Regulating Drones

Also In This Issue

2015 Fall Administrative Law Conference
Strong Presumption of Judicial Review?
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Regulation of the Sharing Economy: Uber and Beyond

January 8, 2016
Sheraton New York Times Square Hotel
811 7th Avenue 53rd Street, New York, NY 10019
Empire East Room, 2nd Floor

Reception and Panel | 6:30 PM - 9:00 PM

Section of Administrative Law Council Meeting
Saturday, Jan 9, 2016
8AM—4PM, 3rd Floor
New York East Room

All Section Members welcome.
RSVP to:
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Presented at the 110th Annual Meeting of the American Association of Law Schools

Professors! Learn more about the AALS Annual Meeting, Jan 6-10, 2016.

This program is sponsored by the Section of Administrative Law and Regulatory Practice of the American Bar Association. The program will begin by asking general questions about regulatory issues concerning the new “sharing economy” including vacation rental operations like Airbnb and ride-sharing companies like Uber and Lyft. It will then focus on the regulatory environment surrounding ride-sharing, presented by Uber’s chief regulatory lawyer and the general counsel of a leading taxicab board. The intent is to engage in a wide-ranging discussion of the regulatory challenges facing industry and government in the face of evolving technology and consumer behavior.

Moderator: Jack Beermann, Professor of Law and Harry Elwood Warren Scholar, Boston University School of Law

Speakers: Bernard N. Block, Managing Principal, Alvin W. Block & Associates
Krishna K. Juvvadi, Senior Counsel at Uber Technologies, Inc.
Randy May, Founder and President, Free State Foundation
Peter Mazer, General Counsel to the Metropolitan Taxicab Board of Trade

NO CLE CREDIT IS AVAILABLE FOR THIS PROGRAM
As you will see elsewhere in this edition of Administrative Law & Regulatory News, the Section’s recent Fall Conference in October was a terrific success on all accounts, and I want to thank everyone who organized it, who spoke or otherwise participated at it, and who attended it. Special thanks to Andrew Emery and Carol Ann Siciliano, our program chairs, who made it happen. Putting on programs about administrative law is one of the core roles of the Section, so in addition to celebrating the Fall Conference, there is a new program to which I want to call your attention: on January 8, 2016, the Section will be presenting a panel program and a reception in New York in coordination with the Association of American Law Schools (AALS) annual conference. The program will address “Regulating the Sharing Economy: Uber and Beyond”. The Section’s Council will hold its next quarterly meeting in New York the next day at the AALS conference as well. I hope many of you will join us there.

In last month’s Chair’s Column I referenced the Section’s long history of involvement with ideas and policy proposals aimed at solving regulatory problems and improving the functioning of our government. At the Fall Conference, I had the privilege of moderating a panel on “The Regulatory Budget Revisited.” The basic concept involves the application of tools used in the fiscal realm as analogous limitations on regulatory compliance costs, recognizing that government can often accomplish an objective either by a direct fiscal expenditure or by compelling a private expenditure for the same objective. The panel’s title came from an essay written by Brian Callanan and me in the Section’s quarterly law review—The Administrative Law Review, which is published in partnership with American University’s Washington College of Law. (Section members can read the essay in the Fall 2014 volume. It is also available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2603760.) The panel at the Fall Conference included three outstanding speakers: Jim Tozzi, who served at OMB during the Carter Administration, when the concept was first proposed as legislation; James Goodwin, an analyst at the Center for Progressive Reform, who has written skeptically about the topic; and Bill Beach, the Chief Economist of the Senate Budget Committee, which held a hearing on this subject in June 2015 and also in December 2015. Section Members will be able to listen to an audiotape of this panel presentation on the Section’s website in upcoming months. Whatever one’s policy views, the regulatory budget idea has garnered recent interest in Congress, so it is helpful for Section members to understand it.

In recent months, the Section’s committees have sponsored and organized a wide range of interesting “brown bag” lunch events and teleforums, and our committees hope to schedule many more in the upcoming months. Such programs in the last few months have included: (a) the Regulatory Policy Officer series, which began with presentations from EPA and DOE; (b) the Supreme Court Administrative Law series, which presented “After King v. Burwell, What is Chevron’s Domain?” and “Michigan v. EPA’s Impact on Cost-Benefit Requirements: A ‘Rifle Shot,’ or Little Bang for the Buck?”; (c) “Careers in Interstate and Multistate Agencies and Commissions”; (d) “Latest Developments at the Office of Special Counsel”; and most recently, (e) “The Real OIRA: Understanding the White House’s Office of Information and Regulatory Affairs” (which featured four senior political appointees from the last four Administrations discussing their experiences and observations). If you missed these, the good news is that recordings of each of them are available on the Section’s website at http://www.americanbar.org/groups/administrative_law/events_cle/2015.html. If you would like to get involved with developing more of these programs, please contact our committee chairs, who are listed on the back inside cover of this issue.

This year the Section created a new committee regarding Administrative Law Legal History, and we are fortunate that Professor Nick Parrillo at Yale Law School agreed to serve as its chair. (Professor Parrillo’s book, Against the Profit Motive: The Salary Revolution in American Government, 1780–1940, won the Section’s award for scholarship in 2014.) In thinking about Legal History, this year marks the 60th anniversary of the Second Hoover Commission’s 1955 report on Legal Services and Procedure, which made significant administrative law reform proposals, some of which addressed issues that are still with us. (The Hoover task force report can be found at http://babel.hathitrust.org/cgi/pt?id=mdp.39015074203830;view=1up;seq=3.) The Hoover report led to the Section’s own special committee report in 1956, which proposed a new Code of Federal Administrative Procedure. More on that another time. . . . Once again, space constrains me here, so I urge you to visit our Section’s website, http://www.americanbar.org/groups/administrative_law/.
And the good news on that topic is that in October the Section announced our new version of the “Notice and Comment” blog, which is now a co-branded joint venture with the Yale Journal on Regulation. It is a fitting addition to the Section’s compelling lineup of publications, including its books, law review, this magazine, and occasional reports. (Many thanks to Council members Chris Walker and Lynn White for their vital roles with regard to the blog.) The new blog has more than twenty-five stellar bloggers so far, and includes a weekly round-up of new D.C. Circuit administrative law decisions by our Section’s Rulemaking Committee co-chair, Professor Aaron Nielsen.

Give the blog a try—along with all the other valuable Section publications and programs!

Jeff Rosen
Chair, 2015–16

Developments in Administrative Law 2014

This comprehensive volume of calendar year 2014 information is provided to Section Members at no charge as a benefit of Section Membership. Available in both hard copy (the 4 cross-cutting chapters only) and eBook versions (all chapters), Section Members should visit the ABA Webstore at this link to download a complimentary copy:


The hard copy book is also available in the webstore for a nominal fee to Section Members. Book Chapters include:

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Manuscripts should be e-mailed to: anne.kiefer@americanbar.org. Articles should generally be between 1500 and 2500 words and relate to current issues of importance in the field of administrative or regulatory law and/or policy. Correspondence and changes of address should be sent to: ABA Section of Administrative Law & Regulatory Practice, 1050 Connecticut Avenue NW, Suite 400, Washington, DC 20036.

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Drones! A Regulatory Process Struggles to Keep Pace

By Thomas Lehrich* and David F. Rifkind**

Introduction

In the first Star Wars movie trilogy decades ago, the Empire used drones as probes to find the planet where the Alliance was hiding and we had no idea at that time the path unmanned aircraft systems (UAS) would take in our own airspace. It would not be an understatement to say that we are in the midst of a revolution in the use of UAS, commonly referred to as “drones.”

From hobbyists to commerce, the use of drones is increasing exponentially. An estimated one million drones were purchased in 2015, many as gifts, equipped with HD cameras and controllable with smart phones. Drones have tremendous potential to improve the common good. Farmers, electric utilities, railroads and others are finding new ways to use drones including to boost crop yields, improve reliability of the electrical grid and to inspect infrastructure.

Utilities are increasingly using drones to inspect power lines and wind turbines, inspections that previously required a manned aircraft operating in close proximity to power line structures or required inspectors to dangle from safety ropes hundreds of feet in the air. Drones are being used in the real estate, mining, and movie industries. The military, police, and other public safety organizations are making increasing use of this new and fast-evolving technology including for search and rescue and disaster recovery.

In Australia, drones are used to track sharks and prevent attacks. The drones provide live images to operators including GPS positioning to better warn and protect swimmers from shark attacks.

Drones can be equipped with a variety of equipment including infrared cameras, fire suppression systems, and listening devices. They may also be mounted with telecommunication equipment to temporarily enhance and extend communication signals. And, they can be used to deliver your latest purchase, as Amazon hopes to do one day.

It is expected that as operational costs drop and technology advances, drones will have a transformative impact in both the commercial and public spheres. We are just beginning to glimpse the technology’s potential.

We are also just beginning to appreciate its risks both to public safety and to privacy. According to the Federal Aviation Administration (FAA), in 2014 alone, there were 238 sightings by pilots of drones near airports. In 2015, that number has increased to over 650. According to researchers at Virginia Tech, a small drone ingested into a jet engine can cause a catastrophic failure. Thus, when drones were spotted in the vicinity of wildfires in California this past summer, authorities were forced to ground firefighting aircraft due to the risk of collision.

Privacy is becoming an increasing concern as drones are redefining our expectation of privacy. As Prince William and his wife Kate Middleton, the Duchess of Cambridge discovered while sun-bathing at a remote villa, the paparazzi and others have found ways to use drones to gain access to places previously regarded as private.

Recently, the original Luke Skywalker, while filming the new Star Wars movie, reportedly was stopped by a production assistant and told that he must keep a robe on in between scenes to keep the surprise of our plot. “Who would be watching?” the older Skywalker asked. “Drones are up there,” the assistant remarked as he pointed to the sky.

Several regulatory initiatives are ongoing with the generally conflicting goals of protecting the safety and security of the national air space, addressing privacy concerns, and promoting the development and use of new drone technologies.

Most significantly, on February 15, 2015, the Federal Aviation Administration (FAA) proposed regulations addressing the operation of small unmanned aircraft systems, certification of their operators, registration, and display of registration markings (the “Small UAS Rules”). (80 Fed. Reg. 9543 (Feb. 23, 2015)). The Notice of Proposed Rulemaking (NPRM) proposes eliminating the need for an airworthiness certification, and it prohibits drones from posing a danger to the National Airspace System (NAS). The FAA’s proposed new rules should improve the current program which requires agency approval for the commercial use of drones on a case-by-case basis. Thus businesses are required to apply for a special

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permitted directly from the FAA, and governmental agencies are required to apply for a Certificate of Waiver or Authorization (COA) from the FAA. About 28 companies have been granted this special permit and approximately 1,000 COAs have been approved by the FAA.

On the other hand, key restrictions on drone use in the proposed rules continue to significantly limit industry ability to fully realize the technology’s potential. Drones could be used to inspect safely and efficiently the nation’s extensive network of transmission lines including in rural and difficult to access areas. Such inspections could yield important public welfare and national security benefits. They would increase the grid’s reliability and resiliency by preventing avoidable outages and assisting in outage recovery efforts. However, the FAA’s proposed rules’ limit operations to within the line of sight of the operator and to daylight hours. While these proposed restrictions are intended to ensure that a drone operator, like any other aircraft pilot, will be able to “see and avoid” other aircraft, they significantly limit electric utilities’ ability to use drones to inspect transmission lines and to aid in recovery efforts. To its credit, the FAA has acknowledged the concerns with the limitations imposed by the “line of sight” rule and are looking for solutions. The FAA has authorized pilot programs by private companies such as BNSF, a major railroad, that allow operations beyond line of sight. It will be important for the FAA to build in to its proposed rules the flexibility to allow commercial uses beyond line of sight. When the safety risks posed by such operations are low, and the safety benefits are high.

Industry efforts to open up U.S. skies to drones are gaining momentum on both the legal and regulatory fronts. However, the FAA faces significant administrative law challenges as the need for new regulations and new procedures far outpace the regulatory rulemaking process. This has forced the FAA to be nimble.

For example, while in the midst of the rulemaking, and with an increasing number of pilots reporting drones near airports, the FAA accelerated its plans to register drones. On October 19, 2015, the FAA announced that it would establish a registration task force, the Unmanned Aircraft Systems Registration Task Force Aviation Rulemaking Committee (the “Task Force”) to “develop recommenda-

It is expected that as operational costs drop and technology advances, drones will have a transformative impact in both the commercial and public spheres.

We are just beginning to glimpse the technology’s potential.

...
Discussion of FAA Authority

Regulations and Framework
The FAA has statutory authority to regulate drones. See 49 U.S.C. § 40103(b) (1) and (2) and 49 U.S.C. § 44701(a)(5). The Small UAS rulemaking was promulgated under the authority described in the FAA Modernization and Reform Act of 2012 (Public Law 112-95). Section 333 of Public Law 112-95 directs the Secretary of Transportation to determine whether “certain unmanned aircraft systems may operate safely in the national airspace system.” If the Secretary determines, pursuant to Section 333, that certain unmanned aircraft systems may operate safely in the national airspace system, then the Secretary must “establish requirements for the safe operation of such aircraft systems in the national airspace system.” The proposed Small UAS Rules seek to fulfill this mandate and would apply to non-governmental users and non-recreational activities.

As proposed, the Small UAS Rules define a series of baseline limitations: maximum weight for the UAS to be less than 55 lbs.; maximum airspeed of 100 mph (87 knots); maximum altitude of 500 feet above ground level; and a minimum weather visibility of 3 miles from control station. Importantly, the operator would be required to have visual line of sight to the aircraft at all times. Visual line of sight is defined as meaning human eyesight unaided by devices except corrective lenses. This also applies to the use of “see and avoid” first person cameras, which may be used but only if the operator’s visual line of sight is maintained.

The rules would prohibit operation of drones over people on the ground except for those directly involved in the use of the aircraft. Operators may not operate drones under the influence of alcohol or drugs and should not operate the drone if they become aware of any physical or mental condition that would impair their ability to pilot the aircraft safely. The operator would be required to inspect the drone prior to usage and may not fly more than one drone at a time. A drone would only be allowed to operate in the daylight hours, defined as official sunrise to official sunset, local time.

Additionally, operators would be required to be at least 17 years old and pass an aeronautical knowledge test at an FAA-approved knowledge-testing center. They would be subject to a vetting process by the Transportation Security Administration and required to take a recurrent aeronautical knowledge test every 24 months. Operators would be required to report to the FAA any accidents that result in injury or property damage within 10 days. And, operators would be required to agree to submit the drone to the FAA, upon request, for inspection or testing. The drone would be required to have the same markings required of all aircraft, though they may be reduced in size to fit the aircraft.

UAS Presidential Memorandum
Contemporaneous with the release of the proposed Small UAS Rules, the President issued a Memorandum entitled “Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems” (the “Memorandum”). The Memorandum directs that all drone operations by federal agencies comply with U.S. law regarding privacy, civil rights, and civil liberties. The Memorandum is significant as it delineates the White House’s expectations for the government’s current and future UAS use and how UAS-collected data across the nation will ultimately be authorized. The President ordered that all governmental use of UAS must follow the Privacy Act of 1974 (5 U.S.C. § 552a). This contemplates that all personally identifiable information (PII) will be used transparently, follow proper accountability procedures, and comply with privacy laws.

The Memorandum requires that agencies formulate appropriate policies and procedures regarding collection, use, retention and dissemination of drone gathered data, and policies regarding transparency as to each agency’s use of drones. Such policies and procedures must be reexamined prior to deployment of new drone technology and at least every three years. Agencies have 180 days to report on the status of this initial implementation and one year to report on how to access their publicly available policies and procedures.

Additionally, the Memorandum directed that by June 23, 2015, a stakeholder engagement process be initiated “to develop and communicate best practices for privacy, accountability, and transparency as issues regarding commercial and private UAS use in the [National Air Space].” The President tasked the Commerce Department through the National Telecommunications and Information Administration (NTIA) with leading this effort. The NTIA sought public comment on March 5, 2015, and held public meetings on August 3, September 24, October 21 and November 20 of this year as it works toward the task assigned.

The proposed Small UAS Rules are an important step in advancing the commercial use and safety for UAS. The Memorandum, however, sets a showdown on the logical agency with authority over drone related privacy issues. The Memorandum also does not address or apply to UAS operated by local governments.

And while the Memorandum tasks NTIA with developing privacy best practices, the process is not, at least not at this time, intended to establish federal regulations governing drone use as it relates to privacy. In this vacuum, several states and municipalities have legislated or are considering legislation restricting drone use to protect privacy. This threatens a patchwork of laws and
regulations that could impede the commercial use of drones, particularly when that use involves flying over state or municipal boundaries. We would expect to see such laws challenged as imposing undue burdens on interstate commerce and subject to federal preemption.

Administrative Law Challenge

In 2009, when the FAA commenced work on the Small UAS Rules, it took a firm stand on limiting commercial operations in the U.S. airspace before initial formal regulations were in place. But, as FAA Administrator Michael Huerta acknowledged before Congress in January 2014, the agency’s current regulatory structure for drones—which already permits uses of drones in strictly defined airspace by an array of government and academic operators—“is not sustainable long term.”

As the FAA stood in the way of commercial drone use, its authority came under challenge. See Michael P. Huerta, Administrator, Federal Aviation Administration v. Raphael Pirker, NTSB Order No.EA-5730, Docket CP-217 (Nov. 18, 2014). Raphael Pirker, a photographer that piloted a drone at the University of Virginia’s campus in order to capture aerial photographs of the campus for compensation, ran afoul of the FAA rules. The FAA initiated an enforcement proceeding alleging that Pirker carelessly and recklessly operated an unmanned aircraft in violation of FAA regulation 14 C.F.R. § 91.13(a). The FAA issued an assessment order fining the photographer $10,000. Pirker appealed to the National Transportation Safety Board (NTSB), the appellate agency for FAA enforcement proceedings, on the grounds that his unmanned “model aircraft” was not an “aircraft” for purposes of the regulation. The Administrative Law Judge agreed with Pirker and vacated the civil penalty; but, Pirker’s victory was short-lived.

On November 18, 2014, the full NTSB reversed, and held that drones are properly considered “aircraft” and subject to Federal regulations that prohibit operation of “an aircraft in a careless or reckless manner so as to endanger the life or property of another.” The NTSB reasoned that an “aircraft is ‘any’ ‘device’ that is ‘used for flight.’ The NTSB rejected the argument that “the term ‘aircraft’ means a device that sustains one or more individuals in flight, thus excluding unmanned aircraft from this definition.” The NTSB reviewed the legislative history of the FAA’s regulatory framework in defining “aircraft” as “any airborne contrivance ‘now known or hereafter invented, used, or designed for navigation of or flight in the air.”

Additionally, the NTSB affirmed the FAA’s decision to apply 14 CFR § 91.13(a)’s prohibition of careless or reckless operations to drones “via the adjudicative process” instead of through formal agency rulemaking, and explained that “Courts have deferred to such interpretations as long as the interpretation is grounded in a reasonable reading of the regulation’s text and purpose.” This proceeding further settled the administrative law environment surrounding the FAA’s authority to regulate drones under the agency’s current regulatory framework.

Conclusion

The FAA, with all the wisdom and experience in airspace together with the work in commercial space can be the agency to be the launch pad of this industry. To do so, the FAA must strike the right balance between safety, security and privacy on the one hand, and facilitating the realization of the tremendous public benefits that drones offer, on the other hand. This challenge is made all the harder by the rapid technological changes in the industry. The new rules will need to incorporate a wide range of flexibility and the FAA will need to continue to be nimble.

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Winter 2016 7 Administrative & Regulatory Law News
Puzzling Out the Strong Presumption of Judicial Review

By Paul Verkuil*

In Mach Mining LLC v. EEOC, decided by the Supreme Court on April 29, 2015, Justice Kagan’s opinion for a unanimous court embraces the presumption of judicial review to a degree that is problematic, or at least puzzling. 135 S.Ct. 1645 (2015). It brings to mind Nicholas Bagley’s fine article, The Puzzling Presumption of Reviewability, 127 Harv. L. Rev. 1285 (2014), which failed to find justification for the presumption of review under the Administrative Procedure Act or in terms of the Constitution (pursuant to Article III, nondelegation doctrine or due process). As Bagley documents, the existence of the presumption may be as much folklore as historical fact. Perhaps it is the legacy of the great Louis Jaffe, whose classic work assumed that the courts must touch an administrative action at some point before it is complete. See Louis L. Jaffe, Judicial Control of Administrative Action, 320 (1965); Bagley, supra at 1319. So here is my “puzzle”: is it possible to honor Jaffe’s dictum while still “unpresuming” judicial review in circumstances like those in Mach Mining?

The Court adopted without much analysis the “strong presumption” of judicial review, and rejected the Seventh Circuit’s nuanced view that, under section 702(a)(2) of the APA, the conciliation function was “committed to the agency discretion by law” and therefore unreviewable. 135 S. Ct. at 1651, citing Bower v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986), vacating 738 F.3d 171 (7th Cir. 2014).

The case was brought before the EEOC by women who were refused employment at defendant/appellant’s coal mine. Conciliation is a necessary step between filing of a complaint before the EEOC and the agency’s taking the defendant to court, which it had sought to do. The statute provides for “informal methods” of “conference, conciliation and persuasion” in order for the agency to decide in its sole discretion whether a settlement can be reached. 42 U.S.C. § 2000 e–5(b). All presentations in this context are private and cannot be used in court without permission of the parties.

The defendant sought dismissal of the case for failure of the EEOC adequately to conciliate. The EEOC responded by submitting to the district court two letters, one initiating the conciliation process and the other saying it had been terminated. To the district court these submissions were insufficient to demonstrate a good faith conciliation process. The court found for the defendant and then certified the conciliation question to the Seventh Circuit. Writing for the circuit court, Judge David Hamilton considered the context and purpose of the conciliation step, recognized the opportunity for strategic behavior that this motion provided (two years had passed since the case was filed), and decided that Congress intended not to make the conciliation process separately reviewable. In doing so, he distinguished the presumption of review endorsed in cases like Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

Mach Mining sought review in the Supreme Court based on a split among the circuits over the degree to which the conciliation process was reviewable. The EEOC and the Solicitor General had a lot at stake. If the broad presumption of review maintained in some circuits prevailed, then a failure of good faith conciliation would not only cause delay but could result in dismissal of the underlying case. So the government argued against review altogether or for highly limited review satisfied by the two letters the EEOC submitted. But once the Court accepted the presumption of judicial review, it was in a scope of review quandary. Reluctant to narrow review to the self-justifying letters, Justice Kagan felt compelled to expand review by the addition of affidavits to support the letters and, if necessary, witness testimony to back them up.

Passing on the opportunity not to presume review left the Court with what might be called the “nose under the tent” dilemma. Justice Kagan’s opinion rejected a “deep dive” approach to judicial review employed by some circuits, in favor of a “relatively barebones review” process. 135 S.Ct. at 1653, 1656. But these words are not familiar judicial review terms and will hardly be self-executing, especially in district courts where the deep dive approach goes by other names. The existence of judicial review seems to promise much collateral litigation, especially from defendants’ who see advantages in delay. Warring affidavits, by definition prepared for litigation and not contemporaneous with the initial agency decision, are in some respects no more helpful than the EEOC letters themselves. They raise the same question: do you trust the agency? That answer can often lead to a further search for the truth even under a limited scope of review.

* Former Chairman of the Administrative Conference of the United States (2010–2015). The views expressed in this post are those of the author and do not necessarily represent the views of the Administrative Conference.
The problem is reminiscent of one that occurred years ago in the Overton Park case. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); See Peter Strauss, Revisiting Overton Park. 30 U.C.L.A. L. Rev. 1251 (1992). In expanding judicial review over the Secretary of Transportation’s decision to expend federal highway funds, the Court handed the district court power to create a record on remand through affidavits. This led to federal administrators having to testify in person, see *Citizens to Preserve Overton Park v. Volpe*, 335 F. Supp. 873 (W. D. Tenn. 1972), and undermined the longstanding “presumption of regularity” to which administrative decisions are entitled. See *United States v. Morgan*, 313 U.S. 409, 442 (1941) (avoiding inquiry into the mental processes of administrators). The Court saw the dangers inherent in this process and promptly constrained review of administrators’ informal decisions. In *Camp v. Pitts*, decided two years later, the Court accepted a brief contemporaneous letter explaining an administrator’s action as a sufficient administrative record in lieu of affidavits or direct testimony of administrators. 411 U.S. 138 (1973). The Comptroller’s letter in *Camp* looks a lot like the EEOC letters in *Mach Mining*.

The *Mach Mining* decision will likely require subsequent Court action. Since the private conciliation process could well be thwarted if defendants request the names of plaintiffs or other identifying data by affidavit or otherwise, the potential for a chilling effect on the underlying claims cannot be discounted.

Moreover, *Mach Mining* is not like *Overton Park*, where denying reviewability of the Secretary’s decision to expend federal funds would have ended the judicial role. The conciliation decision is only a preliminary step. Judicial review can still occur when the EEOC goes to court to try its case. Thus it is still possible to honor Jaffe’s dictum, that the courts must touch the administrative action at some point in the process, without presuming review at this stage.

In some ways, review of the conciliation phase parallels the question of preenforcement review in the rule-making setting which was permitted and encouraged by *Abbott Laboratories*. In both situations timing of judicial review is at issue, not judicial review *vel non*. There is much room to second guess *Abbott* in this regard, see Paul R. Verkuil, *Judicial Review of Rulemaking* 60 Va. L. Rev. 185, 205 (1974), a point that Professor Bagley makes where he says the “presumption of judicial review should be scrapped.” Bagley, *supra*, note 1, at 1336.

In the *Mach Mining* setting, the Court should have considered more seriously the Seventh Circuit’s position, so as to avoid the likelihood that it will have to revisit the matter again and again. Much as we may like to see unanimity on the Supreme Court, one wonders whether it came at the cost of a closer calculation of the consequences of judicial review. The reward that comes from examining the presumption of review at early stages in the administrative process is a better allocation of the judicial work load in the future.

After studying the administrative process close up for the last five-plus years as Chairman of the Administrative Conference, I am more convinced than ever that the proper allocation of workload between the judiciary and the bureaucracy is one of the major problems of government management.
Abstract

2015 Section Scholarship Award-Winner
Anne Joseph O’Connell

Bureaucracy at the Boundary, 162 U. PENN. L. REV. 841 (2014)

The traditional view of the federal administrative state imagines a bureaucracy consisting entirely of executive agencies under the control of the President as well as regulatory commissions and boards that are more independent of the White House. Administrative law clings to this image, focusing almost entirely on these conventional agency forms. The classic image, however, is inaccurate. The reality of the administrative state is more complex.

Contrary to the traditional view, a considerable bureaucracy exists outside of executive agencies and independent regulatory commissions: the largest employer of nonmilitary government employees, the U.S. Postal Service; the only major operator of passenger trains in the country, Amtrak; the organization that ended the career of cyclist Lance Armstrong, the U.S. Anti-Doping Agency; the primary responder to domestic emergencies, the National Guard; the major international lender to developing countries, the International Bank for Reconstruction and Development, a part of the World Bank group; and the federal government’s primary oversight agency, the Government Accountability Office, are a few examples.

This bureaucracy lives largely at the boundaries. There are organizations at the border between the federal government and the private sector. There are organizations at the border between the federal government and other governments, including those of states, foreign countries, and Native American tribes. And there are organizations entirely within the federal government that do not fit squarely within the Executive Branch, including but encompassing far more than independent regulatory commissions and boards. The variety, number, and importance of these organizations greatly complicate the structure of the federal bureaucracy as widely perceived.

To widen the lens on the administrative state, while trying to retain some tractability, this Article locates and classifies the missing federal bureaucracy along the borders of more conventional categories and other important boundaries. In addition to placing these missing parts on the bureaucratic map, it also considers movement to and from the center of these categories. The heart of this Article theorizes about these missing components, specifically why political actors would create bureaucracy at the boundary. Under the theory advanced here—and seemingly in reality—these entities are actually the ordinary outcome of the agency design process. This Article also considers whether their creation serves social welfare or democratic legitimacy objectives, suggesting that efficiency may not always trump accountability in these alternative agency structures. Finally, this Article examines important legal issues surrounding these other bureaucracies and how these entities might shape established law and governance of federal agencies.
Section Chair Jeff Rosen (far right), Co-Chair John Cooney of the Mary C. Lawton Award Committee (behind award-winner), and the nominators and friends of Richard C. Handel honor Mr. Handel for his outstanding government service with the South Carolina Department of Revenue and the Multistate Tax Commission.

Chair of Fellows Committee Michael Herz awards Gellhorn-Sargentich Law Student Essay Award to Brian T. Appel. See a shortened version of this essay beginning on page 15.
Anna Shavers presents the Volunteer of the Year Award to Andrew F. Popper, for his excellent work leading the student board of the Administrative Law Review. See also the photo on page 13 below, featuring the Administrative Law Review editorial board members honoring Professor Popper for his leadership of the Review.

Section members and friends enjoy each others’ company and the annual dinner at which all Section 2015 award-winners pictured above were honored.
The Section warmly thanks Administrative Law Review editorial board members and their Faculty Chair for all their diligent work to bring Section members the latest analysis of trending developments in administrative law throughout the year. Pictured from left to right are: Theresa S. Kim, Senior Recent Developments Editor; Melissa D. Garcia, Senior Symposia Editor; Neil A. Murphy, Editor in Chief; Professor Andrew F. Popper, Faculty Chair; Sam DePrimio, Managing Editor; and Marissa Pisarick, Executive Communications & Development Editor.
Over 500 people attended this year’s Developments in Administrative Law sessions. The analogous 2014 developments reported at this premier Section annual event are now available in book form covering Adjudication, Constitutional Law and Separation of Powers, Judicial Review, and Rulemaking. The ebook version covers these areas, as well as Government Functions Committees, and Government Information and Privacy. See page 2 for more information.

Bill Jordan analyzes exceptions to notice and comment in rulemaking at the annual Developments in Administrative Law panel.
I. The Statutory Framework

The Drug Price Competition and Patent Term Restoration Act of 1984, colloquially referred to as the Hatch-Waxman Act, was a landmark piece of legislation intended to make low-cost generic drugs more readily available. In particular, the Act significantly reduced generic firms’ entry barriers through the creation of the Abbreviated New Drug Application (ANDA).

Because ANDAs effectively allow generic firms to “piggyback[[[]” or “short-cut” the extensive clinical trial work financed by “pioneers”—pharmaceutical companies that research, create, and market new drugs—the Hatch-Waxman Act provided for extension of the pioneer’s patent term beyond the twenty-year baseline to account for regulatory delays that occur during drug development. In this way, the Act “struck a balance between two competing policy interests: (1) inducing pioneering research and development of new drugs and (2) enabling competitors to bring low-cost, generic copies of those drugs to market.”

An ANDA applicant must certify one of the following four criteria with respect to each patent that covers the pioneer drug

(I) that such patent information has not been filed [with FDA],
(II) that such patent has expired,
(III) . . . the date on which such patent will expire,
(IV) that such patent is invalid or will not be infringed by the manufacture, use, or sale of

the new drug for which the application is submitted . . . .

If an ANDA applicant makes a paragraph IV certification that the patent is invalid—that is, not in compliance with the patent laws—or would not be infringed by the ANDA product, the statute provides an intricate framework for resolving the dispute. Consequently, “patent litigation is an integral part of a generic drug company’s business,” and the number of challenges to pioneer patents by generic firms is on the rise.

The Hatch-Waxman Act created a reward for generic firms that challenge pioneer patents. Specifically, the Act provides a 180-day generic exclusivity window for the first ANDA filer that challenges a pioneer patent with a paragraph IV certification and prevails in the ensuing litigation. This 180-day exclusivity window begins when the first generic firm to initiate and lawfully maintain a challenge to a pioneer patent (a “first filer”) enters the market. The 180-day period is worth millions of dollars, vastly exceeding litigation costs.

The 180-day exclusivity period in the Hatch-Waxman Act gave rise to a practice known as exclusivity parking, which occurs when a first filer that otherwise could enter the market refrains from doing so, usually because of an agreement with the pioneer. Exclusivity parking delays not only the start of the first filer’s generic exclusivity, but also its end. Exclusivity parking occurs most frequently as a result of patent litigation settlements. Generally these settlements involve a payment from the pioneer to the first filer in exchange for a promise by the first filer to delay marketing its generic drug for some period of time. These settlements are colloquially called “pay-for-delay” settlements.

Congress did not foresee the problem of exclusivity parking; it was an unintended consequence. In 2003, as part of the Medicare Prescription Drug, Improvement, and Modernization Act (MMA), Congress amended the Hatch-Waxman Act, creating six provisions under which the first filer forfeits its 180-day exclusivity. Two of those forfeiture provisions—the antitrust provision and the failure to market provision—specifically targeted the practice of exclusivity parking. In 2003, Congress utilized the only then-available forum for the resolution of patent disputes: litigation in federal court. Today, new administrative proceedings offer an alternative solution that is quicker and less costly than litigation.

In 2011, Congress enacted the most comprehensive changes to the patent laws since 1952. Among other things, the Leahy-Smith America Invents Act (AIA) created new quasi-judicial administrative proceedings before the Patent Trial and Appeal Board (PTAB), an adjudicative body within the U.S. Patent and Trademark Office (PTO), for a party to challenge a patent’s validity. These new administrative proceedings attempt to decrease the time, cost, and uncertainty of patent litigation by placing patent disputes before a technically competent agency rather than a lay judge or jury. Two of the new proceedings are inter partes review (IPR) and post-grant review (PGR). IPRs and PGRs are very similar to traditional patent litigation in both procedure and substance. IPRs and
PGRs reduce the strain on the federal judiciary effectively by replacing certain patent validity disputes that the parties might otherwise litigate in district court. IPRs and PGRs are not ideal for every patent challenger, but they can be superior to litigation depending on the circumstances. Unfortunately for both pioneer and generic pharmaceutical firms, the AIA’s provisions for IPRs and PGRs contain no reference to the Hatch-Waxman Act and leave practitioners uncertain about how these two statutes interact.

II. Current Statutory Forfeiture Provisions Are Ineffective at Curbing Exclusivity Parking

A. The Antitrust Provision is Ineffective at Curbing Exclusivity Parking

“Pay-for-delay” settlements have attracted antitrust scrutiny from the FTC since they became more common in the early 2000s. While fairly straightforward, the antitrust provision, and antitrust litigation generally, have proven ineffective at combating exclusivity parking.

First, plaintiffs face an uphill battle to prove a pay-for-delay settlement violates the antitrust laws. Specifically, the Supreme Court held in FTC v. Actavis that plaintiffs must prove their case under a “rule of reason” analysis. Rule of reason cases are hard for plaintiffs to win generally, and pay-for-delay cases will likely prove particularly difficult.

Second, the Actavis Court did not provide a clear framework for evaluating pay-for-delay settlements under the rule it announced: “We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation.” This leaves many questions unanswered and leaves antitrust plaintiffs unable to predict how their cases might unfold.

Third, the FTC will not scrutinize most pay-for-delay settlements. Although the FTC has publicly stated its intention to continue aggressively enforcing the antitrust laws in pay-for-delay situations, the FTC’s resources are limited; it cannot pursue every pay-for-delay settlement.

Finally, fighting the rule of reason battle without clear guidance draws out litigation for extended periods of time.

B. The Failure to Market Provision is Ineffective at Curbing Exclusivity Parking

With the failure to market provision, as with the other MMA forfeiture provisions, Congress intended to retain the overall structure of the Hatch-Waxman Act, but incentivize the first filer to use its exclusivity or lose it. The result, however, is a poorly drafted nuanced web of “earlier than” and “later than” language that, when formally applied, leaves a pioneer and first filer almost completely in control and able to thwart Congress’s goals. The provision provides for forfeiture if

1. The first applicant fails to market the drug by the later of—
   a) [a date determined by the first filer’s submission and final approval dates]; or
   b) with respect to the first applicant or any other applicant . . . the date that is 75 days after . . . at least 1 of the following has occurred:
      AA) In an infringement action . . . or in a declaratory judgment action . . . a court enters a final decision from which no appeal . . . has been or can be taken that the patent is invalid or not infringed.
      BB) In an infringement action or a declaratory judgment action . . . a court signs a settlement order . . . that includes a finding that the patent is invalid or not infringed.

The statute provides for forfeiture for failure to market upon the later of two events: an event pursuant to subpart (aa) (a “submission/approval event”) or an event pursuant to subpart (bb) (a “litigation event”).

While the submission/approval event is a straightforward date determination based on the first filer’s ANDA submission and final approval dates, the litigation event depends on the ensuing litigation triggered by “the first applicant or any other applicant.”

The flexibility of the litigation event combined with the overall “later than” framework of the provision initially left an important question unanswered: How long does the FDA wait to decide whether another generic firm might trigger a litigation event? The FDA’s answer: as long as the occurrence of a litigation event is a “possibility,” forfeiture is not triggered. Consequently, the failure to market provision lacks any real teeth, and the FDA acknowledges this loophole:

Inherent in the structure of the “failure to market” forfeiture provisions is the possibility that a first [filer] would be able to enter into a settlement agreement with the [pioneer] or patent owner in which a court does not enter a final judgment of invalidity or non-infringement (i.e., without a [litigation] event . . . occurring), and that subsequent applicants would be unable to initiate a forfeiture with a declaratory judgment action. This inability to force a forfeiture of 180-day exclusivity could result in delays in the approval of otherwise approvable ANDAs owned by applicants that would market their generic drugs if they could but obtain approval. This potential scenario is not one for which the statute currently provides a remedy.

III. Modifying the Failure to Market Provision to Include IPRs

A. IPRs and PGRs Are Unlikely to Fall Within the Failure to Market Provision

Whether the failure to market provision extends to IPRs and PGRs is fundamentally a question of statutory interpretation.

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The plain text of the failure to market provision does not support including IPRs or PGRs within its scope. The statute’s triggering event is a determination of noninfringement or invalidity from “an infringement action or a declaratory judgment action.” And so the issue is whether IPRs or PGRs are “declaratory judgment actions.” The statute frequently uses the term “declaratory judgment” with specific reference to the Declaratory Judgment Act, suggesting that the term should not be broadened to include IPRs or PGRs. The explicit references to title 28 in the failure to market provision strongly suggest that neither IPRs nor PGRs fall within the plain meaning of the forfeiture statute.

The backdrop against which the MMA-enacting Congress legislated supports excluding IPRs and PGRs from any judicial or agency construction of the forfeiture statute. Congress did not include older PTO proceedings in the MMA forfeiture provisions in 2003. Thus, the MMA-enacting Congress presumably intended for only litigation to trigger forfeiture. It is also possible, however, that this was a simple oversight.

Next, the IPR and PGR statutes do not support an interpretation that either proceeding is a “declaratory judgment action.” Sections 315 and 325 of title 35 frequently use the words “proceeding” and “matter” to refer to the IPR or PGR, while referring separately to “civil actions.” There is no reference in the IPR or PGR statutes to the Hatch-Waxman Act, the MMA, or any other related statute that would suggest an IPR or PGR triggers the failure to market provision—a provision that existed in 2011 when Congress created IPRs and PGRs.

The strongest arguments for an inclusive construction flow from the broad estoppel effect of IPRs and PGRs. After an IPR or PGR, a patent challenger “may not assert . . . that the [patent] claim is invalid on any ground that the petitioner raised or reasonably could have raised” during the IPR or PGR. Interpreting the forfeiture provision to exclude IPRs and PGRs could lead to an unusual result—an IPR or PGR final decision of invalidity affirmed on appeal could actually prevent the challenger from triggering a forfeiture event. If neither the PTAB’s final decision nor the Court of Appeals’s decision falls within the bounds of the forfeiture statute, the prevailing patent challenger would be forced to go back to a district court to obtain a consistent declaratory judgment pro forma—to the extent that the case is not moot—to trigger forfeiture. But, as described above, the challenger is stopped from bringing the action and may not even have a justiciable case or controversy.

Arguing for a broad statutory construction would not be unprecedented in this context, but would likely be unsuccessful. In Sullivan v. Hudson, the Supreme Court construed the phrase “civil action” in a fee-shifting statute to include related administrative proceedings because the administrative proceedings were “intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote.” But the analogy to Sullivan v. Hudson fails, however, because neither an IPR nor PGR is a necessary condition to resolve the patent dispute; it is simply a sufficient one. A patent challenger can choose whether to file a declaratory judgment action or a PTAB proceeding. Both lead to a resolution of the dispute, but neither one is necessary to resolve the dispute.

C. Using IPRs and PGRs to Trigger Forfeiture Would Likely Require Congressional Action

Amending the failure to market provision would remove uncertainty from a field in which so much is at stake, and an appropriate amendment would further the goals of both the Hatch-Waxman framework and the AIA. Adding the following italicized words to the failure to market provision at 21 U.S.C. § 355(j)(5)(D)(i)(D)(bb)(AA) would effectuate this result:

In an infringement action brought against that applicant with respect to the patent or in a declaratory judgment action brought by that applicant with respect to the patent or in an administrative proceeding with respect to the patent, a court or agency enters a final decision from which no appeal (other than a petition to the Supreme Court for a writ of certiorari) has been or can be taken that the patent is invalid or not infringed.

First, this amendment would provide greater procedural certainty for later filers that wish to unpark a first filer’s exclusivity. Utilizing an IPR or PGR avoids potential uncertainty concerning standing in a declaratory judgment action and the uncertainty of how to prove a pay-for-delay rule of reason antitrust violation. Uncertainty, especially in the pharmaceutical industry, can cause huge fluctuations in stock prices, making business executives and investors particularly anxious.

Second, this amendment would further the goals of the Hatch-Waxman Act as amended by the MMA. This amendment would assure later filers that their successful IPR or PGR will unpark a first filer’s exclusivity, consistent with Congress’s intent.

Third, this amendment would further the goals of the AIA. The AIA-enacting Congress wanted to remove some patent disputes from district courts and put them in front of a more technically competent agency.

Other options for reducing exclusivity parking remain viable, but involve more sweeping change. These options, however, propose a similar kind of overhaul to the one the MMA-enacting Congress rejected. Significantly reforming these statutes risks unintended consequences.

This proposed amendment is by no means a complete fix to the exclusivity parking problem. While settlements that do not unpark the first filer’s exclusivity do not to lead to timely full competition, the prospect of paying off

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Has Preemption Run Out of Thyme?

By Jim O’Reilly*

Sage advice for future advertising “Mad Men”: spicing up the boring topic of federal preemption sometimes requires us to reach into our pantry of great flavors, and to bring out the natural flavor of ... oops, no, maybe that spice is just a lab chemical concoction ... but gee, couldn't we call it “organic” if we made some of it with chemicals, and then claimed federal preemption to fight off state false advertising claims?

The winter of 2015 marked a loss for the most ardent defenders of federal preemption, with a decision that allows consumers to advance their state law challenges to some aggressive food claims. The critical learning from the December 2015 California Supreme Court Quesada v Herb Thyme Foods Inc., 2015 WL 7770635 (Ca., Dec. 3, 2015) decision is that the states have a continued ability to regulate food marketing fraud, where the federal statute setting standards on organic food labels had not expressly barred state-law fraud enforcement.

Think back: you may have slept through the brief discourse on federal preemption as it was covered in a few minutes of your administrative law class. The legal theme had a very few subtopics (“express” versus “implied,” “occupying the field” versus “obstacles to federal programs,” etc.) but with the same end point—Congress could choose to block litigants from using state statutes or tort law against the commercial entity which asserts an exclusively federal regulatory empowerment of its brand of interstate commerce.

The “highbrow” story of preemption claims is that Article VI, clause 2, made federal authority supreme where Congress asserts federal control. The contrarians assert that Beltway insiders like to slip preemption clauses into complex federal statutes, in order to choke off the creativity of states to be “the laboratories of democracy.” By this view, lobbyists win whenever the industry’s “capture” of federal regulatory agencies could be combined with preemption of state enforcement. This combined defense assures the private sector that neither level of government would “impede growth” of private commerce. The subtle dance of preemption concepts was illustrated at length in this Section’s textbook on preemption, in contrast to the industry-funded studies published in favor of more vigorous preemption of states.

How are spices like thyme affected? Confusion in the 1980s about what crops were “organic” led to legislation. Organic food growers have their own lobbying group, and gradually the consumer demand for their organic foods expanded the category of organic foods, which today is estimated to be worth billions. The U.S. Department of Agriculture was empowered in a 1990 law to define the parameters for foods that are “organic.” USDA, viewed as more friendly to growers of food, was deemed a better regulator of “organic” norms than the Food & Drug Administration which had campaigned against food fraud “misbranding” for years. The proposed rules, debated during the 1990s, were hotly contested before the USDA rule was made final in 2000 and went into effect in 2002. So by 2015, USDA norms on definitions of what is “organic” were understood as incorporating a set of requirements distinct from conventional growth practices for foods.

The December 3, 2015 unanimous decision of the California Supreme Court in the Quesada case is a portent of future state court responses to games-playing in the preemption field. As organic food has become more attractive to consumers, its profit potential has tempted some to make creative claims for foods that are not organic. A spice company used multiple farms; one was organic, the others were not. The company mixed all the spice together and allegedly called it all “organic.. Consumer groups sued for false and deceptive marketing. The spice maker’s lawyers defend the labeling of the mixed, majority non–organic food as “organic,” by invoking federal preemption as a shield from state consumer protection law enforcement.

The text of the federal organic food statute contains a preemption provision. Back in the fields, the organic requirements caused a higher cost of production because of the regulatory constraint on methods of growing and processing foods. Failure to meet the norms for organic content meant that the food could not be sold as “organic.”

But one spice marketer was able to allegedly game the system through mixing the compliant and non-compliant harvests together. The company could avoid the strictness of federal organic standards while holding itself above the powers of the enforcers in states, such as California, which have a tradition of assertive consumers questioning the claims of food producers.

The lower California courts had blocked a class-action lawsuit against Herb Thyme Farms Inc., a large herb grower with many farms throughout California. Most of the company’s farms grow herbs conventionally, which could not claim “organic,” but one farm is certified as organic. The consumer lawsuit contended that Herb Thyme processes its conventional and organic herbs together under an organic label and even sells some herbs grown entirely with chemicals as organic. Herb

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Thyme argued that such claims could not be brought in state court because the federal government has accepted primary responsibility for overseeing such claims for foods.

Organic foods sell at a premium price, and extensive USDA economic data at ers.usda.gov shows the willingness of consumers to pay more for the perceived benefits of food grown under conditions using less chemical pesticide and preservative growth aids.

The unanimous California Supreme Court held that a state law claim that produce is being intentionally mislabeled as organic is not preempted. “When Congress entered the field in 1990, it confined the areas of state law expressly preempted to matters related to certifying production as organic, leaving untouched enforcement against abuse of the label ‘organic.’” Consumer protection had been the purpose of the federal law: “a central purpose behind adopting a clear national definition of organic production was to permit consumers to rely on organic labels and curtail fraud. Accordingly, state lawsuits alleging intentional organic mislabeling promote, rather than hinder, Congress’s purposes and objectives.”

The court laid out the assertions of Herb Thyme’s wrongdoing: “Most of its farms use conventional growing methods, but one of its farms uses organic processes and has been properly certified by a registered certifying agent. When it comes time for distribution and marketing, however, Herb Thyme brings its conventionally grown and organic herbs to the same packing and labeling facility, processes them together, and sends blended conventional and organic herbs out under the same “Fresh Organic” label and packaging. As well, Herb Thyme packages and labels as organic some herbs that are entirely conventionally grown.”

The company asserted that exclusive authority to regulate the labeling and marketing of organic products was delegated to USDA in 1990 and that it “both expressly and impliedly preempts state truth-in-advertising requirements.” The trial court agreed with both express and implied preemption arguments and entered a defense judgment.

The California Supreme Court noted: “The Organic Foods Act effectively federalizes the term “organic”—an agricultural product is, and may be labeled as, organic if and only if it has been produced in accordance with federally approved standards for what that term is to mean. The many occasionally conflicting state definitions growers and consumers had had to cope with before are no more, largely supplanted by a single federal definition.”

Then the parsing of the federal statute sank the spice company: “No similar language of exclusivity is included in the provisions of the Organic Foods Act governing sanctions for misuse of the organic label. The act provides for, inter alia, potential civil fines of up to $10,000 and ineligibility for certification for a period of five years. (7 U.S.C. § 6519(c)) But unlike those portions of the Organic Foods Act governing the standards for organic production and certification, nothing in section 6519(c) suggests these federal remedies are intended to displace whatever state law remedies might exist for deception.”

So the bitter taste of defeat for preemption advocates comes from this parsing of a state’s residual authority to allow attacks on false “organic” claims. (Because the opinion was on a dismissal on legal grounds, no factual finding of Herb Thyme’s wrongdoing has yet been made.) The meaning for future cases is that wording of the delegated powers by Congress is critically important.

Now the scene shifts from workers in a farm field being sprayed with atrazine to lawyers tasked with blocking future enforcers. The lobbyist who delivers the text of the preemption clause to the subcommittee staff aide in the corridor outside the House markup, for delivery into the hands of the friendly member, must think twice: Have I both preempted standards and enforcement of those standards? Am I reaching both parts of the regulatory control, so that only my friends inside the federal agency will ever control my client’s label claims? If I capture the standard writing, that’s helpful; but if I do not also get the House bill to preempt state enforcement of allegedly fraudulent claims, my client companies are still vulnerable to the future charge that they misled consumers under state law false advertising norms. Ah, if I had only stayed awake in AdLaw, I may have been sharper in my preemption analysis… but my client will be out of Thyme! ☹️

MAKE YOUR OPINION COUNT

The Section values the input of all its members. Make your opinion count. Contact us at anne.kiefer@americanbar.org. Also, please let us know how we can help you get more involved with Section activities.
Inflation Adjustment Act: An Implementation Success Story

By Connie Vogelmann*

The Administrative Conference of the United States may be a small agency—the 101-member Conference is supported by just fifteen full-time staff—but it can have a big effect. At the urging of the Obama Administration, Congress recently implemented much of the Conference’s Recommendation 2012-8, Inflation Adjustment Act. The Congressional Budget Office (CBO) predicted that these changes would lead to an increase in government revenue of more than $1.3 billion over the next ten years. Incidentally, based on its current appropriation, this sum of money would be adequate to fund the Conference for over 400 years! The recommendation was also endorsed in the President’s Fiscal Year 2016 Budget.

Recommendation 2012-8 addresses civil monetary penalties—fines paid by parties or entities that violate federal civil statutes. Civil monetary penalties play an important role in the federal government, both by deterring civil violations and, secondarily, by providing a source of revenue for the government. However, over time, if the amount of a civil penalty remains static, inflation diminishes its relative value. When this happens the penalty is weakened, shifting the incentive structure created by Congress and decreasing the penalty’s deterrent effect.

The Federal Civil Penalties Inflation Adjustment Act of 1990 (as amended in 1996) aims to combat the effect of inflation. The statute provides for regular adjustment of civil penalties to account for inflation, seeking to maintain the deterrent value of civil monetary penalties and increase the amount of money collected by the federal government. Unfortunately, the statute led to the creation of an “inflation gap”—a gap between the amount of a penalty as adjusted under the Act and what it should have been if the penalty had been increased to match inflation accurately.

Administrative Conference Recommendation 2012-8, and its accompanying report, took a close look at the Inflation Adjustment Act. The Conference investigated ways to close the “inflation gap,” and highlighted three main ways to do so. The Conference recommended that Congress amend the Act to address these three concerns—and Congress did just that in the Bipartisan Budget Act of 2015.

Recommendation 1(a) — Inflation Gap

Conference Recommendation 1(a) addressed the inflation gap created by an insufficient initial adjustment under the Inflation Adjustment Act. The Act, as amended in 1996, prohibited the first adjustment of a civil penalty under the Act from exceeding 10 percent of the penalty. Subsequent adjustments were limited to the rate of inflation, so if the initial 10 percent increase was not sufficient to account fully for past inflation, the penalty could never “catch up.” A growing “inflation gap” would exist between the adjusted penalty and the amount the penalty should be if accurately adjusted for inflation. The Bipartisan Budget Act of 2015 addresses this problem by allowing the first adjustment to be up to 150 percent of the amount of the penalty on the date the 2015 amendments were enacted.

Recommendation 1(b) — CPI Lag

The second issue addressed in the Conference recommendation is that of the Consumer Price Index (CPI) lag, created by some counterintuitive language in the Inflation Adjustment Act. The 1996 amendments directed that inflation adjustments be made according to the CPI—however, the Act defined “cost-of-living adjustment” in a way that required agencies to use CPI data that were between seven and 18 months old, depending on the time of year an agency decided to update its penalties. Because agencies were directed to rely on old CPI data, the adjustments necessarily lagged behind the true amount of inflation. Further, because each subsequent increase was based on the adjusted penalty, the CPI lag contributed to a growing difference between the penalty under the Act and the penalty amount necessary to fully adjust for inflation. The Bipartisan Budget Act addresses this problem by specifying that adjustments should be made based on the CPI for the month of October preceding the date of adjustment. This change not only makes the Act easier to understand but also decreases the lag significantly.

Recommendation 1(c) — Rounding Rules

Finally, the Conference recommendation addressed the Inflation Adjustment Act’s counterintuitive—and problematic—rounding rules. The Inflation Adjustment Act established six tiers of penalties, and directed agencies to round adjustments based on the amount of the penalty. For instance, for penalties between $100 and $1,000, the Act directed agencies to round adjustments to the nearest multiple of $100. This rounding scheme means

* Attorney Advisor, Administrative Conference of the United States. The views expressed are those of the author and do not necessarily represent the position of the Administrative Conference.
that, for penalties at the lower end of each tier, adjustments would happen infrequently, and when they did, the adjustment would result in a dramatic change to the penalty. For instance, a penalty of $101 would remain at that value until the adjustment could be rounded up to $100—that is, until there had been enough inflation to dictate an adjustment of $51. Assuming an annual inflation rate of about 2.5%, this means an adjustment would not be allowed for 15 years or more. At that point in time, the adjustment would be rounded to $100, and the new penalty value would almost double—from $101 to $201. In short, the Inflation Adjustment Act required a confusing, and counterintuitive, schedule for adjusting penalties. The Bipartisan Budget Act eliminates this complexity. It specifies that, instead of being based on a tiered system, penalty adjustments should be rounded to the nearest dollar.

The Bipartisan Budget Act of 2015 makes two additional changes to the Inflation Adjustment Act: it provides oversight and review authority to the Office of Management and Budget and the Government Accountability Office, and it eliminates the exemption of two statutes from the Act. The CBO predicted that the 2015 amendments to the Inflation Adjustment Act would lead to the $1.3 billion increase in revenue referenced above.

These changes to the Inflation Adjustment Act will help ensure that inflation adjustments to civil monetary penalties maintain pace with inflation. The changes also streamline the statute, making it easier for agencies to adjust their civil monetary penalties regularly, in turn making it easier for regulated parties and other entities to predict the cost of violation. The 2015 amendments to the Inflation Adjustment Act track Administrative Conference Recommendation 2012-8 closely. It is implementation successes like this that the Conference works toward, as we continue our mission to improve administrative procedure throughout the federal government.

Upcoming Section Events

**MID-YEAR COUNCIL MEETING AT THE AALS ANNUAL MEETING**
Sheraton New York Times Square Hotel

**Section Reception/Dinner/Speaker**
Friday January 8, 2016, 6:30–9:30 pm

**Council Meeting**
Saturday, January 9, 2016, 8 am–4 pm

**12TH ANNUAL ADMINISTRATIVE LAW & REGULATORY PRACTICE INSTITUTE**
Walter E. Washington Convention Center, Washington, DC

“Rulemaking 101”
Monday March 14, 2016, 1–5 pm

“Regulatory Reform”
Tuesday March 15, 2016, 8 am–5 pm

**FY2017 EVENTS**

**FALL SECTION COUNCIL MEETING & SECTION DINNER**
Mid-Late October
Dates TBD
Location TBD in Washington, DC

**ADMINISTRATIVE LAW CONFERENCE**
Thursday December 8–Friday December 9, 2016
Walter E. Washington Convention Center, Washington, DC

**ABN ANNUAL MEETING**
San Francisco, California
Locations TBD

**Section Council Meeting & Elections**
Saturday August 6, 2016, 8 am–4 pm

**Section Dinner**
Saturday August 6, 2016, 6:30–9:30 pm

**11TH ANNUAL HOMELAND SECURITY LAW INSTITUTE**
Walter E. Washington Convention Center, Washington, DC

**ABA ANNUAL MEETING**
San Francisco, California
Locations TBD

**MID-YEAR SECTION COUNCIL MEETING**
February 2017
ABA Mid-Year Meeting
Miami, FL

**13TH ANNUAL ADMINISTRATIVE LAW & REGULATORY PRACTICE INSTITUTE**
March 2017
Dates TBD
Washington, DC

**SPRING SECTION COUNCIL MEETING & DINNER**
Late April–Early May
Dates TBD
Washington, DC

**12TH ANNUAL HOMELAND SECURITY LAW INSTITUTE**
Dates & Location TBD

**ANNUAL SECTION COUNCIL MEETING, MEMBERSHIP MEETING & ELECTIONS & SECTION DINNER**
Saturday August 12, 2017
ABA Annual Meeting
New York, NY
By Lincoln L. Davies* and F. Andrew Hessick**

In the first quarter of the 2015 October Term, the Supreme Court did not issue any decisions on administrative law. But it has granted review in a number of cases presenting issues of significant importance to administrative law. These cases raise challenges involving the Affordable Care Act, the Federal Power Act, the Federal Arbitration Act, patent damages, redistricting, and how to interpret statutes relevant to Indian reservations, construction of two other federal laws, and federal protection of access to abortions.

Affordable Care Act
The Court will consider yet another challenge to the Affordable Care Act in Little Sisters of the Poor Home for the Aged v. Burwell, No. 15-105, which has been consolidated with six other cases. Under the Act, employers must provide “coverage” for “preventive care” for women. Regulations promulgated by the Department of Health and Human Services implementing that provision require employers to provide their female employees with health insurance that provides certain forms of birth control free of charge. 77 Fed. Reg. 8725 (Feb. 15, 2012). The regulations also establish exemptions for “religious employers,” 45 C.F.R. § 147.131(a), defining such employers to include churches and “integrated auxiliaries,” 26 C.F.R. § 1.6033-2(h). The exemption does not extend to other nonprofit religious organizations, such as seminaries, faith-based charities, and monastic orders. Instead, HHS regulations create an “accommodation” for these nonexempt religious employers, allowing them to self-certify that they are religious employers that have religious objections to providing contraception. 26 C.F.R. § 54.9815-2713AT(b)(ii)(A), (c)(1). The question presented in these cases is whether this arrangement violates the Religious Freedom Restoration Act, under which the government cannot “substantially burden” the exercise of religion unless doing so is the “least restrictive means” of “furthering [a] compelling government interest.” 42 U.S.C. § 2000bb–1.

Preemption Under the Federal Power Act
Before the Court in Hughes v. PPL EnergyPlus, LLC, No. 14–614 (consolidated with CPV Maryland, LLC v. PPL EnergyPlus, LLC, No. 14–623), is the scope of preemption under the Federal Power Act. That law, in part, gave the Federal Power Commission (now the Federal Energy Commission, or FERC), authority to regulate wholesale power sales. The specific question before the Court in PPL EnergyPlus is whether FERC’s regulation of the wholesale power market in the Mid-Atlantic and various Midwestern states preempts a law adopted by Maryland using price signals to induce local utilities to participate in that market.

Preemption Under the Federal Arbitration Act
At issue in MHN Government Services v. Zaborowski, No. 14–1458, is whether the Federal Arbitration Act preempts California law with respect to the severability of unconscionable arbitration clauses. Under California law, arbitration provisions that are found to render the contract unconscionable may not be severed, thus voiding the arbitration provision altogether. In Zaborowski, the Ninth Circuit held that various portions of an arbitration clause were unconscionable because, for instance, they allowed the employer to choose the arbitrators, they allowed a party who substantially prevailed to obtain attorney fees, and because they foreclosed the possibility of punitive damages and required filing within six months. The court split, however, over whether these provisions could be severed. Before the Supreme Court, then, is the question whether the Federal Arbitration Act’s favoring of arbitration agreements preempts such a determination.

Patent Damages
At issue in Halo Electronics v. Pulse Electronics, No. 14–1513 (consolidated with Stryker Corp. v. Zimmer, No. 14–1520) is the appropriate standard for enhancing patent infringement damages. Under 35 U.S.C. § 284, a person prevailing on a claim of patent infringement is entitled to “damages adequate to compensate for the infringement,” but the court “may increase the damages up to three times the amount” assessed. The Federal Circuit interpreted this provision to authorize enhanced damages only if the infringer (1) had no objectively reasonable basis for its position and (2) acted in subjective bad faith. In Octane Fitness, LLC v. ICON Health & Fitness, Inc., however, the Supreme Court rejected that same two-part test in determining whether to impose attorney fees on patent infringers under 35 U.S.C. § 285, which uses language almost identical to that in § 284. The question in Halo is whether, in light of Octane Fitness, the Federal Circuit’s interpretation of § 284 is correct.

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Redistricting

In Wittman v. Personhuballah, No. 14-1504, the Court will again consider the constitutionality of District 3 under Virginia’s redistricting plan. As drawn in 2012, District 3 is Virginia’s only majority-black congressional district. Voters in the district challenged the drawing of District 3 on the ground that it was a racial gerrymander. To prove a racial gerrymandering claim, the plaintiff must show that the district lines were drawn for racial instead of political reasons. In Wittman, a three-judge district court found that District 3 constituted a racial gerrymander. The principal issue before the Court is whether the lower court adequately supported that conclusion with a finding that the district was drawn for racial rather than political reasons. The Court will also consider whether, assuming the redistricting plan was motivated by race, that plan should nevertheless be upheld because it survives strict scrutiny.

Indian Lands

The Court granted certiorari on two interrelated questions in Nebraska v. Parker, No. 14-1406 (argument Jan. 20, 2016). In this case, the Eighth Circuit affirmed a lower court ruling that an 1882 Act did not diminish the reservation lands of the Omaha Tribe. The question of the reservation’s boundaries arose when the tribe sought to impose a 10 percent sales tax on alcohol in Pender, Nebraska. To reach the conclusion that the 1882 Act did not diminish the tribe’s reservation boundaries, the Eighth Circuit relied on a presumption against diminishment of tribal properties. The questions before the Supreme Court are, first, whether ambiguous evidence about the statutory language and its passage necessarily foreclose the determination that a statute sought to diminish Indian reservation land on a de facto basis; and, second, whether the Omaha Indian Reservation boundaries were in fact diminished by the 1882 Act.

Statutory Construction

The Court granted certiorari this quarter in two cases involving statutory construction—the first related to a provision of the Federal Tort Claims Act, and the second the Alaska National Interest Lands Conservation Act.

The question in Simmons v. Himmelreich, No. 15-109, is how extensive the bar of 28 U.S.C. § 2680 is. That provision, part of the Federal Tort Claims Act (FTCA), precludes subsequent actions brought against federal employees once a claimant chooses to sue under the FTCA. In Himmelreich, a prisoner sued under the FTCA, and the court dismissed his claim for lack of jurisdiction. On appeal, however, the Sixth Circuit upheld some of his claims, including one under the Eighth Amendment. On remand, the district court then granted summary judgment in favor of the government defendants on the Eighth Amendment claim because of the bar under 28 U.S.C. § 2680. The Sixth Circuit reversed, finding that a dismissal of an FTCA claim for lack of jurisdiction does not trigger 28 U.S.C. § 2680. That decision will be before the Supreme Court.

At issue in Sturgeon v. Frost, No. 14-1209 (argument Jan. 20, 2016), is Section 103(c) of the Alaska National Interest Lands Conservation Act of 1980 (ANCILA). The National Park Service ordered John Sturgeon to stop using his hovercraft on portions of the Nation River within the Yukon–Charles Rivers National Preserve, which he had been doing for moose hunting. Sturgeon argued that §103(c) of ANCILA prohibits the Park Service from applying its regulations to lands owned by Alaska, Alaska native corporations, and private lands. The Ninth Circuit disagreed. It held that the statute’s plain language foreclosed Sturgeon’s reading of the Act. Specifically, the court held that §103(c) only applies to conservation area-specific regulations. Thus, because the Park Service regulations in question were generally applicable, §103(c) did not reach them. Before the Supreme Court is the appropriate scope of §103(c).

Right to Abortion

The constitutionality of restrictions on abortions is the topic in Whole Woman’s Health v. Cole, No. 15-274. Under Texas law, a doctor may perform abortions at a clinic only if he has admitting privileges at a hospital no further than thirty miles from the clinic, and each clinic must have the same facilities as an outpatient surgical center. According to Texas, the purpose of these laws is to protect the health of women who seek abortions. Under Planned Parenthood v. Casey, state laws may not impose an “undue burden” on a woman’s ability to obtain an abortion. In Whole Woman’s Health, the Court will consider whether the Texas laws impose an undue burden on women seeking abortions. The Court will also consider whether the courts should defer to Texas’s claim that the laws protect women’s health or whether the courts should evaluate for themselves whether the laws achieve that goal.
5th Circuit upholds injunction against DAPA immigration guidance

On Monday, November 9, 2015, the Fifth Circuit in **Texas v. United States**, 2015 WL 6873190 (5th Cir. 2015), upheld a nationwide preliminary injunction against one of the Obama administration’s signature approaches to the immigration crisis, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). With unusual speed, the Obama administration filed a Petition for a Writ of Certiorari on November 20, seeking to overturn that decision.

DAPA followed the previous initiative, Deferred Action for Childhood Arrivals (DACA), in which the Department of Homeland Security had issued instructions to DHS personnel concerning the treatment of non-citizen children who have arrived in the country without proper documentation. These instructions, known as the DACA Memo, purported to direct the agency’s “exercise of prosecutorial discretion” in enforcement of the immigration laws. The DACA Memo stated several criteria to qualify for “deferred action,” a term referring to a temporary assurance that an individual would not be deported and could apply for work authorization.

Like DACA, the DAPA memo directed DHS personnel to take a similar approach with respect to another group of undocumented aliens, parents of American citizens or lawful permanent residents. This memo set out five specific criteria to qualify for deferred action, including continuous residence since 2010 and “not an enforcement priority” under the terms of a previous memo. The DAPA memo emphasized that each individual was to be considered on a case-by-case basis. It also stated deferred action did not “confer any form of legal status in this country,” but that the individual would, for a limited time, be “permitted to be lawfully present in the United States.” The DAPA memo explained that an individual granted deferred action may apply for work authorization and a Social Security Number. The district court also held that a DAPA beneficiary would be eligible for earned income tax credits with a Social Security Number. The district court also held that a DAPA beneficiary would be eligible for earned income tax credits with a Social Security Number.

Leading several states, Texas challenged DAPA on various grounds. DHS argued Texas and the others lacked standing and that the matter was otherwise not justiciable. Texas essentially based its standing claim on the costs involved in processing and granting applications for driver’s licenses to those “lawfully present” in the country under the program, noting that it would not have

to accept applications from those in the country illegally. The majority held that Texas had standing on this basis, relying heavily upon **Massachusetts v. EPA**, 549 U.S. 497, 518 (2007), in which the Supreme Court had granted “special solicitude” to Massachusetts’ assertion of standing. In particular, the majority considered the provision of a general cause of action in the APA, 5. U.S.C. §704, to be comparable to the Clean Air Act’s specific right to challenge a rule, on which the Supreme Court had relied in granting “special solicitude” to Massachusetts. The majority also considered the costs related to issuing drivers licenses to be comparable to the loss of coastline, on which Massachusetts had relied. The majority essentially acknowledged that this would impose “no principled limit” on a state’s ability to challenge many federal actions, but the majority ascribed the result to the fact that “Massachusetts v. EPA entailed similar risks,” but the Court had found standing. The majority noted limits in other doctrines, including the need to have a cause of action.

Judge Carolyn Dineen King, dissenting, charged the majority with a “breathtaking expansion of state standing [that] would inject the courts into far more federal-state disputes and review of the political branches than is now the case.” She rejected special solicitude and standing for Texas because the general APA provision is not comparable to the specific procedural right in the Clean Air Act and because these indirect economic effects of agency action were not comparable to the projected loss of coastline in **Massachusetts v. EPA**.

In the battle over justiciability, the majority and dissent seemed as the blind men touching different parts of the elephant. The majority saw a decision “to grant lawful presence to millions of illegal aliens on a class-wide basis,” thereby conferring “eligibility for substantial federal and state benefits on a class of otherwise ineligible aliens.” This view removed the states’ claims from any statutory limitations on review. Moreover, far from the unreviewable exercise of prosecutorial discretion in **Heckler v. Chaney**, 470 U.S. 821 (1985), this provided “a focus for judicial review.” By contrast, the dissent saw a relatively simple unreviewable exercise of prosecutorial discretion. According to the dissent, the various asserted benefits now due to illegal aliens (and costly to the states) did not arise from the DAPA Memo, but from preexisting federal and state programs. These programs had long been available to aliens granted deferred action status since well before issuance of the DAPA Memo.

These different visions of the DAPA memorandum had profound implications not only for justiciability, but also for the application of APA notice and comment requirements to the DAPA Memo and the substantive validity of actions taken in the wake of that memo. As to the APA

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requirements, the majority asserted that DAPA “modifies substantive rights and interests” by “conferring lawful presence on 500,000 illegal aliens” and also viewed DAPA as forcing Texas to change its laws in order to avoid the burdens imposed by what it saw as the DAPA program. Not surprisingly, the majority was unable to find clear error in the district court’s factual determination that the DAPA Memo did not “genuinely leave[ ] the agency and its [employees] free to exercise discretion.” After all, the DAPA Memo could not achieve these alleged substantive goals unless it were binding. Because the Memo was effectively binding, it did not qualify as a policy statement exempt from notice and comment under 5 U.S.C. § 553(b) (A). The district court had found the DAPA memo to be binding prior to any implementation of DAPA, contrary to the language of DAPA, and based upon the alleged experience under the DACA Memo, which differed in various ways from DAPA.

The dissent, viewing DAPA as representing the relatively straightforward exercise of prosecutorial discretion, had no difficulty finding clear error based upon the relevant language, the erroneous equating of DAPA with DACA, and the fact that the implementation of DACA did not support a conclusion that the DAPA directive to decide on a case-by-case basis was pretextual. To the dissent, the various benefits that might be available to those granted deferred action (considered burdens by Texas and the other states), were not part of some DAPA program, but simply the normal results of the longstanding practice of granting deferred action to qualifying individuals. Thus, the DAPA Memo was not effectively binding and qualified for the “general statements of policy” exception to notice and comment. Similarly, the contrasting views of the nature of the DAPA Memo drove the ultimate dispute over the substantive validity of the DAPA Memo’s reference to eligible aliens as “lawfully present” in the country and able to apply for work authorization and other benefits. Envisioning the DAPA Memo as creating a program under which illegal aliens may be lawfully present in the United States and eligible for various benefits and work, the majority held the program was substantively invalid. Applying Chevron Step One in a manner quite similar to the majority in FDA v. Brown & Williamson, 529 U.S. 120 (2000), the majority found that Congress had “directly addressed the precise question at issue” because it had, through various enactments over the years, “enacted an intricate process for illegal aliens to derive a lawful immigration classification from their children’s immigration status.” Since Congress had not provided for this sort of program, there was no statutory basis for the agency’s action.

The dissent would not have reached the substantive issue since it had not been decided in the district court and had been briefed only minimally. Addressing the issue, however, the dissent saw discrete administrative actions generally authorized by statute, Congress never having “prohibited or limited ad hoc deferred action, which is no different from DAPA other than scale.” Rejecting the majority’s approach, the dissent described the inquiry at Chevron Step One as “whether Congress has directly spoken to the precise question at issue,” not whether it legislated in the general area or around the periphery.” In any case, the dissent asserted that Congress had indirectly approved of deferred action, as reflected by a regulation “on the books since 1981.”

Finally, the panel clashed on the application of Chevron Step One. The majority held that the statute’s “‘broad grants of authority’ ‘cannot reasonably be construed as assigning [DHS] ‘decisions of vast economic and political significance,’ such as DAPA.” The dissent retorted that in the recent Arizona State Legislature v. Arizona Independent Redistricting Commission, 135 S. Ct. 2652 (2015), the Supreme Court had recognized that “immigration decisions often have substantial economic and political significance,” indicating that deferred action was a “principal feature of the removal system,” and thus well understood by Congress as appropriate for Chevron deference.

6th Circuit stays Clean Water Rule (definition of “waters of the United States”) pending completion of judicial review

In another politically charged decision, the Sixth Circuit issued a stay of the EPA—Corps of Engineers Final Rule clarifying the definition of “‘waters of the United States” in the Clean Water Act. In re EPA, 2015 WL 5893814 (6th Cir. 2015). 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 Clean Water Act 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.” 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.” 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 Administrative Procedure Act.

In applying the four-factor test governing issuance of a stay, the court noted the threshold question, “What is the status quo?” 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 nationwide 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. 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 reason - "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.” Thus, the majority believed that the agencies had failed the standard logical outgrowth test. It stayed the rule nationwide pending resolution of the litigation, including the question of whether the court had subject-matter jurisdiction.

The dissent 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.

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 13 plaintiff states, but others having denied injunctive relief.

9th Circuit holds Information Quality Act does not reach DOJ press release

W. Scott Harkonen was the Chief Executive Officer of a company that subjected one of its drugs to a clinical trial to determine whether the drug would be effective in treating patients with certain disorders. The Food and Drug Administration advised the company that the drug had failed to reduce death and disease progression in the group of subjects in the trial, so the FDA could not grant approval of the drug for the proposed use. Despite that finding, Harkonen issued a press release claiming certain benefits from the drug, including extending the lives of patients suffering from the disorders at issue in the clinical trial.

The Department of Justice indicted Harkonen on counts of wire fraud and felony misbranding. Harkonen was convicted of wire fraud, but acquitted of misbranding. Upon the conviction, DOJ issued a press release asserting that Harkonen had “lied to the public about the results of a clinical trial and offered false hope to people stricken with a deadly disease,” and that his actions “served to divert precious financial resources from the VA’s critical mission of providing healthcare to the nation’s military veterans.”

Harkonen petitioned DOJ for retraction of the press release under the Information Quality Guidelines that DOJ had issued pursuant to the Information Quality Act. He also sought a retraction and removal of the original press release from all government websites. DOJ responded that the Guidelines did not reach the press release, and that in any case the statements were correct. After further attempts at administrative relief, Harkonen challenged the denials in District Court, which granted DOJ’s motion to dismiss.

In Harkonen v. U.S. Department of Justice, 2015 WL 5202141 (9th Cir. 2015), Harkonen relied upon the APA and the IQA to seek judicial review of DOJ’s denial of his correction requests. The Ninth Circuit avoided the issue of whether the IQA creates a private right of action. Instead, it rejected Harkonen’s claim because “both OMB and DOJ excluded press releases from the coverage of the IQA guidelines.”

The IQA required OMB to issue draft guidelines to federal agencies concerning implementation of the statute, and it required each agency to which the guidelines applied to issue its own particular guidelines. The statute provided that the guidelines “apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies.” Agencies are also to issue guidelines ensuring “the quality, objectivity, utility, and integrity of information . . . disseminated by the agency.” Pursuant to this authority, both OMB and DOJ determined that press releases did not qualify as information disseminated by the agency.

The decision thus hinged on the meaning of “disseminated.” Finding that the term was ambiguous in light of the concerns of the statute, neither of which “reflects, or even suggests, an intent by Congress that all information released by the government fall under the ambit of the guidelines,” the Ninth Circuit held that Congress had “left a gap in the IQA for OMB and DOJ to fill regarding the definition of disseminated.” Accordingly, the court applied Step Two of Chevron, upholding the agencies’ determination of the scope of “dissemination” in light of the statutory concerns and OMB’s balancing of the relevant considerations. The court then upheld DOJ’s application of its own guideline to the exclusion of this press release, relying upon Auer v. Robbins, 519 U.S. 452 (1997). Ultimately, this decision simply upholds the guidelines and does not reach the question of whether the IQA provides a private right of action.
7th and D.C Circuits hold Dodd-Frank Act prevents district court review of constitutional claims against enforcement proceedings

When the SEC brings administrative proceedings under the Dodd-Frank Act, respondents have the right to a hearing before an administrative law judge, with the right to petition for SEC review of an adverse decision. They may then seek judicial review of an adverse SEC decision in the circuit in which they reside or in the D.C. Circuit. Seeking to circumvent this scheme, two respondents recently sought review of constitutional claims prior to any decision by the ALJ, much less the SEC.

In Bebo v. SEC, 799 F.3d 765 (7th Cir. 2015), the SEC brought charges against Bebo, who asserted that the SEC had no authority to pursue the administrative proceeding because certain provisions of Dodd-Frank were unconstitutional. After the hearing but prior to the ALJ’s decision, Bebo took the constitutional claims to federal district court. In Jarkesy v. S.E.C., 803 F.3d 9 (D.C. Cir. 2015), was similar, except that the respondents brought suit prior to the hearing, seeking “injunctive and declaratory relief’ to prevent the SEC from proceeding with an administrative proceeding’ that, in their view, ‘has violated, and will continue to violate, [their] fundamental constitutional rights.” In both cases, the district courts dismissed for lack of subject matter jurisdiction because the specific statutory provision for judicial review restricted review to the Courts of Appeals. Both appellate courts agreed.

The Dodd-Frank judicial review provision, 15 U.S.C. § 78(y)(a)(1), authorized a “person aggrieved by a final order of the Commission entered pursuant to this chapter to obtain review of the order in the” Court of Appeals. The Court of Appeals then “has jurisdiction, which is exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.” 15 U.S.C. § 78(y)(a)(3). The statute also provides for substantial evidence review and authorizes the court to remand for further evidence in appropriate circumstances. 15 U.S.C. § 78(y)(a)(4)&(5).

The Supreme Court had previously addressed the effect of § 78y in Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010), holding that review was not restricted to the Courts of Appeals on those particular facts. In Free Enterprise Fund, the plaintiff, which had been subjected to an audit by the Public Company Accounting Oversight Board, challenged the constitutionality of the Board. The Court applied a three-part test to determine whether § 78y restricted district court review. First, would “a finding of preclusion . . . foreclose all meaningful judicial review?” Second, was the suit “wholly collateral to a statute’s review provisions, and third, were the claims “outside the agency’s expertise?” The Court rejected preclusion because the Board’s action might never be “encapsulated in a final Commission order,” so it could not be subjected to review without the company intentionally violating one of the agency’s rules and being subjected to enforcement action. Thus, preventing review in the district court could well foreclose all meaningful review.

The Bebo court distinguished Free Enterprise Fund because Bebo was already the object of an enforcement proceeding, and § 78y provided precisely the mechanism she would need to obtain review the constitutional issue should she not prevail before the Commission. The Seventh Circuit saw “no evidence from the statute’s text, structure, and purpose that Congress intended for plaintiffs like Bebo, who are already subject to ongoing administrative enforcement proceedings, to be able to stop those proceedings by challenging the constitutionality of the enabling legislation or the structural authority of the SEC.” The Jaresky court similarly concluded that, “by contrast to Free Enterprise, the SEC scheme presents an entirely “meaningful” avenue of relief to respondents like Jaresky.” Both courts addressed the Free Enterprise Fund tests at greater length, ultimately finding that it was “fairly discernable” from the statutory scheme that review was to be limited to the Courts of Appeals.

Perhaps the mystery of these two cases is why the courts did not simply dismiss for lack of a final agency action under FTC v. Standard Oil Co. of California, 449 U.S. 232 (1980), which both courts cited, and which seems determinative. As in FTC v. Standard Oil, both Bebo and Jarkesy were the targets of agency administrative proceedings and had the opportunity to challenge the outcomes of those proceedings in court if they were unsuccessful before the agency. Indeed, the argument for dismissal in these cases is stronger than in FTC v. Standard Oil. Here, if the plaintiffs did not prevail before the agency, they would be able to raise constitutional issues on judicial review in the Courts of Appeals. By contrast, Standard Oil had asserted that the FTC had acted for political reasons, not based upon a true “reason to believe” the company had violated the law. If the company lost on the facts before the agency, it is hard to see how it could effectively have litigated whether the agency had truly had “reason to believe” when the agency instituted the proceeding. In any case, the presence of a congressional directive in § 78y gave the panels a straightforward means of reaching a similar result on the basis of adherence to the dictates of the legislature.
Celebrity News—Desperate HousewifeAvoids Exhaustion!

By Michael Asimow

Actress Nicolette Sheridan played Edie Britt in the beloved TV series “Desperate Housewives.” Tragically for her many fans, Sheridan was dropped from the show after five seasons. This is the backstory. She alleges that the show’s creator struck her after she raised a script issue. She complained to the producer, Touchstone Television Productions, and was soon dropped from the show. Needless to say, she sued Touchstone for retaliatory discharge (a potent intentional tort under California law).

The issue was whether Sheridan had to first exhaust her remedy before the California Labor Commissioner. The Labor Commissioner procedure provides a quick and cheap way for employees to get a remedy against their employer, usually for unpaid wages, but also for discharge in violation of public policy. Labor Commissioner hearings are known as “Berman hearings,” named for the legislator whose efforts got the remedy enacted into law. Because Berman hearings deprive employers of their right to a jury trial, a losing employer can get a de novo trial in court (but risks getting stuck for the employee’s attorney fees if the employer does less well in court than at the Berman hearing). For employees who claim they have been subjected to retaliatory discharge, the advantage of Berman hearings is that the Commissioner will investigate their complaint, so they get some free discovery, and can get a back pay remedy much more quickly than in court. Moreover, the Commissioner can order the employee reinstated to the job (probably not a remedy that a court could order).

The statute providing victims of retaliatory discharge with the right to a Berman hearing explicitly made this remedy voluntary. Therefore, California’s rather strict exhaustion of remedies doctrine is inapplicable. Exhaustion is required only when a statute makes the administrative remedy mandatory. Sheridan v. Touchstone Television Productions, 193 Cal. Rptr. 3d 811 (2015). This result makes good sense, since Berman hearings cannot award punitive damages, but the court can. So employees (like celebs) who are more interested in the big bucks are well advised to skip the optional Berman hearing and head straight for the courthouse. On the other hand, Sheridan probably won’t be lunching in Hollywood anytime soon.

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Using New USPTO Post-Grant Proceedings to Trigger Forfeiture of the Hatch-Waxman Act’s 180-Day Exclusivity

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multiple later filers might incentivize the pioneer and first filer to refrain from entering into a pay-for-delay settlement in the first instance.

Furthermore, this proposed amendment allows a first filer to defeat a pioneer patent more quickly and more cheaply. If it were easier to defeat a pioneer patent, Congress should reduce the length of the exclusivity for first filers that defeat pioneer patents in an administrative proceeding; less “reward” would be needed for less expense and risk, and full generic competition could occur sooner.

This amendment is a modest change and a good first step. It would clarify one ambiguity in a complex statutory scheme without overhauling the basic regulatory process. This amendment advances the goals of both the Hatch-Waxman Act and the AIA and contains a relatively low risk of unintended consequences. Exclusivity parking itself was an unintended consequence of major reform, so Congress should proceed cautiously with even moderate reforms. This specific, narrow amendment can be done now. Thus, amending the failure to market provision to include administrative proceedings would remove the uncertainty in the field and help return the Hatch-Waxman Act to its originally intended balance.
The Administrative Conference of the United States recently held its 64th Plenary Session. This column provides an update of the recommendations adopted at the plenary session and a selective list of the agency’s current projects.

December 2015 Plenary Session

The Administrative Conference held its 64th Plenary Session on December 4, 2015 and adopted three recommendations. Brief descriptions of the recommendations follow. Please feel free to reach out to the ACUS staff contact with any questions or implementation-related suggestions you may have on these recommendations.

- **Technical Assistance by Federal Agencies in the Legislative Process:** Congress often asks agencies to review and provide neutral feedback on draft legislation. This type of legislative activity is considered technical drafting assistance, which can ensure that proposed legislation is consonant with the existing statutory and regulatory scheme. This recommendation highlights best practices for the provision of technical assistance on draft legislation. (Alissa Ardito, aardito@acus.gov)

- **Declaratory Orders:** Even though the Administrative Procedure Act authorized the use of declaratory orders in administrative adjudications some seventy years ago, few agencies have ever made use of them with any regularity. This recommendation first identifies contexts in which agencies should consider the use of declaratory orders as an alternative to other forms of regulatory guidance. The recommendation then suggests best practices governing the procedures to be used in declaratory order proceedings, public notice of such proceedings, and the timely disposition of petitions for declaratory orders. (Amber Williams, awilliams@acus.gov)

- **Designing Federal Permitting Programs:** This recommendation considers federal permitting systems—a topic that has been the subject of recent activity by both the White House and Congress. The recommendation 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. The recommendation provides factors for agencies to consider when designing or reviewing permitting programs and encourages agencies to adopt permitting systems that decrease burdens on both agencies and regulated entities while still maintaining required regulatory protections. (Connie Vogelmann, cvogelmann@acus.gov)

The full text of these Recommendations can be found at 80 Fed. Reg. 78161 (Dec. 16, 2015).

Current Projects

The Conference has a full slate of projects in various stages of development. Brief descriptions of selected projects follow. Reach out to the listed staff contact with any questions you have.

- **Aggregate Agency Adjudication:** This project studies recent efforts by agencies to aggregate administrative adjudications. Very little is known about: (1) how agencies choose the cases appropriate for aggregation, (2) which aggregation tools agencies use, (3) the successes and failures of aggregation programs, (4) how often agencies employ aggregation procedures, and (5) other types of proceedings in which different aggregation tools might facilitate more expeditious and fair handling of large groups of claims. The 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. (Amber Williams, awilliams@acus.gov)

- **Electronic Case Management in Federal Administrative Adjudication:** This project studies the use and incorporation of electronic case management in agency adjudication in order to make recommendations and share best practices. The project will not only examine the creation and maintenance of an electronic system in which users may file and manage documents but also will consider various procedural changes that must be made to accommodate such a system.

* Both authors are Attorney Advisors, Administrative Conference of the United States.
The implementation of an electronic system can be instrumental in streamlining an agency’s adjudication practices, improving interagency communication and access, and upgrading technology in related functions, such as hearing recording systems. (Amber Williams, awilliams@acus.gov)

**Negotiated Rulemaking:** This project builds on two past Conference Recommendations (Recommendation 85-5 and Recommendation 82-4, both entitled Procedures for Negotiating Proposed Regulations) and studies the use of negotiated rulemaking and other collaborative mechanisms to involve stakeholders in the process of crafting agency rules. The project aims to identify the optimal contexts for the use of negotiated rulemaking and investigate potential alternative avenues of collaborative policymaking that agencies may use when negotiated rulemaking is impractical or otherwise inadvisable. (Reeve Bull, rbull@acus.gov)

**Ombudsman in Federal Agencies:** This project aims to identify the extent to which federal agencies make use of ombuds and to describe the scope of ombuds activities. The project seeks to identify which ombuds activities have improved agency dispute resolution or program function and provide updated best practices for the establishment and operation of ombuds offices. (David Pritzker, dpritzker@acus.gov)

**Regulatory Waivers and Exemptions:** Federal agencies sometimes grant to regulated parties temporary or permanent “waivers” or “exemptions” from regulatory requirements. Legally and theoretically distinct from prosecutorial discretion, waivers and exemptions may be useful tools for agencies and offer benefits to regulated parties. At the same time, they may also come at the cost of fairness, predictability, and accountability. This project draws conceptual distinctions among waivers, exemptions, and prosecutorial discretion; examines current practices in agencies that grant waivers and exemptions; reviews statutory and doctrinal requirements; and seeks to make concrete procedural recommendations for implementing agency best practices. (Alissa Ardito, aardito@acus.gov)

**Self-Represented Parties in Administrative Hearings:** This project developed out of a working group on the subject which was co-chaired by the Conference and the Department of Justice’s Office for Access to Justice. It seeks to study and develop best practices for agencies to improve fairness and efficiency in administrative hearings involving self-represented parties. (Connie Vogelmann, cvogelmann@acus.gov)

**SSA Federal Courts Analysis:** The Social Security Administration (SSA) engaged the Office of the Chairman to conduct an independent study of federal court review in social security disability insurance and supplemental security income cases by, among other things, evaluating federal court interpretation and application of SSA’s regulations and examining SSA’s acquiescence rulings and how the agency applies decisions of federal appellate courts that diverge from the agency’s policies. The goal is to offer SSA recommendations for bringing consistency to the adjudication of disability cases in federal courts. (Gisselle Bourns, gbourns@acus.gov)

Although the Conference is currently working on a full slate of projects, it is always interested in receiving project ideas on timely and important issues in administrative law. If you have any questions about the Conference’s activities, or want to submit a project idea, please contact Research Chief Reeve Bull at rbull@acus.gov.

Please feel free to reach out to the ACUS staff contact with any questions or implementation-related suggestions you may have on recently adopted recommendations.


Kent Barnett, Codifying Chevmore, 90 N.Y.U. L. Rev. 1 (2015). This article considers the significance and promise of Congress’s unprecedented codification of the well-known Chevron and Skidmore judicial-deference doctrines (to which I refer collectively as “Chevmore”). Congress did so in the Dodd-Frank Act by instructing courts to apply the Skidmore deference factors when reviewing certain agency-preemption decisions and by referring to Chevron throughout. This codification is meaningful because it informs the delegation theory that undergirds Chevmore (i.e., that Congress intends to delegate interpretive primacy over statutory interpretation to agencies under Chevron or courts under Skidmore). Scholars and at least three Supreme Court Justices have decried the judicial inquiry into congressional intent as “fictional” or “fraudulent,” arguing that Congress doesn’t think about interpretive primacy, courts don’t really try to divine congressional intent, and courts rely upon overbroad assumptions as to congressional intent. Dodd-Frank provides the best direct evidence to date as to congressional intent. Dodd-Frank reveals that Congress knows of Chevmore, legislates with it in mind, and acquiesces to its principles. But Dodd-Frank’s preemption provisions—which give an agency rulemaking power subject to Skidmore review—undermine the Supreme Court’s recent suggestion that Congress intends agencies to receive interpretive primacy (via Chevron’s more deferential review) whenever they have rulemaking authority. These insights support earlier precedents that did not treat rulemaking as a talisman. If courts apply these earlier precedents, Chevmore is neither fiction nor fraud. Dodd-Frank also demonstrates Chevron codification’s promise for addressing longstanding administrative-law issues. With “Chevron rewards” and “Skidmore penalties,” Congress can—as it did in Dodd-Frank—clarify how agencies must act to obtain Chevron deference, balance “hard look” judicial review with regulatory ossification, and respond to regulatory capture. Chevmore codification can thereby become a key legislative tool for overseeing the administrative state.

Brian D. Feinstein, Congressional Control of Administrative Agencies, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686233. Conventional wisdom holds that Congress has limited ex post means of controlling the administrative state. This article examines the efficacy of oversight hearings—a relatively understudied potential mechanism for congressional control—to determine the extent to which these hearings can alter agency activity. It then examines the specific conditions under which oversight is likely to occur. Leveraging original data on agency behavior, the article finds that agency “infractions” that are subject to congressional oversight are approximately 22% less likely to recur, compared to similar actions that do not receive oversight attention. The article then examines how structural features of the administrative and congressional environments are associated with oversight activity, suggesting that these institutions may be designed with an eye to altering congressional involvement in administration. These findings suggest that, in an era of greater presidential control over administration, oversight offers a significant tool for Congress to retain some degree of influence.

Donald J. Kochan, Constituencies and Contemporaneous in Reason-Giving: Thoughts and Direction after T-Mobile, 37 Cardozo L. Rev. 1 (2015). This article presents a framework for reason-giving requirements in administrative law that includes a demand on agencies that reasons be produced contemporaneously with an agency’s decisions where multiple constituencies (including regulated entities), not just the courts (and judicial review), are served and respected as consumers of the reasons. The article postulates that the January 2015 U.S. Supreme Court decision in T-Mobile South, LLC v. City of Roswell, 135 S.Ct. 808, may prove to be groundbreaking and stir this framework to the forefront of administrative law decision-making. There are some fundamental, yet very understated, lessons in the T-Mobile opinion that prompt further attention and the fuller justification that this article’s analysis provides. The predominate focus in reason-giving by courts and scholars has been on when the agency must generate or develop reasons, not necessarily on when they must share them with the public. And courts and scholars have focused significantly on how reasons facilitate judicial review, but not necessarily so much on who else can demand the contemporaneous production of reasons associated with an agency’s decision. This article’s framework seeks to broaden the focus. It calls for rules that mandate contemporaneous generation and contemporaneous revelation of reasons for immediate review by all interested constituencies at the time of decision. The two primary conditions on reason-giving recognized in T-Mobile should receive broad implementation across the field of administrative law. Contemporaneous production of reasons with an eye toward cooperatively informing multiple constituencies who require, demand, or simply benefit from being able to access an agency’s reasons works to better serve the administration of our laws and improve the quality of the rules generated.

Richard J. Pierce, The Future of Deference, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2672979. In this essay, Professor Pierce describes the history of the deference doctrines the Supreme Court has announced and applied to agency interpretations of ambiguous statutes and rules over the last seventy years. He predicts that the Court will continue to reduce the scope and strength of those doctrines, in part because of increasing concern about the temporal inconsistencies created by those doctrines. In the current highly polarized political environment, deference doctrines create a legal environment in which the “law” applicable to many agency actions changes every time a President of one party replaces a President of the other party.
“regulating for rationality”—intervening to cure or to overcome cognitive error—poses for regulators. Much of the challenge exists because the contracting choices of rational and irrational consumers often are observationally equivalent: both consumer types prefer the same contracts. Hence, the regulator seldom can infer from contract terms themselves that reasoning errors produced those terms. Rather, the regulator needs a theory of cognitive function that would permit him to predict when actual consumers would make the mistakes that laboratory subjects make: that is, to know which fraction of observed contracts are the product of bias rather than rational choice. The difficulties exist because the psychologists lack such a theory. Hence, cognitive-based regulatory interventions often are poorly grounded. A particular concern is that consumers suffer from numerous biases, and not every consumer suffers from the same ones. Current theory cannot tell how these biases interact within the person and how markets aggregate differing biased consumer preferences. The article then makes three further claims. First, regulating for rationality should be more evidence-based than regulating for traditional market imperfections: in the absence of a theory, the regulator needs to see what actual people do. Second, when the facts are unobtainable or ambiguous, regulators should assume that bias did not affect the consumer’s contracting choice because the assumption is autonomy preserving, administrable, and coherent. Third, disclosure regulation can ameliorate some reasoning errors. Hence, abandoning disclosure strategies in favor of substantive regulation sometimes would be premature.

Matthew Wansley, Cost-Benefit Analysis as a Commitment Device, 87 Temp. L. Rev. 447 (2015). Cost-benefit analysis does not age well. As scientific understanding of health, safety, and environmental risks accumulates over time—and as the technology to mitigate those risks becomes more affordable—the assumptions underlying a rule’s cost-benefit analysis obsolesce. Yet because of agency inaction, rulemaking imperfections: in the absence of a theory, the regulator needs to see what actual people do. Second, when the facts are unobtainable or ambiguous, regulators should assume that bias did not affect the consumer’s contracting choice because the assumption is autonomy preserving, administrable, and coherent. Third, disclosure regulation can ameliorate some reasoning errors. Hence, abandoning disclosure strategies in favor of substantive regulation sometimes would be premature.

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the cooperative approach, which emphasizes the induce-
ment of compliance through flexibility and assistance.
Both scholarly and policymaking communities are
interested in this topic of enforcement approach within
the realms of finance, tax compliance, occupational
safety, food and drug safety, consumer product safety, and
environmental protection. To inform this debate, this
study explores enforcement of environmental protection
laws where the debate has been especially spirited yet
lacking in much empirical evidence. Specifically the study
empirically analyzes the effects of these two approaches
on environmental management practices linked to
compliance with wastewater discharge limits imposed on
chemical manufacturing facilities. For this analysis, the
authors view the enforcement approach as representing a
relationship between a regulator and a regulated entity that
is measured in multiple dimensions so that one is able to
explore the extent of cooperation or coercion. The empiri-
cal results reveal that a more cooperative relationship
induces better environmental management.

Elizabeth Fisher, Pasky Pascual and Wendy
Wagner, Rethinking Judicial Review of Expert Agencies,
93 Tex. L. Rev. 1681 (2015). The role of generalist
courts in reviewing the work of expert agencies is gener-
ally portrayed as either an institutional necessity on the
one hand or a Pandora's Box on the other. Courts are
expected to ensure the accountability of agency actions
through their legal oversight role, yet on matters of
science policy they do not have the expertise of the agen-
cies nor can they allow themselves to become amateur
callmakers in the course of their review. Given these
challenges, this article sets out to better understand
what courts are doing in their review of agency science.
The authors conducted a qualitative examination of
the courts' review of challenges to agency scientific
choices in the entire set of the Environmental Protection
Agency's (EPA's) National Ambient Air Quality
Standards (NAAQS). The study revealed an increasingly
rigorous and substantive engagement in the courts' 
review of scientific challenges to the EPA's NAAQS over
time that tracked the Agency's own progress in develop-
ing rigorous analytical approaches. The findings, albeit
preliminary, suggest the emergence of a constructive
partnership between the courts and agencies in science
policy in NAAQS cases. In overseeing scientific chal-
genches, the courts appear to serve as a necessary irritant,
encouraging the agency to develop much stronger
administrative governance and deliberative decisions on
complex science-policy issues. Conversely, in developing
stronger decision-making processes, the resulting agency
efforts have a reciprocal, positive impact on the courts'
own standards for review. The courts and agencies thus
appear to work symbiotically through their mutual
efforts on the establishment of rigorous analytical yard-
sticks to guide the decision process. While the study's
findings may be limited to the NAAQS, which likely
present a best case in administrative process, the findings
may still offer a grounded, normative model for imagi-
ning a constructive and even vital role for generalist courts
in technically complex areas of social decision making.

Amy Sinden, Formality and Informality in Cost-
Benefit Analysis, 2015 Utah L. Rev. 93. Cost-benefit
analysis (CBA) is usually treated as a monolith. In fact,
the term can refer to a broad variety of decisionmaking
practices, ranging from a qualitative comparison of pros
and cons to a highly formalized and technical method
grounded in economic theory that monetizes both costs
and benefits, discounts to present net value, and locates
the point at which the marginal benefits curve crosses
the marginal costs curve. This article develops a typol-
yogy that helps to conceptualize the multiple varieties of
CBA along a formality-informality spectrum. It then
uses this typology to analyze the treatment of CBA
by the academic community and the three branches
of the federal government. In academic and policy
circles, the formal end of this spectrum generates far
more controversy than the informal end. Additionally,
the law (federal environmental statutes and case law)
seems to favor informal over formal varieties of CBA.
Nonetheless, the executive branch appears to be moving
toward the formal end of the spectrum. Executive Orders
and guidance documents direct agencies to conduct a
highly formal mode of CBA. And anecdotal evidence
suggests that agencies often go out of their way to give
their CBAs the trappings of formality, sometimes in ways
that lead to irrational results. The argument is that 1)
falling to distinguish between formal and informal CBA,
and the many varieties in between, has led to muddled
thinking and to misuses of CBA; and 2) the trend toward
formality in the executive branch is out of step with
Congress and the courts and may be counterproductive,
where, for example, it leads to “false formality”—a
corruption of CBA that can occur when agencies fail to
clearly and consistently define where on the formality-
informality spectrum a particular CBA falls.

Michael T. Morley, Reverse Nullification and
Executive Discretion, 17 U. Pa. J. Const. L. 1283
(2015). The President has broad discretion to refrain
from enforcing many civil and criminal laws, either in
general or under certain circumstances. The Supreme
Court has not only affirmed the constitutionality of
such under-enforcement, but extolled its virtues. Most
recently, in Arizona v. United States, it deployed the judi-
cially created doctrines of obstacle and field preemption
to invalidate state restrictions on illegal immigrants that mirrored federal law, in large part to ensure that states do not undermine the effects of the President’s decision to refrain from fully enforcing federal immigration provisions. Such a broad application of obstacle and field preemption is inconsistent with the text and original understanding of the Supremacy Clause and unnecessarily aggrandizes the practical extent of executive authority. The Supremacy Clause prohibits states from attempting to nullify or ignore federal laws that they believe are unconstitutional or unwise. It should not bar states from engaging in “reverse nullification” by enacting statutes that mirror federal law to ameliorate the effects of executive under- or non-enforcement. Far from undermining the “law of the land,” reverse nullification reinforces it by ensuring that the President cannot effectively amend or nullify federal law by declining to enforce it. The Court should craft an exception to its obstacle and field preemption doctrines to accommodate reverse nullification, and Congress should generally include an exception permitting reverse nullification in statutes’ express preemption provisions.

Marshall J. Breger and Gary J. Edles, Independent Agencies in the United States Law, Structure, and Politics, Oxford Univ. Press (2015). This book provides a full-length study of the structure and workings of federal independent regulatory agencies in the United States, focusing on traditional multi-member agencies, such as the Securities and Exchange Commission, the Federal Communications Commission, the National Labor Relations Board, and the Federal Trade Commission. It recognizes that the changing kaleidoscope of modern life has led Congress to create innovative and idiosyncratic administrative structures including government corporations, government sponsored enterprises governance, public-private partnerships, systems for “contracting out,” self-regulation and incorporation by reference of private standards. In the process, Breger and Edles analyze the general conflict between political accountability and agency independence. They provide a unique comparative review of the internal operations of US agencies and offer contrasts between US, EU, and certain UK independent agencies. Included is an appendix describing the powers and procedures of the more than 35 independent US federal agencies, with each supplemented by a selective bibliography.
Given the extensive use of rulemaking in federal agencies, it is important that agency rulemakers have available the clearest guidance possible. As procedures governing the rulemaking process have proliferated since the Administrative Procedure Act (APA) was enacted, the potential procedural pitfalls have multiplied. This fifth edition continues the tradition of demystifying the rulemaking process and brings the Guide up to date with respect to recent cases and changes introduced during the second term of the Bush II Administration, and the first three years of the Obama Administration.

This Fifth Edition retains the basic four-part organization of the previous four editions: Part I is an overview of federal agency rulemaking and describes the major institutional “players” and historical development of rulemaking. Part II describes the statutory structure of rulemaking, including the relevant sections of the APA and other statutes that have an impact on present-day rulemaking. Part III contains a step-by-step description of the informal rulemaking process, from preliminary considerations to the final rule. Part IV discusses judicial review of rulemaking. Appendices include some key rulemaking documents.

This edition explores the dramatic rise of “e-rulemaking” since 2006 and the many ramifications it has wrought that were not present in the era of “paper” rulemaking. This edition also examines court decisions concerning rulemaking procedure and the judicial review of rules.
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