Recent DC Circuit Decisions


The petitioners—environmental and community organizations—challenged the Environmental Protection Agency’s 2015 modification, without notice and comment, of its prior understandings of how to measure a proposed transportation project’s impact on ambient levels of PM$_{2.5}$ and PM$_{10}$, contending that this violated the Administrative Procedure Act and the Clean Air Act.

With respect to PM$_{2.5}$, the D.C. Circuit held the petitioners lacked standing. Although they had identified three transportation projects that would be affected by the change and asserted standing on the basis that their members would be subject to increased pollutants under the new policy, the court found that they had failed to adduce evidence that the change would in fact have any effect on any of the projects.

With respect to PM$_{10}$, the court said that the agency’s change in its policy was not final agency action and therefore not subject to review. The first question was whether the change was a non-binding policy statement or a binding legislative rule. To answer that question the court looks to three factors: (1) “the actual legal effect (or lack thereof) of the agency action in question on regulated entities”; (2) “the agency's characterization of the guidance”; and (3) “whether the agency has applied the guidance as if it were binding on regulated parties.” The court said that EPA explained that the recommended PM$_{10}$ methodology was just that—a recommendation. The Guidance explicitly states that the EPA is open to considering better, alternative methods. Thus, on its face and as applied, the court found the 2015 changes to the PM$_{10}$ methodology to be not binding. The petitioners argued that the 2015 change had to be a legislative rule, because it modified a legislative rule, the earlier 2010 Guidance. The court responded that, even though the 2010 Guidance was adopted only after notice and comment, that did not convert a policy statement into a legislative rule. The court noted that petitioners' theory, if adopted, would discourage agencies from pursuing the very public engagement they seek.

Because the Guidance was a statement of policy without binding legal effect, it was not final agency action, citing to its earlier case of *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710 (D.C. Cir. 2015). In that case, the D.C. Circuit concluded that one
requirement for final agency action is that the action have binding legal effect.


Over two decades ago, the Department of Justice sent a proposed termination letter to one of its Assistant United States Attorneys (“the Assistant”) working in the Eastern District of New York (EDNY). The letter alleged a series of professional inadequacies. Bloomgarden, serving a sentence of life imprisonment without parole, sought a copy of that letter under FOIA. The Assistant had served as lead prosecutor in an investigation of a series of crimes committed by Bloomgarden, leading to several convictions in New York and California. After Bloomgarden’s FOIA suit, most of the approximately 3,600 pages of exhibits supporting the proposed termination letter were turned over to Bloomgarden – but not the letter itself. Bloomgarden hoped that the content of the letter would help him in contesting his sentence. The government declined to release the letter pursuant to Exemption 6 of FOIA, which can protect personal privacy. The district court, balancing the public interest against the Assistant's privacy interest, determined that the latter clearly outweighed the former and therefore granted summary judgment for the government.

Exemption 6 allows the government to withhold “personnel ... files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” In determining whether a disclosure would be unwarranted, courts are to consider the interests of the public in learning what is in those files and to balance those interests against the privacy interests of the person identified in the files. Here, Bloomgarden argued that, although this request was for only one prosecutor’s grounds for termination, it would give the public a road map to the Department’s disciplinary policy relating to prosecutors, and that the mass of exhibits that were disclosed suggests that the Assistant must have engaged in severe misconduct over a relatively long period of time—at least three years—suggesting a certain departmental laxness. Moreover, Bloomgarden claims, the Assistant was not a private citizen whose personnel records are possessed by the government; instead, the Assistant was a government employee who should be entitled to a lesser degree of privacy.

The D.C. Circuit did not agree. In its view, the substantial privacy interest in the case outweighed the rather modest public interest. The letter presenting allegations against the behavior of the Assistant was over twenty years old and does not necessarily reveal anything of present personnel policies, and as a piece of history the court thought it hardly momentous. On the other hand, the court believed the privacy interests were substantial. Primarily this was due to the fact that the letter only contained allegations, not findings. Apparently, the Assistant was allowed to resign rather then be fired.


Grand Teton and the National Elk Refuge (“Refuge”) are home to the "Jackson herd," one of the largest concentrations of elk in North America. Two federal agencies share primary responsibility for managing the Jackson herd: the Park Service, which has jurisdiction over Grand Teton, and the U.S. Fish and Wildlife Service ("FWS"), which manages the Refuge. In 2007, the two agencies, acting together, adopted a fifteen-year plan ("2007 Plan") to manage the
Jackson herd. The 2007 Plan set objectives to reduce the population size of the herd, limit their risk of disease, and conserve their habitat. In conjunction with the 2007 Plan, the agencies also issued a final environmental impact statement ("EIS"), as required by NEPA. The plan involved an elk-reduction program pursuant to which the Park Service would authorize elk hunting as needed to attain the Plan's population objectives. The program also contemplated that the FWS would reduce supplemental feed given to the elk during winter months on the Refuge. Between 2007 and 2015, the Park Service adhered to the elk-reduction program in determining the number of elk authorized to be harvested and the number of hunters deputized to participate in a hunt. As a result, from 2007 to 2015, the size of the herd decreased, as did the number of deputized hunters and the number of elk authorized to be harvested. During this same period, however, the FWS failed to meet the 2007 Plan's objective to wean the herd from supplemental feed. A wildlife photographer challenged the Park Service’s 2015 authorization for elk hunting, arguing that NEPA requires the agency to do an annual EA or EIS with respect to authorizing hunting for that year. The district court granted the Park Service’s motion for summary judgment.

The D.C. Circuit affirmed. It said that the EIS that accompanied the 2007 plan considered the environmental consequences of a fifteen-year program and unless there was a need for a supplemental EIS, the original EIS fully addressed all the environmental consequences for the fifteen-year period. Here there was no need for a supplemental EIS. The test is whether the agency “makes substantial changes in the proposed action that are relevant to environmental concerns,” or if there are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” The Park Service had made no change to what it proposed to do in the fifteen-year program, so that part of the test was passed. The plaintiff argued that the failure of the FWS to wean the elk from the supplemental feeding during the winter was significant new information that was not contemplated at the time of the adoption of the fifteen-year program. However, the Park Service had not deviated from its proposed reduction in elk hunting and the projected reduction in the number of elk was proceeding as originally planned, so that even if the FWS failure to follow the program was significant new information, it was not significant new information that had a bearing on the proposed action or its impacts. The court noted that the FWS was not a party to the lawsuit, so that its failure to abide by the program was not before the court.

**Judicial Review of Security Clearances; Sovereign Immunity; Failure to Raise Claims Below; Due Process; Department of Navy v. Egan Doctrine. Gill v. United States Department of Justice, 2017 WL 5330086 (D.C. Cir. November 14, 2017)(per curiam)(Tatel, J., concurring).**

Kaiser Gill worked for the Federal Bureau of Investigation (FBI) as a special agent until 2006, when the Bureau revoked his security clearance after he conducted unauthorized searches of its Automated Case Support system. Gill sought review of this decision with the Department of Justice's Access Review Committee (ARC), where he admitted his misconduct and, claiming that the "risk of him engaging in similar misconduct ... was miniscule," asked that he be given "another opportunity to perform his duties as an FBI agent." Although the ARC recognized Gill's remorse, it emphasized that his "admitted misconduct in accessing sensitive information for personal reasons ... raise[d] straightforward concerns regarding his ability to safeguard classified information." Citing applicable guidelines requiring that any doubt be resolved in favor of national security, the ARC affirmed the FBI's revocation of Gill's security clearance.
Gill then sued, contending that the FBI violated the Foreign Intelligence Surveillance Act (FISA) by introducing evidence in the ARC hearings that it obtained through undisclosed FISA-authorized surveillance. Gill also alleged that his due process rights were infringed by the FISA violation, by the fact that it took the ARC five years to issue its decision, and by the ARC's treatment in that decision of his naturalized family members as “foreign influence[s].” Finally, Gill contended that the government denied him equal protection both by treating his family members as foreign influences and by treating him, a Muslim, differently from non-Muslims guilty of similar misconduct. The government moved to dismiss, and the district court granted the motion.

With respect to the FISA claim, the lower court had said that in order to sue for a violation of FISA, there had to be a waiver of sovereign immunity, and Gill had not identified any such waiver. His attempt to raise two theories of waiver before the D.C. Circuit was rebuffed for not having been raised below. The D.C. Circuit quickly dismissed his due process claim, because, assuming for purposes of argument that he had a liberty interest in his security clearance, he had received all the process he was due in the ARC procedure. Moreover, the court said, there was no evidence that the ARC had access to any FISA interceptions of Gill or that the ARC had considered his family’s foreign origins in deciding to revoke his clearance. Circuit precedent established that an agency's delay in issuing an otherwise valid decision does not offend principles of due process without some showing of harm caused by the delay, of which there was none here. The equal protection claim suffered a similar fate. First, again, there was no evidence that the ARC considered his family’s foreign origins, and second, his claim that he was discriminated against because he is a Muslim was forfeited, because he had not raised it below.

Judge Tatel concurred in the opinion but wrote to address an argument the government had raised but which the court did not reach. The government had claimed that the court could not address Gill’s equal protection claims because of the Supreme Court’s decision in Department of the Navy v. Egan, 484 U.S. 518 (1988). In that case the Court had held that the Merit Systems Protection Board had no authority to “review security-clearance determinations.” According to the government, this meant that “outside, non-expert bodies,” including federal courts, “cannot review Executive Branch judgments about whether specific individuals pose a risk to the national security.” Judge Tatel conceded that the case has been extended based on separation of powers concerns to bar challenges under Title VII to a security clearance revocation, but such challenges are based on statutory, not constitutional, claims. He concluded that both the Supreme Court’s decision in Webster v. Doe, 486 U.S. 592 (1988)(allowing a constitutional claim to proceed against the Director of CIA for terminating an employee on national security grounds while finding the statutory claim non-justiciable) and the holdings or suggestions in several other circuits counsel in favor of allowing a colorable constitutional claim to proceed notwithstanding Egan. Here, Gill’s failure to raise the claim below made it unnecessary for the D.C. Circuit to rule on whether Egan constituted a bar to review.


Medicare reimburses hospitals for providing inpatient care by paying hospitals a fixed amount for each patient regardless of the actual costs incurred. In order to account for certain differences among hospitals, the reimbursement formula includes several supplemental adjustments. Two of
those are the Indirect Medical Education (IME) adjustment, which supplements payments to hospitals
that train medical residents, and the Disproportionate Share Hospital (DSH) adjustment, which
supplements payments to hospitals that serve a disproportionate share of low-income patients. Both
adjustments turn on the number of inpatient beds at the hospital. Hospitals claiming the IME
adjustment generally benefit when the bed count is lower, while hospitals claiming the DSH
adjustment benefit when the bed count is higher. What counts as a bed for these purposes is defined
in the regulations, which specifically exclude certain kinds of beds (e.g., bassinets). For years, the
Centers for Medicare and Medicaid Services’ (CMS) method for counting hospital beds conflicted
with the plain language of the applicable regulation by excluding “swing beds” and “observation
beds.” Swing beds, found primarily in small rural hospitals, change in reimbursement status
depending on whether the facility is using the bed for acute care or skilled nursing care. Observation
beds are short-term beds used for outpatient care when a patient has not been formally admitted to the
hospital. A case in the Sixth Circuit, Clark Regional Medical Center v. HHS, 314 F.3d 241 (6th Cir.
2002), held that the exclusion of these beds was contrary to the regulation, and as a result CMS
complied with that decision in the Sixth Circuit, while maintaining in the other circuits its position
that they were properly excluded. However, to make things uniform CMS amended its regulation to
exclude explicitly swing beds and observation beds. This regulation was effective on October 1,
2003.

This case was brought by hospitals in the Sixth Circuit that wanted these beds excluded from
the time of the Sixth Circuit decision. They began by appealing to the Provider Reimbursement
Review Board (PRRB) – the body responsible for initially hearing Medicare reimbursement disputes.
The PRRB rejected their claims, saying “all the providers are located within the Sixth Circuit and the
Clark decision is controlling legal precedent.” The PRRB also noted that it “concur[red] with the
Administrator in [an administrative case] that the “separation of powers doctrine requires
administrative agencies to follow the law of the circuit whose courts have jurisdiction over the cause
of action.’” The hospitals then challenged this decision in the district court, which granted summary
judgment to the government, and this appeal followed.

The hospitals made two arguments as to why the 2003 regulation should be applied to
activities after the Clark decision and before the effective date of the regulation. Neither were
successful. First, they argued that courts are to apply the law in effect at the time of the lawsuit, and
the lawsuit was brought after the 2003 regulation was in effect. The D.C. Circuit, however, said that
there was a counter presumption: “congressional enactments and administrative rules will not be
construed to have retroactive effect unless their language requires this result.” Here, to the contrary,
the regulation explicitly stated that it was effective only with respect to counting beds after the 2003
regulation. Second, the hospitals argued that the PRRB should have applied the revised regulation
retroactively because it “clarified” rather than “changed” the law and because the clarification inured
to their benefit. The court disagreed. The regulation changed the law in the Sixth Circuit, and even if
it did not, the court said, the hospitals had “this circuit's retroactivity law backwards: while we have
prohibited retroactive application of a rule that disadvantages a party by “effect[ing] a substantive
change from the agency's prior regulation,” we never require agencies to apply rules retroactively
even where it would be permissible for them to do so.” (Emphasis in original)

The court then turned to what it said was the issue at the heart of this case: whether CMS
acted arbitrarily or capriciously when it decided to follow Clark by excluding swing and observation
beds when calculating bed counts at the hospitals' facilities. The hospitals argued that the PRRB’s
decision to acquiesce in this case was arbitrary and capricious because it relied on the faulty premise
that the agency was required to follow Clark in the Sixth Circuit. The D.C. Circuit agreed that under
the law of the D.C. Circuit an agency need not always acquiesce to an adverse ruling. However, the
PRRB’s decision also cited to an earlier administrative decision of the Administrator, and the court
allowed that the PRRB’s decision effectively incorporated the rationale of the earlier decision.
Considering both the PRRB’s decision here and the Administrator's earlier decision that it relied
upon, the court held that it was clear that CMS recognized its discretion not to follow Clark but made
a reasoned decision to do so.

The court went on to clarify that, if the D.C. Circuit believed that the Sixth Circuit’s decision
conflicted with the applicable statutory or regulatory text, then the D.C. Circuit would not have been
able to uphold CMS’s decision to acquiesce. That, however, was not the case here.
Recent D.C. Circuit Decisions


The Animal Welfare Act (“AWA” or “Act”) charges the United States Department of Agriculture (“USDA”) with administering a licensing scheme for animal exhibitors, including zoos. For license renewals, an applicant must submit an annual report, pay the appropriate application fee, certify compliance and agree to continue to comply with agency standards and regulations, and agree to keep its facilities available for inspection by the agency “to ascertain the applicant's compliance with the standards and regulations.” Separately, USDA conducts random inspections of licensed facilities as part of its enforcement regime. The Cricket Hollow Zoo in Manchester, Iowa, has filed for and received annual license renewals for over 20 years, but the Animal Legal Defense Fund (ALDF) challenged its most recent renewal. ALDF alleged that the agency was aware that Cricket Hollow was in violation of numerous animal welfare requirements under the Act and its implementing regulations. Accordingly, they argued, the agency's decision to renew the zoo’s license was contrary to AWA's requirement that “no ... license shall be issued until the ... exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary.” They also asserted that the agency's reliance on the zoo’s self-certification of compliance as part of its renewal determination, despite having knowledge that the certification was false, was arbitrary and capricious in violation of the Administrative Procedure Act (“APA”). The district court dismissed the case.

The AWA states no “license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary.” The regulations adopted by the Secretary provided different means by which the applicant could
“demonstrate” compliance depending on whether the application was for an initial license or a renewal. While an agency inspection was required to demonstrate compliance in order to obtain an initial license, for renewals, the applicant could “demonstrate” compliance by self-certifying that it was in compliance. In this case the zoo had so self-certified. The D.C. Circuit concluded that the AWA language was ambiguous as to what needed to be done to demonstrate compliance, and the agency’s interpretation was reasonable. Thus, under Chevron, the court upheld the renewal as within the agency’s statutory authority.

However, from 2013 through August, 2016, the agency documented 77 violations at the zoo over the course of 14 inspections. In addition, the ALDF noted the first-hand accounts in the record in order to highlight the deplorable conditions in which the zoo’s animals must live and the “chronic noncompliance recognized by APHIS’s own officials.” Consequently, the agency knew that the self-certification of compliance was false. The court repeated one of the often repeated statements of what constitutes arbitrary and capricious decisionmaking: an agency’s decision is arbitrary and capricious when its “explanation for its decision ... runs counter to the evidence before the agency.” “Reliance on facts that an agency knows are false at the time it relies on them is the essence of arbitrary and capricious decisionmaking.” The court rejected the agency’s argument that it was rational to renew the license, because the agency could always bring an enforcement action against the zoo, which it indeed had done after this lawsuit was filed. Accordingly, the court remanded the case back to the agency to reconsider the license renewal.

Judge Griffith generally concurred with the court’s opinion, but in his view the critical word in the AWA was not “demonstrated,” but the word “issued.” The agency had argued that only the original issuance of a license is “issued”; renewals of a license are not “issued.” The Eleventh Circuit had concluded that the term was ambiguous and deferred to the agency. Judge Griffith would have take the same route, rather than interpreting the word “demonstrated.”


Lorenzo was the director of investment banking at Charles Vista LLC. On behalf of the firm’s only investment banking client, Waste2Energy Holdings (W2E), Lorenzo sent emails to potential investors in a W2E debenture offering. Although Lorenzo had been informed that W2E had marked down its intangible assets from $10 million to zero, his emails did not reveal this fact. To the contrary, he assured the potential investors that there were three safeguards for their investments, none of which were true. The Securities and Exchange Commission charged Lorenzo, his boss, and the firm with violating three securities-fraud provisions: (i) Section 17(a)(1) of the Securities Act of 1933; (ii) Section 10(b) of the Securities Exchange Act of 1934; and (iii) Securities Exchange Act Rule 10b-5. While his boss and the firm settled the claims, Lorenzo proceeded to an adjudication. The ALJ found that Lorenzo had “willfully violated the antifraud provisions of the Securities and Exchange Acts by his material misrepresentations and omissions concerning W2E in the emails.” She imposed a cease-and-desist order, an order barring him from participating in the securities industry in several enumerated respects, and a civil monetary penalty of $15,000. The Commission affirmed that decision upon appeal.

The D.C. Circuit found that there was substantial evidence that the emails contained false and misleading information and that they had been made with the requisite mental state. However, while the Commission had found that Lorenzo’s emails violated the Securities Act, the
Securities Exchange Act, and all three sub-sections of Rule 10b-5, the D.C. Circuit held that he had not violated subsection (b). That subsection declares it unlawful to “make” any untrue statement with respect to a material fact in connection with the sale of a security. The Supreme Court in Janus Capital Group, Inc. v. First Derivative Traders, 564 U.S. 135 (2011), said that “[o]ne who prepares or publishes a statement on behalf of another is not its maker.” Lorenzo contended that he sent the email messages at the behest of his boss, and that his boss supplied the content of the false statements, which Lorenzo copied and pasted into the messages before distributing them. As a result, Lorenzo contends, his boss (and not Lorenzo himself) was the “maker” of the statements under Janus. The Commission had rejected this contention, but the D.C. Circuit found “voluminous testimony” to the effect that Lorenzo’s boss was the “maker” of the false statements. Because none of the other provisions Lorenzo was found to violate use the term “make,” the court concluded that he remained on the hook for those violations. Because the Commission imposed the penalties on Lorenzo in the belief that he violated subsection (b) as well as the other provisions and in the belief that Lorenzo was responsible for the false statements, the court vacated the penalties and remanded the case to the agency to reconsider the penalties.

Judge Kavanaugh dissented. In his view, a finding under Janus that Lorenzo was not responsible for making the false statements in essence meant he was not responsible for any of the violations. He also read the record differently than did the majority, finding that there was not substantial evidence to support a finding that Lorenzo acted willfully. Finally, Judge Kavanaugh said that the majority opinion created a circuit split by holding that mere misstatements, standing alone, may constitute the basis for so-called scheme liability under the securities laws—that is, willful participation in a scheme to defraud—even if the defendant did not make the misstatements. The majority responded to this point in the dissent and apparently read the cited courts of appeals’ decisions differently than did Judge Kavanaugh.


Bread for the City, Inc., brought suit alleging that the Department of Agriculture spent hundreds of millions of dollars less than the law required on a program to provide food for the needy. The district court upheld the Department’s interpretation, and the D.C. Circuit affirmed. The dispute was over the proper interpretation of the statute mandating how much the Department was to spend on food for the needy. The statute provided that the amount to spent would be:

(C) for each of fiscal years 2010 through 2018, the dollar amount of commodities specified in subparagraph (B) adjusted by the percentage by which the thrifty food plan has been adjusted under section 2012(u)(4) of this title between June 30, 2008, and June 30 of the immediately preceding fiscal year;

(D) for each of fiscal years 2015 through 2018, the sum obtained by adding the total dollar amount of commodities specified in subparagraph (C) and—

(i) for fiscal year 2015, $50,000,000. . .

All were agreed that in 2015 the amount calculated under (C) was $277 million. The question was whether under (D) the amount would be $277 million plus $50 million ($327 million), reading the $50 million in (D)(i) as an addition to the amount in (C); or whether it would be $277 million plus $327 million ($604 million), reading (C) and (D) to be separate provisions, such that (D) would add $277 million (the amount specified in (C)), plus $50 million (in (D)(I)) to the $277 million in
The court gave short shrift to the latter reading, although it acknowledged that it could be read that way. The legislative history supported the Department’s reading, and the court pointed out that there was no explanation why Congress would have wished in 2015 to increase the program’s funding by hundreds of millions of dollars, rather than the incremental additions suggested by inflation.


John M.E. Saad, a broker-dealer, unlawfully misappropriated his employer's funds on two separate occasions, and then spent the next seven months misleading investigators in an effort to cover up his wrongdoing. After a lengthy review process, the Securities and Exchange Commission sustained a decision of the Financial Industry Regulatory Authority ("FINRA") permanently barring Saad from membership and from working with any of its affiliated members. Saad challenges the Commission's decision as insufficiently attentive to mitigating factors and argues that the permanent bar is impermissibly punitive rather than remedial.

FINRA is a private self-regulatory organization that oversees the securities industry, including broker-dealers. The disciplinary process begins when FINRA's Department of Enforcement or Department of Market Regulation files a complaint with the FINRA Office of Hearing Officers. A panel of hearing officers then conducts a disciplinary proceeding and issues a final written decision addressing both liability and remedial sanctions. The violator may then seek review of FINRA's decision by the Securities and Exchange Commission.

In determining the appropriate sanction to be imposed for a violation of its rules, FINRA's Guidelines outline eight factors to be considered: (i) the need for the sanction to be remedial, to deter future misconduct, and to improve business standards in the securities industry, (ii) the violator's status as a repeat or one-time violator, (iii) the appropriateness of the sanction for the specific misconduct, (iv) the need in a particular case either to aggregate or to sanction individually similar violations, (v) the appropriateness of restitution or rescission, (vi) the remediation needed to ensure the individual does not benefit from ill-gotten gains, (vii) the necessity of requalification before permitting continued participation in the securities industry, and (viii) the violator's ability to pay any fine or restitution. In addition to those general principles, FINRA adjudicators must consider any other mitigating or aggravating factors. FINRA's Sanction Guidelines provide a non-exhaustive list of nineteen potential aggravating or mitigating factors, including whether the violator (i) accepts responsibility for the misconduct, (ii) took voluntary corrective action prior to detection, (iii) engaged in a pattern of misconduct, (iv) perpetrated the misconduct over an extended period of time, (v) attempted to conceal the misconduct, (vi) acted intentionally, or (vii) was already disciplined by the FINRA member firm.

This was the second time the D.C. Circuit had seen this case. In its initial consideration, it remanded the case because the Commission's analysis failed to address potentially mitigating factors, such as Saad's termination by his employer and Saad's personal and professional stress. The court left open the question whether the lifetime bar was an "excessive or oppressive" sanction, noting that the Commission had an obligation on remand to ensure its sanction was remedial rather than punitive. On remand, the same sanctions were applied after finding no material mitigating factors and a lifetime ban was an appropriate remedy.
The court applied an arbitrary and capricious standard of review of the Commission’s consideration of Saad’s mitigating factors. It concluded that “the Commission's thoroughgoing decision directly addressed the mitigating evidence, as required by our prior remand order, and provided a careful and comprehensive analysis of Saad's arguments seeking a reduction in his sanction. Its decision reasonably focused on the record of Saad's prolonged pattern of falsehoods and deception, as well as the direct threat that his misconduct posed to customers' and other participants' faith in the integrity of the securities industry.” Nevertheless, the court remanded the case once again with respect to the lifetime ban to address the relevance – if any – of the Supreme Court's recent decision in *Kokesh v. SEC*, 137 S.Ct. 1635 (2017), in which the Court discussed what constituted punitive sanctions, as opposed to remedial sanctions.

Judge Kavanaugh concurred but wrote to state his view that *Kokesh* effectively overturned the D.C. Circuit’s precedent that permanent ban can be remedial, as opposed to punitive. Rather, a permanent ban is necessarily punitive. This was not to say, however, that the SEC cannot permanently ban someone from working in the industry. It may, so long as it is “appropriate (that is, not excessive or oppressive).” That, Judge Kavanaugh suggested, would be the correct analysis, not whether the ban was remedial or punitive.

Judge Millett wrote to express doubts as to the remand. She did not read *Kokesh* to be relevant to Saad’s case. In her view, the Commission had amply explained why the permanent bar was remedial, not punitive, and that should suffice.


Broadcasters transmit emergency alerts over their stations when they receive emergency alerts from federal, state, or local governments. The FCC in 2016 decided not to require broadcasters to translate emergency alerts in languages other than English but instead to seek additional information before any such requirement would be considered. This decision was challenged by a public interest group that alleged this action by the FCC was violation of the Communications Act of 1934 or that it was arbitrary and capricious.

The public interest group argued that the FCC’s action violated Section 1 of the Act, which states the purpose of the Act as “to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service.” The D.C. Circuit first said that statutory statements of purpose do not create mandatory duties. Moreover, the Section’s language does not mention discrimination based on language, although some federal statutes do. In short, it does not require the FCC to mandate broadcasts in languages other than English, and therefore the FCC did not violate the Act.

The court also concluded that the FCC had not acted arbitrarily or capriciously. It began by distinguishing between substantive unreasonableness claims and lack-of-reasoned-explanation claims. substantive unreasonableness claim ordinarily is an argument that, given the facts, the agency exercised its discretion unreasonably. A decision that the agency's action was substantively unreasonable generally means that, on remand, the agency must exercise its discretion differently and reach a different bottom-line decision. By contrast, a lack-of-reasoned-explanation claim in this context ordinarily consists of a more modest claim that the agency has
failed to adequately address all of the relevant factors or to adequately explain its exercise of
discretion in light of the information before it. In short, an agency's exercise of discretion must be
both reasonable and reasonably explained.

As the FCC explained, the best way to ensure multi-lingual emergency alerts through the
traditional emergency alert system would be for the alert originators – who themselves are
ordinarily federal, state, or local government entities – to transmit emergency alerts to
broadcasters in multiple languages. That is because the emergency alert system is automated and
automatic. Broadcasters operate as passive conduits between the alert originators and the general
public. In other words, broadcasters traditionally have not created or altered the content of
emergency alerts transmitted to them by the alert originators. As the FCC has pointed out,
moreover, there are real practical and technological concerns about forcing broadcasters into a
new role in the emergency alert system. Many broadcasters lack the personnel to translate and
then broadcast in other languages the emergency messages that they receive from alert
originators. In some circumstances, there may be no personnel in the station at the time of an
emergency alert. In other circumstances, the broadcasters may have personnel present in the
station, but those personnel may lack the language skills to make a translation into other
languages. Petitioners' approach would change an automated system into a system with a
substantial possibility of human error in translation (as well as potential after-the-fact liability
against broadcasters for erroneous translations). The current automated and automatic system—
with the onus on alert originators to provide multi-lingual alerts when they see fit to do so—does
not carry that same risk of inaccuracies. In any event, the court concluded, it is surely reasonable
for the FCC to move cautiously and gather more comprehensive information before deciding
whether to force private broadcasters to play a major new role in the emergency alert system.
Moreover, the FCC reasonably explained that shifting some of the responsibility for message
content from alert originators to broadcasters by requiring broadcasters to translate and re-
broadcast emergency alerts in other languages would generate practical problems and could
undermine the workability of the emergency alert system at this time. Thus, according to the
court, the FCC's explanation falls comfortably within the zone of reasonableness for purposes of
our deferential arbitrary and capricious review under the Administrative Procedure Act.

Judge Millett concurred in the conclusion that the FCC had not violated the
Communications Act, but she believed that the FCC had acted arbitrarily and capriciously. This
was due to the fact that the FCC had already been studying this issue for ten years or more and
had already sought information on two separate occasions from interested persons about how to
address the problem. To kick the can down the road once again under the guise of needing more
information, Judge Millett found unreasonable. The agency should either fish or cut bait (not the
Judge’s words).

Freedom of Information Act; Prospective Relief. Center for the Study of Services v. United
States Department of Health and Human Services, 2017 WL 4781672 (D.C. Cir. October 24,

In 2013 the plaintiff submitted a FOIA request to the Centers for Medicare and Medicaid
Services (CMS) for data related to the insurance plans that would be offered on the new
healthcare exchanges. Receiving no response from the agency, the plaintiff sued, seeking a
declaration the agency had violated FOIA and an injunction against withholding the requested
records, as well as a permanent injunction against “refusing to disclose or delaying the disclosure
the plaintiff submitted the same request, and each year it received no response, and the various requests were consolidated in litigation before the district court. The district court found that the agency had violated FOIA and ordered “that the Government shall release the requested benefits data each year immediately after the Lock Down/final Data Submission Deadline.”

The government appealed the order’s requirement to release such information “each year,” which it contended “essentially gives [the plaintiff] ‘automatic access’” to data without even requiring [it] to file a FOIA request. It contended, further, that FOIA does not authorize injunctions requiring the release of documents that do not yet exist. The D.C. Circuit rejected this latter argument, saying it has twice authorized prospective injunctions. However, although the district court's equitable powers are broad, the court said that it has required, even in the face of conceded agency recalcitrance in complying with FOIA, that the district court address, in determining whether injunctive relief would be appropriate, the likelihood of continued delinquent conduct by the agency. A government defendant is presumed to adhere to the law declared by the court. Here, the district court had failed to make such a determination, so the D.C. Circuit reversed the order granting prospective relief.

Judge Randolph concurred but thought it worth emphasizing that although equitable remedies are discretionary, they are not left to the district court's “inclination, but to its judgment; and its judgment is to be guided by sound legal principles.”