

ADMINISTRATIVE & REGULATORY LAW NEWS

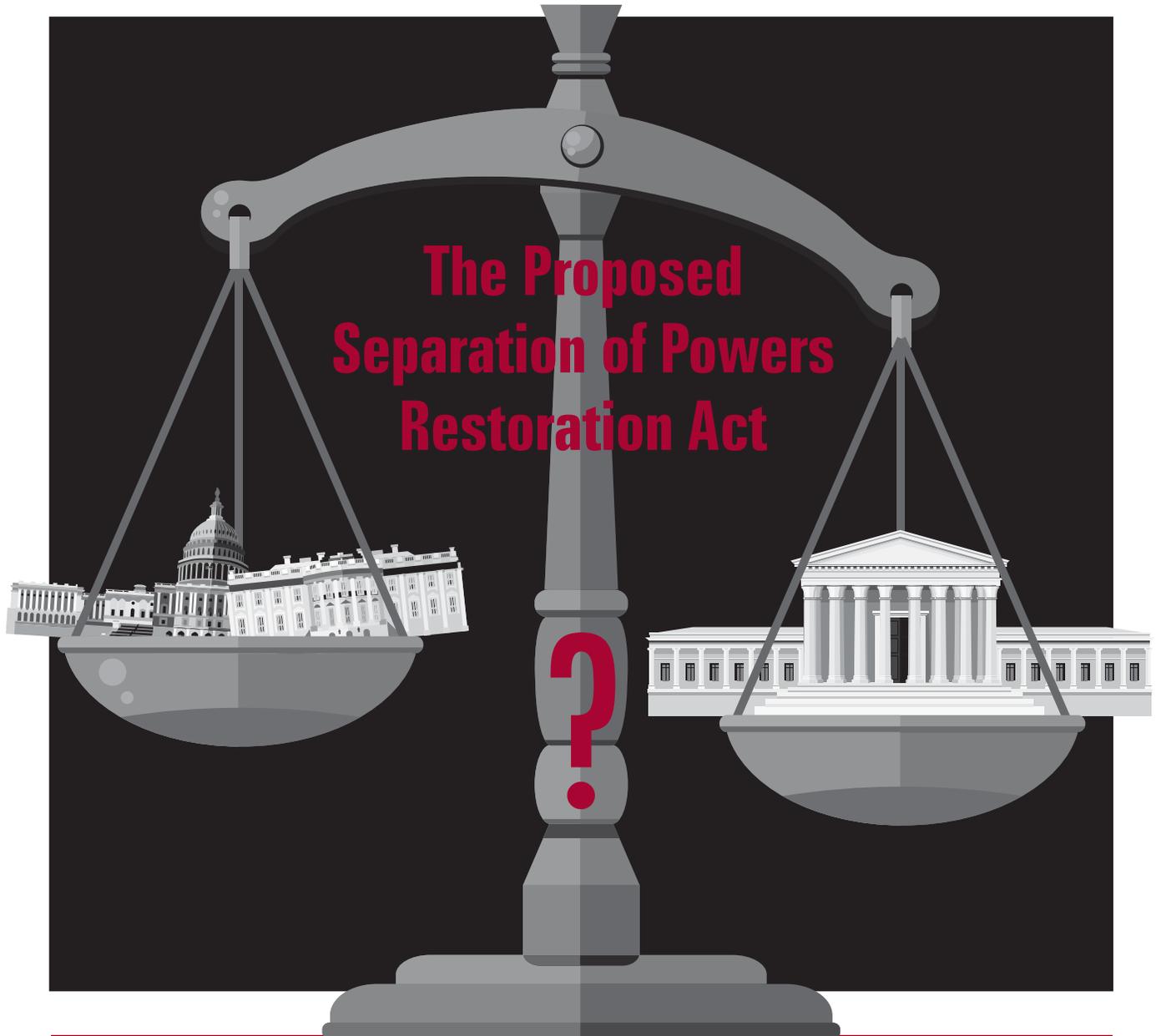


Section of Administrative Law & Regulatory Practice

Vol. 41, No. 4

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USDA Deputy Administrator Marks Animal Welfare Act Milestone

FOIA and the Controversial Home Server

FCC Now Trumps FTC in Writing Broadband Privacy Rules?

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ABA ANNUAL MEETING

Grand Hyatt San Francisco
San Francisco, California

Section Council Meeting, Membership Meeting & Elections

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8 am–4 pm

Section Dinner

Saturday August 6, 2016
6:30–9:30 pm
Morton's The Steakhouse

11TH ANNUAL HOMELAND SECURITY LAW INSTITUTE

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Thursday, August 25, 2016
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ABA Headquarters, Washington, DC

FALL SECTION COUNCIL MEETING

Annual Section Dinner & Awards
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Saturday October 29, 2016
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ADMINISTRATIVE LAW CONFERENCE

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Walter E. Washington Convention Center,
Washington, DC

MID-YEAR SECTION COUNCIL MEETING

Saturday, February 4, 2017
ABA Mid-Year Meeting
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13TH ANNUAL ADMINISTRATIVE LAW & REGULATORY PRACTICE INSTITUTE

March 2017
Dates TBD
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SPRING SECTION COUNCIL MEETING & DINNER

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Dates & Location TBD

ANNUAL SECTION COUNCIL MEETING, MEMBERSHIP MEETING & ELECTIONS & SECTION DINNER

Saturday August 12, 2017
ABA Annual Meeting
New York, NY

Chair's Message



Jeff Rosen

This is my final column, completing a year for which I owe thanks to so many terrific people within our Section who have contributed so much to our programs, publications, policy development, and other activities. With the annual meeting upcoming in San Francisco in August, I want to mention that the Section has a proposed resolution concerning the topic of agencies using privately-developed rules “incorporated by reference” scheduled for presentation to the House of Delegates, and, separately, the leaders of our Section’s working group on regulatory proposals for the next Administration will update the Council for a discussion about those. And, as at our other Council meetings this year, we will again benefit from informal remarks from a judicial guest, as Judge N. Randy Smith from the Ninth Circuit has agreed to join us at the August meeting. Our Council meetings are open to members, so if you will be at the ABA annual meeting, consider visiting the Council meeting.

As my year as chair heads to a close, I would like to harken back to the Section’s origins, as I did in my first column back in Fall 2015. I recently re-read the very first report from the Section’s predecessor committee in 1933, and was struck by the concerns that gave rise to it, including:

to study and report...on problems raised by the growing multiplicity of administrative tribunals and by the apparently irresistible tendency to delegate the promulgation of regulations and the hearing and determination of controversies to such tribunals, and

the legislation enacted during the first session of the 73rd Congress...represents an advance of federal administrative machinery, on a scale and to an extent never before attempted, into fields not heretofore brought under federal regulation.

Report of the Special Committee on Administrative Law, 56 Annu. Rep. A.B.A. 407, 408 (1933). Sound familiar? Later in the report, the committee observed:

One interesting result of these new developments is that, to a greater extent than ever before, the lawyer must look to the President’s executive orders and to the releases and announcements of the several administrative agencies for accurate and up-to-date knowledge of the existing state of the law.

Id. at 421. That was written in the early part of an Administration that issued more than 3400 Executive Orders, but

there have been nearly 4200 more of them in the years after 1945 that lawyers sometimes need to know. Perhaps even more notably, the Code of Federal Regulations has expanded from 22,877 pages in 1960 to 177,107 pages now.

Then, and now, one of the beneficial roles of the Section is to help lawyers who work in all types of settings—such as agency counsel, private practitioners, academics, and judges—to stay current on these issues and the laws, regulations, and orders associated with them. Our programs and publications this year served that purpose well, with historically high levels of attendees and participants. Many of the Section’s free programs were recorded and are on our website—take a look and listen! See http://www.americanbar.org/groups/administrative_law/events_cle/2016.html.

As one who has worked both in private practice and as an agency general counsel, I am acutely aware that lawyers in different settings have different roles. For example, in the private law realm, it is often the case that a lawyer can advise that if something is not prohibited, then it is permitted. By contrast, responsible agency lawyers can often face quite a different posture, because in a constitutional system of limited government, they often must advise instead that our government *cannot* proceed except to the extent to which an agency has been authorized to do so in a statute by Congress. That is something that should not be overlooked or forgotten.

And that, perhaps, is a reminder that the Section usefully takes us back to first principles on occasion. Going back to the 1933 Report, the committee observed:

At the threshold of such an inquiry is the difficulty of defining administrative law...

In general, it may be said that administrative law results from the reposing of what are essentially legislative or judicial functions (or both) in an official or board belonging to the executive branch of the government or in an independent official or board.

Id. at 409–410. Recently, on June 15, 2016, through the efforts of Council member Adam White, we hosted a revival of the Section’s “Great Debate” series, in which Professor Hamburger of Columbia and Professor Vladek of Georgetown, moderated by Judge Randolph from the D.C. Circuit, discussed “*Chevron* Bias and the Administrative State.” And elsewhere in this issue there are several articles about the Separation of Powers Restoration Act pending before Congress. In addition to the topic of judicial deference, these

remind us of the “big picture” issues about the operation of our government in the context of our constitutional order, our history, and today’s economy and politics. Many of the articles and books that have won the Section’s awards for scholarship do that, too, so stay tuned next Fall for this year’s award winners. (The list of previous award winners is available on the Section website, and is worth reading, as are the award-winning publications themselves. See http://www.americanbar.org/groups/administrative_law/initiatives_awards.html). And I would be remiss not to mention the great opportunity to read top experts’ commentary on issues both broad and narrow on the Section’s joint blog with the Yale Journal of Regulation; take a look at that, too! See <http://www.yalejreg.com/blog>.

Administrative law is always important, and perhaps now more than ever. For example, since 2009, the President has vetoed only ten bills that arrived on his desk, but five of those vetoes—50%—have been of legislative resolutions disapproving of regulations under the Congressional Review Act. Those five CRA resolutions related to rules from four different federal agencies: EPA, NLRB, the Department of Labor, and the Army Corps of Engineers.

With regard to the best-known statute in administrative law, the Administrative Procedure Act, it thus bears mention again that Resolution 106B, which the ABA House of Delegates adopted earlier this year, will remain a significant contribution from the Section, because it includes useful, consensus suggestions about improving the rulemaking provisions of the APA. As such, it falls squarely in the Section’s long tradition of proposing ways to improve the operation of our government, and it follows in the path of earlier ABA proposals that emphasized the need to improve the Administrative Procedure Act of 1946. See e.g., *ABA Proposals For Amendments to the Administrative Procedure Act*, 24 Admin. L. Rev. 371 (Fall 1972); Robert M. Benjamin, *A Lawyer’s View of Administrative Procedure: The American Bar Association Program*, 26 LAW AND CONTEMPORARY PROBLEMS 203 (Spring 1961). As then-ABA President David Simmons noted while testifying in favor of the APA bill in 1945, “[w]e need an administrative procedure act, but it is only a beginning.” Statement Before House Committee on Administrative Procedure Bills.” *A.B.A.J.* 31.8 (1945): 438-39.

In preparing this final column, I am grateful to all those who contributed to the Section’s activities this past year, some of whom have been mentioned in this or previous columns, as well as the many others whose good works advanced the Section and its mission. Many of these efforts have fulfilled the Section’s 2013 Strategic Implementation Plan, designed to expand what we do and to provide even

greater value to our members. (The Plan is available at: http://www.americanbar.org/groups/administrative_law/about_us.html, and a summary of the most recent year will also be posted on the Section website.)

We have now accomplished most of the Plan’s specifications such as expanded educational and topical programs for members; a new joint venture blog and an upgraded website; enhancements to our existing publications, and new features such as ALR Accord, and weekly summaries of D.C. Circuit administrative law decisions; some vital new committees for Legal History, Legal Education, and Regulated Parties’ General Counsels; a more engaged format for Council meetings, including guest speakers; and important new policy proposals. Indeed, we have now implemented nearly all aspects of Parts I-VIII of the Plan. Because of the engagement and contributions of so many of you, the Section is well positioned to continue on the path that has been set in place by that Plan, and to complete its remaining elements.

So allow me to reference back to the 1933 Report one more time:

The members of the Association are earnestly urged to communicate their suggestions and criticisms...to the [Special Committee on Administrative Law].

Id. at 415. This Section exists for its members. It can and should continue to be a productive and constructive organization, as was the aim from its beginning. Our members are a diverse group of lawyers from all realms of regulatory practice, with much to offer. The Section has an excellent group of Officers, Council members, and Committee leaders—but always needs more, so I hope many additional members will choose to get involved. Though I remain an officer for one more year when I become Last Retiring Chair, I want to wish my successors every success, and I especially look forward to seeing Section members at events, programs, and other activities in the future.

Jeff Rosen

Chair, ABA Section of Administrative Law & Regulatory Practice ○

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ADMINISTRATIVE & REGULATORY LAW NEWS

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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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The Proposed Separation of Powers Restoration Act of 2016

In what follows, *Administrative & Regulatory Law News* (ARLN) is pleased to present five diverse perspectives on The Separation of Powers Restoration Act, which was recently passed in the House and is currently pending in the Senate. The proposed Act would amend § 706 of the Administrative Procedure Act (APA) to require a *de novo* standard of review for “all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules.” Foremost, the Act seeks to legislatively override the Supreme Court’s deference doctrines in *Chevron, U.S.A., Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (concerning agency interpretations of statutes) and *Auer v. Robbins*, 519 U.S. 452 (1997) (concerning agency interpretations of regulations). See

also Kevin Stack et al., *Auer Deference in Practice*, ADMIN. & REG. LAW NEWS, Vol. 40, No. 2, at 11 (Winter 2015) (summarizing views of conference panelists Scott Angstreich, Aditi Prabhu, Matthew Stevenson, and Amy Wildermuth).

First, ARLN is delighted to present the views of Senator Orrin Hatch, who sponsored the Senate version of the bill, and previously presented his views at a joint program of the ABA Administrative Law Section and the Hoover Institution at The Second Hoover Commission’s 60th Anniversary: Lessons for Regulatory Reform. See <http://www.hoover.org/events/second-hoover-commissions-60th-anniversary>. We are grateful to have his perspectives shared again here. Following Senator Hatch’s comments, we

are also delighted to present four views from the academy. In order of appearance, these contributions come from Professors Kristin Hickman (University of Minnesota), Jack Beermann (Boston University), Emily Hammond (George Washington University), and Eric Ip (University of Hong Kong).

The authors’ respective views will speak for themselves. When considered together, however, they capture a number of familiar themes and tensions in administrative law, constitutionalism, and institutional role. In that sense, the debate surrounding the proposed Separation of Powers Restoration Act is an old one recast for modern times.

— David S. Rubenstein

The Proposed Separation of Powers Restoration Act: Making Agencies Accountable

By Senator Orrin G. Hatch*

In March 2016, I sponsored The Separation of Powers Restoration Act (S.2724) to address a fundamental problem with administrative governance: the lack of agency accountability. For many years, the courts held that when considering the meaning of legal text, “[i]t is for the courts, not the [agencies], ultimately to determine as a matter of law what they include.” *Federal Trade Commission v. Gatz*, 253 U.S. 421, 427 (1920). This approach

was anchored in Chief Justice John Marshall’s seminal words in *Marbury v. Madison* that “it is emphatically the province and duty of the Judicial Department to say what the law is.” 5 U.S. 137, 177 (1803).

But with the advent of judicial deference to agencies’ interpretations of the law, known best as the *Chevron* doctrine and its progeny, the courts now defer to an agency’s interpretation of a statute as long as the statute is “ambiguous” and the agency’s reading is “reasonable.” *Chevron, U.S.A., Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 833–34, 842–43 (1984). In practice, these terms are interpreted extraordinarily broadly to give



Senator Orrin G. Hatch (R-Utah) is the longest serving sitting senator, representing Utah in Congress since 1977.

agencies essentially unbridled power to say what the law is. The Separation of Powers Restoration Act would clarify that courts must decide “*de novo* all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules.”

For many years, the various federal administrative agencies have steadily

* Comments adapted from Senator Hatch’s Keynote Address to the ABA/Hoover Institution Conference on Regulatory Reform, March 16, 2016.

accumulated the power to govern. This phenomenon's occurrence is no accident. Since the dawn of the Progressive Movement, many of those on the Left have argued that an increasingly complex and high-tech world requires government by experts. Only these experts, heavily shielded from the turbulence of politics, could craft the sophisticated policies needed to keep us healthy and safe in the modern world. For more than a century, the federal government has increasingly gravitated toward this vision of governance—agency after agency, mandate after mandate. As a practical matter, agencies' power to regulate has supplanted the legislative process as the primary means by which the policies that affect our lives are made.

This steady march toward administrative governance is naturally in tension with the Constitution's arrangement of powers. After all, one of the central precepts undergirding the Constitution is the notion that the preservation of liberty depends on the separation of powers among branches capable of checking the excesses of each other. But for those of us uncomfortable with the extent of the administrative state's enormous growth, we must also acknowledge that many of our fellow citizens do not share our zeal for the finer points of structural constitutional law. Indeed, in the past, progressives have successfully labeled most regulatory reform efforts as attempts to discard even the most basic regulations, trotting out a parade of horrors like dirty air and polluted water and poisonous children's toys. Such rhetoric holds great sway with the general public because most of us rightly want clean air and water, safe children's toys, and the like.

As a society, we have come to expect and rely on a basic level of health and safety regulation. As much as we may deplore the modern administrative state's constitutional infirmities, seeking to tear down the entire regulatory state in one fell swoop—or to end the federal



Left to right, Section Chair Jeffrey Rosen, and Hoover Institute Director Michael Franc greet Senator Orrin Hatch as he arrives to give the keynote address at a joint program of the Section and the Institute on The Second Hoover Commission's 60th Anniversary: Lessons for Regulatory Reform, March 16, 2016, Washington D.C.

government's power to regulate full stop—does not amount to a serious governing agenda. Instead, we should tailor our proposals to respond to the pressing problems presented by an overweening administrative state, a strategy that I believe will produce serious progress in restoring the separation of powers and the liberty it protects.

One particularly troubling area in need of reform that has thus far escaped much legislative attention is the role the federal judiciary plays in the regulatory process. Given the broad authorities Congress has ceded to the administrative agencies, the courts often stand as the only true independent check on increasingly out-of-control regulators. A primary means by which the judiciary checks the otherwise-unbridled powers of federal bureaucracy is by evaluating whether an agency's action violates the law. In such cases, the paramount matter in contention is the meaning of the law at issue.

Many on both sides of the aisle have argued against *Chevron* from its inception, arguing that the courts' constitutional duty to interpret the law cannot be delegated—either voluntarily by judges or involuntarily by Congress—to the executive. See Thomas W. Merrill & Kristin E.

Hickman, *Chevron's Domain*, 89 GEO. L. J. 833, 864–867, 870–872 (2001); Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 6 n.13 (2013). Moreover, *Chevron* is plainly inconsistent with the governing language of the Administrative Procedure Act, which says that “the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706 (2006); see also *The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies: Hearing Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 12 (2016). Nevertheless, a number of prominent conservatives embraced *Chevron* as a means to prevent liberal judges from striking down the deregulatory decisions of a conservative administration. See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, 520–21 (1989).

Experience has since seriously undermined the conservative case for *Chevron* deference. This case was premised on the hope that a

conservative administration would be able to administratively roll back the federal regulatory burden; however, despite some initial success in the early Reagan administration, the regulatory burden has continued to grow under administrations of both parties. In fact, experience has largely demonstrated that even the most committed and savvy conservative political appointees have struggled to gain control of an agency's agenda from the entrenched

pro-regulatory bureaucracy. *See, e.g., U.S. SENATE COMM. ON ENV'T & PUB. WORKS MINORITY STAFF, EPA'S PLAYBOOK UNVEILED: A STORY OF FRAUD, DECEIT, AND SECRET SCIENCE* (2014). And even when conservative administrations have succeeded in pushing through pro-growth agency actions, *Chevron* has not prevented activist judges from overturning these actions, such as in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which

overturned the Bush administration's decision not to regulate greenhouse gasses under the Clean Air Act. Instead, *Chevron* simply acts to limit the power of good judges to hold the bureaucracy accountable to the law.

Restoring the constitutionally proper judicial role is vital to returning accountability to the regulatory process. The Separation of Powers Restoration Act is an important step in that direction.



The Proposed Separation of Powers Restoration Act: Why?

By Kristin E. Hickman*

Section 706 of the Administrative Procedure Act (APA) calls upon reviewing courts to “decide all relevant questions of law [and] interpret constitutional and statutory provisions.” That same provision goes on to instruct reviewing courts to set aside agency actions they find to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The Court has never tied the *Chevron* standard of review very tightly to the APA's text. To the extent it has tried, the Court has occasionally associated *Chevron* with the APA's arbitrary and capricious language. *See, e.g., Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011). Meanwhile, as Justice Scalia observed in his dissent in *United States v. Mead Corp.*, the Court's *Chevron* jurisprudence has largely ignored the APA's instruction that courts “decide all relevant questions of law.” 533 U.S. 218, 241 & n.2 (Scalia, J., dissenting).

The Separation of Powers Restoration Act of 2016 proposes to amend APA § 706 to require courts to “decide *de novo* all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules”

(emphasis added). Statements by the Act's sponsors indicate that their primary goal is to eliminate the deferential *Chevron* standard of review for agency interpretations of statutes. The *Auer* standard of deferring to an agency's interpretations of its own regulations is also a stated target. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (counseling deference to such interpretations unless they are “plainly erroneous or inconsistent with the regulation”). Given the Court's efforts to carve back *Auer*'s scope in cases like *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156 (2012), as well as strong support for overturning *Auer* altogether among at least a plurality of the justices, *Auer* is clearly a secondary target.

Irrespective of the intent of the Act's sponsors, however, the actual text of their amendment seems unlikely to make much of a dent in *Chevron* deference, for the simple reason that *Chevron* is not irreconcilable with *de novo* review.

The *Chevron* standard is highly malleable. Although the case itself articulates two steps—looking first for statutory clarity, then interpretive reasonableness in the face of statutory ambiguity—judges and legal scholars have always disagreed over what

each of those two steps entails and how they work together. In some cases, judges seem ready to find ambiguity simply because the statute does not directly and explicitly address the question at issue—an approach that would seem to move most cases directly to an evaluation of reasonableness. In other cases, judges go to great lengths seemingly to avoid finding statutes ambiguous. Analyzing existing case law, Matthew Stephenson and Adrian Vermeule maintained in *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009), that *Chevron* really only entails a single inquiry: “whether the agency's construction is permissible as a matter of statutory interpretation.” Mark Seidenfeld argued in *A Syncopated Chevron*, 73 TEX. L. REV. 83 (1994), that courts should place more weight on the second step of scrutinizing the reasonableness of the agency's justification for choosing one interpretation over another, and plenty of cases seem to follow that suggestion. *Mead* is supposedly a Step Zero, yet Justice Breyer seems particularly intent upon merging *Mead*, *Chevron*, and *Skidmore* into a single inquiry of whether Congress would want the courts to defer to the particular agency interpretation at issue. *E.g., City of Arlington v. FCC*,

* Distinguished McKnight University Professor and Harlan Albert Rogers Professor of Law, University of Minnesota Law School.

133 S.Ct. 1863, 1875 (2013) (Breyer, J., concurring); see also Kristin E. Hickman, *The Three Phases of Mead*, 83 *FORDHAM L. REV.* 527, 541–45 (2014) (synthesizing several Breyer opinions). Meanwhile, courts continue to ponder without clear resolution whether they should consider legislative history or substantive canons of construction at *Chevron* step one or step two.

Nevertheless, at least in theory, *Chevron* is not incompatible with de novo review, with a reviewing court turning to deference only if statutory meaning cannot be readily determined. The *Chevron* Court expressly called for “employing traditional tools of statutory construction” to ascertain congressional intent regarding statutory meaning, 467 U.S. 837, 843 n.9 (1984). Arguably, therefore, a reviewing court should only turn to deference and the reasonableness inquiry described as *Chevron* step two if the statute in question is not susceptible to interpretation using those traditional methods. And many opinions applying *Chevron* take precisely that approach. See, e.g., *FDA*

v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

It is fair to observe that judges sometimes do not take a very thorough approach to evaluating statutory meaning in approaching a *Chevron* analysis. For just one recent example, consider *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014), in which six justices in concurring and dissenting opinions criticized the plurality for moving straight to the reasonableness inquiry of *Chevron* step two simply because a snippet of statutory text seemed facially inconsistent.

But sometimes, too, statutory questions legitimately lack clear answers no matter how attentive a court is to text, history, and purpose. At that point of statutory ambiguity, courts have naught else to do *beyond* either nakedly choosing their own policy preferences or assessing whether the agency’s choice seems reasonable. Many judges are uncomfortable, and rightly so, with the former option. Indeed, the late Justice Scalia’s description of *Chevron* review in *Judicial Deference to Administrative Interpretations of Law*, 1989 *DUKE L.J.* 511, is entirely consistent with this

view—contending that *Chevron*’s inquiry into statutory meaning should include all of text, history, and even some amount of policy evaluation, but acknowledging that sometimes judges are wise to acquiesce to the judgment of administrative agencies. The difficulty is and always has been, whether under *Chevron* or otherwise, ascertaining when and under what circumstances such judicial acquiescence is appropriate.

Undoubtedly, the Supreme Court could do much more than it has to reconcile *Chevron* review with the text of APA § 706. Given *Chevron*’s malleability, such reconciliation seems at least theoretically plausible, whether or not APA § 706 more explicitly calls for de novo review of legal questions. Until Congress starts writing clearer statutes (which seems difficult if not impossible) or instructs and convinces courts to make their own policy choices in the face of statutory ambiguity (which seems highly unlikely), judicial deference is here to stay. The proposed Separation of Powers Restoration Act will accomplish little if anything, so why bother?



The Proposed Separation of Powers Restoration Act Goes Too Far

By Jack M. Beermann*

If passed, the Separation of Powers Restoration Act would require federal courts conducting judicial review of agency action to decide “de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules.” Although I have long been highly critical of *Chevron*, see, e.g., Jack M. Beermann, *End the*

Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should be Overruled, 42 *CONN. L. REV.* 9 (2010), and also have misgivings about *Auer* deference, I fear that the proposed Act goes too far in completely eliminating deference to agency legal determinations.

In testimony before the Regulatory Reform, Commercial and Antitrust Law subcommittee of the House Committee on the Judiciary, from which these comments are drawn, I have advocated for a more moderate solution that would encourage courts to apply the factors articulated in

Skidmore v. Swift & Co., 323 U.S. 134 (1944), to determine how much, if any, deference should be afforded to agency legal determinations. Pursuant to *Skidmore*, agency interpretations deserve deference when the agency has thoroughly considered the question, when its reasoning makes good sense and when its views have been consistent (and thus not shifting with the political winds).

Before returning to the substance of my proposal, it is appropriate to point out that the characterization of deference to agency legal determinations as a violation of separation of

* Professor of Law, Boston University School of Law. Much of this article is drawn from Professor Beermann’s recent testimony before the House Committee on Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law (May 17, 2016).

powers is misguided. While it may appear that judicial deference to agency legal decisions is inconsistent with fundamental notions of the judicial role, as embodied in *Marbury v. Madison*'s famous statement that "it is emphatically the province and duty of the judicial department to say what the law is," 5 U.S. 137, 177 (1803), judicial deference to agency legal determinations in most contexts involving judicial review does not implicate separation of powers for the simple reason that there is no constitutional entitlement to judicial review. Congress could constitutionally eliminate judicial review of rulemaking and many adjudicatory decisions, except in those situations in which judicial review is required to satisfy Article III concerns over agency adjudication of private rights.

In light of the long tradition of judicial consideration of agency views when reviewing agency legal determinations, The Separation of Powers Restoration Act is too blunt. It would not recognize situations in which Congress intends that reviewing courts defer to agency legal determinations, for example in highly technical or sensitive areas in which Congress expects agencies to clarify statutory ambiguities or when Congress sometimes explicitly indicates that an agency should define a statutory term. Because there are contexts in which Congress has traditionally favored judicial deference to agency legal determinations, the proposal would force Congress to make explicit exceptions to its

application or it would frustrate Congress's intent in such contexts.

Thus, while the proposal is a laudable effort to dispel some of the negative consequences and confusion caused by the *Chevron* doctrine, insofar as it would disable reviewing courts from taking into account the views of an administering agency on questions of statutory interpretation and make it difficult for Congress to allow deference to administering agencies when appropriate, it may go too far.

In my view, it would be appropriate for Congress to craft legislation in reaction to all of the problems *Chevron* deference has caused without totally ruling out judicial deference to agency views on legal conclusions. My suggestion is to add the following language to APA § 706, after subsection 2(F):

Unless expressly required otherwise by statute, the reviewing court shall decide all questions of law de novo, with due regard for the views of the agency administering the statute and any other agency involved in the decisionmaking process.

Under this standard, courts would apply the pre-APA *Skidmore* factors for determining how much to defer to agency interpretations, but they would have flexibility to shape the deference doctrine to meet modern concerns and legal doctrine.

The "due regard" language would allow courts to calibrate the degree of deference to the particular situation. There might be contexts in

which minimal to no deference is appropriate; for example, where Congress has expressed strong policy preferences but in accidentally ambiguous language. There may also be statutory gaps that Congress would expect agencies to fill in accord with Congress's intent rather than by agency policy views. There may be other contexts, however, in which the language, structure, and purposes of a statute indicate that Congress expects reviewing courts to defer to persuasive agency reasoning concerning the proper construction of a statute or statutory gaps that Congress would have wanted an agency to fill in line with consistent administrative policy.

Concerns over excessive deference would be met by application of the *Skidmore* factors, informed by fidelity to Congress's expressed preference for less deference than has been the case under *Chevron*. The *Skidmore* factors are good indications that the agency has applied its expertise to the matter and acted with due regard to Congress's intent underlying the statute being construed.

In conclusion, while there is no doubt that reform to *Chevron* and *Auer* is needed, the proposed Separation of Powers Restoration Act goes too far in eliminating judicial consideration of agency views when reviewing agency legal determinations. A more moderate reform, perhaps in the form of revising the *Skidmore* factors, would be preferable.

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Four Flaws of the Proposed Separation of Powers Restoration Act

By Emily Hammond*

Judicial review of federal agencies is perhaps the most scrutinized, and sometimes most inscrutable, aspect of administrative law. And we ask a great deal of courts when they review agencies. They police the jurisdictional boundaries set by Congress, they guard against serious errors, and the fact of review incentivizes agencies to engage in legitimizing behaviors before the fact, such as promoting participation, deliberation, and transparency. In turn, these behaviors and judicial review facilitate external monitoring of agency behavior, whether by interested parties, the press, the executive, or Congress. See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749 (2007); Emily Hammond, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733 (2011).

These things could be achieved with *de novo* judicial review, but there are important reasons for giving some level of deference to agencies, most of which relate to comparative institutional competence and the constitutional roles of each of the three branches. When courts review agencies' interpretations of statutes they administer, the two-step test first applied in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is directed at these institutional considerations.

Indeed, as all the relevant cases suggest and as scores of scholars have

articulated, there are often good reasons for deference by a court to an agency's judgment. Agencies have experience with the statutes they administer and the challenges that arise under the applicable regulatory regimes. Relative to the courts, agencies also have superior expertise, particularly with respect to complex scientific or technical matters. Agency officials are not elected, but they are subject to the oversight of the President, so there is more democratic accountability at the agencies than at the courts. All of these rationales stem from separation-of-powers principles relative to the court-executive relationship.

But there are also important separation-of-powers principles at work relevant to the legislative branch. First, courts defer to agencies because Congress has assigned to them—not to the courts—the duties associated with our major statutory schemes. After thirty years' experience with *Chevron*, moreover, Congress can craft substantive statutory language more tightly if it wants to cabin an agency's discretion in carrying out its mandate. The *Chevron* doctrine also facilitates Congress's ability to monitor agencies by incentivizing agencies to use procedures that are more transparent, a point to which I will return below. Finally, *Chevron* is an exercise in judicial self-restraint: by deferring to agencies' reasonable constructions, the unelected courts avoid inserting their own policy preferences into administrative law. See, e.g., Mark Seidenfeld, *Chevron's Foundation*, 86 NOTRE DAME L. REV. 273 (2011).

The proposed Separation of Powers Restoration Act's purpose is to demolish *Chevron*, by amending § 706 of the Administrative Procedure Act (APA) to require a *de novo*

standard of review for “all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules.”

Here are four flaws with the bill:

- **It's naked politics.** The legislators who support the bill are unhappy with President Obama's policies—especially, e.g., the Clean Power Plan and the Waters of the United States rule.
- **It overreacts.** These legislators' short-sighted remedy is to give the courts more power—but they forget that *Chevron* does not require courts to adhere to agencies' interpretations. For examples, consider the Court's decisions in *King v. Burwell*, 135 S. Ct. 2480 (2015); *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014); *Massachusetts v. EPA*, 549 U.S. 497 (2007) (deciding matters of statutory interpretation at *Chevron* step one).
- **It presents (not fixes) separation-of-powers problems.** The bill is disruptive to the careful equilibrium that the full body of administrative law doctrine seeks to achieve. Administrative law is not perfect, but this bill tilts too strongly in favor of judicial power, at the expense of the other two branches.
- **It creates confusion.** On the other hand, it is hard to predict the bill's effect. The *Chevron* doctrine includes a component of *de novo* review, which takes place at step one. If Congress has spoken clearly, it is up to the courts to independently recognize and enforce that clarity. But step one is already the focus of much

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debate regarding *how* this *de novo* step should be conducted. Emily Hammond et al., *Judicial Review of Statutory Issues Under the Chevron Doctrine*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW

OF FEDERAL AGENCIES (2015). In addition, it is not always easy to separate questions of law from questions of fact. Courts grappled with that problem prior to *Chevron*, see, e.g., *Skidmore v.*

Swift & Co., 323 U.S. 134 (1944); *NLRB v. Hearst*, 322 U.S. 111 (1944), and will continue to do so in the future—regardless of the applicable reviewability standard’s verbal formulation.



Judicial Scrutiny of Administrative Statutory Interpretation: A Comparative Perspective

Eric C. Ip*

The year 1984 marked a break in Anglo-American administrative law: the highest courts of the United States and the United Kingdom delivered two remarkable but diametrically opposite judgments—*Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and *Council of Civil Service Unions v. Minister for the Civil Service* [1984] 3 W.L.R. 1174—which permanently redefined the way administrative statutory interpretation was to be judicially reviewed. *Chevron*’s controversial and counter-intuitive doctrine, requiring courts of law to defer to reasonable administrative interpretations of ambiguous statutory language, set U.S. administrative law apart from most of the common law world, which has followed the lead of the U.K. in the direction of judicial supremacy. As

explained below, *de novo* judicial review of agency interpretation fits well in other systems, but less so for the U.S. system.

Supporters of the proposed Separation of Powers Restoration Act of 2016 must envy the record of the Appellate Committee of the House of Lords in scrutinizing administrative interpretation. In a nutshell, English case law demands that administrative officials provide an interpretation that is legally “correct” in the eyes of a reviewing court (*Council of Civil Service Unions*), on the basis of the presumption that Parliament will rarely, if ever, intend to confer on administrators the competence to determine questions of law with finality (*Anisminic v. Foreign Compensation Commission* [1969] 2 A.C. 147; *O’Reilly v Mackman* [1983] 2 A.C. 237; and *R v. Hull University Visitor, ex parte Page* [1993] A.C. 682). In *Re Racal Communication Ltd* [1981] A.C. 374, 383 the Lords clarified

the implications of this presumption all the more: “Parliament intends to confine [administrative] power to answering the question as it has been so defined: and if there has been any doubt as to what that question is, that is a matter for courts of law to resolve in fulfillment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity.”

In *R v. Monopolies and Mergers Commission, ex parte South Yorkshire Transport* [1993] 1 W.L.R. 23, 32 the Lords conceded that the courts should not override a reasonable administrative interpretation if it concerns an “extremely vague” legislative provision. For reasons outlined below, extremely vague provisions are rarely encountered in English administrative disputes, so it should be no surprise that this small concession has never yielded any significant consequences. In *R (Prolife Alliance) v. British Broadcasting Corporation* [2004]

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1 A.C. 185, 240 the majority rejected the concept of “deference” in matters of law because of “its overtones of servility, or perhaps gracious concession.” In *Regina (Cart) v. Upper Tribunal* [2012] 1 A.C. 663, 689–690 the new U.K. Supreme Court unequivocally reaffirmed that “[t]he rule of law requires that the laws enacted by Parliament, together with the principles of common law that subsist with those laws, are enforced by a judiciary that is independent of the legislature and the executive.”

In a recent article, *Doctrinal Antithesis in Anglo-American Administrative Law*, 22 SUP. CT. ECON. REV. 147 (2014), I explained in depth this significant divergence with reference to the broader differences between the American and British polities. In my view, the persistence of “correctness review” in England

and many other Commonwealth countries has much to do with the function of administrative interpretation in the broader legislative system. Parliamentary majorities in the House of Commons have, since the early twentieth century, escaped systemic constraints, whether by federalism, supermajority rules, a codified constitution, or vetoes by the monarch or the House of Lords. Commons majorities control the Government through a system of strong party discipline: *qua* Parliament, they set forth fundamental principles in Acts, and *qua* the Cabinet, they flesh out the details of these principles through statutory instruments. Consequently, there is little difficulty in crafting extremely detailed legislation that circumscribes the scope of administrative autonomy and little need to delegate to agencies the power to

resolve statutory ambiguities with authoritative interpretations of long-lasting policy impact. Against this backdrop, judicial supremacy over statutory meaning seems the best approach for courts to discharge their functions *vis-à-vis* the administrative state.

But the context of administrative interpretation in the U.S. is fundamentally different. The polarization, partisanship and gridlock that have beset Congress in recent decades have rendered widespread and systemic statutory ambiguities and inconsistencies unavoidable. Thus, administrative agencies are ceded considerable leeway, in the guise of “statutory interpretation,” to make substantive policy judgments rooted in scientific information. Such specification of vague statutory provisions is policymaking in essence, and cannot

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be explicated in purely legal terms. As between judges, who are generalists, and specialist agencies oriented toward long-term outcomes, the latter are generally better positioned to resolve the almost endless profusion of interpretative ambiguities and

regulatory questions in the implementation of primary legislation. Agencies can authoritatively improvise the law without bringing the lawmaking system to a halt. Seen in this light, the *Chevron* doctrine is the reasonable and practical response to the prevailing

state of affairs. Any unilateral attempt by Congress to impose *de novo* review statutorily, before addressing the political dynamics that impelled *Chevron* in the first place, is bound to be futile, if not downright counter-productive.

Concluding Editorial Note

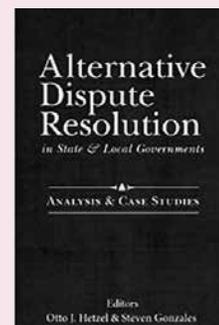
During the production stage of this ARLN volume, the White House announced that it would veto the proposed Act. See https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr4768r_20160622.pdf. Undeterred, the House version of the bill passed by a 240-171 vote on July 13, 2016. For the House Judiciary Committee's report, see <https://www.congress.gov/congressional-report/114th-congress/house-report/622/1>. More perspectives, both in favor and against the bill, are available in congressional testimony. See <https://judiciary.house.gov/hearing/h-r-4768-separation-powers-restoration-act-2016/>, <https://judiciary.house.gov/hearing/the-chevront-doctrine-constitutional-and-statutory-questions-in-judicial-deference-to-agencies/>, and <http://www.hsgac.senate.gov/hearings/examining-agency-use-of-deference-part-ii>. ○

Alternative Dispute Resolution in State & Local Governments, Analysis & Case Studies

Editors Otto J. Hetzel & Steven Gonzales

In recent years, alternative dispute resolution (ADR) has overtaken trial litigation as an cheaper and less complicated method of resolving disputes. This is especially true in government disputes, where the financial burden of litigation falls to the taxpayer. Many overburdened state and local governments have been turning to ADR to alleviate the both the strain on the taxpayers and the overburdened court system. For any lawyer in this field, understanding ADR isn't enough. One must understand the specific needs of state and local governments in order to succeed. This valuable guide, edited by Otto J. Hetzel and Professor Steven Gonzales, collects the thoughts and experiences of eight different ADR experts to analyze the history, usage, and future of state and local government ADR. This important information will position you for this groundbreaking change in government litigation, and help you serve your clients to the best of your abilities. Topics include:

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The Animal Welfare Act: Celebrating 50 Years of Regulatory Protection, Enforcement, and Education

By Deputy Administrator Bernadette Juarez*

Fifty years ago, in August 1966, President Lyndon B. Johnson signed what is now called the Animal Welfare Act (AWA) into law. A galvanizing event—the theft of a family dog, Pepper, sold to a research facility—captured the public’s attention and fostered congressional support for the law. Congress entrusted the U.S. Department of Agriculture (USDA) with authority to administer and enforce this groundbreaking legislation, the first federal statute aimed at protecting the welfare of animals used in research and experimentation.

Five decades later, I’m proud to lead Animal Care (AC), the program within USDA’s Animal and Plant Health Inspection Service (APHIS) that has the noble mission of ensuring the humane care and treatment of animals. Our ultimate goal remains the same—protecting animals by ensuring those who conduct regulated activities provide their animals with established standards of humane housing, handling, husbandry, and veterinary care, among other things.

Congressional amendments enacted since 1966 have refined standards of care and expanded the law’s reach to include animals bred for sale at the retail level, transported commercially, and exhibited to the public. The AWA also prohibits animal fighting ventures, with stiff penalties for sponsors and promoters. In addition, we have adapted our regulations to keep pace with emerging business practices and ensure we are using the latest science to better fulfill our charge.

* Deputy Administrator, Animal Care, U.S. Department of Agriculture, Animal and Plant Health Inspection Service.

Today we protect more than 2 million animals at more than 10,000 facilities—including animal breeders, research sites, zoos, circuses and commercial transporters—and we perform more than 10,000 unannounced inspections a year across the country to ensure the AWA’s minimum standards are protecting these animals. As we commemorate the 50th anniversary of this landmark law, I want to reflect on key regulatory and non-regulatory actions we have taken in recent years to improve the humane care and treatment of the millions of animals covered by the AWA.

In 2013, we updated our AWA regulations to close a loophole that allowed people to sell dogs, cats, and so-called ‘pocket pets’ sight unseen largely through Internet sales. AC



Deputy Administrator Bernadette Juarez is the first woman to lead the Animal Care program with USDA’s Animal and Plant Health Inspection Service, which administers the Animal Welfare and Horse Protection Acts. She previously directed APHIS’s Investigative and Enforcement Services, and served in USDA’s Office of the General Counsel.

The Passage of the Animal Welfare Act and Subsequent Amendments— A Legislative Timeline

The Laboratory Animal Welfare Act of 1966 / Set minimum standards and licensing requirements for certain animal dealers and pre-research laboratories for handling, identification, sale, and transport of cats, dogs, nonhuman primates, rabbits, hamsters, and guinea pigs.

1970 / Expanded the AWA to include all warm-blooded laboratory animals and incorporated exhibitors. Required the appropriate use of anesthetics and other tranquilizing drugs during animal experiments.

1976 / Outlawed the interstate or foreign transport of animals used in fighting ventures and refined standards for transporting animals. Established standards for shipping containers, food, water, rest, ventilation, temperature, and handling in order to promote better care during transport.

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received repeated complaints about the health and welfare of these animals upon arrival at their new homes. The emergence of these new business practices meant we needed to restore the intent of the AWA, leading

to the publication of a rule that brings people who sell animals, sight unseen, to the public under our regulatory framework if they maintain five or more breeding females and have a certain amount of gross sales. Since

the rule took effect, we have issued nearly 250 new licenses to these breeders, ensuring humane care and treatment of approximately 15,000 dogs and other animals.

In 2014, we established new regulations to require that dogs imported into the United States for resale meet health and safety standards. This rule ensures that these dogs are vaccinated against rabies and other diseases, in good health and over 6 months of age—safeguarding the dogs themselves, the public, and other animals.

Regulations are just one tool we use to ensure animals are treated humanely, but it can't be the only one. In the current regulatory climate, it can take several years to draft, propose and finalize a new regulation. With this in mind, we are committed to looking at non-regulatory solutions wherever possible to help ensure humane care and treatment of animals under our protection. And our experience has also taught us that working closely and directly with the regulated community—through learning and training opportunities centered on their AWA obligations and the importance of good animal welfare—is essential to accomplishing our critical mission.

For example, in 2010, we expanded learning opportunities by launching the Center for Animal Welfare. Located in Kansas City, Missouri, the Center provides science-based guidance and training in support of animal welfare initiatives within USDA and for our many stakeholders. The Center collaborates and partners with other animal welfare experts and serves as AC's national resource for science and technology in support of the AWA. The Center employs a team of specialists with a wide range of expertise in areas such as exotic animals, kennel management, biophysics, regulatory compliance, and training. All our experts share information regularly with the animal welfare community at symposia and through other types of outreach.

The Passage of the Animal Welfare Act and Subsequent Amendments—A Legislative Timeline

continued from page 13

Improved Standards for Laboratory Animals Act as part of the Food Security Act of 1985 / Added exercise requirements for dogs and psychological well-being for primates. Mandated the establishment of Institutional Animal Care and Use Committees (IACUCs) to oversee animal care and use at registered research facilities. IACUCs were given responsibility for ensuring that alternatives to animal use were explored when experiments involved pain or suffering or were unnecessarily duplicative in nature. The amendment also strengthened USDA's enforcement authority and established an information service at the National Agricultural Library (eventually the Animal Welfare Information Center (AWIC)) to provide resources on animal care and welfare, and alternatives for reducing animal distress and the number of animals used in laboratories.

1990 / Required all dogs and cats be held at shelters for at least 5 days before they are allowed to be sold to research facilities giving pet owners or prospective owners the chance to claim/adopt the animal and to ensure proper documentation and record keeping is performed to verify that the animals were obtained legally.

2002 / Changed the definition of animal to exclude birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research, narrowing the scope of animals excluded from AWA regulation.

The Animal Fighting Prohibition Act of 2007 / Strengthened the animal fighting ventures provisions by prohibiting the knowing selling, buying, transporting, or delivering, in interstate or foreign commerce, a knife, a gaffe, or any other sharp instrument for attachment to the leg of a bird for use in an animal fighting venture.

2008 / Addressed animal fighting, importation of dogs for resale and substantially increased the statutory maximum civil penalty for the AWA to \$10,000 per violation. (As with other federal statutes like the Clean Water Act, each day during which it continues is a separate offense.)

The Agricultural Act of 2014 / Granted USDA new authority to develop a de minimis exemption for the AWA's licensure requirements for dealers and exhibitors based upon the size of their business. It also included provisions that bar attendance at animal fighting ventures and imposed additional penalties for those who bring children under the age of 16. ○

Adapted from Legislative History of the Animal Welfare Act: Introduction, <https://awic.nal.usda.gov/legislative-history-animal-welfare-act/intro>, by Benjamin Adams, and Jean Larson, M.S., United States Department of Agriculture, National Agricultural Library, Animal Welfare Information Center.

One current Center initiative focuses on enhancing the pre-licensing process to ensure that people who want to breed animals for commercial sale have a thorough understanding of the AWA requirements up front, before we perform our initial pre-licensing inspection. This educational approach helps not only those who want to start these businesses but also benefits the animals that may soon be under their care by providing owners with a strong foundation of knowledge about the AWA and its requirements.

As another example, in the wake of Hurricane Katrina in 2005, AC created a new Emergency Program division to provide national leadership on the safety and well-being of pets during disasters. Katrina opened everyone's eyes to the fact that in an emergency, people won't leave their pets behind. To keep people safe, we need to take care of their pets too. To achieve this goal, AC promotes effective planning at the local, state, tribal and national level. Moreover, AC delivers training in the management of pets during disasters, and mobilizes highly-trained personnel to provide guidance and assistance to local officials during disasters.

On the exotic animal front, AC announced a policy change in April 2016 that prevents public handling and feeding of newborn nondomestic cats, such as young tigers and lions 28 days of age or younger. These young cats are unable to adjust their body temperatures and lack fully functioning immune systems to fight off disease and infection. We found that many of these animals were getting sick from direct contact with the public and some were dying. This new policy protects them from unnecessary stress and potential harm.

While most regulated facilities and licensees work with us in support of animal welfare, we do take enforcement action when necessary to address AWA violations. In 2011, as Director of APHIS' Investigative and Enforcement Services program, I led an initiative to streamline our investigative process to reduce the time

it takes to address alleged violations of APHIS-administered statutes, including AWA violations. Through this effort, we reduced our inventory of open investigations by 72 percent. APHIS also dramatically decreased the time it takes to complete an investigation and resulting enforcement action—reducing the timeline from 632 days in fiscal year (FY) 2011 to 346 days in FY 2015.

We know our ability to quickly respond to AWA noncompliance is an effective deterrent and sends a

Today we protect more than 2 million animals at more than 10,000 facilities—including animal breeders, research sites, zoos, circuses and commercial transporters—and we perform more than 10,000 unannounced inspections a year across the country to ensure the AWA's minimum standards are protecting these animals.

clear message that failing to provide humane care to animals will result in sanctions. In FY 2015, APHIS issued 181 official warnings and initiated 290 investigations in response to alleged AWA violations. The Agency also entered 28 pre-litigation settlement agreements totaling more than \$145,000 in civil penalties. The Agency, working through USDA's Office of the General Counsel, also pursued several alleged violations

through administrative proceedings, filing 36 administrative complaints and obtaining 26 administrative decisions, which included sanctions such as civil penalties and the suspension or revocation of AWA licenses.

Looking ahead, we have two regulatory priorities that will require full rulemaking. The first is updating our marine mammal regulations. The current standards for marine mammals were put in place more than fifteen years ago, and we have proposed a number of actions to update the standards based on the latest science.

The second regulatory action we are pursuing is known as the “*de minimis* rule,” and it is intended to exclude certain dealers or exhibitors from regulatory oversight based on the size of their business or other factors. This rule will allow APHIS to focus its resources on those facilities that pose the greatest threat to the welfare of animals, and move forward with other regulatory actions to implement contingency planning requirements for facilities and establish standards for the humane care of birds.

While I can't predict what the next 50 years will hold for the AWA, we've seen the public increasingly value animal welfare. I firmly believe the American public understands and continues to strongly support our important mission. Our dedicated team of AC employees are resilient, resourceful and responsive, and they remain steadfast in our goal of ensuring animals receive the full protection the law affords. We will carry out our mission transparently, taking regulatory action when necessary for the benefit of all the animals we protect—large and small, exotic and domestic—and using non-regulatory solutions where appropriate. We will also continue to engage our regulated community and stakeholders, and provide learning opportunities to advance our animal welfare mission throughout the United States. ○

But is it Kosher?

FOIA & the Controversial Home Server

By Jim O'Reilly*

Law school friends sometimes had unusual adjustments to make. But when the daughter of an old Virginia family married the son of an Orthodox rabbi, her adjustment in the kitchen was especially challenging, since there would be two sets of kitchenware to follow the traditional kosher separation of foods. That memory flashed back as I read news accounts of Hillary Clinton's computer server at her home, holding correspondence of both personal family messages and official State Department emails, some of them sensitive geopolitical messages that would ordinarily have been separated in secure channels at the Washington office of the Department. What will the Federal Records Act and the Freedom of Information Act say about what is "kosher" or not, when Clinton's separation of documents are examined retrospectively?

Answering that question begins with another one: what counts as an "agency record"? This is not a metaphysical question. Federal agencies create, store and process millions of communications each day. The private sector does the same with billions of communications. If the private communication comes into an agency device such as a computer server owned by the agency, it becomes an agency record when it is placed in that agency owned server. The ownership of one particular server can be ascertained from routine procurement records of the agency. The location of that U.S. government electronic asset inside a private home, absent a wrongful taking, does not lessen the agency's right of ownership. When combined

with the use of the server for the agency's business, its contents are "agency records" even within the private home. But the server may be one that is privately owned and possessed in a private home.

Who can authorize the agency record to be deleted or retained? The senior official of the agency, here the Secretary of State, can authorize the records retention schedule, and by analogy can authorize that the record be removed as an exception to the retention schedule. OMB, GAO and others have a role to play in validating the decisions to delete an incoming record on a government owned server, once the record is an "agency record."

What was the government's official rationale justifying the Clinton actions? Per filings by Justice Department civil division lawyers, led by Principal Deputy Assistant Attorney General Benjamin C. Mizer, "federal employees routinely manage their email and 'self-select' their work-related messages when they, quite permissibly, designate and delete personal emails from their government email accounts." Spencer S. Hsu, *U.S. Judge Orders Discovery to Go Forward Over Clinton's Private Email System*, *The Washington Post* (Feb. 23, 2016). The State Department Inspector General's May 2016 Report ("Evaluation of E-Mail Records Management and Cyber Security", ESP-16-03, May 2016) reaches into the issues with great detail and specificity.

Can private communications exist on a government owned server without becoming agency records? Here, the philosopher may disagree with the administrative lawyer, because intentionality is one of the human variables outside the reach of the CFR. Assume that an e-mail

arrives into a government email in-box, from a federal employee's daughter, telling her directions to the daughter's apartment. The server in-box then displays the chronologically next message from Paris which describes a bargaining position proffered by Iranian diplomats. Intentionality of the employee/parent (wanting to retain a set of street directions purely for the family purposes) is the laudable individual rationale for not immediately deleting a non-governmental communication from the agency server. The record endures.

And then this philosophical argument "doubles down"; so, if the directions e-mail is nongovernmental, private and resides temporarily on that federal computer server, does our answer change, if the agency-owned server sits inside the private home of the agency employee? Can a botanist at USDA communicate while working from home? Can a mathematician at the Census Bureau be counted on to properly use a Bureau laptop at home after a day spent viewing arriving passengers at a major airport? Can a top diplomat have staffers from her agency establish her server in her home? Fifty shades of red (tape) may be the setting within which the courts will resolve the Clinton server cases. By the time it reaches a court decision the public will have spoken its verdict on the relative importance of the issues.

Along the way, a procedural rarity was encountered, in the form of FOIA depositions. What extraordinary circumstances will justify ordering discovery depositions in a rare FOIA case? As one who has pored over 10,000 or more FOIA opinions since

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* Professor, University of Cincinnati; author of *Federal Information Disclosure* (West 5th ed. 2016)

Three Issues to Watch as the FCC Writes Privacy Rules for Broadband Companies

By Arielle Roth*

The Federal Communications Commission's (FCC's) 2015 Open Internet Order classified broadband Internet providers as common carriers, fundamentally altering how the federal government regulates the Internet. See *In re Protecting & Promoting the Open Internet*, GN Docket No. 14-28, 30 FCC Rcd 5601 (Open Internet Order) (Mar. 12, 2015); *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, 81 Fed. Reg. 23,330 (Apr. 20, 2016). Notably, the Order removed the Federal Trade Commission's (FTC's) authority to regulate broadband companies, and assigned the FCC practically exclusive federal consumer protection jurisdiction over those entities. The significance of this jurisdictional shift has become apparent in the FCC's current rulemaking on broadband privacy. The FCC has initiated a regulatory turf war by taking over the FTC's role as the chief federal regulator of privacy for broadband companies and proposing rules that diverge in substance from the FTC's established approach to consumer privacy. Here, I outline three areas of controversy to watch as the privacy rulemaking proceeds:

- i. Interagency tension between the FCC and the FTC;
- ii. Asymmetric regulation of similarly situated Internet companies; and
- iii. The outcome of *US Telecom v. FCC*, the legal challenge to the Open Internet Order.

Background

Since the 1970's, the FTC has been the preeminent federal regulator of consumer privacy. Pursuant to § 5 of the FTC Act, 15 U.S.C. §45(a)(2), the

FTC is empowered to protect consumers from "unfair or deceptive" practices of commercial entities, including unfair or deceptive uses of private data. However, § 5 exempts certain entities from the FTC's jurisdiction, including common carriers. By classifying broadband providers as common carriers, regulated under Title II of the federal Communications Act, the FCC's Open Internet Order displaced the FTC's authority over these companies.

To avoid a regulatory vacuum with respect to broadband providers' privacy obligations, the Open Internet Order announced that the FCC would apply § 222 of the Communications Act, the federal privacy rules for telephone companies, to broadband providers. Section 222 precludes a company classified as a telecommunications service provider from illicit uses of "customer proprietary network information" (CPNI). CPNI refers to information related to a subscriber's telephone usage, such as the services the customer buys, and the customer's incoming and outgoing call logs. The CPNI rules were originally introduced under the Telecommunications Act of 1996—largely to prevent incumbent telephone companies from using their subscribers' data to gain an unfair advantage in marketing long-distance and other telecommunications services. Given the different context in which the CPNI provisions were enacted, and the fact that the provisions have never been applied to broadband providers, the FCC voted to initiate a new rulemaking to tailor the § 222 provisions to the broadband context.

The notice of proposed rulemaking, issued on March 31, 2016, seeks to interpret § 222(a) as protecting a broadened category of customer proprietary information (customer

PI). *In re Protecting the Privacy of Broadband & other Telecomm. Servs.*, WC Docket No. 16-106, Notice of Proposed Rulemaking, FCC 16-39 (Apr. 1, 2016). Customer PI is to include an expanded CPNI category adapted to the broadband context, as well as a novel "personally identifiable information (PII)" category. The notice takes a sweeping approach to the latter category, defining PII as "any information that is linked or linkable to an individual," including all data relating to a broadband subscriber's internet activity.

The notice proposes requiring broadband providers to obtain opt-in consent before sharing customer PI with third parties, or using their subscribers' personal information for any purposes other than marketing communications-related services. By limiting the sharing of subscriber data to such an extent, the opt-in consent requirement de facto prevents broadband providers from monetizing customer data through targeted advertising.

Mandatory opt-in consent for such a broad category of data is significantly more onerous than the FTC's approach to privacy. Primarily an enforcement agency that lacks prescriptive privacy rules, the FTC protects customer data under its consumer protection authority to police "unfair or deceptive acts or practices." 15 USC § 45(a)(1). Under the unfairness authority, a company is prohibited from acts or practices that cause substantial unavoidable injury to consumers, not outweighed by countervailing benefits to consumers or competition. Under the deception authority, a company is proscribed from making materially misleading statements or omissions. In applying these standards, the FTC has primarily sought to ensure that companies

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honor their privacy commitments to customers, and it occasionally required companies to provide an opportunity to opt out of certain data-sharing practices. However, the FTC has only required opt-in consent for a narrow subset of cases, such as when a company retroactively changes its privacy policies, or uses sensitive personal data like customers' social security numbers or precise geo-location data.

By contrast, the FCC proposes to require opt-in consent for practically all sharing of consumer information with third parties, regardless of the sensitivity of the information or the presence of consumer harm. This proposal would subject broadband companies to a much higher privacy burden than the FTC standard.

i. Interagency tension between the FCC and the FTC

The Notice of Proposed Rulemaking argues that since broadband providers carry all of a user's network traffic, they are the "most important and extensive conduits of consumer information" and therefore ought to be subject to tougher consent rules. While the FCC's privacy rulemaking lauds the FTC's leadership in consumer protection, it contends that the FTC's failure to treat broadband providers differently from other companies creates a "gap" in privacy protection, forcing customers to choose between forgoing their privacy and forgoing Internet access.

The FCC's proposed privacy regime comes at the cost of removing the FTC's consumer protection authority over broadband companies and has resulted in considerable tension between the two agencies. FTC officials have publicly criticized the FCC's arrogation of authority, pointing out that the FTC has over 15 years' experience bringing privacy enforcement actions against companies. According to Director of the FTC's Bureau of Consumer Protection Jessica Rich, removal of the FTC's authority "takes an

experienced cop off the beat in this important area." Thomas B. Norton, *Internet Privacy Enforcement After Net Neutrality*, 26 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 225 (Fall 2015). FTC Commissioner Maureen Olhausen has further contended that the FTC's role as an enforcement body—relying on "common-law-like" *ex post* decisionmaking—to address actual harms and real disputes—makes it institutionally better suited to constantly-changing technologies and business models of the Internet economy, compared to the FCC's *modus operandi* of crafting categorical *ex ante* rules. Hon. Maureen K. Olhausen, *The FCC's Knowledge Problem: How to Protect Consumers Online*, 67 *FED. COMM. L.J.* 203 (April 2015).

FTC officials have also criticized the substance of the FCC's proposals. In a March speech, Commissioner Olhausen argued that the FCC's excessively low threshold for opt-in consent is overbroad, "impos[ing] the preferences of the few on the many," and ultimately leaving consumers worse off. By contrast, the FTC is primarily concerned about what consumers actually want, and ensuring that the practices the FTC deems unfair "match practices that consumers generally reject." At a panel in April, Former FTC Commissioner Joshua Wright further argued that whereas the FTC relies on a team of economists to evaluate costs and benefits, the FCC notice is "non-economic altogether" and devoid of data to justify the stricter rules.

Tension between the two agencies over the privacy rulemaking may lead to legal battles. Notwithstanding the FCC's reclassification of broadband as a common carrier, the FTC could argue that it possesses concurrent jurisdiction over broadband privacy. According to the FTC's activity-based interpretation of the common carrier exemption, which was accepted in *FTC v. AT&T Mobility LLC*, 87 F. Supp. 3d 1087 (N.D.Cal. 2015), a business can have both common carrier and

non-common carrier components, and the FTC may regulate a common carrier so long as the regulation is limited to the entity's non-common carriage services. One can imagine the FTC bringing a privacy enforcement action against a broadband company, arguing that despite the reclassification of broadband providers as common carriers by the FCC, the management of subscriber information by broadband companies is not a common carriage service, and therefore remains under the FTC's authority. The question of whether the FCC's classification of broadband providers dictates the FTC's authority, or whether the FTC's interpretation of common carriage would prevail, might need judicial resolution.

ii. Asymmetric regulation of similarly situated Internet companies

One of the main criticisms of the FCC's proposed rule is that it treats broadband providers differently from their competitors in the internet industry: namely, edge providers like Google and Facebook, which remain under the FTC's more flexible authority. By creating a more onerous regime for broadband providers, the FCC subjects them to a competitive disadvantage, creating artificial winners and losers in the Internet industry.

The FCC privacy rulemaking justifies its asymmetric regulation on the grounds that unlike other components of the Internet, broadband companies have unique and comprehensive access to user activity data. However, according to a study led by Professor Peter Swire, who served as a privacy advisor for both the Clinton and Obama administrations, broadband provider access to user data is neither comprehensive nor unique. Internet users commonly use multiple broadband providers, Wi-Fi networks, and devices over the course of the day, precluding a single broadband provider from gaining a comprehensive picture of

a user's online activity. Broadband providers' access to data is further limited by the increasing prevalence of website encryption, and the use of virtual private networks. Peter Swire, Justin Hemmings & Alana Kirkland, *Online Privacy & ISPs: ISP Access to Consumer Data Is Limited and Often Less than Access by Others*, A Working Paper of the Institute for Information Security & Privacy at Georgia Tech (Feb. 29, 2016).

Moreover, according to Swire, broadband companies are by no means the leading sellers of targeted advertising. Rather, social networks and search engines are privy to "the most commercially valuable information about online users." The Electronic Privacy Information Center echoes Swire, pointing out that broadband companies are not "the only so-called gatekeepers to the Internet who have extensive and detailed views of consumers' online activities" and that "many of the largest email, search, and social media companies exceed the scope and data collection activities of the ISPs." *Memorandum re: FCC Communications Privacy Rulemaking*, Electronic Privacy Information Center (Mar. 18, 2016).

The FCC might attempt to correct this regulatory asymmetry by extending the privacy rulemaking to edge providers as well. Although edge providers are not currently considered common carriers, and therefore do not fall within the jurisdiction of § 222, the FCC would not necessarily consider itself foreclosed from regulating them. After all, until the Open Internet Order, broadband service providers were not considered common carriers either. Moreover, the FCC has used § 706 of the Telecommunications Act of 1996, which directs the FCC to promote the deployment of broadband, as an expansive source of regulatory authority. Whether or not that provision was enacted as an independent grant of authority—Republican FCC Commissioners Ajit Pai and Michael O'Reilly have argued that it was not—the D.C. Circuit has deferred under *Chevron* to the FCC's

interpretation of § 706 as a source of rulemaking power, including the authority to regulate entities that fall outside the FCC's core jurisdiction over common carriers. *Verizon v. FCC*, 740 F.3d 623, 637–40 (D.C. Cir. 2014). The FCC could thus very well seek to extend the same stringent privacy rules to edge providers ostensibly pursuant to § 706.

Even if the FCC were to refrain from regulating edge providers, the disparity in treatment of edge providers may put pressure on the FTC to correct regulatory asymmetry and conform to the FCC's stricter rules in enforcing its own § 5 authority. Even though the FTC has expressed substantive disagreement with the privacy rulemaking, it has held that "any privacy framework should be technology neutral," recognizing that broadband providers "are just one type of large platform provider that may have access to all or nearly all of a consumer's online activity." *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses & Policymakers*. FTC Report (Mar. 2012). To the extent that the FTC's mandate is to promote competition, the anti-competitive effects of the FCC's proposed rules can perhaps only be mitigated by the FTC's extending the same stringent rules to edge providers. However, responding to regulatory asymmetry in such a way would require the FTC to abandon its long-held principles about the best approach to consumer privacy protection.

iii. The Future of US Telecom v. FCC

As explained, the FCC's privacy rulemaking is grounded in its reclassification of broadband providers as common carriers in the 2015 Open Internet Order. However, the validity of the reclassification depends on the ultimate outcome of *U.S. Telecom Association v. FCC*, No. 15-1063 (D.C. Cir.), the legal challenge to the order. Although the D.C. Circuit upheld the FCC order on June 14, 2016, the challengers will likely seek *en banc*

rehearing from the Court of Appeals and/or certiorari from the Supreme Court. The potential for continued litigation leaves the vitality of the privacy rule uncertain.

The D.C. Circuit's panel opinion, authored jointly by Judges David Tatel and Sri Srinivasan, rejected the panoply of procedural and substantive challenges to the Open Internet Order advanced by the challengers. Finding that the Supreme Court's opinion in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 986 (2005), established the Communications Act's ambiguity as to the proper classification of broadband Internet, and rejecting arguments that the agency failed to provide sufficient notice of the final order, the majority held that the FCC properly exercised its discretion to reclassify broadband Internet as a telecommunications service. But Judge Stephen Williams, a well-recognized authority on administrative law, dissented in large part, arguing that even if reclassification were permissible as a matter of statutory interpretation, the FCC failed to provide adequate empirical grounds for the change, rendering the reclassification arbitrary and capricious. This disagreement among the panel members on such a significant case signals that further judicial review may be forthcoming.

To the extent that the *en banc* D.C. Circuit or Supreme Court agrees with Judge Williams that the FCC's reasons for reclassification were inadequate, any subsequent attempt at reclassification would require a new rulemaking. Because the extant privacy rule is beholden to the Open Internet Order's reclassification of broadband Internet, a do-over would place the broadband privacy matter in limbo. Furthermore, the outcome of a revamped network neutrality rulemaking may depend on the outcome of the 2016 election and whether the FCC remains under Democratic control or becomes majority Republican. Given Republican FCC Commissioners Pai

and O'Reilly's vigorous dissents to the Open Internet Order, it is unlikely that a Republican-controlled FCC would re-issue the same substantive rules—let alone reclassify broadband Internet as a public utility.

Alternatively, a reviewing court might pursue a compromise position, and uphold the reclassification of wireline broadband as a common carriage service, but still strike down the reclassification of wireless broadband providers. After all, the treatment of wireless providers was viewed as the most vulnerable aspect of the Open Internet Order and many expected it to be invalidated. According to a white paper by Cellular Telephone Industries Association, among the petitioners in the *US Telecom* case, subsections 332(c)

and (d) of the Communications Act plainly state that wireless providers not interconnected with the public switched telephone network cannot be classified as common carriers. However, such a compromise would leave wireline and wireless broadband providers subject to different rules, creating additional disparities in the treatment of similarly situated Internet entities, and further highlighting criticism relating to asymmetric regulation and the proposed rules' anti-competitive distortions.

In short, the legal challenge to the Open Internet Order is far from over—and the FCC's broadband privacy rulemaking continues to hang in the balance.

Conclusion

The FCC's privacy rulemaking highlights the implications of reclassifying broadband Internet as a common carrier service. From a turf war between two federal agencies, to the apparent struggle among industry players to triumph in the targeted advertising market, the implementation of the Open Internet Order's privacy components has been fraught with controversy. With the fate of the Open Internet Order far from resolved, it is still not clear which agency will prevail as the primary regulator of broadband privacy, and whether the proposals in the FCC rulemaking will earn legitimacy. One thing for certain is that the FCC's proposed privacy rules will remain in contention for a long time. ○

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Nominations for 2016–2017

Section Officers and Council Members

Pursuant to Article IV, § 1 of the Bylaws, the Nominating Committee of the ABA Section of Administrative Law and Regulatory Practice, composed of chair Joe D. Whitley, and members Angie Chen and Jeffrey Clark, has made the following nominations for election at the Section's 2016 Annual Membership Meeting. The meeting will take place on Saturday, August 6, 2016, at 3:00 pm Pacific Time in the Grand Hyatt San Francisco, in San Francisco, California.



Chair
(by operation of the bylaws)
Renée Landers

Renée is Professor of Law at Suffolk

University Law School in Boston, where she teaches administrative law, constitutional law, and health law. She also is the Faculty Director of the school's Health and Biomedical Law Concentration. She is a graduate of Radcliffe College and the Boston College Law School and has served as President of the Harvard Board of Overseers. She worked in private practice and served as Deputy General Counsel for the U.S. Department of Health and Human Services and as Deputy Assistant Attorney General in the Office of Policy Development at the U.S. Department of Justice during the Clinton Administration. This year she became a member of the Social Security Advisory Board Disability Review Panel. She previously served on the Massachusetts Commission on Judicial Conduct, of which she was vice chair from April 2009 until October 2010, and as a member of the Supreme Judicial Court's committees studying gender bias and racial and ethnic bias in the courts.

Renée was president of the Boston Bar Association in 2003–2004, the first woman of color and the first law professor to serve in that position. Renée is just concluding a term as Chair Elect (2015–2016), and previously served as Vice Chair (2014–2015) and a three year stint as Secretary of the Section (2011–2014). She has also served as a council member (2000–2003), Nominating Committee member (2003–2004), Membership Committee chair (2004–2006), and vice chair of the Health and Human Services Committee (1998–2000), and is a frequent speaker at Section programs.



Chair Elect
(by operation of the bylaws)
John Cooney

John is a partner at Venable LLP in Washington, D.C., where he focuses

on economic regulatory, administrative, and constitutional litigation involving federal agencies at the trial and appellate levels. He served previously as Office of Management and Budget Deputy General Counsel for Litigation and Regulatory Affairs and as an Assistant Solicitor General. He is a graduate of Brown University and the University of Chicago Law School. He is a public member of the Administrative Conference of the United States, where he chairs the Committee on Administration & Management. John is a former Section Council member, co-chairs the Section's Banking and Financial Services Committee, has written for Section publications, and has been a frequent speaker at Section conferences. He is concluding a term as Vice Chair (2015–2016).



Last Retiring Chair
(by operation of the bylaws)
Jeffrey A. Rosen

Jeff is a partner with Kirkland

& Ellis in Washington, D.C. A graduate of Northwestern University and Harvard Law School, he first joined the firm in 1982. During the George W. Bush Administration, he left Kirkland to serve as General Counsel of the U.S. Department of Transportation (2003–2006) and General Counsel and Senior Policy Advisor for the Office of Management and Budget (2006–2009). Jeff has served the Section in a variety of roles, including Executive Branch Liaison to the Council (2008), council member (2009–2012), co-chair of the Rulemaking Committee (2009–2014), Vice Chair (2013–2014), Chair Elect (2014–2015), and Chair of the Section (2015–2016), and organizer, speaker, or panelist at more than a dozen Section or other ABA-related institutes, programs, and meetings since 2004. He is also a public member of the Administrative Conference of the United States.



Vice Chair
Judge Judith S. Boggs

Judge Boggs was appointed as an Administrative Appeals Judge and member of the

Benefits Review Board (BRB) of the U.S. Department of Labor in 2004. Prior to joining the BRB, Boggs served in the federal government as an Administrative Appeals Judge and member of the Department of Labor's Administrative Review

Board, Senior Policy Analyst at the White House, and Special Assistant to the Administrator of the Health Care Financing Administration/U.S. Department of Health and Human Services (HCFA/DHHS). She served in state government as staff to the Kentucky Human Rights Commission, chief legal counsel to the Kentucky Mental Health Department, and as a member of the Kentucky Registry of Election Finance. Her private law practice focused on health and administrative law matters.

In addition to her longtime membership in the Section of Administrative Law and Regulatory Practice, Judge Boggs is the Immediate Past Chair of the ABA National Conference of the Administrative Law Judiciary (NCALJ). She currently serves NCALJ as Nominating Committee Chair, Section of Administrative Law and Regulatory Practice liaison, co-liaison to the Administrative Conference of the United States, and Executive Committee member. She previously served NCALJ as Secretary, Vice-Chair, Chair-Elect, and as an Executive Committee member, and Chair of the Budget, Strategic Planning, Federal Adjudication, Bylaws, Education and Programs, and Judicial Coordination committees. She is the ABA Judicial Division's liaison to the Government and Public Sector Lawyers Division and serves on the Judicial Division International Law Committee. Previously, she chaired the Judicial Division's Judicial Outreach Network committee, and served as a member of the Judicial Division Council, as well as the Division's Strategic Planning, Outreach Network, Ad Hoc Committee on Webinars, and John Marshall Award committees. In addition, Boggs was the Division's representative for the preparation of the ABA Commission on Disability's "Court Access for Individuals Who Are Deaf and Hard of Hearing: A Guide."

Judge Boggs graduated cum laude from Brooklyn College of the City University of New York, and holds a Juris Doctor degree from the University of Chicago Law School.



Secretary Linda Jellum

Linda Jellum is the Ellison Capers Palmer Sr. Professor of Law in Tax Law at Mercer University School of Law. She teaches administrative law, statutory interpretation, federal income taxation, and property, and has written extensively in those areas. Jellum received both her law and undergraduate degrees from Cornell University. Linda serves or has served on many professional committees and boards.

Currently, Jellum is the Deputy Executive Director for the Southeastern Association of Law Schools. She also served as the Deputy Director of the Association of American Law Schools from January 1, 2012 until July 2013.

Within the Section, Jellum is concluding her second year as Secretary. She was a council member from 2010–2013, member of the Section's Scholarship Committee, co-chair or vice chair of the Judicial Review Committee from 2007–2010, co-chair of the Section's 2014 spring meeting in Atlanta, and a selection committee member for the 2013 Gellhorn-Sargentich Law Student Essay Award.



Budget Officer Louis George

Lou George is currently an Assistant Regional Counsel with the Office of General Counsel, U.S. Social Security Administration, in Boston. From 1998–2015 he was an attorney and then the Director of Training and Publications with the National Veterans Legal Services Program in Washington, D.C. He held prior positions as an attorney

with the U.S. Department of Veterans Affairs and the Commonwealth of Massachusetts. He is a graduate of Salem State College and Georgetown University Law Center. He has served as President of the Court of Appeals for Veterans Claims Bar Association, and as a member of the Rules Advisory Committee of the U.S. Court of Appeals for Veterans Claims. Lou served on the Council of the Section from 2011–2014, and has served as the Assistant Budget Officer from 2015–2016. He is also the chair of the Section's Membership Committee, and has co-chaired the Section's Veterans Affairs Committee.



Council Member Ryan Nelson

Ryan Nelson has served as General Counsel and Assistant Secretary for Melaleuca, Inc., an international direct marketing consumer goods company, since 2009. Prior to joining Melaleuca, Nelson worked for 10 years as an attorney in Washington, D.C., including as Special Counsel to the U.S. Senate Committee on the Judiciary for the Supreme Court; as Deputy General Counsel at the Office of Management and Budget; as Deputy Assistant Attorney General at the U.S. Department of Justice, Environment & Natural Resources Division; and as an Associate at the law firm Sidley Austin.

Nelson has also served as a legal advisor for the Iran-U.S. Claims Tribunal in The Hague, Netherlands, and clerked for Judge Karen LeCraft Henderson on the U.S. Court of Appeals for the D.C. Circuit.

Nelson was appointed by the Section of Administrative Law and Regulatory Practice Council in February 2015 to fill a remaining unexpired term, and is now being nominated for election to serve a full three year term.



Council Member Neomi Rao

Neomi Rao is Associate Professor of Law and Director of the Center for the Study of the

Administrative State at George Mason University School of Law. She teaches constitutional law, legislation and statutory interpretation. Her research focuses on structural constitutional law, executive power, and administrative law, as well as international law. Her analysis of the use of dignity in constitutional law has been widely cited in the United States and abroad.

Professor Rao has served in all three branches of the federal government. In the Executive Branch, she served as Associate Counsel and Special Assistant to President George W. Bush. In the Legislative Branch, she has served as counsel to the U.S. Senate Committee on the Judiciary, where she was responsible for judicial nominations and constitutional law issues. In the Judicial Branch, she clerked for Judge J. Harvie Wilkinson III and for Justice Clarence Thomas. Rao also has practiced law in the London office of Clifford Chance LLP, specializing in public international law and commercial arbitration.

Professor Rao received her J.D. with high honors from the University of Chicago Law School and her B.A. from Yale University. She is a member of the Virginia State Bar and a Qualified Solicitor of England and Wales. Rao has testified before Congress on various matters and is a frequent commentator, with editorials appearing in the Wall Street Journal, New York Times, and Washington Post, and guest blogs at the Volokh Conspiracy and Opinio Juris. She has published several articles on administrative law, including most recently in the NYU Law Review (Nov. 2015 issue).

Rao is currently co-chair of the Section's Regulatory Policy committee and she has spoken at several of

the Section's programs, including the 2014 and 2015 Fall Conferences, the 2016 Administrative Law Institute. She also spoke at the ABA's 2013 Annual Review of the Field of National Security Law.



Council Member Amar D. Sarwal

Sarwal is the Vice President and Chief Legal Strategist of the

Association of Corporate Counsel in Washington, D.C. Before joining ACC, he served as General Litigation Counsel at the U.S. Chamber of Commerce. Prior to the U.S. Chamber, Sarwal was an associate in the Washington, DC office of Jones Day. Earlier in his career, Sarwal served as a judicial clerk to U.S. District Court Judge F.A. Little of the Western District of Louisiana and U.S. Court of Appeals Judge Robert Krupansky of the Sixth Circuit.

Sarwal received a Bachelor of Business Administration from the University of Texas at Austin, with a focus on International Business. He graduated cum laude from the University of Michigan Law School. Sarwal is also a member of the Board of Directors for KEEN Greater DC, a volunteer-driven nonprofit organization that works with children with disabilities.

Sarwal is currently the vice-chair of the Section's Judicial Review committee and has been since 2014. He has also assisted the Section with implementation of the Section's Strategic Plan, serving as coordinator for Item I.7 (partnering with other groups to co-sponsor programs). Sarwal also has been active in the ABA's Center for Professional Responsibility and the ABA Litigation Section's working group on business standards.



Council Member Lynn White

Lynn White is a Councilwoman for the Town of Berwyn Heights, Maryland. She was

previously an EEO Associate at The George Washington University. She also served previously as a compliance officer at the U.S. Department of Labor's Office of Federal Contract Compliance Programs. White is a graduate of the University of Texas at Austin and Howard University School of Law.

White is an inaugural member of the Collaborative Bar Leadership Program, a joint initiative of the American Bar Association, the Hispanic National Bar Association, the National Asian Pacific American Bar Association, the National Bar Association, and the National Native American Bar Association to strengthen the pipeline of diverse bar association leaders.

Since 2012, White has headed the team that runs Notice and Comment, the Section's blog, including its new incarnation as a joint venture with the Blog of the Yale Journal on Regulation. She is also a member of the team that is redesigning the Section's website. In addition to her work for the Section, White has also served on the ABA Commission on Youth at Risk. She was appointed by the Section Council in May 2015 to fill a remaining unexpired term, and is now being nominated for election to serve a full three year term. ○

Enforcement Discretion Under Attack: Implications for FDA

By Lewis A. Grossman*

Author's note: On June 23, as this article was going to press, the Supreme Court deadlocked 4-4 in *U.S. v. Texas*, thus affirming a preliminary injunction against implementation of the Obama Administration's deferred-action program for millions of undocumented immigrants. Because the Court's terse *per curiam* decision established no precedent, the questions that the case raised regarding the permissible scope of administrative enforcement discretion remain unresolved on the national level. The Supreme Court will likely consider them again—after a decision on a permanent injunction in the same case, in a similar immigration dispute, or perhaps in another field of administrative law. The issues explored by this article thus remain very much alive.

Heckler v. Chaney, 470 U.S. 821 (1985), is the leading precedent for the principle that an agency's decision not to bring an enforcement action is a presumptively unreviewable exercise of administrative discretion. In *Heckler*, the Supreme Court held that the Food and Drug Administration's (FDA's) refusal to impose the requirements of the Food, Drug, and Cosmetic Act (FDCA) on drugs used for lethal injection of convicted inmates was nonjusticiable under § 701(a) of the Administrative Procedure Act (APA).

Some in the administrative law community were thus startled several years ago when, in a strikingly similar case, the U.S. District Court for the District of Columbia held that another failure by FDA to enforce the FDCA against a death penalty drug was *not* immune from judicial review. *Beatty v. FDA*, 853 F. Supp. 2d 30 (2012). A close reading of Judge Leon's opinion and the D.C. Circuit's decision affirming it, *Cook v. FDA*, 733 F.3d 1 (D.C. Cir. 2013), explains the apparent incongruity. The death row prisoners in *Cook* challenged FDA's failure to prevent the *importation* of misbranded and unapproved drugs manufactured overseas. This situation is governed by FDCA § 801(a), a provision phrased in unambiguously mandatory terms that was not relevant to the wholly domestic circumstances addressed by

Heckler. *Cook* thus does not represent a comprehensive threat to the presumptive unreviewability of agencies' use of enforcement discretion.

United States v. Texas, a case that the Supreme Court will decide before July, potentially has more sweeping implications. In this matter, argued on April 18, twenty-six states are challenging an Obama Administration program called Deferred Action for Parents of American Citizens and Lawful Permanent Residents (DAPA). The Secretary of the Department of Homeland Security (DHS) instituted this program in a November 2014 memorandum to the Director of Citizenship and Immigration Services. This "DAPA Memo," framed as an exercise of prosecutorial discretion, would defer the deportation of undocumented parents of citizens and permanent residents for three years, if the parents have lived in the country for at least five years and satisfy several other conditions. DAPA grants such parents the revocable status of "lawful presence"—a status that makes them eligible to apply for work authorization and to participate in certain federal earned-benefit programs, including Social Security.

The states sued to enjoin the implementation of DAPA in the U.S. District Court for the Southern District of Texas. They contended that such an action requires APA notice-and-comment rulemaking and represents an unreasonable interpretation of the Immigration and Naturalization Act (INA). The

District Court issued a preliminary injunction, rejecting the United States' contention that DAPA is an unreviewable exercise of enforcement discretion, and the Fifth Circuit affirmed. The Supreme Court is considering the applicability of *Heckler* non-justiciability, along with other issues.

Regardless of how the case is decided, *Texas* is an occasion to consider how deeply engrained enforcement discretion is in the administrative state, not only as a method for allocating scarce government resources, but also (as with DAPA) for advancing particular policies. FDA's administration of the FDCA provides manifold examples of this phenomenon. Throughout its broad portfolio of responsibilities, the agency has established numerous programs organized explicitly around the systematic exercise of enforcement discretion.

Take, for example, the issue of filth in food. Section 402(a)(3) of the FDCA declares a food to be adulterated if it contains "any filthy, putrid, or decomposed substance" (emphasis added). As a formal matter, therefore, the presence of just one rodent hair or one insect renders a product illegal. Although few if any foods satisfy this standard, FDA has not emptied supermarket shelves. Instead, it has adopted "defect action levels." See 21 C.F.R. § 110.110. The *Defect Action Levels Handbook*, available on the agency's website, lists nonhazardous levels of natural or unavoidable defects in

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particular foods below which each product is effectively immune from enforcement action.

Or consider the procedure the agency has established permitting food manufacturers to make disease prevention claims (“health claims”) that do not meet the “significant scientific agreement” standard imposed by § 403(r)(3) of the FDCA. Under its “qualified health claims” framework, the agency sends petitioners “letters of enforcement discretion” declaring its intention not to object to claims with lesser scientific substantiation. Because FDA created this approach in response to court decisions imposing First Amendment limitations on the agency’s authority, there technically is nothing “discretionary” about it. Nevertheless, the qualified health claims regime provides another prominent illustration of how FDA sometimes elaborates its enforcement discretion into a systematic program comparable to DAPA.

FDA has taken similar approaches on the medical products side of its domain. For example, although importation of unapproved drugs and devices is illegal under the FDCA, the agency has long permitted individuals to import “personal use” amounts of such products, and it has set forth this policy in writing since at least 1977. The current FDA Regulatory Procedures Manual contains a “Personal Importation” section that provides “general guidance” setting forth factors FDA personnel should use in allowing entry to personal shipments of unapproved drugs and devices. Although the Manual frames the personal importation policy as a reasonable allocation of limited agency resources, the Commissioner’s public defense of the approach in the late 1980’s, in the midst of the AIDS crisis, left no doubt that it is motivated by compassion as well as economy. Because it involves importation, this policy is threatened by the *Cook* decision, regardless of how *Texas* is decided.

FDA’s programmatic use of administrative discretion is not limited to imported drugs and devices. One of the most sweeping recent exercises of enforcement discretion by FDA in this field concerns the regulation of laboratory developed tests (LDTs)—a category comprising *in vitro* diagnostic devices (IVDs) designed, manufactured, and used within a single laboratory. Since the agency gained its modern authority over medical devices in 1976, it has deemed LDTs to be devices subject to the FDCA, but has nonetheless declined to apply the Act to them as a matter of general practice. Recently, however, the agency decided that it will begin subjecting most LDTs to the Act’s device requirements. In 2014 draft guidance, FDA set forth a detailed, risk-based plan for phasing in regulatory oversight of LDTs during a nine-year period following finalization of the guidance.

In some important respects, the LDT draft guidance resembles the DAPA Memo. Both documents purport to establish enforcement “priorities” that, as a practical matter, temporarily exempt certain defined categories of people/products from otherwise applicable statutory provisions. As an exercise of enforcement discretion, however, the LDT guidance actually goes further than the DAPA Memo, by identifying several categories of LDTs (for example, IVDs for rare diseases) that FDA plans to *permanently* exempt from some or all of the FDCA’s requirements. The DAPA Memo at least clings to the illusion that it is a “deferred” enforcement program.

Last year, FDA established a similar approach to the regulation of mobile medical software applications. A February 2015 final guidance, through descriptions and examples, divides mobile apps into three categories. One includes apps that, though related to health, do not satisfy the statutory definition of “device” and are thus not covered by the FDCA. A second group consists of apps that are medical devices that pose a risk to

patient safety if they malfunction; the agency subjects these products to the full panoply of regulatory requirements for devices. The third category of products limned by the guidance is probably the biggest and most diverse. It comprises “mobile apps that may meet the definition of medical device but because they pose a lower risk to the public, FDA intends to exercise enforcement discretion over these devices (meaning it will not enforce requirements under the FDCA).” In other words, the guidance carves out a large and growing body of products subject to the Act and declares that the agency simply will not apply the law to them.

Could the Supreme Court’s decision in *Texas* threaten some or all of FDA’s broad applications of enforcement discretion? If the Court addresses justiciability under *Heckler*—rather than deadlocking 4-4 or deciding the case on standing grounds—the implications for the FDA policies discussed above will depend on the opinion’s particular reasoning. Although unlikely, the Court could embrace the bold argument advanced in an *amicus* brief filed by three former Attorneys General, Edwin Meese, Richard Thornburgh, and John Ashcroft. They contended that agency decisions to refuse enforcement are immune from judicial review only when limited to “particular individuals and cases.” According to this view, any “generally applicable” or “class-wide” policy of nonenforcement, such as DAPA, is justiciable. Were the Court to adopt this approach, most or all of the FDA policies discussed above could be vulnerable, as could similar programs throughout the administrative state.

The states in *Texas* advanced a more modest position. They did not challenge DHS’s blanket exercise of enforcement discretion in and of itself. Indeed, at oral argument, Texas’s Solicitor General explicitly conceded, “I do believe [DHS] could do it class based if [it] were simply forbearing from removal.” The problem, according to the states, is that DAPA would

confer various affirmative *benefits* on four million unlawfully present aliens, including the status of “lawful presence,” eligibility for work authorization, and the right to apply for participation in Social Security and other federal programs. Consequently, the states asserted, DAPA is not merely a discretionary nonenforcement decision of the sort that *Heckler* declared to be nonjusticiable, but instead an “affirmative governmental action” subject to judicial review. The United States responded to this line of argument by emphasizing that “lawful presence” is an immigration law term of art that signifies nothing but government forbearance from removal and that “lawfully present” aliens’ eligibility for federal benefits flows not from the DAPA Memo itself, but from preexisting statutes, regulations, and policies.

At first glance, these questions may seem too closely tied to the immigration context to be relevant to FDA exercises of enforcement discretion. But there is arguably a parallel between DHS allowing unlawfully present immigrants to participate in the labor market and FDA allowing illegal food, drugs, and devices to be sold in the market for goods. Furthermore, nonenforcement of the FDCA may make the manufacturers of such products eligible for various federal financial benefits. For example, the U.S. military buys massive quantities of food that technically violates the Act because it contains low levels of filth, and the National School Lunch Program reimburses schools for the purchase of such food. Similarly, it seems almost certain that the Veterans Health Administration directly purchases some drugs and devices that are available only because of FDA enforcement discretion, and that Medicare and Medicaid reimburse for the cost of such products. Consequently, a Supreme Court decision embracing the states’ argument for the justiciability of the suit challenging DAPA may open the door to judicial review of comparable

implementations of enforcement discretion by FDA.

If the Supreme Court deems the states’ cause of action to be justiciable, it might then reach another question with broad (though unclear) implications for FDA—namely, whether DHS was required to follow the APA’s § 553 notice-and-comment rulemaking requirements when issuing the DAPA Memo. The United States argued that the memorandum is a “general policy statement” exempt from notice-and-comment under § 553(b)(3)(A). The government pointed to the nonbinding character of the DAPA Memo, as reflected in language in the document stating that it is a “policy” that “confers no substantive right” and “may be terminated at any time.” In upholding the preliminary injunction against DHS, the Fifth Circuit rejected this argument and concluded instead that the states were substantially likely to succeed on their claim that the DAPA Memo is a legislative rule subject to notice-and-comment procedures because it confers certain affirmative benefits and does not “genuinely” leave DHS and its employees free to exercise discretion.

As we have seen, FDA routinely announces broad applications of enforcement discretion in guidance documents. The agency deems these guidances to be general policy statements exempt from APA notice-and-comment procedures. In at least one prominent instance, however, the D.C. Circuit invalidated an FDA guideline declaring an exercise of enforcement discretion. The court held that the guideline in question was effectively binding on the agency and thus subject to notice-and-comment requirements. *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943 (D.C. Cir. 1987). FDA’s current “good guidance practice” regulations try to ensure the exempt status of all guidance documents by requiring that they avoid the use of mandatory language and prominently display a declaration of the document’s nonbinding effect. 21 C.F.R.

§ 10.115(i). If, however, the Supreme Court in *Texas* looks past the DAPA Memo’s nonbinding language and holds that it is binding in practice and thus required to undergo notice-and-comment procedures, that decision may encourage similar attacks against FDA guidances that declare the exercise of enforcement discretion.

Because the question of whether a particular guidance leaves an agency with genuine discretion is a case-specific inquiry, any such decision by the Supreme Court in *Texas* concerning DAPA would have uncertain implications for FDA. In any event, the imposition of APA notice-and-comment procedures, though burdensome, would not preclude FDA from continuing to issue categorical enforcement exemptions. Therefore, a state victory in *Texas* on the § 553 issue would not necessarily represent a profound challenge to FDA’s approach to exercising enforcement discretion.

The same cannot be said with respect to states’ constitutional argument in *Texas*. More specifically, the states contend that DAPA violates Art. II, § 3 of the U.S. Constitution, requiring the President to “take Care that the Laws be faithfully executed.” If the Court declares DAPA invalid under the Take Care Clause, it could, depending on its reasoning, call into question the constitutionality of all class-based exercises of enforcement discretion by any agency. Although the Court specifically requested briefing on this issue, it was not even mentioned at oral argument and seems unlikely to determine the outcome of *Texas*. If the Court is even tempted to strike down DAPA on this basis, however, it should be aware that such a decision would potentially deprive FDA (and other agencies) of a vital regulatory tool and transform the way they do business. 

By Lincoln Davies* and Andrew Hessick**

This quarter, the Supreme Court issued a number of decisions on administrative law. Among the most significant are the decisions affecting the Affordable Care Act, the Administrative Procedure Act (APA), and the Federal Power Act. Other decisions involved standing, the scope of claims under 42 U.S.C. § 1983, time bars for Title VII claims, where state agencies can be sued, and redistricting. The Court also granted review in two cases presenting issues of potential significance to administrative law, both in the area of intellectual property.

Religious Rights and the Affordable Care Act

In *Zubik v. Burwell*, 136 S. Ct. 1157 (2016), the Court considered yet another challenge to the Affordable Care Act. Under the Act, employers must provide “coverage” for “preventive care” for women. Regulations promulgated by the Department of Health and Human Services (HHS) require employers to offer their female employees health insurance that provides certain forms of birth control free of charge. 77 Fed. Reg. 8725 (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 exemptions do 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. *Id.* § 54.9815-2713AT(b)(ii)(A), (c)(1).

In *Zubik*, various groups falling into this nonexempt category challenged the accommodation on the ground that it 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. According to the plaintiffs, requiring them to certify that they have a religious objection substantially burdens the practice of their religion.

In a *per curiam* opinion, the Supreme Court refused to consider the merits of the plaintiffs’ claim. Instead, the Court remanded the case to the lower courts for a determination of whether contraceptive coverage could be provided to the plaintiffs’ employees, through the plaintiffs’ insurance companies, without requiring certification

from the plaintiffs. According to the Court, the parties had confirmed that such an option would be feasible, and the plaintiffs had agreed that such an arrangement would not interfere with the practice of their religion. In resolving the case in this way, the Court stressed that it was not ruling on the merits of the existing regulation.

Justice Sotomayor, joined by Justice Ginsburg, concurred. She wrote separately to emphasize that the Court’s opinion should not be read as a signal of how it would rule on the merits of the existing regulation.

Finality and the Administrative Procedure Act

Another of the most important administrative law cases the Supreme Court has issued this quarter is *United States Army Corps of Engineers v. Hawkes Co., Inc.*, No. 15-290, 2016 WL 3041052 (May 31, 2016). This case involved the finality of agency decisions under the APA, specifically, in the context of a decision by the U.S. Army Corps of Engineers (Corps) under the Clean Water Act (CWA).

The CWA prohibits the discharge of pollutants into “waters of the United States” without a permit. For wetlands, these permits must be issued by the Corps under § 404 of the CWA. The Corps has interpreted the “waters of the United States” in a variety of ways over time, and during the period at issue in *Hawkes*, that definition included lands that are sometimes or regularly saturated with water—including “mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, [and] playa lakes”—the “use, degradation or destruction of which could affect interstate or foreign commerce.” 33 C.F.R. § 328.3(a)(3) (2012).

Hawkes is a peat mining business. It wanted to extract peat from a tract of land in Minnesota that, because it was often wet, may have fit the Corps’ definition of “waters of the United States.” *Hawkes* thus sought from the Corps a “jurisdictional determination” or “JD”—a formal procedure the Corps’ regulations establish to allow parties to determine if their land is subject to § 404.

Corps regulations state that “jurisdictional determinations” are final agency actions. Moreover, the JD inoculates the receiving party from civil and criminal penalty actions by the Corps and the Environmental Protection Agency (EPA) for five years. Nonetheless, after *Hawkes* sought to challenge in court the Corps’ JD that its lands contained “waters of the United States,” the Corps asserted that this determination was not a final agency action—and thus not judicially reviewable under the APA.

The Supreme Court had little difficulty rejecting the Corps’ argument. Applying and reaffirming the two-prong test of *Bennett v. Spear*, 520 U.S. 154 (1997)—namely, that an agency’s action is final when it (1) “mark[s] the consummation of the agency’s decisionmaking process” and

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(2) determines “rights or obligations”—the Court, in an opinion by the Chief Justice, found the Corps’ jurisdictional determination clearly final. First, a JD marks the consummation of the agency’s process. The Corps has an alternative procedure, a preliminary JD, which is by definition advisory in nature, whereas a regular JD is not. Second, it is plain that JDs have legal consequences. If a JD suggests that waters of the United States may be present on a party’s land, the party is put on direct notice that filling those waters may result in an enforcement action by the agency. And if the determination is that the land lacks waters of the United States, the party is immunized from agency enforcement actions for five years, pursuant to a memorandum agreement between the Corps and the EPA.

In reaching this conclusion, the Court also held that the availability of other avenues within the agency did not render jurisdictional determinations non-final. Consistent with longstanding APA law, parties need not wait for the Corps to bring enforcement actions to challenge JDs. “Respondents need not assume such risks while waiting for EPA to ‘drop the hammer’ in order to have their day in court.” Slip Op. at 9 (citation omitted). Moreover, parties need not seek a § 404 permit in order to challenge a JD. The permitting procedure “adds nothing” to the JD, the Court reasoned, and also requires the applicant to expend significant time and resources.

Justice Kennedy, joined by Justices Alito and Thomas, concurred to highlight that the blurriness of CWA jurisdiction is troublesome for the nation. Justice Kagan concurred to note that the memorandum agreement between the Corps and the EPA was not essential to her agreement that JDs are final agency actions under the APA. And Justice Ginsburg concurred to indicate that the memorandum was critical in her joining the Court’s opinion.

State Jurisdiction and the Federal Power Act

Hughes v. Talen Energy Marketing, LLC, 136 S. Ct. 1288 (2016) is another headline case this quarter. In *Hughes*, the Court revisited the preemptive scope of the Federal Power Act (FPA). Specifically, the Court held that a regime adopted by Maryland to encourage the construction of electricity generation facilities at specific locations within the state trespassed into regulatory territory given by the Act to the Federal Energy Regulatory Commission (FERC), and thus, violated the Supremacy Clause.

The FPA divides the world of electricity into two halves. FERC has authority over wholesale sales of generation, as well as the high-voltage transmission of electricity. States retain most other authority, including the shape of their generation fleets, retail sales, and lower-voltage distribution of electricity.

Currently, wholesale power sales in the U.S. occur in a variety of ways. Pertinent here, large portions of the country have organized markets run by “regional transmission organizations,” or “RTOs,” that organize auctions for a variety of products. These products include day-ahead and hourly wholesale electricity production. They also include markets for generation “capacity”—that is, organized markets for the capability, rather than the actual production, of electricity. These capacity markets are designed to send a long-term signal for what new generation needs to be constructed. Pursuant to the FPA, FERC has oversight authority over these wholesale markets.

At issue in *Hughes* was a capacity market in the Mid-Atlantic. The FERC-approved RTO that runs the market there, PJM, established a set of rules for the capacity auction. PJM also rejected certain proposals made by some states, including Maryland, to further encourage new generation facilities to be built, and FERC affirmed PJM’s decision. Accordingly, Maryland established a system in which it would use a financial hedging tool to encourage generators to build in specific parts of Maryland. Importantly, Maryland’s law set the price of this hedging tool based on the PJM capacity market—and it compelled the generators to participate in that market.

The Supreme Court held that the FPA preempted Maryland’s laws. Regulation of wholesale power sales, the Court reasoned, are reserved by the FPA exclusively for FERC, so states cannot regulate in that area at all. Had Maryland not tinkered with the wholesale capacity market to establish its program, its program may have been permissible. But by crossing the wholesale line, its actions were foreclosed.

In fact, the Court went to great lengths to emphasize that its decision leaves much room for states to encourage specific types of generation. “Our holding is limited: We reject Maryland’s program only because it disregards an interstate wholesale rate required by FERC. We therefore need not and do not address the permissibility of various other measures states might employ to encourage the development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector.” *Id.* at 1299. Rather, the preemption inquiry under the FPA focuses on the target aimed at, and Maryland impermissibly aimed at the wholesale market.

Justice Sotomayor concurred separately to emphasize that the FPA itself is the ultimate touchstone when preemption questions under the Act arise, and that complementary federalist regimes are particularly delicate. Justice Thomas concurred in part and concurred in the judgment. In his view, the case could and should have been resolved based on the FPA’s text, without the need to turn to broader preemption principles.

Standing

The Court decided two cases on Article III standing this quarter. First, in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the Court addressed whether an individual can base standing on the violation of a statutory right, even if the individual does not suffer a factual injury resulting from that statutory violation. The Court answered no.

Spokeo involved a private action under the Fair Credit Reporting Act (FCRA), which requires consumer credit reporting agencies to take reasonable measures to make sure that the information they provide is accurate. The Act provides that, if an agency willfully violates these provisions, the consumer whose information was provided may bring a private action for damages of not less than \$100.

Invoking this provision, Thomas Robins filed suit in federal court against Spokeo, which operates a website that provides information about people. Robins claimed that the information Spokeo provided about him was inaccurate. The district court dismissed the case for lack of standing. It found that, although his rights might have been violated, Robins did not suffer any factual harm because the inaccuracies were innocuous. The Ninth Circuit reversed, concluding that, even if Robins did not suffer any factual harm, the violation of his statutory rights alone supported standing.

A divided Court vacated the Ninth Circuit's decision. In an opinion by Justice Alito, the Court declared that a plaintiff must have suffered a "concrete," real-world injury, to establish standing. Thus, the Court said, a person does not automatically have standing "whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." Instead, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* at 1549.

In so ruling, the Court emphasized that the injury need not be tangible to be concrete. Moreover, the Court indicated that the violation of a "right granted by statute can be sufficient...to constitute injury in fact," if the violation of the right necessarily presents a substantial risk of a concrete harm. *Id.* The Court then remanded for a determination whether the violation of Robins's rights under FCRA resulted in concrete harm.

Justice Thomas concurred to express his view that the violation of a private right—rights held by individuals, such as the right against trespass—alone suffices for an individual's standing, and that a separate factual injury is required for standing only when an individual alleges the violation of a public right shared collectively by the community, such as the right against a public nuisance. *Id.* at 1550–54. Justice Ginsburg, joined by Justice Sotomayor, dissented. In her view, a remand was unnecessary because

the inaccurate information about Robins constituted an adequately concrete injury for standing. *Id.* at 1554–56.

The Court's other standing decision this quarter is *Wittman v. Personhuballah*, No. 14-1504, 2016 WL 2945226 (May 23, 2016). In 2013, a group of Virginia voters from District 3 filed suit against Virginia in federal court, arguing that District 3 was drawn in a way that constituted an unconstitutional racial gerrymander. Ten Members of the Virginia congressional delegation intervened in the district court below.

A three-judge district court struck down the plan, concluding that Virginia had used race as the predominant basis for modifying the boundaries of District 3. Virginia did not appeal, but the intervenors appealed to the Supreme Court.

The Supreme Court unanimously dismissed the appeal for lack of standing. It explained that, because Virginia had not appealed, the intervenors could pursue their appeal only if they had standing. Accordingly, the Court said, the intervenors had to establish that they suffered an injury in fact that would likely be redressed by a favorable judicial decision. Only 3 of the 10 intervenors—Representatives Randy Forbes, Robert Wittman, and David Brat—even claimed to have standing, but the Court concluded that none of them had met the Article III requirements.

Representative Forbes, the Republican incumbent in Congressional District 4, based his standing on the claim that, unless the plan was upheld, District 4 would be transformed into a Democratic district, and the threat of that transformation compelled him to run in District 2 instead of District 4. But after argument, Forbes notified the Court that he intended to run in District 2 irrespective of whether the plan was upheld. Accordingly, the Court concluded, it did not see how any injury that Forbes might have suffered by changes to District 4 would likely "be redressed by a favorable judicial decision." *Id.* at *4.

Representatives Wittman and Brat, the Republicans representing Congressional District 1 and Congressional District 7, based their standing argument on the ground that, unless the plan was reinstated, "a portion of the[ir] 'base electorate'" would necessarily be replaced with "unfavorable Democratic voters." *Id.* But the Court concluded that neither representative had pointed to anything in the record establishing those injuries. Instead, the Court stated, the briefs before the Court focused on Congressional District 3 and Congressional District 4, not Districts 1 and 7.

Scope of § 1983 Claims

The question at issue in *Heffernan v. City of Patterson*, 136 S. Ct. 1412 (2016), was whether a governmental actor must actually violate a constitutional right to create liability under 42 U.S.C. § 1983, or whether the actor merely thinking it is violating such a right is sufficient. The Court

held that, in the First Amendment context, if the governmental actor believes it is violating a free speech right, that is enough to create § 1983 liability.

Heffernan arose from a dispute over a contested mayoral race in Patterson, New Jersey. Heffernan worked in the office of the local police chief, who had been appointed by the incumbent mayor, Jose Torres. Although Heffernan was not involved in any way with the campaign of the challenging mayoral candidate, Lawrence Spagnola, he was good friends with Spagnola. During the campaign, he also visited a distribution point of the Spagnola campaign, to retrieve a campaign sign for his ill mother, who had requested that he do so. While at the distribution point, he chatted with Spagnola campaign workers, and he was spotted by other police officers talking with them and holding a large Spagnola campaign sign. News of this quickly spread throughout the force, and the next day, Heffernan was demoted from detective to patrol officer, with a walking route, for his “overt involvement” in the Spagnola campaign. *Id.* at 1416. Heffernan then sued for violation of § 1983.

The Supreme Court held that Heffernan’s § 1983 claim could stand. The Court noted that § 1983 did not resolve whether Heffernan could bring suit, because its text merely authorizes claims for the governmental deprivation of a “right...secured by the Constitution.” 42 U.S.C. § 1983. Likewise, precedent did not give the answer, because different § 1983 cases referred alternately to the action by the plaintiff (and whether they were *actually* exercising a constitutional right) and action by the defendant (and whether the defendant *thought* it was violating a constitutional right).

Noting, however, that in *Waters v. Churchill*, 511 U.S. 661 (1994), the Court found no liability against a defendant because it did not think it was infringing on a constitutional right, the Court held that a corollary principle should apply in *Heffernan*. “If the employer’s motive...is what mattered in *Waters*, why is the same not true here? After all, in the law, what is sauce for the goose is normally sauce for the gander.” 136 S. Ct. at 1418. Thus, even though Heffernan was not exercising a First Amendment right of engaging in political speech by interacting with workers at the Spagnola campaign, he could bring his § 1983 claim against the police force if he could show that actors within the force believed they were violating his constitutional rights. This, the Court noted, was particularly appropriate in the First Amendment context, because the text of that amendment focuses on the government’s, rather than a citizen’s, actions. However, because there was evidence that perhaps Heffernan was demoted according to a neutral anti-political activity police policy, the Court remanded the case to the lower courts to make that determination.

Justice Thomas, joined by Justice Alito, dissented. He reasoned that because the text of § 1983 allows only for the collection of damages when a constitutional right is infringed, Heffernan’s claim could not stand. An actual, not a factually mistaken, violation of a constitutional right must be present to create § 1983 liability.

Title VII Time Bars

Green v. Brennan, No. 14-613, 2016 WL 2945236 (May 23, 2016), presented the question of when a claim arises under Title VII of the Civil Rights Act of 1964. Under that Act, employers may not discriminate against employees based on race, color, religion, sex, or national origin. Two basic types of claims arise under Title VII: The employee has a cause of action for illegal discharge if an employer terminates an employee for a discriminatory reason, or for constructive discharge if an employer discriminates to the degree against an employee that any reasonable person would quit. *Green* involved a constructive discharge claim.

Green was the postmaster in Englewood, Colorado. After he applied but was passed over for the postmaster position in Boulder, Colorado, he alleged discrimination on the basis of race by his supervisors. According to his complaint, the supervisors then initiated a retaliatory investigation against him. Eventually, in December 2009, Green and the supervisors reached an agreement that he would either retire or take a lower paying position in a very small town in Wyoming. Then, in February 2010, Green resigned. He subsequently contacted the Equal Employment Opportunity Commission (EEOC), a compulsory prerequisite to bringing suit under Title VII, and then filed a Title VII claim against the Postal Service.

The question before the Court was whether Green’s contacting the EEOC timely preserved his lawsuit. If measured from December 2009, he was too late and thus time-barred in court. If measured from his date of resignation, however, he was timely and could thus proceed with his lawsuit.

The Court, in an opinion by Justice Sotomayor, held that Green’s notification to the EEOC was timely. The Court reasoned that a constructive discharge claim contains two elements: first, unlawful discrimination by the employer; and second, a resignation by the employee. Without the resignation, the Court explained, there could be no constructive discharge at all because the complainant would still be an employee. Thus, for such claims under Title VII, the discharge must count as part of the facts giving rise to the claim—meaning that, for Green, he gave notice to the EEOC in time to still bring suit.

Notwithstanding this reading of the statute, the Court acknowledged that clear text in the Act or the regulation could contravene this normal canon of construction for

legal time bars. However, the Court observed that neither the statute nor the regulation gave reason to find such an exception here. The regulation simply stated that an aggrieved employee “must initiate contact with [an EEOC] Counselor within 45 days of date of the matter alleged to be discriminatory,” 29 C.F.R. § 1614.105(a)(1), and given the capacious definition of “matter,” this would also include the resignation giving rise to the constructive discharge claim.

Justice Alito concurred in the judgment, emphasizing that *Green* must be read with the Court’s other Title VII cases, which make clear that resignations in constructive discharge cases can only be part of the “matter alleged to be discriminatory” when the facts support the connection between the employer’s discrimination and the resignation. Justice Thomas dissented, on the ground that a voluntary resignation is not part of a discriminatory “matter,” because only the employer can discriminate and an employee is the one who decides to resign.

Locus of Suits Against State Agencies

Franchise Tax Board of California v. Hyatt, 136 S. Ct. 1277 (2016), presented the Court with two questions relevant to where state agencies can be sued and what law applies in such suits. First, the case presented the question of whether an agency from one state can be sued in another state when it would have complete immunity from suit in its home state. Second, the case raised the question of what damages the court in the non-home jurisdiction could award.

The case arose out of California’s attempt to collect taxes from Hyatt, who asserted he moved in 1991 from that state, which imposes income tax, to Nevada, which does not. California believed that Hyatt did not move until 1992 and thus owed millions of dollars in taxes. Hyatt, in turn, sued the California Franchise Tax Board in Nevada for conducting an inappropriate and harassing investigation. A jury awarded Hyatt nearly \$500 million in compensatory and punitive damages, and the Nevada Supreme Court upheld \$1 million of that award.

The Supreme Court began by rejecting California’s attempt to overrule the award against the tax board based on California’s argument that *Nevada v. Hall*, 440 U.S. 410 (1979), on which Nevada based jurisdiction, should be overturned. *Hall* allows courts to exercise jurisdiction against a state agency even if the agency and its home state does not consent to suit. Because the Supreme Court split 4-4 on this issue in *Hyatt*, the lower court’s exercise of jurisdiction was affirmed, and *Hall* remains good law.

Despite its affirmance of jurisdiction, the Court ruled that the Full Faith and Credit Clause required that Nevada’s state court damages award against California’s tax agency be reduced. That clause, the Court held, forecloses states from acting with “hostility” toward another jurisdiction. Here,

the Court said, Nevada did just that. Although Nevada law would have allowed only \$50,000 in damages to be awarded against its own tax authorities, the Nevada courts affirmed a much larger award than that against California’s tax agency. This is the kind of discrimination the Full Faith and Credit Clause forbids. “[A] State that disregards its own ordinary legal principles...is hostile to another State. A constitutional rule that would permit this kind of discriminatory hostility is likely to cause chaotic interference by some States into the internal, legislative affairs of others.” 136 S. Ct. at 1282.

Chief Justice Roberts, joined by Justice Thomas, dissented. He noted that there was no evidence of hostility by the Nevada courts in this case, and that Nevada had legitimate policy reasons for allowing more than \$50,000 in damages, which is all the Full Faith and Credit Clause requires.

Redistricting

In addition to the standing decision in *Wittman*, the Court issued two other redistricting decisions.

In *Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct. 1301 (2016), the Court upheld Arizona’s redistricting plan. In 2010, Arizona’s redistricting Commission created a plan to redistrict Arizona. Not all of those districts had equal populations; instead, populations varied by up to 8.8%. A group of Arizona voters challenged the plan, claiming that the disparities in population among the districts violated the Equal Protection Clause. They asserted that a desire to favor the Democratic party motivated the redistricting. They pointed in particular to District 8, which was drawn in a way that resulted in the district having a high Hispanic population and the adjacent district having a higher Republican population. A three-judge district court upheld the plan. It concluded that “the population deviations were primarily a result of good-faith efforts to comply with the Voting Rights Act...even though partisanship played some role.” *Id.* at 1309 (citation omitted).

The Supreme Court unanimously affirmed. In an opinion by Justice Breyer, the Court stated that although the Equal Protection Clause requires States to “make an honest and good faith effort to construct [legislative] districts...as nearly of equal population as is practicable,” it does “not demand mathematical perfection.” In particular, any variation below 10% in population is presumptively constitutional. To overcome that presumption, a challenger “must show that it is more probable than not” that the deviation “reflects the predominance of illegitimate reapportionment factors.” 136 S. Ct. at 1306. Noting that the variation was only 8.8%, the Court concluded that the challengers had failed to make that showing.

To the contrary, the Court explained that one legitimate consideration for disparities in population is compliance with § 5 of the Voting Rights Act. That Act forbids a

redistricting if the new plan reduces the number of districts in which minority groups “have less opportunity than other members of the electorate...to elect representatives of their choice.” 52 U.S.C. § 10301(b). The Court explained that the record adequately supported the district court’s finding that the variation in population was due to the Commission’s efforts to ensure that the new districting plan had as many of these “ability-to-elect” districts as under Arizona’s prior plan. 136 S. Ct. at 1307-09.

The Court acknowledged that under the new plan, almost all the Democratic-leaning districts are somewhat underpopulated—and almost all the Republican-leaning districts are somewhat overpopulated. But it explained that the record suggested that the tendency to favor Democratic voters was a product of the Commission’s efforts to achieve adequate representation for minorities—who tend to vote Democratic—not to favor the Democratic party.

Evenwel v. Abbott, 136 S. Ct. 1120 (2016), also raised a challenge to population disparities in a redistricting plan. In 2010, Texas redrew its districts using the total population of the state. The redrawn districts had population deviations of 8.04%—well within the presumptively permissible 10% range.

A group of Texas voters challenged the plan. They argued that, instead of using the total population, districting plans should be based on the population of individuals who are eligible to vote. Under that approach, they claimed, the deviation of population among districts exceeded 40% and accordingly violated the Equal Protection Clause. A three-judge district court rejected the challenge.

The Supreme Court affirmed. In an opinion by Justice Ginsburg, the Court concluded that “it is plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts.” The Court explained that, historically, apportionment was based on total population. In particular, it noted that the Framers deliberately allocated representation in the House of Representatives based on States’ total populations. The Court further observed that the proponents of the Fourteenth Amendment, which uses the “whole number of persons in each State” to apportion representation nationwide, expressly rejected apportionment based on eligible voters. According to the Court, this principle of using total population for purposes of national representation equally supported using total population to calculate how representation should be allocated within a state.

The Court also held that designing districts based on total populations complied with the Court’s own precedent, noting that the Court had “consistently looked to total-population figures when evaluating whether districting maps violate the Equal Protection Clause.” *Id.* at 1131. Further, requiring states to apportion based on eligible

voters would create a number of practical problems. For many years, states have used a total-population model in designing districts, and “[a]dopting voter-eligible apportionment as constitutional command would upset a well-functioning approach to districting.” *Id.* at 1132.

Justice Thomas concurred in the judgment. Although agreeing with the majority’s reasoning, he wrote separately to question the constitutional basis for the one-person, one-vote principle, explaining that in his view, the states have broad power to apportion their districts. Justice Alito, joined in part by Justice Thomas, also concurred in the judgment to stress that the Court’s opinion *permits* total-population redistricting, but does not *prohibit* states from redistricting based on eligible voter populations.

Non-Member Fees for Public Unions

The Court’s current lack of a ninth member also came to bear in *Friedrichs v. California Teachers Assoc.*, 136 S. Ct. 1083 (2016). At issue was whether public sector unions, such as a teachers’ union, may lawfully charge non-members union fees, when such fees are used only to cover benefits secured by the union for non-members. The lower court held, based on prior Supreme Court decisions, that unions could charge those fees. Nonetheless, petitioners in *Friedrichs* had challenged that determination on free speech grounds, arguing that the Court’s decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which allowed the charging of such fees, should be overturned. Because the Court split 4-4, however, the lower court’s ruling remains in place, and *Abood* remains good law.

Certiorari grants

The Court granted review in two cases of potential importance to administrative law. Both cases involve intellectual property. In the first, *Star Athletica, LLC v. Varsity Brands, Inc.*, No. 15-866, the Court will clarify the scope of copyright protection. Under federal law, artistic works are eligible for copyright only “insofar as their form but not their mechanical or utilitarian aspects are concerned.” 17 U.S.C. § 101. The Copyright Office and several circuit courts have developed different tests for determining when a design that not only is artistic, but also has utilitarian features, is eligible for copyright.

In the other certiorari grant, *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, No. 15-927, the Court will consider whether laches may bar a claim for patent infringement, even if that claim is brought within the Patent Act’s six-year limitations period. ○

By Bill Jordan*

D.C. Cir.—Amtrak may not issue standards affecting its competitors, and arbitrator appointed to resolve disputes must meet Appointments Clause requirements

Amtrak is a peculiar creature. When the private market failed to meet the perceived need for rail passenger service, Congress created a unique public-private organization. Amtrak is decidedly public in various ways. It was established by an act of Congress. Its Board of Directors consists of the Secretary of Transportation and seven other members appointed by the President and confirmed by the Senate. All Board members may be removed by the President at will. The Secretary of Transportation owns all of its preferred stock and most of its common stock. Its governing statute requires Amtrak to pursue various public goals, including providing “efficient and effective intercity passenger rail mobility,” providing “reduced fares to the disabled and elderly,” and ensuring “mobility in times of national disaster.” Amtrak also exercises joint authority with the Federal Railroad Administration to issue “metrics and standards” addressing the performance and scheduling of railroad passenger service. These and similar considerations prompted the Supreme Court to hold that Amtrak is a governmental agency to which Congress may delegate the authority to issue such metrics and standards. *Dep’t of Transp. v. Ass’n Am. R.R.s.*, 135 U.S. 1225 (2015).

But Amtrak is also to some extent decidedly private. The Rail Passenger Service Act of 1970 provides that Amtrak must “be operated and managed as a for-profit corporation.” 49 U.S.C. § 24301(a)(2). Amtrak is to “undertake initiatives that are consistent with good business judgment and designed to maximize its revenues and minimize Government subsidies.” *Id.* § 24101(d). Consistent with the private side of Amtrak’s character, disagreements between Amtrak and the private railroads concerning metrics and standards are to be resolved by an arbitrator. 49 U.S.C. § 20101 note.

For the D.C. Circuit in *Association of American Railroads v. United States Department of Transportation*, 2016 WL 1720357 (D.C. Cir. 2016), Amtrak’s mandate to maximize its own revenues doomed Amtrak’s metrics and standards referred to above. And the Appointments Clause doomed reliance upon an arbitrator.

Although the metrics and standards govern only Amtrak’s performance, they inevitably affect the private freight carriers whose rail lines Amtrak must use. This

relationship, ideally cooperative, often involves conflict as the two distinct types of rail operations seek to maximize their respective interests. According the D.C. Circuit, Amtrak’s role in regulating rail traffic through the development of metrics and standards blatantly violated due process. *Id.* The court relied upon *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), in which the Supreme Court had struck down a statutorily mandated arrangement in which the companies dominating the coal mining industry set wage and hour requirements for themselves and their competitors. That “naked self-interest” had compromised the neutrality that due process requires in government decisionmaking. Despite arguable differences, including Amtrak’s obligation to fulfill various statutorily mandated goals, the D.C. Circuit found that Amtrak’s “economic self-interest as it concerns other market participants is undeniable.” As a result, it struck down Amtrak’s role in setting metrics and standards. In the process, the court rejected arguments that Amtrak’s political accountability mitigated any concerns about its economic self-interest. Noting that self-interest in legislators could be addressed by elections and by the “auxiliary precautions” of “bicameralism, presentment, judicial independence and life tenure,” the court said, “those original checks on self-interest, custom fitted for legislators, presidents, and judges, loosely drape administrators like outsized hand-me-downs.” As to Amtrak, ultimately, “to co-opt the state’s coercive power to impose a disadvantageous regulatory scheme on its market competitors would be problematic.” Thus, “due process of law is violated when a self-interested entity is ‘entrusted with the power to regulate the business . . . of a competitor.’”

The D.C. Circuit also struck down the use of an arbitrator to resolve disputes between Amtrak and the freight rail industry. The court first held that the arbitrator is an “Officer of the United States” under the Appointments Clause because “the arbitrator’s power to alter the railroad industry through final agency action constitutes ‘significant authority pursuant to the laws of the United States.’” The question then became whether the arbitrator was a “Principal officer,” in which case the arbitrator had to be nominated by the President and confirmed by the Senate, or an “inferior officer . . . ‘whose work is directed and supervised at some level’ by principal officers.” The very nature of the role of an arbitrator dictated the outcome. Whatever the scope of the arbitrator’s power, it would be the final word, not subject to appeal or any other review. Thus, the arbitrator could only be a Principal officer, but the arbitrator’s appointment did not meet the requirements of the Appointments Clause.

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D.C. Cir.—No standing to challenge the Affordable Care Act based upon rate increases: connection too tenuous

Ever creative in their efforts to take down the Affordable Care Act (ACA), opponents saw an attractive target in an administrative decision to delay the deadline by which the statute required health insurance policies to provide minimum coverage. The Obama Administration adopted this “Transition Policy” to counter concerns that the increased cost of ACA-complying policies would deter purchase of health insurance by individuals or small businesses. The American Freedom Law Center and one of its employees (referred to collectively as AFLC) characterized the Transition Policy as “unlawful executive action,” undertaken by “executive fiat.”

In *American Freedom Law Center v. Obama*, 2016 WL 2772301 (D.C. Cir. 2016), however, the D.C. Circuit rejected the challengers’ reliance upon alleged health insurance rate increases as the basis for standing. The AFLC obtained health insurance for its personnel through Blue Cross. Blue Cross informed the organization that it would be offering only health insurance plans that comply with the ACA. Blue Cross chose not to continue offering the plan it had previously provided to the organization, although it could have continued to do so under the Transition Policy.

The AFLC asserted injury-in-fact based upon a Blue Cross rate filing projecting a rate increase for 2015 due in part “to the market being allowed to extend pre-ACA . . . plans into 2016.” In other words, the fact that individuals could purchase non-complying plans at lower costs put upward pressure on the cost of plans complying with the ACA. Able to purchase only complying plans from Blue Cross, the AFLC blamed the cost increase on the agency’s Transition Policy.

The court held that the challengers had failed to establish standing. The alleged injury must be “fairly traceable” to the agency’s unlawful conduct, and “the greater number of uncertain links in a causal chain, the less likely it is that the entire chain will hold true.” According to the court, the AFLC had failed to make the necessary showing. First, AFLC relied upon a Blue Cross rate increase filing, but it was not clear whether that filing related to the challengers’ health care plan at all. The projected cost increase applied “across all of Blue Cross’s plans,” with increases varying depending upon the product and plan, and some plans not increasing at all. Second, a later Blue Cross filing indicated a projected decrease in every plan’s price later in 2015.

The AFLC argued that “basic economic principles” dictate that a reduction in the number of purchasers of complying policies (allegedly caused by the Transition Policy) would necessarily result in an increase in the costs

of complying policies. But the court disagreed, explaining that the later Blue Cross rate filing contradicted this assertion, and that the organization provided “no concrete allegations” or “specific evidence” that their rates would increase in the future or that any rate increase would be caused by the Transition Policy. Moreover, many factors bear upon the cost of healthcare. Thus, the court explained, the difficulty of separating out which factors would cause any particular price increase makes it difficult to show causation, and the challengers had “made no attempt to separate out any of these factors.”

The AFLC’s reliance on asserted “basic economic principles” is a good example of the differing value of an assertion in two different arenas. The AFLC’s assertion, no doubt honestly held and strongly believed, makes for effective political rhetoric. By contrast, it fails in the judicial arena for lack of factual underpinning necessary to establish actual causation.

Finally, the organization’s employee argued that the Transition Policy violated equal protection because he was unable to take advantage of the lower costs of non-complying policies permitted by the Transition Policy. The court found that any harm to the employee derived from the actions of Blue Cross, not from the agency’s decision. While the agency applied the Transition Policy evenhandedly, Blue Cross decided not to issue non-complying policies. Thus, the alleged injury was not traceable to the agency.

Fourth Circuit rules for transgender boy in high school bathroom dispute

In one of the saddest disputes of our time, a Fourth Circuit majority reversed a denial of a preliminary injunction sought by a transgender boy seeking to use the boys’ bathroom at a public high school. *G.G. v. Gloucester County School Board*, 2016 WL 1567467 (4th Cir. 2016). The court split on the meaning of the term “sex” in Title IX of the Education Amendments of 1972, which prohibits schools from discriminating on the basis of “sex.” For the majority, *Auer* deference determined the outcome, while the dissent believed that the term “sex” unambiguously referred to physical characteristics at birth.

U.S. Department of Education regulations provide that schools may provide separate toilet and similar facilities on the basis of “sex.” On January 7, 2015, the Department’s Office for Civil Rights issued a letter interpreting the agency’s regulation to mean that “a school generally must treat transgender students consistent with their gender identity.”

G.G. was born biologically female. During G.G.’s freshman year, he told his parents that he had not felt “like a girl” from an early age and that he considers himself to be

transgender. He began therapy with a psychologist, who diagnosed “‘gender dysphonia,’ a condition of distress brought about by the incongruence of one’s biological sex and gender identity.” After his freshman year, he began to undergo hormone therapy and legally changed his first name to a more traditionally male name. He lives all aspects of his life as a male, but he has not had sexual reassignment surgery.

At the beginning of his sophomore year, G.G. and his parents advised school officials of the situation and asked that he be treated as a boy by teachers and staff. After initially using the nurse’s restroom, G.G. found it stigmatizing and asked to be able to use the boys’ restroom. According to the majority, school officials agreed, and G.G. used the boys’ restroom for some seven weeks without incident. Only when “others in the community” became upset and contacted the School Board did this dispute actually arise. Interestingly, the dissent characterizes the facts differently, asserting that the School Board began receiving complaints from parents and students “the very next day” after the school allowed G.G. to use the boys’ restroom. Perhaps the highly emotional nature of the situation prompted the majority and the dissent to see these rather basic facts so differently.

The School Board ultimately limited the use of male and female restrooms “to the corresponding biological genders” and required that “students with gender identity issues . . . be provided an alternative appropriate private facility.” The high school promptly built three single-stall unisex restrooms for use by all students.

The district court denied G.G.’s request for a preliminary injunction against the school’s enforcement of its new policy excluding him from the boys’ restroom. The Fourth Circuit reversed, finding the term “sex” sufficiently ambiguous to require deference to the position taken by the agency.

The Fourth Circuit agreed that the term “sex” is unambiguous in the sense that there are only two sexes. The regulatory language “of one sex” and “of the other sex,” for example, “refers to male and female students.” But the Fourth Circuit majority found ambiguity in the term “sex” as it applied to the question of whether a particular individual is male or female. Noting that some people have sex-reassignment surgery, some are physically intersexual, and some are born with X-X-Y chromosomes, the majority deferred to the agency’s resolution of the ambiguity, which referred to “the student’s gender identity.”

Applying *Auer* deference, the court noted dictionary references to the determination of an individual’s sex as “the ‘sum of’ various factors” and as “typically manifested in maleness and femaleness.” Thus, the majority found, the agency’s interpretation of Title IX and its regulation

were not “plainly erroneous.” The majority then relied on various factors to hold that the agency’s interpretation, though novel, was the result of “the agency’s fair and considered judgment.” The court remanded to the district court for reconsideration of its denial of the motion for preliminary injunction. The concurring judge, however, indicated that the “uncontroverted facts” as to psychological harm supported issuance of the preliminary injunction.

Complaining that this “unprecedented holding overrules custom, culture, and the very demands inherent in human nature for privacy and safety,” the dissent found no ambiguity in the word “sex.” The dissent, too, weighed in with various dictionaries, this time emphasizing physical differences between “reproductive organs and their functions.” The dissent argued, in particular, that the agency’s position was illogical. If the term “sex” applies “to both biological sex and gender identity,” no bathroom separation by sex (which is permitted) could ever meet the needs of a student with conflicting characteristics. And if the term means “either biological sex or gender identify” the School Board’s policy would comply because it segregated on the basis of biological sex.

Fifth Circuit splits on intervention as of right in reverse-FOIA action against EPA

Administrative law disputes frequently involve three parties or interests, the agency (e.g., EPA), a regulated entity (e.g., a company subject to the Clean Air Act), and a third party whose interests are generally contrary to those of the regulated entity (e.g., an environmental group). In those and similar situations, the third party often seeks to intervene in proceedings involving the other two. In *Entergy Golf States Louisiana, LLC v. EPA*, 2016 WL 1077108 (5th Cir. 2016), the Sierra Club sought to intervene in a reverse-Freedom of Information Act (FOIA) action brought by a power company against EPA.

The Sierra Club filed FOIA requests seeking documents that Entergy had provided to EPA concerning three of Entergy’s power plants. Entergy, however, had designated many of those documents as containing confidential business information (“CBI”) which is exempt from disclosure. EPA notified Entergy of the FOIA requests and gave the company an opportunity to substantiate its CBI claims. After considering Entergy’s claims, EPA found that none of the more than 21,000 pages of requested records constituted Entergy’s CBI. However, EPA determined that some 18,000 pages might contain CBI of third parties. EPA decided to protect that information pending determinations about whether it qualified as third-party CBI, but it decided to release the balance of Entergy’s claimed CBI—some 3,685 pages of records—that did not include third-party documents.

Entergy then filed a reverse-FOIA action against EPA, asserting that the documents contain Entergy CBI and seeking to prevent disclosure. Entergy and EPA jointly sought to stay the action to allow discussion and resolution of various questions, particularly those concerning third-party CBI. They ultimately agreed to a stay pending resolution of EPA's administrative review. The Sierra Club opposed the stay, asserting that it would be prejudiced by delaying disclosure. After various filings, the Sierra Club agreed to the stay as to the potential third-party CBI, but it asked that the case be bifurcated and opposed continuation of the stay as to the remaining documents. The district court continued the stay of the entire case, preferring amicable review by Entergy and EPA to the "piecemeal approach suggested by" the Sierra Club.

Meanwhile, the Sierra Club sought to intervene as of right. A magistrate judge granted that request, but the district court reversed. Entergy participated in the appeal to the Fifth Circuit, but EPA did not.

The dispute came down to the application of the intervention rule, which requires that "the applicant's interest must be inadequately represented by the existing parties to the suit." The rule "is to be liberally construed" with "doubts resolved in favor of the proposed intervenor." The party seeking intervention need show only that its interests "may be inadequately represented," but that burden "cannot be treated as so minimal as to write the requirement completely out of the rule." Representation is presumed to be adequate where (1) "one party is a representative of the absentee by law," or (2) "the would-be intervenor has the same ultimate objective as a party in the lawsuit, in which event the applicant for intervention must show adversity of interest, collusion, or nonfeasance on the part of the existing party to overcome the presumption." (internal quotations removed). Here, the question was whether the Sierra Club and EPA had the same ultimate objective, and if so whether there was sufficient adversity of interest for the Sierra Club to intervene.

Although there seems to be a strong argument that the Sierra Club and EPA did not have the same ultimate interest, the Fifth Circuit assumed they did for the purpose of discussion. The court turned to whether the presumption of adequate representation was overcome by adversity of interest. According to the majority, the prospective intervenor had to specify "the particular ways in which their interests diverged from" EPA's interest and then identify "the particular way in which these divergent interests have impacted the litigation."

The Sierra Club argued that it and EPA differed as to the desired timing of document disclosure, asserting that its interest was in prompt disclosure, while EPA's interest was only in eventual disclosure. The Sierra Club also noted

that had no interest in protecting third-party CBI or in cooperating with Entergy to decide that issue.

Entergy argued that bifurcation and the nature of the stay concerned "mere litigation tactics that are within the district court's broad discretion to regulate and do not warrant intervention." The Fifth Circuit majority rejected this argument, noting EPA's estimate that resolution of the third-party CBI issues would take 12 to 18 months, which was inconsistent with the Sierra Club's interest in prompt disclosure. The court also noted that the third-party CBI review process was expected to result in removal from the case of any documents determined to contain third-party CBI. Those decisions would affect the Sierra Club's ability to address those documents. Noting that this was a "unique situation, the majority granted intervention because "stay and refusal to bifurcate will result in a significantly delayed and likely a narrower ruling."

The dissent characterized the Sierra Club's concerns as "bearing solely on litigation tactics, not on the fundamental adversity of interest between EPA and the Sierra Club." The dissent took some solace in the fact that the majority had emphasized that its ruling with respect to intervention "should in no way be construed as opining on the merits stay or bifurcation."

Tenth Circuit holds that private company decision banning snowboarding at facility on federal lands does not constitute state action necessary to trigger constitutional protections

The Alta Ski Lifts Company operates the Alta Ski Area in a national forest in Utah, one of 120 ski areas operated in federal lands under a Forest Service permit. Under the permit, Alta pays a usage fee each year, the total payment accounting for less than 0.1% of the Forest Service's budget. As provided by the permit, Force Service approves Alta's site operation plan each year. The plan addresses various types of management decisions, including granting Alta "the right to exclude any skiing device from its ski runs that it deems causes risk to the user of the device or other skiers, causes undue damage to the quality of the snow, or is inconsistent with Alta's business management decisions."

Various snowboarders challenged Alta's decision to ban their sport as a violation of equal protection for snowboarders. The snowboarders relied upon Alta's relationship with the Forest Service to contend that the resort's ban constituted state action necessary to trigger application of constitutional protections.

In *Wasatch Equality v. Alta Ski Lifts Company*, 2016 WL 1566626 (10th Cir. 2016), the Tenth Circuit rejected this claim. In determining whether private conduct constitutes

state action, the court applied several tests, all going to the ultimate question of whether “the conduct allegedly causing the deprivation of a federal right must be fairly attributable to the State” (internal quotations removed).

Under the symbiotic-relationship test, state action exists where the government entity “must be recognized as a joint participant in the challenged activity.” Thus, when the state created a parking authority and parking structure relying on rents from a restaurant in the facility, the Supreme Court found state action. Similarly, the Tenth Circuit found state action when a city “substantially participated in the funding, creation, and financial structure” of a hospital and leased the hospital to a public trust, which contracted with a private corporation to manage the hospital. The Alta arrangement did not meet the test because the revenue to the Forest Service was insignificant, and the

Forest Service did not participate significantly in various aspects of the ski area.

Moreover, the court found that the arrangement did not meet the “nexus test” because the Forest Service merely knew of the ban at the time of annual permit reviews, but the permit was not contingent upon or even related to the snowboard ban. General awareness, approval, or acquiescence by a government entity is not enough to constitute state action. Similarly, “mere acquiescence” was not enough to meet the “joint-action test,” which requires willful participation in joint action. Finally, Alta’s ban did not meet the “public-function” test because the operation of a ski area (as opposed to the operation of a National Forest) is not “traditionally exclusively reserved to the State.” 

But is it Kosher? FOIA & the Controversial Home Server

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1975, I can chant the mantra of district judges and magistrates that summary judgment is the norm in the FOIA case law, and motions for discovery depositions are almost never granted. FOIA could not operate otherwise, because a skilled plaintiff’s counsel deposing the agency manager about an undisclosed agency document will expose its contents. Becoming an agency’s chief FOIA officer is already a headache. Hours or days under oath in a lawyer’s office in the hot seat, as the FOIA deponent, would multiply the hassles and would likely reveal some of the departmental staff recommendations, or factual or opinion items, which the requester has sought.

And as of June 2016, it looks as if the challengers against Ms. Clinton’s use of her home-based server will be permitted to take depositions of State Department officials regarding the use and content of that server. This inquiry could either set a wide

precedent, allowing many more depositions of FOIA officers in other federal agencies, or it could be tightly constrained by the pretrial discovery order, to address only the issues of connection, ownership and circumstances of the computer itself. A minimal disruption to FOIA records processing delays would be achieved if the court’s order (and the deponents’ behavior) makes the vital distinction between questions probing the content of the messages (some classified, some routine government, some personal/family matters) and questions limited to the nature of use of the device itself. When was it put in place, with what security, how protected against misuse, etc.? This would be a line of asset-based questions rather than inquiries into diplomatic cables, treaty negotiation position papers, and other content-based questions.

Would the use of a non-government communication device for retention and transmission of government information violate the law (a) in general or (b) in the case of classified information? The law is not clear and Congress seems not to be in the mood to clarify these questions during this election year, if ever. I believe the answer is no, it does not violate the law. As to classified information, I expect that robust arguments can be made on both sides of the issue. This seems to be the likely outcome from the Clinton server litigation...and I could tell you the correct answer, but hmmm...are you suing me and can you prove you have a need to know? As Shakespeare wrote in *Twelfth Night*: “O time! thou must untangle this, not I;/ It is too hard a knot for me to untie!” (II.ii.41). 

Sexual Violence on Campus— Disciplinary Procedures Must be Fair Both to Victim and Alleged Perpetrator

By Michael Asimow*

Sexual violence on college campuses is a huge problem. The Department of Education's Office of Civil Rights (OCR) has made great strides in compelling both public and private colleges to confront the problem. In "The Sex Bureaucracy," 104 CALIFORNIA LAW REVIEW—(forthcoming August 2016) Jacob Gersen and Jeannie Suk contend that OCR overreached in these efforts. An important aspect of the effort to control sexual violence on campus is to assure procedural protection both to victims and to alleged perpetrators.

Under California law, certain powerful *private* institutions must accord basic procedural protections to individuals excluded by those institutions. Case law has imposed such obligations on professional organizations that act as professional gatekeepers, such as private hospitals that have excluded staff physicians or insurance provider networks that exclude physicians. If the common law right of fair procedure applies, the excluded party is entitled to notice and fair procedure (but whether this is equivalent to due process requirements remains unclear). In addition, the factual aspects of the exclusionary decision are judicially reviewed under California's unique administrative mandamus procedure using the substantial evidence test. See Michael Asimow et al., California Practice Guide—Administrative Law, Chapter 12 (2016). Whether students expelled or suspended from private colleges for disciplinary reasons are covered by the common law right to fair procedure is unclear. See *id.*

Recently, in *Doe v. University of Southern California*, 200 Cal. Rptr. 3d 851 (2016), the Court of Appeal drew on this case law and upheld claims by a college student that he had been denied fair procedural protection in a sexual violence case.

The protagonists in the episode, identified only as John and Jane Doe, were both USC athletes. They attended an off-campus fraternity party (at which much drinking occurred). The Office of Student Judicial Affairs and Community Standards (SJACS) investigated Jane's allegations over a lengthy period and notified John that he had violated nine sections of the student conduct code, including sexual assault. It suspended him for two years, effective immediately.

The Student Behavior Appeals Panel (Appeals Panel) then considered John's appeal. The Panel held no hearing, but made its decision based on the evidence in the file. It determined

that John and Jane had consensual sex and that John was not guilty of sexual assault. However, he violated two sections of the conduct code because he had "encouraged and permitted" other students to slap Jane on the buttocks and he endangered Jane by leaving her alone in the bedroom with other students after sexual activity concluded. The Appeals Panel reduced the suspension to one year.

The lengthy opinion in the *Doe* case is critical of every stage of the SJACS's Board and Appeals Panel procedures. Indeed, USC's procedure seemed pretty shabby. First, John never received adequate notice because the SJACS notice included only the sections of the code he allegedly violated, not the evidence supporting those conclusions. John had no notice that the Appeals Panel might sanction him for the slaps and for failing to protect Jane, as opposed to having committed sexual assault himself. Moreover, there was never an oral hearing, and John had no opportunity to rebut the evidence against him. Finally, the court determined that the determination by the Appeals Panel that John had violated two sections of the conduct code was not supported by substantial evidence.

An important issue in sexual violence cases is whether the accused should have the opportunity to cross-examine the victim, given that such cases nearly always present credibility issues. OCR's famous "Dear Colleague" letter to all colleges strongly counsels *against* allowing such cross-examination. See http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104_pg15.html. The *Doe* case did not resolve the question of whether John had a right to an oral hearing or to cross-examine Jane or the other witnesses. However, it said that at a minimum the school must provide the respondent with copies of all of the evidence (including all witness statements) against him, which USC had not done.

Colleges must take strong action against sexual violence, but they must do so in a way that provides adequate procedural protection both to the victim and alleged perpetrator. This means adequate notice and a fair hearing. The hearing must be provided by a neutral adjudicating body, not by an investigative/prosecuting unit like SJACS.

(Note: USC has sought a California Supreme Court hearing in the *Doe* case. If a hearing is granted, the Court of Appeals decision will be vacated. Under an unusual California procedural rule, the Supreme Court also has the option to "depublish" the lower court opinion without actually hearing the case.) ○

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65th Plenary Session and Project Updates

By Amber Williams* and Connie Vogelmann**

The Administrative Conference of the United States recently held its 65th 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.

June 2016 Plenary Session

The Administrative Conference held its 65th Plenary Session on June 10, 2016, and adopted two recommendations. Brief descriptions of the recommendations follow. Reach out to the listed staff contact with any questions or implementation-related suggestions you have.

- *Recommendation 2016-1, Consumer Complaint Databases:* This recommendation encourages agencies that make consumer complaints publicly available through online databases or downloadable data sets to adopt and publish written policies governing the dissemination of such information to the public. These policies should inform the public of the source and limitations of the information and permit entities publicly identified to respond or request corrections or retractions (Gisselle Bourns, gbourns@acus.gov).
- *Recommendation 2016-2, Aggregate Agency Adjudication:* Agencies adjudicate hundreds of thousands of cases each year. Aggregation procedures could help alleviate the burden of large caseloads while achieving efficiency and greater consistency in outcomes. This recommendation identifies the contexts in which aggregation may be an attractive mechanism and develops best practices for those claims or cases in which aggregation is used (Amber Williams, awilliams@acus.gov).

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.

- *Agency Guidance:* Federal agencies frequently issue guidance documents intended to provide clarification of a particular issue. Guidance documents are exempted from the notice-and-comment process and

from pre-enforcement judicial review—exceptions that make the documents relatively easy to issue and modify. To enjoy these exemptions, the documents must not be binding on officials or the public. An agency guidance document that does not go through notice-and-comment, but is deemed to be binding on judicial review, may be vacated. This project studies federal agencies' use of guidance and its effect on agency personnel and nonfederal stakeholders—as well as courts' use of “vacatur” as a remedy to vacate guidance documents—in order to identify best practices and recommendations (Alissa Ardito, aardito@acus.gov and Gisselle Bourns, gbourns@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. 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 recording systems for hearings (Amber Williams, awilliams@acus.gov).
- *Informal Agency Adjudication:* This project arose from the Federal Administrative Adjudication project and focuses on adjudication governed outside of the Administrative Procedure Act—commonly referred to as informal adjudication. This project examines pre-hearing, hearing, and post-hearing procedures. Based on the project's analysis, it will offer best practices regarding, among other things, notice procedures, evidentiary rules, appeal opportunities, and the overall integrity of the decisionmaking process in informal adjudication (Amber Williams, awilliams@acus.gov).
- *Model Adjudication Rules:* The Office of the Chairman has established the Model Adjudication Rules Working Group to review and revise the Conference's Model Adjudication Rules. Released in 1993 by a similar working group of the Conference, the

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Model Adjudication Rules were designed for use by federal agencies to amend or develop their procedural rules for hearings conducted under the Administrative Procedure Act. Numerous agencies have relied on the Model Rules to improve existing adjudicative schemes; newer agencies have relied on them to design new procedures. Significant changes in adjudicative practices and procedures since 1993 necessitate a careful review and revision of the Model Adjudication Rules. In reviewing and revising the Model Rules, the Working Group will rely on the Conference's extensive empirical research of adjudicative practices reflected in the Federal Administrative Adjudication Database, amendments to the Federal Rules of Civil Procedure since 1993, and input from agency officials, academics, practitioners, and other stakeholders (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 to investigate potential alternatives for collaborative policymaking that agencies may use when negotiated rulemaking is impracticable or otherwise inadvisable (Reeve Bull, rbull@acus.gov).
- *Ombudsman in Federal Agencies*: This project is designed to identify the variety of federal ombuds programs and the scope of their activities, identify best practices for the establishment and operation of ombuds offices, and recommend situations in which expanded use of ombuds may benefit agencies (David Pritzker, dpritzker@acus.gov).
- *Public Private Partnerships*: Public-private partnerships are increasingly common as a means for federal agencies to address complex challenges. At the federal level, infrastructure public-private partnerships have been the subject of multiple studies and a presidential memorandum, but much less information is available on other forms of public-private partnerships. Agency experience with public-private partnerships varies, and such partnerships involve novel and crosscutting issues. Because such issues traverse conventional divisions in agency general counsel offices, legal expertise is likewise segmented. This project examines public-private partnerships outside of the infrastructure context

with close attention to pertinent legal issues, in order to devise recommendations and best practices (Alissa Ardito, aardito@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 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. The study also surveys federal court practices and procedures for handling social security cases to identify varying approaches and differential impacts. 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. 

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