The Constitutionality and Policy Implications of Birthright Citizenship

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As incoming chair of the Administrative Law and Regulatory Practice Section, I’d like to extend my greetings to all of the members of our Section, especially the thousands of you who don’t come to meetings but find value in your membership and our numerous publications. If you have comments or suggestions about our programming or publications, or would like to get involved in the work of one of our 57 committees, please send me an email at asimow@law.ucla.edu. As I assume this office, I’m deeply honored and humbled by all the giants of our profession that have previously held the job. I find the Section in great shape and hope to leave it even stronger when I complete my term in August of 2008.

I hope many of you will take advantage of our great meeting schedule which includes the Fall meeting at the National Press Club in DC Oct. 25-26. Meeting chairs Michael Herz and Charlotte Bahin have arranged an amazing selection of programs on cutting edge issues in our field, and we anticipate a great turnout. The winter meeting takes place in my home town of Los Angeles, Feb. 8-10, led by chairs Caroline Newcombe and Chris Franklin (nice weather is guaranteed). Our spring meeting will be at the Paris Hotel in Las Vegas April 18-19. Chair Jon Rusch assures me that what happens in Vegas stays in Vegas.

My priorities as Section chair include completion of our highly successful European Union Administrative Law project led by George Bermann, among many others. You can find the reports about the different facets of EU law (including adjudication, rulemaking, judicial review, transparency, and oversight) at our Section website. http://www.abanet.org/adminlaw/eu/home.html. We also hope to complete a detailed study about e-rulemaking and improvement of regulations.gov. Cynthia Farina is heading up that project. We are working on a letter to the next President of the United States (without, of course, knowing who that will be) about the administrative law priorities we hope that POTUS will embrace. Chair-elect Russ Frisby is leading that effort.

The smashingly successful Homeland Security Institute (led by Lynne Zusman and Joe Whiteley) will take place again in January 2008, and the Regulatory Practice Institute in April will focus on rulemaking issues. We will conduct numerous teleconferences on hot subjects in various regulatory areas, such as the recent programs on food safety and EEOC issues. We have many other law reform and publication projects in the works, including a draft model land use planning ordinance which we are working on in cooperation with the State and Local Government Section. Thus we hope that our activities this year will bring added value to all of our members and result in changes in law and practice of lasting importance.

One of my priorities is to upgrade our Section’s pro bono presence. Vice-chair Bill Luneberg is heading up the pro bono committee. He plans to create a new space on our website that will give information about pro bono opportunities in the areas of administrative law and regulatory practice, both in DC and around the country. If you know of any such opportunities in your specific area of practice, please let me or Bill know. Bill’s email is luneberg@law.pitt.edu. Two important candidates for inclusion in that database involve identity theft and military benefits. At the Annual Meeting, the Council approved a draft resolution and report written by our Criminal Process committee (headed by Jon Rusch and David Frulla) that urges all bar associations to develop programs for pro bono representation of identity theft victims. These victims often have great difficulty in dealing with administrative agencies, creditors, and financial institutions to resolve their situations.

Military personnel on active duty and newly discharged military veterans have great need of pro bono assistance. Tens of thousands of soldiers, sailors, and marines have been injured while serving in the current conflicts over the past six years. These service personnel go through what the military calls its Disability Evaluation System (DES). Effective legal representation during and following the DES process is essential because military personnel must establish they are at least 30% disabled to be entitled to lifetime disability and medical benefits. Lawyers can help either at DES hearings or on appeals to the United States Court of Federal Claims. Contact Ron Smith at rsmith@davmail.org if you’re interested.

Again, my greetings to all of our members. I hope you’ll enjoy this information-packed edition of the Ad Reg News and participate in some of our Section activities this year. ☺
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# Administrative & Regulatory Law News

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Throughout the history of The Immigration and Nationality Act of 1952 (INA), there have been calls from the public to control immigration in various ways. The most recent debates about immigration reform have focused on people who have entered the country without authorization. Included in this debate is the claim that there are some individuals, primarily mothers, who enter the country with the specific intention of giving birth to a child in the United States to claim citizenship for that child and also perhaps in hopes of legalizing the status of the parents. Under the current nationality provisions of the INA and the interpretation of the Fourteenth Amendment of the Constitution, any child born in the United States, with very limited exceptions, is a citizen, whether the mother was here legally or not. This is based upon the first sentence of the 14th Amendment which says: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”

The question of whether all children born on U.S. soil should be granted automatic citizenship involves both legal and policy issues that were thoroughly debated at a program held at the Spring 2007 meeting of the Section of Administrative Law and Regulatory Practice chaired by Professor Anna W. Shavers of the University of Nebraska College of Law. Much of that debate is captured in the following papers written by the panelists.

**Born in the U.S.A.? Rethinking Birthright Citizenship in the Wake of 9/11**

**By John C. Eastman***

Justice Scalia opened his dissenting opinion in *Hamdi v. Rumsfeld*, 542 U.S.

507 (2004), by referring to Yaser Esam Hamdi as a “presumed American citizen.” Hamdi had been captured on the battlefield in Afghanistan, transferred to Guantanamo Bay as an enemy combatant but then treated as a U.S. citizen because he had been born in Baton Rouge, Louisiana while his Saudi parents were temporarily residing in the United States on a work visa. Under the generally-accepted modern interpretation of the Fourteenth Amendment’s citizenship clause, Hamdi’s birth on U.S. soil made him a U.S. citizen, entitled to the full panoply of rights that the U.S. Constitution guarantees to U.S. citizens, and neither the government nor Hamdi, nor the majority of the Court, even considered challenging the current view.

Justice Scalia’s significant, albeit brief and somewhat oblique, challenge to the received wisdom of the meaning of the Fourteenth Amendment’s Citizenship Clause nevertheless warrants our attention. As I argued in the brief I filed in the case, the received wisdom regarding the Citizenship Clause is incorrect, as a matter of text, historical practice, and political theory. As an original matter, mere birth on U.S. soil was alone not sufficient to confer citizenship as a matter of constitutional right. Rather, birth, together with being a person subject to the complete and exclusive jurisdiction of the United States (i.e., *not* owing allegiance to another sovereign) was the constitutional mandate, a floor for citizenship below which Congress cannot go in the exercise of its Article I power over naturalization. While Congress remains free to offer citizenship to persons who have no constitutional entitlement to citizenship, it has not done so. Mere birth to foreign nationals who happen to be visiting the United States at the time, as with the case of Hamdi the Taliban, should not result in citizenship. Because court rulings suggesting the contrary have rested on a flawed understanding of the Citizenship Clause, those rulings should be revisited. Moreover, the statutory grant of citizenship conferred by Congress, which precisely tracks the language of the Fourteenth Amendment, should itself be re-interpreted in accord with the original understanding of the Citizenship Clause. In the wake of 9/11, now would be a good time to do so.

The Citizenship Clause of the Fourteenth Amendment provides: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” It is today routinely believed that, under the Clause, mere birth on U.S. soil is sufficient to confer U.S. citizenship. What the contemporary belief omits, of course, is the other component of the Citizenship Clause. One must also be “subject to the jurisdiction” of the United States in order constitutionally to be entitled to citizenship.

To the modern ear, the current understanding nevertheless appears perfectly sensible. Any person entering the territory of the United States—even for a short visit; even illegally—is considered to have subjected himself to the jurisdiction of the United States, which is to say, subjected himself to the laws of the United States. Surely one who is actually born in the United States is therefore “subject to the jurisdiction” of the Unites States, and entitled to full citizenship as a result.

However strong this interpretation is as a matter of contemporary common parlance, it simply does not comport with either the text or the history surrounding adoption of the Citizenship Clause, or with the political theory underlying the Clause. Textually, such an interpretation would render the “subject to the jurisdiction” clause entirely redundant, or almost so—anyone who is “born” in the United States is, under this interpretation, necessarily “subject to the jurisdiction” of the United States—and it is a well-established doctrine of legal interpretation that legal texts, including the Constitution, are not to be

* Dean and Donald P. Kennedy Chair in Law, Chapman University School of Law. The author participated as amicus curiae in *United States v. John Walker Lindh* and *Yaser Esam Hamdi v. Donald Rumsfeld*, No. 02-7338 (4th Cir. Jan. 8, 2003). The superb research assistance of then-Chapman law student Karen Lugo is gratefully acknowledged.
interpreted to create redundancy unless any other interpretation would lead to absurd results.

Historically, the language of the 1866 Civil Rights Act, from which the Citizenship Clause of the Fourteenth Amendment (like the rest of Section 1 of the Fourteenth Amendment) was derived so as to provide a more certain constitutional foundation for the 1866 Act, strongly suggests that Congress did not intend to provide for such a broad and absolute birthright citizenship. The 1866 Act provides: “All persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.” As this formulation makes clear, any child born on U.S. soil to parents who were temporary visitors to this country and who, as a result of the foreign citizenship of the child’s parents remained a citizen or subject of the parents’ home country, was not entitled to claim the birthright citizenship provided in the 1866 Act.

Of course, it is possible that the positively-phrased “subject to the jurisdiction” clause in the Fourteenth Amendment might easily have been intended to describe a broader grant of citizenship than the negatively-phrased language from the 1866 Act, one more in line with the contemporary understanding that birth on U.S. soil is alone sufficient for citizenship. But the relatively sparse debate we have regarding this provision of the Fourteenth Amendment does not support such a reading. When pressed about whether Indians living on reservations would be covered by the clause because they were “most clearly subject to our jurisdiction, both civil and military,” for example, Senator Lyman Trumbull, a key figure in the drafting and adoption of the Fourteenth Amendment, responded that “subject to the jurisdiction” of the United States meant subject to its “complete” jurisdiction; “[i]n[ot] owing allegiance to anybody else.” And Senator Jacob Howard, who introduced the language of the jurisdiction clause on the floor of the Senate, contended that it should be construed to mean “a full and complete jurisdiction,” “the same jurisdiction in extent and quality as applies to every citizen of the United States now” (i.e., under the 1866 Act). That meant that the children of Indians who still “belong[ed] to a tribal relation” and hence owed allegiance to another sovereign (however dependent the sovereign was) would not qualify for citizenship under the clause. Because of this interpretative gloss, provided by the authors of the provision, an amendment offered by Senator James Doolittle of Wisconsin to explicitly exclude “Indians not taxed,” as the 1866 Act had done, was rejected as redundant.

The interpretative gloss offered by Senators Trumbull and Howard was also accepted by the Supreme Court—by both the majority and the dissenting justices—in The Slaughter-House Cases. As the majority correctly noted, “[t]he phrase, ‘subject to its jurisdiction’ was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.”

Although the statement in Slaughter-House was dicta, the position regarding the “subject to the jurisdiction” language advanced there was subsequently adopted by the Supreme Court in the 1884 case addressing a claim of Indian citizenship, Elk v. Wilkins, 112 U.S. 649 (1884). The Supreme Court in that case rejected the claim to citizenship by an Indian who had been born on a reservation and subsequently moved to non-reservation U.S. territory, holding that the claimant was not “subject to the jurisdiction” of the United States at birth, which required that he be “not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance.” John Elk did not meet the jurisdictional test because, as a member of an Indian tribe at his birth, he “owed immediate allegiance to” his tribe and not to the United States. Although “Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states,” “they were alien nations, distinct political communities,” according to the Court.

Indeed, if anything, Indians, as members of tribes that were themselves dependent to the United States (and hence themselves subject to its jurisdic-

...
between territorial jurisdiction and complete, political jurisdiction was taken to task by Justice Fuller, joined by Justice Harlan, in dissent. Drawing on an impressive array of legal scholars, from Vattel to Blackstone, Justice Fuller correctly noted that there was a distinction between two sorts of allegiance—“the one, natural and perpetual; the other, local and temporary.” The Citizenship Clause of the Fourteenth Amendment referred only to the former, he contended. He contended that the absolute birthright citizenship urged by Justice Gray was really a lingering vestige of a feudalism that the Americans had rejected, implicitly at the time of the Revolution, and explicitly with the 1866 Civil Rights Act and the Fourteenth Amendment.

Quite apart from the fact that Justice Fuller’s dissent was logically compelled by the text and history of the Citizenship Clause, Justice Gray’s broad interpretation led him to make some astonishingly incorrect assertions. He claimed, for example, that “a stranger born, for so long as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason.” And he necessarily had to recognize dual citizenship as a necessary implication of his position, despite the fact that, ever since the Naturalization Act of 1795, “applicants for naturalization were required to take, not simply an oath to support the constitution of the United States, but of absolute renunciation and abjuration of all allegiance and fidelity to every foreign prince or state, and particularly to the prince or state of which they were before the citizens or subjects.” That requirement still exists, though it no longer seems to be taken seriously.

Finally, Justice Gray’s position is simply at odds with the notion of consent that underlies the sovereign’s power over naturalization. What it meant, fundamentally, was that foreign nationals could secure American citizenship for their children merely by giving birth on American soil, whether or not their arrival on America’s shores was legal or illegal, temporary or permanent.

Justice Gray held that the children of two classes of foreigners were not entitled to the birthright citizenship he thought guaranteed by the Fourteenth Amendment. First, as noted above, were the children of ambassadors and other foreign diplomats who, as the result of the fiction of extraterritoriality, were not even considered subject to the territorial jurisdiction of the United States. Second were the children of invading armies born on U.S. soil while it was occupied by the foreign army. But apart from that, all children of foreign nationals who managed to be born on U.S. soil were, in his formulation, citizens of the United States. Children born of parents who had been offered permanent residence but were not yet citizens and who as a result had not yet renounced their allegiance to their prior sovereign would become citizens by birth on U.S. soil. This was true even if, as was the case in Wong Kim Ark itself, the parents were, by treaty, unable ever to become citizens.

Children of parents residing only temporarily in the United States on a work or student visa, such as Yaser Hamdi’s parents, would also become U.S. citizens. Children of parents who had overstayed their temporary visa would also become U.S. citizens, even though born of parents who were now here illegally. And, perhaps most troubling from the “consent” rationale, children of parents who never were in the United States legally would also become citizens as the direct result of the illegal action by their parents—even the children of those from countries with whom the United States might be at war. The notion that the framers of the Fourteenth Amendment, when seeking to guarantee the right of citizenship to the former slaves, also sought to guarantee citizenship to the children of enemies of the United States who were in our territory illegally, is simply too absurd to be a credible interpretation of the Citizenship Clause.

This is not to say that Congress could not, pursuant to its naturalization power, choose to grant citizenship to the children of foreign nationals. But thus far it has not done so. Instead, the language of the current naturalization statute simply tracks the minimum constitutional guarantee—anyone born in the United States, and subject to its jurisdiction, is a citizen. With the absurdity of Hamdi’s claim of citizenship so vividly before us, it is time for the courts, and for the political branches as well, to revisit Justice Gray’s erroneous interpretation of that language, restoring to the constitutional mandate what its drafters actually intended, that only a complete jurisdiction, of the kind that comes with a total and exclusive allegiance, is sufficient to qualify for the grant of citizenship to which the people of the United States actually consented.

Defining “American” Birthright Citizenship and the Original Understanding of the 14th Amendment
by James C. Ho**

For generations, Americans have understood that children born in the United States are entitled to U.S. citizenship, regardless of the nationality of their parents. Legislation to repeal this historic rule has attracted increasing attention in recent years, however, as frustration with enforcement of our nation’s immigration laws increases.

According to one recent poll, 49 percent of Americans believe that a child of an illegal alien should not be entitled to U.S. citizenship (41 percent disagree). Legal scholars including Judge Richard Posner contend that birthright citizenship for the children of aliens may be repealed by statute (see, e.g., Oforji v. Ashcroft, 354 F.3d 609, 620–21 (7th Cir. 2003) (Posner, J., concurring)). Members of Congress have introduced legislation and held hearings in recent years, following similar bipartisan efforts during the 1990s led by now–Senate Minority Leader Harry Reid and others.

The breadth of support is surprising because the proposed legislation is plainly unconstitutional. Birthright citizenship is a constitutional right, no less for the children of undocumented persons

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continued on next page
The Fourteenth Amendment begins: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.” Repeal proponents contend that this language does not apply to the children of aliens – whether legal or illegal – because such persons are not “subject to [U.S.] jurisdiction.” But text, history, judicial precedent, and Executive Branch interpretation confirm that the Citizenship Clause reaches most U.S.-born children of aliens, including illegal aliens.

One might argue that the Constitution’s emphasis on place of birth is antiquated. The requirement that only natural born citizens may serve as President or Vice President has been condemned on similar grounds. But just as a constitutional amendment is the only way to expand eligibility for the Presidency, it is likewise the only way to restrict birthright citizenship.

To be “subject to the jurisdiction” of the U.S. is simply to be subject to the authority of the U.S. government. The phrase thus covers the vast majority of persons within our borders who are required to obey U.S. laws. And obedience, of course, does not turn on immigration status, national allegiance, or past compliance. All must obey.

Common usage confirms this understanding. When we speak of a business that is subject to the jurisdiction of a regulatory agency, it must follow the laws of that agency, whether it likes it or not. When we speak of an individual who is subject to the jurisdiction of a court, he must follow the judgments and orders of that court, whether he likes it or not. As Justice Scalia recently noted, when a statute renders a particular class of persons “subject to the jurisdiction of the United States,” Congress “has made clear its intent to extend its laws” to them. Specter v. Norwegian Cruise Line Ltd., 125 S. Ct. 2169, 2194-95 (2005) (Scalia, J., dissenting).

Of course, the jurisdictional requirement of the Citizenship Clause must do something – and it does. It excludes those persons who, for some reason, are immune from, and thus not required to obey, U.S. law. Most notably, foreign diplomats and enemy soldiers – as agents of a foreign sovereign – are not subject to U.S. law, notwithstanding their presence within U.S. territory. Foreign diplomats enjoy diplomatic immunity, while lawful enemy combatants enjoy combatant immunity. Accordingly, children born to them are not entitled to birthright citizenship under the Fourteenth Amendment.

This conclusion is confirmed by history. The Citizenship Clause was no legal innovation. It simply restored the longstanding English common law doctrine of jus soli, or citizenship by place of birth. Although the doctrine was initially embraced in early American jurisprudence, the U.S. Supreme Court abrogated jus soli in its infamous Dred Scott decision, denying birthright citizenship to the descendents of slaves. Congress approved the Citizenship Clause to overrule Dred Scott and elevate jus soli to the status of constitutional law.

When the House of Representatives first approved the measure that would eventually become the Fourteenth Amendment, it did not contain language guaranteeing citizenship. On May 29, 1866, six days after the Senate began its deliberations, Senator Jacob Howard (R-MI) proposed language pertaining to citizenship. Following extended debate the next day, the Senate adopted Howard’s language. Both chambers subsequently approved the constitutional amendment without further discussion of birthright citizenship, so the May 30, 1866 Senate debate offers the best insight into Congressional intent.

Senator Howard’s brief introduction of his amendment confirmed its plain meaning:

Mr. HOWARD: ...This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons.

This understanding was universally adopted by other Senators. Howard’s colleagues vigorously debated the wisdom of his amendment – indeed, some opposed it precisely because they opposed extending birthright citizenship to the children of aliens of different races. But no Senator disputed the meaning of the amendment with respect to alien children.

Senator Edgar Cowan (R-PA) – who would later vote against the entire constitutional amendment anyway – was the first to speak in opposition to extending birthright citizenship to the children of foreigners. Cowan declared that, “if [a state] were overrun by another and a different race, it would have the right to absolutely expel them.” He feared that the Howard amendment would effectively deprive states of the authority to expel persons of different races – in particular, the Gypsies in his home state of Pennsylvania and the Chinese in California – by granting their children citizenship and thereby enabling foreign populations to overrun the country. Cowan objected especially to granting birthright citizenship to the children of aliens who “owe [the U.S.] no allegiance [and] who pretend to owe none,” and to those who regularly commit “trespass” within the U.S.

In response, proponents of the Howard amendment endorsed Cowan’s interpretation. Senator John Conness (R-CA) responded specifically to Cowan’s concerns about extending birthright citizenship to the children of Chinese immigrants:

The proposition before us ... relates simply in that respect to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. ... I am in favor of doing so ... We are entirely ready to accept the provision proposed in this constitutional amendment, that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others.
Repeal proponents contend that the legislative history supports their position. They claim that the Citizenship Clause protects only the children of persons who owe complete allegiance to the U.S. – namely, U.S. citizens. To support this contention, proponents cite stray references to “allegiance” by Senator Lyman Trumbull (D-IL) (a presumed authority in the text of his Judiciary Committee chairmanship) and others, as well as the text of the 1866 Civil Rights Act.

But the text of the Citizenship Clause requires “jurisdiction,” not “allegiance.” Nor did Congress propose that “all persons born to U.S. citizens are citizens of the United States.” To the contrary, Senator Cowan opposed the Citizenship Clause precisely because it would extend birthright citizenship to the children of people who ... owe [my state] no allegiance; who pretend to owe none; who recognize no authority in her government; who have a distinct, independent government of their own ...; who pay no taxes; who never perform military service; who do nothing, in fact, which becomes the citizen, and perform none of the duties which devolve upon him.

Moreover, Cowan’s unambiguous rejection of “allegiance” formed an essential part of the consensus understanding of the Howard text. Trumbull himself confirmed that the Howard text covers all persons “who are subject to our laws.” The stray references by Trumbull and others to “allegiance” were made during the debate over Indian tribal sovereignty, and not to aliens generally.

The 1866 Civil Rights Act likewise offers no support. Enacted less than two months before the Senate adopted the Howard amendment, the Act guarantees birthright citizenship to “all persons born in the United States and not subject to foreign power, excluding Indians not taxed.” Repeal proponents contend that all aliens are “subject to all foreign power,” and that this is relevant because the Fourteenth Amendment was ratified to ensure the Act’s validity.

But in fact, proponents and opponents of birthright citizenship alike consistently interpreted the Act, just as they did the Fourteenth Amendment, to cover the children of aliens. In one exchange, Cowan, in a preview of his later opposition to the Howard text, “ask[ed] whether [the Act] will not have the effect of naturalizing the children of Chinese and Gypsies born in this country?” Trumbull replied: “Undoubtedly. ... [T]he child of an Asiatic is just as much a citizen as the child of a European.”

Repeal proponents also point out that our nation was founded upon the doctrine of consent of the governed, not the feudal principle of perpetual allegiance to the sovereign. But that insight explains only why U.S. citizens enjoy the right of expatriation – that is, the right to renounce their citizenship – not whether U.S.-born persons are entitled to birthright citizenship.

The original understanding of the Citizenship Clause is further reinforced by judicial precedent. In 1898, the U.S. Supreme Court held in United States vs. Wong Kim Ark that the U.S.-born child of Chinese immigrants was constitutionally entitled to citizenship, noting that the “14th Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory ... including all children here born of resident aliens.”

To be sure, the question of illegal aliens was not explicitly presented in Wong Kim Ark. But any doubt was put to rest in Plyler v. Doe (1982). There, the majority concluded, and the dissent agreed, that birthright citizenship under the 14th Amendment extends to anyone “who is subject to the laws of a state,” including the U.S.-born children of illegal aliens.

The Court continues to abide by this understanding to this day. In INS vs. Rios-Pineda (1985), a unanimous court agreed that a child born to an undocumented immigrant was in fact a citizen of the United States. And in Hamdi v. Rumsfeld (2004), the plurality opinion noted that alleged Taliban fighter Yaser Hamdi was “[b]orn in Louisiana” and thus “is an American citizen,” despite objections by various amici that, at the time of his birth, his parents were aliens in the U.S. on temporary work visas.

The Citizenship Clause plainly applies to the children of aliens and citizens alike. But that may not stop Congress from repealing birthright citizenship.

Pro-immigrant members might allow birthright citizenship legislation to be included in a comprehensive immigration reform package – believing it will be struck down in court – in exchange for keeping other provisions they disfavor off the bill. Alternatively, opponents of a new temporary worker program might withdraw their opposition, if the children of temporary workers are denied birthright citizenship. Stay tuned: Dred Scott II could be coming soon to a federal court near you.

Birthright Citizenship—The Policy Arguments

By Margaret Stock

No one doubts the dysfunction of the current U.S. immigration system, a dysfunction that has resulted in the presence in America of millions of illegal or unauthorized immigrants. Some have suggested that one partial “solution” to the problem of illegal immigration is to reinterpret or amend the 14th Amendment to the U.S. Constitution to eliminate birthright citizenship. Those who suggest this change argue that giving automatic American citizenship to persons born within the geographic limits of the United States encourages foreigners to enter or remain in the United States illegally. They refer pejoratively to “anchor babies,” children born in the United States who are birthright citizens and who have parents who are not authorized to be here. They believe that children who gain citizenship by birth in the US serve to “anchor” their parents, because when the children turn 21, the parents can sometimes migrate legally based on their adult child’s status as a citizen. This “anchor,” they say, should be eliminated.

Yet, such a change would be ill-advised from a policy perspective. Legal scholars refer to the concept of birthright citizenship as “jus solis,” the law of the soil, and the United States has had some form of this rule since

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the dawn of the Republic, although the concept was only enshrined in the US Constitution after the Civil War. Of course, there are other ways that one can become a United States citizen besides having the fortune of being born here—one can also derive citizenship through one’s parent or parents (“jus sanguinis,” or the law of blood) or obtain citizenship by applying for it through the naturalization process, usually after having first obtained “lawful permanent residence” first. Thus, if birthright citizenship is eliminated, many people born in the United States would still be American citizens by inheritance or could perhaps become citizens by filing an application for naturalization. Others, however, would not be eligible for derivative citizenship and would have no status allowing them to apply for American citizenship. They would remain “foreign denizens” resident here—at least until they legalized, left, or were deported.

Unfortunately, US law with regard to derivative citizenship is extremely complex. In fact, with the exception of the current birthright citizenship presumption, all of US immigration and nationality law is tremendously complicated, such that many people in the world who are US citizens—and many of their lawyers—do not know that they are citizens, or if they know, have trouble getting documents proving that they are. Immigrating legally to the United States is also a process of great difficulty and complexity, and unattainable by most.

It is also true that many native-born (birthright citizens) have trouble proving their citizenship. The United States has no national register of its birthright citizens; documents evidencing birth in America are created by thousands of state and local governmental entities as well as the Department of Homeland Security and the Department of State. Because the fact of birth in the United States has been the rule for hundreds of years, however, many Americans do not routinely obtain any governmental documents evidencing their citizenship status. A recent survey by the Brennan Center at New York University found that more than 13 million American adults cannot easily produce documentation proving their citizenship. But at least birthright citizenship can be proved by producing a valid US birth certificate, something that most birthright citizens can obtain without too much expense or difficulty if they are forced to do so.

If birthright citizenship is eliminated, however, those born in the United States will lose their access to easy proof of citizenship. Instead, they will find it necessary to turn to the exceptionally complex US rules for citizenship by blood (the majority will be unable to qualify for the immigration visas necessary as a prerequisite to citizenship by naturalization). Yet the rules for derivative citizenship are so complicated that it can take an experienced immigration attorney more than an hour to determine conclusively whether someone is an American citizen by derivation—the lawyer must inquire about grandparents as well as parents, about marriage dates and birth dates of ancestors, and about the time that one’s parents or grandparents spent in the United States prior to one’s birth. In some cases, whether one’s parents were married or unmarried at the time of one’s birth makes a difference. Whether one’s United States citizen parent was male or female also can be crucial to the determination (as a result of the US Supreme Court’s decision in Nguyen v. Reno, the children of American men cannot claim US citizenship as easily as the children of American women).

Over more than two hundred years of American history, Congress has been responsible for creating the “jus sanguinis” rules in America, and Congress has made them so complicated that figuring out whether someone is a US citizen by blood is sometimes the equivalent of figuring out whether a patent application is valid. So, if we rid ourselves of the birthright citizenship presumption, what we will be doing is replacing a simple rule for most people with one that will be tremendously complex, as our current jus sanguinis rule is.

Under the birthright citizenship presumption in effect today, most Americans—but not all—have it much easier than the minority who are derivative citizens. Most Americans are presumed to be citizens by virtue of birth here. All they have to do to prove citizenship is produce a valid birth certificate. Were they not so presumed—and the hundreds of thousands of Americans born every overseas do not have the benefit of such a presumption—a complex and individualized assessment of their status is required.

There are many such Americans born every year—the children of military members deployed overseas, missionaries, oil company employees, or Americans who choose to have their children in another country while visiting there. The State Department and the Department of Homeland Security charge substantial fees to make derivative citizenship assessments (the current DHS fee is $457)—and depending on the facts, the assessment can take weeks, and require production of numerous documents, including very old historical records. The Government also frequently makes mistakes with regard to people who have not undergone this assessment; any experienced immigration lawyer has stories of US citizen clients who have been deported—mistaken deportations of US citizens are relatively common.

So what it would mean to eliminate birthright citizenship, as a practical matter? The United States has no national registry of American citizens. Presumably, we would have to create one. Each person born in America—at thousands of localities, hospitals, midwiferies—would have to have his or her citizenship adjudicated. Someone expert would have to do the adjudication—most probably a trained immigration attorney—unless we allow these complex adjudications to be made randomly by bureaucrats. Finding such attorneys is very difficult today, but will likely become even more difficult, in that immigration and citizenship law is a field that a Department of Homeland Security spokesperson has accurately called “a mystery and a mastery of obfuscation.”

As a practical matter, the elites of American society are unlikely to be affected much by this. A change in the current system will cause little trouble for those who have the money to hire highly-trained lawyers to handle their paperwork. The burden of proving
citizenship is likely to fall mostly on the less favored elements in society. As mentioned above, one of the little-known facts of US immigration law is that the US government frequently deports US citizens—but those US citizens who get deported are mostly the less-favored in our society—the poor, the uneducated, the mentally disturbed, and minorities. This trend will accelerate if we eliminate birthright citizenship.

So the first policy argument against eliminating birthright citizenship is this: We have a clear, longstanding rule of citizenship law—one that is easy to understand and easy to administer. It is also a Constitutional rule. This rule has been in effect, de facto, since the dawn of the Republic, and by Constitutional law since the end of the Civil War. Those who would overturn or change this rule have the burden of proving why this rule should be changed, as a matter of policy and not just as a matter of law. This rule is much easier to administer than other rules like jus sanguinis (the rule of citizenship by blood). Everyone should appreciate longstanding, easy to use, “bright line” rules. To date, advocates of change have not made the policy case for why the longstanding rule should be changed.

The test of any public policy is whether the benefits of the policy are likely to outweigh the costs. Here, there is no question that proponents of changing the current default rule have not made even a marginal case on policy grounds. They cite vague policy reasons for changing the law such as the need to make US citizenship more valuable; the need to stop what they term an “industry” of women coming to the US to have babies. They seem to assume, without benefit of any hard data, that the US does not benefit from birthright citizenship. And yet there is ample evidence that it does; hundreds of thousands of birthright citizens make tremendous contributions to American society every day, serving in our military, in public office—Senator Pete Domenici, the most famous anchor baby in America, is one example. Opponents of birthright citizenship also assume—again without data—that illegal immigration will lessen or even stop if birthright citizenship is eliminated.

Although there may be some people who might be deterred from coming to the US if birthright citizenship is eliminated, instead of reducing the number of illegal immigrants within our borders, changing the current rule will make even more people into illegal immigrants. We know from the European and Asian experiences with jus sanguinis rules that eliminating jus sanguinis does not stop illegal immigration, but does increase the number of illegal aliens within a country, because fewer people are able to gain legal status.

The number of U.S.-born children of illegal immigrants is estimated to be 3 million—but nobody really has a good idea how many there actually are. And yet facts are critically necessary to evaluate the efficacy of any seismic change to the birthright citizenship rule. Some 200,000-400,000 “anchor babies” are believed to be born each year, but there’s no real way to track it because hospitals in America don’t report the citizenship status of parents when children are born. They do report—without verification—what the parents self-report as the birthplace of the parents—but a parent’s birthplace tells nothing about the parent’s citizenship status. And yet without any hard data, or proof that a change in policy will achieve the policy goals sought by the change, proponents of a change want to cause tremendous hardship and expense to all the rest of America.

While opponents of birthright citizenship seem to assume without facts that their rule will do some good, we do have a pretty good idea what bad things will happen if we eliminate the birthright citizenship rule:

First, we will have thousands of children born every year who have no citizenship. To cite just one group, under the pending Congressional legislation, children of asylees and refugees will have no citizenship. They will be left without a country, creating an underclass of “exploitable denizens.” This is what has happened in countries—like France—that do not have a jus soli (“common law”) rule.

Second, the benefit does not seem to outweigh the cost. Why not just take the money we’d use to adjudicate the citizenship status of 300 million Americans and use it to enforce existing immigration laws?

Third, eliminating birthright citizenship is un-American. This is our unique heritage, one that hundreds of thousands of soldiers—citizens and non-citizens—fought the Civil War to enforce. Birthright citizenship has been the rule since the dawn of the Republic, and we ought to have a pretty good reason to change it—one better than some frustration with the federal government’s inability to enforce existing immigration law. Further, what we are really talking about here is punishing children for something “bad” that their parents did—or maybe not even anything bad but just being from the wrong country.

Finally, changing our rule would cause us to contribute heavily to the current global population of stateless people. And we as a nation have professed that people have a human right to have a country.

In sum, the policy arguments in favor of retaining birthright citizenship as a rule are very, very strong. The policy arguments against it are weak. Even if we believe that it is possible to interpret the Fourteenth Amendment differently than we have been interpreting it for more than a hundred years, it’s not clear why we would want to do so. Trading an easy and egalitarian birthright citizenship rule for one that will cause hardship to millions of Americans is not a smart way to solve our complex immigration problems.

Ending birthright citizenship is essential to any sound reform of American immigration policy

By Robert F. Holland****

The Senate expended substantial political energy this summer in an attempt to craft a bi-partisan legislative package aimed at reforming our nation’s badly broken immigration policy. Proponents

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claimed the proposal would enhance border security against illegal migration, provide workers needed by the American economy through an expanded guest-worker program, and more effectively select which foreigners would be admitted with permanent lawful resident status. However, the proposal died in the Senate over extensive criticism from conservatives objecting to provisions to streamline eventual citizenship for millions of aliens currently living in the United States illegally, and from liberals who saw the compromise measure as excessively impeding immigration.

Conspicuously absent from the compromise package narrowly rejected by the Senate, however, was any modification of one of the most ill-advised features of our country’s present immigration policy - the doctrine of “birthright citizenship.” Until our nation ends the current “birthright citizenship” practice, by which our government effectively grants American citizenship to each child born on American soil to parents who are not lawfully present in the United States, all attempts to control unlawful migration across our borders will be ineffectual. Whether the present practice of “birthright citizenship” can be abolished by ordinary federal legislative action or requires amendment of the federal Constitution is argued elsewhere; in any event, a sound American immigration policy requires that we end this bizarre practice of pretending to regulate lawful immigration while rewarding families who successfully circumvent our border controls and thus manage to deliver their babies on American soil.

The present policy of granting “birthright citizenship” to the children of foreigners illegally inside the United States who manage to give birth to them on American soil is harmful to American society for at least five reasons.

First, granting American citizenship to a child of a couple who are illegally inside the United States when they deliver their baby provides a significant incentive for foreigners to evade the lawful procedures for gaining permanent residence in the United States and eventual American citizenship. If we assume that the overwhelming majority of foreigners who seek to immigrate to America do so out of the desire to improve their lives (as opposed to some small fraction who seek to enter for espionage, sabotage, or other criminal objectives), then we must also expect that those foreigners would want to improve the lives of their offspring as well. The potential to have their child born as an American, even if they may never qualify for citizenship in their own right, serves as a powerful magnet for foreign couples to cross the border clandestinely or to overstay their temporary period of lawful admission, even if those couples realize that their own chances of ever coming out of the shadows, as illegal aliens working surreptitiously inside the US, are negligible. The possibility of securing a better future for one’s child through the birthright citizenship route serves as a powerful incentive for illegal immigration into the US in the same way that lax enforcement of employment laws is a magnet for circumvention of controls on entry into the US, because failing to police restrictions on work for illegal aliens entices them to enter the US and then to labor “underground” in the American economy, in order to send wages back to families in their homelands. Just as we exclude relevant evidence of guilt in a criminal prosecution to avoid rewarding the police officer who unlawfully obtained that evidence, we should not reward foreign couples who bear children while illegally in the US with the tremendous prize of American citizenship for their children.

The second reason that birthright citizenship harms American society is closely related to the fact that the practice acts a magnet for foreigners to evade our immigration procedures. Rewarding foreign couples inside our country illegally with the prize of American citizenship for their offspring born here undermines respect for the rule of law. Quite simply, those people who illegally gain access to our country and have a baby inside the US profit substantially because they did not wait in line for lawful entry into the US, while those who respect our nation’s legitimate interest in controlling naturalization, waiting patiently for the prize of legal emigration to the US, have their chances to reach that goal diminished by American resentment of the presence of ten or twelve million undocumented and illegal foreign line-jumpers.

Third, the birthright citizenship practice has a multiplier effect, eventually adding a significant (albeit deferred) consequence to the immediate reward secured by the illegal alien couple who manage to have their baby on US soil. These children, quite understandably, are termed “anchor babies” because compassionate US law allows them, upon reaching age 21, to sponsor their immediate family members (including, but not limited to, the very parents whose flagrant disregard of American immigration law allowed those children to gain US citizenship at birth) for lawful entry into the US; we thus eventually reward the child’s other family members (and frequently, the law-breaking parents themselves) for the initial trespass into our nation that allowed the anchor baby herself to achieve US citizenship. One estimate places the number of anchor babies born annually of illegal aliens on American soil at almost four hundred thousand children; simple arithmetic suggests that in coming decades, millions of family members of these anchor babies will become eligible to follow them into the US to achieve citizenship. If one posits that America can absorb only a certain number of immigrants annually (which indeed is the logical presumption that underlies our entire national policy of controlling immigration), then the preference afforded to the family members of these anchor babies necessarily reduces the remaining numbers of lawful immigrants who can otherwise be admitted without such family preference, prejudicing the immigration prospects of those who had no relative from their family who previously violated American immigration law.

Fourth, when our birthright citizenship practice grants US citizenship to children born here of illegally-present aliens, despite the illegal presence of their parents in our country, that undermines a key principle of American immigration policy: the principle that America tries to allocate fairly the spaces for immigration among countries all over the world. The federal government periodically estimates the number of foreigners that the United States can absorb through
immigration, and subdivides this total among numerous countries around the world by establishing quotas for lawful entry into permanent resident status from each country of origin. The vast majority of anchor babies (persons granted birthright citizenship despite the illegal presence of their parents in the US) are from Mexico and Latin American countries, who have unlawfully and covertly entered the US across our southern border. The substantial reward of citizenship bestowed on this group of almost a million nationals of Hispanic parentage because of their parents’ illegal border-crossing necessarily reduces the prospects of a similar number of aspiring immigrants from African, Asian, and European countries of origin whose parents have, *ex hypothesi*, not broken American law. In short, the windfall of birthright citizenship for those whose parents were geographically blessed by a convenient, though illegal, land route into the US must diminish proportionately the number of (no less deserving) people from more distant countries of origin who can be admitted through legal immigration procedures. In effect, birthright citizenship disproportionately benefits the children of our southern neighbors, and undermines the principle of simple fairness to other people around the world who similarly aspire to become Americans, just because oceans prevent them from sneaking easily and illegally into the US.

Last, but not least, the parents of anchor babies (who become US citizens through the birthright citizenship route when born in the US to parents here illegally) benefit from all the many economic and social benefits of life in America without any corresponding family obligation to this country. For those few anchor babies who return to their parents’ countries of origin and grow up in those other countries, this is of little moment. Almost certainly, however, the overwhelming majority of these anchor babies are raised inside the US by their illegal alien parents. Those parents benefit tremendously as their American citizen children receive American public education, public health care, civil liberties, and all the other benefits of growing up in America. Unlike parents who are American citizens or foreigners lawfully admitted to permanent residence, the parents of these anchor babies are undocumented, illegal residents living in the shadows of American society; while they pay sales taxes on their purchases of goods and services, few of them ever pay any of the substantial state or federal income taxes or local property taxes that provide the majority of funds for the expensive social services that their children enjoy here, for the modern infrastructure that makes life in the US so enviable to most nationals of other countries, or that fund the costly national security structure that defends America from external threats. Moreover, in a national emergency, one can bet that few of these illegal alien parents will ever be located for involuntary military service to defend the US, despite the many benefits of citizenship afforded their “anchor baby” offspring.

For all of these reasons, it is imperative that reform of America’s flawed immigration policies begin with the abolition of the illogical doctrine by which our nation grants birthright citizenship to the children of those who succeed in illegally gaining a foothold on US soil in time to have their babies here.

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From the ABA Section of Administrative Law and Regulatory Practice and the ABA Government and Public Sector Lawyers Division


*By Jeffrey S. Lubbers*

This fourth edition brings the essential *Guide to Federal Agency Rulemaking*, formerly published by the Administrative Conference of the United States (ACUS), completely up to date. A concise but thorough resource, the *Guide* provides a time-saving reference for the latest case law, and the most recent legislation affecting rulemaking. This manual provides agency rulemakers, participants in rulemaking and judicial review, and private practitioners with valuable insights into how federal rules are made, with an integrated view of the procedural requirements.

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By Meredith Fuchs and Kristin Adair*

More than a decade ago, Congress took bold action. Just as the terms “World Wide Web” and “Internet” were becoming familiar to the public, Congress enacted the Electronic Freedom of Information Act Amendments of 1996 (E-FOIA). The days of overstuffed paper filing cabinets in federal agencies were to be left in the past, and newly-available electronic technologies were to make information more widely and more readily accessible to the public. Instead of slowly processing individual Freedom of Information Act (FOIA) requests, government agencies would affirmatively post significant records on their Web sites. At least that is what Congress intended.

Unfortunately, ten years later, the E-FOIA has failed to revolutionize public access to government information. A recent study conducted by the National Security Archive found many federal agencies failing to fulfill basic requirements for electronic access to information. Oversight by Congress and Executive Branch leadership concerning E-FOIA implementation have been largely non-existent, thus allowing many agencies to remain far out of compliance. While there is some precedent to challenge agencies’ non-compliance with the requirements of E-FOIA, see, e.g., Public Citizen v. Lew, 127 F.Supp. 2d 1 (D.D.C. 2000), there is little incentive for ordinary members of the public to sue to enforce the law’s automatic electronic disclosure provisions rather than pursuing individual FOIA requests. As a result, not only has the public been denied the promised quick and easy access to government information, but federal agencies remain caught in a cycle of delay and unnecessary expenditure on mismanaged and inefficient FOIA programs.

E-FOIA: A Modern Mechanism for Access to Information

The FOIA statute originally enacted in 1966 required agencies to set up public reading rooms housing several categories of information—agency policy statements, staff manuals, and orders and opinions made in adjudications—that should be available to anyone in order to prevent agencies from developing and following “secret law.” 5 U.S.C. § 552(a)(4)(C). The frequently requested records provision of FOIA “represents a strong congressional aversion to ‘secret agency law’.” For the first thirty years, agencies satisfied this portion of the FOIA by establishing what are commonly referred to as “conventional reading rooms,” physical locations where members of the public could review paper files of the required records. FOIA also established a mechanism by which individuals could request specific records in order to better understand government activities and hold the executive branch accountable.

The E-FOIA amendments sought to achieve these goals more effectively by mandating that significant government records be accessible in the home and office of every American via the Internet. Several benefits could accrue from an electronic access system open to the public. First, online access to traditional reading room materials could reduce the number of FOIA requests for that information and help revive the backlogged and bogged down FOIA process. Second, members of the public who resided far from agency conventional reading rooms would have the same ability to quickly access needed information as those closer to Washington, D.C.

Most significantly, E-FOIA added a new category of records to be made automatically available in agencies’ new electronic reading rooms—those records that the agency determines “have become or are likely to become the subject of subsequent requests for substantially the same records,” 5 U.S.C. § 552(a)(2)(D), now commonly referred to as “frequently requested records.” The frequently requested records provision held the promise of real change in the operation of the FOIA. Agencies could no longer passively await FOIA requests and respond to each requester one-by-one. Instead, Congress told agencies to identify records of demonstrated or potentially broad public interest and disclose them to the public on their own initiative, thus alleviating excessive delay for requesters and easing the administrative burden on agencies in responding to multiple requests for the same records.

The National Security Archive reviewed 149 agency and component Web sites in January 2007 to determine...
whether, ten years after enactment of the E-FOIA, the agencies are meeting the requirements of the law. The audit revealed widespread non-compliance.

Empty Shelves in Electronic Reading Rooms

The Archive’s Web site review included a thorough examination of each agency’s electronic reading room, focusing on the categories of information required to be posted by the E-FOIA. These include: (1) agency final opinions and orders, (2) agency policy statements, (3) staff manuals, and (4) frequently requested records. Our review revealed that only 21 percent of the agencies reviewed had made available on their FOIA sites all four categories of records that Congress explicitly required agencies to post.

The three key categories of reading room records that are intended to prevent agency reliance on “secret law” were missing or not identifiable on many agency FOIA sites: only 47 percent of agencies had posted opinions and orders; only 52 percent had policy statements on their sites; and only 48 percent had staff manuals. The absence of so many required records undercut[s] the central rationales for enacting E-FOIA. Although the public may be able to pry loose the significant decisions and policies of agencies, there is an investment of time and resources both for members of the public and for agency staff in exchanging such information. Congress’s goal in enacting E-FOIA was to streamline the process for the type of information that must be made available under all circumstances.

In terms of the posting of frequently requested records—the E-FOIA innovation that was designed to move agencies away from the slow, individual FOIA request system to an affirmative disclosure system—we found that 59 percent of agencies make frequently requested records available in their electronic reading rooms. That statistic, however, likely overstates the compliance record because it is difficult for a member of the public to assess with any certainty whether an agency is posting all of the records that fall within the statutory requirement or simply those that it chooses to post.

There are several obstacles to full implementation of Congress’ intent regarding agency posting of frequently requested records that merit congressional and executive branch policy consideration. The executive branch has followed an extremely restrictive interpretation of the law with regard to identifying frequently requested records. The Department of Justice (DOJ) issued a guidance statement that established a “rule of three” for determining whether a record merits affirmative electronic disclosure. Most agencies have interpreted the guidance to mean that there must be three or more requests for the exact same document in order for it to qualify for affirmative posting. But requesters do not always specify a particular document in their requests, and many requests may relate to the same subject, if not precisely the same document. So an agency like FEMA may receive scores of general requests about Hurricane Katrina but conclude that those requests do not concern the same records and therefore decide not to post some records that may be of interest to a large number of people. Thus, the “rule of three” does not encourage broad disclosure on topics of significant public interest.

An approach that is more topic- and current events-oriented, while not specifically dictated by E-FOIA, is clearly preferable. Rather than sifting through FOIA logs to identify particular documents that have been requested multiple times, agencies could better expend resources by identifying areas of interest—for example, a recent event involving the agency or a specific project or subject—and posting as many releasable documents as possible within that category. Not only would this reduce the number of FOIA requests, but it would also assist requesters who cannot identify an exact record but could find what they are looking for by browsing through a library of topically-related information on the agency’s Web site. For example, NASA affirmatively posted on its FOIA Web site a large collection of materials related to the loss of the Columbia Space Shuttle in 2003. According to the agency, it received “an influx of requests” after the accident and, anticipating continued public interest, acted quickly to make the requested records and others available on its Web site.

Moreover, only a few agencies appear to actively comply with the second portion of Congress’ mandate—to identify records for disclosure prospectively, based on the agency’s experience regarding what is of concern to the public. This portion of the statute has the greatest potential for transforming the FOIA system, and some agencies have proven its utility by releasing records related to a broad subject matter in which the public expressed interest. The Department of State, for example, has been at the forefront of proactive disclosure, establishing an extensive electronic reading room that contains special subject-matter record collections (such as those related to human rights in Chile and Argentina) as well as chronological document sets (including the recent release of several hundred thousand telegrams and cables from 1973–76).

Finally, some agencies are simply incapable of complying with the frequently requested records requirement. The Archive requested several agencies’ FOIA logs to help assess whether those agencies were posting frequently requested records and learned that some agencies still do not maintain electronic FOIA logs. Without basic information management capabilities—including searchable electronic databases of all FOIA requests received—agency FOIA offices cannot easily identify duplicate requests and quickly move to make responsive records available to the public. Agency FOIA officials generally blame lack of resources for such deficiencies. Indeed, funding for FOIA was not increased measurably after the E-FOIA amendments were passed and many agencies lack the resources they need to complete ordinary processing as well as create and maintain FOIA-compliant Web sites.

FOIA Guidance Less Than Helpful

The E-FOIA amendments also set forth a requirement that agencies electronically provide certain records indexes and FOIA guidance to make continued on next page
it easier for members of the public to file clear, targeted FOIA requests. In particular, agencies must make available to the public “reference material or a guide for requesting records or information from the agency.” 5 U.S.C. 552(g).

The FOIA guide must include an index and description of major information systems and record locator systems of the agency—essentially a comprehensive listing of agency record holdings—and a handbook for requesting information. Congress envisioned requesters using these indexes and guides to determine what types of information could be obtained, therefore giving members of the public the knowledge to make FOIA a more powerful tool for open government.

According to the legislative history of the provision and guidance promulgated by the Department of Justice and the Office of Management and Budget (OMB), an agency’s FOIA handbook or online guidance for FOIA requesters should include information about the following: where to send a FOIA request (mailing address and fax, e-mail, or electronic form); fee status information; fee waiver information; how to request expedited processing; agency reply time; an explanation of FOIA exemptions; administrative appeal rights; how to send an appeal; judicial review rights; and an index and description of major information systems. See DOJ FOIA Update, Vol. XVII, No. 4 (1996); OMB Memorandum: Updated Guidance on Developing a Handbook for Individuals Seeking Access to Public Information, April 23, 1998.

Very few agencies—only 6%—included all of these elements in their guidance, although each is a fundamental piece of information that should be available to FOIA requesters to inform them of their rights and make the FOIA process run smoothly. In addition, the format of agency FOIA handbooks varied wildly, and many were inadequate or difficult to use. The major information system and record locator system index requirements have proven particularly problematic for agencies because there is not adequate guidance on how to describe record holdings in a way that makes record-keeping more transparent and accessible to the public. While ensuring that public FOIA guidance is comprehensive and correct, agencies should also develop handbooks that are clear, user-friendly, and easily accessible to the broadest sector of the public.

Although not required, agencies should also seek to facilitate electronic communication with requesters to the extent possible. In the years since enactment of E-FOIA, the American public has grown increasingly comfortable with and had more access to Web-based tools. Further, postal service to U.S. government offices has been plagued by unfortunate security delays. The use of online submission forms to receive FOIA requests offers numerous benefits: speed, diminished possibility of lost requests, a permanent record of the request, ease of tracking, and the ability to follow up quickly and easily with requesters if, for example, they fail to provide all necessary information. Online forms simplify the FOIA process for requesters and are clearly a best practice. The Archive’s audit found, however, that only 26% of agencies now use Web-based FOIA request forms.

Conclusions

It is not enough to say that federal agencies are not complying with the law. The failures, nearly across the board, to implement E-FOIA suggest several more systemic problems. FOIA has been marginalized, underfunded, and at times ignored at many federal agencies. Although reliance on electronic information technology by the government has increased exponentially, use of the Internet for providing access to government information has not brought about the revolution in openness and transparency that it could have.

In December 2005, the President issued Executive Order 13392, which concerns management of FOIA programs. It directs agencies to make their FOIA programs “results-oriented” and to process requests “in an efficient and appropriate manner.” In addition, legislation currently pending in Congress (H.R. 1309 and S. 849) seeks to mandate that agencies establish better tracking and reporting systems. Both of these efforts are targeted at fixing the persistent problem of FOIA backlogs and delay. Unfortunately, neither effort has addressed the unfulfilled promise of E-FOIA, which, if properly implemented, could reduce the administrative burden on FOIA offices across the government. Agency FOIA officials must look at E-FOIA’s dictates not as an encumbrance that makes an already difficult job more difficult, but rather as an asset that holds great potential to help them do their jobs well and to ensure that the public has access to the maximum possible amount of information. Continued oversight and direction can bring FOIA into the 21st century and fulfill E-FOIA’s transformative vision, even if it is ten years after Congress mandated the revolution.

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First, after Gonzales v. Raich, the Court appears unlikely to place many substantive limits on congressional power.\(^4\) Second, the modern Court rejects the nondelegation doctrine.\(^5\) Through both of these decisions, the Court has chosen to underenforce a particular constitutional norm.\(^6\) Third, Chevron accords broad deference to administrative interpretation, thus exacerbating the underenforcement of federalism and nondelegation.\(^7\)

As a result, the Court has resorted to procedural limits as a second-best alternative to substantively enforcing federalism and the nondelegation doctrine.\(^8\) In essence, procedural limits do not take away any substantive power from Congress. Rather, they merely require Congress to provide specific indicia of its intent to achieve certain results-like stretching the bounds of federalism and nondelegation.

Indeed, before the Rehnquist Court had five votes for imposing substantive limits on congressional power, it was fashioning procedural limits on congressional power. In Gregory v. Ashcroft, the Rehnquist Court implemented a clear statement canon of statutory construction based on federalism; in other words, the Court required Congress to provide a clear statement of its intent when it “upset[s] the usual constitutional balance of federal and state powers.”\(^9\) Absent a clear statement, the Court would interpret the statute or agency interpretation at issue as not altering the federal-state balance (thus rejecting Chevron deference for such agency interpretations).

However, as Gonzales v. Oregon confirms, the current Court has selected a different procedural limit for protecting federalism: “Chevron Step Zero.”\(^10\) Under Chevron Step Zero, the Court can deny deference to agency interpretations by concluding that (1) Congress did not intend to give an agency the power to create rules with the “force of law”\(^11\) and (2) the agency’s interpretation is unpersuasive.\(^12\) In fact, Gonzales v. Oregon adopted this very approach by denying deference to the Ashcroft Directive, largely on the grounds that it altered the federal-state balance.\(^13\)

But this Essay argues that the Court is going down the wrong doctrinal path. Instead of using Chevron Step Zero, the Court should expand the Gregory clear statement canon if it truly wants to protect state autonomy. As this Essay proposes, the Court should reject an administrative interpretation made in an area of traditional state regulation unless Congress has provided a clear statement permitting the agency to make such an interpretation. By limiting this expansion of the Gregory canon to administrative interpretations (instead of congressional acts), it can be tailored to directly address instances of the under-enforcement of both federalism and the nondelegation doctrine.

Expanding the Gregory v. Ashcroft Clear Statement Canon

There is substantial support for expanding the Gregory canon to require


\(^{13}\) Id. at 228.

\(^{14}\) Gonzales v. Oregon, 126 S. Ct. 904, 922 (2006); Sunstein, supra note 11, at 191 n.19.
a congressional clear statement when an administrative interpretation is made in an area of traditional state regulation. First, Gregory v. Ashcroft itself contemplates a clear statement canon that is triggered by interpretations made in “areas traditionally regulated by the States.”15 Second, cases after Gregory v. Ashcroft expanded the Gregory canon because of the underenforcement of federalism. Third, a separate line of cases applied a clear statement canon exclusively to administrative interpretations because of the underenforcement of the nondelegation doctrine.

Most importantly, the language of Gregory v. Ashcroft itself supports a clear statement canon for administrative interpretations made in “areas traditionally regulated by the States.”16 Some cases have limited the Gregory canon to situations involving traditional state government functions17 that implicate “a core aspect of state sovereignty.”18 But the language of Gregory suggests that legislation involving traditional state government functions is a sufficient condition for triggering the Gregory canon—not a necessary condition. Rather, the necessary condition for triggering the Gregory canon is legislation in “areas traditionally regulated by the States.”19 After all, Gregory explained that while “Congress may legislate in areas traditionally regulated by the States,”20 that is an “extraordinary power in a federalist system” that “Congress does not exercise lightly.”21 Thus, Gregory v. Ashcroft easily triggered a clear statement canon because a law like the one at issue went “beyond an area traditionally regulated by the States” as it involved “a decision of the most fundamental sort for a sovereign entity.”22 Thus, a “decision of the most fundamental sort for a sovereign entity” is merely one easily identifiable, specialized example of an area traditionally regulated by the states.23

Subsequently, three cases after Gregory v. Ashcroft expanded the Gregory canon based on the underenforcement of federalism. First, BFP v. Resolution Trust Corp. expanded the Gregory clear statement canon to cover “traditional state regulation[s].”24 Second, SWANCC v. United States Army Corps of Engineers applied the Gregory canon and explained that its concern was “heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.”25 Third, Raygor v. Regents of the University of Minnesota applied the Gregory canon because Congress had legislated in a “traditionally sensitive area” that “affect[s] the federal balance.”26 Additionally, three other cases applied a clear statement canon exclusively to administrative interpretations due to the underenforcement of the nondelegation doctrine. Namely, the Court has essentially developed a clear statement canon for administrative interpretations that implicate major questions. The Court’s most cogent statement of this canon came in Whitman v. American Trucking Assocs.: “Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”27 The Whitman major question canon was premised on statements from two other cases—MCI Telecommunications Corp. v. AT&T Co. and FDA v. Brown & Williamson Tobacco Corp.28 Questions of federalism would be one easily identifiable major question as they necessarily implicate the “fundamental details of a regulatory scheme” by setting the outer limits of an agency’s power and jurisdiction.29

That said, there are two main objections to a clear statement canon for administrative interpretations made in areas traditionally regulated by the states. First, such a canon would expand the power of courts and decrease predictability in statutory interpretation. Second, the Court may not be able to create a workable test for what counts as an area of traditional state regulation. In many respects, the Court’s Commerce Clause jurisprudence has struggled in defining formalistic categories, such as what constitutes an area traditionally regulated by states.30

However, the costs of incorrectly invoking a canon are drastically reduced when the consequence is simply to “remand” the question back to Congress instead of categorically prohibiting Congress or agencies from acting.31 Thus, while the canon would increase the power of courts, there are countervailing constraints as Congress has the final say under a clear statement canon. Even if the Court invalidates a federal administrative interpretation by using a clear statement canon, Congress can subsequently amend the statutory delegation to provide a clear statement. Likewise, the Court can afford to experiment in finding the correct definition of “area of traditional state regulation” without the fear of prohibiting Congress from having adequate power to regulate our national economy.

25 SWANCC, 531 U.S. at 173.
29 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) (“Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”); MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218, 231 (1994) (“It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion.”).
30 Whitman, 531 U.S. at 468.
Moreover, the Court relies on this formalistic dichotomy even in light of these objections. To increase predictability and provide a better definition of "area of traditional state regulation," the Court should either abandon its reliance on this formalistic dichotomy or genuinely accept and recognize this reliance. Unfortunately, Gonzales v. Oregon did neither, even though after Gonzales v. Oregon, each Justice of the Rehnquist Court has at one time relied on the area of traditional state regulation dichotomy. As is shown below, Gonzales v. Oregon invoked Chevron Step Zero, while simultaneously alluding to the area of traditional state regulation dichotomy.

**Chevron Step Zero: An Unworkable Doctrine for Protecting Federalism**

Chevron Step Zero is a recently created doctrine that the Court has invoked to avoid according Chevron deference to certain administrative interpretations. Essentially, Chevron Step Zero is a complex threshold question to the entire Chevron deference framework that proceeds in two sub-steps.

At the first sub-step, the Court examines the format of the agency interpretation at issue. If the format is a regulation or an agency’s adjudicative opinion (in other words, if the interpretive method used is informal rulemaking or formal adjudication), then the Court will continue to the Chevron inquiry. But if the format of the interpretation is less formal, then the Court will proceed to the second sub-step of Chevron Step Zero.

The second sub-step of Chevron Step Zero is a balancing test that essentially asks whether Congress intended to delegate the authority for an agency to make authoritative interpretations. This balancing test examines five primary factors: (1) Breadth of the Statutory Delegation; (2) Agency Expertise; (3) Consistently Observed Past Agency Interpretations; (4) Agency Deliberation (Procedures Used for Current Agency Interpretation); and (5) Nature of the Question Addressed by the Current Agency Interpretation.

When an agency interpretation is denied Chevron deference under these factors, the Court states that Congress did not intend to delegate “authority to the agency generally to make rules carrying the force of law.” However, the interpretation could still be entitled to Skidmore deference if it is “persuasive.”

On its face, instead of focusing on the underenforced constitutional norms of federalism and nondelegation as clear statement canons do, Chevron Step Zero tries to compensate by limiting the use of Chevron deference. But besides the fact that Chevron Step Zero is an attenuated means of protecting federalism, there are additional problems with using the doctrine to protect federalism.

First, Chevron Step Zero is an arbitrary, unpredictable doctrine—much more so than this Essay’s proposed expansion of the Gregory clear statement canon. Chevron Step Zero practically invites judges to evade the Chevron framework, which drastically expands the power of courts. As Justice Scalia quipped, the Court opted for “th’ol’ ‘total-ity of the circumstances’ test” through Chevron Step Zero. Worse yet, the Court’s current Chevron Step Zero test is doctrine piled upon doctrine that has produced a maze-like standard for according deference to agency interpretations. In Cass Sunstein’s words, “The Court seems to have opted for standards over rules in precisely the context in which rules make the most sense; numerous and highly repetitive decisions in which little accuracy is to be gained by a more particularized approach.”

Second, contrary to the outcome of Gonzales v. Oregon, Chevron Step Zero does not always protect federalism. Chevron Step Zero would still grant Chevron deference to an agency interpretation altering the federal-state balance in two situations. First, if that interpretation was in a more formal format, Chevron deference would be accorded. Thus, any time an agency uses informal rulemaking, Chevron Step Zero will not prevent the agency from encroaching on the power of states. Second, Chevron deference could be accorded if the other balancing factors outweigh the fact that the interpretation involved a major question of federalism.

Finally, to protect federalism under Chevron Step Zero, the Court must engage in the same inquiry as it would under a clear statement approach. To find the Ashcroft Directive unpersuasive and reject Skidmore deference, Gonzales v. Oregon noted that “when Congress wants to regulate medical practice in the given scheme, it does so by explicit language in the statute.” Likewise, the Gonzales v. Oregon Court inferred that Congress would not use “muffled hints” through an “obscure grant of authority” to give an agency the power “to regulate areas traditionally supervised by the States’ police power.” Thus, Gonzales v. Oregon essentially held that an agency interpretation altering the federal-state balance will never be persuasive unless Congress provided a clear statement permitting this result. But why jump through Chevron Step Zero’s hoops simply to address the question that a clear statement canon could tackle head on?

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34 See Gonzales v. Oregon, 126 S. Ct. at 925; SWANCC, 531 U.S. at 161; Gregory, 501 U.S. at 454.
37 Mead, 533 U.S. at 226.
38 Id. at 237.
40 Mead, 533 U.S. at 228.
41 Barnhart, 535 U.S. at 222; Mead, 533 U.S. at 228.
43 Mead, 533 U.S. at 226 (emphasis added); see also Christensen, 529 U.S. at 587.
45 Mead, 533 U.S. at 241 (Scalia, J., dissenting).
46 Sunstein, supra note 11, at 248.
48 Id. at 925.
49 Cf. David Sclar, U.S. Supreme Court Ruling in Gonzales v. Oregon Upholds the Oregon Death With Dignity Act, 34 J.L. Med. & Ethics 639, 642 (2006) (“But in this case, issues of federalism are generally tangential to questions of statutory interpretation.”).
Conclusion

Gonzales v. Oregon may be remembered as a much more important federalism case than recent history suggests.49 It represents a choice between protecting “Our Federalism”50 from administrative encroachment through Chevron Step Zero or clear statement canons of statutory construction. During the Rehnquist Court, we were used to seeing federalism cases analyzing the substantive limits of congressional power,51 but after Gonzales v. Raich in 2005, those days may be over. Rather, cases of statutory construction will become the “true test of the federalist principle.”52 Given the pervasiveness of federal administrative regulation, the bulk of such statutory construction cases will probably come in the context of administrative law.

Admittedly, the expanded Gregory clear statement canon for administrative interpretations made in areas of traditional state regulation risks creating an arbitrary and unpredictable doctrine that expands the power of courts. But this must be weighed against the systematic underenforcement of federalism, which reduces the ability of states to respond to the divisive needs of a diverse citizenry, it eliminates the ability of states to serve as experimental policy laboratories, it decreases public participation in democracy, and it undermines liberty.53 Not to mention that if the Court is worried about arbitrariness and unpredictability, it should not be using the Chevron Step Zero approach taken by Gonzales v. Oregon.

A clear statement canon for administrative interpretations in areas of traditional state regulation effectively balances the competing needs of protecting federalism with the need to limit the power of courts. Plus, there is ample support for expanding the Gregory v. Ashcroft canon in such a manner. The Court has identified federalism-based clear statement canons, and now it simply needs to effectively develop them before Chevron Step Zero leads the Court too far astray.

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At the end of its 2006–2007 term, the U.S. Supreme Court issued a number of opinions addressing several fundamental issues in administrative law. These issues include: (1) the avenues available for challenging agency action; (2) notice-and-comment rulemaking under the federal Administrative Procedure Act (APA); (3) deference to agency decisions and to their interpretations of statutes; (4) procedural due process; and (5) standing and mootness.

Limiting Challenges to Agency Action

In a unanimous opinion authored by Chief Justice Roberts, the Supreme Court determined that the Tax Court was the exclusive venue for challenging the Internal Revenue Service’s (IRS’s) interest abatement decisions; plaintiffs could not challenge the IRS’s decisions in the federal district courts or the Court of Federal Claims. \textit{Hinck v. United States}, — U.S. —, 127 S. Ct. 2011, 2015 (May 21, 2007). The Court relied on two principles to reach this conclusion. First, it emphasized “the well-established principle that, in most contexts, a precisely drawn, detailed statute pre-empts more general remedies.” \textit{Id.} (quoting \textit{EC Term of Years Trust v. United States}, 127 S. Ct. 1763, 1764 (2007) (quoting \textit{Brown v. GSA}, 425 U.S. 820, 834 (1976))). Second, the Court cited its prior recognition “that when Congress enacts a specific remedy when no remedy was previously recognized, or when previous remedies were ‘problematic,’ the remedy provided is generally regarded as exclusive.” \textit{Id.} (citing \textit{Block v. North Dakota ex rel. Board of University & School Lands}, 461 U.S. 273, 285 (1983)). Because the new interest abatement remedy was both precisely drawn and designed to provide a remedy to taxpayers after courts had said that none existed, the Tax Court’s jurisdiction was exclusive despite the statute’s silence on the issue of exclusivity. \textit{Id.}

In a similar vein, in a 7–2 decision authored by Justice Souter, the Supreme Court concluded that the owner of a commercial guest ranch in Wyoming could not bring claims against the federal Bureau of Land Management (BLM) pursuant to either the \textit{Bivens} doctrine or the Racketeer Influenced and Corrupt Organizations Act (RICO). \textit{Wilkie v. Robbins}, — U.S. —, 127 S. Ct. 2588 (June 25, 2007). Robbins’ challenges focused on the regulatory conduct of BLM officials as they tried to re-establish an easement over Robbins’ property, which had been lost as a result of the BLM’s failure to record the relevant deed. The Court concluded that a \textit{Bivens} remedy was inappropriate because “Robbins has an administrative, and ultimately judicial, process for vindicating virtually all of his complaints” and because “any damages remedy for actions by Government employees who push too hard for the Government’s benefit may come better, if at all, through legislation.” \textit{Id.} at 2600, 2604–05. Robbins’ RICO claim turned on whether the BLM had committed acts of extortion that violated the Hobbs Act. The Court emphasized “[t]he importance of the line between public and private beneficiaries for common law and Hobbs Act extortion [that] is confirmed by our own case law, which is completely barren of an example of extortion under color of official right undertaken for the sole benefit of the Government.” \textit{Id.} at 2606 (citations omitted). As a result, Robbins lacked a cause of action under either claim. \textit{Id.} at 2608.

Justice Ginsburg, joined by Justice Stevens, dissented, arguing that, given the BLM’s seven-year pattern of harassment and interference with Robbins’ property rights, and given the inadequacy of piecemeal administrative remedies, the Court should recognize a \textit{Bivens} cause of action based on the Federal Government’s alleged violations of the Fifth Amendment. \textit{Id.} at 2608–09 (J. Ginsburg, dissenting).

Notice-and-Comment Rulemaking: Deference, Legal Effect, and Notice

A unanimous Supreme Court, in an opinion by Justice Breyer, upheld the Department of Labor’s regulatory interpretation of the Fair Labor Standards Act (FLSA) pursuant to the \textit{Chevron} doctrine. \textit{Long Island Care at Home, Ltd. v. Coke}, — U.S. —, 127 S. Ct. 2339, 2344 (June 11, 2007). The Department’s regulation interpreted the domestic service employment exemption to include companionship workers employed by someone other than the family or household using the companion services. 29 C.F.R. § 552.109(a). After reviewing the \textit{Chevron} doctrine, the Court determined that “the FLSA explicitly leaves gaps, for example as to the scope and definition of statutory terms such as ‘domestic service employment’ and ‘companionship services’” and that the statute “provides the Department of Labor with the power to fill these gaps through rules and regulations.” \textit{Long Island Care at Home, 127 S. Ct. at 2346 (citations omitted). All of the other \textit{Chevron} factors were present: “the subject matter of the regulation in question concerns a matter in respect to which the agency is an expert”; the regulation “concerns an interstitial matter, i.e., a portion of a broader definition, the details of which … Congress entrusted the agency to work out”; “[the Department focused fully upon the matter in question”; and the Department used notice-and-comment rulemaking procedures. \textit{Id.}

Although the regulation at issue appeared to conflict with the Department’s General Regulation, the Court still upheld it. First, the Court concluded that if it decided that the General Regulation controlled, “our interpretation would create serious problems.” \textit{Id.} at 2348. “Second, normally the specific governs the general.” \textit{Id.} (citations omitted). Third, although the Department may have interpreted its regulations differently at different times, “as long as interpretive changes create no unfair surprise — and the Department’s recourse to notice-and-comment rule-
making in an attempt to codify its new interpretation . . . makes any surprise unlikely here – the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation.” Id. at 2349 (citing 58 Fed. Reg. 69,311; Bowen v. Georgetown University Hospital, 488 U.S. 212 (1988)). Finally, although the Department apparently formulated its interpretation of its regulation during the course of litigation, “[w]here, as here, an agency's course of action indicates that the interpretation of its own regulation reflects its considered views – the Department clearly struggled with the third-party-employment question since at least 1993 – we have accepted that interpretation as the agency's own . . . .” Id. (citing Auer v. Robbins, 519 U.S. 452, 462 (1997)).

The Court also addressed whether this interpretive regulation should be considered legally binding. The Second Circuit had concluded that the regulation was not legally binding, because: (1) the Department had put it in the “Interpretations” rather than the “General Regulations” section; (2) the Department said that the regulation contained definitions that the statute requires; and (3) the Department referred to the regulation as definitional and general policy. Id. at 2350 (summarizing and quoting the Court of Appeals' decision). The Supreme Court disagreed, concluding that “other considerations strongly suggest the contrary, namely that the Department intended the third-party regulation as a binding application of its rulemaking authority.” Id. First, “[t]he regulation directly governs the conduct of members of the public, 'affecting individual rights and obligations.’” Id. (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) (quoting Morton, 415 U.S. at 232)). Second, the Department used notice-and-comment rulemaking, which the federal APA does not require for interpretive rules. Id. Finally, “for the past 30 years . . . the Department has treated the third-party regulation like the others, i.e., as a legally binding exercise of rulemaking authority.” Id.

Nevertheless, “the ultimate question is whether Congress would have intended, and expected, courts to treat the agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of 'gap-filling' authority.” Id. Given all the other factors and the fact that “the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency's determination.” Id. at 2350-51.

Finally, the Supreme Court determined that the rulemaking notice complied with the APA and the “logical outgrowth” test. Noting that “[t]he object . . . is one of fair notice,” id. at 2351, the Court concluded that the fact that the Department originally proposed a rule that would have given third-party-employed companionship workers the opposite status “meant that the Department was considering the matter; after consideration the Department might choose to adopt the proposal or to withdraw it.” Id. The possibility of withdrawal was thus reasonably foreseeable, and the Department's explanation based on statutory consistency was reasonable, if brief. Id. at 2351-52.

Agency Responses to Statutory Intersections and Arbitrary and Capricious Review

In approving Arizona's permitting program under the federal Clean Water Act, the EPA had to decide whether it was bound to comply with the federal Endangered Species Act's (ESA's) federal agency consultation requirements as well as to assess the criteria for state delegations in the Clean Water Act. In a 5-4 decision authored by Justice Alito, the Supreme Court decided that the EPA had correctly approved the delegation to Arizona under only the Clean Water Act criteria. National Association of Home Builders v. Defenders of Wildlife, — U.S. —, 127 S. Ct. 2518 (June 25, 3007).

The Court first determined whether the EPA's decision to approve the delegation to Arizona was arbitrary and capricious, on grounds that the EPA and the U.S. Fish & Wildlife Service had “relied . . . on legally contradictory positions regarding [their ESA] obligations,” rendering the decision internally inconsistent. Id. at 2529, 2530 (quoting the Ninth Circuit's opinion below). The Court noted first that the proper response to an arbitrary and capricious finding was to remand the matter to the agency. Id. at 2529. It then emphasized the deferential nature of the arbitrary and capricious standard of review, i.e., concluding that the agencies, and especially the EPA, had not been arbitrary and capricious because: (1) the inconsistencies had arisen in the early stages of consideration, not in the EPA's final decision; (2) although the EPA's final Federal Register statement indicated that it had completed the ESA consultation process appeared to conflict with its overall legal position that the ESA consultation requirement had not been triggered, “the question whether that consultation had been required, as opposed to voluntarily undertaken by the agency, was simply not germane to the transfer decision”; and (3) the EPA gave the challengers sufficient opportunity to participate in the process during the comment period. Id. at 2530-31.

Next, the Supreme Court addressed how to reconcile the two statutory commands: the Clean Water Act's command that the EPA “shall approve” a permit program delegation to a state when the state meets several enumerated criteria, none of which involve the ESA; and the ESA's command that federal agencies shall consult with the U.S. Fish & Wildlife Service when their actions could affect listed species. Although the ESA was the later-enacted statute, the Court stressed that “repeals by implication are not favored . . . .” Id. at 2532 (quoting Watt v. Alaska, 451 U.S. 259, 267 (1981)). Characterizing the application of the ESA's consultation requirement to the Clean Water Act's delegation process as an implicit repeal of the Clean Water Act, id. at 2532-33, the Court instead deferred to the U.S. Fish & Wildlife Service's and National Marine Fisheries Service's regulatory interpretation of the consultation requirement. According to the majority, this interpretation – which, continued on next page
the Court stressed, the agencies had issued “following notice-and-comment rulemaking procedures” – indicates that the ESA consultation requirement applies only to discretionary agency actions. Id. at 2533 (citing 50 C.F.R. § 402.03).

Moreover, the Court upheld the interpretation under the Chevron analysis because it harmonized the two statutes and resolved “a fundamental ambiguity” regarding how to read the ESA’s requirements against the backdrop of other statutory commands in a reasonable way. Id. at 2533-35.

Finally, having accepted that the ESA’s consultation requirement applied only to discretionary agency actions, the Court concluded that the EPA had had no discretion to deny Arizona’s request for delegation of the Clean Water Act permit program. “Nothing in the text of [the Clean Water Act] authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application.” Id. at 2537.

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented. The dissenters stressed that the Supreme Court’s primary duty in cases of statutory conflict is “to give full effect to both if at all possible.” Id. at 2538 (J. Stevens, dissenting) (citing Morton v. Mancari, 417 U.S. 535, 551 (1974)). “The Court fails at this task. Its opinion unsuccessfully tries to reconcile the CWA and ESA by relying on a federal regulation, . . . which it reads as limiting the reach of [the ESA consultation requirement] to only discretionary federal actions . . . . Not only is this reading inconsistent with the text and history of [the regulation], but it is fundamentally inconsistent with the ESA itself.” Id. (J. Stevens, dissenting). The dissenters would have held “that EPA’s decision was arbitrary and capricious under the Administrative Procedure Act, see 5 U.S.C. § 706(2)(A), and would remand to the agency for further proceedings consistent with this opinion.” Id. at 2550-51 (J. Stevens, dissenting).

**Procedural Due Process**

In a fractured judgment of concurring opinions, the Supreme Court addressed the First Amendment and procedural due process rights of schools in the context of sanctions by state interscholastic athletic associations. Tennessee Secondary School Athlete Ass’n v. Brentwood Academy, — U.S. —, 127 S. Ct. 2489 (June 21, 2007). Nevertheless, on the procedural due process issue, six Justices joined Justice Stevens’ analysis of the Brentwood School’s claim that the Tennessee Secondary School Athlete Association (TSSAA) violated its rights when the full Board, “during its deliberations, heard from witnesses and considered evidence that the school had no opportunity to respond to.” Id. at 2496. The district court and the Court of Appeals “found that the consideration of the ex parte evidence influenced the board’s penalty decision and contravened the Due Process Clause,” id. at 2497, but the Supreme Court disagreed. “Even accepting the questionable holding that TSSAA’s closed-door deliberations were unconstitutional, we can safely conclude that any due process violation was harm-less beyond a reasonable doubt.” Id. The Court was skeptical that the ex parte evidence “increased the severity of the penalties leveled against Brentwood,” but, more importantly, Brentwood failed to show that it would have proceeded any differently if it had known that the Board was going to consider the evidence. Id. at 2497-98.

**Standing and Mootness**

In a 5-4 decision authored by Justice Alito, the Supreme Court concluded that the Freedom from Religion Foundation did not have standing to bring an Establishment Clause challenge to President Bush’s Faith-Based and Community Initiatives Program under the taxpayer standing doctrine. Hein v. Freedom from Religion Foundation. — U.S. —, 127 S. Ct. 2553 (June 25, 2007). Emphasizing “that the payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government,” id. at 2559, the majority concluded that the organization did not meet the “narrower exception” created in Flast v. Cohen, 392 U.S. 83 (1968): “Under Flast, a plaintiff asserting an Establishment Clause claim has standing to challenge a law authorizing the use of federal funds in a way that allegedly violates the Establishment Clause.” Id. In this case, however, “Congress did not specifically authorize the use of federal funds to pay for the conference or speeches that the plaintiffs challenged. Instead, the conferences and speeches were paid for out of general Executive Branch appropriations.” Id. (emphasis added). As a result, the Flast exception did not apply. Id. at 2562-68.

Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer. They questioned the majority’s distinction between the Legislative and Executive Branches, arguing “that when [any branch of] the Government spends money for religious purposes a taxpayer’s injury is serious and concrete enough to be ‘judicially cognizable[]’ . . . .” Id. at 2587-88 (J. Souter, dissenting).

In contrast, the Supreme Court concluded that parents had standing to bring an Equal Protection Clause challenge against the Seattle School District’s student assignment plan, which relied on racial classifications as tie-breakers to assign students to oversubscribed high schools. Parents Involved in Community Schools v. Seattle School District No. 1, — U.S. —, 127 S. Ct. 2738 (June 28, 2007). In an 8-1 decision authored by Chief Justice Roberts, the Court determined that the parents’ alleged injury was not too speculative to support standing. The school district argued that members of Parents Involved “will only be affected if their children seek to enroll in a Seattle public high school and choose an oversubscribed school that is integration positive – too speculative a harm to maintain standing.” Id. at 2750-51. According to the Court, however, “[t]he group’s members have children in the district’s elementary, middle, and high schools . . . and the complaint sought injunctive and declaratory relief
on behalf of Parents Involved members which elementary and middle school children may be ‘denied admission to the high schools of their choice when they apply to those schools in the future’ . . . . The fact that it is possible that children of group members will not be denied admission to a school based on their race – because they choose an undersubscribed school or an oversubscribed school in which their race is an advantage – does not eliminate the injury claimed.” Id. at 2751 (quoting the complaint). Moreover, “one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff, . . . an injury that the members of Parents Involved can validly claim on behalf of their children.” Id. (citations omitted).

At the time of the Court’s decision, the Seattle school district had ceased to use its racial tiebreaker policy. However, that action neither destroyed standing nor mooted the case, because “[v]oluntary cessation does not moot a case or controversy . . . .” Id. Because the school district vigorously defended the constitutionality of its policy and could resume using the racial tie-breaker if it received a judgment in its favor, the Court had jurisdiction to hear the controversy. Id.

Mootness was also relevant in an elections advertisement decision. Despite concurrences and dissents, the Supreme Court apparently unanimously agreed that the “capable of repetition, yet evading review” exception to the mootness doctrine applied to the Wisconsin Right to Life, Inc.’s (WRTL’s) claim against the Federal Election Commission (FEC) that the “electioneering communications” provisions of the Bipartisan Campaign Reform Act violated the First Amendment. Federal Election Commission v. Wisconsin Right to Life, Inc., — U.S. —, 127 S. Ct. 2652 (June 25, 2007). The FEC argued that the cases, which were based on three advertisements that the WRTL ran in the 2004 elections and did not intend to use again, were moot. However, according to the Supreme Court, in a 5–4 decision authored by Chief Justice Roberts, “these cases fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review.” Id. at 2662 (citing Los Angeles v. Lyons, 461 U.S. 95, 109 (1983); Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)). First, it was unreasonable to expect that the WRTL could obtain full judicial review of its claims in time to air its ads during the relevant election blackout periods, especially given that “groups like WRTL cannot predict what issues will be matters of public concern during a future blackout period.” Id. Second, the WRTL “credibly claimed that it planned on running ‘materially similar’ future targeted broadcast ads mentioning a candidate within the blackout period . . . .” Id. at 2663 (citations omitted). “Under the circumstances, particularly where WRTL sought another preliminary injunction based on an ad it planned to run during the 2006 blackout period, . . . we hold that there exists a reasonable expectation that the same controversy involving the same party will recur.” Id.

Justices Alito and Scalia concurred in the opinion, the latter joined by Justices Kennedy and Thomas, Justice Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer. None of these opinions, however, quibbled with the mootness analysis.

### From the ABA Section of Administrative Law and Regulatory Practice

**The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner’s Guide**

**By Caroline N. Broun, Michael L. Buenger, Michael H. McCabe, Richard L. Masters**

This book seeks to fill the existing void in this emerging area of law by addressing both the theoretical principles behind interstate compacts and the very practical implications of operating in the compact environment. It is intended to serve not only as a reference for lawyers, but also as a practical guide for legislators, drafters, compact administrators, students, and other parties interested in the development of, or subject to interstate compacts. Thus, some chapters provide a theoretical basis for compacts, while other chapters offer a very practical perspective on compacts and the potential issues one may face in working with interstate compacts or litigating under such agreements. Finally, the book provides both practitioners of the law and others with a perspective on the complexity of compacts and their interaction with other agreements, state laws, and federal laws.

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By William S. Jordan III*

6th Circuit: Journalists & Attorneys Lack Standing to Challenge Warrantless Surveillance

It is tempting to see politics at work in this ruling on one of the most contentious issues of our time. In *American Civil Liberties Union v. National Security Agency*, 2007 U.S. App. LEXIS 16149 (6th Cir., July 6, 2007), Judges Batchelder and Gibbons, appointed by Presidents Bush I and II, respectively, held that various parties, including journalists and attorneys seeking to protect the attorney-client privilege, had no standing to challenge warrantless surveillance conducted under the current Bush Administration’s Terrorist Surveillance Program. Judge Gilman, appointed by President Clinton, disagreed as to standing and would have ruled for the challengers on the merits.

The court issued three separate opinions. Judge Batchelder identified six distinct claims, three constitutional and three statutory, and explored the question of standing separately for each claim. At the core of her opinion is the proposition that the plaintiffs showed nothing more than an allegedly well founded belief that the United States government is probably intercepting their communications with people overseas who are affiliated in some way with al Qaeda. Although Judge Batchelder undertakes a thorough analysis of each of the claims, the bottom line is that a challenger does not have standing to challenge the warrantless surveillance program unless the challenger can show warrantless interception of its own communications.

The plaintiffs asserted three injuries: (1) inability to communicate with overseas contacts due to self-imposed ethical obligations, such as the need to protect the attorney-client privilege, which substantially burdened the pursuit of their professions and imposed increased costs for travel, (2) a “chilling effect” on overseas contacts’ willingness to communicate, and (3) violation of a legitimate expectation of privacy.

In addressing these assertions, Judge Batchelder distinguished between two types of harm that surround an action for a declaratory judgment. The first is an anticipated harm that causes one to refrain from engaging in activities, for example the anticipated harm from the interceptions themselves, which may satisfy injury in fact. The second is harm that arises from refraining from the activity, such as the inability to communicate with the client or to gather information for a journalist’s stories. Judge Batchelder held that the second type of harm is too speculative to support standing. As to the first type, there must be an assertion that an individual’s communications are being intercepted in order to complain of the need to refrain from communication in order to avoid the harm.

As to the constitutional claims, Judge Batchelder also held that the plaintiffs could show neither causation nor redressability. Part of the problem was the lack of any showing of actual interceptions. Another part was the fact that the overseas contact might well refuse the communication even if the court required warrants. As to the statutory claims, Judge Batchelder held that there was no agency action under the Administrative Procedure Act and that the two other statutes clearly did not apply. She also distinguished *Friends of the Earth v. Laidlaw Environmental Services* on the ground that the plaintiffs there were clearly subject to harm when the pollution actually occurred and would be benefited by deterring future pollution. By contrast, back to the core of her opinion, the plaintiffs here could make no showing of actual harm.

Judge Gibbons took the much simpler position that “The disposition of all of the plaintiffs’ claims depends upon the single fact that the plaintiffs have failed to provide evidence that they are personally subject to the TSP.” Thus, the core of Judge Batchelder’s opinion was enough for Judge Gibbons. She also criticized Judge Batchelder’s willingness to reject two statutory claims without first reaching the question of standing.

Judge Gilman agreed that all of the challenges related to one action, so that it was unnecessary to analyze each claim in detail, but he argued the plaintiffs had demonstrated standing by establishing “reasonable concerns” that their communications would be intercepted. In so doing, he rejected Judge Batchelder’s distinction between the anticipated harm that would occur during the communication and the harm that arose from refraining from the communication. He emphasized the attorneys’ claims as the strongest due to concerns about the attorney-client privilege. He buttressed this point by reference to so-called “minimization” provisions of the Foreign Intelligence Surveillance Act (FISA) that are designed to protect the attorney-client privilege.

Judge Gilman relied heavily upon *Friends of the Earth v. Laidlaw Environmental Services* as reflecting the principle that standing could be premised on the existence of “reasonable concerns” about the likelihood of harm. In *Laidlaw*, he said, the Court had upheld standing despite the lack of any showing of current actual environmental harm because there were “reasonable concerns” about future harm. So, here, there were reasonable concerns about warrantless interceptions of communications with those affiliated with al Qaeda. For him, the bottom line was the “reasonableness of the fear” of the illegal surveillance.

As to causation and redressability, Judge Gilman noted that “Which characterization of injury one accepts will largely determine the causation prong (as well as the redressability prong discussed below) of the standing analysis.” Judge Gilman emphasized that the claim was that the Terrorist Surveillance Program was conducted without the minimization protections.

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* C. Blake McDowell Professor of Law; The University of Akron School of Law; Council Member; Chair Judicial Review Committee; and Contributing Editor.
of FISA. Thus the imposition of FISA would provide at least some increased protection of the attorney–client privilege.

**D.C. Circuit: EPA Industry-Wide Settlement Not a Rule, Not Reviewable**

In one of the more interesting decisions in recent years, the D.C. Circuit split on the question of whether EPA was required to pursue notice–and-comment rulemaking before adopting industry–wide settlement agreements. *Association of Irritated Residents v. Environmental Protection Agency*, 2007 U.S. App. LEXIS 16929 (D.C. Cir. July 17, 2007), involved EPA’s efforts to implement the requirements of the Clean Air Act (CWA), the Emergency Preparedness and Community Right to Know Act (EPCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as they apply to Animal Feeding Operations (AFOs). AFOs emit various pollutants subject to these statutes, but EPA and the industry assert that existing methodologies do not permit reliable measures of AFO emissions. Thus, according to EPA, it is not currently possible to determine when such emissions reach reportable levels or when they violate the applicable statutes.

EPA’s solution was to enter consent agreements under which the various AFOs would assist in developing the methodology necessary to measure AFO emissions. Although this was an industry–wide initiative, EPA entered into individual settlement agreements with each of the several thousand participating AFOs. Under the agreements, the AFOs did not admit liability, but they agreed to pay civil penalties based upon the size and number of their farms, to help fund a two-year study monitoring AFO emissions, and to permit monitoring of their facilities. EPA would then use the monitoring data to develop a methodology for measuring AFO emissions. In return, EPA would not sue participating CFOs for certain past or present violations for the duration of the study. EPA predicted that this approach would result in AFO compliance four years from the start of the study. EPA gave public notice and sought comment on the proposed agreements.

AFO neighbors and environmental groups sued, arguing that EPA’s approach constituted legislative rulemaking that failed to comply with the requirements of the Administrative Procedure Act. EPA responded that this was not rulemaking, but simply the exercise of the agency’s prosecutorial discretion, and as such unreviewable. Judges Sentelle and Kavanaugh agreed with EPA, but Judge Rogers issued a strenuous dissent.

The majority found this to be a fairly straightforward application of the *Heckler v. Chaney* presumption against review of the exercise of enforcement discretion, emphasizing that this case involved decisions about allocation of agency resources, enforcement priorities, and the costs of possible alternatives. Without any specific congressional directive as to enforcement (and there was none in any of these statutes), courts are in no position to review the agency’s resolution of these concerns.

The majority also rejected the argument that the agency’s action effectively constituted a rule creating exceptions to the applicable statutory requirements. To the contrary, according to the majority, the agency had merely delayed enforcement, with delay contingent upon each AFO’s compliance with the agreement. Those who did not comply would be subject to immediate enforcement, so the agreements did not change the underlying requirements. The majority saw EPA’s effort as a way to develop the methodology necessary to evaluate compliance, not as changing the applicable requirements. Moreover, the majority held that EPA could, free from judicial review, enter into these agreements without ever actually initiating enforcement actions because the concerns under *Heckler v. Chaney* would be the same whether or not the agency had actually begun proceedings. Finally, EPA’s action did not constitute the abdication of its enforcement responsibility, but an attempt to develop a means of exercising that responsibility.

Judge Rogers disagreed, arguing that EPA was trying to achieve the benefits of rulemaking without going through the required process. To her, EPA’s use of the settlement agreement to obtain civil penalties constituted an “unauthorized system of nominal taxation of regulated entities.” With no assurance of ultimate enforcement, she did not consider EPA’s scheme to constitute enforcement at all, but an agency action of “‘general . . . applicability,’ [that] will have ‘future effect,’ and defines the rights and obligations of members of the regulated community, thereby constraining EPA’s enforcement authority,” and therefore a rule. In particular, deferring compliance is the equivalent of changing the rule for the current period. She also argued that the *Heckler v. Chaney* presumption does not apply because this industry–wide action is not comparable to the individualized decisionmaking at issue in *Heckler*. Moreover, analogizing to *Community Nutrition Institute v. Young*, she argued that EPA had ceded its enforcement discretion in a way that required compliance with the APA’s rulemaking requirements. Finally, she argued that this situation comes within an exception articulated in *Heckler v. Chaney* “where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.” Since each of the three statutes at issue requires particular procedures for pursuing violations, and since enforcement actions must be based upon EPA’s finding of a statutory or regulatory violation, Judge Rogers argued that EPA could not enter into these settlement agreements without first making a finding of violations. But the inability to make such a finding is precisely the reason EPA entered into these agreements in order to develop the necessary emission measurement methodology. Judge Rogers’ approach is in considerable tension with the principle of *SEC v. Chenery* that an agency has broad discretion to choose whether to develop policy through rule-
Three on Ripeness

Right on Substance

D.C. Circuit: FAA Wrong on Procedure, Right on Substance

In Aeronautical Repair Station Association, Inc. v. FAA, 2007 U.S. App. LEXIS 16920 (D.C. Cir. July 17, 2007), the D.C. Circuit considered a challenge to an FAA rule mandating that air carriers require drug and alcohol testing of those who perform certain functions for airlines if they are employees of the airline or if they perform the functions “by subcontract at any tier.” The court addressed two issues worth mentioning, the first a relatively standard question of statutory interpretation, the second a dispute over the breadth of the Regulatory Flexibility Analysis undertaken by the FAA.

The statutory question was whether the language “other air carrier employees” encompassed employees of companies under contract to the airlines. The majority found sufficient flexibility in the language to permit it to grant Chevron deference to the agency’s broad reading. Judge Sentelle dissented, holding that the plain language of the statute could not be extended beyond contractors (which had been covered by the previous rule) to reach subcontractors.

As to the second issue, the Regulatory Flexibility Act requires that an agency prepare a regulatory impact analysis concerning the impact of its rule on small entities. Ironically, despite having effectively regulated various contractors and subcontractors, the FAA decided that the Act did not require it to consider those entities other than air carriers and air traffic control facilities that are directly targeted by the regulation. The FAA argued that it did not need to consider regulatory impacts on the many contract repair stations and their subcontractors because those were merely “indirectly regulated entities.” The FAA relied upon two decisions holding that an RFA analysis did not need to consider the impact of a rule on customers of regulated industries. The court disagreed, holding that the small entities in question here were subject to the “actual regulatory impact” of the rule, not merely to its economic effects. Thus, if a rule by its terms directly controls the actions or personnel of a small entity, that entity must be considered in the RFA analysis, but the entity need not be considered if it is affected only by the economic consequences of the rule.

In the end, the court upheld the substance of the FAA’s Final Rule while remanding for the limited purpose of requiring the agency to conduct an RFA analysis consistent with the court’s holding.

Three on Ripeness

Under the landmark Abbott Laboratories decision, a rule is ripe for review if (1) it is fit for review (involving consideration of whether the issue is purely legal and sufficiently final, and (2) denial of review would impose a hardship on the party seeking review. In two recent decisions, courts effectively ignored the hardship test where the issue was purely legal and Congress had indicated a desire to have disputes resolved quickly. In a third, however, the court held to the teaching of Toilet Goods v. Gardner and denied review. One of these decisions also found that at a statutorily imposed administrative appeal provision provided the basis for a finding of “procedural” injury.

In Cement Kiln Recycling Coalition v. EPA, 2007 U.S. App. LEXIS 16711 (D.C. Cir. July 13, 2007), the D.C. Circuit considered challenges to both an EPA rule concerning the application of Resource Conservation and Recovery Act and the Clean Water Act to Hazardous Waste Combustion Facilities and an EPA guidance document related to compliance with the rule. The rule provided that a facility would generally achieve statutory compliance if it applied Maximum Achievable Control Technology (MACT), but that the permitting authority could require tighter controls by conducting a Site Specific Risk Assessment (SSRA) if needed to protect the public health and the environment. Industry challenged the rule as violating the applicable statutes and APA notice requirements, and it challenged the guidance document as violating APA rulemaking requirements.

EPA argued that neither challenge was ripe because the rule had not been implemented, so that the challengers were not subjected to any hardship. The court disagreed, emphasizing that both challenges raised purely legal issues that could be resolved on the face of rule and the guidance document. Noting that a purely legal claim is presumptively reviewable, the court said as to both challenges that, “[w]here the first prong of the . . . ripeness test is met and Congress has emphatically declared a preference for immediate review[,] . . . no purpose is served by proceeding to the [hardship] prong.” In this case, Congress’ emphatic declaration was the statutory provision requiring that a challenge to the rule must be brought within 90 days of its promulgation. The court then ruled for the agency on the merits.

Exxon Mobil Corp. v. FERC, 2007 WL 2141952 (D.C. Cir., July 27, 2007), followed suit with respect to the ripeness analysis, although it was also able to find a hardship. In response to a facial challenge to a FERC rule, the court found a hardship to the sponsors of an Alaska natural gas pipeline in that uncertainty over the status of the rule would inhibit or delay investment in the pipeline. The court also emphasized that Congress has twice said that it wants the pipeline to move ahead quickly.

In a seeming contrast to the cases just described, the Ninth Circuit in Earth Island Institute v. Ruthenbeck, 490 F.3d 687 (9th Cir. 2007), found a challenge ripe as to rules that had actually

continued on page 27
As to provisions that had not been applied, the court considered itself bound by the [Administrative Procedure] Act, potentially creating a number of unintended consequences detrimental to the efficient operation of our State government.” The bill addressed a number of issues, but the Governor only mentioned the provision in the bill that would have limited an agency’s authority to rely on unadopted statements that are subject to pending legal challenges. In addition, the Governor acknowledged the need for governmental accountability, and he directed his office and state agencies “to work with the Legislature to address any concerns, recommend changes to streamline government, simplify procedures and better serve the people of Florida.”

Accordingly, look for the Florida Legislature to consider legislation similar to HB 7183 in the 2008 Regular Session.

**Florida Gives Final Order Authority to ALJs in Elections Commission Cases**

Governor Crist has signed a measure that makes a number of changes to Florida’s elections laws. Among other things, Chapter 2007-30, Laws of Florida, provides that a person charged by the Elections Commission with a violation may elect a formal hearing before an administrative law judge (ALJ) and that in such cases, the ALJ shall render a final order. Previously, the ALJ entered a recommended order (as in most cases involving disputed facts under Florida’s APA) and the Commission entered the final order. This change may have been prompted by cases such as *Wills v. Florida Elections Commission*, 32 FLW 878 (Fla. 1st DCA 2007), where the court determined that the Commission improperly rejected the ALJ’s findings of facts. In the *Wills* case, the court also ordered the Commission to pay attorneys fees pursuant to s. 120.595(5), FS.

Chapter 2007-30 also directs the Commission to maintain a database of all final agency actions. The database must be available to the public and must be searchable by issue, statute, person or entity referenced.

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**News from Florida**

*By Larry Sellers*  

**Florida Governor Vetoes “Open Government Act”**

By letter dated June 27, Florida Governor Charlie Crist vetoed HB 7183, an act relating to administrative procedures—a summary of which was published in the Summer issue of the *Administrative & Regulatory Law News*. In his veto letter, the Governor expressed concern that the bill “substantially rewrites the [Administrative Procedure] Act, potentially creating a number of unintended consequences detrimental to the efficient operation of our State government.” The bill addressed a number of issues, but the Governor only mentioned the provision in the bill that would have limited an agency’s authority to rely on unadopted statements that are subject to pending legal challenges. In addition, the Governor acknowledged the need for governmental accountability, and he directed his office and state agencies “to work with the Legislature to address any concerns, recommend changes to streamline government, simplify procedures and better serve the people of Florida.”

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**News from the Circuits** continued from page 26

been applied, but unripe as rules that had not yet been applied to particular circumstances. The dispute involved procedures for appeals of certain Forest Service decisions. Prior to 1992, the Forest Service had provided for such appeals. In 1992, the Forest Service adopted certain categorical exclusions from the appeal provisions for environmentally insignificant decisions. This resulted in much uproar and in congressional action requiring reinstatement of appeal procedures. In 2003, the agency finally adopted regulations purporting to implement the congressional resolve. Again the agency adopted some categorical exclusions, and again uproar ensued, this time in the form of a challenge to the new procedural rules. As to ripeness, the court held that two provisions were reviewable because they had been applied to particular circumstances. Interestingly, the parties had settled as to the particular circumstances, but the record that had been developed in that conflict was sufficient to permit review of the rules. As to provisions that had not yet been applied, the court considered itself bound by *Toilet Goods v. Gardner*, which had denied review where there was no immediate hardship and the court’s consideration of the issue would be informed by more complete development of the facts. The key distinction between *Earth Island Institute* and the decisions discussed above appears to be that the court did not consider this to be a facial challenge, but to require consideration of particular applications of the challenged rules.

Earth Island Institute is also interesting because it recognized standing on the basis of a “procedural” injury. Here, Congress had required the agency to provide for the procedural right to appeal. According to the Ninth Circuit, this was comparable to the procedural rights under the National Environmental Policy Act, “essentially a procedural statute.” It is important to recognize, however, that the harm that supports standing is not purely procedural. It is the harm the procedures are designed to mitigate or avoid. Both the appeal rights at issue in *Earth Island Institute* and those provided by NEPA are designed ultimately to protect the environmental interests of those who would be adversely affected by the agency’s substantive decision. Thus, in both cases a plaintiff would have to show that it could be adversely affected by an agency decision not to its liking. The relevant harm is still the ultimate physical or aesthetic injury. The point is that the procedural denial may be challenged because it prevents the plaintiff from participating in a way that Congress specifically intended to influence the substantive outcome.
MAKE YOUR OPINION COUNT

The Section values the input of all its members. Make your opinion count. Contact us at knightk@staff.abanet.org. Also, please let us know how we can help you get more involved with Section activities.

Section News & Events

Section Dues Cap Increased

At the Annual Meeting in San Francisco, the Section voted to amend and update its bylaws. Section Secretary Jamie Conrad examined the existing bylaws and suggested numerous changes that modernize them. The most important change lifted the ceiling on Section dues from $40 to $75. Section Chair Michael Asimow noted that “at present, we have fallen far behind other ABA Sections in our annual dues, yet we supply a greater range of free publications than other sections.” The publications Section members receive as a benefit of Section membership include the Administrative Law Review, The Administrative & Regulatory Law News, and Developments in Administrative Law & Regulatory Practice.

Budget Officer Bill Morrow has reported at several meetings over the past year that notwithstanding a number of cost-cutting measures and record income from Section publications, the Section has been regularly dipping into its reserves for several years to cover current operating expenses because of insufficient revenue. Current expenses include those associated with membership-benefit publications, Section meetings held four times each year (which include CLE programs), and the Homeland Security and Administrative Law & Regulatory Practice Institutes, as well as numerous CLE luncheons held throughout the year by the Section’s many committees. “As a result,” said Asimow, “a dues increase is necessary.”

The Council likely will consider the appropriate dues level at the upcoming 2007 Administrative Law Conference in October. “An increase from $40 to $65 is a definite possibility,” said Asimow. “This will bring our Section in line with other comparable ABA sections and put us back on a solid financial footing.”

The cap increase was later approved by the ABA Board of Governors.

ITC Resolution Passes House

The ABA House of Delegates approved a Section-sponsored resolution at the Annual Meeting supporting the International Trade Commission’s adoption of certain procedures consistent with the Government in the Sunshine Act. The resolution reads as follows:

RESOLVED, That the American Bar Association supports the International Trade Commission’s (“ITC”) adoption of procedures relevant to its compliance with the Government in the Sunshine Act, 5 U.S.C. § 552(b), that:

1. Support the ITC’s interpretation of the term “meeting” under the Government in the Sunshine Act to permit Commissioners to meet in a non-public manner as a body to discuss aspects of a particular investigation, prior to making a decision;
2. Urge the ITC to employ, when applicable, Exemptions Four (discussion of confidential information) and Ten (formal agency adjudication) of the Government in the Sunshine Act; and
3. Upon announcing their votes to the public, the Commissioners individually explain the rationale underlying the Commissioner’s vote.

House Adopts Election Reform Resolution

The ABA House of Delegates approved a Section-sponsored resolution at the Annual Meeting promoting election process reform. The resolution reads in principal part as follows:

• RESOLVED, That the American Bar Association urges federal, state, local, and territorial governments to
  • improve the administration of elections to facilitate voting by all individuals with disabilities, including people with cognitive impairments;
  • ensure that no governmental entity exclude any otherwise qualified person from voting on the basis of medical diagnosis, disability status, or type of residence. State constitutions and statutes that permit exclusion of a person from voting on the basis of mental incapacity, including guardianship and election laws, should explicitly state that the right to vote is retained, except by court order where [certain] criteria [are] met;
  • permit citizens to opt freely for absentee (“vote at home”) balloting, permanently or temporarily, including at the time of registration, with the ability to change one’s choice thereafter;
  • improve access to voting by residents of long-term care facilities that provide room, board, and any level of personal care to persons in need of assistance;
  • require and fund the development of voting systems that achieve universal design, such that all voters can cast ballots privately and independently on the same voting machine, adaptable to accommodate any impairment, including physical, sensory, cognitive, intellectual, or mental; and
  • recruit and train election workers to address the needs of voters with disabilities, including physical, sensory, cognitive, intellectual, or mental disabilities.
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Federal Preemption of State and Local Law: Legislation, Regulation and Litigation

By James T. O’Reilly

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