While some chapters are team efforts and others the product of a single individual, they are all authoritative.

Like in years past, we are publishing a paperback covering the four main cross-cutting chapters: *Adjudication*, *Constitutional Law and Separation of Powers*, *Judicial Review*, and *Rulemaking*. These are the four topics covered at our Section's popular fall Administrative Law Conference program on *Developments in Administrative Law*.

Section members can download this volume for free and order hard copies for a nominal price from the links on the Section's website, *http://www.americanbar.org/groups/administrative_law/publications.html*. An eBook containing all of the chapters is also available from that website. Finally, one can also download specific *Developments* chapters by visiting *http://www.americanbar.org/groups/administrative_law/publications/Developments2012.html*. These member benefits, along with the *Administrative Law Review*—produced by students at American University, Washington College of Law—and the *Administrative & Regulatory Law News*, make the Section dues a real bargain. I also note that past editions of the *Developments* series are available (in full text) from HeinOnline's subscription service.

This edition covers the 2015 calendar year. My role as *Developments* editor is simply to review the submissions, put them into a consistent format, edit where necessary, and supply some footnotes. The real heavy lifting was done by the chapter authors, each of whom is identified in the first footnote of each chapter. My personal acknowledgments, including to this year's *Developments* intern, follow this foreword.

The list of *Developments* chapters is included here and is also on the Section website. Below I offer some of the highlights of the four cross-cutting Administrative Process Committees chapters and the cases discussed

therein. Where there is overlap among these four chapters, I have indicated such here as well as in the respective chapters.

## CHAPTER 1: ADJUDICATION

In the *Adjudication* chapter, Professor Christopher J. Walker and Executive Director of the Administrative Conference of the United States (ACUS) Matthew Lee Wiener team up to provide an extensive review of administrative adjudication cases and developments in 2015.

The authors first discuss noteworthy judicial developments in administrative adjudication. This discussion includes *B&B Hardware v. Hargis Industries*,[1] a case in which the U.S. Supreme Court addressed when and how the doctrine of collateral estoppel (or issue preclusion) applies to federal agency adjudications. The petitioner (B&B Hardware) protested Hagris Industries' attempt to register a trademark to the Trademark Trial and Appeal Board (TTAB); the TTAB ruled the trademark could not be registered due to likely confusion with the petitioner's already registered trademark.[2] In a separate trademark *infringement* suit brought under the Lanham Act in federal court, the Court found nothing in that Act to overcome the presumption "that Congress has legislated with the expectation that [issue preclusion] will apply except when a statutory purpose to the contrary is evident."[3] While the Court held that issue preclusion applied to the case at hand, the authors explain in their discussion why "the Court's holding was not a blanket acceptance that all TTAB registration decisions will lead to issue preclusion."[4] The authors also discuss the D.C. Circuit's 2015 *Pierce v. SEC*[5] decision, focused on the doctrine of res judicata (claim preclusion) in the administrative context.

The authors, like in the *Judicial Review* chapter described below, touch on adjudication and equitable tolling through their discussion of the 2015 decision *United States v. Kwai Fun Wong*,[6] which discussed whether Federal Torts Claims Act (FTCA) claim time limits were jurisdictional or could be

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1. 135 S. Ct. 1293 (2015).
2. *See id.* at 1299.
3. *See id.* at 1303 (quoting Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991)).
4. *Adjudication*, *infra* at 5.
5. 786 F.3d 1027 (D.C. Cir. 2015), *cert. pet'n filed*, No. 15-901 (U.S. Jan. 18, 2016).
6. 135 S. Ct. 1625 (2015).

equitably tolled.[7] The Court held that equitable tolling applied to such claims due to a "rebuttable presumption that statutory time bars may be equitably tolled and to defeat that presumption Congress must 'provide a clear statement' otherwise."[8] The authors turn next to the topic of final agency action with the Eleventh Circuit decision *LabMD, Inc. v. FTC*,[9] where the court held that the Federal Trade Commission's (FTC's) denial of a motion to dismiss an administrative complaint did not constitute final agency action, and therefore, was not reviewable under the Administrative Procedure Act (APA).[10]

For scope of remedies in agency adjudication, the authors examine *POM Wonderful, LLC v. FTC*,[11] an amusing case from the D.C. Circuit worth highlighting here. POM had spent millions of dollars researching the health benefits of pomegranate juice and then advertised its products as having certain health benefits.[12] The FTC found POM liable for violating the Federal Trade Commission Act due to "misleading and inadequately supported claims about the health benefits of POM products,"[13] and barred POM from making such claims "without providing at least two randomized, controlled human clinical trials."[14] While the court agreed with the FTC's finding of a violation, it held that the agency failed to meet its burden—under the *Central Hudson* test for commercial speech restrictions[15]—of demonstrating a "'reasonable fit' between the governmental interest and the restriction or requirements imposed [(i.e., two randomized clinical trials)]."[16] The court, therefore, modified the FTC's injunctive order.[17]

Other notable judicial developments the authors discuss thoroughly relate to the decisional independence and constitutional status of Administrative Law Judges (ALJs). As to decisional independence, the authors describe the Social Security Administration's (SSA's) annual case-volume goal requiring an ALJ to manage his or her "docket in such a way that they will be

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7. *See id.* at 1627.
8. *Id.* at 1633 (citing Irwin v. Dep't of Veteran Affairs, 498 U.S. 89, 95 (1990)).
9. 776 F.3d 1275 (11th Cir. 2015).
10. *See id.* at 1279.
11. 777 F.3d 478 (D.C. Cir. 2015).
12. *See id.* at 484.
13. *Id.*
14. *See id.* at 489.
15. *See id.* at 501 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980)).
16. *Id.* at 502.
17. *Id.* at 505.

able to issue 500–700 legally sufficient [disability benefits] decisions each year."[18] The authors discuss the Seventh Circuit's decision in *Ass'n of Administrative Law Judges v. Colvin*, where the court held that such quota did not interfere with the ALJs' decisional independence because the quota was imposed to quicken decisionmaking, not to induce ALJs into granting more disability benefit applications.[19] As to the constitutional status of ALJs, the authors discuss at length the challenges to and continued concerns about the U.S. Securities and Exchange Commission's (SEC's) ALJs,[20] also discussed in the *Constitutional Law and Separation of Powers* and *Judicial Review* chapters described below.

The authors then discuss developments in immigration adjudication, citing three Supreme Court decisions in 2015. The authors review each of the cases, which are also discussed in either the *Judicial Review* or *Constitutional Law and Separation of Powers* chapters previewed below, including: *Mata v. Lynch*[21] (addressing "whether the court of appeals' jurisdiction to review a decision by the [Board of Immigration Appeals (BIA)] . . . admits of an exception when the '[BIA] denies a motion to reopen because it is untimely'"[22]); *Mellouli v. Lynch*[23] (addressing "whether an immigrant should be deported for a conviction under state law of possession of drug paraphernalia, when the state failed to show the relation to a controlled federal substance"[24]); and *Kerry v. Din*[25] (avoiding the decision of "whether there is a constitutional marriage right at stake when a spouse's visa is denied, but [finding] that the denial was justified for national security reasons"[26]).

Next, the authors address 2015 developments in adjudication before administrative agencies. First, they describe further the constitutional objections to SEC administrative proceedings alluded to above.[27] "By statute, the SEC may enforce most of the securities laws subject to civil enforcement either by bringing suit in a federal district court or by initiating administrative enforcement proceedings (which are presided over, at the hearing stage,

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18. Ass'n of Admin. Law Judges v. Colvin, 777 F.3d 402, 403 (7th Cir. 2015).
19. *See id.* at 404–05.
20. *Adjudication*, *infra* at 12–14.
21. 135 S. Ct. 2150 (2015).
22. *See Adjudication*, *infra* at 17–18 (quoting *Mata*, 135 S. Ct. at 2155).
23. 135 S. Ct. 1980 (2015).
24. *See Adjudication*, *infra* at 18 (discussing *Mellouli*, 135 S. Ct. at 1985–86).
25. 135 S. Ct. 2128 (2015).
26. *See Adjudication*, *infra* at 19 (discussing *Din*, 135 S. Ct. at 2131).
27. *Adjudication*, *infra* at 20–23.

by the SEC's own ALJs)."[28] Following enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the remedies available in both proceedings are basically the same.[29] The authors provide an overview of the numerous federal-court suits challenging the constitutionality of the SEC's proceedings, as well as some SEC administrative decisions.[30] The authors turn next to the decisional independence of ALJs through discussion of *SSA v. Butler*,[31] a pending Merit Systems Protection Board case challenging the SSA's alleged interference with decisional independence through its suspension of an ALJ, as the authors detail, "in part based on his refusal to comply with a specific directive that he follow the SSA's interpretation of the provision."[32] The authors also discuss a 2015 National Labor Relations Board decision that found that receiving testimonial evidence in a video hearing did not infringe on a litigant's due process rights.[33]

Finally, the authors discuss ACUS recommendations from 2015, including one identifying "contexts in which agencies should consider the use of declaratory orders in [both formal and informal] administrative adjudications,"[34] two pending adjudication-related projects at ACUS that are expected to result in adopted recommendations in 2016, and two other such projects that are pending currently and will yield reports.[35]

## CHAPTER 2: CONSTITUTIONAL LAW AND SEPARATION OF POWERS

Professor Bill Funk's *Constitutional Law and Separation of Powers* chapter reviews the major constitutional law cases from the 2014 Term of the Supreme Court and previewed the pending ones in the 2015 Term. He begins

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28. *Adjudication*, *infra* at 20.
29. *See* H.R. Rep. No. 111-687, at 78 (2010). *See also* Jarkesy v. SEC, 803 F.3d 9, 12 (D.C. Cir. 2015).
30. *See Adjudication*, *infra* at 20–23.
31. No. CB-7521-14-0014-T-1, 2015 MSPB LEXIS 7906 (M.S.P.B. Sept. 16, 2015).
32. *Adjudication*, *infra* at 24.
33. *See Adjudication*, *infra* at 25–26 (discussing E.F. Int'l Language Sch., Inc., 363 N.L.R.B. No. 20 (2015), *available at* https://www.nlrb.gov/case/20-CA-120999).
34. Admin. Conf. of the U.S., Recommendation 2015-3, 80 Fed. Reg. 78161, 78163 (Dec. 16, 2015), https://www.gpo.gov/fdsys/pkg/FR-2015-12-16/html/2015-31575.htm.
35. *See Adjudication*, *infra* at 26–29.

with the Non-Delegation Doctrine. In *Department of Transportation v. Ass'n of American Railroads*,[36] the Supreme Court reversed unanimously a D.C. Circuit decision, determining that Amtrak was a government (rather than private) entity and thus vacating the lower court's finding that the Passenger Rail Investment and Improvement Act of 2008 had effected an unconstitutional delegation of regulatory authority to a private entity.[37] The Court remanded to the D.C. Circuit the remaining constitutional claims for consideration, including Appointments Clause, Non-Delegation Doctrine, and Due Process Clause challenges.[38]

The next case Professor Funk discusses is *Zivotofsky v. Kerry*,[39] a separation of powers decision. The U.S. State Department had refused to grant the challenger's request to have his passport list "Jerusalem, Israel" as his birthplace (instead of "Jerusalem" only) based on instructions in the State Department Foreign Affairs Manual that reflect the President's neutrality with respect to Jerusalem being part of Israel.[40] The Court held that despite Congress' "substantial powers" over passports, it cannot command through law the State Department to list "Jerusalem, Israel" in a U.S. citizen born in Jerusalem's passport due to the President's exclusive power over recognition determinations of foreign nations.[41] Professor Funk also discusses the two dissents—one written by Chief Justice Roberts and one written by Justice Scalia—and Justice Thomas' separate opinion (concurring in part and dissenting in part), demonstrating how close the Court's decision truly was.[42]

Professor Funk discusses due process in the Court's *Kerry v. Din*[43] decision, also discussed in the *Adjudication* chapter described above. The Court vacated the Ninth Circuit's finding that Din's liberty interest in her marriage was deprived without due process when her husband's visa was denied without sufficient explanation of his engagement in terrorist activities.[44] Professor Funk discusses a reason this case was so interesting: because there was no majority opinion—Justice Scalia (joined by Chief Justice Roberts and Justice Thomas) authored the judgment; Justice Kennedy (joined by Justice Alito) concurred in the judgment for other reasons; and Justice Breyer (joined by

36. 135 S. Ct. 1225 (2015).
37. *See id.* at 1233–34.
38. *See id.* at 1234.
39. 135 S. Ct. 2076 (2015).
40. *See id.* at 2083.
41. *See id.* at 2096.
42. *See Constitutional Law and Separation of Powers*, *infra* at 38–39.
43. 135 S. Ct. 2128 (2015).
44. *See id.* at 2138.

Justices Ginsburg, Kagan, and Sotomayor) dissented—the decision's precedential effect is unknown.[45]

In the *Judicial Review* chapter described below, there is discussion of the Supreme Court's *Arizona Legislature v. Arizona Independent Redistricting Commission*[46] decision on the issue of whether the state legislature had standing to bring its challenge. In the *Constitutional Law and Separation of Powers* chapter, Professor Funk also discusses in detail *Arizona Legislature*, but concentrates on the issue of whether a ballot initiative amending the Arizona Constitution to place the legislature's redistricting authority in an independent commission violated the Elections Clause.[47] Professor Funk describes the Court's precedent indicating how "legislature" can mean different things in different places throughout the Constitution.[48] In *Arizona Legislature*, the Court found that the term "legislature" in the Elections Clause can include any method a state has for adopting legislation, and thus, the redistricting ballot initiative constituted a manner of passing legislation in Arizona. The Court, therefore, rejected the Arizona Legislature's challenge.[49]

Professor Funk discusses *Horne v. Department of Agriculture*,[50] another interesting case worth highlighting here. In *Horne*, the Court reversed the Ninth Circuit's decision, holding that U.S. Department of Agriculture (USDA) "marketing orders"—pursuant to the Agricultural Marketing Agreement Act of 1937—requiring a certain percentage of particular agricultural crops to be given the federal government to keep it out of the competitive market and to maintain stable markets violated the Takings Clause.[51] The Hornes—raisin handlers—refused to comply with a USDA marketing order and were fined. The Court found, among other things, that the Takings Clause protects real and personal property, the marketing order constituted a physical, not just regulatory, taking, and for compensation, the Hornes should be relieved of paying the fine.[52]

In his chapter, Professor Funk also discusses a series of Supreme Court decisions involving the First Amendment. The first, *Walker v. Sons of Confederate Veterans*,[53] concerned whether Texas' denial of the Sons of Confed-

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45. *See Constitutional Law and Separation of Powers*, *infra* at 41.
46. 135 S. Ct. 2652 (2015).
47. *Constitutional Law and Separation of Powers*, *infra* at 42–43.
48. *See Constitutional Law and Separation of Powers*, *infra* at 43.
49. *See Arizona Legislature*, 135 S. Ct. at 2676.
50. 135 S. Ct. 2419 (2015).
51. *See id.* at 2424.
52. *Id.* at 2433.
53. 135 S. Ct. 2239 (2015).

erate Veterans' proposed design (including a Confederate flag) for a state specialty license plate program violated the Free Speech Clause of the First Amendment. The Court found no such violation because Texas license plates constituted government, not private, speech. The second, *Williams-Yulee v. Florida Bar*,[54] concerned whether Florida's judicial conduct rule prohibiting judicial candidates in elections from soliciting campaign funds personally violated the Free Speech Clause. The Court found, when applying strict scrutiny, no such violation because "[s]tates have a compelling interest in preserving public confidence in their judiciaries" and Florida's restriction limiting speech was narrowly tailored.[55] The Court noted that a "[s]tate's decision to elect judges does not compel it to compromise public confidence in their integrity."[56]

As discussed in last year's *Constitutional Law and Separation of Powers* chapter, the Supreme Court in 2014 decided *Harris v. Quinn*,[57] "an exception to the general rule established in *Abood v. Detroit Board of Education*,[58] that the First Amendment did not bar requiring public employees from paying union dues that were used solely for the purposes of the union's core collective bargaining activities."[59] Professor Funk suggests that there was a chance to overrule *Abood* altogether in 2015 when the Court granted certiorari in *Friedrichs v. California Teachers Ass'n*,[60] involving a First Amendment free speech and association challenge—through the Fourteenth Amendment—to California's law requiring public school employees represented by a union under an exclusive bargaining agreement to join such union, or pay a fair share service fee related to collective bargaining activities. An equally divided Court affirmed the Ninth Circuit's judgment rejecting the fee system challenge.[61] Professor Funk explains:

> Given this discussion in *Harris* rejecting *Abood*'s reasoning, it would have been extraordinary for the Court not to overrule *Abood* in *Friedrichs*. However, the passing of Justice Scalia before the decision in the case deprived the *Harris* majority its fifth vote. As a

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54. 135 S. Ct. 1656 (2015).
55. *See id.* at 1673.
56. *Id.*
57. 134 S. Ct. 2618 (2014).
58. 431 U.S. 209 (1977).
59. *Constitutional Law and Separation of Powers*, *infra* at 49.
60. 135 S. Ct. 2933 (2015).
61. *See* Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016)

result, the Court affirmed by an equally divided court the lower court judgment rejecting the challenge to the union fee system. Thus, *Abood* lives to fight another day.[62]

Finally, Professor Funk turns to a string of lower court decisions, and any related Supreme Court precedent, on whether ALJs are unconstitutional under the Appointments Clause or Separation of Powers.[63] Professor Funk discusses in great detail the constitutionality of such appointments, which may depend on whether ALJs are characterized as principal or inferior officers, or mere employees—he describes how the "dividing line between officers and employees is not well established"[64]—and on what constitutes a "department" for purposes of the Appointments Clause.[65]

## CHAPTER 3: JUDICIAL REVIEW

This year, Professors Linda Jellum and Richard ("Chip") Murphy partner to provide an extensive discussion of scope-of-review and access-to-the-courts cases in their thorough *Judicial Review* chapter. Starting first with the scope-of-review section, Professor Jellum reports on a variety of cases involving different scope of review doctrines, including *Chevron*,[66] *Auer*,[67] and *Skidmore*[68] deference, and substantial evidence[69] and arbitrary and capricious[70] review.

Professor Jellum demonstrates a theme of retreat from *Chevron* deference in 2015 as she discusses three Supreme Court cases—*King v. Burwell*[71] (where the Court refused to apply *Chevron* analysis (or any deference period) to the U.S. Department of Treasury's interpretation of the Affordable Care Act because of the issue's importance, apparently too great for the agency to resolve); *Michigan v. EPA*[72] (where again the Court—"mashing up" *Chevron*'s two steps—refused to defer to the U.S. Environmental Protection Agency's

62. *Constitutional Law and Separation of Powers*, *infra* at 52 (footnote omitted).
63. *See Constitutional Law and Separation of Powers*, *infra* at 52–59.
64. *See Constitutional Law and Separation of Powers*, *infra* at 53.
65. *See Constitutional Law and Separation of Powers*, *infra* at 53.
66. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
67. *See* Auer v. Robbins, 519 U.S. 452 (1997).
68. Skidmore v. Swift & Co., 323 U.S. 134 (1944).
69. 5 U.S.C. § 706(2)(E) (2012).
70. *Id.* at § 706(2)(A).
71. 135 S. Ct. 2480 (2015).
72. 135 S. Ct. 2699 (2015).

(EPA's) interpretation both because Congress had spoken and the EPA's interpretation was unreasonable); and *Mellouli v. Lynch*[73] (where, as discussed in the *Adjudication* chapter as well, Justice Ginsburg, for the Court, refused to defer to the BIA's interpretation of a drug offense statute in its guidance because it made "scant sense" and thus interpreted the statute *de novo*[74]). This retreat extended to the D.C. Circuit, as Professor Jellum discusses a decision from December 2014, *Natural Resources Defense Council v. EPA*,[75] where that court vacated the EPA's rule revising its 2008 standards for air pollutants, as required by the Clean Air Act, due to the EPA's interpretation of attainment deadlines for such standards being "untethered to Congress's approach" and so failing at *Chevron* Step Two.[76]

In 2015, the theme of retreat carried over into *Skidmore* deference as Professor Jellum explains in her account of *Young v. UPS*.[77] The Court, applying *Skidmore* deference, refused to defer to the U.S. Equal Employment Opportunity Commission's (EEOC's) 2014 guidance document in which the EEOC took a position in an area where its earlier guidance was silent.[78] Professor Jellum then discusses *Perez v. Mortgage Bankers Ass'n*,[79] not as much for the Court's holding (invalidating the D.C. Circuit's decades-old *Paralyzed Veterans* doctrine, which required notice-and-comment before an agency issues "a new interpretation of a regulation that deviates significantly from one the agency has previously adopted"[80]), as for its "attack" on *Auer* deference in dicta with Justices Scalia, Thomas, and Alito writing separately "to dramatically undercut this doctrine," and two of them even suggesting abandonment altogether.[81]

With respect to applications of substantial evidence review, Professor Jellum discusses the Court's *T-Mobile South, LLC v. Roswell*[82] decision, where the Court examined both "when and how, under the substantial evidence standard, a local government must explain its decisionmaking."[83] Justice

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73. 135 S. Ct. 1980 (2015).
74. *Id.* at 1989.
75. 777 F.3d 456 (D.C. Cir. 2014).
76. *Id.* at 469
77. 135 S. Ct. 1338 (2015).
78. *Id.* at 1351–52.
79. 135 S. Ct. 1199 (2015).
80. *Id.* at 1203.
81. *See Judicial Review*, *infra* at 78 (discussing the dissents in *Mortgage Bankers*).
82. 135 S. Ct. 808 (2015).
83. *See Judicial Review*, *infra* at 79.

Sotomayor, for the Court, explained that the statute at hand required the local government to provide written reasons (for a reviewing court to be able to determine whether the denial is supported by substantial evidence) essentially contemporaneously with its denial (so the adversely affected party can decide whether to seek judicial review within the statutory timeframe).[84] For arbitrary and capricious review, she discusses *EnerNOC, Inc. v. Electric Power Supply Ass'n*,[85] where the Court has granted certiorari in a case involving the Federal Energy Regulatory Commission's rule that, according to challengers, infringes on states' exclusive authority under the Federal Power Act to regulate the electricity retail market.[86] Two issues are presented in *EnerNOC*, including one requiring *Chevron* analysis (whether the agency's interpretation of a statute permits it to regulate a certain market) and arbitrary and capricious review (whether the agency's rule was arbitrary and capricious by failing to consider a certain issue).

In access to the courts, Professor Murphy discusses 2015 decisions addressing various administrative law doctrines, including constitutional standing, causes of action, statute of limitations periods, reviewability, and finality. First, regarding standing, Professor Murphy discusses *Arizona Legislature*, also discussed in the *Constitutional Law and Separation of Powers* chapter and described above. The Court found that the Arizona legislature had Article III standing to pursue its challenge that an approved ballot initiative creating an independent commission to draw congressional districts prevented the legislature from "trump[ing] the force of [the] ballot initiative," therefore "depriv[ing] any legislative actions directed at congressional redistricting of all legal effect."[87] Because *Arizona Legislature* did not, however, address whether "Congress has standing to sue the President" in light of separation of powers concerns,[88] legislative standing continues to be an "unsettled area of law," as evidenced in Professor Murphy's discussion of the D.C. District Court's *U.S. House of Representatives v. Burwell*,[89] decided shortly after *Arizona Legislature*.

Professor Murphy then discusses two standing cases from federal courts of appeals about "whether state or local authorities had standing to contest the immigration policy directives" at issue.[90] In *Texas v. United States*, the Fifth

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84. *See T-Mobile South*, 135 S. Ct. at 814–18.
85. 753 F.3d 216 (D.C. Cir. 2014), *cert granted*, 135 S. Ct. 2049 (2015).
86. *See id.* at 220.
87. *Judicial Review*, *infra* at 89.
88. *Arizona Legislature*, 135 S. Ct. at 2665 n.12.
89. 130 F. Supp. 3d 53 (D.D.C. 2015).
90. *Judicial Review*, *infra* at 93–97.

Circuit found that Texas showed injury because implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) "would increase state expenditures on subsidies for driver's licenses";[91] the D.C. Circuit in *Arpaio v. Obama*,[92] however, found that the Maricopa County sheriff's claim that implementation of DAPA and the Deferred Action for Childhood Arrivals (DACA) would increase crime and related costs to be speculative and thus held the sheriff had no standing.

With regard to cause of action, Professor Murphy discusses *Armstrong v. Exceptional Child Center, Inc.*,[93] where the Supreme Court rejected Medicaid providers' suit against Idaho's Department of Health and Welfare for alleged violations of the Medicaid Act. The Court held that the Supremacy Clause does not create a private cause of action for challenging a state action on preemption grounds.[94] Professor Murphy discusses next the D.C. Circuit's continued strict approach in applying the zone-of-interests test for determining whether a plaintiff has a cause of action in *Gunpowder Riverkeeper v. FERC*,[95] a decision in tension with the Supreme Court's warnings as to the test's generosity to plaintiffs.

Professor Murphy discusses statutory time limitations, with the Supreme Court's effort "to draw a relatively clear line delineating which statutory time limits are 'jurisdictional' and which are mere 'claims-processing' rules,"[96] in the 2015 decision *Kwai Fun Wong*, mentioned above for its discussion in the *Adjudication* chapter. The Court found the FTCA "forever barred" limitation period is nonjurisdictional, subject to equitable tolling when appropriate. He then discusses reviewability, with the Court's *Mach Mining, LLC v. EEOC*[97] decision, in which the Court resolved a circuit split on the issue of "whether and to what extent . . . an attempt to conciliate is subject to judicial consideration,"[98] as well as *Mata v. Lynch*, in which the Court confirmed its holding in *Kucana v. Holder*[99] "that courts have jurisdiction to review the BIA's denials of motions to reopen."[100]

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91. *Judicial Review*, *infra* at 93.
92. 797 F.3d 11 (D.C. Cir. 2015), *cert. denied*, No. 15-643, 2016 WL 207283 (U.S. Jan. 19, 2016).
93. 135 S. Ct. 1378 (2015).
94. *See id.* at 1384
95. 807 F.3d 267 (D.C. Cir. 2015).
96. *Judicial Review*, *infra* at 103.
97. 135 S. Ct. 1645 (2015).
98. *Id.* at 1651.
99. 558 U.S. 233 (2010).
100. *Judicial Review*, *infra* at 107 (citing *Mata*, 135 S. Ct. at 2156).

Professor Murphy then analyzes the Seventh Circuit's *Bebo v. SEC*[101] and the D.C. Circuit's *Jarkesy v. SEC*,[102] two 2015 decisions finding that federal district courts lack subject matter jurisdiction to resolve constitutional challenges (e.g., equal protection, due process) to the SEC's authority under the Dodd-Frank Act to initiate enforcement actions in an internal agency proceeding before an SEC ALJ instead of federal district court.[103]

In his discussion, Professor Murphy then sets the stage for 2016 with discussion of the circuit split on whether the U.S. Army Corps of Engineers' issuance of a jurisdictional determination that certain land constitutes wetlands subject to Clean Water Act regulations constitutes final agency action. He does so through his discussion of the Eighth Circuit's *Hawkes Co. v. U.S. Army Corps of Engineers*[104] and the Fifth Circuit's *Belle Co. v. U.S. Army Corps of Engineers*.[105] The Supreme Court has granted certiorari in *Hawkes* to resolve this split.

Finally, Professor Murphy discusses two other D.C. Circuit decisions from 2015 related to finality: *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*[106] (finding that a Federal Aviation Administration notice to safety inspectors constituted "a statement of agency policy or an interpretive rule" (i.e., proper guidance, not a regulation) and was "therefore unreviewable"[107]) and *In re Murray Energy Corp.*[108] (striking down attempts to challenge the legality of the EPA's Clean Power Plan rule before it became a final rule).[109]

## CHAPTER 4: RULEMAKING

Professor Bill Jordan's extensive review of rulemaking developments in 2015 starts with a Fifth Circuit case on whether an agency has the authority to issue a rule. In *Contender Farms, LLP v. USDA*,[110] the USDA attempted to cite to its broad statutory language in the Horse Protection Act (HPA)—

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101. 799 F.3d 765 (7th Cir. 2015).
102. 803 F.3d 9 (D.C. Cir. 2015).
103. *See Judicial Review*, *infra* at 108–114.
104. 782 F.3d 994 (8th Cir. 2015), *cert. granted*, 136 S. Ct. 615 (2015).
105. 761 F.3d 383 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1548 (2015).
106. 785 F.3d 710 (D.C. Cir. 2015).
107. *Id.* at 717.
108. 788 F.3d 330 (D.C. Cir. 2015), *reh'g en banc denied*, 2015 U.S. App. LEXIS 17161 (D.C. Cir. Sept. 29, 2015).
109. *See generally id.*
110. 779 F.3d 258 (5th Cir. 2015).

granting rulemaking authority "necessary to carry out the provisions of this chapter"[111]—as providing the USDA with substantive enforcement-related authority, thus supplementing its rulemaking authority in the HPA that already captures the contested issues. The Fifth Circuit declined, finding that with no enforcement-related authority elsewhere in the HPA, the USDA's enforcement-related regulation was an attempt "to make amendments to statutory provisions."[112] Professor Jordan offers a "narrow lesson" from the decision that "the courts may look askance at agency efforts to use general rulemaking authority to supplement (and rationalize) regulatory schemes authorized under more specific statutory provisions."[113]

Like in the *Judicial Review* chapter described above, Professor Jordan discusses the Supreme Court's *Mortgage Bankers* decision, which he characterizes as a "stop to [the D.C. Circuit's] blatant violation of *Vermont Yankee*."[114] The lower court, since *Paralyzed Veterans of America v. D.C. Arena L.P.*,[115] required "agencies to go through notice and comment before issuing interpretive statements that differed substantially from previous interpretive statements,"[116] despite the APA's explicit exception for interpretive rules. The Court put an end to the lower court's doctrine and practice because, according to *Vermont Yankee*, the APA had "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures."[117]

Professor Jordan discusses three more 2015 decisions regarding exceptions to the APA's notice-and-comment requirement worth noting here. The first decision is *Community Health Systems, Inc. v. Burwell*,[118] in which the D.C. District Court offered "principles that help clear the air with respect to whether an informal agency statement qualifies as an 'interpretive rule.'"[119] The court found the U.S. Department of Health and Human Services' statement (i.e., manual) did not impose any new obligations, prohibitions, or bases for enforcement or liability than what the underlying regulation already contained, and because the regulation "compels or logically justifies"

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111. 15 U.S.C. § 1828 (2012).
112. *See Contender Farms*, 779 F. 3d at 273.
113. *See Rulemaking*, *infra* at 129.
114. *Rulemaking*, *infra* at 130.
115. 117 F.3d 579 (D.C. Cir. 1997).
116. *Rulemaking*, *infra* at 130.
117. *Mortg. Bankers*, 135 S. Ct. at 1207.
118. 113 F. Supp. 3d 197 (D.D.C. 2015).
119. *Rulemaking*, *infra* at 131.

the statement, the statement is an interpretive rule not subject to notice and comment. The second decision is *Texas v. United States*—also discussed in the *Judicial Review* chapter—where Texas and other states argued that a U.S. Department of Homeland Security (DHS) memorandum directing DHS personnel to establish the DAPA process—related to deferring possible deportation or removal actions for certain undocumented aliens—was a rule requiring notice and comment. The Fifth Circuit held that the guidance document was in fact a "rule" under the APA, not qualifying for an exception to notice-and-comment requirements. Professor Jordan describes how this decision "threatens the effective administration of agency policies."[120] The third decision is *EME Homer City Generation, L.P. v. EPA*,[121] for the proposition that judicial remand justifies revising a rule without notice and comment under the APA's "good cause" exception.

In his *Rulemaking* chapter, Professor Jordan also discusses *In re EPA*,[122] the Sixth Circuit's "politically charged" and "unusual" decision.[123] There, the court "issued a stay of the EPA-Army Corps of Engineers final rule clarifying the definition of 'waters of the United States'" in the Clean Water Act.[124] Several states sought a stay, arguing that the agencies violated the APA in their rulemaking process and that the rule effected "an expansion of respondent agencies' regulatory jurisdiction and dramatically alter[ed] the existing balance of federal-state collaboration."[125] Believing that the agencies' rule failed under the logical outgrowth test, the Sixth Circuit issued a nationwide stay pending resolution of the litigation (and notably without determining whether it even had subject-matter jurisdiction).[126]

Two more noteworthy decisions detailed in the *Rulemaking* chapter came out of D.C. federal courts in 2015. Professor Jordan discusses the D.C. District Court's *Delta Airlines, Inc. v. Export-Import Bank of the United States*[127] decision, which provides "authority for the proposition that an agency's response to a remand of a rule is itself part of the administrative record of the rule for the purpose of further judicial review."[128] He then discusses *Delaware*

120. *Rulemaking*, *infra* at 134–35.
121. 795 F.3d 118 (D.C. Cir. 2015).
122. 803 F.3d 804 (6th Cir. 2015).
123. *Rulemaking*, *infra* at 145–46.
124. *Rulemaking*, *infra* at 145.
125. *In re EPA*, 803 F.3d at 806.
126. *See id.* at 808–09.
127. 85 F. Supp. 3d 387 (D.D.C. 2015).
128. *Rulemaking*, *infra* at 136.

*Department of Natural Resources and Environmental Control v. EPA*,[129] in which the D.C. Circuit found the EPA's narrow response to comments in a final rule inadequate based on D.C. Circuit precedent requiring an agency to respond to comments "significant enough to step over a threshold requirement of materiality."[130]

Additional 2015 decisions on which Professor Jordan opines include three on whether the new regulations at issue were impermissibly retroactive: *Brandywine Explosives & Supply v. Director, Office of Workers' Compensation Programs*,[131] *Moffitt v. McDonald*,[132] and *Ass'n of Private Sector Colleges & Universities v. Duncan*.[133] He also discusses *Center for Biological Diversity, Defenders of Wildlife v. Kelly*,[134] in which the Idaho federal district court found a U.S. Fish and Wildlife Service rule to be invalid for violating the logical outgrowth doctrine with its "fundamental and dramatic" changes;[135] and *Oxfam America, Inc. v. SEC*,[136] in which the Massachusetts federal district court held that an agency is bound by a rule's statutory deadline despite a court's remand of the agency's first attempt to issue such rule.

Finally, Professor Jordan discusses the many rulemaking-related actions taken by the White House and ACUS in 2015, as well as the many legislative developments, which included proposals introduced in 2015 that would, for example, increase analytical and procedural requirements for the rulemaking process.[137]

## CONCLUSION

The four substantive chapters previewed above will certainly offer practitioners in Administrative Law, and even those with a mere interest in the area, an understanding of the developments in the field in 2015, as well as insight into where it may head in 2016. I would be remiss if I did not mention the additional 2015 *Developments* chapters also devoted to substantive areas

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129. 785 F.3d 1 (D.C. Cir. 2015).
130. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393–94 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).
131. 790 F.3d 657 (6th Cir. 2015).
132. 776 F.3d 1359 (Fed. Cir. 2015).
133. 110 F. Supp. 3d 176 (D.D.C. 2015).
134. 93 F. Supp. 3d 1193 (D. Idaho 2015).
135. *Id.* at 1205.
136. No. 14-13648-DJC, 2015 WL 5156554 (D. Mass. Sept. 2, 2015).
137. *See Rulemaking*, *infra* at 149–51.

of administrative law and regulatory practice and available in eBook version on the ABA's website. These include: a chapter on *Government Information and Privacy*, authored by Professor Bernard Bell, Chair of the Section's Committee on Government Information and Privacy; a chapter on *Education*, co-authored by Professor Caroline Newcombe and Will Creeley; and a chapter on *Intergovernmental Relations*, co-authored by Jeffrey Litwak and Kevin Misener. These thorough and engaging chapters provide excellent overviews of those important and interesting areas of regulatory law and all are absolutely worth downloading.

It is my hope that both the new and faithful readers of *Developments* enjoy this edition and the accompanying e-chapters!

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My editorship is made possible by the Section, which afforded me the opportunity to take on this important work. For their support and encouragement, I specifically extend my gratitude to our Section's Last Retiring Chair, Professor Anna Shavers; Chair of the Section's Publications Committee, Professor Bill Jordan; and Section Director, Anne Kiefer.

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Michael Tien serves as an Attorney-Advisor in the General Counsel's Office of Legislation at the U.S. Department of Transportation (USDOT) in Washington, D.C. He joined the USDOT as part of the prestigious Honors Attorney Program. In his current capacity, he oversees the development and clearance of Departmental testimony and policy statements on legislative and executive proposals, and advises policymakers on the technical components of statutory drafting. He has handled legislative matters related to the Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), Pipeline and Hazardous Materials Safety Administration (PHMSA), among other modal administrations. Most recently, he has been working with FHWA to develop and issue implementing guidance for FHWA's programs and other authorities under the Fixing America's Surface Transportation (FAST) Act.

Michael received his Juris Doctorate, *cum laude*, from Loyola University Chicago School of Law. At Loyola, he served as Student Bar Association President and Editor-at-Large of *Loyola University Chicago Law Journal*, and was a member of Loyola's Thomas Tang Moot Court Competition Team and National Moot Court Team. Additionally, he was the recipient of the Cooney & Conway Fellowship for his demonstrated interest and strengths in trial advocacy. He is a graduate of the University of Michigan, Ann Arbor, where he received his Bachelor of Arts in anthropology and political science.

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# Core Administrative Process Committees

1. Administrative Adjudication
2. Constitutional Law and Separation of Powers
3. Judicial Review
4. Rulemaking

CHAPTER 1

# Administrative Adjudication*

## PART I. JUDICIAL DEVELOPMENTS

### A. Agency Adjudication and Collateral Estoppel/Res Judicata

The doctrine of collateral estoppel—also known as issue preclusion—generally prevents a party from re-litigating an issue (fact or law) already decided by one tribunal in another legal proceeding, whereas the doctrine of res judicata—also known as claim preclusion—generally precludes the same parties from litigating the same dispute before another tribunal. Both of these well-settled doctrines are designed to preserve the parties' and tribunal's resources and to respect the finality of prior judgments. What is perhaps less well settled is when and how these doctrines apply to federal agency adjudications.

The U.S. Supreme Court addressed that question with respect to collateral estoppel (or issue preclusion) in *B&B Hardware v. Hargis Industries*.[1] Under the Lanham Act,[2] when a person wants to register a trademark, she can register it with the U.S. Patent and Trademark Office (PTO). Registration

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1. 135 S. Ct. 1293 (2015). For more on the case, see Ronald Mann, *Opinion Analysis: Justices Unsettled in Trademark Preclusion Dispute*, SCOTUSBLOG (Mar. 25, 2015), perma.cc/65SU-VCL2.
2. Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. § 1051 *et seq.* (2012)).

provides many legal benefits and rights for trademark owners.[3] Any person who thinks the new trademark infringes on her already existing one can file an opposition to be heard by the Trademark Trial and Appeal Board (TTAB).[4] This agency adjudication is based on a paper hearing—no live witnesses or live cross-examination—and judicial review of the agency's decision is *de novo*.[5] The Lanham Act also provides direct access to federal courts to sue for trademark infringement.[6]

In *B&B Hardware*, the use of issue preclusion arose in the context of trademark law after petitioner B&B Hardware (B&B) protested Hargis Industries' (Hargis) attempt to register "SEALTITE" as its trademark, even though B&B already had a trademark for "SEALTIGHT."[7] The TTAB agreed with B&B and concluded that "SEALTITE" could not be registered because of a likelihood of confusion.[8] Hargis did not seek judicial review of that agency decision.

In an infringement suit, B&B argued that issue preclusion prevented Hargis from contesting the likelihood of confusion, since the TTAB had already issued a decision holding that it would lead to confusion.[9] The district court disagreed and the Eighth Circuit affirmed, both holding that issue preclusion did not apply since the TTAB used different factors to determine confusion than the district court.[10]

Looking to the principles of trademark protection and to the purposes of the Lanham Act, the Supreme Court focused on the protection of trademarks, particularly through registration with the PTO.[11] And the Court reiterated the presumption first articulated in 1993 that when Congress gives agencies power to decide disputes, "courts may take it as given that Congress has legislated with the expectation that [issue preclusion] will apply except when a statutory purpose to the contrary is evident."[12] The Court found that neither the text nor the structure of the Lanham Act overcame the presumption of issue

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3. *See B&B Hardware*, 135 S. Ct. at 1299.
4. *See id.*
5. *See id.* at 1300–01.
6. *See id.* at 1299.
7. *See id.*
8. *See id.*
9. *See id*.
10. *See id.*
11. *See id.* at 1299–1300.
12. *Id.* at 1303 (quoting Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991)).

preclusion.[13] Because the same likelihood of confusion applies to both registration and infringement suits, the Court allowed issue preclusion to apply.[14]

However, the Court's holding was not a blanket acceptance that all TTAB registration decisions will lead to issue preclusion. Instead, the factors used to assess the likelihood of confusion were not fundamentally different in this case.[15] The TTAB used the *DuPont* factors test, analyzing fame, how the products are used, how much the marks resemble each other, and whether customers are confused.[16] The Eighth Circuit, by contrast, used similar but not identical factors found in *SquirtCo v. Seven-Up Co.*[17] The different factors and procedures do not suggest that issue preclusion will never apply, only that it sometimes will not.[18] And in this case, since the factors were not fundamentally different, issue preclusion was appropriate.

Justice Thomas, joined by Justice Scalia, dissented, arguing against the presumption that agency proceedings should have preclusive effect on courts and raising a number of constitutional concerns about administrative preclusion.[19] Although the dissent focused on administrative preclusion, the constitutional concerns raised apply with some force to the propriety of agency adjudication of private rights more generally, perhaps laying the groundwork for subsequent constitutional challenges.

In *Pierce v. SEC*,[20] the D.C. Circuit also decided an important question regarding preclusion in the agency adjudication context—this time focusing on res judicata or claim preclusion. The U.S. Securities and Exchange Commission (SEC) found Pierce in violation of the Securities Act of 1933[21] in two different proceedings for selling unregistered securities. Pierce appealed

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13. *See id.* at 1305.
14. *See id.* at 1306.
15. *See id.* at 1309.
16. *See id.* at 1301 (citing *In re* E.I. DuPont DeNemours & Co., 476 F.2d 1357 (C.C.P.A. 1973)).
17. *See id.* at 1306 (citing SquirtCo v. Seven-Up Co., 628 F.2d 1086, 1091 (8th Cir. 1980)).
18. *See id.* at 1308–09.
19. *See id.* at 1310–18 (Thomas, J., dissenting). Justice Ginsburg also filed a one-paragraph concurrence, noting that preclusion does not apply when subsequent proceedings are based on marketplace usage of the marks as opposed to the marks in the abstract. *Id.* at 1310 (Ginsburg, J., concurring).
20. 786 F.3d 1027 (D.C. Cir. 2015), *cert. pet'n filed*, No. 15-901 (U.S. Jan. 18, 2016).
21. Pub. L. No. 73-22, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. § 77a *et seq.* (2012)).

the second action, arguing that "the second enforcement action was barred by res judicata because the charges in the first and second enforcement actions both drew on the same series of connected transactions and on the same common core or nucleus of facts."[22]

According to the record, Pierce sold stock through offshore bank accounts for millions in profits, yet failed to comply with the SEC security sale requirements. During the first investigation, Pierce lied to the SEC investigators about his interest in the corporate accounts and his sale of stock through those accounts. Instead, the SEC only went after the unlawful profits from his personal account. After discovering Pierce's second violation and after the close of the hearing in the first action, the SEC attempted to add the personal accounts to the agency adjudication, but the administrative law judge (ALJ) declined to expand the charges. The ALJ determined that Pierce had violated the law, and neither side sought further review.

Instead, the SEC initiated a second action against Pierce with respect to his personal accounts. The SEC rejected Pierce's claim of res judicata on two grounds. First, it held that "because each unregistered sale of stock is a separate violation of the [Securities] Act, there was no identity between the causes of action in the first and second enforcement actions."[23] And, in the alternative, the well-settled fraudulent concealment exception to res judicata applies because "the evidence plainly shows that Pierce fraudulently concealed the evidence of the sales in the corporate accounts."[24]

The D.C. Circuit avoided ruling on the former argument—one that seems quite suspect as the two agency proceedings arguably do arise out of the same transaction or connected series of transactions—and instead denied the petition because it found "no error in the SEC's application of the fraudulent concealment exception" to res judicata.[25]

## B. Adjudication and Equitable Tolling

To be timely under the Federal Tort Claims Act (FTCA),[26] a tort claim against the United States must first be presented to the appropriate federal agency within two years; if the agency denies the claim via its adjudicatory

22. *Pierce*, 786 F.3d at 1030.
23. *Id.*
24. *Id.* at 1031.
25. *Id.* at 1035.
26. Ch. 171, 62 Stat. 982 (1948) (codified as amended at 28 U.S.C. § 2671 *et seq.* (2012)).

processes, the claimant must file in federal court within sixth months of the denial. The issue presented to the Supreme Court in two consolidated cases—*United States v. Kwai Fun Wong* and *United States v. June*—was whether the time limits for FTCA claims are jurisdictional or if they can be subject to equitable tolling.[27]

In a split 5-4 decision authored by Justice Kagan, the Court ruled that equitable tolling does apply.[28] Relying on *Irwin v. Department of Veterans Affairs*, the Court held that there is a rebuttable presumption that statutory time bars may be equitably tolled, and to defeat that presumption, Congress must "provide a clear statement" otherwise.[29] Furthermore, the Court reasoned that most time bars are not jurisdictional.[30] Based on the statutory text and the context, the Court concluded that the FTCA provides no clear statement that it is a jurisdictional statute.[31] The government's emphasis on the language "shall be forever barred" did not sway the Court.[32] Instead the Court dismissed it by interpreting that language to just be a common way of citing statutory limitations, not a jurisdictional limit.[33] Justice Alito, joined by the Chief Justice and Justices Scalia and Thomas, dissented, arguing that "[t]he statutory text, its historical roots, and more than a century of precedents show that this absolute bar is not subject to equitable tolling."[34]

## C. Adjudication and Final Agency Action

In *LabMD, Inc. v. FTC*,[35] the Eleventh Circuit considered whether an agency's denial of a motion to dismiss an administrative complaint constituted final agency action and thus was reviewable under the Administrative Procedure Act (APA).

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27. United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1627 (2015). For more on the case, see Howard M. Wasserman, *Opinion Analysis: Clear Statements, Sovereign Immunity, and Timeliness*, SCOTUSblog (Apr. 23, 2015), perma.cc/FS25-76GM. This case is also discussed in *Judicial Review*, *infra*, in Part II.C.
28. *Kwai Fun Wong*, 135 S. Ct. at 1627.
29. *Id.* at 1633 (citing Irwin v. Dep't of Veteran Affairs, 498 U.S. 89, 95 (1990)).
30. *See id.* at 1630–33.
31. *See id.* at 1638.
32. *See id.* at 1634.
33. *See id.* at 1634–35.
34. *Id.* at 1639 (Alito, J., dissenting).
35. 776 F.3d 1275 (11th Cir. 2015).

LabMD allegedly had private patient information stored in an unsecure network. The Federal Trade Commission (FTC) became aware of a possible breach of patient information and began investigating the company.[36] Three years into the investigation, LabMD's CEO, who had publicly criticized the FTC's actions, posted an online trailer for his book, *The Devil Inside the Beltway*,[37] which is subtitled *The Shocking Expose of the US Government's Surveillance and Overreach Into Cybersecurity, Medicine and Small Business*.[38] As the Eleventh Circuit explained, "Three days after Mr. Daugherty posted the trailer online, the FTC gave notice of its intent to file a complaint against LabMD."[39] LabMD moved to dismiss the complaint, and the FTC denied it.[40] LabMD subsequently filed suit in the Northern District of Georgia, challenging the FTC's administrative complaint and its order denying the denial of the complaint.[41] The district court granted the FTC's motion to dismiss LabMD's complaint.

On appeal, the Eleventh Circuit affirmed because the FTC's denial of the motion to dismiss was not a final agency action. To determine whether an agency action is final, the court applied a two-part *Bennett* standard: (1) the agency action must be at the end of the process, it cannot be "merely tentative or interlocutory nature"; and (2) the agency action "must be one by which rights or obligations have been determined, or from which legal consequences will flow."[42] Because the denial of a motion to dismiss will necessarily lead to more proceedings, the Eleventh Circuit held that action is not final. Furthermore, even if the denial leads to a higher probability of legal consequences, the possibility of future legal actions is not enough for the court to review it. Since the FTC's order was not "sufficiently definitive, cleanly legal, or im-

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36. *Id.* at 1277.
37. *Id.*
38. *See* MICHAEL J. DAUGHTERY, THE DEVIL INSIDE THE BELTWAY: THE SHOCKING EXPOSE OF THE US GOVERNMENT'S SURVEILLANCE AND OVERREACH INTO CYBERSECURITY, MEDICINE AND SMALL BUSINESS (2013).
39. *See LabMD*, 776 F.3d at 1277.
40. *See id.* at 1278.
41. *See id.* at 1277–78. LabMD also filed a petition for review directly in the Eleventh Circuit, which the Eleventh Circuit dismissed for lack of final agency action, without addressing whether the district court could consider the action. LabMD also filed a claim in the District Court of the District of Columbia, but later voluntarily withdrew the suit. *Id.* at 1277.
42. *Id.* at 1278–79 (quoting Bennett v. Spear, 117 S. Ct. 1154, 177–78 (1997)).

mediately burdensome," the Eleventh Circuit affirmed the district court's dismissal.[43]

## D. Scope of Remedies in Agency Adjudication

In *POM Wonderful, LLC v. FTC*,[44] the D.C. Circuit reviewed the scope of remedies available for an agency to impose via adjudication. In 2012, the FTC found POM and the associated parties liable for violating the Federal Trade Commission Act[45] when it made "misleading and inadequately supported claims about the health benefits of POM products."[46] The facts of this case are a fun read. POM claimed it had spent over $35 million in research on the health benefits of pomegranate juice—sponsoring more than one hundred studies—and promoted the POM products in numerous advertisements as having various health benefits with respect to heart disease, prostate cancer, and erectile dysfunction.[47]

After going through the administrative process, the FTC ordered POM to stop making unsubstantiated claims about the health benefits of its products.[48] The requirements for substantiation go to the heart of proper remedies in agency adjudications. The FTC lawyers argued that POM should not be able to make any claims about the product's effectiveness to treat or prevent any disease until POM first obtained approval from the U.S. Food and Drug Administration. The FTC's chief ALJ did not go that far and, instead, "ordered [POM] to cease and desist from making further claims about the health benefits of any food, drug, or dietary supplement unless the claims are nonmisleading and supported by competent and reliable scientific evidence."[49] On appeal, the full FTC unanimously affirmed the ALJ's decision to impose liability on POM and broadened the scope of the injunctive order to bar POM and any other related party from advertising health benefits of their products

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43. *Id.* at 1279. However, the Eleventh Circuit arguably did chip away a bit at *Chevron* deference, noting that just because the FTC has classified its order as a "definitive interpretation of Section 5" does not mean the court was obliged to "agree with the FTC's characterization of its own Order." *Id.* at 1278–79.
44. 777 F.3d 478 (D.C. Cir. 2015).
45. Ch. 311, 38 Stat. 717.
46. *POM Wonderful*, 777 F.3d at 484.
47. *See id.*
48. *See id.* at 488–89.
49. *Id.*

in the future without providing at least two randomized, controlled human clinical trials (RCTs).[50]

The D.C. Circuit upheld the FTC's order, but found that the requirement of two studies had inadequate justification to uphold the new agency rule.[51] The court reviewed the remedial order requiring two RCTs under the *Central Hudson* test for commercial speech restrictions.[52] The test requires, first, that the government interest be "substantial" and, second, that the "challenged restriction 'directly advance[] the governmental interest' and that it 'is not more extensive than necessary.'"[53]

While the D.C. Circuit agreed with the FTC that there was a governmental interest and some RCT requirement was adequate, it opposed the requirement of two or more.[54] The FTC bore the burden of showing a "reasonable fit" between the governmental interest and the restriction or requirements imposed.[55] The court also cited the FTC's past advertising guidelines emphasizing the importance of quality over quantity of testing.[56] In this case, the court said the FTC failed to provide justification for the categorical two RCT requirement. Instead, in Solomonic fashion, the D.C. Circuit modified the injunctive order to require POM "to possess at least one RCT before making disease claims covered by that provision."[57]

## E. ALJs and "Decisional Independence"

An annual case-volume "goal" established by the U.S. Social Security Administration (SSA) has met strong opposition from the Association of Administrative Law Judges (Association), the union representing SSA's ALJs. In 2007, SSA issued a "directive" setting forth a "goal" that each ALJ "manage" his or her "docket in such a way that they will be able to issue 500–700 legally sufficient [disability benefits] decisions each year."[58] The Association

50. *See id.* at 489.
51. *See id.* at 501–02.
52. *See id.* at 501 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980)).
53. *Id.* at 501–02 (internal quotation marks omitted).
54. *See id.* at 502.
55. *Id.*
56. *See id.* at 503 (citing the FTC's advertising guide for industry which said that "in most situations, the quality of studies will be more important than quality").
57. *Id.* at 505.
58. Ass'n of Admin. Law Judges v. Colvin, 777 F.3d 402, 403 (7th Cir. 2015).

challenged the goal—alleged to be a "quota"—by filing suit in federal district court under the APA. The Association claimed that the quota interferes with an ALJ's "decisional independence, in violation of the [APA]" (in particular, 5 U.S.C. § 554 (2012)).[59] The Association's argument, as the Seventh Circuit summarized it, was:

> [B]ecause it takes less time for an [ALJ] to award . . . benefits than to deny benefits, because an award is not judicially appealable and therefore the [ALJ] doesn't have to be as careful in his analysis of the disability claim . . . , the effect of the quota . . . is to induce [ALJs] to award more benefits: were it not for the quota, they would deny benefits whenever they thought the applicant wasn't entitled to them under law, even if making that determination took a lot of time.[60]

The district court dismissed the suit for lack of subject matter jurisdiction on the ground that the administrative enforcement scheme established by the Civil Service Reform Act[61] provides the exclusive remedy for challenging any adverse personnel action affecting an ALJ's working conditions.[62] "Although presented as interference with decisional independence," the district court explained, "[T]he ALJs' allegations are actually challenging working conditions and duties."[63]

In an opinion by Judge Posner, the Seventh Circuit affirmed, albeit on somewhat different grounds. Contrary to the D.C. Circuit's recent holding in *Mahoney v. Donovan*,[64] Judge Posner allowed that the Civil Service Reform Act might not limit a federal court's jurisdiction to hear a claim directly arising under the APA if the SSA had imposed the alleged quota with the objective of interfering with ALJs' decisional independence. Judge Posner explained that a contrary "ruling" would "nullify the express protection of . . . independence" provided for in the APA.[65] But here the alleged quota had no such impermissible intent. It was not alleged, Judge Posner explained, that

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59. *Id.*
60. *Id.* at 404.
61. Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended throughout 5 U.S.C. part II (2012)).
62. Ass'n of Admin. Law Judges v. Colvin, No. 13-cv-2925, 2014 U.S. Dist. LEXIS 24574 (N.D. Ill. Feb. 26, 2014).
63. *Id*. at *6.
64. 721 F.3d 633 (D.C. Cir. 2013).
65. *Ass'n of Admin. Law Judges*, 777 F.3d at 405.

SSA had imposed the quota with the objective of "prod[ding] [ALJs] to grant more applications for disability benefits."[66] (If anything, Judge Posner noted, the facts showed otherwise: SSA has been under pressure to reduce the rate of benefit grants.) Rather, SSA's only "aim" in imposing the quota, as the plaintiffs themselves conceded, was to "speed up decision-making."[67] Any increase in grant rates that might have resulted from the imposition of the quota was "an unintended and presumably unwanted byproduct."[68]

Judge Ripple, concurring, would have followed the D.C. Circuit's approach and held that the Civil Service Reform Act, with its exclusive remedial scheme for addressing adverse personnel actions, forecloses resort to federal court under the APA.[69] At the same time, he allowed for the possibility that a particular agency policy, no matter its objective, might "so burden the exercise of [the] judicial decision-making process that the congressional intent of protecting the [ALJs] can be fundamentally impaired," in which case a *litigant* might have redress in the courts as a matter of due process.[70] Judge Posner expressed concern about the implications of such an exception, but conceded that he could "imagine a case in which a change in working conditions could have an unintentional effect on decisional independence so great as to create a serious issue of due process."[71] He gave as an example a rule without exceptions limiting every SSA hearing to fifteen minutes. "The quality of the justice meted out by the" ALJ, he said, "would be dangerously diminished."[72]

## F. Constitutional Status of ALJs

As discussed in the *Developments* Chapters on *Judicial Review* and *Constitutional Law and Separation of Powers*, administrative enforcement proceedings before the SEC have been challenged in the courts on two related grounds

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66. *Id.*
67. *Id.* at 404.
68. *Id.*
69. *Id.* at 406 (Ripple, J., concurring).
70. *Id.* at 409 (emphasis in original). Judge Ripple characterized a litigant's burden in such a case as "gargantuan." *Id.*
71. *Id.* at 406.
72. *Id.* at 405. Judge Posner indicated that the "constitutional remedy" in such cases would be the ALJ's. *Id.* It may be that he meant to say, as Judge Ripple did, that it would be a litigant's (rather than the ALJ's). Why the ALJ would have a constitutional remedy (or even standing to seek one) is unclear.

based on Article II of the Constitution.[73] Both are premised on the contested argument that the ALJs who preside over the hearings in such proceedings are employees rather than officers under the Constitution.

The first ground is that SEC ALJs, as inferior officers, are appointed in violation of the Constitution's Appointments Clause. That clause requires that inferior officers be appointed only by the President, the "Courts of Law," or the "Heads of Departments."[74] If SEC ALJ's are inferior officers (as opposed to employees), then their appointments are unconstitutional, for they are not appointed by the SEC's commissioners themselves (that is, by the head of a department).

The second constitutional ground is that the multiple layers of for-cause protection enjoyed by ALJs—ALJ's may only be removed by the SEC for cause (and then only with the consent of the Merit Systems Protection Board (MSPB)) and the SEC commissioners in turn may only be removed by the President for cause—contravenes the "Article II's vesting of the executive power in the President" under the Supreme Court's decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.[75] District courts have divided on the Appointments Clause question. None has yet sustained a challenge to an SEC administrative proceeding under *Free Enterprise Fund*.

An important procedural question is whether a party in (or threatened with) an administrative enforcement proceeding before the SEC may challenge the constitutionality of that proceeding in a collateral (or parallel) proceeding before a federal district court or whether instead it must raise its challenge, in the first instance, before the SEC (whose decisions are reviewable in the courts of appeals). The two federal courts of appeals to have addressed the question—the Seventh and D.C. Circuits—have both answered "no."[76] Both reasoned that Congress' enforcement scheme—which provides, first, for adjudication of an alleged securities-law violation before the SEC and then judicial review of an adverse SEC order before the courts of appeals—provides the exclusive means of redress for alleged constitutional infirmities in SEC adjudicatory proceedings and thereby divests district courts of subject-matter jurisdiction to hear collateral challenges.[77] District courts

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73. *See Constitutional Law and Separation of Powers, infra,* in Part III.A., and *Judicial Review, infra,* in Part II.D.
74. U.S. CONST. art. II, § 2.
75. 561 U.S. 477 (2010).
76. *See* Bebo v. SEC, 799 F.3d 765 (7th Cir. 2015); Jarkesy v. SEC, 803 F.3d 9 (D.C. Cir. 2015).
77. *See Bebo*, 799 F.3d at 768–75; *Jarkesy*, 803 F.3d at 15–29.

within the Second Circuit have split on the question;[78] district courts within the Eleventh Circuit have permitted collateral challenges;[79] and, most recently, a court within the District of Maryland has sided with the Seventh and D.C. Circuits in disallowing them.[80] As discussed below in Part III, the SEC has adjudicated constitutional challenges within the context of administrative enforcement proceedings in several cases decided during 2015.

Much litigation may lie ahead before the question of the constitutionality of the ALJ appointment at the SEC (and other agencies) is finally settled. Resolution by the Supreme Court may be necessary. Assuming ALJs at the SEC are found to be unconstitutionally appointed, difficult questions may arise as to what curative steps agencies can and should take—and, if the dual for-cause argument is accepted, what curative steps Congress or the courts can and should take—and what effect such a finding will have on pending adjudications, adjudicative orders that are not yet final, and so forth.[81] So far, the SEC has declined to remediate the alleged Appointments Clause problem by having its commissioners themselves reappoint its few existing ALJs, insisting (as noted below) that ALJs are employees rather than officers.[82]

## G. Fee Awards Under the Equal Access to Justice Act

Under the Equal Access to Justice Act (EAJA),[83] a prevailing private litigant in an adversarial administrative adjudication or a federal-court pro-

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78. *Compare, e.g.*, Spring Hill Capital Partners, LLC v. SEC, No. 1:15-CV-4542 (S.D.N.Y. June 29, 2015) (bench ruling) (disallowing collateral challenge), *and* Tilton v. SEC, No. 15-CV-2472 RA, 2015 WL 4006165 (S.D.N.Y. June 30, 2015) (same), *with* Duka v. SEC, No. 15 Civ. 357, 2015 WL 4940083 (S.D.N.Y. Aug. 12, 2015) (allowing collateral challenge). For a list of other cases, see *Jarkesy*, 803 F.3d at 15.
79. *See, e.g.*, Ironbridge Global IV, LTD v. SEC, No. 1:15-CV-2512, 2015 U.S. Dist. LEXIS 156925 (N.D. Ga. Nov. 17, 2015); Hill v. SEC, No. 1:15-CV-1801, 2015 WL 4307088, at *6 (N.D. Ga. June 8, 2015).
80. *See* Bennett v. SEC, No. PWG-15-3325, 2015 U.S. Dist. LEXIS 168710 (D. Md. Dec. 17, 2015).
81. For a good overview of these issues, see Peter D. Hardin et al., *The Appointment of SEC Administrative Law Judges: Constitutional Questions and Consequences for Enforcement Actions*, BNA Sec. Reg. Law Rpt. (June 22, 2015).
82. *See* text accompanying *infra* note 145.
83. Pub. L. No. 96-481, 94 Stat. 2327 (1980) (codified as amended at 5 U.S.C. § 504 (2012)).

ceeding involving the challenge of agency action is entitled to an attorney's fee award unless the agency adjudicator or the court, as the case may be, finds that the government's position was "substantially justified" or that "special circumstances make [an award of fees to a prevailing party] unjust."[84] Two appellate cases interpreted the EAJA's fee-shifting provision in 2015.

The Seventh Circuit's decision in *Sprinkle v. Colvin*[85] concerned the provision of EAJA that sets the fee award by reference to the "prevailing market rates for the kind and quality of the services furnished," subject to a presumptive cap of $125 per hour.[86] The cap is presumptive because a court may exceed it if it "determines that an increase in the cost of living [since the adoption of the cap in 1996] or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."[87]

*Sprinkle* involved a social security disability claimant's request for attorney's fees at an hourly rate of $173, "which reflected the statutory rate adjusted for inflation" to the month in which most of the lawyer's services were provided, using the Consumer Price Index (Index).[88] The claimant submitted affidavits from four lawyers who practiced in the areas of social security disability benefits establishing that they had hourly rates ranging from $250 to $500 per hour, as well as an affidavit from his own attorney establishing that his hourly rate was $275 per hour.[89] The district court denied the request for an increase in reliance on the Seventh Circuit's 2001 decision in *Matthews-Sheets v. Astrue*.[90]

In *Matthews-Sheets*, the Seventh Circuit established (or so its decision was read by some district courts to establish) a two-part standard for deciding whether to exceed the $125 cap based on an increase in the cost of living. A litigant had to establish both (1) that inflation had increased his or her *own* attorney's costs in providing "adequate" legal services, and (2) that "without a cost of living increase that would bring the fee award up to the [amount requested], a lawyer capable of competently handling [the case] could not be found in the relevant geographical area."[91] That stringent standard was apparently seldom met.

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84. 5 U.S.C. § 504(a)(1) (agency adjudication); 28 U.S.C. § 2412(d)(1)(A) (2012) (federal court proceedings).
85. 777 F.3d 421 (7th Cir. 2015).
86. 28 U.S.C. § 2412(d)(2)(A).
87. *Id.* § 2412(d)(2)(A)(ii).
88. *Sprinkle*, 777 F.3d at 423.
89. *See id.* at 423–24.
90. 653 F.3d 560 (7th Cir. 2001).
91. *Id.* at 565.

*Sprinkle* overruled *Matthews-Sheets*, thereby bringing the Seventh Circuit's approach in line with that of other circuits.[92] Under the Seventh Circuit's new standard "for obtaining a cost-of-living adjustment under" the EAJA,[93] litigants need not "prove the effect of inflation *on their individual attorneys' costs* in order for a judge to find that an increase in the cost of living justifies a higher fee."[94] They may prove the effect of inflation by using the Index.[95] As the Seventh Circuit explained, courts "should generally award the inflation-adjusted rate according" to the Index,[96] which will provide "a reasonably accurate measure of the need for an inflation adjustment in most cases."[97] ("Generally" is an important caveat: The government "may offer evidence" that the Index "does not accurately reflect what has happened in a particular legal market."[98])

That is not the end of the inquiry under the Seventh Circuit's new standard. Having established a cost-of-living increase by reference to the Index, the claimant "must still produce satisfactory evidence," as the statute requires, "that the increase in the cost of living [is] justifie[d]."[99] That burden can be met by producing "evidence that the [requested] rate is in line with those [rates] prevailing in the community for similar services by lawyers of comparable skill and experience."[100] The Seventh Circuit suggested that even a single sworn statement from a provider of comparable legal services might suffice.[101] At the same time, it cautioned that "courts may not award an inflation-adjusted rate that is higher than the prevailing market rate."[102]

The second decision, the D.C. Circuit's *Roberts v. National Transportation Safety Board*,[103] concerned the EAJA's requirement that a claimant "incur" legal fees in connection with an administrative adjudication.[104] Here the

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92. *Sprinkle*, 777 F.3d at 428.
93. *Id.* at 427.
94. *Id.* at 426–27 (emphasis added).
95. Or other "readily available measure of inflation." *Id.* at 423.
96. *Id.* at 427.
97. *Id.* at 428. The Seventh Circuit declined to decide whether courts should rely on national or regional indices, noting a split among district courts on the question. *Id.* at n.2.
98. *Id.* at 428.
99. *Id.*
100. *Id.*
101. *See id.* at 429.
102. *Id.*
103. 776 F.3d 918 (D.C. Cir. 2015).
104. 5 U.S.C. § 504(a)(1).

claimant prevailed before the National Transportation Safety Board (Board) in challenging a Federal Aviation Administration (FAA) order suspending him as an airline mechanic.[105] While the Board concluded that the government's position was not substantially justified, it nevertheless denied his petition for EAJA fees on the ground that the claimant had not himself incurred the fees.[106] The Board found, on a messy set of facts, that even though the claimant's employer had not contracted to pay his attorneys' fees, contrary to an ALJ finding, there was no "clear evidence" in the record that the claimant was himself contractually obligated to pay the fees himself.[107] The government took the position that, as the D.C. Circuit characterized it, "the absence of a written agreement" so "obligating him" was "dispositive."[108]

The D.C. Circuit held that the Board had abused its discretion in holding that the claimant had not incurred fees. As the D.C. Circuit explained, the question of whether the claimant incurred legal fees under EAJA must be decided by the applicable state law rather than by a federal rule of the sort established by the Board.[109] It was clear under state law, the court concluded, that the claimant was responsible for the attorney's fees under the doctrine of quantum meruit, notwithstanding the absence of a contractual obligation, and hence that he himself incurred them within the meaning of EAJA.[110]

The D.C. Circuit left open the possibility that, on remand, the Board could reduce the amount claimed because of "inadequate documentation, failure to justify the hours sought, inconsistencies, and improper billing entries."[111] Any such deficiencies, the court held, could not "preempt the state law that shows" that the claimant incurred fees, but they "may factor into the question of how much reimbursement is due."[112]

## H. Immigration Adjudication

In 2015, the Supreme Court issued three important decisions in the context of immigration adjudication.

First, in *Mata v. Lynch*,[113] the Court addressed whether the court of ap-

105. *See Roberts*, 776 F.3d at 919.
106. *See id.*
107. *See id.* at 921.
108. *See id.*
109. *See id.* at 921–22.
110. *See id.* at 922.
111. *Id.* at 923 (internal quotation marks and citations omitted).
112. *Id.*
113. 135 S. Ct. 2150 (2015).

peals' jurisdiction to review a decision by the Board of Immigration Appeals (BIA), as established in *Kucana v. Holder*,[114] admits of an exception when the "[BIA] denies a motion to reopen because it is untimely."[115] The Court answered "no." "[T]he reason for the BIA's denial," the Court explained, "makes no difference to the jurisdictional issue."[116] The Court also held that the courts of appeals' jurisdiction "remains unchanged if the [BIA], in addition to denying" the motion to reopen, "states that it will not exercise its separate *sua sponte* authority to reopen on the case," even if it is assumed that the BIA's exercise of that authority is not itself reviewable by the courts.[117]

Second, in *Mellouli v. Lynch*,[118] the Court addressed whether an immigrant should be deported for a conviction under state law of possession of drug paraphernalia, when the state failed to show the relation to a controlled federal substance.[119] A noncitizen can only be deported under 8 U.S.C. § 1227(a)(2)(B)(i) (2012) for conviction of any controlled-substance-related crime.[120] If convicted under state law, the controlled substance must relate to the federal statutory definition of a controlled substance, since states are allowed to add more to their own controlled substance list.[121] Traditionally the "categorical approach" is used when looking at state controlled substance convictions. Under the categorical approach, only if the crime falls within a federal removable category can the immigrant be deported.[122] However, the BIA had taken a different approach to drug paraphernalia convictions and

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114. 558 U.S. 233, 253 (2008).
115. *Mata*, 135 S. Ct. at 2155. For more on the case, see Steve Vladeck, *Opinion Analysis: Distinguishing Between Jurisdiction Over (and the Merits of) Untimely Immigration Appeals*, SCOTUSblog (June 15, 2015), perma.cc/5BK8-Q2M2.
116. *Mata*, 135 S. Ct. at 2154.
117. *Id.* at 2155. Here, as in *Kucana*, the Court "declined to decide whether courts have jurisdiction to review the BIA's use of [its] discretionary power" to reopen. The circuits have held that they lack such jurisdiction. *See id.*
118. 135 S. Ct. 1980 (2015). This case is also discussed in *Judicial Review*, *infra*, in Part I.A.
119. *See id.* at 1985–86. For more on the case, see Kevin Johnson, *Opinion Analysis: Court Rejects Removal Based on Misdemeanor Drug Paraphernalia Conviction*, SCOTUSblog (June 1, 2015), perma.cc/54BN-Z4UB; Christopher J. Walker, *The "Scant Sense" Exception to* Chevron *Deference in* Mellouli v. Lynch, Yale J. Reg. Notice & Comment Blog (June 2, 2015), perma.cc/T49E-STUA.
120. *See Mellouli*, 135 S. Ct. at 1984.
121. *See id.*
122. *Id.* at 1986.

interpreted drug paraphernalia statutes as relating to any and all controlled substances, whether the substances were on the federal list.[123] In an opinion by Justice Ginsburg, the Court found no *Chevron* deference was owed to the BIA's interpretation because it made "scant sense" to be able to remove someone from the United States for possession of drug paraphernalia under state law when it was not a deportable offense under federal law.[124] The Court said this interpretation was surely not Congress' intended result because it would make any drug offense a removable offense, regardless of whether they were in possession of drugs that were actually on the federal controlled substance list.[125] Justice Thomas, joined by Justice Alito, dissented, arguing that "[t]he statutory text resolves this case."[126]

Third, in *Kerry v. Din*,[127] a splintered Court avoided deciding whether there is a constitutional marriage right at stake when a spouse's visa is denied, but did find that the denial was justified for national security reasons.[128] While the Court did not make any real moves to go against its doctrine of consular non-reviewability, there did seem to be "hints" that a majority of the Court would be more willing to review some consular decisions in the future.[129] However, in this current case, the plurality opinion authored by Justice Scalia determined that regardless of whether there was a due process right at stake, the national security justification for denying the visa was enough to satisfy any due process requirements.[130] Justice Kennedy's concurrence looked to *Kleindienst v. Mandel*'s standard of providing a "facially legitimate and bona fide" reason for the actions.[131] Because Din's husband worked for the Taliban government, that was enough of a bona fide reason to justify any potential due process violations, if they did exist.[132] Justice Breyer, joined by Justices

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123. *See id.* at 1988.
124. *Id.* at 1989.
125. *See id.*
126. *Id.* at 1995 (Thomas, J., dissenting).
127. 135 S. Ct. 2128 (2015). This case is also discussed in *Constitutional Law and Separation of Powers*, *infra*, in Part I.C.
128. *See id.* at 2131. For more on the case, see Kevin Johnson, *Opinion Analysis: Limited Judicial Review of Consular Officer Visa Decisions—Foreshadowing the Result in the Same-Sex Marriage Case?*, SCOTUSblog (June 15, 2015), perma.cc/TK45-43PC.
129. Johnson, *supra* note 128.
130. *See Din*, 135 S. Ct. at 2138.
131. *Id.* at 2141 (Kennedy, J., concurring) (citing Kleindienst v. Mandel, 408 U.S. 753 (1972)).
132. *See id.*

Ginsburg, Sotomayor, and Kagan, dissented, arguing that Din "possesses the kind of 'liberty' interest to which the Due Process Clause grants procedural protection" and that "the Government has failed to provide her with the procedure that is constitutionally 'due.'"[133]

### I. Binding Effect of Internal Manual in Social Security Disability Litigation

In *Morgan v. Colvin*,[134] the Fifth Circuit addressed whether the SSA's "internal" *Hearings, Appeals, and Litigation Law Manual*, known as HALLEX, binds the agency on judicial review. The agency denied the claimant a second hearing after his case was reassigned to a new ALJ contrary to a provision of HALLEX that says upon such a reassignment, the ALJ to whom the case is reassigned must hold another hearing if the "claimant's credibility . . . could be a significant factor in deciding the case."[135] There was no question in *Morgan* as to the importance of the claimant's credibility in deciding his claim for benefits. Relying on Fifth Circuit precedent, the court held that HALLEX was binding on the agency and that, because the claimant was prejudiced by the agency's failure to follow its own policies, he was entitled to a new hearing.[136] Other circuits, by contrast, have held that HALLEX does not have the effect of law and thus does not bind SSA on judicial review.[137]

## PART II. DEVELOPMENTS BEFORE ADMINISTRATIVE AGENCIES

### A. Constitutional Objections to SEC Administrative Proceedings

By statute, the SEC may enforce most of the securities laws subject to civil enforcement either by bringing suit in a federal district court or by initiating administrative enforcement proceedings (which are presided over, at the hearing stage, by the SEC's own ALJs).[138] The Dodd-Frank Wall Street

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133. *Id.* at 2142 (Breyer, J., dissenting).
134. 803 F.3d 773 (5th Cir. 2015).
135. *Id.* at 777.
136. *See id.*
137. *See id.* at n.5 (citing Moore v. Apfel, 216 F.3d 864, 868 (9th Cir. 2000)).
138. *See, e.g.*, *Bebo*, 799 F.3d at 766–67; *Jarkesy*, 803 F.3d at 17.

Reform and Consumer Protection Act (Dodd-Frank)[139] "expanded the remedies available to the SEC in administrative proceedings,"[140] with the result that "the SEC's authority in administrative penalty proceedings" is now generally "coextensive with its authority to seek penalties in Federal court."[141] The SEC's decision whether to proceed in federal court or before one of the agency's ALJs is unconstrained by statute or regulation.[142]

The SEC's post-Dodd-Frank reliance on administrative proceedings rather than federal-court actions to enforce the securities laws has drawn strong criticism from the securities defense bar and regulated parties. Critics have decried the "home-court advantage" that the SEC is said to enjoy when it brings enforcement actions before its own ALJs. In May 2015, a much-cited *Wall Street Journal* study found that in administrative enforcement actions brought before its ALJs since Dodd-Frank, the SEC had prevailed in over 90 percent of the cases.[143] The *Journal* later reported, however, that win rates for the agency declined markedly in 2015.[144]

As noted above in Part I.F., numerous federal-court suits have been brought by respondents in SEC administrative enforcement proceedings chal-

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139. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o).
140. *Jarkesy*, 803 F.3d at 12.
141. *Id.* (quoting H.R. Rep. No. 111-687, at 78 (2010)). There are some exceptions, especially with respect to the remedies available to the agency.
142. *See, e.g.*, *id.* As noted below, the SEC's Division of Enforcement has set forth general guidelines governing the choice between administrative and federal-court enforcement.
143. *See, e.g.*, Jean Eaglesham, *SEC Wins With In-House Judges*, Wall St. J. (May 6, 2015), *available at* www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803; *see also* Peter Henning, *Constitutional Challenges to S.E.C.'s In-House Judges*, N.Y. Times (Oct. 5, 2015), *available at* http://www.nytimes.com/2015/10/06/business/dealbook/constitutional-challenges-to-secs-use-of-in-house-judges.html?_r=0. The *Wall Street Journal* has reported that, in response to the criticism, the SEC has retreated from its reliance on administrative enforcement. *See* Jean Eaglesham, *SEC Trims Use of In-House Judges*, Wall St. J. (Oct. 11, 2015), *available at* http://www.wsj.com/articles/sec-trims-use-of-in-house-judges-1444611604.
144. *See* Jean Eaglesham, *SEC Judges Are Finding Against Agency More Often Lately*, Wall St. J. (Nov. 22, 2015), *available at* http://www.wsj.com/articles/sec-judges-are-finding-more-often-for-agency-lately-1448243785.

lenging the constitutionality of those proceedings.[145] The suits have alleged not only that ALJs are unconstitutionality appointed under Article II of the Constitution and enjoy multiple layers of for-cause protection condemned by *Free Enterprise Fund*,[146] but also that the proceedings deprive parties of their Seventh Amendment right to a jury trial, offend due process because they fail to provide an impartial forum, and treat similarly-situated persons differently (with some subject to federal court enforcement and others administrative enforcement) in violation of the Equal Protection Clause.[147]

A few district courts have enjoined SEC administrative proceedings on the limited ground that the SEC's ALJs have been appointed in violation of the Appointments Clause—in each case either rejecting or declining to reach the other constitutional challenges made[148]—but most suits have been dismissed on the ground that district courts lack subject-matter jurisdiction to hear them.[149] As noted above in Part I.F., the Seventh and D.C. Circuits have both addressed jurisdictional question in favor of the SEC. Appeals of the district court decisions enjoining SEC proceedings on Appointments Clause grounds are pending in the Second and Eleventh Circuits.[150]

The SEC's commissioners, for their part, decided several cases in 2015 in which constitutional challenges were raised to its administrative proceedings. Not surprisingly, the commissioners rejected the challenges in each case.[151] On the Appointments Clause question, the commissioners concluded that the SEC's ALJs are indistinguishable from the ALJs held to be employees (and hence not subject to the clause) in *Landry v. FDIC*.[152] The courts of appeals will likely review at least some of these SEC decisions.

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145. As far as we are aware, no such suits have been brought challenging the constitutionality of adjudicative systems at agencies other than the SEC.
146. 561 U.S. 477 (2010).
147. For an overview, see David T. Zaring, *Enforcement Discretion at the SEC*, 94 Tex L. Rev. ___ (2016) (forthcoming); *see also* Kent Barnett, *The ALJ Quandary*, 66 Vand. L. Rev. 797, 816–27 (2013).
148. *See Duka*, 2015 WL 4940083; *Hill*, 2015 WL 4307088; *Ironbridge*, 2015 WL 7273262.
149. *See* Part II.F. *infra*.
150. *See* Ironridge Global IV, Ltd. v. SEC, No. 16-10205 (11th Cir. docketed Jan. 19, 2016); Duka v. SEC, No. 15-2732 (2d Cir. docketed Aug. 27, 2015).
151. *See* David F. Brandimere, Release No. 9972, 2015 WL 6575665, at *2 (Oct. 29, 2015); Timbervest, LLC, Release No. 4197,2015 WL 5472520, at *23–26 (Sept. 17, 2015); Raymond J. Lucia Co., Exchange Act Release No. 34-75837, 2015 WL5172953, at *21–23 (Sept. 3, 2015).
152. *See* 204 F.3d 1125 (D.C. Cir. 2000).

In May 2015, the SEC's Division of Enforcement issued a memorandum in which it set forth the considerations on which it relies in deciding whether to proceed in federal court or administratively.[153] It identified (and elaborated upon, though not with much specificity) these four factors: (1) the "availability of desired claims, legal theories, and form of relief in each forum"; (2) "[w]hether any charged party is a registered entity or an individual associated with a registered entity"; (3) the "cost-, resource-, and time-effectiveness of litigation in each forum"; and (4) the "[f]air, consistent, and effective resolution of the securities law issues and matters."[154] As for the last factor, "[i]f a contested matter is likely to raise unsettled and complex issues under the federal securities laws," the Division explained, "consideration should be given to whether, in light of the [SEC's] expertise concerning those matters, obtaining [SEC] decision on such issues, subject to appellate review in the federal courts, may facilitate the development of the law."[155]

## B. Decisional Independence of ALJs

Another notable challenge to the SSA's *alleged* interference with the decisional independence of ALJs has arisen in a case pending before the MSPB, *SSA v. Butler*.[156] The question before the MSPB is whether, as required by 5 U.S.C. § 7521 (2012), the SSA had "good cause" for suspending one of its ALJs.[157]

The SSA advanced numerous grounds to justify the ALJ's suspension. Of particular significance beyond the facts of this case was the ALJ's alleged failure to comply with the SSA's HALLEX.[158] One of its provisions requires an ALJ to "ensure" that an interpreter is provided to a claimant for disability benefits "throughout" the hearing whenever the claimant "has difficulty un-

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153. *See* Division of Enforcement Approach to Forum Selection in Contested Actions, SEC (2015), https://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf.
154. *Id.* at 1–4.
155. *Id.* at 3–4.
156. No. CB-7521-14-0014-T-1, 2015 MSPB LEXIS 7906 (M.S.P.B. Sept. 16, 2015).
157. *Id.* at *17. Suspensions and certain other adverse personnel actions may not be undertaken without the MSPB's consent following proceedings that begin with an ALJ hearing.
158. *Id.* at *3. *See supra* Part I.I. (discussing *Morgan*, 803 F.3d 773, for its holding that HALLEX is binding on the SSA on judicial review).

derstanding or communicating in English."[159] The SSA has interpreted the provision—or so it is alleged in the MSPB case—to require the ALJ to allow an interpreter "whenever an applicant [for benefits] asks for one," with the result that an ALJ may not examine the claimant to assess his English proficiency. In *Butler*, the SSA grounded its decision to suspend the ALJ in part based on his refusal to comply with a specific directive that he follow the SSA's interpretation of the provision.

After a hearing, the MSPB's ALJ concluded in a recommended decision that the SSA ALJ's refusal to comply with the SSA's directives did not amount to "good cause" for his suspension.[160] The MSPB ALJ rested his recommended decision on two grounds. The first was that, as applied, the interpreter provision of HALLEX—a mere "guidance document," as the ALJ characterized it, that was neither adopted through notice-and-comment rulemaking procedures nor ever published in the *Federal Register*—was not binding on ALJs because it conflicted with an SSA legislative rule giving ALJs discretion to decide whether the presence of any non-parties at hearings is "necessary and proper."[161] The second was that HALLEX's interpreter provision (again, as applied by the SSA) interfered with the ALJ's decisional independence by preventing him from examining the claimant as to a key fact that can be determinative in the "ultimate disability determination"—namely, the claimant's English proficiency.[162]

The MSPB's ALJ declined to address whether, on its face, HALLEX's interpreter provision conflicted with the SSA's legislative rules and hence was unenforceable against an ALJ. That question may well be raised in future proceedings before the MSPB. So also might the more general question raised by some ALJs of whether and when the many sub-regulatory policies on which the SSA relies are binding on ALJs in the first place and, if so, on what legal authority.[163]

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159. *Butler*, 2015 MSPB LEXIS 7906, at *24 (quoting HALLEX § I-2-6-10).
160. *Id.* at *2.
161. *Id.* at *21 (citing 20 C.F.R. §§ 404.944, 405.320(a) (2015)). The interpretation of the rule to cover interpreters seems questionable.
162. *Id.* at *39. That is because a claimant's English proficiency affects the number of available jobs in the economy for which he might be qualified.
163. The Association of Administrative Law Judges has asked the MSPB for permission to file an amicus brief, as it did before the ALJ, to address the question eviewing permitting programs." "whether the HALLEX is binding upon ALJs in the performance of their adjudicatory duties conducting APA disability hearings." Ass'n of Admin. Law Judges, Request to File an Amicus Brief, SSA v. Butler (M.S.P.B. Nov. 10, 2015) (CB-7521014-0014-5-1). The Association's answer is "no." *See id.*

## C. Hearings by Video in Administrative Adjudications

Adjudicating agencies have increasingly resorted to the use of video hearings in place of live, in-person hearings.[164] The National Labor Relations Board recently addressed the question of whether the receipt of testimonial evidence by video contravenes the due-process rights of litigants.[165] In an unfair labor practice hearing governed by the APA's formal adjudication provisions in which the respondent challenged the use of video, the Board answered "no" (at least on the facts before it) and rejected, in particular, the respondent's contention that receipt of evidence impaired the ALJ's ability to make required credibility determinations. The ALJ observed in a recommended decision adopted by the Board:

> During the video transmission, which had been tested prior to the hearing, the audio and video quality was flawless, the witness' demeanor, i.e., his appearance, attitude and manner, was easily observable. Certainly, *any hesitation, discomfort, arrogance, or defiance would have been easily discerned*. The entire proceeding was as spontaneous as live testimony. There was little or no audio delay between the questions and answers. Thus, [the witness's] testimony by video may be evaluated on an equal footing with the testimony of witnesses appearing in person at the hearing.[166]

In rejecting the respondent's exceptions to the ALJ's recommended decision, the Board distinguished the precedents on which the respondent relied

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164. For a survey of agencies that use video hearings, see OFFICE OF THE CHAIRMAN, ADMIN. CONF. OF THE U.S., MEMORANDUM ON THE HISTORY OF AGENCY VIDEO TELECONFERENCING ADJUDICATIONS (2014), https://www.acus.gov/sites/default/files/documents/VTC%20Hearing%20History_FINAL.pdf. ACUS has adopted two recommendations relating to video hearings. *See* Admin. Conf. of the U.S., Recommendation 2014-7, Best Practices for Using Video Teleconferencing for Hearings, 79 Fed. Reg. 75119 (Dec. 17, 2014), https://www.gpo.gov/fdsys/pkg/FR-2014-12-17/pdf/FR-2014-12-17.pdf; *and* Admin. Conf. of the U.S., Recommendation 2011-4, Agency Use of Video Hearings: Best Practices and Possibilities for Expansion, 76 Fed. Reg. 48795 (Aug. 9, 2011), https://www.gpo.gov/fdsys/pkg/FR-2011-08-09/pdf/2011-20138.pdf.

165. E.F. Int'l Language Sch., Inc., 363 N.L.R.B. No. 20 (2015), *available at* https://www.nlrb.gov/case/20-CA-120999 (click on "Cases and Decisions" and then "Board Decisions" and then "Volume 363").

166. *Id.* at 4–5 (emphasis added).

and emphasized that the "video technology used enabled observation of the witness at all material times."[167] A petition for review of the Board's order filed with the Court of Appeals for the D.C. Circuit challenges the Board's conclusion.[168]

### D. Proposed Amendments to the SEC's Rules

In October 2015, the SEC published for public comment major proposed revisions to its *Rules of Practice*.[169] Especially noteworthy are the SEC's proposals to enlarge the period for the completion of hearings and the issuance of decisions;[170] to provide for expanded rights to pre-trial discovery (most notably, the right to take depositions, which are now permitted only to secure the testimony of witness who will be unable to testify at the hearing);[171] to tighten evidentiary requirements to add "unreliable" evidence to the list of evidence that must be excluded;[172] and to simplify the requirements for petitioning the SEC to review an ALJ's recommended decisions.[173] The period for public comment closed on December 4, 2015. No final rule has yet been issued.

## PART III. RECOMMENDATIONS AND PENDING PROJECTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

In 2015, the Administrative Conference of the United States (Conference) adopted a recommendation relating to the issuance of declaratory orders in both formal and informal agency adjudications.[174] The recommendation:

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167. *Id.* at 1 n.1.
168. Brief of Petitioner at 44–47, E.F. Int'l Language Sch., Inc. v. N.L.R.B., No. 15-1349 (D.C. Cir. Feb. 2, 2016).
169. SEC Proposed Amendments to Commission's Rules of Practice, 80 Fed. Reg. 60091 (proposed Sept. 24, 2015) (to be codified at 17 C.F.R. part 201).
170. *See id.* at 60091–92.
171. *See id.* at 60091–94.
172. *See id.* at 60095. At the same time, the SEC has proposed a new rule to "clarify that hearsay may be admitted if it is relevant material, and bears satisfactory indicia of reliability so that its use is fair." *Id.*
173. *See id.* at 60095–96.
174. Admin. Conf. of the U.S., Recommendation 2015-3, 80 Fed. Reg. 78161 (Dec. 16, 2015), https://www.gpo.gov/fdsys/pkg/FR-2015-12-16/html/2015-31575.htm. The underlying consultant's report for the Conference is Emily S.

> [I]dentifies contexts in which agencies should consider the use of declaratory orders in administrative adjudications. It also highlights best practices relating to the use of declaratory orders, including explaining the agency's procedures for issuing declaratory orders, ensuring adequate opportunities for public participation in the proceedings, responding to petitions for declaratory orders in a timely manner, and making declaratory orders and other dispositions of petitions readily available to the public.[175]

Now underway at the Conference are two adjudication-related projects that are expected to yield recommendations adopted by its Assembly during 2016. Each project has been assigned to the Conference's Committee on Adjudication.

The first, *Aggregate Agency Adjudication*, is "studying recent efforts by agencies to aggregate administrative proceedings."[176] This goal is to identify the types of agency adjudications in which aggregate procedures have the greatest potential, the challenges and obstacles to greater use of aggregation, and best practices for agencies that wish to use aggregation mechanisms.[177] The consultants for this project are Michael D. Sant'Ambrogio of

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BREMER, DECLARATORY ORDERS 25 (2015), https://www.acus.gov/report/declaratory-orders-final-report. Adopted by the Conference at the same time was Recommendation 2015-4, *Designing Federal Permitting Programs*, which "describes different types of permitting systems and provides factors for agencies to consider when designing or reviewing permitting programs." 80 Fed. Reg. at 78161. Recommendation 2015-4 "discusses both 'general' permits (which are granted so long as certain requirements are met) and 'specific' permits (which involve fact-intensive, case-by-case determinations), as well as intermediate or hybrid permitting programs. It encourages agencies that adopt permitting systems to design them so as to minimize burdens on the agency and regulated entities while maintaining required regulatory protections." *Id.* The underling consultants' report for the Conference is ERIC BIBER & J.B. RUHL, DESIGNING REGULATORY PERMITS (2015), https://www.acus.gov/report/licensing-and-permitting-final-report, which is based on Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133 (2014).

175. 80 Fed. Reg. at 78163.
176. Admin. Conf. of the U.S., *Aggregate Agency Adjudication*, ACUS.GOV, https://www.acus.gov/research-projects/aggregate-agency-adjudication.
177. *Id.*

Michigan State University College of Law and Adam Zimmerman of Loyola Law School, Los Angeles.[178]

The second, *Electronic Case Management in Federal Administrative Adjudication*, will "examine the factors agencies should consider to optimize the use of electronic case management in furthering agencies' goals and . . . share best practices to improve the process of converting to and maintaining electronic case management."[179] A consultant has not yet been announced.

Two other adjudication-related projects are underway in the Conference's Office of the Chairman that will yield reports (but not necessarily Assembly-adopted recommendations). The first is a study of federal-court review of benefits adjudications by SSA. The study will, among other things, "evaluate federal court interpretation and application of SSA's rules and regulations . . . and examine SSA's acquiescence rulings and how the agency applies decisions of federal appellate courts that are at variance with the SSA's national policies."[180] The goal is to "offer SSA recommendations for bringing consistency to the adjudication of disability cases in federal courts."[181] The consultants for the study are Jonah Gelbach of the University of Pennsylvania Law School and David Marcus of the University of Arizona Rogers College of Law.

The second, *Federal Administrative Adjudication*, will "map the contours of the federal administrative adjudicatory process, including both 'formal' adjudication conducted under the [APA] and 'informal' adjudication." The project will "explor[e] the wide variety of agency adjudicatory schemes across the federal government and their related rules of practice and case management techniques; catalog[] [and compare] the types of matters handled by formal and informal adjudication respectively; describ[e] the federal administrative judiciary, including [ALJs] and other types of hearing and ap-

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178. The project arises from the consultants' article *The Agency Class Action*, 112 Colum. L. Rev. 1992 (2012).

179. Admin. Conf. of the U.S., Aggregate Agency Adjudication, Request for Proposals–Aug. 27, 2015: Electronic Case Management in Federal Administrative Adjudication, https://www.acus.gov/sites/default/files/documents/Electronic%20Case%20Managment%20RFP_FINAL.pdf (Aug. 27, 2015).

180. Admin. Conf. of the U.S., *SSA Federal Courts Analysis*, ACUS.gov, https://www.acus.gov/research-projects/ssa-federal-courts-analysis.

181. *Id.* The Conference has engaged the subject of social-security disability adjudication several times since the resumption of the Conference's activities in 2010. *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2013-1, Improving Consistency in Social Security Disability Adjudications, 78 Fed. Reg. 41352 (July 10, 2013), https://www.gpo.gov/fdsys/pkg/FR-2013-07-10/pdf/2013-16541.pdf.

pellate officers; and collect[] and analyze[] agency caseload statistics and other empirical data."[182] The consultant for the project is Michael Asimow, formerly of UCLA Law School, now of Stanford Law School. The Conference staff's extensive research for *Federal Administrative Adjudication* now resides on a searchable database jointly established by Stanford Law School and the Conference.[183]

182. Admin. Conf. of the U.S., *Federal Administrative Adjudication*, ACUS.GOV, https://www.acus.gov/research-projects/federal-administrative-adjudication.

183. *Adjudication Research*: *Joint project of ACUS and Stanford Law School*, STANFORD UNIV., https://acus.law.stanford.edu (last visited Apr. 8, 2016).

CHAPTER 2

# Constitutional Law and Separation of Powers*

## PART I. THE SUPREME COURT'S 2014 TERM

### A. The Non-Delegation Doctrine

*Department of Transportation v. Ass'n of American Railroads*[1] was the constitutional law case that did not bark in the night. The D.C. Circuit had held that a section of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA)[2] was an unconstitutional delegation of regulatory authority to a private party.[3] The last time a federal law was held unconstitutional for that reason was in *Carter v. Carter Coal Co*.[4] in 1936. Consequently, this case generated some buzz. The U.S. Supreme Court, however, reversed on statutory grounds and remanded for the D.C. Circuit to consider the remaining constitutional issues.

The Rail Passenger Service Act of 1970[5] created Amtrak to take over the dying passenger rail service then required to be maintained by railroads. The actual tracks over which Amtrak runs belong overwhelmingly to freight railroads, which might prefer to give preference to their own trains over Amtrak's passenger trains. In order to enable Amtrak to provide reliable, timely service, the Act provided that Amtrak's passenger service, absent an emergency,

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1. 135 S. Ct. 1225 (2015).
2. Pub. L. No. 110–432; 122 Stat. 4907, § 207(a) (2008).
3. *See* Ass'n of Am. R.Rs. v. DOT, 721 F.3d 666 (D.C. Cir. 2013).
4. 298 U.S. 238 (1936).
5. Pub L. No. 91–518, 84 Stat. 1327 (1970).

"has preference over freight transportation in using a rail line, junction, or crossing."[6] Section 207 of the PRIIA tells Amtrak and the Federal Railroad Administration (FRA) to jointly develop "metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations." If Amtrak and the FRA cannot agree, the provision states that either "may petition the Surface Transportation Board [(STB)] to appoint an arbitrator" to resolve the dispute.[7] The resulting standards are "to the extent practicable" to be incorporated into the operating agreements maintained between Amtrak and the freight railroads over whose tracks Amtrak travels. If the on-time performance or service quality of Amtrak's trains fails to meet the standards, the STB may investigate and, if the failure is attributable to a freight railroad's failure to provide preference to Amtrak, may award damages or other relief against the offending railroad. Pursuant to this statutory scheme, Amtrak and the FRA developed standards, but the freight railroads did not like the standards and their association sued, asserting that the standards were the result of an unconstitutional delegation of regulatory authority to a private entity.

While it is black letter law that Congress may not delegate legislative authority to private entities, the Supreme Court has upheld regulatory schemes that involve private entities in the decisional process. In *Currin v. Wallace*,[8] for example, the Court upheld a system that required two-thirds of a regulated industry to approve of the agency's regulation. And, in *Sunshine Anthracite Coal Co. v. Adkins*,[9] the Court upheld a system where Congress authorized private parties to propose regulations to an agency for adoption. Here, however, the D.C. Circuit said the PRIIA combined both of these powers in Amtrak, which both can veto any standards the FRA might desire and, as a joint developer of any standards, can also propose regulations. The D.C. Circuit believed the Supreme Court's decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*[10] provided some guidance. First, in that case the Court found that a for-cause removal requirement for a principal officer can be constitutional and a for-cause removal requirement for an inferior officer can be constitutional, but the two combined are unconstitutional. Here, the combination of the two functions involved in *Currin* and

6. 45 U.S.C. § 24308(c) (2012).
7. *Id.*
8. 306 U.S. 1 (1939).
9. 310 U.S. 381 (1940).
10. 561 U.S. 477 (2010). This case is also discussed in *Adjudication*, *supra*, in Part I.F., and in *Judicial Review*, *infra*, in Part II.D.

*Adkins* likewise might be unconstitutional, while each separately was not. Second, *Free Enterprise Fund* reflected the concern that novelty may signal unconstitutionality, and here the PRIIA's statutory scheme is unprecedented. Finally, if Amtrak and the FRA cannot reach agreement on standards, the STB is to appoint an arbitrator; but the statute does not require the arbitrator to be an officer of the government, so the final decisionmaker here as well could be a private entity. The court rejected the invitation to interpret the statute to require a government arbitrator, saying the "constitutional avoidance canon is an interpretive aid, not an invitation to rewrite statutes to satisfy constitutional strictures."[11]

The question remained whether Amtrak was indeed a private entity or a federal government entity. The D.C. Circuit conceded that several factors suggested that Amtrak, although created in corporate form, is governmental in nature: Amtrak's board of directors are the Secretary of Transportation, seven other presidential appointees, and the President of Amtrak (who is chosen by the other members of the board); Amtrak is subject to the Freedom of Information Act (FOIA); private persons own the common stock in Amtrak, but the federal government owns all the preferred stock, each share of which is convertible into ten shares of common stock, giving the federal government overwhelming controlling interest; congressional appropriations are necessary to maintain Amtrak's solvency; and in *Lebron v. National Railroad Passenger Corp.*,[12] the Supreme Court held that Amtrak was "part of the Government for purposes of the First Amendment."[13] On the other hand, the D.C. Circuit noted that when Congress created Amtrak, it provided that it "shall be operated and managed as a for-profit corporation" and that it "is not a department, agency, or instrumentality of the United States Government."[14] Moreover, Amtrak's website is www.amtrak.com, not www.amtrak.gov. In deciding whether Amtrak should be considered private or public, the D.C. Circuit found particularly persuasive the fact that government agencies are supposed to act for the public good, whereas Amtrak is to operate for profit. Consequently, it found Amtrak private, and the statutory scheme unconstitutional.

The Supreme Court reversed unanimously, although Justice Alito wrote a concurring opinion and Justice Thomas concurred in the judgment but not in the Court's opinion. Justice Kennedy wrote for the Court. His opinion

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11. *Ass'n of Am. R.Rs.*, 721 F.3d at 673 n.7.
12. 513 U.S. 374 (1995).
13. *Ass'n of Am. R.Rs.*, 721 F.3d at 676.
14. *Id.* at 675.

addressed whether Amtrak is a private entity or a government entity. Looking at the same considerations that the D.C. Circuit had, he concluded that Amtrak was a government entity. The fact that Congress had by statute declared that Amtrak was not a "department, agency, or instrumentality of the United States Government" might be determinative with respect to Amtrak's treatment under statutes passed by Congress, but Congress' characterization could not be determinative of Amtrak's status under the Constitution.[15] This, in essence, was the conclusion of the Court's earlier decision regarding the First Amendment's applicability to Amtrak. Instead, the Court focused on whether the government has effective control of Amtrak. Not only does the government possess controlling power through its stock ownership of Amtrak, all of the members of Amtrak's Board of Directors are appointed either by the President or a principal officer of the United States. In addition, Congress has subjected Amtrak to a number of requirements peculiarly governmental, such as applying the FOIA to Amtrak, requiring Amtrak to make numerous annual reports, subjecting Amtrak to the Inspector General Act, and conducting oversight hearings on Amtrak's routes and budget. Contrary to the D.C. Circuit's suggestion that Amtrak is to be run for-profit, the Court noted that a number of statutory provisions impose public service duties on Amtrak. And last, but not least, Amtrak would not exist but for government subsidies, having received subsidies averaging on the order of $1 billion a year for the entire forty-three years of its existence.[16]

Having concluded that Amtrak was governmental, rather than private, the Court vacated the D.C. Circuit's decision that the PRIIA had effected an unconstitutional delegation to a private entity, but remanded for consideration of remaining constitutional claims that the D.C. Circuit did not address. These are claims that: (1) the appointment of the President of Amtrak by the other eight members of the Board of Directors violates the Appointments Clause, which requires principal officers to be appointed by the President with the advice and consent of the Senate; (2) the appointment of the arbitrator violates the Appointments Clause because the arbitrator is appointed by the STB rather than the President with the advice and consent of the Senate; (3) the appointment of the arbitrator violates the Non-Delegation Doctrine because the law does not specify that the arbitrator is a government official; and (4) that entire structure of the PRIIA violates the Due Process Clause because it effectively enables an entity (Amtrak) to make regulations regarding its competitors.

15. *Id.* at 674.
16. *See id.* at 676.

That at least some of these claims may have legs is made clear by Justice Alito's opinion, which provides a framework that invites lower courts to find the PRIIA's structure unconstitutional with respect to the appointments of the Amtrak President and of the arbitrator.

Justice Thomas—in contrast and consistent with his willingness to reconsider issues taken for granted for hundreds of years—has adopted the arguments made by Professor Philip Hamburger in his book *Is Administrative Law Unlawful?*, which he first floated in his opinion concurring in the judgment in *Perez v. Mortgage Bankers Ass'n.*[17] Those arguments conclude that it is unconstitutional for federal agencies to make rules that govern private conduct. In short, all regulatory activity carried out by federal agencies is unconstitutional. Don't expect this to be what the D.C. Circuit decides on remand.

In any case, this is not the last we will see of *Department of Transportation v. Ass'n of American Railroads*, although as of the date of this writing, there has been no lower court decision on any of these issues.

## B. Separation of Powers

The status of the city of Jerusalem is highly contested, with both the state of Israel and the people of Palestine claiming sovereignty to it. Since the creation of Israel in 1948, United States Presidents have taken a position of neutrality on the subject, resulting in the U.S. State Department's Foreign Affairs Manual instructing that passports of U.S. citizens born in Jerusalem may only name "Jerusalem" as the place of birth, rather than the city and nation as is normally the case. Congress, however, has attempted to decide the issue by law by, among other things, directing the Secretary of State, upon request, to record on the passport of a U.S. citizen born in Jerusalem the place of birth to be Israel. Pursuant to this law, Menachem Zivotofsky, a three-year old citizen of the United States, requested the Secretary of State to have "Jerusalem, Israel" listed as his place of birth on his passport. Notwithstanding this law, the State Department refused to comply with Zivotofsky's request, resulting in a lawsuit. The district court dismissed the suit, finding that the plaintiff lacked standing and that the issue was a non-justiciable political question.[18] The D.C. Circuit found the plaintiff had standing but affirmed the holding that the case was non-justiciable as a political ques-

17. 135 S. Ct. 1199, 1213 (2015). This case is also discussed in *Judicial Review*, *infra*, in Part I.B., and in *Rulemaking*, *infra*, in Part I.B.
18. 511 F. Supp. 2d 97 (D.D.C. 2007).

tion.[19] The first time around, the Supreme Court vacated the D.C. Circuit's decision, holding that the issue simply presented a question of whether a statute passed by Congress was unconstitutional, which since *Marbury v. Madison*[20] has been a justiciable question for the courts.[21] On remand, the D.C. Circuit ruled in favor of the State Department, holding that the statute was unconstitutional. And again the Supreme Court granted certiorari.

In *Zivotofsky v. Kerry*,[22] the Court affirmed the lower court's decision, but it was close, with only the four "liberal" justices joining Justice Kennedy's opinion for the Court. And Justice Breyer, although he joined the Court's opinion, repeated his belief that the case presented a political question, but because that issue had been decided against him in *Zivotofsky I*, he was willing to concur on the merits. Dissents were filed by Chief Justice Roberts (joined by Justice Alito) and by Justice Scalia (joined by Justice Alito and the Chief Justice). Justice Thomas, almost predictably, wrote separately to concur in the judgment in part and to dissent in part.

Justice Kennedy posed two questions to address the issue before the Court. First, does the President have the exclusive power to grant formal recognition to a foreign sovereign? Second, if so, does Congress have the power to command the President and his Secretary of State to make a statement that contradicts his determination as to recognition? To answer these questions, he began his analysis by invoking Justice Jackson's tripartite framework from *Youngstown Sheet & Tube v. Sawyer*[23] for assessing presidential power, and he and the government conceded that as in that case the President's power here is at its lowest ebb, because he is acting in contravention of an act of Congress. Thus, in order for the President's power of recognition to overcome an act of Congress, that power must be exclusively his.

Article II, Section 3's Reception Clause (that the President "shall receive Ambassadors and other public ministers") is the claimed source of the President's power to recognize foreign nations. Both Hamilton and Story described it as such, and international law writers at the time seemed to view sending and receiving ambassadors to and from a nation as the equivalent of recognizing the sovereignty of that nation. Moreover, the Supreme Court has acknowledged the President's unilateral power to recognize foreign nations in cases from 1839 to 1964. Texts and treatises on international law have

19. 725 F.3d 197 (D.C. Cir. 2013).
20. 5 U.S. [1 Cranch] 137 (1803).
21. *See* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427–28 (2012).
22. 135 S. Ct. 2076 (2015).
23. 343 U.S. 579, 635 (1952).

reached the same conclusion.[24] And then there are the policy reasons for lodging the sole power of recognition in the President: "[I]f the President is to be effective in negotiations over a formal recognition determination, it must be evident to his counterparts abroad that he speaks for the Nation on that precise question."[25] Looking at historical practice, the Court said that "history is not all on one side, but on balance it provides strong support for the conclusion that the recognition power is the President's alone."[26]

That said, the Court rejected the government's request to reaffirm the famous statement in *United States v. Curtiss-Wright Export Corp.*[27] that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations," saying that this description of the President's exclusive power was not necessary to that case's holding, which involved congressional authorization of Presidential action.[28] Rather, the Court said that "it is essential the congressional role in foreign affairs be understood and respected."[29] The Court explained as follows:

> It is not for the President alone to determine the whole content of the Nation's foreign policy. [However,] judicial precedent and historical practice teach that it is for the President alone to make the specific decision of what foreign power he will recognize as legitimate, both for the Nation as a whole and for the purpose of making his own position clear within the context of recognition in discussions and negotiations with foreign nations.[30]

This then raised the question of whether the statute requiring the insertion of the name "Israel" in a passport of one born in Jerusalem unconstitutionally infringed on the President's exclusive power of recognition. The Court found that it did: "If the power of recognition is to mean anything, it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent's statements."[31] Here the facts surrounding the passage of the law made

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24. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 204, at 89 (Am. Law Inst. 1987).
25. *Zivotofsky*, 135 S. Ct. at 2087.
26. *Id.* at 2091.
27. 299 U.S. 304 (1936).
28. *Zivotofsky*, 135 S. Ct. at 2089–90.
29. *Id.* at 2090.
30. *Id.*
31. *Id.* at 2112.

clear that its intent was indeed to force a contradiction of the President's non-recognition of Jerusalem as being in Israel. After all, its title is: "United States Policy with Respect to Jerusalem as the Capital of Israel."[32] The Court recognized that Congress has substantial authority over passports, which only exist as a result of acts of Congress, but this was an improper exercise of that authority because it "aggrandiz[ed] its power at the expense of another branch."[33]

Justice Thomas partially concurred in and partially dissented from the judgment. He agreed with the majority that the President has exclusive authority over recognition and therefore over what a passport reflects with regard to the nation in which the person is born. His analysis differed from the majority's analysis, however, on the reasons for this exclusivity. In his view, Congress has only those foreign affairs powers specifically granted to it, while the President retains all residual foreign affairs authority. Because there is no Passport Clause and because passports are not necessary and proper to carry into execution Congress' powers over commerce with foreign nations or naturalization, Congress simply did not have independent authority with respect to passports. Zivotofsky, however, had also sought to have the consular report of his birth reflect Israel as his place of birth. The majority said he had waived any claim that the consular report should be treated differently than the passport and thus had not addressed it, but Justice Thomas disagreed, saying the issue was on the table. Consular reports, Justice Thomas explained, are issued not as part of the President's foreign affairs powers, as he said passports were, but pursuant to Congress' authority to provide a uniform rule of naturalization, because its function is to identify the person born as being an American citizen, so that he or she need not be naturalized. Therefore, because consular reports were issued under congressional authority, Congress could specify how the place of birth should be identified.

Chief Justice Roberts authored a dissent that was joined by Justice Alito, and Justice Scalia authored a dissent that was joined by the Chief Justice and Justice Alito. The Chief Justice characterized the majority's decision as unprecedented: "Never before has this Court accepted a President's direct defiance of an Act of Congress in the field of foreign affairs."[34] Citing *Youngstown*,[35] he noted that the President's authority is at its lowest ebb when he acts in

32. *See* Pub. L. No. 107–228, § 214, 116 Stat. 1365 (2002).
33. *Zivotofsky*, 135 S. Ct. at 2096 (quoting Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 878 (1991)).
34. *Id.* at 2113.
35. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

contravention of an act of Congress. Whether or not the President has exclusive recognition authority, the statute is valid, he said, because it does not purport to undo the President's unwillingness to recognize Jerusalem as being in Israel. That some foreign nations and entities might misperceive a passport's identification of an individual as born in Jerusalem, Israel, as a tacit recognition of Jerusalem being in Israel no more makes that identification unconstitutional than if Congress imposed a trade embargo against a nation the President had recognized in order to express its displeasure with his recognition. The Chief Justice called the majority's opinion a "perilous step" by allowing the President to defy Congress in the field of foreign affairs.[36]

Justice Scalia disagreed with Justice Thomas as to Congress' power to issue passports, saying that the power to issue uniform rules of naturalization, augmented by the Necessary and Proper Clause, enabled Congress to legislate with respect to passports. He disagreed with the majority that the President has *exclusive* authority to recognize foreign nations, but like the Chief Justice, Justice Scalia argued that the statute did not concern recognition. That is, by requiring the State Department to honor a request to specify a place of birth in a passport as Jerusalem, Israel, Congress was not changing the nonrecognition of Jerusalem as being in Israel; it was merely honoring the personal desire of the person seeking the specification. As an example, he noted that the State Department allows persons born in Belfast, Northern Ireland, to have their place of birth reflected merely as Belfast, and this does not derecognize the United Kingdom's sovereignty over Northern Ireland.

## C. Due Process

*Kerry v. Din*[37] involved Fauzia Din, a citizen of the United States, who is married to a citizen of Afghanistan. She petitioned to have him classified as an "immediate relative" entitled to priority immigration status. This was approved, but her husband was denied a visa on the grounds that he was inadmissible as an alien who had engaged in terrorist activities. Din sued in federal court asserting that she had a liberty interest in her marriage and that she had been deprived of that liberty interest without due process when the visa was denied without a more detailed explanation, such as why the government thought he had engaged in terrorist activities.

The Ninth Circuit essentially accepted her argument, but the Supreme Court vacated the judgment and remanded. There was, however, no majority

36. *Zivotofsky*, 135 S. Ct. at 2116 (Roberts, C.J., dissenting).
37. 135 S. Ct. 2128 (2015).

opinion. Justice Scalia, joined by the Chief Justice and Justice Thomas, delivered the judgment of the court. They found that Din had not been deprived of any constitutional right entitling her to due process of law.[38] Justice Kennedy, joined by Justice Alito, concurred in the judgment, concluding that there was no need to decide whether Din had a constitutional right entitling her to due process because, assuming that she did have such a right, she had been afforded due process.[39] Justice Breyer authored a dissenting opinion, joined by Justices Ginsburg, Kagan, and Sotomayor, expressing the belief that Din both had a constitutional right and that she had not been afforded due process.[40]

Justice Scalia, referring back to the Magna Carta and the historical understanding of "life, liberty, and property" protected by the Due Process Clause, concluded that Din "could not conceivably claim the denial of [her husband's] visa application deprived her . . . of life or property; and . . . a claim that it deprived her of liberty is equally absurd."[41] Justice Scalia then reluctantly admitted that the Court had expanded the concept of "liberty" to include certain unenumerated fundamental rights, but here the government was not denying Din the right to marry, and the government's significant imposition on the enjoyment of her marriage comes from a long practice of regulating spousal immigration. Such a long practice establishes that there is not a history and tradition of recognizing a right of married couples to be together.

Given Justice Scalia's niggardly acknowledgement of a right to marry and what it may entail with respect to the enjoyment of marriage, it is not surprising that Justice Kennedy did not concur in his opinion. While he did not hold to the contrary of Justice Scalia, he found that Din had been afforded due process, even assuming she had a due process right. In so finding, he relied on the case of *Kleindienst v. Mandel*,[42] in which the U.S. Attorney General had denied a visa to Mandel, a self-described revolutionary Marxist. This denial was challenged by professors who had invited Mandel to the United States to speak at a conference, claiming it violated their First Amendment constitutional right to hear his views and engage with him in a free and open debate. The Court concluded there that the Executive's "decision to deny a visa that burdens a citizen's own constitutional rights is valid when it is made 'on the basis of a facially legitimate and bona fide reason.'"[43] There,

38. *See id.* at 2131 (Scalia, J.) (plurality opinion).
39. *See id.* at 2139 (Kennedy, J., concurring in the judgment).
40. *Id.* at 2141 (Breyer, J., dissenting).
41. *Id.* at 2133 (Scalia, J.) (plurality opinion).
42. 408 U.S. 753 (1972).
43. *Kerry*, 135 S. Ct. at 2140 (quoting *Kleindienst*, 408 U.S. at 770).

the facially legitimate and bona fide reason had been that the law then denied visas to aliens who advocated world communism, and the Attorney General refused to waive this prohibition because Mandel had previously overstayed visas on more than one occasion. Inasmuch as this summary response was sufficient in *Kleindienst*, Justice Kennedy believed the summary explanation of why Din's husband was denied the visa similarly met the standard of providing a facially legitimate and bona fide reason.

Justice Breyer, dissenting, first argued that Din had a protected liberty interest that flowed implicitly from a recognized fundamental right—the right to marry. The more difficult question, he said, was what procedures were required by the Due Process Clause before Din could be deprived of that liberty interest. However, the only procedure Din requested was "a statement of reasons, some kind of explanation, as to why the State Department denied her husband a visa."[44] Justice Breyer pointed out that such a statement has been consistently held to be a "fundamental element of due process."[45] He then went on to demonstrate that the statement that she did receive—that her husband had engaged in "terrorist activities" as defined by statute—was meaningless because that statute contained at least ten subsections of different kinds of activities classified as terrorist activities, and the State Department's explanation failed to indicate which it was applying or on what basis.

Perhaps the most interesting aspect of this case is trying to discern what its legal precedential effect is. A majority of the justices addressing the issue found there to be a due process right involved (seven justices expressed an opinion as to whether there was a due process right; four of the seven held there was a due process right); and a majority of the justices addressing the issue found that the State Department's explanation did not satisfy due process (six justices expressed an opinion as to whether due process was satisfied; four of the six held it was not satisfied). Nevertheless, a majority of the justices concluded that Din had not been denied due process. Utilizing the rule of *Marks v. United States*[46]—that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds"[47]—we can perhaps conclude that Justice Kennedy's opinion concurring in the judgment is the narrowest ground.

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44. *Id.* at 2144.
45. *Id.*
46. 430 U.S. 188, 193 (1977).
47. *Id.*

## D. The Elections Clause

In 2000, Arizona voters adopted by initiative an amendment to the state constitution, removing redistricting authority from the Arizona Legislature and placing it in an independent commission. The Arizona Legislature challenged this action as a violation of the Elections Clause of the Constitution (Art. I, Sec. 4, cl. 1), which states, "The times, places, and manners of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."

The Court, by a 5-4 margin with Justice Kennedy joining the "liberal" justices, rejected the challenge in *Arizona Legislature v. Arizona Independent Redistricting Commission*.[48] One issue in the case was whether the legislature had standing to bring this case. Seven of the nine justices found that it did, with Justices Scalia and Thomas disagreeing. Discussion of that issue in the case can be found in the *Developments* Chapter on *Judicial Review*.[49] Justice Ginsburg, writing for the Court, began by identifying three precedents. *Davis v. Hildebrant*[50] upheld a state supreme court's refusal to void a referendum that disapproved the legislature's redistricting plan. The Court there held that the people of Ohio had established the referendum as part of the state's legislative power (through amendment of the state's constitution), and that, for purpose of the Elections Clause, the term "the Legislature" did not necessarily mean the representative body alone. However, in *Hawke v. Smith*,[51] the Court held that a referendum on Ohio's ratification of the Eighteenth Amendment was unconstitutional because the Constitution requires amendments to be ratified by the "legislatures" of three-quarters of the states. In *Hawke*, the Court distinguished *Hildebrant* on the grounds that ratification of a constitutional amendment is not a "legislative" act. That is, it is not legislation; not the passing of a law. The Constitution may place the responsibility for ratification in a legislature, but that does not make ratification legislation. By contrast, redistricting is done through legislation. In *Smiley v. Holm*,[52] the Court continued this distinction, upholding Minnesota's method of redistricting—adoption by the legislature but subject to the veto of the governor. Against the claim that allowing the governor to play a role in redistricting was inconsistent with the Elections Clause's specification of the "the Legisla-

48. 135 S. Ct. 2652 (2015).
49. *Arizona Legislature* is discussed in *Judicial Review*, *infra*, in Part II.A.
50. 241 U.S. 565 (1916).
51. 253 U.S. 221 (1920).
52. 285 U.S. 355 (1932).

ture," the Court repeated the idea that redistricting was legislation, and for purposes of the Elections Clause, "the Legislature" included whatever the state provided as constituting its legislative power, which included a role for the governor. Thus, "the Legislature," as used in the Constitution in different places, could mean different things. When the Constitution required "the Legislature" to make legislation about something, as with redistricting, the term could include whatever the mechanism the state had for adopting legislation. If, however, the Constitution required "the Legislature" to undertake some function other than legislation, such as ratifying constitutional amendments, selecting United States Senators before the Seventeenth Amendment, or consenting to the acquisition of lands by the United States under Article I, Section 8, then only the state legislature itself could perform the function.

Using this analysis, the Arizona initiative process easily passed muster, as it is a manner of passing legislation. The Court bolstered its argument from precedent by referring to four dictionaries in common usage at the time of the founding, each of which defined "legislature" as the power that makes laws.

The Chief Justice wrote for the four dissenters. His argument was rather simple: "Legislature" means a legislature, and a legislature is a representative body, not the people themselves. The fact that contemporary dictionaries did not make that clear, the Chief Justice said, is simply because at the time the only power that made laws was a representative assembly; lawmaking by popular vote was unknown. Moreover, he said that the majority misrepresented the reasoning of the cases it cited for precedent because none of them held that the word legislature meant whatever power there was to make law, and none divested the power to redistrict from the state's legislative body. In *Hildebrant* and *Smiley*, while a referendum of disapproval or gubernatorial veto could block a particular legislative redistricting, that would only return the issue to the legislature. Ultimately, in those states, only the legislature could redistrict and that is why the referendum and gubernatorial veto were held constitutional: because they did not conflict with the constitutional requirement that it be a state legislature that makes the redistricting. Here, in Arizona, however, the legislature was completely excluded from the redistricting.

## E. The Takings Clause

One of the holdover statutes from the New Deal and its response to the Great Depression is the Agricultural Marketing Agreement Act of 1937. It

authorizes the Secretary of Agriculture to make "marketing orders" to help maintain stable markets for particular agricultural products. Today, one of those products is raisins, and the marketing order requires raisin handlers in certain years to give a percentage of their crop to the federal government, which the government keeps out of the competitive market in order to maintain stable markets from year to year despite differences in crop yields in different years. The Hornes are raisin handlers that refused to comply with this requirement, which resulted in a fine. The Hornes appealed the fine on the basis that the scheme constituted an uncompensated taking in violation of the Takings Clause of the Fifth Amendment, which provides: "[N]or shall private property be taken for public use without just compensation." The government sought dismissal of the case, arguing that the Hornes' only recourse was a claim for compensation in the Court of Federal Claims, rather than a defense to a fine imposed in an administrative proceeding. In *Horne v. Department of Agriculture*,[53] the Supreme Court rejected the government's argument and remanded the case to the Ninth Circuit for consideration of the merits. The Ninth Circuit held that the system did not result in a violation of the Takings Clause, but in *Horne v. Department of Agriculture*,[54] the Court reversed, holding that it did.

The Chief Justice authored the opinion for the Court. The first question in the case was whether the Takings Clause only refers to real property or whether it also includes personal property. That was easy; it protects both real and personal property. No justice appeared to dissent from that conclusion. The second issue was whether the marketing order was properly characterized as a regulatory taking or a physical taking. On this issue again all the justices seemed to agree that the requirement to physically transfer the raisins to the government constituted a physical, not just a regulatory, taking. The third issue was whether the government has a categorical duty to pay compensation for a physical taking of property when it reserves to the property owner a contingent interest in a portion of the value of the property taken. Other than Justice Sotomayor, again all the justices agreed that a contingent interest in the property taken did not eliminate a duty to pay any compensation. The fourth question was whether a requirement to surrender certain property as a condition for permission to engage in commerce constitutes a *per se* taking. Once more, other than Justice Sotomayor, all the justices agreed that it did. "Selling produce in interstate commerce, although certainly sub-

53. 133 S. Ct. 2053 (2013).
54. 135 S. Ct. 2419 (2015).

ject to reasonable government regulation, is . . . not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection."[55]

It was the next question that divided the Court into its now usual 5-4 split, with Justice Kennedy providing the swing vote: what compensation would be due to the Hornes? The government argued that the Court should remand the case to the Ninth Circuit to determine what compensation would have been due to the Hornes had they complied with the marketing order. The government suggested that no compensation might be due, because as a result of the marketing order's resulting reduction of the supply of raisins, the increased price the Hornes received for the raisins they retained might have more than offset what they would have received if the market had been flooded with raisins in the absence of the marketing order. The majority was not moved. It noted that the canonical rule is that "compensation normally is measured by 'the market value of the property at the time of the taking.'"[56] Here the government had set the fine at the level of what the government found the fair market value of the raisins to be—$483,843.53—and the majority said the government could not now disavow that valuation. Consequently, the majority ruled that the Hornes should be relieved of the obligation to pay the fine (and associated civil penalty). It concluded: "This case, in litigation for more than a decade, has gone on long enough."[57]

Justice Thomas concurred in the opinion but noted that he questioned whether taking the raisins was a taking "for a public use" as required by the Takings Clause.

Justice Breyer, joined by Justices Ginsburg and Kagan, dissented from the Court's resolution of the last issue. He said that the issue of just compensation was not presented in the petition for certiorari and "barely touched" in the briefs. Moreover, he believed that the marketing order itself may have provided just compensation to the Hornes. Consequently, he believed that the issue of compensation should have been remanded for a full consideration.

Justice Sotomayor dissented generally from the Court's opinion. In her view, if a taking of property does not take all the property rights from the private owner but leaves the owner with significant residual rights, then it is not a *per se* taking. Here, because the Hornes would have had certain residual rights in the proceeds from the raisins they would have surrendered, she

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55. *Id.* at 2430–31.
56. *Id.* at 2432 (quoting United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984)).
57. *Id.* at 2433.

believed that the marketing order did not effect a *per se* taking, so she would have affirmed the Ninth Circuit.

While it is not clear that *Horne* will have much impact on Takings law, it may have an impact on the remaining programs under the Agricultural Marketing Agreement Act of 1937, as it seems it will make them all unenforceable if they also require the actual transfer of the commodity to the government. If any grower and handler can opt out of such a marketing order with impunity and enjoy the benefits resulting from a restricted supply of the commodity where others comply with the order, ultimately no one will comply with the order.

## F. Freedom of Speech—Government Speech

Texas offers persons a choice between ordinary and specialty automobile license plates. Those wishing a specialty plate may propose a design, which if approved by the state will be made available for use by persons on their automobiles, for a fee. The Texas Division of the Sons of Confederate Veterans (SCV) proposed a design that included a Confederate battle flag, but the state would not approve it. The SCV brought suit claiming that the denial violated the Free Speech Clause of the First Amendment. In *Walker v. Sons of Confederate Veterans*,[58] the Supreme Court, by a 5-4 vote, held that there was no First Amendment violation because the speech on the Texas license plates was government speech, not private speech. Justice Breyer wrote for the Court, joined by Justices Kagan, Ginsburg, Sotomayor, and Thomas (!). He began by repeating accepted doctrine that as a general matter, when government speaks, it is entitled to promote a program, espouse a policy, or take a position. In short, it can favor a particular viewpoint or content without running afoul of the First Amendment. The real question in the case was whether the specialty license plates were indeed government speech. After all, the designs were requested by private entities, not the government. Justice Breyer analogized the license plates to the permanent displays at issue in *Pleasant Grove City v. Summum*.[59] There, the city had allowed to be placed in the city park at least eleven permanent displays donated to the city by private entities. When a religious organization wished to have a monument added to the park espousing the principles of Summum, the city refused. The organization claimed that by accepting a wide range of other displays, the city had created a public forum. The Court, however, rejected that argument, con-

58. 135 S. Ct. 2239 (2015).
59. 555 U.S. 460 (2009).

cluding that by accepting the other displays the city had engaged in its own expressive conduct, and it was free to reject requested displays that it did not wish to be associated with. The Court noted that historically monuments in city parks were intended as the government speaking to citizens, that it is not common for property owners to allow permanent installations on their property with which they did not wish to be associated, and that the city maintained control over which permanent displays were allowed to be placed in the park. Similarly, with regard to license plates, historically they had been used to communicate messages on behalf of the state; license plate designs are often closely identified in the public mind with the state; and the state maintained direct control over the design of all its license plates.

Justice Alito wrote for the dissenters. He derided the notion that by approving the specialty designs, the plates became government speech. He noted that the state had approved specialty designs extolling the sports teams of at least nine out-of-state universities, which seemed an unlikely expression of Texas state speech. He distinguished *Summum* by pointing out that there, the limited space in the park had reinforced the need for the city to be selective with respect to permanent monuments, but the Texas specialty plate program was not designed to be selective. Indeed, its purpose was to generate additional revenue for the state, so that new designs were encouraged, and the brochure explaining how to obtain the approval for specialty designs stressed that the message was one coming from the requester, but noted that "your design is subject to reflectivity, legibility, and design standards."[60] Consequently, Justice Alito believed that the state had created a limited public forum and its rejection of the SCV's design was prohibited viewpoint discrimination.

There is an irony in the Court's reliance on *Summum* in light of the fact that Justice Alito was the author of the Court's opinion in that case.

## G. Freedom of Speech—Judges' Election Campaigns

Florida, like many states, forbids candidates in judicial elections from personally soliciting campaign funds. *Williams-Yulee v. Florida Bar*[61] involved a challenge to that judicial conduct rule, arguing that it violated the First Amendment's Free Speech Clause. The Chief Justice wrote the Supreme Court's opinion, which was joined by the four "liberal" members of the Court,

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60. *Walker*, 135 S. Ct. at 2260.
61. 135 S. Ct. 1656 (2015).

holding that the rule was constitutional. It began with the observation that a state's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office. Applying strict scrutiny, the Chief Justice found that the state had a compelling government interest in preserving both the reality and appearance of judicial integrity. Florida, he said, "has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the integrity of the judiciary."[62] By limiting the prohibition to personal solicitation, while allowing campaign committees and their members to solicit on behalf of the candidate and allowing candidates themselves to write thank you notes to those who contributed to the campaign, Florida has narrowly tailored the limitation on speech.

Justice Ginsburg concurred in the Court's opinion except for that part which stated that "strict scrutiny" was the test to be applied. In her view, strict scrutiny should not be applied when a state differentiates elections for political offices from those for judicial offices. Given the different roles of judges and politicians, the means by which to ensure the integrity of the judiciary in their elections should not be governed by the same standard as applied to political elections.

Justice Scalia authored a dissent joined by Justice Thomas. He began by noting that the rule here restricts fully protected speech on the basis of content, thereby triggering strict scrutiny, but he argued that the Chief Justice did not apply strict scrutiny; he applied the appearance of strict scrutiny. Inasmuch as solicitations can be made by proxy and the donors identified to the judicial candidate so he may write thank-you notes, it is difficult to see how the rule furthers in any way preserving either the reality or appearance of integrity. At bottom, he expressed the view that once a state has decided to have judges elected, then those elections should be governed the same as any other election.

Justice Kennedy also dissented. He agreed with Justice Scalia but wrote to point out two ironies in the Court's opinion. First, "that the very First Amendment protections judges must enforce should be lessened when a judicial candidate's own speech is at issue."[63] And second, that the Court "weakened the rigors of the First Amendment in a case concerning elections, a paradigmatic forum for speech."[64]

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62. *Id.* at 1671.
63. *Id.* at 1682.
64. *Id.*

Justice Alito also dissented. Agreeing with both Justices Scalia and Kennedy, he expressed the view that the Florida rule "is about as narrowly tailored as a burlap bag,"[65] inasmuch as it prohibited not only one-on-one solicitations, but also mass mailings and even newspaper ads. That is, a newspaper ad in which the candidate said he would like your support, and that you should send money to his campaign, would be prohibited; but an ad in which the candidate's campaign committee said it would like your support and to send money to the campaign committee, would not.

The "liberal" justices have been consistent in allowing restrictions in elections that implicate First Amendment concerns where those restrictions are aimed at preventing corruption or its appearance. That has been true in campaign finance cases, *see, e.g.*, *Citizens United v. Federal Election Commission*,[66] and in judicial election cases, *see Republican Party of Minnesota v. White*.[67] Similarly, Justices Scalia, Thomas, Kennedy, and Alito have been likewise consistent in holding speech-related restrictions involving campaigns to the strictest of scrutiny. Here it is the Chief Justice who blinked.

## PART II. THE SUPREME COURT'S 2015 TERM

Last year, the Court decided *Harris v. Quinn*,[68] in which it held by a 5-4 vote that the First Amendment prohibited requiring certain public employees, because of their unique circumstances, to pay union dues to a public employee union. The *Harris* decision thus created an exception to the general rule established in *Abood v. Detroit Board of Education*,[69] that the First Amendment did not bar requiring public employees from paying union dues that were used solely for the purposes of the union's core collective bargaining activities. Despite the *Harris* Court's reliance on the special nature of the employees involved there, it went out of its way to critique the Court's analysis in *Abood*, leading many to believe that the Court was inviting an opportunity to overrule *Abood* altogether. They did not have to wait long.

In June, the Court granted certiorari in *Friedrichs v. California Teachers Ass'n*.[70] *Friedrichs* involved a challenge to the requirement under California

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65. *Id.* at 1685.
66. 558 U.S. 310 (2010).
67. 36 U.S. 765 (2002).
68. 134 S. Ct. 2618 (2014).
69. 431 U.S. 209 (1977).
70. 135 S. Ct. 2933 (2015).

law that public school employees represented by a union pursuant to an exclusive bargaining agreement with their employer must either join the union or pay a "fair share service fee." This fee represents the cost to the union of activities germane to collective bargaining. Friedrichs and others claimed that, by requiring them to make any financial contributions in support of any union, California's agency shop arrangement violated their rights to free speech and association under the First Amendment as it applies to the states under the Fourteenth Amendment. This claim was clearly foreclosed by the Supreme Court's decision in *Abood*, so the district court granted judgment to the defendants; the Ninth Circuit, without argument or opinion, affirmed that judgment.

The Supreme Court's opinion in *Harris* was written by Justice Alito and joined by the four other "conservatives." There, the Court noted that *Abood* had treated the First Amendment issue as largely settled by two earlier cases involving unions in the private sector: *Railway Employees v. Hanson*[71] and *Machinists v. Street*.[72] This, the Court said, was error. *Hanson* involved a challenge by railroad employees to an amendment of the Railway Labor Act (RLA) authorizing the creation of union shops in the railroad industry—i.e., requiring all employees to join a union and pay union dues—thereby preempting state right-to-work laws. The main challenge was under the Commerce Clause, but the employees included a facial First Amendment challenge as well, claiming that union shops force men "into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought."[73] However, because the challenge to the RLA amendment occurred before there was any experience under the union shop, there was no evidence that the union had engaged in political or ideological activities. The Court dismissed the First Amendment challenge with one sentence, likening the union shop to states' integrated bars, where to be admitted to practice in a state one must be a member of the state bar and pay state bar dues.

*Street* involved a later challenge on First Amendment grounds to the union shop authorized by the RLA, but this time there was evidence of the unions being involved in political and ideological activities. The *Street* Court said the *Hanson* Court had not addressed this particular issue, and it recognized that this was a constitutional question "of the utmost gravity."[74] However, the

71. 351 U.S. 225 (1956).
72. 367 U.S. 740 (1961).
73. *Hanson*, 351 U.S. at 236.
74. *Street*, 367 U.S. at 749.

*Street* Court avoided this constitutional question by interpreting the RLA union shop provision to "deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes."[75] That is, the union *could* require all employees to provide funds to support the union's non-political expenditures for collective bargaining, contract administration, and grievance-adjustment purposes.

The *Abood* Court recognized that forced association with a union impinged on the employees' First Amendment speech and associational rights but understood *Hanson* and *Street* to have held that two government interests justified that impingement with regard to the union's core collective bargaining activities. Those interests were the promotion of labor peace by assuring exclusive union representation (i.e., preventing inter-union rivalries in the work force) and the elimination of free rider problems (i.e., allowing employees to enjoy the benefits of union representation without having to contribute to the union). The employees' speech and association rights did, however, trump the union's interest in promoting its political or ideological agenda, so that an employee could not be forced to contribute to those union activities.

Whether or not *Hanson* and *Street* were correctly decided—and there are hints in the *Harris* opinion suggesting that the Court believed they were not—the *Harris* Court said that *Abood* failed to appreciate the difference between public sector unions and private sector unions:

> In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector. . . . *Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made for political ends.[76]

Indeed, wage levels and pension benefits of government employees are political issues in themselves.

Moreover, the *Harris* Court found unpersuasive the underlying justifications given in *Hanson* and *Street*, and repeated in *Abood*, for impinging on employees' speech and association rights. First, a union shop requiring all employees to be members of the union is not necessary to achieve labor peace by assuring an exclusive union representation. Allowing employees to opt out

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75. *Id.* at 768–69.
76. *Harris*, 134 S. Ct. at 2632.

of membership in the recognized union does not carry a right to establish a second, competing union. That is, there can be one, exclusive union to represent all the employees without requiring all the employees to be a member of the union. The Court noted that under federal law, a union in a federal agency cannot compel employees to be members of the union. Second, the Court dismissed the significance of a free rider problem. It suggested that if a majority of employees vote to have a union, presumably they would be willing to pay the union dues, and it said that "a host of organizations advocate on behalf of the interests of persons falling within an occupational group, and many of these groups are quite successful even though they are dependent on voluntary contributions."[77]

Given this discussion in *Harris* rejecting *Abood*'s reasoning, it would have been extraordinary for the Court not to overrule *Abood* in *Friedrichs*. However, the passing of Justice Scalia before the decision in the case deprived the *Harris* majority its fifth vote. As a result, the Court affirmed by an equally divided court the lower court judgment rejecting the challenge to the union fee system.[78] Thus, *Abood* lives to fight another day.

## PART III. LOWER COURTS

### A. Are ALJs Unconstitutional Under the Appointments Clause or Separation of Powers?

The Appointments Clause (Article II, Sec. 2, cl. 2) states that the President:

> [S]hall nominate, and by and with the advice and consent of the Senate, shall appoint . . . all other officers of the United States, . . . 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.

ALJs might be characterized as principal officers, inferior officers, or employees. If ALJs are principal officers, then their appointments have been clearly unconstitutional because they were not appointed by the President with the advice and consent of the Senate.

If ALJs are inferior officers, then the appointments of many ALJs are

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77. *Id.* at 2641.
78. Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016).

unconstitutional because they were not appointed by the head of a department. For example, apparently the SEC ALJs are routinely appointed by the SEC's Office of Administrative Law Judges. And the Social Security Administration's ALJs are appointed by the Chief Judge. If, however, they were appointed by the head of the department, then the Appointments Clause would not be violated.

What constitutes a "department" for constitutional purposes is not clear, but the Supreme Court has taken a broad view of the term, applying it to an independent regulatory agency (the SEC). In *Freytag v. Commissioner of Internal Revenue*,[79] the Court split 5-4 on the question of whether the Tax Court was a "court" or a "department" for purposes of the Appointments Clause, with the majority choosing "court." However, in *Free Enterprise Fund*,[80] the Court adopted the analysis of the *Freytag* minority that any "freestanding component of the Executive Branch, not subordinate to or contained within any other such component . . . constitutes a 'Departmen[t]' for the purposes of the Appointments Clause."[81] The D.C. Circuit has even found the Library of Congress to be a "department" for purposes of the Appointments Clause, despite in a previous case having characterized it as a legislative agency.[82]

Whether the Federal Energy Regulatory Commission is a "department" is unclear, because, while it is contained within the U.S. Department of Energy,[83] its "members, employees, [and] other personnel of the Commission shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent of any other part of the Department [of Energy]."[84]

If ALJs are not officers at all but employees of the agencies for which they work, then there is no Appointments Clause problem.

The dividing line between officers and employees is not well established. In *Buckley v. Valeo*,[85] the Court described one set of powers given to the Federal Election Commission as investigative and informative, and it said that one need not be an officer to exercise these powers. However, it went on to say that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States.'"[86] In *Landry v.*

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79. 501 U.S. 868 (1991).
80. 561 U.S. 477 (2010).
81. *Id.* at 511.
82. *See* Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332, 1341 (D.C. Cir. 2012).
83. 42 U.S.C. § 7171(a) (2012).
84. *Id.* § 7171(d).
85. 424 U.S. 1 (1976).
86. *Id.* at 126.

*FDIC*,[87] the D.C. Circuit concluded that the Federal Deposit Insurance Corporation's (FDIC's) ALJs were employees rather than officers. The primary reason for this conclusion was a reading of the Court's decision in *Freytag*[88] that placed primary importance on whether the person could make final decisions binding the agency. In *Freytag*, the Special Trial Judges of the Tax Court (STJs) could do so and were therefore held to be officers, but in *Landry*, the FDIC ALJs could not. Under the FDIC procedures, FDIC ALJs could only make recommended decisions. Judge Randolph, concurring in part and concurring in the judgment in *Landry*, did not subscribe to this conclusion. Rather, he opined that in *Freytag*, the Court's discussion of the STJs' ability to make final decisions for the agency was an alternative holding as to why they were officers. He noted that the *Freytag* Court appeared also to hold that the STJs were officers because they could "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders,"[89] and because in the course of "carrying out these important functions . . . [they] exercise significant discretion."[90] Two district court decisions this year have reached the same conclusion as Judge Randolph and on the same basis to conclude that SEC ALJs are officers, not employees.[91]

Thus, whether ALJs are for constitutional purposes to be considered officers or employees is unclear. On the one hand, to the extent that agencies retain final decision authority with respect to cases before ALJs, even if that authority is generally exercised as a rubber stamp, one could say, consistent with *Buckley*, that ALJs are really just engaged in obtaining information and making recommendations to the agency and therefore are not exercising significant authority under the laws of the United States. Moreover, in the Supreme Court's most recent decision regarding the Appointments Clause, *Free Enterprise Fund*,[92] the Court casually referred to ALJs as "employees" rather than officers.[93] And it cited the *Landry* case in saying that there was a dispute

87. 204 F.3d 1125 (D.C. Cir. 2000).
88. 501 U.S. 868 (1991).
89. *Landry*, 204 F.3d at 1141 (Randolph, J., concurring in part and concurring in the judgment) (quoting *Freytag*, 501 U.S. at 881–82).
90. *Id.*
91. See Duka v. SEC, No. 15 Civ. 357(RMB)(SN), 2015 WL 4940057 (S.D.N.Y. Aug. 3, 2015); Hill v. SEC, 114 F. Supp. 3d 1297 (N.D. Ga. 2015).
92. 561 U.S. 477 (2010).
93. *See id.* at 506 n.9 ("[O]ur holding . . . does not address that subset of independent agency employees who serve as administrative law judges.").

over whether ALJs are officers. In addition, the Administrative Procedure Act (APA) refers to ALJs as "employees" in sections 554, 556, and 557.[94] Of course, Congress' characterization in a statute of a person as an employee is not determinative of whether that person is an employee, rather than an officer, under the Constitution. On the other hand, Judge Randolph's interpretation of the Court's opinion in *Freytag* seems more accurate than the majority's in *Landry*, and the same conclusion reached by two district courts further suggests that the functions of an ALJ might constitute the exercise of significant authority of the United States. Finally, in *Edmond v. United States*[95]—not discussed by the majority in *Landry*—in which the status of judges of the U.S. Coast Guard Court of Criminal Appeals was at issue, the Supreme Court stated, "What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers."[96] But this statement was made to justify the finding that these judges were inferior officers rather than principal officers. It certainly did not mean that they were employees rather than officers.

If ALJs are officers, it remains to be seen whether they are principal officers or inferior officers. The principal test of whether an officer is a principal officer or an inferior officer was established in *Edmond*. There it was said: "Whether one is an 'inferior' officer depends on whether he has a superior."[97] And "we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[98] In determining whether someone's work is "directed and supervised" by a principal officer, the Court has said that the "power to remove officers . . . is a powerful tool for control."[99] It is a particularly powerful tool if the removal need not be for cause, but the Court has noted that the existence of "for cause" removal limitations does not eliminate the ability to direct and supervise someone's work.[100] However, the D.C. Circuit has said that the Court in

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94. *Id.*
95. 520 U.S. 651 (1997).
96. *Id.* at 665.
97. *Id.* at 662.
98. *Id.* at 663.
99. *Id.* at 664 (quoting Bowsher v. Synar, 478 U.S. 724, 727 (1986)).
100. *See Free Enter. Fund*, 561 U.S. at 532–33 (citing Morrison v. Olson, 487 U.S. 654 (1988)).

*Morrison v. Olson* "did not hold that such a restriction on removal was generally consistent with the status of an inferior officer."[101]

ALJs can be removed for cause by the employing agency but only after a determination by the Merit Systems Protection Board, so it could be said that this supports a determination that they are inferior officers. But in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, the D.C. Circuit suggested that the fact that Copyright Royalty Judges (CRJs) could only be removed for cause weighed in favor of them being principal rather than inferior officers.

In *Edmond*, the Court found that the work of judges of the Coast Guard Criminal Appeals Court was directed and supervised in two different ways. First, there was an executive branch entity that reviewed the decisions of the court. Under the APA, the agency may always review the initial decision of an ALJ.[102] Second, while he could not attempt to influence the outcome of individual proceedings, the Judge Advocate General of the Coast Guard was responsible for prescribing uniform rules of procedure for the court. Under the APA, the agency promulgates the procedural rules applicable to hearings before ALJs.[103]

If ALJs are officers, they are probably inferior officers because they may be removed by a principal officer, albeit for cause, and are under the direction and supervision of a principal officer. Many ALJs can be distinguished from CRJs because the decisions of CRJs are final for purposes of the executive branch. Consequently, unless they are appointed by the head of the agency, their appointments are unconstitutional. However, this problem has an easy fix: have an agency head appoint the agency's ALJs.

Assuming that ALJs are inferior officers, and that any Appointments Clause problem could be cured by their appointment by the head of the agency, there is a remaining question of whether their protection from removal except for cause violates the Separation of Powers under the analysis used in *Free Enterprise Fund*.[104]

In *Free Enterprise Fund*, the Court by a 5-4 margin held that the Sarbanes-Oxley Act's for-cause limitation on removal of members of the Public Com-

101. *Intercollegiate Broad. Sys.*, 684 F.3d at 1340.
102. *See* 5 U.S.C. § 557(b) (2012) (providing that the agency may in specific cases or by general rule require the entire record to be certified to it for decision and that the agency may review an ALJ's initial decision *sua sponte*).
103. *See* 5 U.S.C. § 556(c) (2012) (stating that ALJs preside at hearings "subject to published rules of the agency").
104. 561 U.S. 477 (2010).

pany Accounting Oversight Board (PCAOB) was unconstitutional because the persons who could remove them (the members of the SEC) could themselves only be removed for cause. The Court said that such a dual for-cause removal scheme attenuated too far the President's responsibility to take care that the laws are faithfully executed. The Court acknowledged that it had approved for-cause removal provisions for principal officers in *Humphrey's Executor v. United States*,[105] and for an inferior officer in *Morrison*,[106] but those cases did not suggest that a dual for-cause removal scheme would be constitutional.

Almost all ALJs are appointed by someone who is protected from removal except for cause. For example, the Commissioner of Social Security can only be removed for cause.[107] *Free Enterprise Fund* did not by its terms extend its analysis to ALJs. Indeed, in a footnote, the Court explicitly stated:

> [O]ur holding also does not address that subset of independent agency employees who serve as administrative law judges. *See*, *e.g.*, 5 U.S.C. §§ 556(c), 3105. Whether administrative law judges are necessarily "Officers of the United States" is disputed. *See*, *e.g.*, *Landry v. FDIC*, 204 F.3d 1125 (C.A.D.C. 2000). And unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, see §§ 554(d), 3105, or possess purely recommendatory powers.[108]

The footnote thus provides two separate arguments as to why, perhaps, the analysis in *Free Enterprise Fund* would not apply to ALJs.

First, it holds open the idea that ALJs are not officers at all, and in the text of *Free Enterprise Fund*, the Court stated unequivocally that "[n]othing in our opinion . . . should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies."[109] Second, even if ALJs are considered inferior officers, the fact that they perform solely adjudicative functions would distinguish them from the PCAOB, which possessed not only adjudicative functions but also wide-ranging rulemaking and policymaking functions. Moreover, the Court has recognized greater limits on presidential control of adjudicative functions than on policymaking functions. Indeed, the Court has even gone so far as to deny the President the

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105. 295 U.S. 602 (1935).
106. 487 U.S. 654 (1988).
107. 42 U.S.C. § 902(a)(3) (2012).
108. *Free Enter. Fund*, 561 U.S. at 507 n.10.
109. *Id.* at 507.

power to remove members of the War Claims Commission except for cause, even though they were principal officers and the statute did not even provide for for-cause removal protection.[110] Finally, the solution in *Free Enterprise Fund* was to sever the for-cause removal provision of the Sarbanes-Oxley Act as unconstitutional with respect to the PCAOB members, meaning they could be removed by the SEC at will. A similar solution with respect to ALJs is difficult to conceive. The Court has indicated numerous times that adjudicators need independence and being subject to removal at will by an agency would potentially destroy ALJs' independence. The district court in *Duka v. SEC*[111] considered whether the dual for-cause removal restrictions applicable to ALJs fell under the analysis of *Free Enterprise Fund* and held that it did not, essentially for the reasons addressed above. Similarly, the district court in *Hill v. SEC*,[112] while declining to decide the issue, opined that it had "serious doubts" that the dual for-cause removal limitations applicable to ALJs interfered with the President's ability to perform his duties, citing *Duka*.

Nevertheless, in *Intercollegiate Broadcasting System*, the D.C. Circuit relied upon *Free Enterprise Fund*'s solution to craft its own solution to the unconstitutional appointment of CRJs.[113] There the court found that the CRJs were principal officers because their decisions were not subject to review by anyone in the executive branch, but they were not appointed by the President with the advice and consent of the Senate. In order to cure this constitutional problem, the court held unconstitutional the for-cause limitation on the removal of CRJs and severed it from the statute. Because CRJs now could be fired at will, the court found that they would be inferior officers instead of principal officers, and their appointment by the Librarian of Congress (the head of a department, the court held) was therefore constitutional. In deciding on this cure, the court explicitly noted that in this way the Librarian, through the threat of removal, could significantly constrain the decisions of the CRJs.

While this decision is disturbing because it ignored any question about the need for independence by judges, two aspects of the case can distinguish it from a case involving ALJs. First, CRJs' exclusive function is ratemaking, which normally is classified as rulemaking, rather than adjudication; adjudication is what almost all ALJs perform, and traditionally there has been less need for independence from political influence in the rulemaking context.

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110. *See* Wiener v. United States, 357 U.S. 349 (1958).
111. *Duka*, 2015 WL 4940057.
112. *Hill*, 114 F. Supp. 3d 1297.
113. *See Intercollegiate Broad. Sys.*, 684 F.3d at 1340–41.

The court stressed the degree of discretion CRJs exercise in their ratemaking function and its potential impact on companies. Second, CRJs' decisions are not subject to review by anyone, whereas ALJs' decisions are subject to review by the agency. Thus, there may have been a felt need for some political control over such decisions, even if indirectly through the threat of removal.

Whether by classifying ALJs as employees, rather than as officers, or by distinguishing ALJs from the PCAOB members in *Free Enterprise Fund*, the courts will probably not find a violation of the Separation of Powers in the for-cause removal limitation on ALJs.

CHAPTER 3

# Judicial Review*

## INTRODUCTION

This chapter examines the U.S. Supreme Court's major decisions from 2015, discussing judicial review of agency action and access to the courts. A few especially notable opinions from the lower federal courts are also included.

Part I of this chapter focuses on the scope of review. As is always the case, the federal courts this past year decided a variety of cases involving different scope of review doctrines, including *Chevron*,[1] *Auer*,[2] and *Skidmore*[3]

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1. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (requiring judicial deference to an agency's reasonable interpretation of ambiguous statutory language).
2. Auer v. Robbins, 519 U.S. 452 (1997) (requiring judicial deference to an agency's interpretation of its own regulations so long as that interpretation is neither plainly erroneous nor inconsistent with the regulation).
3. Skidmore v. Swift & Co., 323 U.S. 134 (1944) (noting that deference may be given to an agency's interpretation of ambiguous statutory language that lacks authoritative effect based on the persuasive power of the agency's interpretation).

deference, as well as arbitrary and capricious[4] and substantial evidence review.[5] The most notable developments from this past year include the Supreme Court's decision in *King v. Burwell*,[6] where the majority refused to apply *Chevron* at all because the issue was too important, and *Michigan v. EPA*,[7] where the majority refused to defer under *Chevron* deference because the agency interpretation was too irrational.

The Court also decided one case involving the substantial evidence standard, *T-Mobile South, LLC v. Roswell*,[8] and granted certiorari in another case involving the arbitrary and capricious standard, *EnerNOC, Inc. v. Electric Power Supply Ass'n.*[9] Lastly, the D.C. Circuit applied *Chevron*, but refused to afford deference to the U.S. Environmental Protection Agency's (EPA's) decision that the agency could adjust statutory deadlines in *Natural Resources Defense Council v. EPA*.[10]

Part II summarizes opinions addressing administrative law doctrines governing access to the courts for review of agency action (e.g., standing, jurisdiction, the availability of causes of action). Especially notable Supreme Court opinions include: (1) *Arizona Legislature v. Arizona Independent Redistricting Commission*,[11] which discusses the problem of standing for legislatures; (2) *Armstrong v. Exceptional Child Center, Inc.*,[12] which both establishes that the Supremacy Clause does not create a private cause of action and contains an important discussion of reviewability; and (3) *United States v. Kwai Fun Wong*,[13] which characterizes filing deadlines under the Federal Tort Claims Act (FTCA) as nonjurisdictional. A number of especially interesting lower court opinions discussing standing, statutory preclusion of review, and finality are also included.

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4. Administrative Procedure Act (APA) § 10(e)(B)(1), Pub. L. No. 79-404 § 10(e)(B)(1), 60 Stat. 237, 243 (1946) (codified as reformatted and amended at 5 U.S.C. § 706(2)(A) (2012)).
5. APA § 706(2)(e).
6. 135 S. Ct. 2480 (2015).
7. 135 S. Ct. 2699 (2015).
8. 135 S. Ct. 808 (2015).
9. 753 F.3d 216 (2014), *cert granted*, 135 S. Ct. 2049 (2015).
10. 777 F.3d 456 (D.C. Cir. 2014).
11. 135 S. Ct. 2652 (2015). This case is also discussed in *Constitutional Law and Separation of Powers*, *supra*, in Part I.B.
12. 135 S. Ct. 1378 (2015).
13. 135 S. Ct. 1625 (2015). This case is also discussed in *Adjudication*, *supra*, in Part I.B.

## PART I. JUDICIAL DEVELOPMENTS INVOLVING SCOPE OF REVIEW DOCTRINES

The Supreme Court's jurisprudence regarding judicial review for 2015 shows the beginnings of what may become a dramatic retreat from the strong deference approach of the past. No agency was safe; no deference doctrine left unscathed.

First up: a retreat from *Chevron*. In *King v. Burwell*,[14] Chief Justice Roberts, joined by the liberals and Justice Kennedy, refused to apply *Chevron*'s two step analysis to the U.S. Department of Treasury's (Treasury's) interpretation of a statute—promulgated through notice-and-comment rulemaking—because the issue was simply too important for the agency to resolve. While the decision led to what many view as a liberal outcome, the authority of agencies to act was significantly curtailed, which many would view as a conservative approach.

And in *Michigan v. EPA*,[15] the conservative justices refused to defer to an EPA interpretation, also reached via informal rulemaking. The majority refused to defer because the agency had failed to consider industry costs before deciding to regulate, even though the agency considered those costs in fashioning the final regulation as part of its analysis of the costs and benefits of the rule. According to the majority, the EPA's refusal to consider costs was neither logical nor rational. In refusing to defer, the majority created a mash-up of *Chevron*'s first and second steps, finding both that Congress directly spoke to the issue and that the agency's interpretation of that language was unreasonable.

Additionally, in *Mellouli v. Lynch*,[16] Justice Ginsburg jumped on the agency-bashing bandwagon. She said that the Board of Immigration Appeal's (BIA's) interpretation contained in a guidance document was "incongruous," made "scant sense," and was undeserving of *Chevron* deference.[17] Her conclusion that *Chevron* deference was undeserved is likely correct: the interpretation was contained in a guidance document and, thus, entitled to *Skidmore* deference at best. Notably Justice Ginsburg, and the dissent, failed entirely to consider whether *Skidmore* deference applied at all.

Even the D.C. Circuit Court joined the retreat. In *Natural Resources Defense Council v. EPA*,[18] the court held that deadlines in the EPA's new

14. 135 S. Ct. 2480 (2015).
15. 135 S. Ct. 2699 (2015).
16. 135 S. Ct. 1980 (2015).
17. *Id.* at 1982.
18. 777 F.3d 456 (D.C. Cir. 2014).

ozone standards were unreasonable under *Chevron*'s second step. In essence, the majority held the EPA to statements that it had made more than a decade earlier, claiming that the agency had no authority to adjust the statutory deadlines. Finding the new deadlines to be "untethered to Congress's approach," the majority invalidated the rule.[19]

Next up: a retreat from strong *Skidmore* deference. In *Young v. UPS*,[20] Justice Breyer, joined by all but the most conservative of the justices, similarly refused to respect the U.S. Equal Employment Opportunity Commission's (EEOC's) interpretation contained in a guidance document. In contrast to Justice Ginsburg, Justice Breyer applied the appropriate standard, *Skidmore*, but he concluded that the agency interpretation was unpersuasive and thus deserved no deference at all. Justice Breyer was critical that the agency had adopted its new interpretation right after the Court had granted certiorari in the case and had failed to explain why it was changing its longstanding interpretation.[21]

Last up: attacks on *Auer* deference and its continued validity. In *Perez v. Mortgage Bankers Ass'n*,[22] Justices Scalia, Alito, and Thomas, writing in separate concurrences, suggested that *Auer* deference should be jettisoned altogether. Oddly, the case actually addressed a completely different issue: whether an agency must use notice-and-comment-rulemaking to reverse a longstanding interpretive rule, otherwise known as the *Paralyzed Veterans*' doctrine.[23] While the Court's holding was very agency friendly, the concurrences were anything but agency-friendly regarding *Auer*.

## A. *Chevron* Developments in the Supreme Court

### *1.* King v. Burwell*: "Too Important" for Deference*

The most important and highly anticipated case to be decided this year was *King v. Burwell*.[24] This case involved implementation of the Affordable

19. *See id.* at 469.
20. 135 S. Ct. 1338 (2015).
21. *See id.* at 1352.
22. 135 S. Ct. 1199 (2015). This case is also discussed in *Rulemaking*, *infra*, in Part I.B.
23. *See* Paralyzed Veterans Ass'n v. D.C. Arena, L.P., 117 F.3d 579 (D.C. Cir. 1997); *accord* Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030 (D.C. Cir. 1999).
24. 135 S. Ct. 2480 (2015).

Care Act (ACA),[25] pejoratively known as Obamacare (and even "SCOTUScare").[26] The ACA requires individuals to either purchase health insurance or remit a "shared responsibility payment."[27]

Congress enacted the ACA after a long history of failed health insurance reform.[28] In the 1990s, several states had tried to expand access to health insurance coverage by imposing two insurance market requirements.[29] The first such requirement was known as the "guaranteed issue" requirement.[30] It "barred insurers from denying coverage to any person because of his" or her existing health issues.[31] The second requirement was known as the "community rating" requirement.[32] It "barred insurers from charging a person higher premiums" due to factors unique to a particular community.[33] These two requirements helped expand access to health insurance coverage, but they also "encouraged people to wait until they got sick to buy insurance."[34] The result was an economic "death spiral": health insurance premiums rose, while the number of people buying insurance declined.[35] Many insurers left the market entirely.[36]

In 2006, however, Massachusetts discovered a way to make the guaranteed issue and community rating requirements work as intended. Massachusetts required individuals to buy insurance and then provided tax credits to make health insurance more affordable. The combination of these four requirements—(1) the guaranteed issue requirement; (2) the community rating requirement; (3) the required coverage requirement; and (4) tax credits—

25. Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010).
26. *See, e.g.*, *King*, 135 S. Ct. at 2507 (Scalia, J., dissenting) ("This Court . . . rewrites the law to make tax credits available everywhere. We should start calling this law SCOTUScare.").
27. *See* ACA, Pub. L. No. 111-148 tit 1, subtit. F, part I, § 1501(b), 124 Stat. 244 (adding to title 26 of the U.S. Code "Chapter 48—Maintenance of Minimum Essential Coverage," including section 5000A(b) ("Shared responsibility payment")); 26 U.S.C. § 5000A(b) (2012).
28. *See King*, 135 S. Ct. at 2485 (explaining our recent national history of failed attempts to reform health care).
29. *See id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 2486.
36. *See id.*

helped Massachusetts to drastically reduce its uninsured rate.[37] The ACA adopted all of these reforms.[38]

The language challenged in *King* relates to the ACA's requirement that each state establish an "Exchange"—"a marketplace that allows people to compare and purchase insurance plans."[39] "The [ACA] gives each State the opportunity to establish its own Exchange, but provides that the Federal Government will establish the Exchange if the State does not."[40] At the time of the *King* litigation, only sixteen states and the District of Columbia had established exchanges, while thirty-four states opted to have the federal government do so.[41] Importantly, the ACA provides that tax credits "shall be allowed" for any "applicable taxpayer,"[42] but only if the taxpayer has enrolled in an insurance plan through "an Exchange *established by the State* under [42 U.S.C. § 18031 (2012)]."[43] At issue in *King* was whether this statutory language, contained in a definitions section of the ACA, means what it says literally—that tax credits are authorized for purchases *only* in state-established exchanges—or whether the language can be read to authorize tax credits for insurance purchased through exchanges established by the federal government.[44]

The Treasury promulgated a regulation[45] interpreting this language—"an Exchange established by the State"—as allowing tax credits "regardless of whether the exchange is established and operated by a State . . . or by [the

37. *See id.*
38. *See id.*
39. *Id.* at 2485.
40. *Id.*; *see* 42 U.S.C. §§ 18031(b)(1) (2012) (requiring each state to establish an Exchange), 18041(c) (providing that if a state decides not to establish an Exchange, the Secretary of Health and Human Services shall establish "such Exchange" for that state).
41. *See King*, 135 S. Ct. at 2488; Brief of Respondents Sylvia Burwell, Secretary of Health and Human Services, et al. at 11, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114) (hereinafter "Brief of Respondent Burwell"), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2015/01/14-114-Respondents-Brief.pdf (filed Jan. 21, 2015).
42. Brief of Respondent Burwell at 19 (citing 26 U.S.C. § 36B(a) (2012)).
43. 26 U.S.C. § 36B(c)(2)(A)(i) (2012) (emphasis added).
44. *See King*, 135 S. Ct. at 2487 ("The issue in this case is whether the Act's tax credits are available in States that have a Federal Exchange rather than a State Exchange. The Act initially provides that tax credits 'shall be allowed' for any 'applicable taxpayer.' 26 U.S.C. § 36B(a).").
45. Treas. Reg. § 1.36B-2 (2014). The Supreme Court mistakenly calls the regulation an "IRS rule." *See, e.g.*, *King*, 135 S. Ct. at 2487.

U.S. Department of Health and Human Services (HHS)]."[46] The plaintiffs lived in Virginia, which has a federal exchange; the regulation effectively required them to buy health insurance.[47] Because plaintiffs did not want to purchase health insurance, they sued the Secretaries of HHS (Burwell) and Treasury, and the acting Commissioner of the Internal Revenue Service (IRS).[48] Plaintiffs argued that Virginia's exchange did not qualify as "an Exchange established by the State under [section 18031]."[49] And because it was not such an Exchange, they argued that they should not receive any tax credits, which would make the cost of buying insurance so expensive plaintiffs would be exempt from the ACA's coverage requirement.[50] If the Treasury's interpretation applied, however, plaintiffs would be obligated to buy insurance.[51]

The district court and the Fourth Circuit rejected plaintiffs' arguments. Applying *Chevron* analysis, the courts first concluded that the statute was ambiguous, and then found Treasury's interpretation to be reasonable under *Chevron*'s second step.[52]

In contrast, the D.C. Circuit concluded just the opposite in another case at nearly the same time. The D.C. Circuit found the statute clear at *Chevron*'s first step and never reached step two.[53] Although a rehearing was pending in the D.C. case, the Supreme Court nevertheless granted certiorari.[54]

Calling *King* an "extraordinary case[]"[55] the Court, with a six to three majority, refused to apply *Chevron* at all, or any deference standard.[56] The

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46. *Id*. at 2483 (citing 45 CFR § 155.20 (2014)).
47. *See id.* at 2487.
48. *See id.*
49. *Id.*
50. *See id.*
51. *See id.* at 2488.
52. *See* King v. Burwell, 759 F.3d 358, 363 (4th Cir. 2014), *cert. granted*, 135 S. Ct. 475 (2014).
53. *See* Halbig v. Burwell, 758 F.3d 390 (D.C. Cir. 2014), *reh'g en banc granted, judgment vacated*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014). After the Supreme Court granted certiorari in *King*, the D.C. Circuit agreed to hold the *Halbig* case in abeyance pending the Supreme Court's decision in *King*. *See* Halbig v. Burwell, No. 14-5018, 114 A.F.T.R. 2d 2014-6576 (D.C. Cir. Nov. 12, 2014) ("It is ORDERED that this case be removed from the oral argument calendar of December 17, 2014, and held in abeyance pending disposition by the Supreme Court of *King v. Burwell*, No. 14-114 (*cert. granted* Nov. 7, 2014).").
54. *See* 135 S. Ct. 475 (2014).
55. *King*, 135 S. Ct. at 2488.
56. *See id.* at 2496.

Court reasoned that the question of whether plaintiffs had to purchase health care was one of such "deep 'economic and political significance' [and was so] central to this statutory scheme," that if Congress wished to assign resolution of that question to an agency, "[Congress] *surely would have done so expressly.*"[57] Because the majority did not find a clear expression of congressional intent to delegate this issue to Treasury,[58] the majority refused to defer to Treasury's interpretation at all, even though the agency had promulgated its interpretive regulation using notice-and-comment rulemaking, or force of law, procedures.[59] Moreover, the *King* majority did not even mention *Skidmore* deference. Rather, the Court decided the issue *de novo*, refusing to apply any degree of deference to the agency's interpretation. As a result, the Court significantly limited the implied-delegation rationale following its earlier, well-known decision in *FDA v. Brown & Williamson Tobacco Corp*.[60] In both the *King* and *Brown & Williamson* cases, the Court held that Congress did not implicitly delegate interpretive power to the agency despite statutory ambiguity, because the issue was simply too important for Congress to delegate to an agency. Perhaps these cases are simply extraordinary, but *Chevron*'s relevance may well be fading.

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57. *Id*. at 2489 (emphasis added).
58. Notably, the statute provides, "The [Treasury] Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section . . . ." 26 U.S.C. § 36B(g) (2012). Some commentators have argued that this broad, general grant of authority should be sufficient. *See* Leandra Lederman & Joseph C. Dugan, *King v. Burwell: What Does it Portend for* Chevron*'s Domain?*, 326 Pepp. L. Rev. Online 3 (forthcoming 2016), *available at* http://ssrn.com/abstract=2663553 (citing Syd Gernstein, *King v. Burwell: A Win for the President, but a Loss for the IRS?*, Fed. Tax Blog (June 25, 2015), *available at* http://www.bna.com/king-burwell-win-b17179928783/); Andy Grewal, *Brown & Williamson vs. Congressional Intent*, Yale J. on Reg.: Notice & Comment (June 30, 2015), *available at* http://www.yalejreg.com/blog/brown-williamson-vs-congressional-intent-by-andy-grewal. I recently demonstrated that such broad, general grants of authority do not necessarily grant agencies such interpretive power. *See* Linda D. Jellum, *Dodging the Taxman: Why the Treasury's Anti-Abuse Regulation is Unconstitutional*, 70 Miami L. Rev. 152, 196–97 (2015) (arguing that general words like "needful" and "necessary" are insufficient to provide agencies with interpretive authority).
59. *See King*, 135 S. Ct. at 2496.
60. 529 U.S. 120 (2000).

### *2.* Michigan v. EPA*: Too Irrational for Deference*

In *Michigan v. EPA*,[61] petitioners (including twenty-three states) challenged the EPA's interpretation that a regulation was "appropriate and necessary" as required by the Clean Air Act (CAA).[62] The CAA directs the EPA to regulate emissions of hazardous air pollutants from stationary sources, such as refineries and factories.[63] Pursuant to the statute, the EPA may regulate power plant emissions only when it concludes that "regulation is *appropriate and necessary*" to protect public health.[64] Pursuant to its authority, the EPA promulgated a regulation setting standards for hazardous power plant air pollutants after finding that these emissions posed significant risks to the public health and the environment.[65] In so doing, the EPA concluded that the term "appropriate" did not require it to consider costs during its initial decision to regulation: "[c]ost does not have to be read into the definition of 'appropriate.'"[66]

Although the EPA did not consider costs when it decided whether to regulate, the EPA did subsequently complete a regulatory impact analysis, finding that costs to the industry would exceed $9.6 billion per year, while direct benefits would be only $4 to $6 million.[67] Although the regulatory impact analysis noted that ancillary benefits would also accrue, thereby increasing the EPA's estimate of quantifiable benefits from $4 to $6 million to $37 to $90 billion per year, the agency conceded that the findings in the regulatory impact analysis played no role in its "appropriate-and-necessary finding."[68]

Petitioners challenged the EPA's interpretation that regulating was "appropriate and necessary" when regulation would cost industry "between 1,600

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61. Michigan v. EPA, 135 S. Ct. 2699 (2015).
62. Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified at 42 U.S.C. § 741 *et seq.* (2012)).
63. *See* 42 U.S.C. § 7412 (2012).
64. *Id.* § 7412(n)(1)(A) (emphasis added).
65. *See* 135 S. Ct. at 2705; *see* EPA National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam-Generating Units, 77 Fed. Reg. 9,304, 9,326 (EPA finding its regulation necessary), 9,363 (EPA finding its regulation appropriate).
66. *Michigan*, 135 S. Ct. at 2706 (quoting 77 Fed. Reg. 9,327).
67. *See id.*
68. *Id.*

and 2,400 times" more than "the quantifiable benefits."[69] The D.C. Circuit upheld the EPA's interpretation.[70]

The Supreme Court reversed and remanded.[71] Justice Scalia wrote the majority opinion, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. The Court held that the EPA unreasonably interpreted section 7412(n)(1)(A) by concluding that cost was irrelevant in deciding whether to regulate power plants.[72]

Justice Scalia reached this conclusion using a one-step, reasonableness analysis that jumbled together *Chevron*'s analysis and arbitrary and capricious review. He began by noting that "Federal administrative agencies are required to engage in 'reasoned decisionmaking. Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.'"[73] Process sounds like an arbitrary and capricious concern, and sure enough, in his very next sentence and without mentioning the arbitrary and capricious test by name, Justice Scalia quoted *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance*[74] for its well-known articulation of arbitrary and capricious review: "It follows that agency action is lawful only if it rests 'on a consideration of the relevant factors.'"[75]

Finally, Justice Scalia applied *Chevron*. It is not entirely clear whether he applied step one or step two or, indeed, a mash-up of the two. In applying what looks like step one analysis, he concludes that the text of the statute "requires at least some attention to cost. One would not say that it is even

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69. *Id.* at 2706.
70. *See* White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222 (2014), *rev'd sub nom*, Michigan v. EPA, 135 S. Ct. 2699 (2015).
71. *See Michigan*, 135 S. Ct. at 2712.
72. *See id.*
73. *See id.* at 2706 (quoting Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998) (internal quotation marks omitted)).
74. 463 U.S. 29, 43 (1983).
75. *Michigan*, 135 S. Ct. at 2707 (quoting *State Farm*, 463 U.S. at 43). Moreover, Justice Scalia appeared to equate step two with *State Farm*'s arbitrary and capricious test, an analysis that some scholars have already promoted. Gary Lawson, *Outcome, Procedure, and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 315 (1996); Ronald M. Levin, *The Anatomy of* Chevron: *Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1267–69 (1997); Mark Seidenfeld, *A Syncopated* Chevron: *Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 129–30 (1994).

rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."[76]

However, without mentioning step two and without explaining why step two would be relevant after he determined that "'congressional election settles this case,'"[77] Justice Scalia characterizes the agency's interpretation as unreasonable—classic step two terminology.[78] Acknowledging that *Chevron* deference is a very deferential standard, he opined that "'agencies must operate within the bounds of reasonable interpretation.'"[79] And, he concluded, the EPA strayed far beyond those bounds when it read section 7412(n)(1) to mean that it could ignore cost when deciding whether to regulate power plants.[80] He thus held that the EPA's determination—that it need not consider industry costs when determining whether to regulate—was inconsistent with congressional intent because the interpretation was both contrary to the text and unreasonable.[81] In sum, Justice Scalia applied *Chevron*, used a unitary step analysis that merged the traditional two steps, and concluded that the EPA acted unreasonably and arbitrarily and capriciously.[82]

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, disagreed that the EPA had not given proper consideration to cost. "[The] EPA's power plant regulation would be unreasonable if '[t]he Agency gave cost no thought *at all*.'"[83] But, she explained, that is not what happened in this case. Rather, the EPA considered cost "at multiple stages and through multiple means as it set emissions limits. . . ."[84] Because the EPA considered industry costs in fashioning the limits, Justice Kagan would have held that the agency acted reasonably when it chose not to consider industry cost when deciding whether to regulate in the first place.[85] In short, the dissent and majority disagreed primarily about the timing of the agency's consideration of costs: whether cost mattered when the EPA decided *whether* to regulate (as the

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76. *Id.*
77. *Id.* at 2710 (quoting CSX Transp., Inc. v. Ala. Dept. of Revenue, 562 U.S. 277, 296 (2011)).
78. *Id.* at 2706 ("We review this interpretation under the standard set out in [*Chevron*]").
79. *Id.* at 2707 (quoting Util. Air Regulatory Grp. v. EPA, 573 U.S. 2442 (2014) (internal quotation marks omitted)).
80. *See id.*
81. *See id.* at 2712.
82. *See id.*
83. *Id.* at 2714 (Kagan, J., dissenting).
84. *Id.*
85. *See id.* at 2715.

majority held) or when the agency decided *how* to regulate (as the dissent argued). Finally, Justice Thomas concurred separately "to note that [the EPA's] request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."[86] According to Justice Thomas, *Chevron* "wrests" from the Court interpretive power to provide the best reading of an ambiguous statute.[87] He warned the Court to "stop to consider [the Constitution] before blithely giving the force of law to any other agency 'interpretations' of federal statutes."[88] Notably, none of the other justices joined him.

This case may have important ramifications. It is highly likely that the EPA will simply promulgate the same standards despite industry costs given that it has now estimated the combined benefits to far exceed those costs. And likely, the industry will sue again to prevent the rule's implementation. Alternatively, and less likely, the EPA could return to court with a different explanation for its interpretation that "appropriate and necessary" does not include a consideration of costs. Under *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[89] an agency's interpretation of statutory language that differs from a judicial interpretation of that language is entitled to deference if the judicial interpretation was made during the second step of *Chevron*.[90] Hence, if this case—*Michigan v. EPA*—is a *Chevron* step two case, then a later interpretation by the EPA would, technically,[91] be entitled to deference if it were reasonable. If this case is a *Chevron* step one case, any differing interpretation would not be entitled to any deference. While Justice

86. *Id.* at 2712 (Thomas, J., concurring) (citing *Chevron*).
87. *Id.*
88. *Id.* at 2714.
89. 545 U.S. 967 (2005).
90. *Id.* at 985.
91. I say technically because the Court might refuse to apply *Brand X*, as it did in *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2012). In *Home Concrete*, the Court examined an opinion from Justice Harlan from decades ago that had described the relevant statutory language as "not unambiguous." *Id*. at 1840 (quoting and analyzing Colony Inc. v. Comm'r., 357 U.S. 28 (1958)). Justice Breyer, writing for a plurality of four, nevertheless resolved the meaning of the language at *Chevron*'s first step, thereby avoiding deferring to the Treasury under *Brand X*. *Id*. at 1843. Justice Breyer reasoned, in part, that Justice Harlan had analyzed the statutory language prior to *Chevron*, so the "not unambiguous" statement was not meant to trigger a step two analysis. *Id*. at 1844. In contrast, *Michigan v. EPA* was written in a post-*Chevron* world.

Scalia likely believed that he resolved this issue at *Chevron* step one (he regularly found statutory language clear at step one), his mash-up of the two steps might create an argument for the EPA that *Michigan v. EPA* is a step two opinion.

### *3.* Mellouli v. Lynch*: Too Stupid for Deference*

This case is a reminder that deference doctrines do not matter to members of the Supreme Court when (1) the interpretation is obviously wrong (Justice Ginsburg) or (2) the interpretation is obviously right (Justice Thomas).

Petitioner, Moones Mellouli, a lawful permanent resident and citizen of Tunisia, pleaded guilty to the possession of drug paraphernalia used to store or conceal "a controlled substance," which is a misdemeanor offense under Kansas law.[92] The sole "paraphernalia" Mellouli was charged with possessing was a sock in which he had placed four unidentified orange tablets.[93] While neither the criminal charge nor the plea agreement identified the controlled substance involved, Mellouli acknowledged, prior to the charge and plea, that the tablets were Adderall.[94]

Citing Mellouli's misdemeanor conviction, an immigration judge ordered him deported pursuant to a federal statute, which authorizes the deportation of any alien who is "convicted of [violating] . . . any law or regulation of a State . . . relating to a controlled substance (*as defined in section 802 of title 21, United States Code*)."[95] Under federal law, Mellouli's concealment of controlled-substance tablets in his sock would not have qualified as a drug-paraphernalia offense because federal law criminalizes the sale of or commerce in drug paraphernalia, but not its possession.[96] But the act qualified under state law.[97]

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92. Mellouli v. Lynch, 135 S. Ct. 1980, 1983 (2015) (citing Kan. Stat. Ann. § 21–5709(b)(2) (2013 Cum. Supp.)).
93. *Id.*
94. *See id.* Mellouli was sentenced to a suspended term of 359 days and 12 months' probation.
95. *Id.* at 1984 (citing 8 U.S.C. § 1227(a)(2)(B)(i) (2012)) (emphasis added). Section 802, in turn, limits the term "controlled substance" to a "drug or other substance" included in one of five federal schedules. 21 U.S.C. § 802(6) (2012). Kansas defines "controlled substance" as any drug included on its own schedules, without referring to section 802. *See* Kan. Stat. Ann. § 21–5701(a) (2013 Cum. Supp.).
96. *Mellouli*, 135 S. Ct. at 1985.
97. *See* Kan. Stat. Ann. § 21–5701(a).

Mellouli appealed the immigration judge's order. The BIA affirmed, and the Eighth Circuit then denied his petition for review. The Supreme Court granted certiorari and reversed.[98]

The case addresses the BIA's "categorical" and "non-categorical" approaches to immigration for drug offenses in some detail. Relevantly, the BIA categorizes drug offenses differently from drug paraphernalia offenses. The BIA arrived at its disparate interpretation during an earlier informal adjudication.[99]

On appeal, the defendant acknowledged that the tablets were not prescribed, but argued that the criminal complaint did not identify the substance as Adderall; hence, the drugs could not be "a controlled substance." The government argued that the BIA's interpretation—that convictions for paraphernalia possession trigger removal whether or not they involve a federally controlled substance—was entitled to deference under *Chevron*.[100] The Supreme Court disagreed, holding (1) that the BIA's interpretation of the statute was not entitled to any deference, and (2) that Mellouli's conviction did not trigger removal under the statute.[101]

Writing for the majority, Justice Ginsburg first eloquently rejected the government's argument[102] that the BIA interpretation arrived at during an informal adjudication was entitled to *Chevron* deference:

> The incongruous upshot is that an alien is *not* removable for *possessing* a substance controlled only under Kansas law, but he *is* removable for using a sock to contain that substance. Because it makes scant sense, the BIA's interpretation is owed no deference under the doctrine described in [*Chevron*].[103]

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98. *Mellouli*, 135 S. Ct. at 1991 (reversing the judgment of the U.S. Court of Appeals for the Eight Circuit).
99. *See id.* at 1982, 1988–89 (discussing Matter of Martinez Espinoza, 25 I. & N. Dec. 118 (BIA 2009)).
100. *See id.* at 1989.
101. *See id.* at 1989, 1991.
102. *See* Brief for Respondent Eric H. Holder, Jr. Attorney General, Mellouli v. Holder at 20–21, 135 S. Ct. 1980 (2015) (13-1034), 2014 WL 6613094, at *20–21 ("Any ambiguity should be resolved in favor of the Board's reasonable interpretation. The Board is entitled to deference concerning its interpretations of the [Immigration and Nationality Act] under *Chevron* . . . .").
103. 135 S. Ct. at 1989 (emphasis in original).

Rather than explain that the BIA opinion was not entitled to *Chevron* deference under either the Court's *Mead*[104]*/Christensen*[105] force of law analysis or under *Barnhart*'s[106] congressional intent factors, Justice Ginsburg simply refused to defer to the BIA's "incongruous" interpretation, because it made "scant sense."[107] In short, she refused to defer because the interpretation was too stupid.[108] Perhaps Justice Ginsburg equated unreasonable with making scant sense; however, she certainly was not clear that she applied either of *Chevron*'s two steps.

Additionally, Justice Ginsburg did not explain why the BIA interpretation was not entitled to *Skidmore* deference, although she may have concluded that her description of the interpretation as making "scant sense" was all that was needed.[109] Interpreting the statute *de novo*, Justice Ginsburg concluded that "[t]he BIA's disparate approach to drug possession and distribution offenses and paraphernalia possession offenses finds no home in [the statute's] text and 'leads to consequences Congress could not have intended.'"[110]

Justice Thomas and Alito dissented, applying a *de novo* approach as well. Indeed, neither *Chevron* nor *Skidmore* was mentioned anywhere in the dissenting opinion. Finding the statutory text clear and supportive of the BIA's interpretation, the dissent would have affirmed.[111]

## B. *Skidmore* & *Auer* Developments in the Supreme Court

In addition to *Chevron* deference, the Supreme Court addressed both *Skidmore* deference and *Auer* deference this past year.

### *1.* Young v. United Parcel Service*: Too New for Deference*

In *Young v. UPS*,[112] an employee brought an action against the United Parcel Service (UPS), alleging that it discriminated against her because she

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104. U.S. v. Mead Corp., 533 U.S. 218 (2001).
105. Christensen v. Harris Cnty, 529 U.S. 576 (2000).
106. Barnhart v. Walton, 535 U.S. 212 (2002).
107. *Mellouli*, 135 S. Ct. at 1989.
108. *See id.*
109. *Id.*
110. *Id.* (citing 21 U.S.C. § 1227(a)(2)(B)(i) (2012) and Moncrieffe v. Holder, 133 S. Ct. 1678, 1690 (2013)).
111. *See id.* at 1995 (Thomas, J., dissenting).
112. 135 S. Ct. 1338 (2015).

was pregnant, in violation of the Americans with Disabilities Act (ADA) and the Pregnancy Discrimination Act (PDA).[113] The employer had refused to accommodate a pregnancy-related lifting restriction. The district court granted the employer's motion for summary judgment; the Fourth Circuit affirmed.[114] Certiorari was granted; the Supreme Court reversed.

The issue for the Court was whether a guidance document published by the EEOC was entitled to deference.[115] Applying *Skidmore* deference, the Court refused to defer.[116] The Court found problems with the timing, consistency, and thoroughness of the EEOC's consideration:

> The EEOC promulgated its 2014 guidelines only recently, after this Court had granted certiorari in this case. In these circumstances, it is fair to say that the EEOC's current guidelines take a position about which the EEOC's previous guidelines were silent. And that position is inconsistent with positions for which the Government has long advocated. Nor does the EEOC explain the basis of its latest guidance. Does it read the statute, for example, as embodying a most-favored-nation status? Why has it now taken a position contrary to the litigation position the Government previously took? Without further explanation, we cannot rely significantly on the EEOC's determination.[117]

Neither the concurrence nor the dissent discussed *Skidmore* deference, or any form of deference for that matter. Rather, both interpreted the statute *de novo*.

The opinions collectively stand for the point that the justices collectively view guidance documents that are prepared as part of a litigation strategy and that alter a prior agency interpretation as worthy of suspicion rather than deference.[118]

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113. *Id.* at 1344.
114. 707 F.3d 437 (2013).
115. *Young*, 135 S. Ct. at 1351.
116. *Id.* at 1351–52.
117. *Id.* at 1352 (citations omitted).
118. Note that in *Barnhart*, the Supreme Court seemed to suggest that the litigation posture of the case was irrelevant. However, in *Barnhart*, the agency did have an existing guidance document, that it then promulgated after notice-and-comment procedures. *Barnhart*, 535 U.S. at 221. Here, the agency issued a guideline after the Supreme Court had granted certiorari in the case without using any such procedures. *See Young*, 135 S. Ct. at 1352.

### *2.* Perez v. Mortgage Bankers Ass'n*: Too Deferential to be Constitutional*

In *Perez v. Mortgage Bankers Ass'n*,[119] the Supreme Court invalidated the D.C. Circuit's *Paralyzed Veterans*[120] doctrine, which required an agency to use notice-and-comment procedures before the agency could "issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted."[121] The Court was unanimous on this point, and it is un-notable for purposes of judicial review.

What is notable is the justices' discussion, albeit in dicta, of *Auer* deference. Pursuant to *Auer* deference, courts generally must regard an agency interpretation of its own regulations as "controlling" and should defer to that interpretation unless it is "plainly erroneous or inconsistent with the regulation."[122] In footnote 4, the majority cited *Auer*, but failed to include either the "controlling weight" or the "plainly wrong" language.[123] Instead, the majority highlighted its own interpretive role: "it is the court that ultimately decides whether a given regulation means what the agency says."[124] The majority next explained that "*Auer* deference is not an inexorable command in all cases," and identified those cases where it was inapplicable.[125] Likely the majority did not

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119. 135 S. Ct. 1199 (2015).
120. This doctrine came from two cases: *Paralyzed Veterans*, 117 F.3d 579 (D.C. Cir. 1997), and *Alaska Prof'l Hunters Ass'n*, 177 F.3d 1030 (D.C. Cir. 1999).
121. *Mortg. Bankers*, 135 S. Ct. at 1203. This part of the case is discussed in *Rulemaking*, *infra*, in Part I.B.
122. *Auer*, 519 U.S. at 461. *Auer* came after the Supreme Court's opinion in *Chevron* and confirmed that what had previously been known as *Seminole Rock* deference survived *Chevron*. *Id*. at 461–63 (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)).
123. *Mortg. Bankers*, 135 S. Ct. at 1208 n.4.
124. *Id.*
125. The Court noted that an agency interpretation would not get deference or would receive less deference if it were plainly erroneous; if it conflicted with a previous agency interpretation; or if the agency failed to explain changed factual findings or reliance interests engendered by the prior policy. *Id*. The third limitation comes from *FCC v. Fox Television Stations, Inc*., 556 U.S. 502 (2009), in which the Supreme Court held that the Federal Communications Commission (FCC) had not acted arbitrarily when it banned all "fleeting expletives," despite a prior rule that had allowed them. The majority explained that an agency need not prove that a new policy was "better" than the prior one; rather, the agency need merely show that the new policy is "permissible" and that there are good reasons for the change.

mean to downplay *Auer*'s strong deference command; however, arguably those who oppose *Auer* may find this language favorable to their cause.

What is most notable in this case is that Justices Scalia, Thomas, and Alito wrote separately to dramatically undercut this doctrine. They argued that the Court's holding in *Mortgage Bankers* exemplified previously articulated concerns about the constitutionality and wisdom of *Auer* deference. Justices Scalia and Thomas suggested that the doctrine be abandoned altogether.[126] Justice Scalia worried that the Court's holding "[c]onsidered alongside our law of deference to administrative determinations, . . . produces a balance between power and procedure quite different from the one Congress chose when it enacted the [Administrative Procedure Act (APA)]."[127] Similarly, Justice Alito expressed concern "about the aggrandizement of the power of administrative agencies."[128]

Justice Thomas' opinion was, perhaps, the most extreme. Much like he wrote in his concurrence in *Michigan v. EPA*,[129] Justice Thomas explained why he believes that deference to agency interpretations is unconstitutional: deference represents an unconstitutional transfer of judicial power from the judiciary to the executive and prevents the judiciary from serving as a check on the other political branches.[130] Specifically, with regard to *Auer* deference, he argued that the courts' practice of giving "controlling weight" to agency interpretations of regulations is incompatible with the courts' duty to exercise independent judgment in applying the law.[131] As in *Michigan v. EPA*, none of the other justices joined his opinion.

Although Justice Scalia originally authored *Auer*, he appeared to regret its holding. In *Mortgage Bankers*, Justice Scalia reiterated arguments he raised in a 2013 case.[132] In that 2013 case, he noted that when agencies have the power to interpret their own regulations, that power "violate[s] a fundamental principle of separation of powers—that the power to write a law and the power to interpret it cannot rest in the same hands. . . ."[133] They also have an incentive to cheat by initially issuing vague regulations, which they can later

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126. *Mortg. Bankers*, 135 S. Ct. at 1211–13 (Scalia, J., concurring in the judgment); *id*. at 1213–25 (Thomas, J., concurring in the judgment).
127. *Id.* at 1211 (Scalia, J., concurring in the judgment).
128. *Id.* at 1210 (Alito, J., concurring in part and concurring in the judgment).
129. *Michigan*, 135 S. Ct. at 2712 (Thomas, J., concurring).
130. *Mortg. Bankers*, 135 S. Ct. at 1217 (Thomas, J., concurring in the judgment).
131. *Id.* at 1217–20.
132. *See* Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326 (2013).
133. *Id.* at 1339 (Scalia, J., concurring in part and dissenting in part).

clarify with interpretive rules.[134] Rather than recommend that courts use a less deferential form of deference review, such as *Skidmore*,[135] Justice Scalia urged courts to afford no deference to these interpretations.[136]

This issue of agency deference, and more specifically *Auer* deference, has piqued the U.S. Senate's interest. On April 28, 2015, a subcommittee of the Senate's Committee on Homeland Security and Governmental Affairs held a hearing regarding the proper role for judicial review in the federal regulatory process. Witnesses were asked to address, among other topics, whether *Auer* deference should be abandoned.[137]

### *C. "Substantial Evidence" Developments in the Supreme Court*

*T-Mobile South, LLC v. Roswell*: Not Clear Enough

The Supreme Court in *T-Mobile South, LLC v. Roswell*,[138] examined when and how, under the substantial evidence standard, a local government must explain its decisionmaking. T-Mobile South (T-Mobile) wanted to build a 108–foot cell tower resembling a man-made tree in a well-established residential neighborhood in the City of Roswell, Georgia (City).[139] After significant public outcry, the elected members of the Roswell City Council voted to deny the application.[140] The Telecommunications Act of 1996 (TCA) provided that any "decision" denying an application to construct a cell tower "shall be *in writing* and supported by substantial evidence contained in a written record."[141] The statute also provided for judicial review.[142]

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134. *Id.* at 1342.
135. John Manning, Justice Scalia's former law clerk, has made this argument. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 686–90 (1998).
136. *Mortg. Bankers*, 135 S. Ct. at 1213 (Scalia, J., dissenting).
137. *See Examining the Proper Role of Judicial Review in the Federal Regulatory Process: Hearing Before the Subcomm. on Homeland Sec. & Gov. Affairs*, 114th Cong. (Apr. 28, 2015) (witnesses Ronald M. Levin and Andrew M. Grossman), *available at* http://www.hsgac.senate.gov/hearings/examining-the-proper-role-of-judicial-review-in-the-federal-regulatory-process.
138. 135 S. Ct. 808 (2015).
139. *See id.* at 812.
140. *See id.* at 813.
141. *Id.* at 814 (emphasis added) (citing section 332(c)(7)(B)(iii) of the Telecommunications Act of 1996, 110 Stat. 151 (codified at 47 U.S.C. § 332(c)(7)(B)(iii) (2012))).
142. *Id.*

Two days after the City Council meeting, city officials sent a letter to T-Mobile, noting only that "[t]he minutes from the . . . hearing [denying the application] may be obtained from the city clerk."[143] Twenty-six days after sending the denial letter (and four days before petitioner's deadline to seek judicial review expired), the City finally made the council meeting minutes available to T-Mobile.[144]

T-Mobile sued the City, claiming that the City had not provided substantial evidence supporting the denial and that the City violated the TCA.[145] The district court did not rule on the substantial evidence question, but held that the City had not complied with the TCA because its reasons were not provided "in writing."[146] The district court ordered the City to grant the permit; the City appealed.[147] The Eleventh Circuit reversed, holding that the City had met the TCA's "in writing" requirement by issuing a written denial and referring T-Mobile to the minutes of the hearing for its reasoning.[148]

On appeal, the Supreme Court addressed three questions: (1) under the TCA, does a locality have to give reasons for the denial of an application; (2) does a locality have to give the reasons in a particular format; and (3) does a locality have to give reasons contemporaneously? T-Mobile argued that the City was required to include its reasons for denying the cell tower application in the same document as the denial itself.[149] The City argued that it need not provide reasons at all, but that, if provided, the reasons need not be included in the same document as the written denial.[150]

Justice Sotomayor delivered the opinion of the Court, which Justices Scalia, Kennedy, Breyer, Alito, and Kagan joined. The majority held that the statute requires localities to provide written reasons contemporaneously with the denial.[151] As noted above, the statute provides that the denial must be "supported by *substantial evidence* contained in a written record."[152] The majority concluded that the term "substantial evidence" in the statute is an

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143. *Id.* at 813.
144. *See id.*
145. *Id.*
146. *Id.*
147. *See id.*
148. *Id.* at 814.
149. *See id.* at 814, 815, 818.
150. *Id.* at 814.
151. *See id.* at 818.
152. *Id.* at 814 (emphasis added) (citing 47 U.S.C. § 332(c)(7)(B)(iii) (2012)).

administrative law "term of art," which describes how "an administrative record is to be judged by a reviewing court."[153]

Addressing the first question, the majority held that localities must provide reasons for the decision.[154] The Court reasoned that a reviewing court would have difficulty determining whether a locality's denial was supported by substantial evidence if localities were not obligated to identify their reasons for denying the application.[155] And an affected party would have to guess at a locality's reasons for denying permission.[156] Moreover, a locality could subsequently identify different or additional reasons to support an otherwise unsupportable decision: "The entity would thus be left to guess at what the locality's written reasons will be, write a complaint that contains those hypotheses, and risk being sandbagged by the written reasons that the locality subsequently provides in litigation after the challenging entity has shown its cards."[157]

The Court's answer to the first question impacted the resolution of the second question: the format the reasoning must take. The Court held that the City had significant flexibility in determining how to provide its reasons, because "Congress imposed no specific requirement on that front, but instead permitted localities to comply with their obligation to give written reasons so long as the locality's reasons are stated clearly enough to enable judicial review."[158] In other words, that the reasons were contained in the minutes satisfied the statute.

Finally, the Court addressed the third question: when that reasoning must be provided. The Court held that the reasoning must be provided *essentially* contemporaneously:

> Because an entity may not be able to make a considered decision whether to seek judicial review without knowing the reasons for the denial of its application, and because a court cannot review the denial without knowing the locality's reasons, the locality must pro-

153. *Id.* In addition, the reviewing court had to determine whether a locality had "unreasonably discriminate[d] among providers of functionally equivalent services," § 332(c)(7)(B)(i)(I), or regulated siting "on the basis of the environmental effects of radio frequency emissions," § 332(c)(7)(B)(iv).
154. *See id.*
155. *See id.* ("In order to determine whether a locality's denial was supported by substantial evidence, as Congress directed, courts must be able to identify the reason or reasons why the locality denied the application.").
156. *See id.*
157. *Id.* at 816 n.3.
158. *Id.* at 816.

> vide or make available its written reasons at essentially the same time as it communicates its denial.[159]

Because an adversely affected entity must decide whether to seek judicial review within thirty days from the date of the denial and because a court cannot review the denial without knowing the locality's reasons, the locality must provide or make available its written reasons at essentially the same time that it communicates its denial.[160]

Applying those requirements to the facts in the case, the Court concluded that the City had provided its reasons in writing and in an acceptable format, but the City did not provide the reasons sufficiently timely; hence, the City failed to comply with its statutory obligations.

Justice Alito concurred. While he did not disagree with the remand, he seemed to be instructing the lower court to find the error that the majority found—lack of reasons—to be harmless in this case. He noted that under traditional administrative law principles, if the locality errs, "a court must not invalidate the locality's decision if the error was harmless. 'In administrative law, as in federal civil and criminal litigation, there is a harmless error rule.'"[161] Here, he believed that any error was harmless, because T-Mobile secretly recorded the hearing and could not have been surprised by the decision.[162] Finally, he cautioned courts that they remand the issue to the locality, not order the agency to act (i.e., build the tower), as the district court had done.[163]

Chief Justice Roberts dissented.[164] He argued that the City had fully complied with the TCA because the City issued its decision in writing and provided reasons for that decision in a written record.[165] Further, Roberts criticized

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159. *Id.*
160. *See id.* (citing 47 U.S.C. § 332(c)(7)(B)(v)).
161. *Id.* at 819 (Alito, J., concurring).
162. *See id.*
163. *See id.* The majority responded to his points, saying, "We do not consider questions regarding the applicability of principles of harmless error or questions of remedy, and leave those for the Eleventh Circuit to address on remand." *Id*. (majority opinion).
164. *See id.* (Roberts, C.J., dissenting). Justice Ginsburg joined Justice Roberts' dissent in full and Justice Thomas joined Part I of the dissent, also writing separately to remark that it "says all the Court needed to say to resolve this case," *id.* at 823 (Thomas, J., dissenting).
165. *See id.*

the majority's timing requirement, arguing that the text of the statute did not require any specific timing.[166]

### *D. "Arbitrary & Capricious" Developments in the Supreme Court*

*EnerNOC, Inc. v. Electric Power Supply Ass'n*: The "Talk Around" Trap

While the Supreme Court did not decide any truly interesting major cases involving arbitrary and capricious review, the Court has granted certiorari in a case that may prove interesting: *EnerNOC, Inc. v. Electric Power Supply Ass'n.*[167] Electricity demand does not respond to time-sensitive price signals, because electricity prices are regulated to stay constant over long periods of time. In economic terms, the demand for electricity in the wholesale market is inelastic.[168] As a result, there are times when people and businesses consume electricity that costs more to produce than to consume. This balance is inefficient.[169]

Recognizing this problem, the Federal Energy Regulatory Commission (FERC) promulgated a rule to incentivize retail customers to reduce electricity consumption by buying electricity on the wholesale rather than retail market.[170] Petitioners—five energy industry associations—filed suit complaining that the FERC's new rule encroached on the states' exclusive statutory jurisdiction under the Federal Power Act[171] to regulate the retail market.[172] The D.C. Circuit agreed and vacated the rule in its entirety.[173]

There were two issues: (1) whether the FERC reasonably concluded that it had authority under the statute to regulate consumers who voluntarily participate in the wholesale market, and (2) whether the lower court erred in holding that the FERC's rule was arbitrary and capricious. Issue one requires a *Chevron* analysis: whether the FERC's interpretation that it has authority to regulate retail customers who voluntarily enter the wholesale arena is a valid interpretation of the statute that grants the FERC authority to regulate "the wholesale market" for electricity.[174] The court held under *Chevron*'s step one

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166. *See id.* at 820.
167. 753 F.3d 216 (D.C. Cir. 2014), *cert granted*, 135 S. Ct. 2049 (2015).
168. *See id.* at 228 (Edwards, J., dissenting).
169. *Id.*
170. *See id.* at 219 (majority opinion).
171. 16 U.S.C. § 791a *et seq.* (2012).
172. *See EnerNOC, Inc.*, 753 F.3d at 220.
173. *See id.* at 226.
174. *Id.* at 219 (quoting 16 U.S.C. § 824(b)(1) (2012)).

that Congress had directly spoken to the issue and that the FERC's regulation was not consistent with congressional intent.[175]

Alternatively, the court, in dicta, noted that even if the FERC had statutory authority to regulate, the rule would still fail because it was arbitrary and capricious. In short, the court reasoned that the FERC had not considered an important issue, namely that its rule would result in unjust and discriminatory rates.[176] "[R]easoned decisionmaking requires . . . a 'direct response'" not "talk around."[177] The dissent agreed that the FERC was required to provide a direct response to this concern, but concluded that the agency had done so.[178]

Oral argument was held on October 14, 2015.

### *E.* Chevron *Deference Developments in the Lower Courts*

*Natural Resources Defense Council v. EPA*: Too Untethered for Deference

In December 2014, the D.C. Circuit reviewed the EPA's ozone standard revisions in *Natural Resources Defense Council v. EPA*.[179] The CAA[180] directs the EPA to promulgate National Ambient Air Quality Standards (NAAQS) for air pollutants, including ground level ozone, which is a key component in smog.[181] The CAA requires the EPA to reconsider these standards every five years.[182] In 2008, the EPA revised and strengthened the ozone standards.[183] When it revised the standards, the EPA allowed affected regions an additional year to meet the new standards as compared with the prior revision.[184] An environmental group sued, alleging that the new standards were arbitrary and capricious. The court never reached the issue of whether the new standards were arbitrary and capricious because it identified *Chevron* deference as the appropriate standard to review the EPA's interpretation of the CAA.[185]

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175. *See id.* at 224.
176. *Id.*
177. *Id.* at 225.
178. *See id.* at 237 (Edwards, J., dissenting).
179. 777 F.3d 456 (D.C. Cir. 2014).
180. 42 U.S.C. §§ 7401 *et seq.* (2012).
181. *See* 777 F.3d at 458–59 (citing 42. U.S.C. § 7407 (2012)).
182. *See id.* at 459 (citing 42. U.S.C. § 7409(d)(1) (2012)).
183. *See id.* at 457.
184. *See id.*
185. See *id.* at 463.

Pursuant to step one, the court noted that the CAA "requires all nonattainment areas to achieve compliance with the ozone NAAQS 'as expeditiously as practicable.'"[186] However, the statute contains a "timing gap," because it does not directly set forth the attainment deadlines.[187] The court thus found that Congress had not resolved the issue at step one and moved to step two.[188]

After a lengthy analysis, the court concluded that the EPA's interpretation was "'untethered to Congress's approach' and thus failed at *Chevron* step two."[189] The majority paid particular attention to the EPA's statement a decade earlier that it had no "authority to change the attainment dates."[190] Accordingly, the court vacated the rule.[191]

In dissent, Judge Randolph accused the majority of choosing a solution that it thought was "better than EPA's," rather than respecting the agency's authority and expertise under *Chevron*.[192] Noting that the Supreme Court had identified a "timing gap" in the statute with respect to when to "start the clock" and stating that the EPA had thoroughly explained why the end-of-year date was not only preferable but also consistent with the CAA, Judge Randolph would have deferred to the EPA under *Chevron*'s second step.[193]

This case harkens back to the interpretive approaches taken by the majority and dissent in *Brown & Williamson*.[194] There, the conservative majority prevented the agency from regulating tobacco, in large part because the agency had for many decades claimed it did not have the authority to act.[195] Here, the majority took essentially the same approach in constraining the EPA.

In contrast, in *Brown & Williamson*, the liberal dissent essentially ignored the agency statements and would have respected the agency's interpretation as eminently reasonable, an approach somewhat analogous to Judge Randolph's approach here. If, as *Brand X* teaches, agencies are able to change their interpretations, is not Judge Randolph correct in this case: agency statements that they lack power to regulate are non-binding on future administrations?

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186. *Id.* at 464.
187. *Id.*
188. *See id.* at 465.
189. *Id.* at 469 (quoting S. Coast Air Quality Mgmt. Dist. v. EPA, 472 F.3d 882, 894 (D.C. Cir. 2006)).
190. *Id.* at 468.
191. *See id.* at 473.
192. *Id.* at 473 (Randolph, J., dissenting).
193. *Id.* at 474.
194. 529 U.S. 120 (2000).
195. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

## PART II. JUDICIAL DEVELOPMENTS INVOLVING ACCESS TO THE FEDERAL COURTS

### A. Constitutional Standing

#### *1. A Case to Watch: Maybe the Supreme Court Will Explain the Injury Requirement to Us*

*Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014), *cert. granted*, *Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (2015).

This potentially important case implicates the power of Congress to create statutory rights that, when violated, give rise to constitutional standing. As of this writing, the Supreme Court has heard arguments in the *Spokeo* matter but has not yet issued its opinion.

Robins sued Spokeo, Inc., for willfully violating the Fair Credit Reporting Act (FCRA)[196] by posting on its website false information about him. The FCRA creates a cause of action that allows for recovery of statutory damages for willful violations without a showing of actual damages.[197] Spokeo contested Article III standing on the theory that Robins could not "sue under the FCRA without showing actual harm."[198]

The Ninth Circuit rejected this argument, holding that Robins had standing to press his FCRA claim. The court acknowledged that Congress could not, of course, ignore constitutional limits on standing with its requirements of injury, causation, and redressability. Congress could, however, "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law."[199] Following the Sixth Circuit's analysis, the Ninth Circuit declared that Congress' power to create standing by this means is subject to two limits. First, the plaintiff must allege a violation of

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196. Pub. L. No. 91-508, tit. VI, 84 Stat. 1127–36 (1970) (codified as amended at 15 U.S.C. § 1681 *et seq.* (2012)).

197. *See* 15 U.S.C. § 1681n(a) (2012) ("Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to . . . damages of not less than $100 and not more than $1,000 . . . .").

198. Robins v. Spokeo, Inc., 742 F.3d 409, 412 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (2015).

199. *Id.* (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992)).

"*her* statutory rights"—i.e., she must be "among the injured."[200] Second, the "statutory right at issue must protect against 'individual rather than collective harm.'"[201]

The Ninth Circuit concluded that Robins' FCRA claim satisfied these two limits. First, the posting at issue violated "*his* statutory rights"[202]—the allegedly false information was about him, not somebody else. Second, his "personal interests in the handling of his credit information are individualized rather than collective," which justified the conclusion that the "alleged violations of Robins' statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III."[203]

This is not the first time in recent years, by the way, that the Court has taken up a case that explores the limits of Congress' power to create statutory rights and causes of action consistent with the requirements of constitutional standing. In *First American Financial Corp. v. Edwards*,[204] the plaintiff, a home purchaser, claimed that an exclusive referral agreement between a title insurer and title agencies violated the anti-kickback provisions of the Real Estate Settlement Procedures Act (RESPA).[205] The defendants argued that the plaintiff had suffered no injury from the exclusivity agreement because state law required that all title insurers charge the same price. The plaintiff countered that the damages provision of RESPA, which awards a winning plaintiff "three times the amount of any charge paid,"[206] created a statutory cause of action sufficient for constitutional standing. The Ninth Circuit agreed with the plaintiff, holding that a plaintiff can satisfy the injury requirement by showing that the defendant engaged in conduct that violates a statute that grants the plaintiff a right to judicial relief.[207] As such, the plaintiff could suffer an "injury" without paying anything extra for title insurance.[208]

The Supreme Court took up the case, heard oral argument, and then dismissed certiorari as improvidently grounded. Perhaps things will turn out differently this time.

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200. *Id.* at 413 (quoting Beaudry v. TeleCheck Servs., Inc., 579 F.3d 702, 707 (6th Cir. 2009)) (emphasis in original).
201. *Id.* (quoting same).
202. *Id.* (emphasis in original).
203. *Id.* at 413–14.
204. 132 S. Ct. 2536 (2012).
205. Pub. L. No. 93–533, 88 Stat. 1724 (1974) (codified at 12 U.S.C. §§ 2601–17 (2012)).
206. 12 U.S.C. § 2607(d)(2) (2012).
207. *See* Edwards v. First Am. Corp., 610 F.3d 514, 518 (9th Cir. 2010).
208. *Id.* at 518.

### *2. Legislative Standing: Arizona State Legislature Suffered an Institutional Injury Sufficient for Standing to Contest Powers of Independent Commission*

*Arizona Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015).

The voters of Arizona approved a ballot initiative, Proposition 106, which created an independent commission to draw congressional districts. The state legislature, after authorizing votes in both chambers, sued the new commission, its members, and Arizona's secretary of state based on the claim that the new commission usurps authority that the Elections Clause of the U.S. Constitution grants to state legislatures to regulate elections.

A five-justice majority concluded in short order that the state legislature had standing to press its constitutional claim. To get to this result, the Court relied substantially on the 1939 case of *Coleman v. Miller*,[209] which arose after the lieutenant governor of Kansas cast a tie-breaking vote in the Kansas state senate in favor of ratification of a federal constitutional amendment. The twenty Kansas state senators who opposed ratification challenged its validity on the ground that the lieutenant governor should not have been allowed to vote. Almost sixty years later in *Raines v. Byrd*,[210] the Court characterized *Coleman* as holding "that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative [a]ct have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."[211] Nullification must require more than mere disobedience to a law or disagreement concerning its meaning. For instance, the legal effect of speed limits is not "nullified" just because many people exceed them when driving. Rather, nullification is implicated where a plaintiff alleges that legislative actions sufficient to determine controlling law have been deprived of that effect. Applying this concept to *Coleman*, on the plaintiffs' theory of the case, the twenty votes of the Kansas state senators opposing ratification should have been enough to prevent ratification from occurring. The lieutenant governor's vote completely deprived the twenty senators' votes of this power.

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209. 307 U.S. 433 (1939).
210. 521 U.S. 811 (1997).
211. *See* Ariz. Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2665 (2015) (quoting Raines v. Byrd, 521 U.S. 811, 823 (1997)).

According to the majority in *Arizona Legislature*, Proposition 106 had a similar nullifying effect. Under the Arizona state constitution, the legislature cannot trump the force of a ballot initiative or take steps to undermine one. Proposition 106 thus deprived any legislative actions directed at congressional redistricting of all legal effect. The legislature, considered as an institution, had therefore suffered an injury sufficient for Article III standing.[212]

On its face, *Arizona Legislature* might seem to provide a recipe for increased judicialization of legal fights among political entities—in particular, Congress and the President. The Court took several steps to defuse this possibility. First, the Court emphasized that it was upholding standing for the Arizona state legislature as an institution, not standing for individual legislators.[213] Regarding this point, the Court took pains to distinguish *Arizona Legislature* from the Court's last major discussion of legislator standing in *Raines*. In *Raines,* the Court had rejected standing for six individual members of Congress who sought to litigate the constitutionality of the Line Item Veto Act. Notably, Congress, unlike the Arizona state legislature, had not sued as an "institution." Moreover, any injury caused by the Line Item Veto Act was "widely dispersed" and failed to "zero[] in on any individual member."[214] The six plaintiff members therefore lacked the "personal stake" needed for standing.[215]

In addition, the Court stressed that *Arizona Legislature*, which involved a tussle between a state legislature and a commission created by ballot, did not speak to the issue of whether "Congress has standing to sue the President."[216] This sort of confrontation "would raise separation-of-powers concerns absent" from *Arizona Legislature.*[217]

This caveat was insufficient for Justice Scalia who, joined by Justice Thomas, penned a strong dissent on the issue of standing. The dissenters reached their conclusion in part because they fundamentally disagreed with the majority regarding the purpose of standing doctrine. For the majority, standing was satisfied given that the circumstances of the dispute indicated that it would "be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[218] Justice Scalia,

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212. *See* 135 S. Ct. at 2664–65.
213. *Id.* at 2664.
214. *Id.*
215. *Id.* (quoting *Raines*, 521 U.S. at 830).
216. 135 S. Ct. at 2665 n.12.
217. *Id.*
218. *Id.* at 2665 (quoting Valley Forge Christian Coll. v. Ams. United for Sep. of Church and State, Inc., 454 U.S. 464, 472 (1982)).

by contrast, sounding a common theme of conservative opinions on standing, insisted, "'[T]he law of [Article] III standing is built on a single basic idea—the idea of separation of powers.' It keeps us minding our own business."[219] Courts should figure out the scope of their own business by consulting history and judicial tradition, and what these "show is that courts do not resolve direct disputes between two political branches of the same government regarding their respective powers."[220]

### *3. Legislative Standing Redux: D.C. District Court Concludes that the House has Standing to Challenge Alleged Executive Violation of the Appropriations Clause*

*U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015).

The first echo of *Arizona Legislature* did not take long to arrive. In *U.S. House of Representatives v. Burwell*,[221] the House, acting as an institution, sued the Secretaries of HHS and Treasury. The House contends that these agencies are spending billions of unappropriated dollars to implement provisions of the ACA, requiring the government to reimburse insurance companies to reduce insurance costs for qualifying policyholders. According to the House, this spending violates Article I, § 9, cl. 7 of the U.S. Constitution, which provides that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." It also contends that the Secretary of the Treasury has improperly delayed and altered operation of the ACA's "employer mandate."[222]

Judge Rosemary Collyer of the D.C. District Court concluded that the House had standing to press its constitutional claim that the expenditure of unappropriated funds violated Article I, § 9, cl. 7, but that the House lacked standing to press its more generalized constitutional claims or its statutory claims.[223]

Supreme Court precedent played a rather limited role in supporting this finding of standing. The district court discussed *Coleman* but ultimately did

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219. *Id.* at 2695 (Scalia, J., dissenting) (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)).
220. *Id.* The merits portion of this case is discussed in *Constitutional Law and Separation of Powers*, *supra*, in Part I.D.
221. 130 F. Supp. 3d 53 (D.D.C. 2015).
222. *Id.* at 57.
223. *See id.* at 73.

not rely on its "nullification" theory of standing.[224] *Raines* was distinguishable as it involved individual congresspersons as plaintiffs rather than the House as an institutional plaintiff.[225] Turning to the Supreme Court's most recent effort in the doctrinal vicinity, the district court observed, "To be sure, the *Arizona* [*Legislature*] Court went out of its way *not* to decide the question" of congressional standing to sue the executive.[226] Drawing a dubious distinction, however, the district court added "[t]hat *obiter dictum* raises cautions only as to justiciability, not jurisdiction."[227]

The district court drew some support from a forty-year-old D.C. Circuit opinion, *United States v. AT&T*, which in one short paragraph had concluded that the House had standing to seek judicial enforcement of a subpoena against executive authorities.[228] The district court also cited three of its own precedents that "followed *AT&T*'s lead."[229] In two of these cases, the district court had concluded that congressional committees had standing to seek judicial enforcement of subpoenas against executive authorities.[230] In a third, the district court had concluded that "informational injury" provided a basis for standing for the House to challenge the use of statistical sampling as part of the census.[231] The district court conceded, however, that no available precedent was "fully-applicable."[232]

Having marched through this underbrush, the district court concluded that the House lacked standing to bring any claims based on the premise that the Executive had improperly implemented statutory provisions. These claims ran afoul the principle that the Executive, not Congress, is charged with implementation of the laws that Congress enacts.[233] The district court also rejected as too generalized the constitutional claim that the Executive had by

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224. *Id.* at 73–74.
225. *See id.* at 67.
226. *Id.* at 69 (emphasis in original).
227. *Id.*
228. *See id.* at 68 (quoting U.S. v. AT&T, 551 F.2d 384 (D.C. Cir. 1976) (finding it "clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf")).
229. *Id.*
230. *See id.* (citing Comm. on Oversight & Gov. Reform v. Holder, 979 F. Supp. 2d 1, 4 (D.D.C. 2013); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 68 (D.D.C. 2008)).
231. *Id.* (citing House of Reps. v. Dep't of Commerce, 11 F. Supp. 2d 76, 85 (D.D.C.1998)).
232. *Id.* at 69.
233. *See id.* at 70, 73, 75–76.

its actions infringed on Congress' constitutional authority to legislate.[234] To allow such a claim based on "Article I's general grant of legislative authority" to go forward would "turn every instance of the Executive's statutory noncompliance into a constitutional violation," which would be inconsistent with "decades of precedent for the proposition that Congress lacks standing to affect the implementation of federal law."[235]

This limitation on congressional standing, however, did not apply to the House's "non-appropriation claim."[236] The district court observed that "Congress . . . is the only body empowered by the Constitution to adopt laws directing monies to be spent from the U.S. Treasury."[237] This constitutional power would become "meaningless, if the Executive could circumvent the appropriations process and spend funds however it pleases."[238] It followed that, if the Executive spent unappropriated dollars "in contravention of the specific proscription in Article I, § 9, cl. 7, the House as an institution has standing to sue."[239]

One problem with this analysis is that the executive authorities in this case *agree* with the obvious constitutional proposition that Congress must authorize appropriations. Their defense is that Congress has, in point of fact, enacted statutory language sufficient to appropriate the funds needed for the programs at issue. On this view, the controversy centers around *how to interpret and implement a statute*, not on a constitutional debate. Considered in this light, the House's claim would seem to run afoul of the principle, accepted by the district court, that Congress lacks standing to contest matters of statutory implementation.[240]

Suffice to say, Judge Collyer's adventuresome opinion in this unsettled area of law will not be the last word on the issue of whether the House has standing based on its "non-appropriation claim." As noted above, the majority in *Arizona Legislature* was careful to reserve the issue of congressional standing to contest executive action in light of separation-of-powers concerns.[241] Moreover, Justices Scalia and Thomas expressed strong opposition to this practice in dissent.[242]

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234. *Id.* at 74 (dismissing count based on Art. I, § 1 (vesting), and Art. I, § 7, cl. 2 (presentment)).
235. *Id.*
236. *Id.* at 58.
237. *Id.* at 71.
238. *Id.*
239. *Id.*
240. *See id.* at 70.
241. *See Ariz. Legislature*, 135 S. Ct. at 2665 n.12.
242. *See id.* at 2695 (Scalia, J., dissenting) *and id.* at 2698 (Thomas, J., dissenting).

### *4. More Injury Metaphysics: Increased State and Local Government Expenditures as Injury*

*Texas v. United States*, 809 F.3d 134 (5th Cir. Nov. 9, 2015; revised Nov. 29, 2015), *cert. granted*, No. 15-674, 2016 WL 207257 (U.S. Jan. 19, 2016).

*Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015), *cert. denied*, No. 15-643, 2016 WL 207283 (U.S. Jan. 19, 2016).

In *Texas v. United States* and *Arpaio v. Obama*, circuit courts reached opposing results regarding whether state or local authorities had standing to contest the immigration policy directives—the Deferred Action for Childhood Arrivals (DACA) and the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). In *Texas*, the Fifth Circuit held that the State of Texas had shown injury by demonstrating that, under current Texas law, implementation of DAPA would increase state expenditures on subsidies for driver's licenses. By contrast, in *Arpaio*, the D.C. Circuit rejected standing for the sheriff of Maricopa County on the ground that his claim of injury—that implementation of DACA and DAPA would increase crime and crime-related costs—was speculative.

In *Texas*, various states challenged DAPA, a directive from the U.S. Department of Homeland Security (DHS) that establishes criteria for "exercising prosecutorial discretion" regarding enforcement of immigration laws "through the use of deferred action, on a case-by-case basis."[243] A decision to defer action does not grant "legal status" to a recipient, but it does allow them to be "legally present" in the U.S.[244] Plaintiffs contended that DAPA violates notice-and-comment rulemaking requirements of the APA and exceeds executive statutory and constitutional authority. In addition to contesting the merits, the government contended that the case should be dismissed both because the plaintiffs lacked standing and on reviewability grounds.[245]

The district court granted a preliminary injunction blocking implementation of DAPA after concluding that Texas had made a sufficiently strong showing that it would succeed on the claim that DHS had improperly failed to follow notice-and-comment procedures. The government appealed the in-

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243. Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship and Immigration Servs., et al., at 4 (Nov. 20, 2014), *available at* https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

244. *Id.* at 2.

245. *See* Texas v. United States, 809 F.3d 134, 149 (5th Cir. Nov. 9, 2015; revised Nov. 29, 2015).

junction and moved for a stay pending appeal. The Fifth Circuit denied this motion after concluding that the government's appeal was unlikely to succeed, and in a subsequent opinion, the court affirmed the preliminary injunction.[246] On January 19, 2016, the Supreme Court granted the government's petition for a writ of certiorari. Students of administrative law should be on the lookout for the Court's opinion in this case, as it will likely provide significant guidance on issues including standing, reviewability, and the scope of the policy statement exemption from notice-and-comment rulemaking requirements.

The Fifth Circuit concluded that it was "plain" that Texas enjoyed standing "based on [its] driver's-license rationale."[247] This rationale works like this: (1) Texas subsidizes the issuance of driver's licenses to the tune of at least $130.89 apiece;[248] (2) Texas law provides that the Department of Public Safety "shall issue" a license to a qualified applicant;[249] (3) to qualify, a noncitizen "must present . . . documentation issued by the appropriate United States agency that authorizes the applicant to be in the United States";[250] (4) DAPA beneficiaries will be able to satisfy this requirement by presenting proof of lawful presence or employment authorization;[251] and (5) there are 500,000 such beneficiaries in Texas, so DAPA will cost Texas at least several million dollars.[252]

At the outset of its standing analysis, the Fifth Circuit relied on *Massachusetts v. EPA*, in which the Supreme Court, along the way to holding that Massachusetts had standing to contest the EPA's denial of a petition for rulemaking to control greenhouse gas emissions, had declared that states are entitled to "special solicitude in standing analysis."[253] The Court explained that this "special solicitude" is justified where a state seeks to protect "quasi-sovereign" interests.[254] The scope of this category is not clear, but it does include protecting "all the earth and air in [a state's] domain." The Court added that the statutory "procedural right" that the CAA establishes for plaintiffs to seek review of the EPA's decision also indicated that "special solici-

246. *Id.*
247. *Id.* at 150.
248. *See id.* at 155.
249. *Id.* (citing Texas Transp. Code § 521.181).
250. *Id.* (citing Texas Transp. Code § 521.142(a)).
251. *See id.* (citing Texas Dep't of Pub. Safety, Verifying Lawful Presence 3–4 (2013)).
252. *See id.*
253. *Id.* at 154 (quoting Massachusetts v. EPA, 549 U.S. 497, 520 (2007)).
254. *Massachusetts*, 549 U.S. at 520.

tude" was justified.[255] The Court did not, however, elucidate why procedural rights should be of greater significance for states than for any other plaintiff, which suggests that the notion of "quasi-sovereign" interests is the real driver of this "special solicitude"—whatever, precisely, it might mean.

In any event, the Fifth Circuit emphasized that both of these factors that the Court had cited in *Massachusetts* as justifying "special solicitude" applied with equal force in *Texas*. Just as the CAA authorized Massachusetts to seek review of the EPA's action, the APA authorized Texas to seek review of DHS' issuance of the DAPA memorandum.[256] Unlike Massachusetts, Texas was not pursuing a "quasi-sovereign" interest relating to environmental protection. DAPA, however, was imposing "substantial pressure" on Texas to change its laws to avoid subsidizing aliens obtaining driver's licenses.[257] This pressure implicated a "quasi-sovereign" interest in maintaining its legal code.

The U.S. did not dispute that it would cost Texas a minimum of $130.89 for each license issued to a DAPA beneficiary. It did, however, argue that these expenses did not add up to a proper injury because they would be outweighed by countervailing benefits—DAPA beneficiaries would be more likely to pay fees to register their vehicles, to purchase auto insurance, and to join the work force, thus reducing various state costs and increasing revenues.[258] The court rejected this argument, noting that "standing analysis is not an accounting exercise" and that tallying benefits against costs was only proper where "they are of the same type and arise from the same transaction."[259] The most closely connected benefits in this case were increased vehicle registration fees and reduced costs associated with uninsured motorists. Even these, however, would be based "on the independent decisions of DAPA beneficiaries" and "not a direct result of the issuance of licenses."[260]

The government also argued that any injury to Texas was not "fairly traceable" to DAPA because Texas could "avoid injury by not issuing licenses

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255. *Id.*
256. *See Texas*, 809 F.3d at 152–53.
257. *Id.*
258. *See id.* at 155.
259. *Id.* at 156 (citing NCAA v. Governor of N.J., 730 F.3d 208, 223 (3d Cir. 2013) (explaining that standing analysis is not an "accounting exercise") as well as, *inter alia*, L.A. Haven Hospice, Inc. v. Sebelius, 638 F.3d 644, 656–59 (9th Cir. 2011) (regulated entity had standing to challenge regulation "that allegedly increased its costs in some ways even though the regulation may have saved it money in other ways")).
260. *Id.*

to illegal aliens or by not subsidizing its licenses."[261] The court rejected this argument, reiterating Texas' (quasi-sovereign) interest in creating and enforcing a legal code.[262]

Lastly, the government argued that Texas' injury failed the causation requirement because "it is merely an incidental and attenuated consequence" of DAPA.[263] Once again, the Fifth Circuit was unimpressed, observing that it was "apparent" that many DAPA beneficiaries would seek driver's licenses, thus causing the injury. The court also emphasized that the causal chain it confronted was far less attenuated than in *Massachusetts*, which was premised on the theory that the EPA's failure to take action would cause individuals to drive less fuel efficient cars and that this would "contribute meaningfully to a rise in sea levels, causing the erosion of the state's shoreline."[264] Rather than "playing an insignificant role" in causing the claimed injury, it was clear that "DAPA would be the primary cause and likely the only one."[265]

The government's argument that a claim of injury was too attenuated and speculative fared far better by contrast in *Arpaio*.[266] The sheriff of Maricopa County in Arizona, Arpaio, claimed standing based on two closely intertwined theories of injury: (1) DACA and DAPA, although they apply only to persons already in the U.S., would encourage greater illegal immigration, which would increase crime and crime-related costs, and (2) DACA and DAPA would decrease the rate of deportation of undocumented aliens already within the U.S., likewise increasing crime and crime-related costs above where they would be without DACA and DAPA.[267]

The D.C. Circuit rejected both theories as unsupported speculation. Arpaio had no support for his claims that DACA and DAPA would either increase illegal immigration or lead to a reduction in deportations. He also had no support for his contention that "more immigrants means more crime" given "the reality that crime is notoriously difficult to predict."[268]

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261. *Id.*
262. *See id.* at 156–57.
263. *Id.* at 159.
264. *Id.* at 160 (citing *Massachusetts*, 549 U.S. at 523).
265. *Id.*
266. Arpaio v. Obama, 797 F.3d 11 (D.C. Cir. 2015), *cert. denied*, No. 15-643, 2016 WL 207283 (U.S. Jan. 19, 2016).
267. *See* 797 F.3d at 14.
268. *Id.* at 22.

Of particular note for future cases raising similar standing issues, the D.C. Circuit emphasized that Arpaio's "reliance on the anticipated action of unrelated third parties [e.g., to immigrate and to commit crimes] makes it considerably harder to show the causation required to support standing."[269] Also, the court stressed that, because Arpaio based standing on "predicted future injury," he bore a "more rigorous burden" that required him to demonstrate a "realistic danger of sustaining a direct injury."[270] Given this sort of language, we can safely expect that in future cases where state and local entities claim injury based on the theory that a federal action will cause them to expend resources due to conduct of third parties, the federal government will be quick to rely on *Arpaio*.

*Arpaio* is also noteworthy for Judge Brown's striking concurrence, which criticizes "our modern obsession with a myopic and constrained notion of standing" which "often immunize[s] government officials from challenges to allegedly *ultra vires* conduct."[271] The implication of this critique is that courts should abandon this "modern obsession" to ensure that the Executive obeys the law.[272] Certainly, the doctrine of constitutional standing presents a target-rich environment for criticism and even mockery. Still, calls to abandon standing in order to control Executive misconduct do have a ring of judicial supremacy, no?

## B. Cause of Action

### *1. The Supremacy Clause Does Not Create a Private Cause of Action for Challenging State Action on Preemption Grounds*

*Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015).

Suppose a person believes that a state law is inconsistent with federal law and wishes to use the latter to block enforcement of the former. To avoid the

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269. *Id.* at 20 (citing *Lujan*, 504 U.S. at 562; Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 941 (D.C. Cir. 2004) (requiring "substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress")).
270. *Id.* at 21 (citing United Transp. Union v. ICC, 891 F.2d 908, 913 (D.C. Cir. 1989)).
271. *Id.* at 25, 29 (Brown, J., concurring).
272. *Id.* at 31 (Brown, J., concurring) ("But what if the Chief Executive decides *not* to faithfully execute the laws? In that case our doctrine falls silent.").

snarl of state sovereign immunity, this person might deploy the charming fiction of *Ex parte Young*.[273] This doctrine permits a plaintiff to sue a state official (rather than the state itself) to obtain injunctive relief blocking violations of federal law based on the Supremacy Clause. The fig leaf protecting such suits from state sovereign immunity is that a state official cannot be acting on behalf of the state while that official is violating controlling law.[274]

This move did not, however, work in *Armstrong v. Exceptional Child Center, Inc*., in which Medicaid providers sued officials of Idaho's Department of Health and Welfare to enjoin alleged violations of section 30(A) of the Medicaid Act,[275] which requires a state "to assure that [Medicaid] payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers."

The Supreme Court rejected the plaintiffs' contention that the ultimate source of the cause of action for this *Ex parte Young* suit was the Supremacy Clause.[276] Federal courts have long asserted the power to enjoin violations of federal law not just by *state* officials but also by *federal* officials.[277] The Supremacy Clause obviously was not the source of a cause of action to enjoin the latter. Moreover, reading a private cause of action into the Supremacy Clause would force Congress to accept private suits as a means to enforce federal law even where Congress would prefer enforcement solely by public

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273. 209 U.S. 123, 155–56 (1908).
274. *See id.* at 159–60.
275. Pub. L. No. 89-97 § 30(A), 79 Stat 343 (1965) (codified at 42 U.S.C. § 1396a(a)(13)(A) (2012)).
276. Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384 (2015). This case was the Court's second in several years to implicate the problem of whether the Supremacy Clause creates a cause of action. In *Douglas v. Independent Living Center of Southern California, Inc*., 132 S. Ct. 1204 (2012), the plaintiffs had, as in *Armstrong*, filed suit to enforce section 30(A) against state officials. The Court granted certiorari to determine whether the plaintiffs had a cause of action under the Supremacy Clause. The majority, however, declined to reach this question because, shortly after oral argument, the state plan amendments at issue were approved by the Centers for Medicare & Medicaid Services (CMS). This approval opened the possibility for plaintiffs of challenging the legality of the state plan amendments through an APA action directed against CMS. The Court vacated and remanded to give the Ninth Circuit an opportunity to determine the ramifications of this alternative path for review. *Id.* at 1211.
277. *See Armstrong*, 135 S. Ct. at 1384 (citing Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 110 (1902); L. Jaffe, Judicial Control of Administrative Action 152–96 (1965)).

officials. Pursuing this vein, the Court added, "It would be strange indeed to give a clause that makes federal law supreme a reading that limits Congress's power to enforce that law, by imposing mandatory private enforcement—a limitation unheard-of with regard to state legislatures."[278] Instead, the source of the power to bring equitable actions to block officials from violating federal law is the courts themselves, "reflect[ing] a long history of judicial review of illegal executive action, tracing back to England."[279]

What the courts created, Congress can take away through either "express or implied statutory limitations."[280] And, by a 5-4 majority, the Court in *Armstrong* concluded, for two reasons, that the Medicaid Act implicitly precludes private enforcement of section 30(A), thereby dooming the plaintiffs' suit.

First, Congress provided the alternative remedy that the Secretary of HHS can withhold Medicaid funds from states that fail to uphold the program's requirements. This "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."[281]

Second, this suggestion gathers force from the "judicially unadministrable nature of [section] 30(A)'s text."[282] This statutory provision instructs that state plans must ensure that payments are "consistent with efficiency, economy, and quality of care" while also avoiding "unnecessary utilization of . . . care and services."[283] Congress would expect that the Secretary would enjoy exclusive enforcement authority over this "judgment-laden standard" to ensure "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking."[284] Allocating exclusive authority to the Secretary would also avoid the risk that private enforcement actions in court would lead to "inconsistent interpretations and misincentives."[285]

Writing for a four-justice dissent, Justice Sotomayor contended that the majority's conclusion that Congress had implicitly precluded equitable enforcement of section 30(A) "threatens the vitality of our *Ex parte Young*

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278. *Id.*
279. *Id.* (citing JAFFE & HENDERSON, JUDICIAL REVIEW AND THE RULE OF LAW: HISTORICAL ORIGINS, 72 L.Q. REV. 345 (1956)).
280. *Id.* at 1385.
281. *Id.* (quoting Alexander v. Sandoval, 532 U.S. 275, 290 (2001)).
282. *Id.*
283. *Id.*
284. *Id.* (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 292 (2002) (Breyer, J., concurring in judgment)).
285. *Id.*

jurisprudence."[286] She emphasized that the majority had identified "only a single prior decision," *Seminole Tribe of Florida v. Florida*,[287] in which the Court had determined that Congress had implicitly precluded equitable enforcement. In *Seminole Tribe*, however, Congress had adopted a "carefully crafted and intricate scheme" for enforcement of statutory duties.[288] Section 30(A), by contrast, lacks the "detailed remedial scheme previously deemed necessary to establish a congressional intent to preclude resort to equity."[289]

### *2. "Statutory Standing": Another Grudging Application of the Zone-Of-Interests Test From the D.C. Circuit*

*Gunpowder Riverkeeper v. FERC*, 807 F.3d 267 (D.C. Cir. 2015).

Readers of last year's *Developments* summary might recall discussion of *White Stallion Energy Center, LLC v. EPA*,[290] in which the D.C. Circuit held that a competitor lacked statutory standing under section 112 of the CAA to force the EPA to impose stricter regulations on its competitors. This opinion prompted a masterful partial concurrence by Judge Kavanaugh in which he complained that his court frequently applies the zone-of-interests test with a "crabbed" strictness that is manifestly inconsistent with the Supreme Court's frequent admonitions of this test's breadth and generosity to plaintiffs.[291] The majority opinion in *Gunpowder Riverkeeper* provides another good example of this tendency.[292]

Gunpowder Riverkeeper (Gunpowder) is an association of individuals who "work, live, and recreate along the Gunpowder River and its tributaries."[293] This organization petitioned the D.C. Circuit for review of an order

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286. *Id.* at 1392 (Sotomayor, J., dissenting).
287. 517 U.S. 44 (1996).
288. *Armstrong*, 135 S. Ct. at 1392 (Sotomayor, J., dissenting) (quoting *Seminole Tribe*, 517 U.S. at 73–74).
289. *Id.* at 1390 (Sotomayor, J., dissenting).
290. 748 F.3d 1222, 1258 (D.C. Cir. 2014), *rev'd on other grounds sub nom. by* Michigan v. EPA, 135 S. Ct. 2699 (2015).
291. *White Stallion*, 748 F.3d at 1272 (Kavanaugh, J., concurring and dissenting) (noting that the Supreme Court's most recent discussion of the zone-of-interests test in Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012), "should have put a final end to this Court's crabbed approach to the zone of interests test").
292. *See generally* Gunpowder Riverkeeper v. FERC, 807 F.3d 267 (D.C. Cir. 2015).
293. *Id.* at 270 (quoting petitioner's self-description).

by FERC that issued a conditional certificate to Columbia Gas Transmission, Inc. (Columbia), for extension of a pipeline in Maryland. The conditional certificate authorized Columbia to exercise eminent domain to obtain the needed right-of-way and to put certain equipment into place. Gunpowder contended that its members had or would suffer injury as Columbia exercised its power to take their property. According to the panel majority opinion authored by Judge Ginsburg, this claim of injury was good enough to satisfy Article III, but it was not enough to establish that Gunpowder had a cause of action.

Gunpowder contended that issuance of the conditional certificate violated FERC's authority under the Natural Gas Act (NGA) because: (1) FERC had failed to comply with the requirements of the National Environmental Policy Act (NEPA), and (2) Columbia had failed to procure certification from Maryland that the project would comply with the Clean Water Act (CWA). The D.C. Circuit concluded that the petitioner did not satisfy the zone-of-interests test for any of these three statutes, and the court, therefore, dismissed for lack of a cause of action.

In general, claims of property damage do fall within the zone-of-interests arguably protected by the NGA.[294] This general principle did not apply, however, because the NGA's zone-of-interests does not "encompass injuries arising out of violations of other statutes,"[295] and the petitioner's claim that FERC had violated the NGA was based on underlying claims that it had violated NEPA and the CWA.

NEPA did not help the petitioner either because this statute's broad protection of environmental values does not extend to protection of interests that are strictly monetary.[296] Here, although some of the petitioner's affidavits "contain some assertions of injury that could be construed as environmental," it had "alleged only that some of its members are subject to actual or the threat of eminent domain proceedings now that will result in a loss of property rights."[297] Given this focus on property rights, the petitioner failed to fall within NEPA's environmental zone.

The CWA is similarly directed at protecting environmental values, and, along these lines, the D.C. Circuit has previously held that "claims not aimed at 'protect[ing] navigable rivers and streams from pollution' or at 'requir[ing]

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294. *See id.* at 273 (quoting Moreau v. FERC, 982 F.2d 556, 564 n.3 (D.C. Cir. 1993)).
295. *Id.*
296. *See id.* at 274.
297. *Id*. (internal quotation marks omitted).

those who desire to discharge pollutants into the waterways to obtain a permit for doing so' fall outside the zone-of-interests protected by the CWA."[298] Just as with NEPA, the petitioner's property-oriented claim did not fill this zone-of-interests bill.

Judge Rogers dissented from the majority's application of the zone-of-interests test. As is usual in such a dissent, she quoted from a series of Supreme Court opinions stressing the generosity of the zone-of-interests test. For instance, she observed that "'the test forecloses suit only when a [petitioner]'s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that [petitioner] to sue.'"[299] Even if we take as given the dubious characterization that Gunpowder's only interest was to protect the property rights of its members, its pursuit of this interest to force compliance with NEPA and the CWA does not seem "inconsistent with the purposes implicit" in these statutes[300]—rather, it would seem serve them. This point would seem enough to satisfy the Supreme Court's broad approach to the zone-of-interests test.

Moreover, characterizing the petitioner's interest as purely monetary was, in any event, quite unfair. Gunpowder's "general purpose is the protection [of] the Gunpowder River watershed," which is where its "members live, work, and recreate."[301] Although the petitioner had styled its interest in terms of "property" rather than the "environment," its members' affidavits "describe a litany of environmental interests that will be adversely affected by the loss of property through eminent domain."[302]

In sum, *Gunpowder Riverkeeper* provides a fine example of the tension between the Supreme Court's and the D.C. Circuit's approaches to applying the zone-of-interests test to determine whether a plaintiff has a cause of action. The D.C. Circuit gave a crabbed characterization to the interest that the petitioner sought to protect and then applied a restrictive form of the zone-of-interests test to this interest. This yielded the result that the petitioner lacked a cause of action.

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298. *Id.* (quoting Citizens Coordinating Comm. on Friendship Heights, Inc. v. Wash. Metro. Area Transit Auth., 765 F.2d 1169, 1173 (D.C. Cir. 1985)).
299. *Id.* at 275 (Rogers, J., partially dissenting) (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1389 (2014)).
300. *Id.*
301. *Id.* at 276 (Rogers, J., partially dissenting) (quoting petitioner's self-description).
302. *Id.* at 277 (Rogers, J., partially dissenting).

## C. Jurisdictional Status of Statutory Limitations Periods

### *1. Application of the Court's New(ish) Clear Statement Rule to the FTCA*

*United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015).
The FTCA informs us, in seemingly no uncertain terms:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.[303]

Upon reading this passage, you might be inclined to think that FTCA claims are "forever barred" unless they satisfy the two-year or six-month deadlines specified. The Supreme Court, by a 5-4 vote, disagrees with you. The FTCA's limitation periods are nonjurisdictional and are subject to equitable tolling in appropriate cases.[304]

This result is the Court's latest effort in its campaign to draw a relatively clear line delineating which statutory time limits are "jurisdictional" and which are mere "claims- processing" rules. Failure to comply with a jurisdictional bar "deprives a court of all authority to hear a case."[305] Nonjurisdictional time limits, by contrast, are potentially subject to waiver or tolling. Under the Court's new(ish) approach, a statutory limitations period counts as jurisdictional only if Congress has clearly indicated that it should do so.[306] Every term or two for the last decade or so, the Court has issued an opinion applying this clear statement rule to a limitations period.[307] Most limitations peri-

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303. 28 U.S.C. § 2401(b) (2012).
304. United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1629 (2015).
305. *Id.* at 1631.
306. *See, e.g.*, Arbaugh v. Y&H Corp., 546 U.S. 500, 515–16 (2006) (holding that numerosity requirement of a Title VII claim was a substantive requirement of the claim rather than a jurisdictional limitation).
307. *See, e.g.*, Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817 (2013) (holding that 180-day statutory limit for providers to file appeals with the Provider Reimbursement Review Board was neither jurisdictional nor subject to equitable tolling); Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237 (2010) (holding the Copyright Act's requirement that copyright holders register their works

ods, it turns out, are nonjurisdictional "claim-processing" rules.[308]

Applying the clear statement rule to the FTCA, the five-justice majority stressed that the statutory text "speaks only to a claim's timeliness, not to a court's power," and it does so with "mundane statute-of-limitations language."[309] The emphatically mandatory nature of this language did not signify jurisdictional status given that most limitations periods use such phrasing. More particularly, the Court rejected the government's argument that the phrase "shall be forever barred" must signify a jurisdictional limitation given that identical language appears in the Tucker Act's six-year limitation, which the Court has treated as jurisdictional for over a century.[310] This phrase was a "commonplace" in statutory limitations periods of a certain vintage, and it lacked "talismanic power to render time bars jurisdictional."[311] The Court added, "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it."[312] This "something special" does not appear in the FTCA's limitations periods.

To the contrary, Congress signaled that the FTCA's limitations periods were nonjurisdictional by including them in a different portion of the FTCA than the provision conferring power on the federal district courts.[313] This separation in statutory space suggested that the limitations periods spoke to mere claims processing rather than judicial power.

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before suing is nonjurisdictional); Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs, 130 S. Ct. 584 (2009) (holding that requirement of conferencing before seeking arbitration was a nonjurisdictional, claim-processing rule given that this requirement: (1) was quite informal, and (2) appeared in a different statutory provision than the one that established the powers and duties of the arbitrator); Bowles v. Russell, 551 U.S. 205 (2007) (holding that 30-day limit on filing notice of appeal, 28 U.S.C. § 2107 and Federal Rule of Appellate Procedure (F.R.A.P.) 4, was jurisdictional).

308. *See Kwai Fun Wong*, 135 S. Ct. at 1632.
309. *Id.*
310. *See generally* U.S. v. Finn, 123 U.S. 227 (1887) (treating the six-year limitation on claims against the United States as jurisdictional).
311. *Kwai Fun Wong*, 135 S. Ct. at 1634. The Court also observed that it has construed "shall be forever barred" language in the Clayton Act, 15 U.S.C. § 15b, as nonjurisdictional. *Id.* (citing Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 559 (1974)).
312. *Id.* at 1632.
313. *See id.* at 1633 (observing that the time limits are in § 2401(b) whereas § 1346(b)(1) grants jurisdiction in express terms; noting also that the "Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional").

Justice Alito authored a four-justice dissent. For him, "[t]he statutory text, its historical roots, and more than a century of precedents show that this absolute bar [in the FTCA] is not subject to equitable tolling."[314] He wryly noted that "'[s]hall be forever barred' is not generally understood to mean 'should be allowed sometimes.'"[315] This phrase was not the "mundane" language of a claims-processing rule—these ordinarily instruct claimants on deadlines for filing rather than categorically barring claims.[316] Congress had in any event patterned the FTCA limitations period on the Tucker Act's, which the Court had long regarded as jurisdictional. Adding to the pile, the FTCA limitations periods set boundaries on a waiver of sovereign immunity, which the Court was obligated carefully to respect. In short, the Court was "wrong at every step" of its analysis.[317]

## D. Reviewability

### *1. The Supreme Court Provides Another Example of a Very Vague Statutory Requirement Establishing a Manageable Standard for Judicial Review*

*Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015).

Before suing a firm for discrimination, the EEOC has a statutory duty to "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[318] In *Mach Mining*, the defendant firm contended that the EEOC had failed to satisfy this prerequisite. The district court determined that this issue was reviewable but also authorized an interlocutory appeal on this point. The Seventh Circuit reversed, concluding that satisfaction of the conciliation requirement is unreviewable both because no workable standard exists for reviewing the EEOC's expert and discretionary judgment and because review of this issue would complicate and undermine enforcement of Title VII.[319] The ruling created a circuit split, and the Supreme Court granted certiorari

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314. *Id.* at 1639 (Alito, J., dissenting).
315. *Id.* at 1640 (Alito, J., dissenting).
316. *Id.* at 1643 (Alito, J., dissenting).
317. *Id.* (Alito, J., dissenting).
318. 42 U.S.C. § 2000e-5(b) (2012).
319. *See* EEOC v. Mach Mining, LLC, 738 F.3d 171, 174, 178–79 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2872, *vacated and remanded by* 135 S. Ct. 1645 (2015).

"to address whether and to what extent . . . an attempt to conciliate is subject to judicial consideration."[320]

The Supreme Court, in a unanimous opinion, made short work of concluding that the statutory requirement of informal conciliation was of a sort that "[c]ourts routinely enforce."[321] It rejected the government's argument that the statute left the EEOC with such broad discretion to determine "how to engage in, and when to give up on, conciliation" as to leave the courts with no "judicially manageable" criteria for review.[322] A court could, for instance, easily discern that the agency had violated this requirement if the agency made no effort at all to conciliate before filing suit. The EEOC must, at minimum, "tell the employer about the claim—essentially, what practice has harmed which person or class—and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance."[323] This minimum requirement provides a "manageable standard" for courts to apply in checking whether the EEOC has complied with the statutory duty to conciliate.[324]

Acknowledging that the conciliation process implicates agency discretion, the Court emphasized that the scope of review should be quite narrow. Judicial review should check only: (1) whether the EEOC has "inform[ed] the employer about the specific allegation," and (2) whether the EEOC has "engage[d] the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice."[325] Absent contrary credible evidence from an employer, a sworn affidavit from the EEOC stating that these things have occurred "will usually suffice to show that it has met the conciliation requirement."[326]

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320. *Mach Mining*, 135 S. Ct. at 1651.
321. *Id.* at 1652.
322. *Id.*
323. *Id.*
324. *Id.*
325. *Id.* at 1656–57.
326. *Id.* at 1657.

### 2. *The Supreme Court Rejects the Fifth Circuit's Recharacterization of a Reviewable Denial of a Motion to Reopen as an Unreviewable Refusal to Invoke* Sua Sponte *Authority to Reopen*

*Mata v. Lynch*, 135 S. Ct. 2150 (2015).

After Mata's conviction for assault, an immigration judge ordered Mata removed. Mata sought review from the BIA, but his attorney failed to file a brief, and the BIA dismissed the appeal. Later, with new counsel, Mata moved to reopen, but the statutory deadline for such motions had passed. Mata sought equitable tolling on the ground that his earlier counsel had been ineffective. The BIA acknowledged that it has applied equitable tolling on this ground in the past, but concluded that Mata was not entitled to this favorable treatment because he could not demonstrate prejudice. The BIA added that it would not, in any event, exercise its *sua sponte* authority to reopen.[327]

In *Kucana v. Holder*,[328] the Supreme Court had held that the courts of appeals have jurisdiction to review the BIA's denials of motions to reopen its proceedings. The Fifth Circuit nonetheless dismissed Mata's appeal not on the merits but for lack of jurisdiction. The Fifth Circuit reached this conclusion based on its premise that "[i]n this circuit, an alien's request [to the BIA] for equitable tolling on the basis of ineffective assistance of counsel is construed as an invitation for the BIA to exercise its discretion to reopen the removal proceeding *sua sponte*."[329] Under circuit precedent, the BIA's decision to decline to exercise its *sua sponte* authority is unreviewable for lack of judicially manageable standards.

Before the Supreme Court, the government agreed with Mata that the Fifth Circuit's conclusion that it lacked jurisdiction was mistaken. And the Supreme Court agreed, too, holding that the Fifth Circuit should not have recharacterized Mata's motion to reopen as an invitation to exercise the BIA's *sua sponte* authority. As such, *Kucana*'s holding that courts have jurisdiction to review the BIA's denials of motions to reopen was controlling.[330]

Amicus appointed to defend the decision tried to save it by arguing that: (1) equitable tolling was unavailable under the Immigration and Nationality

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327. *See* Mata v. Lynch, 135 S. Ct. 2150, 2153 (2015).
328. 558 U.S. 233 (2010).
329. Mata v. Holder, 558 Fed. App'x 366, 367 (5th Cir. 2014) (per curiam), *rev'd and remanded by* 135 S. Ct. 2150 (2015).
330. *See Mata*, 135 S. Ct. at 2156.

Act[331] and (2) it was within the court's power to recharacterize the motion as seeking some sort of relief that might be legally available.[332] Even assuming, however, that the initial premise of this argument were true, the Fifth Circuit's proper course would have been to take jurisdiction and then to affirm the BIA's denial of Mata's motion for untimeliness.[333] Moreover, recharacterization of requests for relief is a means for "identifying a route to relief, not in rendering relief impossible."[334] It was, therefore, improper for the Fifth Circuit to recharacterize Mata's request in a way that "constru[ed] away adjudicative authority."[335]

### *3. Special Statutory Scheme for Judicial Review Precluded District Court Jurisdiction Over Facial Constitutional Claims*

*Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015).
*Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015).

Under the Dodd-Frank Act, the U.S. Securities and Exchange Commission (SEC) can choose to bring an enforcement proceeding seeking a monetary penalty from a non-regulated individual either in federal district court or in internal agency proceedings before an administrative law judge (ALJ).[336] Over the last several years, the SEC has used this authority to initiate various agency proceedings. The defendants have often responded by initiating their own actions in district court, challenging the SEC's authority to use agency proceedings on various constitutional grounds. District courts have split regarding the threshold issue of whether they have subject matter jurisdiction to resolve the constitutional challenges to the SEC's statutory authority.[337] The Seventh Circuit in *Bebo* and the D.C. Circuit in *Jarkesy* have now added

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331. Pub. L. No. 89-236, 66 Stat. 163 (1965) (codified as amended at 8 U.S.C. § 1101 *et seq.* (2012)).
332. *Mata*, 135 S. Ct. at 2155.
333. *Id.* at 2156.
334. *Id.*
335. *Id.*
336. *See* 15 U.S.C. § 78u-2 (2012).
337. For district court cases finding subject matter jurisdiction, *see, e.g.*, Hill v. SEC, 114 F. Supp. 3d 1297 (N.D. Ga. 2015); Duka v. SEC, 103 F. Supp. 3d 382 (S.D.N.Y. 2015). For cases rejecting subject matter jurisdiction, *see, e.g.*, Tilton v. SEC, No. 15-CV-2472 (RA), 2015 WL 4006165 (S.D.N.Y. June 30, 2015); Bebo v. SEC, No. 15-C-3, 2015 WL 905349 (E.D. Wis. Mar. 3, 2015).

appellate voices to the fray, concluding that the district courts lack this jurisdiction.[338]

Starting with the Seventh Circuit case, the SEC initiated an administrative cease-and-desist proceeding against Bebo, claiming that she had violated federal securities laws. Bebo's answer contended that the SEC's "unguided" power to choose between administrative and judicial enforcement proceedings violated equal protection and due process.[339] She also attacked the foundations of the administrative adjudicative system, arguing that protecting ALJs from removal with multiple levels of for-cause protection violates Article II as the Supreme Court interpreted it in another Dodd-Frank case, *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.[340] The ALJ's initial decision in this administrative action is still pending. If the administrative proceedings ultimately turn out badly for Bebo, she will be able to seek judicial review in the circuit courts under 15 U.S.C. § 78y(a)(1) (2012).

Preferring not to wait, she has instead sued the SEC in federal district court, seeking to block the administrative proceedings based on her constitutional arguments. Whether the district court has subject matter jurisdiction to hear these claims turns on whether the judicial review scheme established by section 78y(a)(1) for review of SEC actions is exclusive. Where the issue is whether Congress has precluded all judicial review of an administrative action, the courts demand a clear statement from Congress indicating this intent.[341] By contrast, where the issue is instead whether Congress has directed judicial review for a particular claim to a particular judicial forum, "the appropriate inquiry is whether it is 'fairly discernible' from the statute that Congress intended the plaintiff 'to proceed exclusively through the statutory

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338. *See generally* Bebo v. SEC, 799 F.3d 765 (7th Cir. 2015); Jarkesy v. SEC, 803 F.3d 9 (D.C. Cir. 2015).
339. *Bebo*, 799 F.3d at 768 ("Bebo contends that § 929P(a) of Dodd-Frank is facially unconstitutional under the Fifth Amendment because it provides the SEC 'unguided' authority to choose which respondents will and which will not receive the procedural protections of a federal district court, in violation of equal protection and due process guarantees.").
340. 561 U.S. 477, 483–84 (2010) (holding that dual for-cause limitations on removal, where the President could remove SEC Commissioners for cause and SEC Commissioners could remove Public Company Accounting Oversight Board members for cause, unconstitutionally interfered with the President's Article II power and obligation to ensure enforcement of the law). This issue is discussed herein in *Constitutional Law and Separation of Powers, supra*, in Part III.
341. *See, e.g.*, Elgin v. Dep't of Treas., 132 S. Ct. 2126, 2132 (2012).

review scheme.'"[342] The Seventh Circuit concluded that it was, indeed, "fairly discernible" that section 78y provides the exclusive judicial means for addressing Bebo's constitutional arguments.[343] Reasoning to this result required the court to square two recent Supreme Court cases applying the "fairly discernible" standard—*Free Enterprise Fund* and *Elgin v. Department of Treasury.*

Bebo naturally relied heavily on *Free Enterprise Fund*. In this case, an accounting firm and an organization to which it belonged sued in district court to challenge the constitutionality of the statutory scheme for appointing and removing members of the Public Company Accounting Oversight Board (Board). Board rules and sanctions are subject to SEC review, and SEC actions are subject to judicial review under section 78y. The government argued that this statutory scheme established the exclusive means for reviewing the plaintiffs' constitutional claims.

The Court set up its rejection of this argument in *Free Enterprise Fund* by identifying three pertinent factors, explaining, "[W]e presume that Congress does not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'"[344] Taking these factors in reverse order, the plaintiffs' constitutional claims did not implicate any particular agency expertise, and their challenge to the Board's existence was "'collateral' to any [SEC] orders or rules from which review might be sought" under section 78y.[345]

The Court's discussion of whether preclusion would foreclose "all meaningful judicial review" focused on the circuitous path the plaintiffs would need to take to deploy statutory review under section 78y. To obtain judicial review under this statute, the plaintiffs could either: (1) seek SEC review of a Board rule and then seek judicial review of the SEC's decision, or (2) take steps to incur a sanction by the Board, appeal that sanction to the SEC, and then seek judicial review of the SEC's decision if it proved unfavorable. Neither route, in the Supreme Court's view, was acceptable. Challenging a rule would require the plaintiffs to pick a rule at random as a means for making a constitutional attack, which would be "an odd procedure for Congress to choose."[346] As for the sanctions route, the Court does not normally

342. *Bebo*, 799 F.3d at 767 (quoting *Elgin*, 132 S. Ct. at 2132–33).
343. *See id.* at 766.
344. *Free Enterprise Fund*, 561 U.S. at 489 (quoting Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212–13 (1994)).
345. *Id.* at 490.
346. *Id.*

"require plaintiffs to 'bet the farm . . . by taking the violative action' before 'testing the validity of the law.'"[347]

The Seventh Circuit acknowledged that "read broadly," as Bebo would prefer, *Free Enterprise Fund* "seems to open the door for a plaintiff to gain access to federal district courts by raising broad constitutional challenges to the authority of the agency where those challenges (1) do not depend on the truth or falsity of the agency's factual allegations against the plaintiff, and (2) the plaintiff's claims do not implicate the agency's expertise."[348] The Seventh Circuit concluded, however, that the Supreme Court had foreclosed this approach in the more recent *Elgin*,[349] to which we now turn.

*Elgin* examined the exclusivity of the scheme for judicial review established by the Civil Service Reform Act of 1978 (CSRA).[350] This scheme authorizes covered employees to seek administrative and judicial review of specified adverse employment actions—including termination. Administrative review occurs before the Merit Systems Protection Board (MSPB), which can order remedies including reinstatement, back pay, and attorney's fees. Employees may appeal adverse decisions by the MSPB to the U.S. Court of Appeals for the Federal Circuit.

The *Elgin* petitioners were federal competitive service employees who were terminated pursuant to 5 U.S.C. § 3328 (2012), which bars persons who knowingly and willfully fail to register for the Selective Service from employment with executive agencies. The petitioners sought administrative relief from the MSPB and lost there. Rather than appeal to the Federal Circuit, they instead took a page from *Free Enterprise Fund* and filed suit in federal district court to press their constitutional arguments that section 3328 amounts to a bill of attainder and unconstitutionally discriminates based on sex.[351]

The Supreme Court concluded that the CSRA precluded jurisdiction over the petitioners' constitutional claims even though the MSPB lacked authority to resolve them. The Court emphasized that the CSRA provides an "elaborate" framework that lays out in "painstaking detail" the methods for covered employees to contest covered adverse actions.[352] As a general matter, the text and structure of the CSRA thus support implied preclusion of district court jurisdiction.

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347. *Id.* (quoting MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 129 (2007)).
348. *Bebo*, 799 F.3d at 770.
349. *Id.* at 771.
350. 5 U.S.C. § 1101 *et seq.*
351. *See Elgin*, 132 S. Ct. at 2131.
352. *Id.* at 2134.

Petitioners contended that this general rule of implied preclusion should not apply to them because "neither the MSPB (because it lacks authority to decide the legal question) nor the Federal Circuit (because it is an appellate court)" could create a proper factual record for the constitutional claims.[353] The Court disposed of this argument by observing that (1) the Federal Circuit could take judicial notice of some facts bearing on constitutional claims (such as the petitioners' sex discrimination claim), and (2) the MSPB could take evidence on constitutional claims even if it lacked authority to decide them.[354]

As for the three *Free Enterprise Fund* factors: (1) precluding jurisdiction in the district courts would not cut off meaningful review of constitutional claims, which could be resolved under the CSRA by the Federal Circuit; (2) petitioners' constitutional claims were not "collateral" to the CSRA scheme but instead were part and parcel of "a challenge to CSRA-covered employment action brought by CSRA-covered employees requesting relief that the CSRA routinely affords"; and (3) CSRA expertise could prove relevant to determining threshold questions that could eliminate the need to reach the constitutional issues.[355]

Back to *Bebo*. Minimizing the third *Free Enterprise Fund* factor, the Seventh Circuit read *Elgin* for the proposition that the jurisdictional question did not "hinge on whether Bebo's constitutional challenges fall outside the agency's expertise."[356]

Turning to the second *Free Enterprise Fund* factor, determining whether Bebo's claims were "collateral" to the section 78y scheme was problematic given that courts have taken differing approaches to this issue. Some check for a relationship between the constitutional claim and the factual allegations at issue in the administrative proceeding; others, following *Elgin*, check whether the constitutional claim is a "vehicle" to challenge the outcome of the administrative proceeding. The Seventh Circuit decided that it did not need to choose between these two approaches because, under *Elgin*, "the most critical thread in the case law is the first *Free Enterprise* factor: whether the plaintiff will be able to receive meaningful judicial review without access to the district courts."[357]

In *Free Enterprise Fund* itself, this first factor had heavily favored the plaintiff accounting firm, which, to obtain review of its constitutional claims

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353. *Id.* at 2138.
354. *Id.*
355. *Id.* at 2136–40.
356. *Bebo*, 799 F.3d at 773.
357. *Id.* at 774.

under section 78y, would have needed to challenge a Board rule at random or "bet the farm" by taking steps to incur a Board sanction. Bebo, by contrast, already *is* the target of a pending administrative proceeding. To obtain judicial review of her constitutional claims, she need not "bet the farm" by taking actions that risk further sanctions. She need only wait until the SEC resolves the pending action and then seek judicial review if that administrative outcome is adverse to her. Enduring the administrative proceedings may be unpleasant and expensive, but "the expense and disruption of defending oneself in an administrative proceeding does not automatically entitle a plaintiff to pursue judicial review in the district courts, even when those costs are 'substantial.'"[358]

In *Jarkesy*, the D.C. Circuit followed a similar but somewhat broader path to the same result. Near the beginning of its analysis, the court characterized the special statutory review scheme for SEC actions as having the sort of "painstaking detail" that justifies concluding that it is "fairly discernible" that Congress generally intended this scheme to preclude district court review.[359] The court then examined whether the three *Free Enterprise Fund* factors, which it regarded as "general guideposts," provided a "strong countervailing rationale" for concluding that Jarkesy's particular types of claims were nonetheless subject to district court jurisdiction.[360]

Regarding the first factor, the D.C. Circuit essentially agreed with the Seventh Circuit that precluding district court jurisdiction would not "foreclose all meaningful judicial review" given that, if the SEC ultimately ruled against Jarkesy, he could obviously seek judicial review at that time.[361] The inability of the agency to definitively determine constitutional issues did not require concluding otherwise.[362] The D.C. Circuit, like the Seventh Circuit, also distinguished *Free Enterprise Fund* on the ground that Jarkesy, as he was already the object of an enforcement action, did not need to manufacture a fake dispute with the SEC or "bet the farm" in order to create an agency action subject to judicial review.[363]

Turning to the second factor, the court shed important light on what it means for a dispute to be "wholly collateral" for the purpose of determining the exclusivity of a special statutory review scheme.[364] Jarkesy contended that

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358. *Id.* at 775 (quoting FTC v. Standard Oil Co., 449 U.S. 232, 244 (1980)).
359. *Jarkesy*, 803 F.3d at 17 (quoting *Elgin*, 132 S. Ct. at 2134).
360. *Id.* (citing E. Bridge, LLC v. Chao, 320 F.3d 84, 89 (1st Cir. 2003)).
361. *Id.* at 18.
362. *See id.*
363. *Id.* at 20.
364. *Id.* at 17.

this factor should hinge on whether the claims for which he sought district court review were "independent of and irrelevant to the securities fraud allegations" against him.[365] The district court could, for instance, determine whether the SEC's authority violated the nondelegation doctrine without determining whether Jarkesy had committed securities fraud; therefore, Jarkesy reasoned, the district court should be able to exercise jurisdiction over his nondelegation claim.

The court responded that this broad approach misconceived the meaning of "wholly collateral."[366] In *Elgin*, the Supreme Court had held that the plaintiffs' constitutional claims were not collateral to their administrative efforts to seek reinstatement where the constitutional claims were a "vehicle" for seeking this relief.[367] By contrast, the claims in *Free Enterprise Fund* were necessarily "'collateral' to the SEC administrative-review scheme" because the plaintiffs, who were not the object of any enforcement proceedings, "were not *in* that scheme at all."[368] Put another way, in *Free Enterprise Fund*, the constitutional claims could not be a "vehicle" for challenging any agency action because there was no agency action to challenge. Jarkesy, as in *Elgin*, was using his constitutional claims as a "vehicle" for contesting the administrative action against him. Therefore, his constitutional claims were not "collateral" to the SEC's enforcement action—even if the constitutional claims were factually independent from the SEC's charges.[369]

Nor did the third factor, relating to agency expertise, help Jarkesy. For one thing, the court observed that he gave short shrift to the SEC's familiarity with certain types of constitutional issues. Moreover, even where an agency lacks expertise to determine a constitutional claim, it may moot the need for a court to resolve it by disposing of a case on other grounds.[370] In addition, if a court must reach a constitutional issue, the agency's interpretation of its statutory authority may shed light on how to do so.[371]

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365. *Id.* at 23.
366. *Id.*
367. *Id.* (citing *Elgin*, 132 S. Ct. at 2139–40).
368. *Id.*
369. *Id.*
370. *See id.* at 20.
371. *See id.*

## E. Finality

### *1. A Circuit Split on Whether it is Final Agency Action When the U.S. Army Corps of Engineers Issues a Jurisdictional Determination that Your Property is a Wetland Subject to Regulation Under the Clean Water Act—With Supreme Court Resolution Coming Soon*

*Hawkes Co. v. U.S. Army Corps of Engineers*, 782 F.3d 994 (8th Cir. 2015), *cert. granted*, 136 S. Ct. 615 (2015).

*Belle Co. v. U.S. Army Corps of Engineers*, 761 F.3d 383 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1548 (2015).

Maybe you recall from last year's update that, in *Belle Co. v. U.S. Army Corps of Engineers*, the Fifth Circuit ruled that a Corps "jurisdictional determination" (JD) finding that land constituted wetlands subject to CWA regulations did not amount to final agency action and was, therefore, unreviewable.[372] We now have a circuit split as, in *Hawkes Co., Inc. v. U.S. Army Corps of Engineers*, the Eighth Circuit has reached the opposite conclusion.[373] The Supreme Court has granted a petition for a writ of certiorari in *Hawkes* to resolve this split.[374]

Let's start by reviewing last year's discussion of *Belle Co.* For finality, the familiar test of *Bennett v. Spear* instructs: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."[375] According to the Fifth Circuit, the Corps' JD satisfied the consummation prong as it represented the agency's "final position on the facts underlying jurisdiction—that is, the presence or absence on Belle's property of waters of the United States as defined by the CWA."[376]

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372. Belle Co., LLC v. U.S. Army Corps of Eng'rs, 761 F.3d 383, 394 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1548 (2015). *See also* Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586, 591 (9th Cir. 2008) (reaching the same result).
373. *See* Hawkes Co. v. U.S. Army Corps of Eng'rs, 782 F.3d 994, 996 (8th Cir. 2015), *cert. granted*, 136 S. Ct. 615 (2015).
374. *See Hawkes*, 136 S. Ct. 615 (2015).
375. 520 U.S. 154, 177–78 (1997).
376. *Belle Co.*, 761 F.3d at 390.

The problem for finality lay with the second prong. The Fifth Circuit observed that the plaintiffs faced an uphill struggle given that all the courts to consider the question before had concluded that JDs lack the legal consequences needed for finality.[377] The plaintiffs, however, argued that the legal ground had shifted on this point due to the Supreme Court's recent decision in *Sackett v. EPA*,[378] which held that an administrative compliance order (ACO) that the EPA had issued ordering restoration of wetlands on the Sacketts' property constituted reviewable, final agency action.

The Fifth Circuit held that *Sackett* did not control the issue of the JD's finality. The Supreme Court's grounds for considering the ACO final had included: (1) the ACO had imposed a "legal obligation" on the Sacketts "to restore their property according to an agency-approved Restoration Work Plan"; (2) it required the Sacketts to "give the EPA access to their property and to records and documentation related to the conditions at the Site"; (3) it made the Sacketts vulnerable "to double penalties in a future enforcement proceeding"; (4) it limited their ability to obtain a needed permit from the Corps; and (5) it exposed the Sacketts to rapidly accruing liability as they waited for the agency to bring an enforcement action.[379]

The JD, by contrast, did not order Belle to do anything—its legal obligations under the CWA were a function of whether the property included wetlands. The JD informed the plaintiffs of the Corps' determination on this issue, but, according to the court, the JD did not add or subtract from these legal obligations.[380] Also, unlike the ACO, the JD: (1) did not expose Belle to the risk of double penalties; (2) did not limit Belle's ability to obtain a permit from the Corps; and (3) did not conclude that Belle had discharged fill into wetlands in violation of the CWA.[381]

To set up its opposite conclusion in *Hawkes*, the Eighth Circuit characterized the issue as whether the Supreme Court's "application of its flexible final agency action standard in *Sackett* should also apply in this case."[382] It

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377. *See id.* at 391 (collecting authority).
378. 132 S. Ct. 1367 (2012).
379. *Belle Co.*, 761 F.3d at 391–93.
380. *See id.* at 391. *Accord, Fairbanks N. Star Borough*, 543 F.3d at 593–94 ("Fairbanks' rights and obligations remain unchanged by the approved jurisdictional determination. It does not itself command Fairbanks to do or forbear from anything; as a bare statement of the agency's opinion, it can be neither the subject of 'immediate compliance' nor of defiance.").
381. *Belle Co.*, 761 F.3d at 392–94.
382. *Hawkes*, 782 F.3d at 997 (footnote discussing the Supreme Court's "'pragmatic' and 'flexible' approach to the question of finality" omitted).

turns out, not too surprisingly, that the Eighth Circuit thinks it should follow the Supreme Court's example. In the Eighth Circuit's view, this approach leads to the conclusion that the Corps' JDs are final after all.

Like the Fifth Circuit in *Belle Co.*, the district court in *Hawkes* had distinguished *Sackett* on the grounds that the EPA had ordered the Sacketts to restore their property immediately, facing the risk of enhanced penalties if they did not. Also, the ACO in *Sackett* made it more difficult for the Sacketts to obtain a Corps permit. The JD in *Hawkes* created none of these legal effects.

The Eighth Circuit opined that "this analysis seriously understates the impact of the regulatory action at issue by exaggerating the distinction between an agency order that compels affirmative action, and an order that prohibits a party from taking otherwise lawful action."[383] Moreover, the possibility that the appellants might seek a CWA permit and then appeal a denial as a means to contest the JD did not amount to a sufficient alternative remedy given that: (1) the permitting process was expensive and time-consuming; (2) facts accepted as true for the sake of resolving the government's motion to dismiss indicated that the effort would be futile; and (3) even if the appellants ultimately won in court, they could "never recover the time and money lost in seeking a permit they were not legally obligated to obtain."[384] In addition, "appellants' other option—commencing to mine peat without a permit and await an enforcement action—is even more plainly an inadequate remedy."[385]

The Eighth Circuit did little to address the crux of the Fifth Circuit's analysis, which is that a property owner's rights and obligations are determined by the presence or absence of wetlands within the meaning of the CWA and its regulations. A JD does not add or subtract from these obligations; rather, it merely tells the property owner the Corps' conclusion about whether wetlands are present.

In an indirect response to this point, the Eighth Circuit suggested that appellants, by being "forthright in undertaking to obtain a permit" and getting an unfavorable JD for their troubles, had worsened their legal position.[386] With the JD in hand, if they chose to mine peat without a permit, they would expose themselves "to substantial criminal monetary penalties and even imprisonment for a knowing CWA violation."[387] This point strengthened the

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383. *Id.* at 1000.
384. *Id.* at 1001.
385. *See id.*
386. *Id.*
387. *Id.*

analogy between the JD and the ACO in *Sackett*, which started the clock for enhanced penalties running.

Judge Kelly, concurring, threw a bit of cold water on this argument. He "agree[d] with the other courts that have considered this issue that any penalties resulting from a JD are far more 'speculative' than those threatened in *Sackett*."[388] He added that the petitioners had "fail[ed] to point to a single case in which increased civil penalties were levied against a party for ignoring a JD."[389] Nonetheless, Judge Kelly's agreement with the majority's result on pragmatic grounds seems worth quoting:

> In my view, the Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction—a threshold determination that puts the administrative process in motion. This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property. This jurisdictional determination was precisely what the Court deemed reviewable in *Sackett*. *See Sackett*, 132 S. Ct. at 1374–75 (Ginsburg, J., concurring). Accordingly, I concur in the judgment of the court.[390]

Stepping back for a slightly broader view, one might say that in *Belle Co.* and *Hawkes* we have a clash between formalism and pragmatism. A Corps finding that property contains jurisdictional waters has obvious practical consequences for a landowner. It means, for one thing, that the property is on the Corps' "radar screen," which increases the incentive for a landowner to work through an expensive and time-consuming permitting process before taking action that might violate the CWA.[391] Still, the Court has held elsewhere that the expense of working through an administrative process is generally not a "legal consequence" that can justify avoiding that administrative process.[392]

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388. *Id.* at 1003 (Kelly, J., concurring) (citing *Belle Co.*, 761 F.3d at 392, and *Fairbanks N. Star Borough*, 543 F.3d at 595).
389. *Id.* (Kelly, J., concurring).
390. *Id.* at 1003–04.
391. *See Fairbanks N. Star Borough*, 543 F.3d at 596 ("We do agree that now that Fairbanks is on the Corps' radar screen, it is at least plausible that the probability of enforcement action if Fairbanks proceeds with construction without securing a Section 404 permit is greater than it was before it requested an approved jurisdictional determination.").
392. FTC v. Standard Oil of California, 449 U.S. 232, 242 (1980). *See also* Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 735 (1998) (observing that litigation costs did not "justify review in a case that would otherwise be unripe").

Upholding the outcome of *Hawkes* under the two-prong test of *Bennett v. Spear* should therefore require the Supreme Court, if it takes the case, to identify some other formal "legal consequence" of the JD. The Fifth Circuit's *Belle Co.* opinion suggests that finding such a legal consequence may take some creativity.[393] But then the Supreme Court can be very creative.

### 2. FAA Guidance Document Wasn't a Legislative Rule so It Wasn't Final or Reviewable

*Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710 (D.C. Cir. 2015).

In this case, a flight attendants' union petitioned for review of a notice that the Federal Aviation Administration (FAA) issued to safety inspectors. The petitioner contended that this notice, which related to use and stowage of personal electronic devices, constituted an amendment to a regulation that should have gone through notice and comment. The court dismissed on the ground that the notice constituted a guidance document that the court lacked jurisdiction to review.

The court's opinion is notable for clarifying that, as far as the D.C. Circuit is concerned, proper guidance documents (i.e., policy statements and interpretive rules) never amount to final agency actions. Again, the second prong of *Bennett*'s test for finality requires that an agency action determine legal rights and obligations or otherwise create legal consequences.[394] Policy statements "are binding on neither the public nor the agency," and interpretive rules "do not carry the force and effect of law."[395] Neither, therefore, can be final.[396]

With *Ass'n of Flight Attendants*, the D.C. Circuit has completed its march towards equating the legal consequences needed for finality with the type of legislative force that triggers the APA's notice-and-comment requirements. Decades ago, in *National Automatic Laundry & Cleaning Council v. Schultz*,[397]

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393. *See Belle Co.*, 761 F.3d at 391 ("But even if Belle had never requested the JD and instead had begun to fill, it would not have been immune to enforcement action by the Corps or EPA."). *Accord Fairbanks N. Star Borough*, 543 F.3d at 593–94.
394. *Bennett*, 520 U.S. at 177–78.
395. Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta, 785 F.3d 710, 716 (2015).
396. *See id.*
397. 443 F.2d 689 (D.C. Cir. 1971).

the court took a notably more flexible approach, concluding that an agency head's letter ruling setting forth an interpretive rule was final and reviewable given, among other factors, the absence of any indications that the ruling was tentative. In 2006, however, in *Center for Auto Safety v. NHTSA*,[398] the D.C. Circuit relied upon *Bennett*'s second prong to conclude that policy statements properly exempt from notice-and-comment requirements can never be final as, by hypothesis, they are nonbinding and thus lack legal consequences.[399] In 2014, in *National Mining Ass'n v. McCarthy*,[400] the D.C. Circuit reiterated that policy statements are not final or reviewable but, citing the Supreme Court's decision in *Whitman v. American Trucking Ass'n* as authority, conceded that "interpretive rules may be subject to pre-enforcement judicial review."[401] *Ass'n of Flight Attendants* abandons this concession without explanation other than to stress that neither policy statements nor interpretive rules are "legislative rule[s] carrying 'the force and effect of law.'"[402] Thus, it seems that neither of these types of guidance can be "final" under *Bennett*.

But of course an agency cannot evade finality, and thus review, merely by calling a rule an "interpretive rule" or "policy statement." The rule might be an improperly labeled "legislative rule" that creates legal consequences and is subject to judicial review. The line between guidance document and legislative rule is, as we have long been told, "enshrouded in considerable smog."[403] A rule is legislative if it creates "new rights or imposes new obligations," or "narrowly limits administrative discretion."[404] This inquiry can often turn into the question-begging exercise of checking whether a rule has legal effect to determine if it is legislative (i.e., has legal effect). For further guidance, courts look to the rule's language—rules that read like "edict[s]" are likely to be legislative; those "riddled with caveats" that expressly preserve discretion are likely to be nonlegislative.[405] Courts also look to whether the agency itself has characterized the rule as legislative or not, as well as to

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398. 452 F.3d 798 (D.C. Cir. 2006).
399. *Id.* at 806–07.
400. 758 F.3d 243 (D.C. Cir. 2014).
401. *Id.* at 251 (citing Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 477–79 (2001)).
402. *Ass'n of Flight Attendants*, 785 F.3d at 716 (quoting *Mortg. Bankers*, 135 S. Ct. at 1204).
403. *Id.* at 717 (quoting Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987)).
404. *Id.* (quoting *Cmty. Nutrition Inst.*, 818 F.2d at 948).
405. *Id.*

whether the agency has published the rule in the Federal Register or Code of Federal Regulations.[406]

Looking to these signals to cut through the smog, the D.C. Circuit determined that the FAA's notice "reflects nothing more than a statement of agency policy or an interpretive rule" and was "therefore unreviewable."[407]

### *3. Like You Thought, Proposed Rule Wasn't Final or Reviewable, but with Bonus Concurrence on Judicial Superpowers Under the All Writs Act*

*In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015), *reh'g en banc denied*, 2015 U.S. App. LEXIS 17161 (D.C. Cir. Sept. 29, 2015).

Petitioners sought review of the Clean Power Plan before the EPA issued this rule in its final form on August 3, 2015. On the merits, the petitioners' theory in challenging the proposed rule was that section 111(d) of the CAA did not authorize the EPA to regulate carbon dioxide emissions from existing power plants. Getting to the merits was problematic, of course, given that petitioners were asking the court "to do something [it had] . . . never done before: review the legality of a *proposed* rule."[408] As a proposal, the rule was obviously not final and, presumably, unreviewable as a matter of bedrock administrative law.[409]

In an opinion issued just two months before final promulgation of the Clean Power Plan, Judge Kavanaugh shot down three efforts by petitioners to get around this problem. Their first try relied on the All Writs Act, which provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[410] Judge Kavanaugh explained that it was neither "necessary" nor "appropriate" to issue a writ in this case to aid the court's jurisdiction given that the parties would soon be able to challenge the rule in its final form.[411] The fact that the petitioners expected to incur costs in preparing for a rule that they hoped the court would later invalidate did not provide a justification for ignoring the requirement of finality. More broadly,

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406. *See id.* (citing *Ctr. for Auto Safety*, 452 F.3d at 806).
407. *Id.*
408. *In re* Murray Energy Corp., 788 F.3d 330, 333 (D.C. Cir. 2015).
409. *See id.* at 334 (citing 42 U.S.C. § 7607(b)(1) (2012) (judicial review provision of the CAA) and 5 U.S.C. § 704 (APA's finality requirement)).
410. 28 U.S.C. § 1651(a).
411. *Murray*, 788 F.3d at 335.

the court observed that "the All Writs Act does not authorize a court to circumvent bedrock finality principles in order to review proposed agency rules."[412]

Second, the petitioners argued that various public statements by the EPA concerning the scope of its legal authority to regulate carbon dioxide emissions amounted to reviewable final agency action. This argument failed both prongs of the finality inquiry, which checks whether an agency action has been consummated as well as whether it creates legal consequences.[413] As for the first prong, "[i]n the context of an ongoing rulemaking, an agency's statement about its legal authority to adopt a proposed rule is not the 'consummation' of the agency's decisionmaking process," which does not occur until the agency issues the rule in its final form.[414] As for the second prong, the court explained that an "agency's statements about its legal authority—unconnected to any final rule or other final agency action—do not impose any legal obligations or prohibitions on petitioners."[415] It is the final rule exercising the agency's authority, not the agency's earlier interpretive discussions of its scope, which carries legal consequences.[416]

Third, the petitioners challenged a 2011 settlement agreement that the EPA had struck with various states and environmental groups to establish a timeline for determining whether to regulate carbon dioxide emissions from existing power plants. The court characterized this challenge as seeking a "backdoor ruling from the [c]ourt that EPA lacks legal authority under Section 111(d) to regulate carbon dioxide emissions from existing power plants."[417] This challenge was untimely. Moreover, it failed for lack of standing given circuit precedent establishing that "a settlement agreement that does nothing more than set a timeline for agency action, without dictating the content of that action, does not impose an injury in fact on entities that are not parties to the settlement agreement."[418]

Judge Henderson, concurring, wrote separately "to distance [herself] from [her] colleague's cramped view of our extraordinary writ authority" under the All Writs Act.[419] To start her analysis, Judge Henderson emphasized that

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412. *See id.*
413. *See id.* at 335–36 (citing *Bennett*, 520 U.S. at 177–78).
414. *Id.* at 336.
415. *Id.*
416. *Id.*
417. *Id.*
418. *Id.* (citing Defenders of Wildlife v. Perciasepe, 714 F.3d 1317, 1324–25 (D.C. Cir. 2013)).
419. *Id.* at 337 (Henderson, J., concurring).

jurisdiction under the All Writs Act lies "in the court that would have authority to review the agency's final decision."[420] Jurisdiction thus extends to cover agency actions *before* they are final.

Issuance of a writ, whether of mandamus or prohibition, is only "appropriate," however, where: (1) the petitioner has no other adequate means to obtain relief; (2) the right to the writ is "clear and indisputable"; and (3) "the court . . . is satisfied that the writ is appropriate under the circumstances."[421] The last prong—whether the court deems issuance "appropriate"—calls for "a relatively broad and amorphous totality of the circumstances consideration."[422] Judge Henderson agreed with the majority that issuance of the writ in the instant case was inappropriate given that: (1) the petitioners would soon have a final rule to challenge, and (2) the inconvenience and cost of preparing for the final rule could not justify a writ.

Given these points of agreement, Judge Henderson's objection to the majority opinion seems to have been to its suggestion that the All Writs Act cannot trump "bedrock" finality requirements.[423] By stressing that courts have jurisdiction over non-final actions under the All Writs Act and that issuance of a writ should depend on a "relatively unbounded" totality-of-the-circumstances test, she would leave greater space, perhaps, for courts to issue writs related to proposed rules or other non-final agency actions.[424]

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420. *Id.* (Henderson, J., concurring) (quoting *In re* Tennant, 359 F.3d 523, 531 (D.C. Cir. 2004)).
421. *Id.* at 339 (Henderson, J., concurring) (quoting *In re* Kellogg Brown & Root, Inc., 758 F.3d 754, 760 (D.C. Cir. 2014)).
422. *Id.* (Henderson, J., concurring) (quoting *Kellogg Brown & Root*, 758 F.3d at 762).
423. *See id.* at 335 (observing that "the All Writs Act does not authorize a court to circumvent bedrock finality principles in order to review proposed agency rules").
424. *See id.*

CHAPTER 4

# Rulemaking*

## INTRODUCTION

Rulemaking achieved heightened prominence in 2015, symbolized by two hotly contested rules issued by the Obama Administration and by strong judicial and congressional reactions to those and other rulemaking initiatives.

On August 3, 2015, U.S. Environmental Protection Agency (EPA) Administrator Gina McCarthy signed the Clean Power Plan final rule with the goal of reducing greenhouse gas emissions from existing fossil fuel-fired power plants—quite literally part of an effort to save the world, from the Obama Administration's perspective. At 1,560 pages, the rule was so long that it had not yet appeared in the Federal Register as of September 25, 2015. But even before the rule was issued, it was attacked in this pre-presidential year by candidate Jeb Bush, who said it would "run[] over state governments, . . . throw countless people out of work, and increase[] everyone's energy prices,"[1] and by candidate Marco Rubio who called it "catastrophic."[2] Indeed, the coal industry and various states were so upset by the very prospect of this rule that they challenged the proposal before the final rule even appeared—a

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1. Press Release, Jeb Bush, Statement on Obama's Clean Power Plan (Aug. 2, 2015), https://jeb2016.com/jeb-bush-statement-on-obamas-clean-power-plan/?lang=en (last visited Feb. 2, 2016).
2. Dan Roberts, *White House insists tough new carbon restrictions are legal under Clean Air Act*, THE GUARDIAN: U.S. ED., (Aug. 3, 2015, 4:29 PM EST), http://www.theguardian.com/environment/2015/aug/02/obama-white-house-emissions-cuts-clean-air-act (last visited Feb. 2, 2016).

bizarre move firmly rejected by the D.C. Circuit.[3] This followed the Senate's passage in March of legislation that would prevent the administration from withholding funds from states that would not comply with the new Clean Power Plan rule, which had not yet even been issued.[4]

Earlier in the year, the EPA and the U.S. Army Corps of Engineers issued the final Clean Water Rule, designed to protect streams and wetlands from degradation and pollution by guiding the identification of "waters of the United States" subject to regulation under the Clean Water Act (CWA).[5] In response, a coalition of eighteen states sought declaratory and injunctive relief in three separate federal district courts against what they called an "impermissible expansion of federal power over the states."[6]

Meanwhile, a badly split U.S. Supreme Court remanded an EPA Clean Air Act (CAA) rule for failure to consider costs,[7] but in a similarly split decision, the Court upheld an Internal Revenue Service (IRS) rule implementing the Affordable Care Act.[8] These and other decisions prompted strong judicial rhetoric, as when Justice Scalia complained that "normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved."[9] In another decision, Justice Alito complained "about the aggrandizement of the power of administrative agencies,"[10] while Justice Scalia argued that doctrines of deference had created "a balance between power and procedure quite different from the one Congress chose when it enacted the [Administrative Procedure Act (APA)]."[11]

These developments may well portend greater difficulties ahead for rulemaking. Indeed, Judge Janice Rogers Brown of the D.C. Circuit argued

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3. *See In re* Murray Energy Corp., 788 F.3d 330 (D.C. Cir. 2015).
4. *See* S. Amdt. 836 to S. Con. Res. 11, 114th Cong. (2015).
5. *See* 80 Fed. Reg. 37,054 (June 29, 2015).
6. *See The Regulatory Week in Review: July 3, 2015*, Penn Program on Reg.: RegBlog (July 3, 2015), http://www.regblog.org/2015/07/03/the-regulatory-week-in-review-july-3-2015/ (last visited Feb. 6, 2016).
7. Michigan v. EPA, 135 S. Ct. 2699 (2015) (Scalia, J., delivered the opinion of the Court; Thomas, J., concurring; Kagan, J., dissenting).
8. King v. Burwell, 135 S. Ct. 2480 (2015) (Roberts, J., delivered the opinion of the Court; Scalia, J., dissenting). This case is discussed at length in *Judicial Review*, *supra*, in Part I.A.
9. *Id.* at 2497 (Scalia, J., dissenting).
10. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring). This case is discussed at length in *Judicial Review*, *supra*, in Part I.B.
11. *Id.* at 1211 (Scalia, J., concurring).

that "our obsession with standing 'present[s] courts with an opportunity to avoid the vindication of unpopular rights, or even worse to disguise decision on the merits in the opaque standing terminology of injury, causation, remedial benefit, and separation of powers.'"[12] She would weaken the standing doctrine to allow more attacks, such as Arizona Sheriff Joseph Arpaio's attempt to challenge the Obama Administration's deferred action policies. Any such weakening would change the rulemaking landscape, making it easier for a wide variety of challengers to attack agency rules.

Not to be outdone, politicians also got into the act, as with Senator Orrin Hatch's (R-UT) reintroduction of the Searching for and Cutting Regulations That are Unnecessarily Burdensome Act of 2015 (the SCRUB Act), which would establish a bipartisan committee to identify existing rules that should be repealed. And the House Committee on Science, Space, and Technology held a hearing entitled "EPA Regulatory Overreach: Impacts on American Competitiveness."

As judicial attitudes evolve and elections potentially change the landscape, we may be nearing the end of an era in which rulemaking both expanded and almost always survived judicial review in both Democratic and Republican administrations.

## PART I. JUDICIAL DEVELOPMENTS

### A. Determining Whether an Agency has the Authority to Issue a Rule

In 1973, the D.C. Circuit in *National Petroleum Refiners Ass'n v. Federal Trade Commission (FTC)*[13] upheld an FTC rule requiring the posting of octane ratings on service station gas pumps. The court found statutory authority for this substantive rule in language from the Federal Trade Commission Act, which provided that the "Commission shall also have the power . . . (g) . . . to make rules and regulations for the purpose of carrying out the provisions" of the Act.[14] In so doing, the court noted that the "need to inter-

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12. Arpaio v. Obama, 797 F.3d 11, 32 (D.C. Cir. 2015) (Brown, J., concurring) (quoting 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.3 (3d ed. 1998)). This case is discussed at length in *Judicial Review*, *supra*, in Part II.A.
13. 482 F.2d 672 (D.C. Cir. 1973).
14. *Id.* at 676 n.8.

pret liberally broad grants of rule-making authority . . . has been emphasized time and again by the Supreme Court."[15]

The Fifth Circuit's recent decision in *Contender Farms, LLP v. USDA*,[16] apparently part of a trend,[17] declined to recognize similarly broad language as granting substantive authority, at least where another statutory provision in the act granted rulemaking authority specific to the issues at hand. Responding to an industry practice of soring horses (i.e., cutting them in a manner that produces the desired gait), the Horse Protection Act (HPA)[18] established a regulatory scheme intended to prevent the practice. The HPA requires the U.S. Department of Agriculture (USDA) to "prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this chapter."[19] Any sored horse would be disqualified from the particular competition.

Event managers have the choice of accepting strict liability for failing to disqualify a sored horse or of hiring USDA-approved inspectors and then facing liability only if they allowed an identified horse to compete.[20] The agency implemented this program through a regulation under which only "designated qualified persons" (DQPs) are licensed to inspect horses at these events. DQPs may obtain licenses only through programs certified by the agency but operated by horse industry organizations (HIOs). HIOs must meet certain regulatory requirements in order to operate DQP licensing programs.[21]

This regulatory structure resulted in the creation of several HIOs, which vary as to both the penalties they impose for soring and the appeal procedures used when inspectors identify sored horses. Competitors choose the events in which to compete, and those choices could be based upon particular HIO penalties and appeal procedures. Years of seeking voluntary cooperation to reduce these disparities produced only an Office of Inspector General report concluding that the scheme resulted in inconsistent enforcement of the HPA and did not adequately address the problem of soring.

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15. *Id.* at 680.
16. 779 F.3d 258 (5th Cir. 2015).
17. *See* Chamber of Commerce of the U.S. v. NLRB, 721 F.3d 152 (4th Cir. 2013) *and* Am. Bar Ass'n v. FTC, 430 F.3d 457 (D.C. Cir. 2005).
18. Horse Protection Act of 1970, Pub. L. No. 91-540, 84 Stat. 1404 (1970) (codified as amended at 15 U.S.C. §§ 1821-1831 (2012)).
19. *See Contender Farms*, 779 F.3d at 271 (quoting 15 U.S.C. § 1823(c) (2012)).
20. *See id.* at 262–63.
21. *See id.* at 263.

The USDA then issued a regulation requiring HIOs to adopt mandatory minimum penalties for various violations and to have appeals processes approved by the USDA.[22] In response to an industry challenge to the scheme, the Fifth Circuit rejected the agency's reliance upon the specific statutory provision quoted above because the authorized "requirements" were to govern only the licensing and use of the persons who would inspect the horses—the DQPs—and not the HIOs that would implement the inspection and penalty scheme.

The USDA sought to recover by citing its general rulemaking authority under the HPA, which provides that "[t]he Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter."[23] Emphasizing that this language related only to carrying out "the provisions of this chapter," the court found no enforcement-related authority elsewhere in the statute.[24] However sensible the agency's attempt to achieve uniformity, the Fifth Circuit characterized the regulation as an invalid attempt "to make amendments to statutory provisions."[25]

The narrow lesson of this decision is that the courts may look askance at agency efforts to use general rulemaking authority to supplement (and rationalize) regulatory schemes authorized under more specific statutory provisions. More generally, it may reflect growing judicial skepticism about the "need to interpret liberally broad grants of rule-making authority" emphasized by the Supreme Court more than four decades ago.[26]

## B. Exceptions to the "Notice-and-Comment" Requirement

### *1. The Demise of the* Paralyzed Veterans-Alaska Professional Hunters *Doctrine*

Thirty-seven years after slapping down the D.C. Circuit's creative intrusions into agency rulemaking processes, the Supreme Court reminded the D.C. Circuit that *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Corp.*[27] is still good law. Beginning with *Paralyzed Veterans of America*

22. *See id.*
23. *See id.* at 273 (quoting 15 U.S.C. § 1828 (2012)).
24. *See id.* at 273–74.
25. *See id.* at 273.
26. *See Nat'l Petroleum*, 482 F.2d at 680 (discussing, for example, Mourning v. Family Publ'ns Serv., Inc., 411 U.S. 356 (1973)).
27. 435 U.S. 519 (1978).

*v. D.C. Arena L.P.*,[28] and with renewed emphasis in *Alaska Professional Hunters Ass'n, Inc. v FAA*,[29] the D.C. Circuit had begun requiring agencies to go through notice and comment before issuing interpretive statements that differed substantially from previous interpretive statements. Section 553(b)(A) of the APA explicitly provides an exception to notice and comment for "interpretative rules," but the D.C. Circuit considered reliance interests and even vaguer concerns sufficient to require notice and comment on certain revised agency interpretations.

In *Mortgage Bankers*, the Supreme Court put a stop to this blatant violation of *Vermont Yankee*. In the process, the majority emphasized the availability of arbitrary-and-capricious review as the appropriate means of addressing the concerns that arise when an agency changes its interpretation of a statute or regulation. The concurring justices, however, took the opportunity once again to invite challenges to the principle of deference to an agency's interpretation of its own regulation, as embodied in *Bowles v. Seminole Rock & Sand Co.*[30]

*Mortgage Bankers* involved statements issued by the Wage and Hour Division (Division) of the U.S. Department of Labor (DOL) concerning whether mortgage-loan officers qualify for an administrative exemption to the overtime pay requirements of the Fair Labor Standards Act. In 1999 and 2001, the Division issued two letters concluding that mortgage-loan officers did not qualify for the exemption. In 2004, DOL issued new regulations governing the exemption. The Mortgage Bankers Association sought a new interpretation of the application of the regulations to mortgage-loan officers, and the Division issued an opinion letter in 2006 concluding that mortgage-loan officer positions qualified for the exemption. In 2010, DOL withdrew the 2006 letter and issued a new interpretation concluding that mortgage-loan officer positions do not qualify for the exemption (and therefore the officers must be paid overtime).

The D.C. Circuit struggled through its own precedents, ultimately rejecting any need for a plaintiff to show reliance in order to require notice and comment on a revised administrative interpretation. Its theory was that "a definitive interpretation is so closely intertwined with the regulation that a significant change to the former constitutes a repeal or amendment of the latter."[31] This opened the door to arguments about when an interpretation was

28. 117 F.3d 579 (D.C. Cir. 1997).
29. 177 F.3d 1030 (D.C. Cir. 1999).
30. 325 U.S. 410 (1945).
31. Mortg. Bankers Ass'n v. Harris, 720 F.3d 966, 969 n.3 (D.C. Cir. 2013), *rev'd*, Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015).

so definitive as to be "so closely intertwined with" a regulation such that a change to the interpretation effectively amended the underlying regulation.[32]

This invited just the sort of boundless arguments and judicial creativity the Court had struck down in *Vermont Yankee*. Quoting *Vermont Yankee*, the Court's majority noted that the APA had "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures."[33] Justice Sotomayor wrote that a requirement for notice and comment before an agency revises an earlier interpretation may or may not be wise policy, but this decision was for Congress or the agency, not the courts. She noted that the Court "trust[s] that Congress weighed the costs and benefits of placing more rigorous procedural restrictions on the issuance of interpretive rules."[34]

Justices Alito, Scalia, and Thomas all concurred in the judgment, but they also argued to varying extents that this outcome highlighted their previously-expressed concerns about the principle of deference to agency interpretations of their own regulations. As Justice Scalia put it, for example, "Considered alongside our law of deference to administrative determinations, . . . today's decision produces a balance between power and procedure quite different from the one Congress chose when it enacted the APA."[35]

### *2. Useful Guidance in Identifying Interpretive Statements*

Although the line between an exempt informal statement and a legislative rule requiring notice and comment is often said to be "enshrouded in considerable smog,"[36] the District Court for the District of Columbia recently articulated principles that help clear the air with respect to whether an informal agency statement qualifies as an "interpretative rule." The fundamental principle is straightforward: an interpretive statement derives "a proposition from an existing document whose meaning compels or logically justifies the proposition."[37]

In *Community Health Systems, Inc. v. Burwell*, a group of hospitals challenged the denial of reimbursement for "bad debt" incurred by the hospitals

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32. *Id.*
33. *Mortg. Bankers*, 135 S. Ct. at 1207.
34. *Id.*
35. *Id.* at 1211.
36. This phrase originated in *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975), and has been quoted often since.
37. Cmty. Health Sys., Inc. v. Burwell, 113 F. Supp. 3d 197, 230 (D.D.C. 2015).

in treating patients covered by Medicare. The Medicare legislation prohibits forcing non-Medicare patients to bear any of the costs of treating Medicare patients. In order to achieve that goal, the statutory and regulatory regime provides that hospitals may be reimbursed for the "bad debts" left by Medicare patients who do not pay deductibles or co-insurance payments for which they are responsible. Hospitals do not obtain reimbursements directly from the U.S. Department of Health and Human Services (HHS), but through contractors known as Medicare Intermediaries.

The applicable regulation requires that a hospital demonstrate "reasonable collection efforts," that a debt was "worthless," and that there was "no likelihood of recovery at any time in the future."[38] In managing this complex program, HHS issued the Provider Reimbursement Manual (Manual) to guide Medicare Intermediaries in determining whether "bad debt" claims qualified for reimbursement. This dispute centered on the use of collection agencies where the Manual provided that if "the [bad] debt is written-off on the provider's books 120 days after the date of the bill and then turned over to a collection agency, the amount cannot be claimed as a bad debt on the date of the write-off. It can be claimed as a bad debt only after the collection agency completes its customary collection efforts."[39]

The hospitals claimed that this informal statement was a legislative rule requiring notice and comment. The court disagreed, noting that the underlying regulatory criteria had themselves been subject to notice and comment, and that the resulting legislative rule had created the "legally binding obligations or prohibitions on regulated parties."[40] The Manual statement about collection agencies served only to supply "crisper and more detailed lines" than the regulation itself, but the Manual did not "impose any obligation or prohibition on regulated entities" or "create a new basis for enforcement or liability."[41] All legal obligations contained in the Manual depended upon the underlying regulation. As long as the Manual statement derives from the regulation, and the regulation "compels or logically justifies" that statement, the Manual is an interpretive rule exempt from notice and comment.

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38. *Id.* at 204.
39. *Id.* at 221.
40. *Id.* at 230.
41. *Id.* at 231.

### *3. DAPA Directive Held to Require Notice and Comment*[42]

In addition to exempting interpretive statements from the requirement for notice and comment,[43] section 553(b)(A) of the APA also exempts so-called "general statements of policy." As described by the *Attorney General's Manual on the Administrative Procedure Act* (1947), these are "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." In order to implement any such policy, an agency must also advise its own personnel of the policy. Thus, a directive advising agency staff of an administration's enforcement policies and priorities is a general statement of policy. An agency's attempt to rely upon this exception to notice and comment may fail, however, where a court is convinced that the agency has, in effect, issued a legislative rule in disguise. This will occur where a court is convinced that "the agency's document is for all practical purposes binding."[44]

In one of the more politically sensitive decisions of the year, the Obama Administration's attempt to implement its immigration policies stumbled over this obstacle in *Texas v. United States*[45] in the Fifth Circuit. Texas and many other states challenged a 2014 memorandum in which the Secretary of the U.S. Department of Homeland Security (DHS) had directed agency personnel to establish a process known as Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). Similar to the previously issued Deferred Action for Childhood Arrivals (DACA), DAPA set out several criteria for determining, on a case-by-case basis, whether to defer possible deportation or removal action with respect to a particular category of undocumented aliens.[46] According to this memorandum, deferred action did not "confer any

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42. The following discussion is drawn in large part from material in the *News from the Circuits* column in 41 ADMIN. & REG. L. NEWS, No. 1, at 23–24 (Fall 2015).
43. *See supra* Part B.1. (discussing the Supreme Court's *Mortgage Bankers* decision, in which the Court held that requiring agencies to use notice and comment procedures to revise interpretive rules is contrary to the APA's text).
44. Appalachian Power Co. v. EPA, 208 F.3d 1015, 1021 (D.C. Cir. 2000) (internal quotation marks omitted).
45. 787 F.3d 733 (5th Cir. 2015).
46. *See id*. at 744 (citing Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship and Immigration Servs., et al. (Nov. 20, 2014), *available at* https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

form of legal status in this country," but it did mean that, "for a specified period of time, an individual is permitted to be 'lawfully present' in the United States."[47]

Texas challenged the guidance on the ground that it was not a mere statement of policy, but, in reality, a rule that could be issued only after notice and comment. The majority and dissent agreed that the guidance constituted a "rule" under section 551(4) of the APA, but they disagreed as to whether it qualified for an exception to the requirements for notice and comment. The majority accepted the district court's view that the guidance did not qualify as a general statement of policy because "[n]othing about DAPA 'genuinely leaves the agency and its [employees] free to exercise discretion.'"[48] The district court had based this conclusion largely on the low percentage of deferral applications that had been denied under the administration's previous DACA program, noting that government counsel had not provided the number of applications denied for discretionary reasons. The district court concluded that the "case-by-case" admonition of the guidance was "merely pretext."[49] The district court also relied upon the proposition that the DAPA processes effectively prevented "officers from conducting case-by-case investigations."[50] The majority also rejected the argument that the guidance could qualify for an exception as an agency rule of practice or procedure.

In dissent, Judge Stephen Higginson found that DAPA emphasized the exercise of discretion in various ways, thereby qualifying as a statement of policy. He emphasized that the district court's decision was based largely on conjecture, the record essentially undeveloped. In particular, the low percentage of application denials was based upon experience under DACA, and the district court "did not explore . . . the government's contention that a significant difference existed between the two programs."[51] Also the district court had placed the burden on the government to show evidence of denials, while the plaintiff had to carry the burden for a stay or preliminary injunction.[52]

This decision threatens the effective administration of agency policies. Perhaps most troubling is the fact that both the district court and the court of appeals were prepared to enjoin nationwide guidance to agency personnel on the basis of an allegedly flawed comparison with an earlier program and

47. *Id.*
48. *Id.* at 773.
49. *Id.* at 763.
50. *Id.* at 765.
51. *Id.* at 781.
52. *See id.*

without detailed factual exploration of the extent to which the directive was somehow inappropriately binding in individual cases. If anything, the politically charged nature of this dispute argued for greater care and more complete development of the facts in order to maintain not only the proper constitutional balance between the judicial and executive branches, but also the legitimacy of judicial decisions in the Fifth Circuit. Moreover, the argument that internal agency guidance documents may not effectively bind lower level agency personnel misconceives the very nature of the administrative exercise. As Judge Higginson wrote in dissent, "[I]t is to be expected and encouraged that subordinate executive officers will follow enforcement guidelines. . . . This positive should not become a negative to invalidate the very delineation of executive authority the APA exists to assure."[53] At a minimum, these principles require extraordinary judicial caution and very careful examination of the facts before concluding that agency guidance to its personnel so constrains discretion as to become binding in each individual case, precluding any exercise of discretion by the agency's enforcement personnel.

### *4. Judicial Remand Constitutes "Good Cause" to Revise Without Notice and Comment*

When a court remands an agency rule, the agency frequently responds by instituting further notice-and-comment proceedings to reconsider the issue remanded by the court. In *EME Homer City Generation, L.P. v. EPA*,[54] however, the EPA responded to one particular aspect of a remand by relying upon the "good cause" exception to justify forgoing notice and comment.[55] The decision addresses the question of how far an agency may go in citing a judicial remand as a justification for pursuing regulatory revisions without notice and comment.

In *EME Homer City Generation*, previous judicial decisions had invalidated the EPA's Clean Air Interstate Rule (CAIR), which the EPA had implemented in part through approval of several State Implementation Plans (SIPs) prepared by states subject to the rule. As a result of those prior judicial decisions, the EPA revised the SIP approvals by rescinding "any statements that

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53. *Id.* at 783.
54. 795 F.3d 118 (D.C. Cir. 2015).
55. The particular exception appeared in the CAA, which governs this rulemaking proceeding, 42 U.S.C. § 7601(d)(1) (2012), and authorizes reliance upon "good cause" when justified under section 553(b)(B) of the APA. *See* 5 U.S.C. § 553(b)(B) (2012).

the [CAIR] SIP submissions either satisfy or relieve the state of the obligation to submit a SIP to satisfy the requirements of" the CAA's good neighbor provision.[56] The EPA relied upon the "good cause" exception to revise its rules without notice and comment.

Noting that the exception applies where undertaking notice and comment would be "impracticable, unnecessary, or contrary to the public interest," the D.C. Circuit accepted EPA's assertion that "commentators could not have said anything during a notice and comment period that would have changed" the fact that judicial decisions had already invalidated the SIPs at issue.[57] Thus, it would have been "utterly 'unnecessary' and wasteful to go through notice and comment."[58]

It is important to recognize that this is a very narrow application of the good cause exception. Here, the courts had already effectively invalidated the SIPs, and the EPA simply acknowledged the effect of that invalidation. This situation contrasts sharply with the aftermath of many other remands, in which an agency may seek to improve upon its reasoning and thereby provide a new and more successful explanation for a remanded rule.

## C. What Counts as Part of the Administrative Record?

Although it may seem obvious, it is useful to have authority for the proposition that an agency's response to a remand of a rule is itself part of the administrative record of the rule for the purpose of further judicial review. This issue arose in *Delta Airlines, Inc. v. Export-Import Bank of the United States*,[59] in which two airlines and the Air Line Pilots Association International challenged the Export-Import Bank's (Bank) approval of financing for aircraft purchases by competing foreign airlines.

The Bank initially approved the transactions in 2007. In response to a challenge, the D.C. Circuit held that the Bank had not adequately explained its justification for its position on a particular issue. The D.C. Circuit directed the district court to remand to the Bank, with three options as to a possible response.[60] The Bank responded with Response One, an "attempt to provide a reasonable explanation" for how its 2007 actions complied with the applicable statute.[61]

56. 795 F.3d at 133.
57. *Id.* at 134–35.
58. *Id.*
59. 85 F. Supp. 3d 387 (D.D.C. 2015).
60. *See id.* at 396.
61. *Id.*

The plaintiffs then objected to the district court's considering of Response One, which it characterized as a *post hoc* rationalization, as part of the administrative record during the continuing litigation. Confirming the principle that a court "must judge the propriety of [the agency's] action solely by the grounds invoked by the agency,"[62] the court nonetheless concluded that the longstanding practice of remanding to the agency for further explanation justified considering the agency's explanation on remand as part of the administrative record. As the court explained, "The prohibition against *post-hoc* rationalizations . . . 'is not a time barrier which freezes an agency's exercise of its judgment after an initial decision has been made and bars it from further articulation of its reasoning.'"[63] At least where a later agency explanation comes in response to a judicial remand, that explanation is part of the administrative record.

## D. How Thoroughly Must an Agency Respond to Comments?

Although the APA does not specifically require an agency to respond to comments received during the rulemaking process, the D C. Circuit long ago explained that an agency must respond to comments "significant enough to step over a threshold requirement of materiality."[64] The devil is in the details, of course, including complications that arise when more than one agency has the regulatory jurisdiction over the same industry.

In *Delaware Department of Natural Resources and Environmental Control v. EPA*,[65] the D.C. Circuit rejected the EPA's narrow response to comments relating to electricity capacity and supply (regulated by the Federal Energy Regulatory Commission) as well as to environmental concerns. The decision involved regulations allowing the operation of "backup generators" without emission controls under certain circumstances. These generators were historically used "to produce power for critical networks or equipment . . . when electric power from the local utility is interrupted."[66] That sort of use was not at issue in this dispute, but the EPA had also allowed these generators to operate without emission controls for "an additional 50 hours per year in

62. *Id.* at 402 (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).
63. *Id.* (quoting Alpharma, Inc. v. Leavitt, 460 F.3d 1, 6 (D.C. Cir. 2006)).
64. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393–94 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).
65. 785 F.3d 1 (D.C. Cir. 2015).
66. *Id.* at 6 (quoting the regulations).

non-emergency situations."[67] The EPA became concerned that this provision might cause facilities to use backup generators inappropriately to respond to peak power demand. In response, the EPA prohibited reliance upon backup generators in non-emergency situations to generate income by supplying power to the electric grid.

With that background, the EPA in 2010 promulgated hazardous air pollutant emission standards for backup generators, this time allowing their use without emissions controls for only fifteen hours each year as part of "demand response programs" during "emergency conditions that could lead to a potential electrical blackout."[68] This rule prompted petitions for reconsideration of the fifteen-hour limitation, to which the EPA responded by instituting a new notice-and-comment rulemaking proceeding. The EPA's new final rule then "radically revised the fifteen-hour limit" on non-emergency uses to "up to 100 hours each year," noting that such uses can help prevent grid failure or blackouts."[69]

On review, challengers argued that the EPA had failed to respond to comments to the effect that reliance upon backup generators can displace traditional power plants, ultimately causing under-investment in power plants, reducing supply, and undermining the reliability of the power grid. These commenters had also asserted that the use of uncontrolled backup generators also causes greater pollution than reliance upon traditional power plants, which are subject to air pollution controls.

The EPA responded that "there was no guarantee" that its regulation would "encourage the use of backup generators in lieu of cleaner alternatives of energy," but it did not address "the perverse effect the 100-hour exemption would have on the reliability and efficiency" of the energy markets.[70] According to the EPA, these concerns were "far afield from EPA's responsibilities for setting standards under the CAA."[71]

This was not enough for the D.C. Circuit. Noting that "an agency must respond sufficiently to enable us to see what major issues of policy were ventilated . . . and why the agency reacted to them as it did," the court said that the EPA had "refused to engage with the commenters'" market-related comments.[72] Indeed, the court characterized the final rule as having "placed

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67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 15.
71. *Id.*
72. *Id.* (internal quotation marks omitted).

reliability at the center of its reasoning," but the EPA's response to those comments forsook "justifying its regulation primarily on the reliability needs" of the electricity market.[73] The EPA could not "excuse its inadequate responses by passing the entire issue off onto a different agency."[74]

No doubt the EPA caused itself serious problems by justifying the 100-hour limit in part based upon its potential to "help prevent grid failure or blackouts," and then by disclaiming any role in the regulation of electricity markets. But even without that assertion, the EPA could not avoid the significance of the market-related comments in issuing its final rule.

## E. The "Logical Outgrowth" Requirement

In order to protect the integrity of the notice-and-comment rulemaking process, courts require that a final rule be the "logical outgrowth" of the proposed rule. An agency may change a final rule in response to comment, but only if "interested parties reasonably could have anticipated the final rulemaking from the draft."[75] If "a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule," the final rule fails this test.[76]

In *Center for Biological Diversity, Defenders of Wildlife v. Kelly*,[77] the Idaho federal district court ruled that the U.S. Fish and Wildlife Service (FWS) had violated the "logical outgrowth" doctrine when it reduced a proposed 375,562 acres of Endangered Species Act critical habitat for a certain population of woodland caribou to only 30,010 acres in the final rule. The agency explained that it had revised its determination of the geographic area occupied as habitat by the species and had decided not to designate any unoccupied areas. The agency also relied upon certain Canadian lands in which the particular caribou population was protected, but it had not mentioned these Canadian lands in the proposed rule.

Although Ninth Circuit authority permits an agency to add information to the rulemaking record in response to comments, the agency may do so only if "no prejudice is shown."[78] Under previous decisions, the agency had

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73. *Id.*
74. *Id*. at 16.
75. NRDC v. EPA, 279 F.3d 1180, 1186 (9th Cir. 2002).
76. *Id*.
77. 93 F. Supp. 3d 1193 (D. Idaho 2015).
78. *Id.* at 1205 (citing Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1402 (9th Cir. 1995)).

failed to produce a valid rule where it had relied upon a newly available study that "provided the only scientific information" on a significant relevant issue.[79] But it had succeeded in another circumstance in which newly added information did not "provide the sole, essential support for the listing decision," and instead confirmed and expanded upon "existing data, providing additional grounds" for the final rule.[80]

Here, the proposed rule had generated several comments and peer reviews critical of the agency's approach. Taking these into account, the agency had appropriately reassessed the proposal. However, the agency "made a fundamental and dramatic change in reasoning based on materials not previously discussed or cited in the Proposed Rule."[81] The new materials indicated that the occupied habitat was substantially less than indicated in the proposed rule, and that the caribou occupy protected lands in Canada. The court invalidated the rule because it determined that "the Final Rule's habitat designation could not have been anticipated as it does not logically flow from the Draft Rule's reasoning."[82] Interestingly, the court emphasized that it had not found the FWS's reasoning "unsound or arbitrary and capricious."[83] Although the court seems to have been convinced by the agency's discussion of the newly available evidence, it nonetheless invalidated the rule for the procedural error under the logical outgrowth doctrine.

We may draw two lessons from this decision. First, if there is a ten-fold difference between a proposed rule and a final rule, the agency is well-advised to be very cautious in issuing the final rule without further notice and comment. Second, although agencies certainly should respond and revise their thinking in response to significant comments, they must seek additional comment if they change their reasoning as a result of information or arguments available to them for the first time only in response to the original request for comments. If those comments gave the agency its first opportunity to see the matter in a new light and address the issues in a new way, presumably the same would be true for interested members of the public. Although the APA does not provide for responsive comment, this situation requires a further round of comment to address the newly-changed analysis.

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79. *Id.*
80. *Id.* (citing Kern Cnty. Farm Bureau v. Allen, 450 F.3d 1072, 1079 (9th Cir. 2006)).
81. *Id.*
82. *Id.*
83. *Id.* at 1207.

## F. Statutory Rule Deadline is not Changed by Remand of Rule

*Oxfam America, Inc. v. SEC*[84] addressed the question of whether an agency is still bound by a statutory rulemaking deadline if the agency's first attempt to issue a rule is remanded by a court. The answer is yes, although the implementation of the requirement is complicated by the fact that the agency is long past the original deadline once the remand occurs.

*Oxfam America* involved a Dodd-Frank Act requirement that the U.S. Securities and Exchange Commission (SEC) issue a rule requiring affected companies to "disclose payments made to foreign governments or the federal government for the commercial development of oil, natural gas or minerals."[85] The statute required the SEC to issue final rules no later than 270 days after its enactment. This deadline turned out to be April 17, 2011.

After the SEC pushed its projected original promulgation date back to August 2012, Oxfam filed suit to challenge the delay. The SEC then published the final rule in September 2012, and Oxfam dismissed that action.

On July 2, 2013, a district court vacated the rule and remanded to the SEC for further proceedings. The SEC responded by projecting issuance of a proposed rule in March 2015, and then October 2015.

Oxfam sued again. To address the agency's obligations under the statutory deadline, the district court first had to determine whether the agency's delay in issuing the rule constituted an agency action "unlawfully withheld" under section 706(1) of the APA. The answer to that question both depended upon and determined the outcome of the substantive issue of the agency's statutory obligation.

The court determined that the prior judicial "decision to vacate the final disclosure rule simply returned matters to where they stood before and that, in general, remand orders only serve to 'restore the status quo ante. . . .'"[86] Thus, the agency's delay was reviewable, and it also violated the statutory deadline. As the court explained, this outcome was necessary because "otherwise, an agency could take inadequate action to promulgate a rule and forever relieve itself of the obligations mandated by Congress."[87] Accordingly, the statutory deadline remains in effect after a remand despite the fact that the actual date has long passed. The court must then exercise its own creativity in the notoriously difficult effort to nudge the agency toward issuance of the rule.

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84. No. 14-13648-DJC, 2015 WL 5156554 (D. Mass. Sept. 2, 2015).
85. *Id.* at *1.
86. *Id.* at *3.
87. *Id.*

## G. Bright Line Rule Implementation Valid Even if Substantive Policy Best Served by Waiver in a Particular Case

*Mary V. Harris Foundation v. FCC*[88] involved a rule governing applications for licenses to operate noncommercial educational radio stations. In implementing the statutory mandate to achieve "fair distribution" of such radio services, the Federal Communications Commission (FCC) had long held "comparative hearings" in which it heard from competing license applicants. The FCC then adopted the so-called "Fair Distribution Rule."

This rule provided that "[a]n applicant will receive the license if at least 10% of all people it proposes to reach will receive their first or second reserved channel [noncommercial educational (NCE)] service, as long as the absolute number of people newly to receive first or second service is at least 2,000."[89] If no competing applicant met the 10% criterion, the rule provided that the FCC would compare the applicants under four criteria, none of which went directly to the question of underserved populations.[90]

In this case, two applicants, Holy Family and Mary V. Harris Foundation (MVH), applied for a license to serve the greater Buffalo, New York, area. Holy Family would reach 88,434 people, 5.53% of whom (or 4,886) then received only one NCE service. By contrast, MVH would reach 300,673 people, 9.46% of whom (or 28,453) then received only one NCE service. Since neither applicant reached the 10% threshold, the FCC applied the applicable criteria and ruled for Holy Family.[91]

After failing in a challenge to the 10% threshold, MVH argued that the FCC had abused its discretion in refusing to waive the 10% requirement where the MVH application would serve substantially more underserved people than the Holy Family application. The court disagreed, concluding that "[a]n agency does not abuse its discretion by applying a bright-line rule consistently in order both to preserve incentives for compliance and to realize the benefits of easy administration that the rule was designed to achieve."[92] The agency had explained its imposition of the bright-line rule as "necessary in order to encourage applicants to expand service to communities noncontigu-

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88. 776 F.3d 21 (D.C. Cir. 2015).
89. *Id.* at 23.
90. *See id.* (describing the criteria for comparing NCE applicants when the rule is not dispositive).
91. *See id.*
92. *Id.* at 28.

ous to well-populated areas."[93] In other words, holding to the 10% threshold would encourage expansion of service to the currently underserved, thereby achieving the statutory purpose.

Thus, even where a particular application of a rule may seem contrary to the underlying statutory purpose, an agency may, with appropriate reasoning, adopt and then rely upon a bright-line rule to decide the wide range of cases.

## H. Retroactivity—Rule Not Retroactive if It Embodies Existing Principles

Despite the relative clarity of the law, challengers continue to attack new regulations as retroactive where the new regulations merely codify existing practices. Three recent decisions usefully illustrate the principles governing the question of whether a rule is impermissibly retroactive.

In *Brandywine Explosives & Supply v. Director, Office of Workers' Compensation Programs*,[94] a company operating surface mines challenged the award of benefits to one of its workers under the Black Lung Benefits Act[95]. The award hinged on the question of whether conditions at the surface mine were "substantially similar" to those of an underground mine. Under the statute, a surface mine employee is entitled to a presumption of total disability due to pneumoconiosis if the employee had spent fifteen years in an underground coal mine or in a surface mine where conditions "were substantially similar to conditions in an underground mine."[96]

The regulations in effect when this claim began simply reiterated the statutory requirement. While a case was pending, however, the agency issued a new regulation stating that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal mine dust while working there."[97] Thus, the new regulation appeared to reduce the burden on the claimant to demonstrate the substantial similarity between the conditions in a surface mine and those in an underground mine. This gave rise to the question of whether the new regulation was impermissibly retroactive.

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93. *Id.*
94. 790 F.3d 657 (6th Cir. 2015).
95. Pub. L. No. 91-173, 83 Stat. 792 (1969) (codified as amended at 30 U.S.C. § 901 *et seq.* (2012)).
96. 790 F.3d at 662. *See* 30 U.S.C. § 921(c)(4) (2012).
97. 790 F.3d at 662.

The Sixth Circuit upheld the regulation because it was "substantially consistent with prior regulations or prior agency practices."[98] In fact, the new regulation formally adopted a long-standing position taken by the Seventh Circuit under which the claimant needed only to "produce sufficient evidence of the surface mining conditions under which he worked" and did not need to address the question of substantial similarity with an underground mine.[99]

Similarly, in *Moffitt v. McDonald*,[100] the Federal Circuit upheld the retroactive application of a newly-issued rule where the new rule had "merely codified" the agency's long-standing position on the issue. In reaching this conclusion, the court applied three factors it had previously developed in *Princess Cruises, Inc. v. United States*[101]: (1) "the nature and extent of the change of the law"; (2) "the degree of connection between the operation of the new rule and a relevant past event"; and (3) "familiar considerations of fair notice, reasonable reliance, and settled expectations."[102] In *Moffitt* and related cases, the second factor appears to come down to whether the party adversely affected by the new regulation could have changed its "primary conduct" to avoid the adverse outcome had it known of the regulation at the time. Even then, however, the other factors could ultimately support retroactivity because they go to whether the new regulation actually represented change in agency principles or practices and whether the party was on fair notice of the then-existing principles and practices. If the challenger could reasonably have known of the existing principles even though they were not explicitly stated in the prior regulation, the retroactivity challenge should fail.

Finally, *Ass'n of Private Sector Colleges & Universities v. Duncan*[103] rejected a retroactivity challenge to a new rule governing the determination of whether for-profit and vocational schools qualify for financial aid for their students. The new rule required the schools to show that their graduates made enough money to service their educational debt. The schools argued that the new rule was retroactive because the outcome depended upon "the earnings of students who graduated *before* the regulations were finalized."[104] But a "statute [or rule] is not rendered retroactive merely because the facts or

98. *Id.* at 663.
99. *Id.* at 662–63.
100. 776 F.3d 1359 (Fed. Cir. 2015).
101. 397 F.3d 1358 (Fed. Cir. 2005).
102. *Id.* at 1365.
103. 110 F. Supp. 3d 176 (D.D.C. 2015).
104. *Id.* at 196.

requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment."[105] Because the rule did not change the past legal consequences of the past earnings of their graduates, it was not retroactive. Had the rule somehow taken away federal financial aid granted before the rule was issued, it would have been retroactive; however, the rule affected only future eligibility for that aid. While the schools' past performance might well burden its ability to make federal financial aid available to their students, all sorts of determinations by government or otherwise are legitimately based upon the prior performance of those affected by those determinations.

## I. Unusual Nationwide Stay of Clean Water Rule[106]

In the politically charged decision of *In re EPA*, the Sixth Circuit issued a stay of the EPA-Army Corps of Engineers final rule clarifying the definition of "waters of the United States" in the CWA.[107] In a rulemaking proceeding spanning several years, the agencies had sought "through increased use of bright-line boundaries" to make "the process of identifying waters protected under the [CWA] easier to understand, more predictable and consistent with the law and peer reviewed science, while protecting the streams and wetlands that form the foundation of our nation's water resources."[108] The several states seeking a stay argued that the rule effected "an expansion of respondent agencies' regulatory jurisdiction and dramatically alter[ed] the existing balance of federal-state collaboration."[109] They also asserted that the bright lines adopted by the rule were inconsistent with the principles governing identification of waters of the United States and that the rulemaking process violated the APA.[110]

In applying the four-factor test governing issuance of a stay, the court noted the threshold question, "What is the status quo?"[111] The majority accepted the states' argument that the status quo should be considered to be the circumstance prior to issuance of the rule, considering the "pervasive nation-

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105. *Id.*
106. The following discussion will also appear in the *News from the Circuits* column in 41 Admin. & Reg. L. News, No. 2, at 25–26 (Winter 2016) (forthcoming).
107. *In re* EPA, 803 F.3d 804 (6th Cir. 2015).
108. *Id.* at 805.
109. *Id.* at 806.
110. *Id.*
111. *Id.*

wide impact" of the new rule and the open question of whether the litigation was properly in the Sixth Circuit or in the district courts. The majority also concluded that the petitioners had shown a substantial possibility of success on the merits both as to the reach of the statute and the rulemaking process.[112] As to the latter, the majority asserted that the agencies "have failed to identify anything in the record that would substantiate a finding that the public had reasonably specific notice that the distance-based limitations adopted in the Rule were among the range of alternatives being considered."[113] Thus, the majority believed that the agencies had failed the standard logical outgrowth test. The court stayed the rule nationwide pending resolution of the litigation, including the question of whether the court had subject-matter jurisdiction.[114]

In dissent, Judge Damon Keith argued that the court could not issue a stay or otherwise act without determining whether it had jurisdiction to review the rule. Accordingly, the dissent did not reach the merits.[115]

The majority's decision to issue a stay without determining its own jurisdiction probably derives from the unusual procedural posture of this litigation. Challenges brought in the courts of appeals had been consolidated in the Sixth Circuit, but several challenges were also moving forward in various district courts, with one district court having granted an injunction in the thirteen plaintiff states, but others having denied injunctive relief.

## PART II. ADMINISTRATIVE DEVELOPMENTS

### A. Presidential Action

Earlier in his administration, President Obama directly addressed rulemaking, as in Executive Order 13,563 (which reaffirmed the principles of Executive Order 12,866 and directed agencies to undertake retrospective analysis of existing rules), Executive Order 13,610 (which directed agencies to improve the process for retrospective review and revision of existing regulations), and Executive Order 13,579 (which urged independent agencies to follow the various principles of Executive Order 13,563). He did not issue any such Executive Orders in 2015, but he did issue one that we can expect to affect rulemaking in addition to other aspects of agency operation. Addition-

112. *See id.* at 808.
113. *Id.* at 807.
114. *See id.* at 808–09.
115. *See id.* at 809 (Keith, J., dissenting).

ally, the Director of the Office of Management and Budget (OMB) issued a Memorandum consistent with a likely push for major rulemaking efforts as the Obama Administration comes to an end.

On September 15, 2015, President Obama issued Executive Order 13,707, entitled "Using Behavioral Science Insights to Better Serve the American People."[116] Noting the value of insights from behavioral science to improve the "effectiveness and efficiency of Government," President Obama directed agencies to identify programs where behavioral science insights "may yield substantial improvements in public welfare, program outcomes, and program cost-effectiveness," and to develop strategies for applying those insights, including recruiting appropriate experts in the behavioral sciences. The Executive Order specifically addresses rulemaking by encouraging consideration of behavioral science insights in the "ongoing review of existing significant regulations to identify and reduce regulatory burdens." If taken seriously, this Executive Order could significantly affect rulemaking efforts in the future.

Meanwhile, on April 6, 2015, the OMB Director, Shaun Donovan, issued a Memorandum entitled "Focusing on Implementation to Drive Improvements." The Memorandum begins, "In the final year of the Administration, it will be more important than ever for the senior leadership team to focus on implementation to lock in progress on Administration priority issues." The Memorandum asks the leadership "to bring together career executives, managers, front-line employees, and service providers to accelerate progress on those areas that will have the greatest impact for the American public." Agencies were to submit fiscal year 2016–2017 action plans by July 15, 2015. Perhaps this coordinated effort will reduce the late issuance of so-called midnight regulations, but it certainly indicates that the Obama Administration is determined, as it says, to "lock in progress" on matters of concern to President Obama. 2016 may well be a busy year in rulemaking.

## B. Annual Report to Congress on Regulatory Costs and Benefits

The Regulatory-Right-to-Know Act requires the administration to prepare an annual Report to Congress on the Benefits and Costs of Federal Regulations.[117] OMB published the draft 2015 report together with the required annual Report to Congress on Agency Compliance with the Unfunded Man-

116. 80 Fed. Reg. 56,365 (Sept. 18, 2015).

117. *See* Treasury and General Government Appropriations Act of 2001, Pub. L. No. 106-554—App. C, § 624, 114 Stat. 2763A-161 to 62 (2000) (codified at 31 U.S.C. § 1105 note (2012)).

dates Reform Act, on October 16, 2015.[118] The report reviewed regulations from October 1, 2004, to September 30, 2014. The bottom line for major federal regulations in the study was estimated annual benefits in the aggregate of $216–812 billion and estimated costs in the aggregate of $57–85 billion.

As the ranges for both benefits and costs suggest, the estimates are subject to considerable uncertainty. Moreover, sometimes benefits or costs cannot be adequately quantified for reasons varying from a lack of necessary information to the difficulty of quantifying unquantifiable benefits such as protection of the environment or enhanced protection of homeland security.

## C. ACUS Activities

On June 4, 2015, the Administrative Conference of the United States (ACUS) issued Recommendation 2015-1 entitled "Promoting Accuracy and Transparency in the Unified Agenda,"[119] with the goal of enhancing the transparency of the rulemaking process.

ACUS recommends that agencies provide periodic updates on their websites and elsewhere "concerning rulemaking developments outside of the semiannual reporting periods connected with the Unified Agenda." It also recommends that the Unified Agenda itself should indicate where such updates might be found if they occur. The Recommendation discusses several other detailed suggestions to enhance the transparency of the rulemaking process.

On September 25, 2015, ACUS also issued Statement #19: Issue Exhaustion in Preenforcement Judicial Review of Administrative Rulemaking.[120]

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118. Office of Mgmt. & Budget (Office of Info. & Regulatory Affairs), Draft 2015 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities (Oct. 16, 2015), *available at* https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/draft_2015_cost_benefit_report.pdf (last visited Feb. 13, 2016). Part II of the Report is OMB's Eighteenth Annual Report to Congress on Agency Compliance with the Unfunded Mandates Reform Act (UMRA).
119. Admin. Conf. of the U.S., Recommendation 2015-1 (Dec. 16, 2015), *available at* https://www.acus.gov/recommendation/promoting-accuracy-and-transparency-unified-agenda (last visited May 22, 2016).
120. Admin. Conf. of the U.S., Statement No. 19 (Sept. 25, 2015), *available at* https://www.acus.gov/recommendation/statement-19-issue-exhaustion-preenforcement-judicial-review-administrative (last visited May 22, 2016).

Although not a formal recommendation, the statement quite usefully discusses the evolution of the issue exhaustion doctrine, which began in the adjudicative arena and has recently been applied to judicial review of agency rules. ACUS suggests the following as "a checklist of potentially relevant factors, not a fixed doctrinal formula" to be considered unless a statute directs otherwise:

- The issue was raised by a participant in the rulemaking other than the litigant.
- The issue was addressed by the agency on its own initiative in the rulemaking.
    - o The agency failed to address an issue that was so fundamental to the rulemaking proceeding or to the rule's basis and purpose that the agency had an affirmative responsibility to address it.
    - o The issue involves an objection that the rule violates the U.S. Constitution.
    - o It would have been futile to raise the issue during the rulemaking proceeding because the agency clearly indicated that it would not entertain comments on or objections regarding that issue.
    - o The issue could not reasonably be expected to have been raised during the rulemaking proceeding because of the procedures used by the agency.
    - o The basis for the objection did not exist at a time when rulemaking participants could raise it in a timely comment.

## PART III. LEGISLATIVE DEVELOPMENTS

There has for the past few years been some chance that Congress might enact, or at least seriously consider, what is now the Independent Agency Regulatory Analysis Act of 2015 (S. 1607), a bi-partisan proposal introduced by Senator Rob Portman (R-OH) and co-sponsored by Senators Susan Collins (R-ME) and Mark Warner (D-VA). The bill would authorize the President to require independent agencies, as is already true of other agencies, to comply with regulatory analysis requirements, undergo Office of Information and Regulatory Affairs (OIRA) review of costs and benefits of significant rules, and submit significant proposed and final rules to OIRA. The Senate Committee on Homeland Security and Governmental Affairs reported this bill to the full Senate on October 7, 2015.

With so little progress on such a widely-supported bill, it is not surprising that no regulatory reform measure made it through both houses of Congress in 2015. These low prospects for success have not deterred several efforts to revise the regulatory process. One of the few bipartisan proposals (two Republicans and one Democrat), S. 1820, the Early Participation in Regulations Act of 2015, would require advance notice of proposed rulemaking for major rules, a relatively minor imposition upon the existing rulemaking process. Another bipartisan proposal (again two Republicans and one Democrat), S. 1818, the Principled Rulemaking Act of 2015, by contrast, would prohibit the issuance of a new rule unless the rule were required by law, necessary to interpret a law, or "made necessary by compelling public need, such as a material failure of the private markets to protect or improve the health and safety of the public, the environment, or the well-being of the people of the United States." This proposal would also impose detailed analytical requirements. Both of these bills were also reported to the full Senate on October 7, 2015.

Interestingly, two proposals would address details of the rulemaking process familiar to students of administrative law. H.R. 445, the Transparency in Rulemaking When Using Scientific Testing Act of 2015, would effectively codify *Portland Cement Ass'n v. Ruckelshaus*[121] by requiring that any notice of proposed rulemaking include any scientific research in which the agency is aware that is relevant to the rulemaking. S. 1487, the Regulatory Predictability for Business Growth Act of 2015, would override the Supreme Court's recent decision in *Mortgage Bankers* by requiring notice and comment for changes to "long-standing interpretive rules."

Several proposals would adopt some sort of sunsetting of existing rules, with approaches ranging from requiring review of rules for possible termination,[122] to some version of terminating existing rules after a certain period of time unless extended by notice and comment or in emergency,[123] to establishing a Retrospective Regulatory Review Commission to create a program to repeal regulations and also to require any agency issuing a new rule to "repeal rules identified by the Commission to offset the cost of the economy of such

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121. 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).
122. *See, e.g.*, Regulatory Review and Sunset Act of 2015, S. 1067, 114th Cong. (2015).
123. *See* Small Business Regulatory Sunset Act of 2015, H.R. 3328, 114th Cong. (2015); Reviews Act, S. 826, 114th Cong. (2015); *and* Sunset Act of 2015, H.R. 2778, 114th Cong. (2015).

new rule."[124] Others would require congressional action to give any new regulation the force of law.[125]

Finally, two would increase analytical and procedural requirements. S. 2006, the Regulatory Accountability Act of 2015, bi-partisan in the sense of being sponsored by six Republicans and one Independent, would substantially revise the APA to require cost-benefit analysis, adoption of the least costly rule, publication of a notice of the initiation of rulemaking, and formal rulemaking upon petition for high-impact rules. S. 168, the Regulatory Responsibility for our Economy Act of 2015, would require "a reasoned determination that the benefits of such regulations justify the costs" and would promote retrospective analysis of existing rules.

While the Independent Agency Regulatory Analysis Act may be enacted in 2016, the others will either not make it through both houses, or they will be vetoed by President Obama. They illustrate the fault lines of the struggle over the administrative state. They also provide a good indication of what a Republican administration is likely to pursue if the White House changes hands in 2017.

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124. Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2015 (SCRUB Act), S. 1683, 114th Cong. (2015).
125. *See* Regulations from the Executive in Need of Scrutiny (REINS) Act of 2015, S. 226, 114th Cong. (2015) *and* Sunset Act of 2015, H.R. 2778, 114th Cong. (2015).