February 16, 2017


Parties are to address the following questions: 1. Is the CFPB's structure as a single-Director independent agency consistent with Article II of the Constitution and, if not, is the proper remedy to sever the for-cause provision of the statute? 2. May the court appropriately avoid deciding that constitutional question given the panel's ruling on the statutory issues in this case? 3. If the en banc court, which has today separately ordered en banc consideration of Lucia v. SEC, 832 F.3d 277 (D.C. Cir. 2016), concludes in that case that the administrative law judge who handled that case was an inferior officer rather than an employee, what is the appropriate disposition of this case?


This case involves challenges raised by two separate FOIA requesters to the fees assessed against them by the Department of Justice for processing their requests for records. One requester argues that the fees assessed against him exceed the amounts permitted by the statute. The other contends that its request falls within a statutory waiver of fees for certain disclosures furthering the public's understanding of government operations. The district court denied both claims and awarded summary judgment to the Department.

Jeffrey Stein, a columnist and blogger who writes about national security issues, sought disclosure of "all pages on the internal Federal Bureau of Investigation ('FBI') Records Management Division ('RMD') website, ... as well as all documents, images, audio and video files, and any other files posted on the RMD website." The FBI responded by releasing, free of charge, a CD containing an initial 567 pages of responsive material. The agency further conveyed that it had located an additional 21,753 responsive pages, which the agency would produce for Stein on multiple CDs if he paid a fee of $665. The FBI calculated that fee pursuant
to its interim release policy, under which it responds to large document requests by burning a series of CDs, each of which contains a maximum of 500 pages of responsive documents. The agency charges requesters $15 per CD. Stein, without appealing within the agency, brought an action in district court, claiming that the FBI's fee policies, at least as they apply to large requests like his own, are inconsistent with FOIA.

As an initial matter, the D.C. Circuit rejected the government’s argument that the case should be dismissed for failure to exhaust administrative remedies. D.C. Circuit precedent holds that a FOIA requester's failure to exhaust administrative remedies “is not [a] jurisdictional” bar to review. Therefore, the court said that it was within its discretion to entertain Stein's arguments. Although “FOIA's administrative scheme favors treating failure to exhaust as a bar to judicial review,” the court concluded that, in the specific circumstances of this case, the purposes of the exhaustion doctrine would not be served by declining to hear Stein's claim. It noted that it had in previous cases elected to consider the claim of a party who failed to exhaust agency remedies when that party's claim and the claim of someone who did personally exhaust “are so similar that it can fairly be said that no conciliatory purpose would be served” by requiring exhaustion from both parties. Here, when two co-plaintiffs jointly asserting precisely the same claim in the same action did exhaust, the court elected to consider Stein's challenge notwithstanding his own failure to exhaust.

With respect to the fee assessed, the court explained that fees must “be limited to reasonable standard charges,” and an agency may recover “only the direct costs of search, duplication, or review.” Because the agency had come forward with a reasonable, non-obstructionist explanation for the interim release policy’s 500–page–per–CD limitation, the court said that limitation did not result in a violation of FOIA's mandate that agencies recover only “reasonable standard charges.” However, the agency’s explanation for the $15 per CD lacked adequate specificity to determine whether, and to what extent, the agency’s assumption of employee work time and therefore the cost to review and copy was accurate. Therefore, it remanded Stein’s case to the district court.

The National Security Counselors (NSC) requested records concerning post-2000 FOIA cases handled by the Department of Justice's Federal Programs Branch and sworn declarations made by Department representatives in connection with certain FOIA and Privacy Act litigation between 2002 and 2006. It claimed entitlement to a waiver of fees for those requests pursuant to FOIA's provision establishing a waiver or reduction of fees for certain disclosures in the public interest. In order to qualify for the fee waiver, the FOIA specifically requires that the “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” Although fee waiver applications are to be liberally construed, the court found that NSC failed to provide adequate evidence suggesting that it would effectively disseminate its requested information in furtherance of the public's understanding of government operations. While NSC provided some barebones indication of how it intended to use its requested information, it failed to provide sufficiently specific and non-conclusory statements demonstrating its ability to disseminate the disclosures to a “reasonably broad audience of persons interested in the subject.” Accordingly, the court upheld the denial of the fee waiver.
Two non-profits sought from the government copies of emails to and from Hillary Clinton, while she was Secretary of State, that were not contained in the government recordkeeping systems. While the government had obtained most of those emails, it had not acquired all of them, including those to and from the Secretary’s Blackberry. The non-profits sued to require the Archivist and the State Department to request the Attorney General to begin legal proceedings against the former Secretary to retrieve those emails.

In Armstrong v. Bush, 924 F.2d 282, 295 (D.C. Cir. 1991), the D.C. Circuit had held that the Federal Records Act requires an agency “to ask the Attorney General to initiate legal action” to recover and protect federal records whenever they have been removed. In Armstrong the agencies involved had done nothing to try to retrieve the records, whereas in the instant case the agencies had diligently attempted to obtain the records. This led the district court to believe that Armstrong’s stated requirement to ask the Attorney General to initiate legal action did not apply in this case, and the court dismissed the case as moot.

The D.C. Circuit reversed and remanded. It clarified that Armstrong’s requirement for the agency to ask the Attorney General to initiate legal action always applied, and because it was a mandatory duty, persons could sue under the APA asserting that the agency was withholding
action legally required. Moreover, the case was not moot because, at least as the record before
the D.C. Circuit showed, the plaintiffs had not received all the records they had requested.

Labor Relations Authority, 844 F.3d 957 (D.C. Cir. 2016) (Tatel, J.).

The Federal Labor Relations Authority (FLRA) ordered the Air Force to bargain
collectively with its civilian employees over their access to an on-base shoppette – a gas station
and convenience store that forms part of the military's network of commissaries and exchanges.
The Air Force challenged that decision, arguing that the issue was not a proper subject of
bargaining, because Congress has given the military unfettered discretion to determine whether
civilians may patronize commissaries and exchanges.

The Federal Service Labor-Management Relations Statute governs collective bargaining
in the federal workplace, but prior court decisions have held that employees have no right to
bargain over matters that Congress has committed to an agency’s “unfettered discretion.” The
question, therefore, was whether the statutes governing the operation of post exchanges,
including shoppettes, committed their operation to the unfettered discretion of the military
services. The court stated that it owed no deference to the FLRA’s interpretation of these statutes
because the FLRA is not charged with administering them. The law grants the Secretaries of the
Army, Navy, and Air Force "the authority necessary to conduct[ ] all affairs of the[ir respective]
Department[s]," including the "functions [of] ... Recruiting[,] ... Administering (including the
morale and welfare of personnel)[,] ... and Maintaining" Department personnel. The law also
authorizes the Branch Secretaries to "prescribe regulations to carry out [their] functions, powers,
and duties under this title," subject only to "the authority, direction, and control of the Secretary
of Defense." The court noted that the three enumerated duties – recruiting, administering, and
maintaining – appear in almost identical form in the section of the law declaring the purpose of
commissaries and post-exchanges, where Congress explained that it "intended [commissaries and
exchanges] ... to support military readiness, recruitment, and retention." The court drew two
conclusions from this: First, Congress intended commissaries and exchanges to advance the
objectives of recruiting, administering, and maintaining the armed forces. Second, Congress gave
the Branch Secretaries authority to decide how best to achieve those objectives, subject only to
direction by the Secretary of Defense. Consequently, the court said, “Given these legislative
directives, we cannot imagine that Congress intended to empower a civilian agency like the
Federal Labor Relations Authority to second-guess the military's judgment about non-military
access to commissaries and exchanges.” Therefore, the court held that civilian access to
commissaries and exchanges was not a proper subject of collective bargaining because Congress
has vested the military with "unfettered discretion" over the matter.

Investment Advisers Act of 1940; Securities Exchange Act of 1934; Dodd-Frank Act;
Retroactive Penalties; Unclean Hands Doctrine. Bartko v. Securities and Exchange

Between 2004 and 2005, Gregory Bartko masterminded a wide-ranging scheme that
sought to defraud investors through the sale of securities. Five years later, Bartko was convicted
of conspiracy, selling unregistered securities and mail fraud. Shortly thereafter, the Securities
and Exchange Commission (SEC or Commission) instituted a follow-on administrative
proceeding against him. In that proceeding, the Commission permanently barred Bartko from associating with six classes of securities market participants – broker-dealers, investment advisers, municipal securities dealers, transfer agents, municipal advisors, and nationally recognized statistical ratings organizations. During the period in which Bartko engaged in the fraudulent activity, however, the D.C. Circuit had interpreted the law to allow the Commission to bar a person only from the class of securities market participants with which he had a nexus, and Bartko had not had a nexus with several of the classes from which he was barred. But the law changed with the Dodd-Frank Act in 2010, which explicitly authorized the SEC to impose collateral bars – a tool by which the SEC could ban a market participant from associating with all classes based on misconduct regarding only one class.

The question, therefore, was whether the SEC’s bar to Bartko associating with all of the six classes was an impermissible retroactive penalty. The SEC argued that the bar was not a retroactive penalty but a prospective protection of the investing public from future harm, as reflected in its finding that the bars were in the public interest. The court was not convinced. It concluded that the Commission’s use of Dodd-Frank’s collateral bar against Bartko constituted an impermissibly retroactive penalty. The application of post-Dodd-Frank penalties to pre-Dodd-Frank misconduct constituted a quintessential example of "attach[ing] new legal consequences to events completed before [Dodd-Frank’s] enactment.” Accordingly, the court overturned the bar with respect to the three classes with which he had no nexus.

Bartko also challenged the entire administrative proceeding that led to his bar. On the appeal of his criminal conviction, the court had found that the government had engaged in certain misconduct in his prosecution. Nevertheless, the court had upheld his conviction, finding the government misconduct did not rise to a level that undermined confidence in the jury’s verdict. In the instant case, Bartko argued that the SEC was estopped from bringing the proceeding to bar him from associating with the various classes of securities market participants because of its misconduct in the previous criminal trial. The court rejected the argument. It noted that the Supreme Court has said that the unclean hands doctrine does not apply to the government in the same way as other litigants. The Court suggested that the unclean hands doctrine may apply where "the public interest in ensuring that the Government can enforce the law free from estoppel [is] outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.” Lower courts have interpreted this standard as requiring “the agency's misconduct be egregious and the resulting prejudice to the defendant rise to a constitutional level.” Here, the misconduct in Bartko’s case did not fit within this window, so the D.C. Circuit upheld his bar from the class of security market participants with which he had a nexus during his fraudulent activities.


In 2013, in light of the growing movement in the states to legalize the possession and sale of marijuana, the United States Department of Justice issued a guidance memorandum to federal prosecutors about enforcement of the Controlled Substances Act in cases involving marijuana. The Memorandum advised federal prosecutors generally to rely on state authorities to address marijuana activity unless the state's regulatory system is insufficiently robust or the activity implicates a federal enforcement priority. Arthur West, an authorized medical marijuana user in the state of Washington, sued the Department, claiming that the Memorandum
unconstitutionally "commandeer[s]" state officials and institutions. He also claimed that the Department violated the National Environmental Policy Act of 1969 (NEPA) by failing to prepare an environmental impact statement before publication of the Memorandum. He alleged that, taken together, Washington's laws and the Memorandum subject him to injuries from the wider availability of recreational marijuana and new restrictions on medical marijuana. The relief he sought was that the Memorandum be "void[ed]" and that the Department "be compelled to comply with ... NEPA" in connection with the "federal ... response" to the state's legalization of recreational marijuana. The District Court dismissed his complaint for lack of standing.

West’s complaint alleged that he frequents a park in Olympia that is "suffering under the impacts of homelessness and casual recreational drug use." The Washington law, as "sanctioned" by the Memorandum, "will" cause a surge in drug use, further "degrad[ing]" the park. Moreover, because the state law authorizes "an entirely new commercial market" in marijuana, it "will" eventually cause more "crime, traffic, noise, air pollution, and cumulative impacts." He further alleged that he holds a medical marijuana authorization, uses marijuana for medical purposes and is an "independent consultant" in that field. The Memorandum "will" have the "foreseeable and imminent effect[s]" of limiting his access to medical marijuana and making it more expensive for him, as state legislators have referred to the Memorandum in proposing legislation "sharply regulat[ing]" medical marijuana and subjecting it to new taxes.

The D.C. Circuit addressed West’s standing for each of his two claims. As to the commandeering claim, the court skipped over whether West adequately pleaded a concrete injury, because it found that he had failed to satisfy the requirement to show that his claimed injury would likely be redressed. Citing to an earlier D.C. Circuit opinion, the court said, “a plaintiff's standing fails where it is purely speculative that a requested change in government policy will alter the behavior of regulated third parties that are the direct cause of the plaintiff's injuries.” That was the case here. The direct causes of West's alleged injuries – e.g., recreational users who smoke marijuana in public and state officials who restrict his access to medical marijuana – are not governed by the Memorandum but by state laws he does not challenge. If the Memorandum no longer existed, the court questioned whether federal prosecutors would expend their limited resources cracking down on the use of recreational marijuana in Washington. West's allegations offered no basis to conclude that they would. Would an uptick in federal prosecutions dissuade scofflaws from publicly smoking marijuana in the park West frequents? His complaint did not support a positive answer. Similarly, West failed to explain why state legislators would loosen their restrictions on medical marijuana if federal prosecutors began bringing more marijuana cases.

As for his NEPA claims, the court said he had failed to show that his claimed injury – the degradation of the park he frequents – was caused by the Memorandum, as opposed to the Washington state law legalizing recreational marijuana. Thus, whether or not there had been an environmental impact statement preceding the Memorandum was irrelevant to his injury.


On March 9, 2012, a unit of employees at 800 River Road Operating Company d/b/a Woodcrest Healthcare Center (“Woodcrest”) elected 1199 SEIU United Healthcare Workers East Union (“the Union”) as its exclusive collective-bargaining representative. Woodcrest filed
objections to the election with the National Labor Relations Board, which the Board rejected after a representation hearing. In the D.C. Circuit, Woodcrest challenged certain conduct that occurred during that hearing. It asserted three reasons to conclude the Hearing Officer abused his discretion in the underlying proceeding, and it also argued the Board abused its discretion when it affirmed the Hearing Officer's recommendations to overrule Woodcrest's objections.

The essence of Woodcrest’s objections to the election was that various supervisors interfered with, restrained, or coerced employees during the representation election, specifically that the supervisors interfered with the employees’ free choice, by promoting the Union and/or creating the impression that they favored the Union, conveying to voters that they should support the Union. In the hearing, however, Woodcrest was denied a subpoena to six employees, the ability to examine six witnesses who had been subpoenaed, and the ability to treat one supervisor as a hostile witness. Consequently, Woodcrest argued that the Hearing Officer abused his discretion and caused prejudicial error. In addition, Woodcrest argued that the Board abused its discretion when it affirmed the hearing officer's determination overruling Woodcrest’s objections.

The Board and the D.C. Circuit both noted that the Hearing Officer’s failure to issue the subpoenas was error, because Board regulations made such subpoenas mandatory. However, both the Board and D.C. Circuit found the error harmless, because Woodcrest itself had not called five witnesses that were available, and it had not demonstrated the centrality to its case of the witnesses it wished to have subpoenaed. In addition, even if the Hearing Officer had subpoenaed those witnesses, the Hearing Officer would have had grounds to deny them the ability to testify, as he did with respect to other witnesses who had been subpoenaed. The Hearing Officer’s refusal to permit eight subpoenaed witnesses to testify was not an abuse of discretion, the court held, because after hearing ten of Woodcrest’s witnesses, nine of whom provided no evidence of supervisor’s inappropriate conduct and in fact directly contradicted Woodcrest’s claims, it was reasonable to deny further witnesses whom Woodcrest could not indicate had any direct knowledge involving the alleged supervisory inappropriate conduct. Finally, the court held that it was not an abuse of discretion by the Hearing Officer to refuse to allow Woodcrest to treat one of the supervisor’s as a hostile witness. Not only do the rules of evidence in court not control these hearings, but as a practical matter the Hearing Officer allowed Woodcrest to ask leading questions and gave Woodcrest wide latitude in the questioning of the supervisor. Inasmuch as the court found the Hearing Officer not to have abused his discretion, it likewise found that the Board had not abused its discretion in upholding the Hearing Officer’s recommendation to reject Woodcrest’s objections to the election.


The Office of Legal Counsel (OLC) in the Department of Justice prepares the formal opinions of the Attorney General as well as opinions directly to other departments and agencies and the White House. It has a procedure for deciding which of its “significant” opinions might be published for the edification of the public, which includes obtaining the views of agencies that may have an interest. Unsatisfied that these procedures provide the public with the access the Freedom of Information Act demands, appellant Citizens for Responsibility and Ethics in Washington (CREW) sent a letter to OLC requesting that it comply with its obligations under
FOIA section 552(a)(2) – the so-called "reading-room" provision – which requires agencies to "make available for public inspection in an electronic format" certain records, including "final opinions ... made in the adjudication of cases" and "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." CREW argued that OLC opinions are subject to disclosure under the reading-room provision because they "function as binding law on the executive branch." In response, OLC explained that, in its view, FOIA exempts OLC opinions from disclosure because they are "ordinarily covered by [FOIA's] attorney-client and deliberative process privileges" and, "as confidential and predecisional legal advice, ... constitute neither 'final opinions ... made in the adjudication of cases' nor 'statements of policy and interpretations which have been adopted by the agency.'” Shortly after receiving OLC's response, CREW commenced this action, alleging a claim under the APA – challenging as arbitrary, capricious, and contrary to law OLC's purported failure to meets its disclosure obligations under FOIA's reading-room requirements. As its primary form of relief, CREW seeks an injunction directing OLC to disclose all documents subject to that provision. The injunction would have four features: (1) it would apply prospectively, that is, to documents not yet created; (2) it would impose an affirmative obligation to disclose, that is, OLC would disclose documents regardless of whether someone specifically requests a given document; (3) it would mandate that OLC make documents available to the public, as opposed to just CREW; and (4) it would require OLC to make available to the public an index of all such documents. The district court granted DOJ’s motion to dismiss, stating that a suit under the APA can only be brought when "there is no other adequate remedy" available, 5 U.S.C. § 704, and the FOIA itself provides an adequate remedy.

The D.C. Circuit recognized this case as one of first impression. The court started with the proposition that FOIA section 552(a)(4)(B) vests courts with broad equitable authority. Although that provision explicitly confers jurisdiction only to grant injunctive relief of a described type, namely, “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant,” the Supreme Court has made clear that Congress did not intend that language "to limit the inherent powers of an equity court" in FOIA cases. The court noted that its prior case law reflects the wide latitude courts possess to fashion remedies under FOIA, including the power to issue prospective injunctive relief. In other cases, the D.C. Circuit has recognized courts' power to order relief beyond the simple release of extant records. Thus, prior precedent establishes that the FOIA provides an adequate remedy for the first two of CREW’s requested relief.

The last two requests for relief both involve requiring making items available to the public. This ran into contrary circuit precedent. In *Kennecott Utah Copper Corp. v. Department of Interior*, 88 F.3d 1191 (D.C. Cir. 1996), the D.C. Circuit held that courts were without authority under section 552(a)(4)(B), the FOIA’s remedial provision, to order the publication of documents subject to the provisions of section 552(a)(1). Section 552(a)(4)(B), the court said, "is aimed at relieving the injury suffered by the individual complainant, not by the general public" as "[i]t allows district courts to order ‘the production of any agency records improperly withheld from the complainant,’ not agency records withheld from the public.” While *Kennecott* involved records under Section 552(a)(1), rather than 552(a)(2), the court felt the rationale was equally applicable to the latter records. Authorizing a court to order an agency to make documents "available for public inspection" would reach beyond section 552(a)(4)(B)'s focus on "relieving the injury suffered by the individual complainant" to remedy an injury suffered by "the general public" – a result *Kennecott* forecloses. The same problem was met by the request for OLC to
create a public index. Nevertheless, CREW could obtain an injunction under 552(a)(4)(B) that would require disclosure of documents and indices only to CREW, not disclosure to the public.

The question then was whether the disclosure of documents and indices to CREW, rather than to the public, was an adequate remedy. Because section 704 requires only an adequate alternative, the D.C. Circuit court has held that the alternative remedy need not provide relief identical to relief under the APA. Thus, while courts lack authority under FOIA to order agencies to "make [records] available for public inspection," CREW itself can gain access to all the records it seeks. Thus, despite some mismatch between the relief sought and the relief available, the court said, FOIA offers an "adequate remedy" within the meaning of section 704 such that CREW's APA claim was barred.

The court mentioned, however, two caveats. Its determination that FOIA is the proper vehicle for CREW's claim is entirely distinct from the question whether CREW is entitled to relief. That merits question – whether the reading-room provision commands disclosure of any OLC opinions – awaits a different day and a different case. Second, even if CREW prevails on the merits, the court's conclusion that certain relief is available under FOIA says nothing about its propriety in an individual case. Indeed, the court concluded, only a rare instance of agency delinquency in meeting its duties under the reading-room provision will warrant a prospective injunction with an affirmative duty to disclose subject records to a plaintiff.


The district court dismissed as untimely an action Continental Resources, Inc. brought for judicial review of a decision of the Department of the Interior requiring Continental to pay $1.7 million in additional royalties from gas extracted from the land it leased from Interior. The question on appeal is whether, as the district court ruled, Continental failed to file its action within 180 days after its "receipt of notice" of Interior's "final decision," as required by statute, 30 U.S.C. § 1724(j) & (h)(2)(B).

The real issue was when did Continental receive notice of Interior's final decision. The particular factual proceedings confused the issue. The first step was an order of the Interior’s Minerals Management Service (MMS) to Continental to pay the additional royalties. Continental filed an administrative appeal of that order, and the statute states that if the Secretary does not issue a decision within 33 months of the order, the appeal will be deemed denied in claims involving more than $10,000. However, this 33 month period may be extended by agreement between the parties, which Continental and the MMS did, extending the period for an additional six months in order to allow for settlement negotiations. This agreement was terminable by either party, and the MMS did terminate it after three weeks. In April, 2013, the MMS issued an order denying Continental’s appeal. Continental then appealed to the Interior Board of Land Appeals. The Board was not sure what effect the extension and then its termination had on the 33-month period that would effectively render the Secretary’s final decision and divest the Board of jurisdiction over the appeal. It took briefs from the parties on the subject and decided on July 29, 2013, that it had been deprived of jurisdiction as of June 17, 2013, because the 33 month period had expired on that date, effectively making that the date of the Secretary’s final decision. Continental then filed its action under the APA on January 16, 2014, challenging the merits of Interior’s order that it pay $1.7 million in additional royalties. This date was within 180 days of
of July 29, 2013 – the date of the Board’s decision – but not within 180 days of June 17, 2013 – the date the Board said was the Secretary’s final decision. The district court agreed that the Secretary’s final decision was on June 17 and that “by operation of law” Continental had notice of that decision. Therefore, the district court dismissed the case as untimely, beyond the 180-day period for filing for judicial review.

The D.C. Circuit reversed and remanded. It focused on the statutory requirement that the 180-day period begins to run on the date the person receives notice. It did not understand how Continental could have had notice “by operation of law.” Rather, the court held that because the issue of when the final decision was made was in question, a question decided by the Board only on July 29, Continental could not have had notice that the final decision was made on June 17 until the July 29 order. Accordingly, the action was brought within the 180-day period. The court made clear that it was not deciding what notice would suffice in the ordinary case.


Tito Contractors, Inc. (Tito) is a Washington, D.C.-based general contracting company providing a diverse set of services, ranging from masonry to snow removal and recycling services. Nevertheless, the National Labor Relations Board concluded that Tito's employees all should be included in one "wall-to-wall" bargaining unit. Tito raised one procedural and one substantive issue. Tito’s procedural argument was that, by rejecting its offer of proof and approving an employer-wide unit based on a presumption, the Hearing Officer failed to "inquire fully into all matters and issues necessary to obtain a full and complete record" and to "afford[ ] [Tito] full opportunity to present [its] position[ ] and to produce the significant facts in support" thereof, in violation of the Board’s regulations. However, the D.C. Circuit said both the Board’s Casehandling Manual and Board precedent confirmed that the Board has historically regarded the offer-of-proof approach as sound and the court gives "controlling weight to the Board's interpretation of its own rule unless it is plainly erroneous or inconsistent with the regulation itself."

Its substantive claim was that the Board’s decision was not supported by substantial evidence. Although the court stated that the Board is entitled to wide deference in making determinations as to the appropriate bargaining unit, the court agreed with Tito that here the Board’s decision lacked substantial evidence. The test for determining whether a unit is appropriate is whether the employees share a community of interest. Here, however, the Board did not discuss the portions of Tito's offer of proof which plainly showed no community of interest. Tito's offer of proof contained at least three types of evidence contradicting the Board's conclusion.

First, the Board failed to recognize the unchallenged assertion that Tito's business comprised two discrete halves – a labor side and a recycling services side. As Tito explained, its laborers' tasks included such varied duties as painting, tile installation, and snow removal. Most of its employees on the labor side of the business performed work exclusively for Tito. In contrast, all of Tito's recycling employees worked on site at Maryland recycling facilities where they did not "perform labor work," but instead bagged compost and sorted recyclables. These employees worked in different locations several miles apart and the recycler exercised considerable control over their working conditions. The Board minimizes these plain – and
specific – differences with its generic observation that "[t]he petitioned-for employees work for the same employer in facilities located in a common geographical region and perform skilled and unskilled physical work." This, the court said was inadequate.

Second, the Board also failed to consider the lack of interchange among the different types of Tito employees. Significantly, the Acting Regional Director himself noted that "[t]here was no evidence of any interchange between the recycling employees, or between the recycling employees and any other classification of employee."

Third, the Board overlooked the significant differences among Tito's employees' "wages, hours and other working conditions."

The opinion generated two concurring opinions, one by the author of court’s opinion herself. She wished to put the Board on notice that its standard operating practice of issuing an order “composed of two sentences of text and a footnote analysis of the unit-appropriateness issue” was likely to result in more court “re-do’s.” This was especially true in this case where there was a dissenting Board member.

Judge Rogers’s concurrence, while fully supporting the decision of the court, indicated that it remained open to the Board to reach the same conclusion about the appropriateness of a company-wide bargaining unit upon providing a reasoned explanation that “take [s] into account whatever in the record fairly detracts from its weight.”


Judicial Watch made a Freedom of Information Act request to the Department of Defense for documents related the Secretary of Defense’s 2014 determination that five Guantanamo Bay detainees could be transferred to Qatar. Although the Department released several documents, it withheld a memo from Assistant Secretary of Defense Michael Lumpkin to Secretary of Defense Chuck Hagel on the grounds that it was exempt as a privileged deliberative document. Judicial Watch sued, and the district court entered judgment for the Department, agreeing that the document was a pre-decisional, deliberative document.

Judicial Watch did not dispute that, when the Lumpkin Memo was drafted, it was both predecisional and deliberative. Nevertheless, Judicial Watch noted, a document can lose its predecisional character – and the protections of the privilege – if an agency adopts the document as its own. However, to “adopt the document as its own,” an agency must make an "express[ ]" choice to use a deliberative document as a source of agency guidance. The D.C. Circuit did not find any express adoption in the memo, notwithstanding that its recommendations were followed. The Secretary did not sign the memo or otherwise indicate that he was adopting its rationale. Accordingly, the court affirmed the district court’s denial of Judicial Watch’s request.