The concept of homeland security has evolved from a mostly academic military proposal to the biggest reorganization of the federal government since the creation of a Defense Department in 1947. Homeland Security: Legal and Policy Issues draws upon the expertise of leading practitioners in the emerging and expanding field of homeland security. This comprehensive resource looks at homeland security as a critical area of legal practice affecting both the public and private sectors. It also serves as an important compilation of policy and practice-oriented information pertaining to the Homeland Security Act.

The book begins with an evaluation of the policy shifts and outcomes to date and looks ahead to the challenges that exist for the Obama Administration. It then seeks to familiarize you with 14 key and essential areas in the Homeland Security legal discipline such as state and federal emergency powers, the USA Patriot Act, information security, CFIUS and foreign investment and so much more. The expert authors have included easy references to additional authorities and information sites, making this publication a useful tool and lasting legal education sourcebook. Order your copy today.
Chair’s Message

Jamie Conrad

I have just finished reading David M. Dorsen’s Henry Friendly: Greatest Judge of His Era (2012)—remarkably, the first biography of someone who genuinely deserved the title, as the book argues in a variety of ways. My first job out of law school was with Cleary Gottlieb, the firm that Friendly co-founded in 1946,1 and when I started there Friendly was still alive and still legendary within the firm—mostly for the extent to which he had intimidated young lawyers by his brilliance, productivity, and occasional sarcastic comments.2

Friendly made influential contributions in so many legal fields, and the docket of the Second Circuit was so dominated by commercial disputes, that he is not typically thought of as an “administrative law” judge like Leventhal or Breyer. Yet, in somewhat the same way that California’s economy would be the world’s tenth largest if it were broken out from the United States, Friendly’s effect on the field of administrative law was as significant as that of any short list of judges. Dorsen summarizes Friendly’s Ad Law contributions in a chapter that draws heavily from a speech (which you should also read) by former Friendly clerk, and judicial branch liaison to this Section, Judge Ray Randolph.3 Those contributions include:

Administrative due process. Friendly’s article Some Kind of Hearing,4 addressing the implications of the Supreme Court’s “bombshell” (his word) opinion in Goldberg v. Kelly, laid out logic that the Supreme Court adopted the next year in Mathieson v. Eldridge: a matrix of various elements of a fair hearing and the extent to which they would be appropriate for government actions of varying seriousness, balanced by the cost to society (and particularly other claimants) of providing too much process.5

Ripeness. Friendly’s opinion in Toilet Goods Association v. Gardner6 was the (essentially unattributed) source of the Supreme Court’s logic in Abbott Laboratories v. Gardner,7 which “changed radically” the practice of courts providing pre-enforcement review of regulations: before, it was more the exception; afterward, it became more the rule—so long as the issue is “sufficiently ripe,” in Friendly’s phraseology, for resolution.8

Reasoned explanation. In his 1962 Oliver Wendell Holmes Lectures and in multiple opinions, Friendly argued that a principal reason private interests were so successful in pressuring and overturning agencies like the Civil Aeronautics Board and the FCC was an inability on the parts of such agencies “to develop and adhere to intelligible standards”—“to ‘make law’ within the broad confines of the[ir] charters.”9 In one of the rare reversals of Friendly, the Supreme Court overturned his opinion in Bell Aerospace Co. v. NLRB, in which he concluded that the NLRB had to proceed by rule-making, rather than adjudication, in order to “be particularly sure that it has all available information” before departing from a long-held and justifiably relied-upon statutory interpretation—especially “where nothing stands in the way of a rule-making proceeding, except the Board’s congenital disinclination to follow [the] procedure.”10 While the decision does not cite Bell Aerospace, much of this same logic exudes from Alaska Professional Hunters Association v. FAA,11 perhaps not coincidentally written by Judge Randolph.12

Presidential oversight of agency rulemaking. Initially, Friendly said of the involvement of the White House in agency rulemaking that he could imagine “nothing worse,” but by 1979 he was one of several members of an ABA commission, to which then-Professor Breyer was the consultant, which advocated a statute that would authorize the President to instruct independent regulatory agencies like the FCC “to consider or reconsider the issuance of critical regulations . . . and to direct such agencies to modify or reverse their decisions concerning such regulations.”13 Thirty-plus years later, we are still actively debating this issue, as illustrated by the blanket authority letter this Section almost sent last fall on S. 3468.

As Dorsen’s book makes clear—and perhaps unusually, in light of his staggering intelligence—Friendly was not a huge fan of legal philosophies or theoretical work in general. To the contrary, his greatest genius was his tendency not to follow long-established legal rules because they were rules, but instead to “make law” within the broad confines of the[ir] charters.”14

1 By coincidence, my current office is located in the same edifice (the Southern Building) that housed Cleary’s first D.C. office. I haven’t yet figured out if they were on the same floor.

2 The most famous, which Friendly actually borrowed from Samuel Johnson, was reputedly scribbled on an associate’s memo: “This memorandum contains much that is new and much that is good. However, that which is new is not good and that which is good is not new.”


6 360 F.2d 677 (1966).


8 74 N.Y.U. L. Rev. 8 (quoting Stephen G. Breyer & Richard B. Stewart, Administrative Law & Regulatory Policy 1136 (2d ed. 1985)).


11 177 F.3d 1030 (D.C. Cir. 1999).

12 Although Judge Randolph was not Judge Friendly’s clerk when the latter wrote Bell Aerospace.

13 Henry Friendly at 298 (quoting ABA Commission on Law & the Economy, Federal Regulation: Roads to Reform 2 (1979)).

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Administrative & Regulatory Law News

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Nonmembers of the Section may subscribe to this publication for $28.00 per year or may obtain back issues for $7.00 per copy. To order, contact the ABA Service Center, 321 North Clark Street, Chicago, IL 60610; Tel. 800/285–2221.

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Mapping the Contours of the Federal Government

By John M. Kamensky*

President Obama has called several times for a “21st century government” and the need to reorganize: “We can’t win the future with a government of the past.”1 But before policymakers reorganize, they need to understand how the government is currently organized and whether the original rationale behind that organizational construct still holds. Typically, the focus of policy makers is on the hierarchical structure of a department or agency. But many of the important elements of how an agency operates, and why, are below the surface. These elements include the interactions among agencies, their cultures, and an understanding of their existing forms. However, there is no comprehensive “map” of the federal government that covers all of these elements. But, courtesy of the Administrative Conference of the U.S., there is now an update of an earlier “map” originally created in 1980 by the Congressional Research Service.2 This new Sourcebook of United States Executive Agencies3 was prepared by David E. Lewis and Jennifer L. Selin, of Vanderbilt University and released in December 2012 by the Administrative Conference.

The Sourcebook, according to its authors, “describes the evolution of the current executive establishment, looks backward to understand what now exists, and analyzes trends to see what may be coming.”4 So it is not just a simple set of organization charts of various agencies, with statements of key missions and positions. Those exist in the annually prepared United States Government Manual5 and in the quadrennially prepared “Plum Book,”6 which lists all political and policy positions in the executive branch.

How Many Government Agencies Are There?

You would think there would be a simple answer. However, the authors note that “there is no authoritative list of government agencies”7 and that “many federal entities do not neatly reside in the executive branch.” They observe that the official Government Manual lists 96 independent executive units and 220 components of the executive departments, while the website USA.gov lists 137 independent executive agencies with 268 components. Other sources list different numbers. So the first section of the report addresses the question “What is a Federal Agency?” and comes to no real conclusion because “Congress defines what an ‘agency’ is in relation to particular laws rather than provide one overarching definition.”8 For example, is the Federal Agricultural Mortgage Corporation a government agency? It is governed by a board in which two-thirds of the members are selected by private shareholders, not the President. What about venture capital funds, such as In-Q-Tel?

Not even the courts have offered a definitive answer; so, the authors developed their own definition so that they could provide a count. They define an agency as “a federal executive instrumentality headed by one or more political appointees nominated by the President and confirmed by the Senate (the instrumentality itself rather than its bureaus, offices or divisions).”9

The next section of the report describes those agencies, starting with the Executive Office of the President, the various executive departments, and the various independent agencies. It also provides an overview of the federal personnel system, since an understanding of how it evolved historically is important to interpreting the characteristics of the various alternative personnel structures that follow in the next section. This section includes the historical trend towards increased numbers of political appointees, the creation of personnel authorities for individual agencies that vary from the core civil service overseen by the Office of Personnel Management, and the rise in the use of contractors to deliver government services.

Characteristics of Federal Agencies

The heart of the Sourcebook is not a mere count of agencies or how many work for the government (a more problematic number, if you cannot count the number of agencies in the first place, but the authors say it stands at around 2.13 million or 2.85 million continued on next page

* Senior fellow with the IBM Center for the Business of Government; fellow of the National Academy of Public Administration; and public member of the Administrative Conference of the U.S. This article was adapted from an earlier article by the author, How Big is Government? New “Map” Shows Us Nobody Knows, that appeared in Government Executive on January 16, 2013. Available at http://www.govexec.com/.


2 Senate Committee on Governmental Affairs, 96th Congress, “The Federal Executive Establishment: Evolution and Trends” (Committee Print 1980). This report was authored by Ronald C. Moe of the Congressional Research Service.


4 Id. at 1.


7 Sourcebook, at 14.

8 Id. at 13.

9 Id. at 16.
civilians, depending on how you define federal employees). The value of this section of the report is in its exploration of the underlying characteristics of agencies, which are detailed in a series of tables that list all agencies (based on the authors’ definition) and their associated acronyms and that provide answers to questions such as:

- How many agencies are inside the Executive Office of the President?
- How many appointees are in each of the Executive Departments?
- How many independent agencies are there?
- Which bureaus have chiefs appointed with fixed terms?
- What are the different agency-specific personnel systems?
- Which agencies are excluded from OMB review of their budgets, rule-making, and legislative proposals?
- Which agencies have statutes that provide monies other than through appropriations?
- Which agencies have adjudicatory authority? and
- Which Senate committees have jurisdiction over the confirmation of different agency nominees?

Each of the accompanying tables provides rich color to understanding the subtleties of various federal entities and how any reorganization might affect the balance of power between them and their political masters—either in Congress or the White House.

The Sourcebook ends with some insights about the creation and design of federal agencies, which could be useful context in discussions to create new agencies, or more importantly, in reorganization efforts, which could be on the agenda in coming years. While the default design approach is to create an agency and locate it within an existing department, there are times, the authors note, when “Congress and the President have chosen to deviate from this design and insulate agencies from the President and/or Congress.”

In some cases, this means insulating agencies from the President by limiting his or her appointment authority, creating multi-member bodies, requiring fixed term appointments, and limiting the President’s authority to remove agency officials.

In other cases, it means limiting OMB review of agency budget submissions and/or proposed regulations, limiting agency communications with Congress; and/or permitting an agency to litigate independently of the Department of Justice. The Sourcebook’s tables describe which agencies have these exceptions. The authors also describe how some agencies are insulated from congressional influence by allowing them to collect and spend revenues outside the appropriations process.

Understanding these subtleties, and why they exist in the first place, are important in any effort to reorganize government. The authors provide a roadmap of where to find them.

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**National Administrative Law Judiciary Foundation**

The National Administrative Law Judiciary Foundation (NALJF) is the public interest arm of the National Association of Administrative Law Judiciary (NAALJ). One of the Foundation’s major purposes is to promote the study and research of administrative law and distribute this knowledge to the administrative judiciary and the public. To further this purpose, a Fellowship was endowed to encourage research and scholarship for improving administrative justice.

**2013 FELLOWSHIP COMPETITION**

NALJF is currently requesting applications for the 2013 Fellowship. The topic for 2013 is: **"The history of the Federal Administrative Procedure Act."**

To be considered, each submission should propose, for approval by the Fellowship Committee, a scholarly review of the law on the above topic.

ONLY ONE fellowship proposal will be chosen for the Fellowship.

All applications for the 2013 Fellowship must be in electronic format (Word Format preferred) and must include the following documents: (1) an abstract or an introduction to the proposed article; (2) a detailed outline for the proposed article; (3) a writing sample; (4) curriculum vitae; and (5) a list of publications. All submissions must be sent by e-mail to naalj@naalj.org, with a cc to julian.mann@oah.nc.gov.

**The deadline for all submissions is April 30, 2013.**

The Fellowship Committee will review the submissions and select the Fellowship winner by May 31, 2013.

**IMPORTANT NOTICE:** Prior Fellowship winners, current members of the Fellowship Committee, current members of the NAALJ Journal Board of Advisors, and current members and officers of the NAALJ Board MAY NOT APPLY for the Fellowship.

The Fellow will prepare an original article for publication in the Journal of the National Association of Administrative Law Judiciary and will deliver an oral presentation at the 2013 NAALJ Annual Conference in Chicago, Illinois, September 15–18, 2013. The final draft of the paper will be due January 1, 2014.

The Fellow will receive a $1,500 cash stipend, as well as transportation, accommodations, and meals, at the 2013 NAALJ Annual Meeting and Educational Conference.

Applications and inquiries regarding the Fellowship should be submitted by e-mail to naalj@naalj.org, with a cc to the Hon. Julian Mann, Fellowship Committee Chair julian.mann@oah.nc.gov.

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10 Id. at 12 n.27.
11 Id. at 98.
Get Engaged with Notice and Comment

By the Notice and Comment Blog Working Group

W e are pleased to officially announce the re-launch of Notice and Comment (http://regulatorypractice.blogspot.com/), the blog of the Section of Administrative Law and Regulatory Practice. In Fall 2012, Section Chair Jamie Conrad solicited volunteers for a working group of Section members dedicated to exploring how the blog could provide the most benefit to Section members. The undersigned stepped up, and with guidance from the Section’s Council, our working group redesigned the blog to accomplish three goals: 1) feature news about Section developments and provide a platform to debate administrative law issues within the Section; 2) spotlight the contributions of Section members and other professionals to the legal field; and 3) connect members to information regarding job opportunities. These goals are discussed in more detail below.

Section Debate about Current Issues

The Notice and Comment blog provides an opportunity for Section members and legal professionals to learn about emerging issues in administrative law and debate positions the Section might take on them. As many of you are aware, the first term of the Obama Administration laid the foundation for an aggressive regulatory agenda for several federal agencies and for comprehensive changes to the regulatory process. A number of proposals will continue that process in the Administration’s second term. The blog’s “Agency Action” feature will highlight our government at work from the perspective of the legal professionals involved in shaping or implementing these new initiatives. We welcome contributions from Section members and other practitioners to share expertise regarding proposed or final rulemakings and raise awareness about administration and agency activities. Similarly, the “Recent Cases” feature will also give Section members and “guest” contributors an opportunity to write about cases that have an impact on administrative law. These features and the “Section News” feature will provide a forum for debating the issues involved and for shaping proposals for how the Section might participate in these processes through the development of ABA resolutions and reports or Section-specific blanket authority letters.

Learn About the Section’s Diverse Membership

The “Member Spotlight” portion of the blog is designed to highlight Section members as professionals and interesting individuals. We will routinely profile different Section members and give them an opportunity to discuss their career, the challenges and opportunities that exist in the field of administrative law, and any fun personal facts they would like to share. To get as broad a perspective on the field as possible, we will also highlight non-Section members who are practitioners or professors in guest spotlights. One of our main objectives in doing the spotlights is to bring a human interest element to the blog and Section.

More important, we hope to broaden everyone’s perspective on what it means to be a practitioner in the field of administrative law. First, we hope that law students and new attorneys—and even attorneys with established careers—will benefit from learning more about the myriad career paths in administrative law. Second, our goal is for member insights about new (or old) obstacles facing practitioners to stimulate debate or personal reflection on what reforms may alleviate or remedy these issues. And, of course, we also hope that our readers will walk away with a new appreciation for how many talented and thoughtful lawyers belong to the Section.

Connect with Job Opportunities

In these tough economic times, many aspiring, new, and seasoned attorneys are seeking information about job opportunities. We are excited to use the blog as a platform to connect members to information regarding job opportunities. Allison Bonnenburg, the Section’s Young Lawyer Division Representative, is developing a process to maintain an updated list of employment opportunities and fellowships in administrative law. The blog will complement that effort by highlighting potential job opportunities and connecting readers with information on how to obtain a more comprehensive list of job postings.

Keep Up with Section News

In close collaboration with Anne Kiefer, the chief source for news regarding Section activities, the Notice and Comment blog will also serve as a source of information about what is happening in the Section. We will provide notices about upcoming events and opportunities for Section members and highlight other news regarding the Section’s development of policy positions as it happens.

We Need to Hear From You

Now that we’ve described the vision for Notice and Comment, we need to hear from you to make it the dynamic resource for Section members that we hope it will become. If you would like to submit an entry for the blog, please feel free to contact the appropriate individual listed below. We look forward to hearing from you!

General Questions: regulatorypractice@gmail.com
Agency Actions: Shannon Allen, Shannon_A_Allen@msn.com
Recent Cases: Katherine Kennedy, katherinemarykennedy@gmail.com
Member Spotlights: Nina Hart, nhart226@gmail.com
Job Opportunities: Allison Bonnenburg, bonnenburg@yahoo.com
Section News: Dominique Scalia, dominiquescalia@gmail.com
Promoting The Role of Ombuds in Healthcare Reform Exchanges

By James T. O’Reilly

The Section of Administrative Law & Regulatory Practice of the ABA has made significant progress with promotion and enhancement of government ombuds, the administrative problem-solvers who aid individuals with finding their way through the complexities of governmental paperwork. This excellent Scandinavian concept has been widely accepted in states and in several federal agencies under various names like Taxpayer Advocate or City Ombudsman. Perhaps one of the most widely known examples would be ombuds engaged in the protection of nursing home patients, who look to the helpful intercession of an ombuds to mediate and resolve disputes between nursing home residents, their families, and the home’s managers. This commentary urges administrative law practitioners and scholars to bring the ombudsman concept into the 2014–2015 creation of the new Health Insurance Exchanges.

Clarity and simplicity are desirable attributes anywhere. Government does some things very well; your flu shot was a reminder that one central federal inspection entity takes a careful look at each proposed formulation of vaccine; your holiday table was safer than ever because FDA and USDA inspectors did their quiet behind-the-scenes screening of food plants. Government insurance might not be as often lauded—especially after Katrina and Sandy showed problems with flood insurance and the anger of homeowners at Fannie Mae and other housing insurers swelled with the mess of paperwork after the recent “housing bubble” burst. We face a rare opportunity in 2013 to prepare for 2014–2015 as the health insurance exchanges are created.

In 2012, the health insurance marketers and conservative elected officials, and many of the candidates they supported, ran vigorously against Obamacare, more properly the Affordable Care Act (ACA), and their effort showed deep hostility to the law’s new federal mandates affecting healthcare insurance marketers. They were successful in some states in fostering state-level encumbrances against the new ACA health insurance exchange mechanism. The ACA is not simple, but one of the key provisions that survived the insurance industry litigation was the creation of “health insurance exchanges” to promote access to health insurance for the middle class and working poor. In an exchange, consumers choose among health insurance plans, and some consumers receive subsidies for the basic healthcare coverage, with the goal of reducing the costs and harsh effects of economic exclusion from access to healthcare.

As the new year turned, ACA implementation moved ahead in the second term of the Obama Administration, and the states faced a deadline to either accept funding and create a state health insurance exchange or reject participation and shift the responsibility to the federal government. The states split. Although the statutory mechanism of creating state-level health insurance exchanges had survived the very deep hostility against the ACA, the option chosen by dozens of state governors to resist operating a state exchange leaves the Health & Human Services Department in the posture of organizing, operating, and administering the health exchange apparatus. In 40 years of working on HHS-regulated issues, I know they do good work, but rarely do their efforts have clarity or simplicity. That is where the ombuds role comes in for those states that have refused to manage their own health insurance exchange systems.

After ACA’s survival in 2012, consumer choice in health insurance is going to be a reality, and periodicals of the insurance and healthcare industries reflect that begrudging awareness. HHS needs to be successful in managing the many questions from consumers in states where governors and legislators refuse to participate. Local and state officials anticipate lots of confused consumers showing up with questions and uncertainties. Ideological hard lines aside, elected officials know that the 2014–2015 users of a government service (the exchange) are going to demand that some level of government answer their questions. In Ohio, for example, the state insurance department reports to an elected official vocally opposed to the ACA under a governor who championed the opposition in this swing state. Don’t expect Ohioans’ questions about health insurance exchanges to be well handled by state employees who report to those officials who want the ACA exchange system to fail.

Administrative lawyers should step up to the plate now and ask their state legislators to fund a legislative ombuds office to educate, respond, and intervene as necessary. Unlike the states that embrace the health exchange, these resisters will not have a role in consumer selection. They have ceded that function to distant federal managers who will do the best they can from thousands of miles away. The state–based ombuds ideally would report to the state legislature as a small office to which the flood of questions and complaints to state senators might be routed, for example. Task 1 will be training interns or borrowing staff to answer routine constituent questions and host a legislative ombuds hotline, while a core of skilled professionals provide the more detailed interventions and defuse hostility. Task 2 will be communicating the hotline and office’s existence during and before the January 2014 start of exchanges.

*Vice Mayor, City of Wyoming, OH; Professor, University of Cincinnati College of Law; Former Chair, Section of Administrative Law & Regulatory Practice; current Co-Chair, Food & Drug Committee; and Member, Administrative & Regulatory Law News Advisory Board. Views expressed are those of the author.
Consumer confusion can be dispelled with confident and prompt response to the most common inquiries, and deeper conflicts likely will require follow-ups with insurance-licensing agencies, federal fraud investigators, and HHS managers of specific topical areas. With ombuds, the voter wins; the legislator who has a competent backstop for exchange related calls or emails wins; HHS wins; and perhaps the success of such a rational program might melt the governor’s heart enough to allow their state insurance department to enforce the Act’s provisions. Catching the ripoff, exposing the fraud, explaining the coverage choice, are all administrative law functions even though the ideologues refuse to allow their state to be involved. Reality check: What did you do to ease the burden on your state’s health insurance consumers? Better start in 2013, as the exchange system is coming soon to a kitchen table or family mailbox near you!  

but rather to step back and think carefully and practically about:  
• what those rules were intended to accomplish;  
• whether they actually did so fairly and effectively in the given case, and predictably in the future; and if not,  
• how they should be rehabilitated or replaced.  
As Dorsen summarizes: “His primary goal was to clarify and rationalize the law”—to do “what seemed to work and make sense.” Judge Richard Posner makes the same point some  
what more colorfully in his Foreword:  
He bent his powerful legal intelligence to the service of shaping legal doctrine to the enablement of sensible results in individual cases. The aim was to improve the law—American law is in constant need of improvement, in fact is a mess to a degree that only insiders can appreciate—without unduly perturbing the doctrinal and institutional framework that provides necessary stability and continuity.  
Our Section similarly tries to make administrative law work better—or, in the more colorful words of our Bylaws, to “lend our legal expertise to the resolution of important administrative law issues at the state, national and international levels” so as to “further the vital public interest in effective, efficient, and fair administration at all levels of government.” It is a noble goal and one that is no less important to the extent that it is focused on practicality rather than theory. After all, greater minds than ours have been so focused.  
Speaking of trying to make government work better, I am pleased to report that the House of Delegates in February approved our two proposed resolutions and reports on (i) equalizing the disclosure requirements applicable to political contributions to entities, regardless of their tax status and (ii) improving the ethics requirements applicable to government contractors. (Thanks are due, of course, to our hard-working delegates, Randy May and Russ Frisby.) The ABA highlighted the disclosure resolution in its press release regarding the output of the Mid-Year Meeting, featuring a quote from ABA President Laurel Bellows upon passage of resolution 110B:  
New ABA policy to broaden disclosure about the source of money for political spending increases transparency and gives voters the information they need to make informed decisions. Making the amount spent on political communications widely available is in the public interest and will instill greater confidence in our electoral system.  
This issue will be one of the ABA’s legislative priorities during ABA Day in Washington, April 16-18. I hope you will register to participate.  
Having urged Congress generally to improve the political disclosure laws, we need to urge specific Members of Congress in person to do so.  
I expect that we will have a substantial and wide-ranging discussion at our Spring Meeting in Santa Fe (April 12-14), discussing how the Section might help the ABA address other election law issues, particularly in light of the President’s creation of a bipartisan Commission on Election Administration. In December we wrote the Acting Administrator of OIRA calling for prompt publication of the Spring and Fall 2012 unified regulatory agendas, neither of which had yet been published. (The Section of Public Utility, Communications and Transportation also joined this letter.) At his invitation, the leaders of the E-Government Committee and I will be meeting with him and his deputies to discuss the feasibility of a government-wide, evergreen website that would contain the same information as the agendas so that this information would be made publicly available on a continuing basis, rather than (as now) becoming as much as a year out of date.  

Notice and Comment Blog.  
Lynn White and her fellow working group members have completely revamped the the Section’s blog, Notice and Comment (http://regulatorypractice.blogspot.com/). In addition to containing news about Section, agency, and judicial developments, it will now serve as more of an intra-Section tool, to allow Section members to debate issues (including proposals for Section action) and for posting job openings. See her separate piece on the blog in this issue of the News, and kudos to Lynn and her team.  
As always, if you have questions or comments, or if you think there is some other way the Section might be helpful to you, just let me know (jamie@conradcounsel.com).
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PRE-PROGRAM WORKSHOPS

WEDNESDAY – JUNE 19, 2013

CAREERS IN HOMELAND SECURITY
Moderator | Valerie E. Caproni – Vice President and Deputy General Counsel, Northrop Grumman Corporation, Falls Church, VA; Former General Counsel, Federal Bureau of Investigation

HOMELAND SECURITY LAW & POLICY 101
Panelists | James W. McCament – Chief of Legislative Affairs, U.S. Citizenship and Immigration Services, Washington, DC | Evan D. Wolff – Partner and Director, Homeland Security Practice, Hunton & Williams, Washington, DC

DAY ONE

THURSDAY – JUNE 20, 2013

AN OVERVIEW OF THE U.S. NATIONAL SECURITY DIVISION AND WHAT TO EXPECT IN 2013

OUR NATION’S SECURITY: A PERSPECTIVE FROM THE HOUSE COMMITTEE ON HOMELAND SECURITY”
Congressman Michael T. McCaul (TX-10), Chairman, House Committee on Homeland Security

HOMELAND SECURITY: REGULATORY & LEGISLATIVE DEVELOPMENTS 2013
Moderator | Elizabeth L. Branch – Judge, Court of Appeals of the State of Georgia, Atlanta, GA
Panelists | Nelson Peacock – Assistant Secretary of Legislative Affairs, U.S. Department of Homeland Security
Additional panelists to be confirmed

TRANSPORTATION AND SUPPLY CHAIN SECURITY
Moderator | Joel A. Webber – Couri & Couri, Chicago, IL

HOMELAND DEFENSE & CIVIL SUPPORT: DOMESTIC MILITARY ROLES AND RESPONSIBILITIES
Moderator | Paul F. McHale – President, Civil Support International LLC, Alexandria, VA; Former Congressman and Assistant Secretary of Defense for Homeland Defense
Panelists | Brad Kieserman – Chief Counsel, FEMA, Washington, DC | Chris Rofrano – Chief Counsel, National Guard Bureau | Paul Stockton – Former Assistant Secretary of Defense for Homeland Defense and America’s Security Affairs (HD & ASA) | Carl Wagner – Associate Deputy General Counsel, Office of Assistant Secretary of Defense for Homeland Defense and America’s Security Affairs (HD & ASA)

EXPORT CONTROL | Moderator: Timothy Bumann – Partner, Smith, Gambrell & Russell, LLP, Atlanta, GA
Panelists: Sandra L. Cross – Huntington Ingalls, Newport News, VA; Additional panelists to be confirmed

http://www.americanbar.org/calendar/2013/06/8th_annual_homelandsecuritylawinstitute.html
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SAFETY ACT

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**Panelists** | Hon. Cheryl A. LaFleur – Commissioner, Federal Energy Regulatory Commission (FERC)  
Patricia A. Hoffman – Assistant Secretary for the Office of Electricity Delivery and Energy Reliability, U.S. Department of Energy  
Roger R. Martella, Jr. – Partner, Sidley Austin LLP; former General Counsel, United States Environmental Protection Agency

**PROTECTING OUR NATION'S CYBER CRITICAL INFRASTRUCTURE**

**Moderator** | Harvey Rishikof – Chair, ABA Standing Committee on Law and National Security Advisory Committee; Former Professor, National Security Law National War College, National Defense University  

**Panelists** | Leonard Bailey – Senior Counsel to the Assistant Attorney General, U.S. Department of Justice, National Security Division (DoJ NSD) (invited)  
Stewart A. Baker – Partner, Steptoe & Johnson LLP; Former Assistant Secretary of Policy, U.S. Department of Homeland Security  
Steven R. Chabinsky – SVP Legal Affairs and Chief Risk Officer, CrowdStrike, Inc., former Senior Advisor to the Director of National Intelligence, Office of the Director of National Intelligence (ODNI)  
Evans D. Wolf – Partner and Director, Homeland Security Practice, Hunton & Williams LLP, Washington, DC

**GOVERNMENT CONTRACTING**

**Moderator** | David Z. Bodenheimer–Partner, Crowell & Moring, Washington, DC  

**Panelists** | Elaine Duke, Principal, Elaine Duke & Associates, LLC; former DHS Under Secretary for Management and Chief Acquisition Officer  
Brett Egusa, Deputy Associate Chief Counsel, Procurement and Fiscal Law Division, Office of Chief Counsel, FEMA

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**Moderator** | Dr. Amit Kumar – Fellow for Homeland Security and Counterterrorism, Center for National Policy, Washington DC, and Adjunct Associate; Professor, Security Studies Program, Edmund A. Walsh School of Foreign Service, Georgetown University, Washington, DC  

**Panelists** | Theodore S. Greenberg – President, TG Global; Former Senior Counsel, Financial Marketing Integrity Group, World Bank, Washington, DC  
Dennis Lormel – President, DML Associates; Former Chief Terrorist Financing Operations Section, Federal Bureau of Investigation, Washington, DC  
Chip Poncy – Director of Office of Strategic Policy, Terrorist Financing and Financial Crimes, U.S. Department of Treasury

**THE FABRIC OF IDENTITY**

**Moderator** | Scott P. Boylan – Vice President and General Counsel, MorphoTrust USA, Arlington, VA  

**Panelists** | Matthew Helmman – Partner, Jenner & Block, Washington, DC  
Michael Robertson – Consultant, Sanford, NC; Former Division of Motor Vehicles (DMV) Commissioner of North Carolina Department of Transportation (NCDOt)  
Ted Sobel, Director, Office of State-Issued ID Support, Office of Policy and Screening Coordination Office, U.S. Department of Homeland Security

**CFIUS IN 2013**

**Moderator** | Jonathan G. Cedarbaum – Partner, Wilmer Cutler Pickering Hale & Dorr, Washington, DC  

**Panelists** | David Heyman – Assistant Secretary for Policy, U.S. Department of Homeland Security (invited)  
Malcolm Tuesley – Counsel, Skadden Arps, Washington, DC  
Mark E. Plotkin – Partner, Covington Burling LLP, Washington, DC

**THE OFFICE OF DHS GENERAL COUNSEL (2003-2013)**

**Moderator** | John Sandweg, DHS Acting General Counsel  

**Panelists** | Ivan K. Fong – Senior Vice President, Legal Affairs & General Counsel, 3M Company; Former and Third General Counsel at U.S. Department of Homeland Security  
Gus P. Coldebella – Partner, Goodwin Proctor LLP, Washington, DC; Former Acting General Counsel at U.S. Department of Homeland Security  
Joe D. Whitley – Shareholder and Chair of Atlanta White Collar Practice, Greenberg Traurig LLP, Washington, DC and Atlanta, GA; Former and First General Counsel at U.S. Department of Homeland Security

**KILL OR CAPTURE?: DRONES, TRIALS, AND OTHER COUNTER-TERRORISM CHALLENGES FOR THE SECOND TERM**

**Moderator** | Jim Turner – Partner, Arnold & Porter LLP, Washington, DC; Former Congressman, U.S. House of Representatives – Texas 2nd District  

**Panelists** | Hon. John B. Bellinger III – Partner, Arnold & Porter LLP, Washington, DC; Former Legal Advisor, U.S. Department of State  
Elisa Massimino – President and CEO, Human Rights First, Washington, DC  
Stephen J. Vladeck – Professor of Law and Associate Dean for Scholarship American University Washington College of Law, Washington, DC  
Benjamin Wittes – Senior Fellow and Research Director in Public Law The Brookings Institution, Washington, DC

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By Robin Kundis Craig*

Midway through the current Term, the Supreme Court has issued a few opinions of interest to the administrative law and regulatory practice community.

Federal Agency Liability for Unconstitutional “Takings” of Property

In 1948, the U.S. Army Corps of Engineers (Army Corps) constructed the Clearwater Dam on the Black River in northeastern Arkansas. It has operated that dam ever since, mostly according to its Water Control Plan. The plan sets water-release rates for different seasons, but it also allows deviations from those rates for agricultural, recreational, and other purposes. From 1993 to 2000, the Army Corps allowed such deviations for the benefit of downstream farmers. Specifically, the Army Corps held back more water than usual to extend the farmers’ harvest seasons. However, the Corps then had to release more water than normal during spring and summer flooding. The Arkansas Game and Fish Commission claimed that this additional flooding damaged or destroyed more than 18 million board feet of timber in its Dave Donaldson Black River Wildlife Management Area, which is downstream of the Clearwater Dam. It sued the United States, arguing that the Army Corps’ water management had effectuated an unconstitutional taking of state property in violation of the Fifth Amendment to the U.S. Constitution.

On December 4, 2012, in a unanimous opinion authored by Justice Ginsburg (Justice Kagan did not participate), the Court agreed that such an unconstitutional taking had occurred. Arkansas Game & Fish Comm’n v. United States, — U.S. — , 133 S. Ct. 511 (Dec. 4, 2012). The Court emphasized that “[i]n view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area” and that “most takings claims turn on situation-specific factual inquiries.” Id. at 518. The issue, therefore, was “whether temporary flooding can ever give rise to a takings claim.” Id.

Relying on precedent, the Court concluded that government-induced seasonal or temporary flooding could indeed result in a compensable taking. Id. at 518–19 (citing Pumpelly v. Green Bay Co., 13 Wall. 166, 177, 181 (1872); United States v. Cress, 243 U.S. 316, 328–29 (1917); United States v. Westinghouse Elec. & Mfg. Co., 339 U.S. 261, 267 (1950); United States v. Peave Coal Co., 341 U.S. 114 (1951); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Gen. Motors Corp., 323 U.S. 373 (1945); United States v. Causby, 328 U.S. 256, 266 (1946); United States v. Dickinson, 331 U.S. 745, 751 (1947)). The Court was unwilling to recognize a blanket “flood control” exception to takings liability: “There is thus no solid grounding in precedent for setting flooding apart from all other government intrusions on property. And the Government has presented no other persuasive reason to do so. Its primary argument is of the in for a penny, in for a pound genre: reversing the decision below, the Government worries, risks disruption of public works dedicated to flood control.” Id. at 521.

However, the Court’s decision was fairly limited: “We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection.” Id. at 522. It remanded the case to the Court of Appeals for the Federal Circuit for further consideration, emphasizing for remand that: (1) “[w]hen regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence vel non of a compensable taking,” id.; (2) “[a]lso relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action” and the character of the land at issue and the owner’s “reasonable investment-backed expectations’ regarding the land’s use,” id.; and (3) several issues of fact had been challenged and remained to be reviewed. Id. at 523.

Judicial Review of the MSPB’s “Mixed Cases”

The Supreme Court unanimously decided a sticky issue of jurisdiction over judicial review of Merit Systems Protection Board (MSPB) decisions in “mixed cases”—that is, cases where the agency action appealable to the MSPB also allegedly violates a federal antidiscrimination statute. Kloeckner v. Solis, — U.S. — , 133 S. Ct. 596, 600–01 (Dec. 10, 2012). In an opinion authored by Justice Kagan, the Court decided that appeals from the MSPB in such cases, particularly where the MSPB has decided the case on procedural grounds, should go to the relevant federal district court, not the Court of Appeals for the Federal Circuit, which ordinarily has jurisdiction over MSPB appeals. Id. at 600; 5 U.S.C. § 7703(b)(1). However, the Civil Service Reform Act of 1978, 5 U.S.C. §§ 1101, et seq., explicitly carves out an exception for claims that allege violations of the Civil Rights Act, the Age Discrimination in Employment Act, or the Fair Labor Standards Act, 5 U.S.C. § 7703(b)(2)—and, as the Court emphasized, each of these statutes authorizes suit in federal district court. Kloeckner, 133 S. Ct. at 601. Thus, the Court concluded, while “the intersection of federal civil rights statutes and civil service law has produced a complicated, at times confusing, process for resolving claims of discrimina—

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* William H. Leary Professor of Law, University of Utah S.J. Quinney College of Law; Salt Lake City, UT; and Contributing Editor, Administrative & Regulatory Law News. The author may be reached at robin.craig@law.utah.edu.
n in the federal workplace . . . some things are plain. So it is in this case, where two sections of the CSRA, read naturally, direct employees like Kloecner to district court.” Id. at 603.

**Standing and Mootness**

In *Already, LLC v. Nike, Inc.*, — U.S. — , 133 S. Ct. 721 (Jan. 9, 2013), Nike sued Already for infringement of Nike’s “Air Force 1” trademark; Already counterclaimed that the trademark was invalid. Ten months after filing suit, Nike issued a covenant not to sue Already. The issue for the Court was whether the covenant not to sue mooted Already’s counterclaim. *Already*, 133 S. Ct. at 725–26. In a unanimous opinion authored by Chief Justice Roberts, the Court concluded that the entire case was indeed moot, despite Already’s arguments that it possessed independent standing to pursue its trademark invalidity claim.

The Court began by reviewing Article III’s “Case or Controversy” requirement, emphasizing first that this “limitation requires those who invoke the power of a federal court to demonstrate standing—a ‘personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief’.” Id. at 726 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Moreover, “[w]e have repeatedly held that an ‘actual controversy’ must exist not only ‘at the time the complaint is filed,’ but through ‘all stages of the litigation.’” Id. (quoting *Alvarez v. Smith*, 558 U.S. 87, 92 (2009), and citing *Arizona v. Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). Finally, the Court noted, “[a] case becomes moot—and therefore no longer a ‘Case’ or ‘Controversy’ for purposes of Article III—‘when the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome.’” “No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs’ particular legal rights.” Id. at 726–27 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam), and *Alharez*, 558 U.S. at 93).

As the Court noted: “At the outset of this litigation, both parties had standing to pursue their competing claims in court.” Id. at 727. Nike’s covenant not to sue, however, brought the Court’s continuing jurisdiction into question. The Court determined that the voluntary cessation doctrine applied but emphasized that:

> And it covers not just current or previous designs, but any colorable imitations.

*Id.* at 727–28. As a result:

Given Nike’s demonstration that the covenant encompasses all of its allegedly unlawful conduct, it was incumbent on Already to indicate that it engages in or has sufficiently concrete plans to engage in activities not covered by the covenant. After all, information about Already’s business activities and plans is uniquely within its possession. The case is moot if the court, considering the covenant’s language and the plaintiff’s anticipated future activities, is satisfied that it is “absolutely clear” that the allegedly unlawful activity cannot reasonably be expected to recur.

*Id.* at 728–29.

Already failed to show that it manufactured a shoe that fell outside the scope of the covenant not to sue and yet could potentially infringe Nike’s trademark. Nevertheless, it asserted its right to continue to challenge the validity of Nike’s trademark, asserting several theories of injury for independent standing:

First, it argues that so long as Nike remains free to assert its trademark, investors will be apprehensive about investing in Already. Second, it argues that given Nike’s decision to sue in the first place, Nike’s trademarks will now hang over Already’s operations like a Damoclean sword. Finally, and relatedly, Already argues that, as one of Nike’s competitors, it inherently has standing to challenge Nike’s intellectual property.

*Id.* at 729–30. According to the Court, however, “[t]he problem for Already is that none of these injuries suffices to support Article III standing. Although the voluntary cessation standard requires the defendant to show that the challenged behavior cannot reasonably be expected to recur, we have never held that the doctrine—by imposing this burden on the defendant—allows the plaintiff to rely on theories of Article III injury that would fail to establish standing in the first place.” *Id.* at 730. Already’s fear regarding investors pulling out was a conjectural and hypothetical injury, not the actual or imminent injury required for standing. *Id.* As to the second argument, Nike’s covenant not to sue protected Already’s customers and retailers, as well, eliminating any injury on account of their infringement risk. *Id.* at 730–31. As for Already’s third theory:

Taken to its logical conclusion, the theory seems to be that a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful—whether a trademark, the awarding of a
contract, a landlord-tenant arrangement, or so on. We have never accepted such a boundless theory of standing. The cases already cited for this remarkable proposition stand for no such thing. In each of those cases, standing was based on an injury more particularized and more concrete than the mere assertion that something unlawful benefited the plaintiff’s competitor.


According to the Court, “Already’s arguments boil down to a basic policy objection that dismissing this case allows Nike to bully small innovators lawfully operating in the public domain. This concern cannot compel us to adopt Already’s broad theory of standing.” Id.

Justice Kennedy concurred in Already, joined by Justices Thomas, Alito, and Sotomayor, to emphasize that the burden of showing that the entire case was moot lay with Nike, the party moving to dismiss the case. According to Justice Kennedy:

As the Court now holds and as the precedents instruct, when respondent Nike invoked the covenant not to sue to show the case is moot, it had the burden to establish that proposition. The burden was not on Already to show that a justiciable controversy remains. Under the voluntary cessation doctrine, Nike bears the “formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” In the circumstances here, then, Nike must demonstrate that the covenant not to sue is of sufficient breadth and force that Already can have no reasonable anticipation of a future trademark infringement claim from Nike.

Id. at 733 (quoting Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc., 528 U.S. 167, 190 (2000)). Moreover, “[t]his brief, separate concurrence is written to underscore that covenants like the one Nike filed here ought not to be taken as an automatic means for the party who first charged a competitor with trademark infringement suddenly to abandon the suit without incurring the risk of an ensuing adverse adjudication.” Id.

**Jurisdictional Requirements for Administrative Appeals and Chevron Deference**

Under the relevant Medicare statute, health care providers have 180 days to file an administrative appeal of the initial determination of reimbursement due for inpatient services to Medicare beneficiaries. 42 U.S.C. § 1395oo(a) (3). Through a regulation promulgated in 1974, the then-Department of Health, Education, and Welfare authorized the Provider Reimbursement Review Board (PRRB) to extend the 180-day limitation, for good cause, up to three years, and the current Department of Health and Human Services (HHS) has retained this regulation. 42 C.F.R. § 405.1841(b).

In Sebelius v. Auburn Regional Medical Center, — U.S. — , — S.Ct. — , 2013 WL 215485 (Jan. 22, 2013), the issues for the Court were: (1) whether the 180-day limit was jurisdictional; and (2) if not, whether the Department’s construction of the statute was arbitrary and capricious. In a unanimous opinion authored by Justice Ginsburg, the Court held that the 180-day limitation was not jurisdictional and that the Department was not arbitrary and capricious. 2013 WL 215485 at *4.

On the jurisdictional issue, the Court clearly expressed a disinclination to find rules to be jurisdictional. As it explained: “Characterizing a rule as jurisdictional renders it unique in our adversarial system. Objections to a tribunal’s jurisdiction can be raised at any time, even by a party that once conceded the tribunal’s subject-matter jurisdiction over the controversy. Tardy jurisdictional objections can therefore result in a waste of adjudicatory resources and can disturbingly disarm litigants.” Id. at *6. As a result, the Court has adopted a “readily administrable bright line” for determining whether to classify a statutory limitation as jurisdictional. We inquire whether Congress has “clearly state[d]” that the rule is jurisdictional; absent such a clear statement, we have cautioned, “courts should treat the restriction as nonjurisdictional in character.” This is not to say that Congress must incant magic words in order to speak clearly. We consider “context, including this Court’s interpretations of similar provisions in many years past,” as probative of whether Congress intended a particular provision to rank as jurisdictional.


According to the Court, however, the Medicare 180-day “provision ‘does not speak in jurisdictional terms.’” Id. at *7 (quoting Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394 (1982)). Moreover, “we have repeatedly held that filing deadlines ordinarily are not jurisdictional; indeed, we have described them as ‘quintessential claim-processing rules.’” Id. (citations omitted).

Because the 180-day limit was not jurisdictional, it did not automatically invalidate HHS’s regulation. Instead, the Court reviewed the legitimacy of the regulation under the Chevron deference standard—specifically, it noted that “[a] court lacks authority to undermine the regime established by the

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Secretary unless her regulation is ‘arbitrary, capricious, or manifestly contrary to the statute.’” 14

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Id. at *9 (citing Chevron USA, Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837, 844 (1984)). The Court first noted that “Congress vested in the Secretary large rulemaking authority to administer the Medicare program. The PRRB may adopt rules and procedures only if ‘not inconsistent’ with the Medicare Act or ‘regulations of the Secretary.’” Id. (quoting 42 U.S.C. § 1395oo(e)). Second, it concluded rather quickly that the regulation survived Chevron review:

As HHS has explained, “[i]t is in the interest of providers and the program that, at some point, intermediary determinations and the resulting amount of program payment due the provider or the program become no longer open to correction.” CMS, Medicare: Provider Reimbursement Manual, pt. 1, ch. 29, § 2930, p. 29–73 (rev. no. 372, 2011); cf. Taylor v. Freeland & Kronz, 503 U.S. 638, 644 (1992) (“Deadlines may lead to unwelcome results, but they prompt parties to act and produce finality.”). The Secretary brought to bear practical experience in superintending the huge program generally, and the PRRB in particular, in maintaining three years as the outer limit. A court must uphold the Secretary’s judgment as long as it is a permissible construction of the statute, even if it differs from how the court would have interpreted the statute in the absence of an agency regulation. National Cable & Telecommunications Assn. v. Brand X Internet Services, 545 U.S. 967, 980 (2005); see also Chevron, 467 U.S. at 843, n. 11).

Id.

Statutory Construction

The Court once again returned to construing the Clean Water Act, 33 U.S.C. §§ 1251-1387, in Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc., — U.S. — , 133 S. Ct. 710 (Jan. 8, 2013). In this case, the Los Angeles County Flood Control District (LACFCD) operated a municipal separate storm sewer system (MS4), through which it collects, transports, and ultimately discharges storm runoff, much of which is polluted. Pursuant to the Clean Water Act’s requirements requiring permits for MS4s serving populations of more than 100,000, the LACFCD has a National Pollutant Discharge Elimination System (NPDES) permit for its MS4. The National Resources Defense Council (NRDC), however, argued that the LACFCD was violating the terms of its permit because of water quality measurements taken at monitoring stations in the Los Angeles and San Gabriel Rivers. The federal district court granted summary judgment to the LACFCD, but the Court of Appeals for the Ninth Circuit reversed, concluding that a “discharge of pollutants” triggering the Act occurred when storm water flowed out of the concrete-lined rivers and entered downstream, non-lined portions of those waterways.

In an 8-1 decision through an opinion authored by Justice Ginsburg, the Court reversed; Justice Alito concurred in the judgment without joining the majority opinion or offering one of his own. The issue, as the Court framed it, was “[u]nder the CWA, does a ‘discharge of pollutants’ occur when polluted water ‘flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river,’ and then ‘into a lower portion of the same river’?” Id. at 712-13 (quoting the petition for certiorari). In a very short analysis, the Court emphasized that, under its precedents, “the transfer of polluted water between ‘two parts of the same water body’ does not constitute a discharge of pollutants under the CWA.” Id. at 713 (citations omitted). Thus: “It follows, a fortiori, . . . that no discharge of pollutants occurs when water, rather than being removed and then returned to a water body, simply flows from one portion of the water body to another. We hold, therefore, that the flow of water from an improved portion of a navigable waterway into an unimproved portion of the very same waterway does not qualify as a discharge of pollutants under the CWA.” Id. The Court refused to address, as being outside the scope of the grant of certiorari, NRDC’s argument that “[t]he monitoring system proposed by the District and written into its permit showed numerous instances in which water-quality standards were exceeded. Under the permit’s terms, the NRDC and Baykeeper maintain, the exceedances detected at the instream monitoring stations are by themselves sufficient to establish the District’s liability under the CWA for its upstream discharges.” Id. at 713-14.

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D.C. Circuit Creates Circuit Split Over NLRB Recess Appointments

Under the Appointments Clause of the Constitution, the President normally may appoint “Officers of the United States” only “by and with the Advice and Consent of the Senate.” U.S. Const. art. II, § 2, cl. 2. The Senate has stymied many presidents, including the current one, by failing even to vote on some presidential nominees. President Obama sought a way around this recalcitrance.

There is no question that the members of the National Labor Relations Board are “Officers of the United States,” but beginning January 4, 2012, three of the five members of the NLRB held their positions, created the necessary quorum of three members, and participated in operating the agency without having been confirmed by the Senate. President Obama relied instead upon an alternative appointment provision, the Recess Appointments Clause, under which “[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” U.S. Const. art. II, § 2, cl. 3. But there was a problem. The Senate had remained in session, holding “pro forma” business sessions every three days from December 20, 2011, through January 22, 2012. The Senate had never adjourned sine die, which is the mechanism it uses to end a session. It simply continued operating such that there was no period of time that clearly could be considered “the Recess” between the 2011 and 2012 sessions of the Senate. Having convened, as required by the Constitution, on January 3, 2012, to begin its 2012 session, the Senate did not meet on January 4. The President tried to take advantage of this Senate break by making recess appointments on that day. In so doing, the Obama Administration interpreted the Recess Appointments Clause broadly to allow such appointments whenever an administrative position was vacant during an appropriate break in the Senate’s operations even if the break was not the period between the end of one congressional session and the beginning of the next.

On February 8, 2012, a three-member panel of the NLRB ruled against the Noel Canning Company on a charge of unfair labor practice. The company challenged the NLRB’s decision, arguing that the agency had no power to act because three of its members (at least one of whom was necessary to create a quorum) held office through unconstitutional appointments. No doubt sending a shudder through the Administration, the D.C. Circuit agreed in Canning v. NLRB, 2013 WL 276024 (D.C. Cir. 2013). In a strongly textualist and originalist opinion, the panel unanimously held that “the Recess” referred to in the Recess Appointments Clause is the period between the end of one session of the Senate and the beginning of another. It cannot refer to some other break in the Senate’s business.

The court first addressed the meaning of the term “the Recess,” noting that “the” is a definite article, referring “as a matter of cold, unadorned logic” to only one recess. Seeking to determine the “natural meaning as it would have been understood at the time,” the court found that the use of the definite article “[i]n the end . . . makes all the difference.” The Board’s position could not stand because it would allow for recesses during a session of the Senate as well as “the Recess” between sessions. The court contrasted the two constitutional uses of “the Recess,” to six uses of the term “adjourn” or “adjournment” for a break, concluding that “the Recess” meant “something different than a generic break in proceedings.” The court also relied upon a comparable state constitutional provision from the same era and on the absence of any intrasession recess appointments for the first 80 years of the nation’s existence under the constitution and only a few from that point to 1947. According to the court, the essential absence of such appointments “suggests an assumed absence of [the] power.” Rejecting arguments based on more recent recess appointment practices, the court concluded that “practice of a more recent vintage is less compelling than historical practice dating back to the era of the Framers” in determining the original intent.

The court then addressed the fact that the Board’s position would effectively give the President discretion to identify Senate breaks during which to make recess appointments. The court’s response: “This will not do. Allowing the President to define the scope of his own appointments power would eviscerate the Constitution’s separation of powers.” The checks and balances of the constitutional structure must be “self-executing safeguard[s] against the encroachment or aggrandizement of one branch at the expense of the other.”

Having dispensed with meaning of “the Recess,” the court addressed the meaning of the word “happen” in the language authorizing the President “to fill up all Vacancies that may happen during the Recess of the Senate.” Relying upon dictionaries of the period, and rejecting “modern dictionaries used by other circuits” as “little guide to original meaning,” the court held that “happen” meant “to come to pass,” thereby excluding from the President’s recess appointment authority any vacancies that had arisen prior to the recess in question. Since the vacancies had occurred...
during or at the end of a session of the Senate, they did not “happen” during a recess.

Since Canning created a split in the circuits on a fundamental question of separation of powers, it is likely that the Supreme Court will grant review.

It is worth noting a threshold issue. Section 10(e) of the National Labor Relations Act prohibits a court from hearing an objection that had not been argued to the Board “unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” Although the company had not raised the recess appointment issue to the Board, the court considered this to be an extraordinary circumstance because “the objections before us concerning lack of a quorum raise questions that go to the very power of the Board to act and implicate fundamental separation of powers concerns.”

**D.C. Circuit Strikes Down EPA Projection as Non-Neutral**

The D.C. Circuit in *American Petroleum Institute v. EPA*, 2013 WL 276044 (D.C. Cir. 2013), struck down what the court considered to be an invalid attempt at technology-forcing as to production of one type of biofuel, while upholding a closely related EPA projection of advanced biofuels production for 2012. Various provisions of the Clean Air Act create the “renewable fuel standard (RFS) program.” Under the RFS program, EPA must, through regulations, ensure that transportation fuels contain increasing amounts of renewable fuels through 2022. The Act sets “applicable volumes” for each year for renewable fuels generally and for “advanced biofuels” that produce fewer greenhouse gases than other biofuels. The statute requires increases in so-called “cellulosic biofuel,” an advanced biofuel, to the point that it would constitute more than 75% of advanced biofuels by 2022. The “applicable volumes” set under the RFS program determine how much of a particular biofuel must be purchased each year by refiners, importers, and blenders.

Because there was no commercial-scale production of cellulosic biofuels when the requirement was enacted in 2007, Congress required EPA to project the “volume of cellulosic biofuel production” for each calendar year. If EPA’s projection is lower than the statutorily mandated volume the projection becomes the mandatory target. In case of a reduction, the Act also authorizes EPA to reduce the total volume of renewable fuel and advanced biofuels for that particular year. Since cellulosic biofuel is a subset of the total volume of advanced biofuels, a reduced projection for the former could affect the projected total volume for all advanced biofuels.

In a January 2012 final rule, EPA projected 8.65 million gallons of cellulosic biofuels, far below the statutory target for that fuel. It also considered, but did not reduce, the projection for total volume of advanced biofuels. As to the latter, EPA projected that other advanced biofuels would “make up the shortfall.”

The American Petroleum Institute (API) challenged both projections. Before reaching the merits, however, API had to overcome a jurisdictional challenge. The statute set a 60-day time limit for challenges to EPA’s projection for 2011, which had used the same methodology as the 2012 projection. Biofuel industry interests argued that API should have challenged EPA’s methodology when it was available for challenge in the 2011 rule. The court had denied a similarly late review in a previous decision, requiring the challenge to come when the agency “first use[d]” the approach embodied in the rule. Here, however, the court permitted the seeming late review because the methodology here involved a “prediction.” A prediction inherently “can look more arbitrary the longer it is applied.” Developments after an initial prediction may raise questions about the methodology used in the prediction. Here, the 2011 prediction had failed badly, “color[ing] the rationality” of using the methodology again. Thus, API appropriately challenged the methodology in the context of the 2012 rule.

On the merits, the court first rejected API’s argument that EPA’s cellulosic biofuel projection inappropriately “supplanted” the Energy Information Agency (EIA) estimate on which the statute required EPA to base its projection. Applying *Chevron* deference, the court upheld EPA’s determination that the statutory “based on” requirement allowed appropriate deviations from the EIA estimate. Reciting EPA’s reasons for its deviations from the EIA estimate, the court characterized the deviations as “little more than a technocratic exercise of agency discretion.” Second, the court rejected API’s complaint that EPA based its projection largely on information from owners of cellulosic biofuel facilities. Since these were an inevitable source of such information and had been relied upon by the EIA, the court upheld EPA’s consideration of that information.

In its most interesting holding, the court invalidated EPA’s projection on the ground that the agency had biased its projection in favor of increased production of cellulosic biofuels. In issuing the rule, EPA had noted that, “Congress did not specify what degree of certainty should be reflected in the projections.” In addressing the inevitable uncertainties, EPA noted the likely interaction between whatever projection it might make and the actual level of production: “The standard that we set helps drive the production of volumes that will be made available.” In light of that interaction, EPA said, “our intention is to balance such uncertainty with the objective of promoting growth in the industry.” EPA said its ultimate figures would “provides the appropriate economic conditions for the cellulosic biofuel industry to grow.”
To the court, this violated the statutory mandate to predict the “projected volume of cellulosic biofuel.” EPA was to predict “what will actually happen.” Despite the statutory purpose of increasing production of “clean renewable fuels,” EPA could not “advance a technology-forcing agenda, at least where the text does not support such a reading.” Thus, the decision appears in the guise of a statutory ruling, when it is possible that a better EPA explanation of the inevitable interaction between any projection and the ultimate reality might be upheld. Certainly the agency needs to be careful about how it characterizes its handling of uncertainty in making projections.

The ultimate result of this analysis is the court’s statement that EPA’s methodology “did not take neutral aim at accuracy.” No doubt this language will appear in future industry challenges to EPA regulations, but here EPA virtually admitted to some bias, so the actual application of these principles is likely to be quite narrow.

Finally, the court upheld EPA’s judgment that a reduced projection for one category of advanced biofuel did not require reducing the overall projection. EPA adequately provided a reasoned basis for its conclusion that other advanced biofuels would take up the slack.

4th Circuit Faults DOL Rulemaking Attempt to Reverse Previous Administration’s Policies

In 1987, the Department of Labor (DOL) issued regulations governing the admission of foreign workers for temporary employment in agriculture. The 1987 regulations were generally favorable to the interests of U.S. agricultural workers. They required, for example, that employers pay workers at an “adverse effect wage rate” to ensure the influx of foreign workers does not adversely affect the wages of U.S. workers. In 2008, DOL used the notice and comment process to change the regulations in ways favorable to agricultural employers.

In March 2009, a few months after the effective date of the 2008 regulation, the incoming Secretary of Labor proposed to suspend the 2008 regulations temporarily and to reinstate the 1987 regulations temporarily. While stating nine distinct reasons for her action, the Secretary allowed a comment period of only ten days and asserted that the agency would consider only comments on the suspension itself, not the merits of either set of regulations. Two months after the close of the comment period, DOL issued a final rule suspending the 2008 regulations and reinstating the 1987 regulations.

In *North Carolina Growers’ Association, Inc. v. United Farm Workers*, 2012 WL 6634773 (4th Cir. 2012), employer interests challenged the 2009 action as violating the rulemaking requirements of the Administrative Procedure Act. U.S. farm worker interests argued that the 2009 action did not constitute rulemaking as defined in § 551(5) of the APA: The “agency process for formulating, amending, or repealing a rule.” In their view, both the 2008 and 1987 rules had previously been “formulated,” such that the reinstatement of the 1987 rule did not constitute “formulating” a rule. The court disagreed, noting that the 1987 rule “ceased to have any effect” upon publication of the 2008 rule, so its “reinstatement would have put in place a set of regulations that were new and different ‘formulations’ from the 2008 regulations.” Moreover, the Department’s own actions of publishing notice and seeking comments strongly indicated that it viewed reinstatement of the 1987 rule as rulemaking.

The farm workers also argued that the agency’s action fell within the “good cause” exception to the requirement for notice and comment. After a succinct discussion of the elements of the “good cause” exception, the court ultimately held that the agency had not expressly or impliedly invoked the exception, as required by the APA. Although there is no “rigid requirement that an agency must explicitly invoke the good cause exception,” the record had to demonstrate the agency’s reliance on the exception. Here, the record indicated to the contrary that the agency had pursued the notice and comment process and believed it had satisfied its requirements.

Unfortunately for the agency, the court held that “the record clearly demonstrates that the Department did not satisfy its notice and comment obligations.” DOL expressly refused to consider the merits of the 2008 and 1987 rules, although the merits were “integral to the proposed agency action.” Although the short length of the 10-day comment period was not determinative, the court found that it supported a conclusion that the agency “did not provide a meaningful opportunity for comment,” particularly in light of the 11,000 comments the agency had received during the 2008 rulemaking, as compared to only 800 received during the 2009 ten-day period.

Judge Wilkinson concurred, noting the reality that these changes reflected “a political back-and-forth” between affected interests. Although such politically based changes are not necessarily invalid, the APA “requires that the pivot from one administration’s priorities to those of the next be accomplished with at least some fidelity to law and legal process.”

9th Circuit Accepts Agency Experience as Sufficient to Support Rule

There is a tension between an agency’s attempt to rely upon its “experience” to support a rule and the requirement that an agency demonstrate sufficient factual support for a rule. *Peck v. Thomas*, 697 F.3d 767 (9th Cir. 2012), illustrates the sort of narrow circumstance in which an agency may rely upon experience without a specific factual showing.

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Two prisoners who had been convicted of “being a felon in possession of a firearm” (and one of whom had a past robbery conviction more than 15 years old) asserted that as nonviolent offenders they were eligible for early release in return for successfully completing a residential drug-abuse treatment program. The Bureau of Prisons (BOP) denied release under a regulation that “categorically excludes certain classes of inmates” from eligibility for early release under the program. The rule excludes those with convictions for possession of a firearm and those with a prior conviction for robbery, among others. The BOP had struggled through several years of litigation over the rule. At one point, the Supreme Court upheld the agency’s assertion of authority to impose such limitations: “[T]he agency’s interpretation is reasonable both in taking account of preconviction conduct and in making categorical exclusions.” But the Court did not reach the issue of whether the BOP had complied with the rulemaking requirements of the APA.

In later decisions, the Ninth Circuit invalidated the rule for procedural reasons and because the BOP had “failed to give a reasoned basis for its action” because the administrative record did not contain a rationale for its decision.

The BOP tried again, specifically asserting that its experience with those convicted of the excluded offenses supported a conclusion that they pose “a particular risk to the public. There is a significant potential for violence from criminals who carry, possess or use firearms.” The BOP also said that “in committing such offenses, these inmates displayed a readiness to endanger another’s life.” The BOP made a similar assertion with respect to prior convictions of the offenses identified in the regulation. The court accepted these assertions as providing a sufficiently reasoned basis for the agency’s decision.

However, the inmates challenged the factual basis for the agency’s conclusions about risks posed by those convicted of the crimes in question. They argued that the agency did not “collect and consider” any of the various available studies bearing on these issues. The Ninth Circuit rejected this argument, holding that “the BOP is entitled to invoke its experience as a justification for” its conclusion that “the commission of these crimes rationally reflects the view that such inmates displayed readiness to endanger the public.” This is a far cry from the detailed scientific studies necessary to sustain many other agency rules. No doubt the fact that the BOP had daily interactions with those convicted of the excluded crimes was significant to the court’s conclusion, even though the agency had not provided specific details of that experience.

The Ninth Circuit reported that under *Brand X*, the agency was not bound by prior circuit interpretation—Chevron deference due despite lack of formal procedures. *Managed Pharmacy Care v. Sebelius*, 2012 WL 6204214 (9th Cir. 2012), provides a useful example of two aspects of Chevron analysis. First, the court recognized, as required by *Brand X*, that its own prior interpretation was not controlling where the court had not determined that its interpretation was the only one permitted by the statute. Indeed, the court had noted in the previous decision that its “standard of review might have been different had the agency spoken on the issue.”

Second, the court found that Congress intended deference despite the absence of formal procedures for the decision. Reciting the various factors in *Barnhart v. Walton*, the court noted that the statutory language was “broad and diffuse,” using terms like “consistent,” “sufficient,” “efficiency,” and “economy.” The court also noted the complexity of the Medicaid program, the Secretary’s responsibility to make decisions in the exercise of her expertise, and the express authorization to engage in rulemaking and adjudication. The absence of formal procedures was not enough to preclude Chevron deference.

The Section values the input of all its members. Make your opinion count. Contact us at anne.kiefer@americanbar.org. Also, please let us know how we can help you get more involved with Section activities.
Edited by William Funk*

Collections

36 Harv. J.L. & Pub. Pol’y, vol. 1 (2013). I. The Rule of Law and the Administrative State with articles by Richard A. Epstein (The Perilous Position of the Rule of Law and the Administrative State) and Peter M. Shane (The Rule of Law and the Inevitability of Discretion); II. Congress vs. Agencies: Balancing Checks and Efficiency: Gridlock, Organized Interests, and Regulatory Capture with articles by David Freeman Engstrom (Corralling Capture) and C. Boyden Gray (Congressional Abdication: Delegation Without Detail and Without Waiver); III. Perspectives on Executive Power: Czars, Libya, and Recent Development with articles by Mariano-Florentino Cuéllar (American Executive Power in Historical Perspective), Sanford Levinson (Reconsidering the Modern Hanoverian King), and John Yoo (President Obama and the Framers’ Presidency); IV. Technology and Regulation with articles by Richard A. Epstein (Can Technological Innovation Survive Government Regulation?), Anthony Falzone (Regulation and Technology), and Mark A. Lemley (The Regulatory Turn in IP); and an article by Emily S. Bremer (Incorporation by Reference in an Open Government Age).


Articles

Mark Seidenfeld, The Irrelevance of Politics for Arbitrary and Capricious Review, 90 Wash. U. L. Rev. 141 (2012). This article contends that, properly understood, judicial review of agency action under the reasoned decision-making standard precludes a court from consider-

\* Robert E. Jones Professor of Law, Lewis & Clark Law School; former Chair, ABA Section of Administrative Law and Regulatory Practice; and Advisory Board Member and Contributing Editor, Administrative & Regulatory Law News.

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Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive’s Power to Make and Interpret Law*, 44 Loy. U. Cmt. L.J. 141 (2012). The Supreme Court’s willingness to defer to agency interpretations of ambiguous statutes has vacillated over the past seventy years. The Court’s vacillation has dramatically impacted the executive’s power to make and interpret law. This article examines how the Court augmented and then constricted executive lawmaking power and ceded then reclaimed executive interpretive power with a single case and its legal progeny. Prior to *Chevron*, Congress had the primary responsibility for lawmaking, while agencies made policy choices only when Congress explicitly delegated that power to them. Also, prior to *Chevron*, the judiciary resolved questions of statutory interpretation of regulatory statutes with a bifurcated approach. Agencies did not receive deference when they resolved issues involving pure questions of law but did receive some level of deference when they resolved issues involving questions of law application. In short, prior to *Chevron*, the executive was an expert advisor, not a law maker or law interpreter. With its holding in *Chevron*, the Court dramatically, and likely unintentionally, altered executive lawmaking and interpretive power. Specifically, executive power burgeoned. The sphere of legitimate agency lawmaking expanded because of the adoption of implicit delegation as a legitimate legislative mandate. In short, with *Chevron*, the executive moved from expert advisor to quasi-law maker and law interpreter. But the transition was short-lived. Today, the Court is reclaiming the power it both surrendered and transferred with *Chevron*. With two important changes to *Chevron*’s application—restricting the types of agency interpretations entitled to deference and curbing the implied delegation rationale—the Court has begun to reclaim the interpretive power it ceded and the lawmaking power it shifted with the rise and fall of *Chevron*. Simply put, the Court has come full circle by expanding executive power and then dramatically contracting it.

John Gedid, *Administrative Procedure for the Twenty-First Century: An Introduction to the 2010 Model State Administrative Procedure Act*, 44 St. Mary’s L.J. 241 (2012). This article describes the evolution of earlier state administrative procedure acts (APAs) into the 2010 MSAPA. By providing an overview of the Act’s new features, this article will offer guidance that is useful for analysts and legislators seeking to implement similar models designed to improve state APAs. This overview examines how the development of the administrative procedure acts as model acts made the ultimate goal of fairness achievable, as evidenced in the various revisions of the MSAPA. It includes a description of the progression of political and other restraints on agencies and the evolutionary relationship between the 1961 MSAPA and the 2010 MSAPA. Additionally, this article discusses the drafters’ attempt to adopt administrative procedures that take advantage of developments in the digital realm.

Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, Harv. L. Rev. (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192639. Since its creation in 1980, the Office of Information and Regulatory Affairs (OIRA), a part of the Office of Management and Budget (OMB), has become a well-established institution within the Executive Office of the President. This essay, based on public documents and the author’s experience as OIRA Administrator from 2009–2012, attempts to correct some pervasive misunderstandings and to describe OIRA’s actual role. Perhaps above all, OIRA operates as an information aggregator. One of OIRA’s chief functions is to collect widely dispersed information—information that is held by those within the Executive Office of the President, relevant agencies and departments, state and local governments, and the public as a whole. Costs and benefits are important, and OIRA does focus on them (as do others within the executive branch, particularly the National Economic Council and the Council of Economic Advisers), above all in the case of economically significant rules. But for most rules, the analysis of costs and benefits is not the dominant issue in the OIRA process. Much of OIRA’s day-to-day work is devoted to helping agencies work through interagency concerns, promoting the receipt of public comments on a wide range of issues and options (for proposed rules), ensuring discussion and consideration of relevant alternatives, promoting consideration of public comments (for final rules), and helping to ensure resolution of questions of law, including questions of administrative procedure, by engaging relevant lawyers in the executive branch. OIRA seeks to operate as a guardian of a well-functioning administrative process, and much of what it does is closely connected to that role.

David Fontana, *Executive Branch Legalisms*, 124 Harv. L. Rev. Forum 21 (2012). The Office of Legal Counsel (OLC) and White House Counsel’s Office (WHC) have both been the subject of much recent attention in legal scholarship. However, these offices remain less representative of and less important to executive branch legalism than the substantial amount of attention these offices are receiving suggests. These offices matter, and matter more than any other individual legal office in the executive branch. However, there are limitations in using these two offices as a means of understanding the executive branch’s legal operations more generally. Executive branch lawyering is still overwhelmingly lawyering by civil service lawyers who are not appointed by the President or substantially affected by the lawyers that the President appoints. In other words,
the law created and shaped by civil service lawyers—what the article calls “civil service legalism”—is a crucial but increasingly unappreciated part of the legal presidency (and different than the law created and shaped by the more “political lawyers” in OLC and WHC). In particular, there are differences between OLC/WHC and the large majority of other legal offices in the executive branch in terms of their legal personnel: how do these lawyers come to work in the executive branch, and what are their incentives once they are working there? The executive branch is a “they,” not an “it,” and so too executive branch legality is more accurately described as executive branch legalisms—a plural and not a singular, with some important implications for our understanding of separation of powers.


Interagency coordination is one of the great challenges of modern governance. This report, prepared for the Administrative Conference of the United States (ACUS), highlights the challenges presented by fragmented agency responsibilities. Rather than oppose all agency fragmentation, the report highlights instances when it presents governance problems and describes the variety of tools that Congress, the President, and agencies may use to manage coordination challenges more effectively. These tools include agency interaction requirements, formal interagency agreements, and joint policymaking.

This report also assesses the relative strengths and weaknesses of these coordination tools using the normative criteria of efficiency, effectiveness, and accountability, and it concludes that the benefits of coordination frequently will be substantial. To varying extents, these instruments can reduce regulatory costs for both government and the private sector, improve expertise, and ameliorate the risk of bureaucratic drift without compromising transparency. Coordination can also help to preserve the functional separation of powers—what the article calls “civil service legalism”—is a crucial but increasingly unappreciated part of the legal presidency (and different than the law created and shaped by the more “political lawyers” in OLC and WHC). In particular, there are differences between OLC/WHC and the large majority of other legal offices in the executive branch in terms of their legal personnel: how do these lawyers come to work in the executive branch, and what are their incentives once they are working there? The executive branch is a “they,” not an “it,” and so too executive branch legality is more accurately described as executive branch legalisms—a plural and not a singular, with some important implications for our understanding of separation of powers.


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have witnessed a burst of scholarship at the intersection of national security and administrative law. Many scholars endorse a heightened “super-strong” brand of *Chevron* deference to presidential decisionmaking during times of emergency. Believing that the Executive’s comparative advantage in expertise, access to information, and accountability warrant minimal judicial scrutiny, these *Chevron*-backers advance an Executive-centric view of national security powers. Other scholars, by contrast, dispute *Chevron’s* relevance to national security. These *Chevron*-detractors argue for an interventionist judiciary in national security matters. Both camps criticize the Supreme Court’s scaling of deference to the Executive after 9/11: *Chevron*-backers argue that the Court failed to accord sufficient deference to the President, while *Chevron*-detractors argue that the Court failed to clarify the scope of individual liberties. However, neither side appreciates the role that Justice Jackson’s seminal *Youngstown* concurrence has played in the Court’s resolution of recent national security cases. *Youngstown* makes congressional legislation—not Executive power or individual rights—the central judicial concern in cases pitting individual liberty against Executive power. The post-9/11 Supreme Court, following Justice Jackson, has used judicial review to catalyze congressional action by remanding to Congress policy questions lacking joint political branch support. This dual-branch theory of governance preserves a critical rule-of-law basis for judicial review of national security decisionmaking that *Chevron*’s backers and its detractors overlook.


Agencies wield enormous discretion when deciding how to regulate. This discretion allows executive branch agencies to insulate their decisions from presidential review by raising the costs of such review. They can do so, for example, through variations in policymaking form, cost-benefit analysis quality, timing strategies, and institutional coalition-building. This article seeks to help shift the literature’s focus on court-centered agency behavior to consider, instead, the role of the President under current executive orders. Specifically, it marshals public choice insights to offer an analytic framework for what it calls agency self-insulation under presidential review, illustrates the phenomenon, and assesses some normative implications. The framework generates several empirically testable hypotheses regarding how presidential transitions and policy shifts will influence agency behavior. It also challenges the doctrinal focus on removal restrictions and highlights instead a more functional understanding of agency independence. Finally, these dynamics suggest that courts and Congress should serve to facilitate political monitoring by encouraging information from sources external to the presidential review process and help enforce separation-of-powers principles within the executive branch.

Zachary James Gubler, *Experimental Rules*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2210101. When forming policy under conditions of extreme uncertainty, the optimal approach seems to be a process by which the policy decision is divided into multiple stages, or in other words, an experimental approach. The optimal legal vehicle for such policy experimentation is what the article calls “experimental rules,” which are rules that terminate automatically and are designed for the express purpose of generating data during the sunset period that can then be used to determine the optimal policy strategy for the long run. Such rules are at their most effective when they are adopted by federal agencies, since “arbitrary and capricious” review is likely to compel regulators to take into account learning generated by the experiment, thereby overcoming one of the principal obstacles to policy experimentation. Yet, it turns out that agencies rarely adopt such “experimental rules” in the real world. Indeed, over the past ten years, many agencies, including the Securities and Exchange Commission, adopted experimental rules less than 1% of the time. The reason, the article argues, has to do with the political economy, which appears to disfavor experimental rules either because they are more temporary and therefore less valuable to interest groups or because they are more costly to adopt. However, one could overcome these political economy constraints and encourage policy experimentation by having courts apply greater deference to experimental rules (at least during the initial, experimental phase of the multi-stage process). This approach would have the effect of nudging actors in the political economy toward experimental rules, thereby avoiding the possibility of sub-optimal policies becoming entrenched in permanent rules. It would also preserve rules that might otherwise be vacated by courts at least long enough to generate the necessary learning to determine whether they should be implemented on a more permanent basis.

Yoon-Ho Alex Lee, *An Options-Approach to Agency Rulemaking*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2207196. Agencies must often draft regulations in the face of substantial uncertainty about costs and benefits. A recent D.C. Circuit case, *Business Roundtable v. SEC*, significantly raised the bar for independent agencies conducting economic analysis in rulemaking. Under *Business Roundtable*, many potentially efficient rules may not survive judicial review because it is simply impossible for agencies to quantify costs and benefits with the certainty demanded by the court. Most scholarship critical of the holding tends to urge the court to relax the standard of review or to suggest that agencies find ways to shield regula-
Recent years have seen much speculation over executive branch legal interpretation and internal decisionmaking, particularly in matters of national security and international law. Debate persists over how and why the executive arrives at particular understandings of its legal constraints, the extent to which the positions taken by one presidential administration may bind the next, and, indeed, the extent to which the President is constrained by law at all. Current scholarship focuses on rational, political, and structural arguments to explain executive actions and legal positioning, but it has yet to take account of the diverse ways in which legal questions arise for the executive branch, which have a significant effect on executive decisionmaking. This article adds necessary texture to these debates by identifying and exploring the role of distinct triggers for legal interpretation—which this article terms “interpretation catalysts”—in driving and shaping executive branch decisionmaking, particularly at the intersection of national security and international law. Interpretation catalysts impel the executive to consider, crystallize, and potentially assert a legal interpretation of its obligations under domestic or international law on a particular matter, and they can both impede and facilitate change within the executive. Examples of interpretation catalysts include such diverse triggering events as decisions whether to use force against an armed group; lawsuits filed against the U.S. government; obligatory reports to human rights treaty bodies; and even the act of speechmaking. Each of these unique catalysts triggers a distinct process for legal decisionmaking within the executive and is instrumental in framing the task at hand, shaping the process engaged to arrive at the substantive decision, establishing the relative influence of the actors who will decide the matter, and informing the contextual pressures and interests that may bear on the decision and thus shapes the ultimate substantive position itself. These distinct mechanisms for decisionmaking each carry their own individual pressures and biases; thus, in laying bare the interpretation catalysts phenomenon, this article demonstrates potential avenues for actors inside and external to the executive branch to predict, explain, and even affect executive decisionmaking. This article explores the effect of interpretation catalysts on executive legal interpretation and address some of the implications of this phenomenon for scholars, private actors, courts, and executive branch officials.

**Christopher J. Walker, How to Win the Deference Lottery, Tex. L. Rev. (forthcoming),** http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2205073. In Deference Lotteries, Jud Mathews proposes that the deference framework in administrative law be viewed through the game-theory lens of a lottery. Such approach helps us think critically about how varying standards of review may affect the behavior of agencies and courts engaged in the judicial review process. This response suggests that the lottery lens can also help agencies think more strategically about how to develop and defend interpretations of statutes they administer. Assuming the validity of the lottery framework, the response suggests a playbook for agencies to win the deference lottery. As the playbook reveals, this lottery is not a win-or-go-home contest. Instead, it is a repeated game—a dialogue of sorts between agencies and court—where agencies have multiple opportunities to play and replay (and win). The predictive effect of tightening or loosening the lottery thus may not be as strong as one would hope.

**Rebecca Ingber, Interpretation Catalysts and Executive Branch Legal Decisionmaking, Yale J. Int’l L. (forthcoming),** http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201199. Recent years have seen much speculation over executive branch legal interpretation and internal decisionmaking, particularly in matters of national security and international law. Debate persists over how and why the executive arrives at particular understandings of its legal constraints, the extent to which the positions taken by one presidential administration may bind the next, and, indeed, the extent to which the President is constrained by law at all. Current scholarship focuses on rational, political, and structural arguments to explain executive actions and legal positioning, but it has yet to take account of the diverse ways in which legal questions arise for the executive branch, which have a significant effect on executive decisionmaking. This article adds necessary texture to these debates by identifying and exploring the role of distinct triggers for legal interpretation—which this article terms “interpretation catalysts”—in driving and shaping executive branch decisionmaking, particularly at the intersection of national security and international law. Interpretation catalysts impel the executive to consider, crystallize, and potentially assert a legal interpretation of its obligations under domestic or international law on a particular matter, and they can both impede and facilitate change within the executive. Examples of interpretation catalysts include such diverse triggering events as decisions whether to use force against an armed group; lawsuits filed against the U.S. government; obligatory reports to human rights treaty bodies; and even the act of speechmaking. Each of these unique catalysts triggers a distinct process for legal decisionmaking within the executive and is instrumental in framing the task at hand, shaping the process engaged to arrive at the substantive decision, establishing the relative influence of the actors who will decide the matter, and informing the contextual pressures and interests that may bear on the decision and thus shapes the ultimate substantive position itself. These distinct mechanisms for decisionmaking each carry their own individual pressures and biases; thus, in laying bare the interpretation catalysts phenomenon, this article demonstrates potential avenues for actors inside and external to the executive branch to predict, explain, and even affect executive decisionmaking. This article explores the effect of interpretation catalysts on executive legal interpretation and address some of the implications of this phenomenon for scholars, private actors, courts, and executive branch officials.

**Ryan Bubb and Patrick L. Warren, Optimal Agency Bias and Regulatory Review, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201042.** Why do bureaucratic principals appoint agents who hold different policy views from the principal? This article posits an explanation based on the interplay between two types of agency costs: shirking on information production and policy bias. Principals employ biased agents because they shirk less. This creates an incentive for the principal to use review mechanisms that mitigate the resulting bias in the agents’ decisions. The availability of such review mechanisms encourages principals to employ more extreme agents. The article applies the theory to explain various features of the administrative state. In contrast to existing accounts, in this model the use by the president of ideological bureaucrats at the regulatory agencies and centralized regulatory review are complements. The use of bias to mitigate shirking results in an amplification of the swings of regulatory policy and heightens the role of regulatory policy in partisan politics.
Cass R. Sunstein, The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2199112. Some of the most interesting discussions of cost-benefit analysis focus on difficult problems, including catastrophic scenarios, “fat tails,” extreme uncertainty, intergenerational equity, and discounting over long time horizons. As it operates in the actual world of government practice, however, cost-benefit analysis usually does not need to explore the hardest questions, and when it does so, it tends to enlist standardized methods and tools. It is useful to approach cost-benefit analysis from the bottom up, that is, by anchoring the discussion in specific scenarios involving trade-offs and valuations. Thirty-six stylized scenarios are presented here, alongside an exploration of how they might be handled in practice. Open issues are also discussed.

Thomas O. McGarity and Rena I. Steinzor, The End Game of Deregulation: Myopic Risk Management and the Next Catastrophe, 23 Duke Envtl. L. & Pol’y F. 93 (2012). On December 22, 2008, the contents of an enormous impoundment containing coal-ash slurry from the Tennessee Valley Authority’s Kingston Fossil Fuel Plant poured into the Emory River. In the aftermath, EPA Administrator Lisa Jackson promised to reevaluate by the end of 2009 the agency’s decades-old reluctance to regulate the disposal of some 129 million tons of coal ash generated annually. Jackson met this deadline. But her efforts were thwarted when an intensive industry lobbying campaign provoked the White House to rewrite the EPA proposal, adding two significantly weaker options and derailing the momentum of Jackson’s proposal. Historically, events like the Kingston disaster resulted in dramatic governmental reforms. But more recently, the passive response to the Kingston spill was not an outlier. The past decade has witnessed a confluence of crises across a broad array of federal regulatory programs. The response by Congress and the regulatory agencies to most of them has been tepid at best. This trend raises the question of why the twentieth-century dynamic of crisis and reform has apparently disappeared in the early twenty-first century. Using the Kingston disaster as a case study, this article offers several explanations for this unfortunate trend. We argue that regulated industries dominate regulatory debates on Capitol Hill and at the federal agencies to an unprecedented extent. Rather than stressing the importance of science-based rulemaking, the White House has engaged in its own intemperate interventions, upping the ante for flexing raw political muscle at both ends of Pennsylvania Avenue. The growing weakness of the media’s investigative reporting has exacerbated both trends. These factors have sparked the deeply disturbing evolution of the administrative process into a kind of blood sport. This degeneration’s most obvious and immediate threat is to our shared commons, but over the long run it is equally likely to cause irrevocable harm to individual businesses and to the efficient functioning of regulated markets.

Cynthia Farina, Dmitry Epstein, and Josiah Heidt, Knowledge in the People: Rethinking “Value” in Public Rulemaking Participation, Wake Forest L. Rev. (forthcoming) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2175061. A companion piece to Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts, this essay continues the examination of the nature and value of broader public participation in rulemaking. Here, the authors argue that rulemaking is a “community of practice” with distinctive forms of argumentation and methods of reasoning that both reflect and embody craft knowledge. Rulemaking newcomers are outside this community of practice: Even when they are reasonably informed about the legal and policy aspects of the agency’s proposal, their participation differs in kind and form from that of sophisticated commenters. From observing the actual behavior of rulemaking newcomers in the “Regulation Room” project, the authors suggest that new public participation is often, if not predominantly, experiential in nature and narrative in form. It is unrealistic to expect that rulemaking newcomers can be significantly inculcated into the norms and methods of the existing rulemaking community of practice. Yet, the potential policymaking value of the on-the-ground, situated knowledge they can bring to the discussion justifies efforts to expand our understanding of the kinds of comments that should “count” in the process. This essay takes some first steps in that direction.

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By Jeffrey S. Lubbers

Given the extensive use of rulemaking in federal agencies, it is important that agency rulemakers have available the clearest guidance possible. As procedures governing the rulemaking process have proliferated since the Administrative Procedure Act (APA) was enacted, the potential procedural pitfalls have multiplied. This fifth edition continues the tradition of demystifying the rulemaking process and brings the Guide up to date with respect to recent cases and changes introduced during the second term of the Bush II Administration, and the first three years of the Obama Administration.

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