

ADMINISTRATIVE & REGULATORY LAW NEWS



Section of Administrative Law & Regulatory Practice

Vol. 39, No. 1

American Bar Association

Fall 2013

A Lethal Injection of CA Administrative Law



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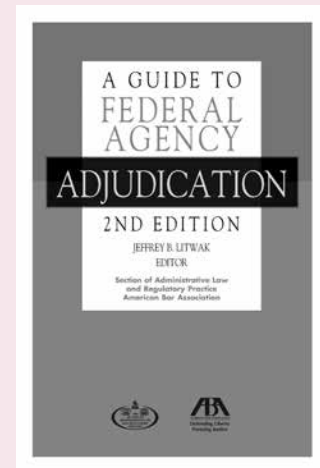
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Chair's Message



Joe Whitley

Greetings to you as a Member of the Administrative Law and Regulatory Practice Section (AdLaw Section) of the American Bar Association (ABA). As Chair of the Section, I will appear three more times in this publication and then the reins of the Section will be turned over to my successor, Chair-Elect Anna Shavers for the year 2014–15. Although my time in this position will be brief, I will endeavor to put something in these paragraphs that will hold your interest and will hopefully get you excited about becoming more involved with the Section this year.

This year is going to be a great year to join in the work of the Section and encourage others to join. No matter your practice area—you will be a better, more successful and accomplished law student, lawyer, judge or academic if you embrace participation in the Section.

I am honored and excited to follow in the footsteps of many accomplished AdLaw Chairs, including Last Retiring Chair Jamie Conrad. All of my predecessor chairs—like you—have their own special stories to tell about how they came to be interested in administrative law. During my year as Chair, I look forward to hearing your stories and building on your skills and expertise through programs and publications. In my own case, I came to the AdLaw Section through the encouragement of many people, including former Section Chairs Randy May and Russ Frisby.

The obligations of the Chair are substantial, and they will undoubtedly pull me away from practicing law at my law firm. However, it will be worth it for me. And it is my hope that in this 2013–14 year, you will make the Administrative Law Section a bigger priority as well. We are not the largest Section of the ABA, but we are doubtless a place for the considered study and constructive debate of administrative law issues. In a sense, we are the embodiment of all that is good about New England town hall politics. I challenge you to become part of the informed dialogue for which the AdLaw Section is justifiably famous. No matter your political stripes, there is room for you in our Section.

So what about the year ahead? First, it will be filled with programs. Our Fall Conference took place on November 7th and 8th at Georgetown University Hotel & Conference Center, 3800 Reservoir Road NW in Washington, DC. Program Chairs Carol Ann Siciliano and Russell Frye engineered a great two-day conference. Early discounted rates are often available for meetings throughout the year, so plan to register online for them. Contact Section Director Anne Kiefer at 202.662.1690 or anne.kiefer@americanbar.org or visit our website at www.americanbar.org/adminlaw for additional information about our programs throughout the year.

Now my story: Over ten years ago, I became General Counsel at a brand-new Department within the

government, the Department of Homeland Security (DHS). Together with over 1800 attorneys at the newly-formed Department, we had the task of developing regulations for ports, airports and chemical plants—to name just a few. Looking back on that time in the days after 9/11, I owe a debt of gratitude to the men and women of DHS General Counsel's office for the work they did to help build the regulatory infrastructure of the new Department. Without a doubt, the support we received from other agencies—including the Departments of Transportation, Treasury, and Justice—contributed to the fulfillment of our regulatory mandate at DHS. We also had a lot of help from the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB). Specifically, DHS General Counsel's Office “stood up” a number of regulatory imperatives under the legislative direction of Congress, including the Maritime Transportation Security Act, the Support Antiterrorism by Fostering Effective Technologies Act, and Chemical Facility Antiterrorism Standards, to name just a few. We are much safer as a country today with DHS's regulatory guidance, thanks to the hard work of the excellent lawyers at these various departments.

DHS benefited in particular from the assistance and help from administrative law legend, previous Section Chair Neil Eisner, formerly at the Department of Transportation's Office of General Counsel. I recall fondly Neil's willingness and agreement to volunteer his time and energies to help bolster the regulatory component of our DHS Counsel's office. The first Associate General Counsel for Regulations in the DHS General Counsel's office, Judge Lisa Branch, would join me in accolades for Neil.

Early in my tenure as General Counsel, I was asked to give a speech at the Administrative Law Section's Fall Conference. I accepted the invitation and focused my remarks on how we were “standing up” the regulatory component of DHS. After my remarks, I remember receiving a nice gift from the Administrative Law Section: a miniature booklet of the Administrative Procedure Act (APA) in the U.S. Code (5 U.S.C Subchapter II). The booklet was inside a small block of Lucite. I remember joking with the audience that many days it felt like it was this hard to get at some of our regulatory agenda.

After I became active in the Section, I was asked by Randy May and others to create for the Section a program on Homeland Security with the particular help and assistance of long-time Section Fellow Lynne Zusman — and many others. We “stood up” a program called the Homeland Security Law Institute, which began in 2006 and continues to

continued on next page

Chair's Message


today. I look forward to developing with others the 9th Annual Homeland Security Law Institute Spring 2014. As a corollary of building the Homeland Security Law Institute, co-editors Lynne Zusman and I put together the *Homeland Security: Legal and Policy Issues* book in 2009, which became a near “best-seller” for the Section. All of this would not have happened had I not had an opportunity through these activities to get to know the fine men and women of the Administrative Law Section of the ABA. Thank you, Lynne and Randy!

Since no deed goes unpunished, I was asked to consider serving as a member of the Administrative Law Section Council, where I had the pleasure of being part of the governing body of the Section. Now today, I find myself honored to be assuming the mantle of leadership as Chair of the Section. I feel no different today about why I believe administrative law should be a core curriculum course for law school students. I only wish that I had more of an infusion of administrative law earlier in my career, because I do truly enjoy and love the opportunity to be part of a community so bright, capable and enduring as the Administrative Law Section of the ABA.

Thank you for this opportunity to be your Chair. I look forward to being a good listener this year and to building on your ideas and carrying the Section forward and passing it along to the leadership that follows. Specifically this year, I will be working very closely with the Last Retiring Chair Jamie Conrad, Chair-Elect Anna Shavers and Vice-Chair Jeff Rosen with a view toward developing a three-year plan so that the Section will not only have the great leadership we have had in the past, but will also plan and develop a vision that will carry the Section forward into the remainder of the decade.

In specific terms, we will prioritize the things that make our Section great with programs like the Fall Conference and with publications, under the leadership of Publications Committee Chair Bill Jordan. Also, we will be investing time in maintaining and building our membership under the direction of former Section Chair, current Membership Chair, Jon Rusch. We will continue to explore ways to bring the AdLaw Section to you through technology with our webpage, listserv and blog. We will also be exploring the creation of as many as five regional subcommittees over the next three years. Plus, we are reaching out to the private sector and the business community with the creation of a new advisory committee to the Section composed of a number of corporate general counsels from a broad swath of corporations to serve as a sounding board on the growth of the regulatory state. We are pleased that this Committee will be chaired by former Section Chair Dan Troy, now the General Counsel of GlaxoSmithKline. Finally, I am pleased that Vice-Chair Jeff Rosen has agreed to head up a committee that will look at the Section's current Strategic Plan developed in 2010 to help us with implementing and augmenting the activities that the Section will pursue in the balance of the decade.

So, all in all, if you have read this entire set of opening remarks in the Chair's Corner, I would like to reward your toil with a challenge to go the extra mile this year – help me and our leadership team, together with Section Director Anne Kiefer, push the envelope for you and advance your interests in the legal discipline called administrative law.

With appreciation,
Joe Whitley 

From the ABA Section of Administrative Law and Regulatory Practice **Homeland Security: Legal and Policy Issues**

Joe D. Whitley and Lynne K. Zusman, Editors

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

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



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The Administrative & Regulatory Law News (ISSN 1544–1547) is published quarterly by the Section of Administrative Law & Regulatory Practice of the American Bar Association to provide information on developments pertaining to administrative and regulatory law and policy, Section news, and other information of professional interest to Section members and other readers.

The Administrative & Regulatory Law News welcomes a diversity of viewpoints. From time to time, the editors may publish articles on controversial issues. The views expressed in articles and other items appearing in this publication are those of the authors and do not necessarily represent the position of the American Bar Association, the Section of Administrative Law & Regulatory Practice, or the editors. The editors reserve the right to accept or reject manuscripts, and to suggest changes for the author's approval, based on their editorial judgment.

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A Lethal Injection of California Administrative Law

By Michael Asimow*

California's death penalty law has been an unmitigated disaster. Since 1978, when the death penalty was re-introduced, only 13 prisoners have been executed. Meanwhile, 727 remain on death row. Some of them have been there thirty years or more. Death from natural causes is a far greater risk to death row inmates than being executed. In 2012, the voters came close to repealing the death penalty by almost passing an initiative (Proposition (Prop.) 34) to that effect. Prop. 34 drew a surprising 48% of the votes.

The argument for Prop. 34 was not moralistic or based on the risk of executing the innocent. It was based on economics. The system has cost the cash-strapped state over \$4 billion (that's billion with a b) since 1978 over the cost of convicting the same people and sentencing them to life without possibility of parole. Each year, it costs about \$130 million more of precious tax dollars to keep the death penalty system going, all to execute 13 people over 35 years — and, as we'll see, it will be a long time before anybody else is executed. Whatever else you may think about it, the California (CA) death penalty is unaffordable. Sentencing many people to death, then warehousing them on death row for the rest of their natural lives, seems like the worst possible approach.

What has all this to do with administrative law? Quite a lot, actually! Before I explain the connection, let's take a quick look at the California Administrative Procedure Act (CA APA) provisions relating to

rulemaking. They are astoundingly detailed. Nobody except a few experts can remember all of the details. I am among those who can't keep the rulemaking provisions straight — and I am writing a treatise on California administrative law.

The rulemaking provisions of the CA APA consist of page after page of mind-numbing statutory fine print about all of the requirements of notice, explanation, analysis, hearings, and impact statements required to adopt every single rule. The agency must reply to every public comment. It must go through an additional comment cycle if it makes any change in the proposed rule. It must complete rulemaking within one year from issuance of the notice of proposed action or start over.

The CA Office of Administrative Law (OAL) is an independent agency that scrutinizes every detail of every rule, watching for failure to comply with the CA APA process and assuring itself that the rule is consistent with the authorizing statute, supported by evidence in the rulemaking record, and meets the standard of "clarity." No other state has anything like OAL. And reviewing courts overturn rules if agencies have "substantially failed" to comply with the APA requirements.

There are no guidance documents — no bulletins, guidelines, rulings, interpretations, policy statements — in California because there is no APA exception for them. The cost of complying with the CA APA makes it infeasible for budget-deprived agencies to adopt guidance documents. (The federal APA, of course, has a rulemaking exception for interpretive rules and policy statements.) Guidance documents adopted without CA APA compliance are pejoratively known as "underground regulations." OAL and the courts rigorously enforce the ban on underground regulations. Similarly,

there is no CA APA exception for procedural rules (again the federal APA has such an exception). There is an exception for "internal management," but the courts have construed it so narrowly that it applies to little more than rules about employee parking.

Well, back to the death penalty. There are many practical problems associated with California's administration of the death penalty by lethal injection, such as the fact that qualified medical professionals refuse to take part in the process or the looming unavailability of the drugs necessary to administer it. There are also serious legal obstacles (such as the severe shortage of attorneys willing to work on the mandatory appeals to the state Supreme Court). However, I won't pause to discuss these issues. For present purposes, let's start with the 1992 statute substituting death by lethal injection for death in the gas chamber. Shortly thereafter, the California Department of Corrections and Rehabilitation (CDCR) adopted Opinion (Op.) 770, which set forth the details of administration of lethal injection by the customary three-drug formula.

In 2006, in *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006), a federal district court made an extensive study of the current procedures used in the administration of lethal injections in California. *Tilton* held that the death penalty as applied in California was unconstitutional. The reason was that prison authorities improperly administered sodium thiopental (the anesthetic injected as the first drug in the three-drug protocol) and thus the administration of the second and third drugs could cause terrible pain. The court found a lack of meaningful training, supervision, and oversight of the execution team. As a team member testified, about the problems in a particular botched execution, "shit does happen, so . . ."

*Visiting professor of law at Stanford Law School, professor of law emeritus at UCLA Law School. The author thanks Herb Bolz, Lawrence Friedman, Steve Mayer, David Mills, Jim O'Reilly, and Robert Weissberg for their comments on this article — and respects the disagreement of some of them with his conclusions.

In addition, there was inadequate monitoring and record-keeping about administration of sodium thiopental. Blank paper was used for EKG tracings instead of graph paper. The sodium thiopental was unreliably mixed and prepared. The death chamber (built for lethal gas) was improperly designed and lit for lethal injections, which require a large number of persons on the execution team working together. And so on. . . .

But, no problem, really. The *Tilton* decision did not invalidate the three-drug protocol — though it suggested that a one-drug protocol might be better (simply giving a bigger dose of sodium thiopental is fatal without the risk of pain caused by the two other chemicals). It called on CDCR to fix all these practical problems by reviewing and revising Op. 770, suggesting that then everything would be fine.

So CDCR completely revised Op. 770 to deal with the many practical issues highlighted in the *Tilton* case. And not long thereafter, in 2008, the California Court of Appeal struck down the revised rule. In *Morales v. CDCR*, 85 Cal. Rptr. 3d 724 (2008), the court held that Op. 770 was an “underground rule” and therefore invalid because it was not adopted in compliance with APA procedures.

CDCR tried out various theories to escape invalidation of the rule, but all in vain. It argued that the rule lacked “general application,” but that was a non-starter considering that the rule applied to all of the 700-odd death row inmates. More plausibly, CDCR relied on a CA APA exception for a rule “applying solely to a particular prison or other correctional facility.” This seemed promising (indeed, it seemed like a slam dunk), given that executions occur only at San Quentin. Nope. The court rejected the “particular prison” exception because one rather minor provision of Op. 770 stated that if the warden couldn’t fill out the 20-person execution team with staff from San Quentin, the warden could draw on personnel from other prisons. This reasoning seems absurd on its face — since executions can occur only at San Quentin, the rule applies “solely to a

single prison” and it should have qualified for a CA APA exception.

Well, how about the “internal management” exception? Nope, forget about that one also. CDCR had failed to raise the internal management exception at trial. And even if it had, the rule made it possible to hire outside specialists to serve on the team, so the impact of the rule wasn’t strictly internal. Again, this seems absurd. As an example of this kind of reasoning, if a rule about employee parking provided that an outside janitorial service would clean up the parking lot, the rule would no longer qualify as “internal management.”

How does one understand the nit-picky reasoning of *Morales v. CDCR*? How much does judicial hostility to the death penalty have to do with it?

After going through a full-fledged notice-and-comment procedure, CDCR went back to the drawing board and adopted a new version of Op. 770. The proposed rule attracted an astounding 29,416 written comments. At a six-hour public hearing, 102 people expressed their views on the proposed regulation. CDCR made some changes to the proposed regulation and recirculated them for additional public comment. OAL then rejected the rule for failure to comply with the CA APA, so CDCR revised the rule, submitted it to the public for additional comments, and resubmitted to OAL, *which approved it*. Op. 770 returned to the Court of Appeal in *Sims v. CDCR*, 157 Cal. Rptr. 3d 409 (2013). Surprise! The court struck down the rule because of a “substantial failure” by CDCR to comply with the CA APA rulemaking provisions.

The reason was a series of CA APA violations which, in the aggregate, added up to a “substantial failure” of compliance. The most significant of these failures were:

- CDCR failed to explain the alternatives to the three-drug protocol in its initial statement of reasons (ISOR) and final statement of reasons (FSOR). Both ISOR and FSOR must analyze alternatives to the regulation and the agency’s reasons for rejecting them.
- In FSOR, CDCR said that it had considered the one drug-alternative

but rejected it in reliance on the U.S. Supreme Court’s *Baze* decision upholding the three-drug formula. Unfortunately, *Baze* wasn’t decided until after CDCR had decided to stick with the three-drug approach. Thus, CDCR’s statement was false.

- CDCR failed to respond to 24 of the 29,416 written comments. FSOR must include “a summary of *each objection or recommendation* made [to the proposed rule] together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change.”
- The statute requires the agency to make the complete rulemaking file available to the public at the time of notice of the proposed action, but CDCR didn’t release the file until 6 weeks later when the public comment process had only three weeks left to run.
- CDCR failed to provide the mandatory statement of additional costs or savings to any state or local agency.

Granted, CDCR butchered the CA APA rulemaking process. It appears that its legal staff just wasn’t familiar with the CA APA’s requirements and was careless in following them. Everyone in California government should know that you just can’t do that. Specialists in the CA APA must oversee every detail of the process to ensure meticulous compliance with every bit of the CA APA’s paperwork requirements. Otherwise OAL will kick out the rule. But legal staff who are qualified and experienced to do that are in short supply. Perhaps CDCR just didn’t have any of them available. Perhaps they ran out of time (they submitted the rule to OAL just one day before the one-year rulemaking period expired). Perhaps the staff was swamped by the unexpected and unprecedented deluge of public comments. But whatever the reason for CDCR’s failures, the case confirms my opinion that the minutely detailed and mind-bogglingly complex provisions

continued on page 8

Does OIRA Improve the Rulemaking Process? Cass Sunstein's Incomplete Defense

By Sidney A. Shapiro*

The role of the Office of Information and Regulatory Affairs (OIRA) in the rulemaking process has become an accepted and expected feature of the regulatory landscape. Nevertheless, the merits of OIRA review continue to be debated, mainly concerning the necessity of further reforms in the process. Professor Cass Sunstein, who served as the administrator of OIRA in the first term of the Obama Administration, has recently defended OIRA oversight. Cass Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013). Sunstein contends that OIRA performs a useful function in the rulemaking process, but significant questions remain concerning the extent to which this is the case. Because of the lack of transparency, however, it is difficult to reach a definitive judgment about Sunstein's claims.

In his time as OIRA administrator, Sunstein reports that OIRA served primarily as an "information aggregator" because it was "largely in the business of helping to identify and aggregate views and perspectives of a wide range of sources both inside and outside of the federal government." Inside the government, OIRA facilitated comments from other agencies, creating a type of executive branch notice-and-comment process. OIRA also ensured that agencies engaged all stakeholders and took their views into account. Finally, delays in approving agency cost-benefit estimates were

due to "technical questions that need good answers," rather than to a White House official's having "a fundamental objection to the rule and the agency's approach."

Secrecy. Any effort to assess these claims is hampered by White House secrecy. Although OIRA maintains a website that is supposed to list the rules under review, there are a number of significant transparency limitations. First, the website is incomplete. It does not include informal submissions of rules by agencies to OIRA, and OIRA has instructed agencies not to reveal the changes in rules that are made during informal review at its behest. In addition, some rules submitted to OIRA appear on its website only weeks after the agency has submitted them and some submitted rules never appear. For yet other rules, the White House refuses to permit agencies to submit them to OIRA, thus preventing OIRA review and stopping the regulatory process.

Second, OIRA does not explain to agencies in writing why rules under consideration are inconsistent with the President's agenda, nor does OIRA have a public log showing when and to whom disputes between an agency and OIRA are being elevated.

Third, OIRA holds up rules for long periods of time without any public explanation or explanation to an agency. For example, as of August 15, 2013, OIRA was stunningly overdue, pursuant to its own deadlines, in finishing its review of the following regulations: 1) Environmental Protection Agency's (EPA's) Chemical Concerns List Rule (1077 days overdue); 2) Department of Energy's (DOE's) Efficiency and Sustainable Design Standards for New Federal Buildings Rule (614 days overdue); 3) DOE's Energy Conservation Standards for Walk-in Coolers and Walk-in Freezers Rule (578 days overdue); 4) Occupational Safety

and Health Administration's (OSHA's) Occupational Exposure to Silica Rule (799 days overdue); and 5) EPA's Clean Water Protection Guidance (427 days overdue);

Fourth, although agencies post "before" and "after" versions of rules that have gone through OIRA review and have been returned to the agency, according to studies by the Government Accountability Office (GAO) in 2003 and again in 2009, this disclosure sheds little light on what changes have been demanded by OIRA. GAO, *Office of Management and Budget's (OMB's) Rule in Review of Agencies' Draft Rules and the Transparency of Those Reviews*, Sept. 2003, at 110; GAO, *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules as Well as to the Transparency of OMB Regulatory Reviews*, April 2009. A 2012 study of OIRA oversight of EPA confirmed that the OIRA review process remains opaque. Wendy Wagner, *Science in Regulation: A Study of Decisionmaking Approaches*, Feb. 18, 2013 (Report prepared for the Administrative Conference of the United States).

Despite the lack of transparency, there are good reasons to be cautious about Sunstein's claims about OIRA review. It is not apparent that interagency review improves decision-making, and political considerations appear to trump agency preferences for politically salient rules. This is problematic because the White House is largely not accountable to voters for its role in rulemaking.

Interagency Review. Interagency review does not necessarily improve a proposed rule for four reasons. First, in some instances, it is the sister agencies that are being regulated, and their participation is as interest groups, not impartial commentators. While this should not disable other parts of the government from weighing in, their comments are likely to reflect

* University Chair in Law, Wake Forest University. This essay is based on the 2013 Foulston Siefkin Lecture, hosted by the Washburn University Law School, and a forthcoming article that expands on the lecture. See Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, __ WASHBURN L. REV. __ (forthcoming 2013); see also Recent Articles of Interest, this issue.

their policy preferences, not neutral expertise. Second, not all of the agencies commenting on a rule will have expertise relevant to the rule. Third, because interagency comments are kept secret, they do not assist in the rulemaking process. While this might constitute a notice-and-comment process inside the government, it does nothing to enlarge the public process of notice and comment. Finally, because interagency comments are secret, it is not possible to determine whether interagency review brings any new information into the process or merely duplicates the comments filed by outside interests.

The government has refused to reveal the comments on the ground that they are covered by deliberative process privilege, but this is a weak argument. The government should have nothing to hide if agencies are contributing their expertise to the process. OIRA should require interagency comments to be public, while keeping confidential actual negotiations or deliberations between parts of the government.

Political Considerations. Sunstein concedes that special interest politics may sometimes play a role in White House intervention, but he maintains that OIRA staff members are not political operatives but bureaucrats, and that OIRA reviews are therefore technical, not political. Although this seems accurate, it does not rebut the fact that other White House offices, more motivated by politics, also appear to be deeply involved in overseeing rules. But what happens when politics and expertise collide in the White House? Political considerations usually prevail.

Consider, for example, EPA's Smog Rule. In 2011, the White House decided to postpone a proposed EPA rule that would have significantly reduced emissions of smog-causing chemicals on the grounds that it would have imposed too severe an economic burden on industry and local governments at a time of economic distress. News reports attributed the decision to heavy lobbying by industry interests and the White House's political concerns that the proposed rule would harm the President's re-election. Sunstein claims

the "decision was based on judgments about the merits." Without more transparency, his claim cannot be fully assessed from the outside. Nevertheless, it does not seem fully credible in light of concurrent press accounts.

Another troubling example involves a proposed rule by the Department of Agriculture to speed up the processing of chickens. The proposal was issued in response to an executive order by President Obama requiring agencies to review existing rules that might be outmoded, ineffective, or excessively burdensome. The order came at the time that he was gearing up for re-election, and it was part of an effort to convey to the electorate that the President was in agreement with regulatory critics' concerns about unreasonable regulation. OIRA quickly approved publication of the proposed rule even though the agency had not completed the cost-benefit study that was required because it was an economically significant rule. Moreover, OIRA does not appear to have conducted any interagency review or even to have given notice to OSHA regarding the existence of the proposal, despite the serious worker safety implications of the rule.

If, as Sunstein claims, OIRA is uninvolved in politicized efforts to change proposed regulations, this means that the public cannot lay blame (or credit) at its doorstep for when this occurs. But, if the review is technical and nonpartisan, OIRA takes credit. However, if there is a political motivation, then the blame lies elsewhere, although, in terms of accountability, there is no way to know who is responsible. The result is that everyone is responsible for the shape and scope of regulatory policy — and no one is accountable: "Who is responsible, for example, for the hundreds of technical changes made to EPA's scientific analysis of air quality rules? We simply don't know." Lisa Heinzerling, *Essay: Who Will Run EPA*, *YALE J. REG.*, available at <http://yale-jreg.org/category/essays/>.

Supporters of greater White House control see it as improving electoral accountability, but it is doubtful that the President is really accountable

to the voters for the way in which regulatory oversight is exercised. The Dean of the Harvard Law School has described OIRA as the "most powerful federal agency that most people have never heard of." *Note: OIRA Avoidance*, 124 *HARV. L. REV.* 994 (2011), quoting Martha Minow. Moreover, even if voters are aware of White House oversight, it is almost impossible to know what has occurred because of a lack of transparency. This opens the door for the White House to be more responsive to some segments of the electorate that are in a position to furnish electoral support, particularly financial support. "The President, no different from Congress, may use unfettered discretion to instruct the agencies under his control to select the policies that favor his most generous supporters." Lisa Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 *N.Y.U. L. REV.* 461, 504-05 (2003).

The Problem of Discretion. The White House's oversight role in rulemaking is now an institutional feature of the regulatory process. Sunstein argues that its role is broader than technical review of an agency's cost-benefit study, and that it is about adding value (rationality) to the rulemaking process. Only OIRA can perform the role of organizing interagency comment and can ensure, as Sunstein points out, that agencies take their rulemaking responsibilities seriously. Still, the evidence suggests that White House involvement in the rulemaking process is not as benign as Sunstein would like us to believe.

A forthcoming article confirms this conclusion. See Lisa Heinzerling, *A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, ___ *PACE ENVTL. L. REV.* (forthcoming 2013). Heinzerling reports that the distribution of decisionmaking authority is ad hoc and chaotic; most rules reviewed by OIRA are mostly not economically significant but instead are merely of special interest to OIRA staffers; OIRA does not approve

continued on next page

proposed rules for a variety of reasons, some “extra-legal and some simply mysterious”; it routinely ignores its own deadlines for review and does not follow — or permit agencies to follow — most of its own transparency requirements, resulting in a “utterly opaque” review process. Finally, the review process is so diffuse, involving other Cabinet officers, career staff in

other agencies, White House economic offices, Members of Congress, the White House Chief of Staff, OIRA career staff, and many more — “that at the end of the day no one is accountable for the results [the White House] demands [or blocks, in the case of the many rules stalled at OIRA].”

Since the advent of the regulatory state in the New Deal, there has been

a strong concern about how agencies use the discretion that they have under legislative delegations. We should be equally concerned about how the White House uses its discretion as the overseer of agency rulemaking. What is wrong with White House oversight is unlikely to be remedied until there is greater transparency and public awareness of the process. ○

A Lethal Injection of California Administrative Law *continued from page 5*

of the CA APA are mostly make-work nonsense, serving no purpose except to make rulemaking ever more expensive and burdensome.

Who was minding the store at OAL? Normally, OAL insists on precise compliance with every detail of the CA APA. Courts seldom have to overturn a rule for failure to comply with the procedural requirements of the CA APA because OAL acts as a pre-judicial-review screen. How is it possible that OAL approved these rules (after having once rejected them) when the failures to comply with the CA APA were so obvious? Could there have been some sort of political interference with OAL, given that the Governor wanted to get the death penalty machinery back into motion? Certainly, the episode is a huge black eye for OAL.

And how about the holding in *Sims* that CDCR substantially failed to satisfy the CA APA requirements? The court explained that “substantial failure” means that the procedural defects compromised the “reasonable objectives” of the APA. In this case, the incredible outpouring of public sentiment about the proposed rule — 29,416 written comments — suggests that the process worked well and that no CA APA objectives (reasonable or otherwise) were compromised. The failure to respond to 24 of 29,416 comments, while regrettable, doesn’t seem like a “substantial failure.” And the objective of the CA APA is to encourage public participation in rulemaking — and that objective was more than achieved.

True, the ISOR and FSOR failed to adequately discuss the one-drug alternative to the three-drug protocol. Apparently that’s because CDCR

(and Governor Schwarzenegger) were committed to the three-drug approach and never considered replacing it. They thought the project to revise Op. 770 was solely about improving administration of the three-drug protocol and fixing the problems identified in *Tilton*. It would seem that an agency should be able to frame a rulemaking project to address specific procedural problems without being required to go back and address first principles. For example, a regulation to establish procedures for implementing a specific licensing scheme shouldn’t have to engage in detailed analysis of the possibility of abolishing the licensing scheme in favor of some other sort of regulation. In any event, the failure to analyze the one-drug protocol in ISOR and FSOR or the delay in releasing the file didn’t discourage public comment on that issue.

Incidentally, CDCR did not appeal *Sims* to the California Supreme Court; it plans to start rulemaking over again to revise Op. 770. This time it will seriously consider substituting a one-drug protocol for the three-drug protocol. So one reading of *Sims* is that the decision was successful because it forced CDCR to face up to the real issues in administration of death by lethal injection. Of course, this new rulemaking project will consume more years and large amounts of CDCR financial and staff resources. No doubt, death penalty opponents will then mount a heavy attack on the one-drug protocol. The whole situation is further complicated by *Cook v. FDA*, 2013 U.S. App. Lexis 14883 (D.C. Cir. 2013), a recent D.C. Circuit decision banning importation of sodium thiopental (a drug which

is not produced domestically). If the *Cook* decision stands up, states will be unable to use either the one-drug or three-drug protocols.

A final, personal note: I’m against the death penalty. My opposition isn’t moralistic — I think it’s OK to execute the worst of the worst — but is based on utilitarian grounds. These include the staggering financial costs, the endless delays, and the misallocation of resources in the overburdened criminal justice process. The deterrent effect of the death penalty (as compared to life without possibility of parole) is slight (if it exists at all), and the costs are huge. I’m disturbed by the racially discriminatory way the death penalty is administered in many states. I was deeply disappointed that Prop. 34 failed. (I realize that retributivists would disagree with my utilitarian analysis; they favor the death penalty regardless of its costs and regardless of whether it deters homicide.)

Despite my opposition to the death penalty, I’m troubled by the decisions in *Morales v. CDCR* and *Sims v. CDCR*. (I recognize that many people who morally object to the death penalty would disagree with me on this point, since they favor any court decision that prevents or delays an execution.) *Morales* and *Sims* suggest that anti-death penalty courts are seizing on the CA APA as a way to increase the costs of operating the death penalty system and to delay executions until the voters or the legislature get fed up enough to abolish capital punishment or prosecutors decide to stop seeking it. This just doesn’t seem like the right way to oppose the death penalty. ○

ACUS, FOIA & Arbitration: Breakthrough or Fool's Errand?

By James O'Reilly*

News that the Administrative Conference of the United States (ACUS) has launched a landmark study of the future uses of arbitration to settle Freedom of Information Act (FOIA) disputes has given great joy to the FOIA “groupies” who have been slumped in despair by the hostility to openness shown by numerous conservative federal judges in recent appellate decisions. Maybe there’s a way to get real neutrals who share the requester’s skepticism of agency *bona fides*? Perhaps we will reduce the caseload of the busiest U.S. District Courts? Perhaps FOIA litigation would cost the taxpayers less? The prospects are juicy indeed.

AdLaw Section members who don’t often think about arbitration may vaguely remember its principles from law school: all the facts are known; the nuances and consequences of the facts or contracts are disputed; the parties agree in advance to settle; the neutral hears all sides, reads the disputed contract or treaty, and decides. Arbitration saves thousands of court-days here and abroad. The World Trade Organization does it on a global scale, the Federal Mediation and Conciliation Service does it on a national scale, baseball does it every season, and millions of dollars are often at stake.

Now comes the tough part: critics described the FOIA adjudication system in the 1960s as a bureaucrat holding a cloth bag and telling the requester: “If you can guess what’s inside, you can have it!” The *res*, the object in dispute, is often a database or compilation of facts, usually less copious than what Private Manning delivered to WikiLeaks, and usually of little importance to people outside the agency and its regulated industries. The 13,000-plus requesters who have sued under FOIA since 1967 have predominantly been financially motivated or ideologically


hostile to an agency program. Arbitrations are usually commercial- or labor-related disagreements where the *res* is known to both sides and the same contract can be read in several ways or the same *res* can be valued at different numbers of dollars, Euros, etc. Arbitration law and FOIA law developed quite differently, and ACUS’s task will be to find the happy medium to recommend to a skeptical House committee in the 114th Congress.

The best model for ACUS would be the Special Master for Discovery, a solo lawyer with no conflicts, reporting to a powerful federal judge, who can hear all of the arguments of both sides, then select documents to review, and recommend to the District Judge which records should be discoverable by the adversaries. Civil Procedure and Evidence students rarely delve into this corner of the Federal Rules of Civil Procedure, but it is quite distinct from an Arbitration class where students may mimic the U.S. Trade Representative’s global fight with exporting nations or similar high-stakes arbitrations. The key fact is that the Special Master does not see the whole of the documents until parties demonstrate why disclosure to that Master is essential. Selective review then typically convinces the Master to recommend that X class of documents be withheld, Y documents be shared, and Z documents be filed with the court under protective order and/or seal. Very few U.S. district courts have experimented with special masters in large-volume FOIA cases. But if ACUS urges that option, such are likely to become outsourced mini-trials sparing the judge for other calendar priorities like sentencing and speedy trials.

The Office of Government Information Services in the National Archives survived Bush-era hostility and seems to be functioning well as a mediator. Wishing for agency cooperation isn’t getting it. Agencies will routinely pull their “sorry it’s classified and you’re not vetted” routines. Until the Federal Bureau of Investigation (FBI) scrutinizes your cable TV bills and

expense accounts, and calls your ex-wife for her view of your character, you can’t get that Secret clearance — so you can’t see any of the Department of Defense (DoD) records AND you can’t be a FOIA arbitrator. Veterans of bar complaints or brutal election campaigns need not apply, either; the purity of the person who is able to arbitrate will be maligned by agency counsel who are likely to express fear of bias and hostility against the Federal Widget Agency. Your author, a reluctant draftee E-5 during Vietnam days, found the documents in 2013 showing that the U.S. Army is actively working with gas-fracking drillers to help locate gas well sites under reservoirs in Ohio. So I’ll never arbitrate the FOIA disputes of the Pentagon without fear that my drill sergeant’s review of my grenade skills will be spilled to Fox News. Who then will the arbitrators be?

By 2024, the ACUS arbitration model may be accepted by the House over agency objection as a cost-saving response to crowded federal court dockets. A part-time corps of pre-selected special masters, paid per diem what an administrative law judge would earn, will displace district judges and magistrate judges and will hear FOIA disputes subject to court orders for *in camera* safeguards. Those within the group who allow themselves to be Secret- or Top Secret-vetted will hear Central Intelligence Agency, DoD, and FBI disputes over disclosure of data. The agency can at any time give up its exemption claims. If the agency rejects the arbitrator’s ruling, then the decision and the documents will be presented to the district court. Most will be routinely accepted, thereby saving the *in camera* and *de novo* review powers for the rare exceptions.

AdLaw Section members are urged to watch www.acus.gov for progress of the FOIA arbitration project, and to pitch in with your personal and client views of these improvements to the expensive and delay-prone FOIA process. Arbitration to resolve document access disputes will either be a great breakthrough or a fool’s errand. Watch this space for years of future debates. 

*Author of treatise FEDERAL INFORMATION DISCLOSURE, Professor of Law, University of Cincinnati College of Law.

by Lincoln L. Davies* and F. Andrew Hessick**

This quarter, the Supreme Court issued a number of decisions that appear destined to become considered landmark rulings, with important implications for administrative law. These decisions cut across the field and include rulings on agency deference, statutory interpretation, preemption, standing, and ripeness.

Agency Deference

In *City of Arlington v. FCC*, 133 S. Ct. 1863 (May 20, 2013), the Court resolved a question about the scope of *Chevron* deference for agencies' interpretations of their enabling statutes. The question was "whether an agency's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to [*Chevron*] deference." The Court, in a 5-1-3 decision, answered in the affirmative. Under *City of Arlington*, regardless of whether an agency is interpreting its own jurisdiction or some other part of its statute, courts must afford the agency *Chevron* deference of ambiguous statutory terms.

At issue in *City of Arlington* were provisions of the Telecommunications Act of 1996 that required local zoning authorities to act on applications to site mobile phone towers and antennas "within a reasonable period of time after the request is duly filed." 47 U.S.C. § 332(c)(7)(B) (ii). Responding to concerns that local governments were delaying such decisions, the Federal Communications Commission (FCC) issued a declaratory ruling establishing a rebuttable presumption of 90 days as reasonable for applications for new antennae on existing towers and 150 days for other applications. Several state and local governments challenged the FCC's action. Pointing to a savings clause that preserved "State or local" authority "over decisions regarding the placement, construction, and modification of personal wireless service facilities," *id.* § 332(c)(7)(A), these parties argued that the FCC lacked authority to issue its declaratory order — and did not deserve deference in saying that it did.

The Supreme Court found *Chevron* deference appropriate. Writing for the majority (also including Justices Thomas, Ginsburg, Sotomayer, and Kagan), Justice Scalia defended *Chevron* as "a stable background rule against which Congress can legislate," because Congress "knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *Chevron* fortifies this mode of legislation, giving agencies and regulated entities certainty in understanding what Congress has done.

* Professor of Law, University of Utah, S.J. Quinney College of Law

**Professor of Law, University of Utah, S.J. Quinney College of Law

With this starting point, the Court explained that *Chevron* applies to agencies' interpretations of their own jurisdiction, refusing to distinguish between agency interpretations of jurisdictional provisions and nonjurisdictional provisions. The premise of this dichotomy is "false" because the distinction between "'jurisdictional' and 'nonjurisdictional' interpretations is a 'mirage': 'No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority.'" Moreover, the Court reasoned, basing whether *Chevron* applies on the "bogey-man" of a jurisdiction-nonjurisdiction division would be "dangerous," creating an incentive for parties to "play the 'jurisdictional' card in every case."

In rejecting this dichotomy, the Court also dismissed any analogy between judicial and administrative jurisdiction for deference purposes. This analogy is a "misconception"; only in the judicial context is there "a meaningful line": Congress has "the power (within limits) to tell the courts what classes of cases they decide, but not to prescribe or superintend how they decide those cases . . ." But for agencies, the jurisdiction-nonjurisdiction line makes no sense: "Both their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*."

The Court also reasoned that attempts to classify agencies' interpretation of statutes into jurisdictional and nonjurisdictional categories would only needlessly complicate matters, when statutory interpretation already can be a tricky business. Finally, it noted that drawing a distinction between jurisdictional and nonjurisdictional statutes would "render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*."

Writing only for himself, Justice Breyer concurred in part and concurred in the judgment. Citing *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), he emphasized that there are three possible levels of deference to agency interpretations: 1) no deference where the statute is clear, 2) *Chevron* deference where "Congress would have intended the agency to resolve" an ambiguity, and 3) *Skidmore* deference where an "agency's special expertise" gives its interpretation the "power to persuade, if lacking power to control" (quoting *Skidmore*). Determining which level of deference applies depends on how the statute reads, always a contextual question. In this regard, "the statute's text, its context, the structure of the statutory scheme, and canons of textual construction are relevant." Statutory purposes can also be relevant. Applying that structure, Justice Breyer reasoned that the term "reasonable period" in the statute "leaves a gap for the FCC to fill,"

and that the FCC reasonably interpreted the statute in filling it.

Writing also for Justices Kennedy and Alito, Chief Justice Roberts framed his dissent with three pillars: 1) “the danger posed by the growing power of the administrative state,” 2) the fact that *Chevron* “is a powerful weapon in an agency’s regulatory arsenal,” and 3) *Marbury v. Madison*’s dictate that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” With these principles in mind, the dissent, like Justice Breyer’s concurrence, emphasized the mandate of *Skidmore* and *Mead* that courts should not defer to agency interpretations until they have determined that Congress gave the agency interpretative authority — and that the agency in fact used that authority with the force of law. Thus, Chief Justice Roberts wrote, “we do not defer to an agency’s interpretation of an ambiguous provision unless Congress wants us to, and whether Congress wants us to is a question that courts, not agencies, must decide. Simply put, that question is ‘beyond the *Chevron* pale’” (quoting *Mead*).

The Court also discussed agency deference this quarter in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (June 24, 2013). The deference issue in *Nassar* was whether the Court should give weight under *Skidmore* to an Equal Employment Opportunity Commission (EEOC) manual’s interpretation of the causation element of retaliation claims under Title VII of the Civil Rights Act of 1964. A 5–4 majority of the Court said no, for two reasons: 1) the EEOC’s interpretation relied on judicial constructions of similar discrimination provisions, but those “[o]ther discrimination statutes do not have the structure of statutory subsections that control the outcome at issue here,” and 2) the EEOC’s interpretation was “circular,” since it asserts that “the lessened causation standard is necessary in order to prevent ‘proven retaliation’ from ‘go[ing] unpunished.’” By contrast, the dissent, authored by Justice Ginsburg and joined by Justices Breyer, Kagan, and Sotomayor, would have afforded *Skidmore* deference to the EEOC’s construction. The EEOC, the dissent noted, had long held its view: from “the inception of § 2000e-2(m).”

The Court likewise declined to give *Skidmore* deference to an agency interpretation in *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (June 13, 2013). *Myriad* involved patent claims for both natural DNA discoveries and “complementary DNA” (cDNA) segments used in genetic testing for breast and ovarian cancer. The Court ruled that *Myriad* could not receive patents for “naturally occurring” DNA segments but that “cDNA is patent eligible because it is not naturally occurring.” Much of the Court’s decision focused on Section 101 of the Patent Act and the longstanding rule against patents on “naturally occurring things.” From an administrative law perspective,

however, one argument *Myriad* advanced in favor of allowing the patenting of naturally occurring DNA was the Patent and Trademark Office’s (PTO’s) “past practice of awarding gene patents” — a practice, *Myriad* said, entitled the PTO to deference. The Court unanimously rejected this suggestion. The Court distinguished *Myriad*’s request for deference from other cases where Congress subsequently “endorsed the views of the PTO in . . . legislation,” something it had not done here, also noting that the government’s assumption of contrary litigation positions undermined any claim to deference for prior agency practice. In short, an agency’s subsequent litigation position can destroy any claim for judicial deference for its prior practice.

Statutory Interpretation

The Court decided a number of cases involving statutory interpretation this quarter. Although the Court employed traditional tools of statutory construction in each of these cases, it also emphasized statutory design and structure in two of them. Two of the cases divided the Court in 5–4 decisions. The Court found the provisions in two other cases more straightforward, with unanimous results.

University of Texas Southwestern Medical Center v. Nassar — discussed above — centered on the level of causation required to succeed on a claim of discriminatory retaliation in the workplace. Writing for the majority, Justice Kennedy found that retaliation claims under Title VII of the Civil Rights Act of 1964 require “but for” causation. This standard of causation stands in contrast to the causation requirement for status-based discrimination claims, which require a showing only that the plaintiff’s race, color, religion, sex, or national origin was a “motivating factor” in the discrimination. To reach this conclusion, the Court relied on the statute’s text; an examination of how Congress amended it over time, including in response to a prior Supreme Court decision; and “the design and structure of the statute as a whole.” The dissent, penned by Justice Ginsburg, took umbrage with the majority’s reading, including its “ascrib[ing] to Congress the unlikely purpose of separating retaliation claims from discrimination claims, thereby undermining the Legislature’s effort to fortify” Title VII protections. “Until today,” Justice Ginsburg noted, “the Court has been clear-eyed on just what retaliation is: a manifestation of status-based discrimination.” *Id.*

Maracich v. Spears, 133 S. Ct. 2191 (June 17, 2013) also sharply divided the Court. *Maracich* asked the Court to decide whether an exception in the Driver’s Privacy Protection Act (DPPA) allows lawyers to obtain access to personal identification information from state departments of motor vehicles (DMVs) in order to locate possible members of a putative class action. The provision in question

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stated that such information could be obtained “[f]or use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State or local court . . . , including . . . in anticipation of litigation” 18 U.S.C. § 2721(b)(4). Drawing on this text, the “statutory framework and design,” and the canon of construction *noscitur a sociis*, the majority of five Justices ruled that the term “in connection with” must be limited. Writing for the Court, Justice Kennedy explained that the limiting principle was the distinction between “an attorney’s commercial solicitation of clients and his duties as an officer of the court.” The statute commanded this distinction, in part, the Court reasoned, because it contained a separate exception for obtaining personal information for solicitations. Because the activity in question was a solicitation of potential clients, the DPPA did not allow the attorneys to obtain the personal information they had requested: “Unlike an attorney’s conduct performed on behalf of his client or the court, solicitation by a lawyer of remunerative employment is a business transaction.” The dissent, written by Justice Ginsburg and joined by Justices Kagan, Scalia, and Sotomayor, found the lawyers’ request “squarely within the metes and bounds” of the statutory exception. The distinction invoked by the majority, the dissent posited, was meaningless, because lawyers often play such roles simultaneously: “[T]he letters served both as an investigative tool and as an invitation to car purchasers to join the suit. How is the factfinder to determine which purpose was predominant?”

In *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (May 13, 2013), the Court unanimously put to rest a longstanding disagreement among lower courts over “whether ‘defalcation’ [embezzlement] includes a scienter requirement and, if so, what kind of scienter it requires.” Finding both historical and modern dictionaries unhelpful on the question, the Court, in an opinion by Justice Breyer, turned to its own precedent on fraud and numerous canons of construction, including *noscitur a sociis*, *ejusdem generis*, the rule against statutory surplusage, and “the long-standing [bankruptcy] principle that ‘exceptions to discharge should be confined to those plainly expressed.’” Having walked through these canons’ application to the provision at issue, the Court held that “defalcation” includes “a culpable state of mind,” one involving “knowledge of, or gross or recklessness in respect to, the improper nature of the relevant fiduciary behavior.”

In *Sebelius v. Cloer*, 133 S. Ct. 1886 (May 20, 2013), a unanimous Court relied on the “unambiguous” statutory text to construe the attorney fees provision of the National Childhood Vaccine Injury Act. The question was whether an untimely filed suit could nevertheless satisfy the requirements for attorney fees. In an opinion by Justice Sotomayor, the Court noted that when a claimant prevails under the Act, attorney fees are automatic — but they are also available

in some cases even when a claimant does not prevail. Given this, “so long as such a petition was brought in good faith and with a reasonable basis, it is eligible for an award of attorney’s fees, even if it is ultimately unsuccessful.” Justices Scalia and Thomas did not join in the portion of the Court’s opinion that looked to the statute’s “goals” to bolster the Court’s construction of the statute.

Preemption

The Court decided an important express preemption case this quarter, *American Trucking Ass’n, Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (June 13, 2013). *City of Los Angeles* presented the question of whether a provision of the Federal Aviation Administration Authorization Act of 1994 (FAAAA) precluded the Port of Los Angeles from compelling short-haul trucking companies to display certain language on their vehicles and to submit off-street parking plans for trucks not in service. Section 14501(c)(1) of the statute prevents state and local governments from “enact[ing] or enforc[ing] a law, regulation or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.” 49 U.S.C. § 14501(c)(1). The parties agreed that the Port’s requirements affected a price, route, or service covered by the statute, so the only question was whether those requirements had the force of the law.

The Court had no difficulty answering yes. In a unanimous decision authored by Justice Kagan, the Court said the question turned on whether the Port was acting as a regular participant in the market, entering into voluntarily negotiated contracts with willing parties, or, instead, if it was using its official power to command a certain result. The fact that the Port’s placard and parking plan requirements were mandatory and carried with them potential criminal sanctions resolved the matter. Even though the requirements were written into contracts that short-haul truckers signed, “the contract here functions as part and parcel of a governmental program wielding coercive power over private parties, backed by the threat of criminal punishment.” Nor was the Court persuaded that the Port could escape the statute’s preemptive effect because it adopted the requirements in response to environmental and community opposition to a proposed expansion of the Port — or that the requirements technically applied only to terminal operators who in turn entered into contracts with truckers, not to the truckers themselves. On the first point, “the Port’s intentions are not what matters.” It is the action that controls — the wielding of “the hammer of criminal law,” something “only a government” can do. On the second, the Court noted that it “often” has “rejected efforts by States to avoid preemption by shifting their regulatory focus from one company to another in the same supply chain.” The same logic applied

here: “Slice it or dice it any which way, the Port . . . acted with the ‘force of law.’”

Justice Thomas joined the Court’s opinion, but wrote separately to express concern that the federal statute in question might exceed Congress’s power to regulate interstate commerce to the extent the statute governs intrastate activities outside the Port itself.

Standing

The Supreme Court issued two opinions on standing this quarter. Although standing ordinarily arises in the context of whether a plaintiff may bring suit, both cases presented issues of appellate standing. In *United States v. Windsor*, 133 S. Ct. 2675 (June 26, 2013), the Court held that the United States had standing to appeal a decision finding unconstitutional § 3 of the Defense of Marriage Act (DOMA), 110 Stat. 2419, even though the government declined to defend the statute’s constitutionality.

Section 3 of DOMA excludes a same-sex partner from the definition of “spouse,” as that term is used in federal statutes. Edith Windsor, who had been lawfully married to Thea Spyer under New York law, filed suit in federal district court challenging this provision’s constitutionality after the IRS denied her request for an estate tax refund. The Department of Justice declined to defend the constitutionality of DOMA. The district court granted summary judgment for Windsor, holding DOMA unconstitutional and ordering the United States to pay the refund. *See* 833 F. Supp. 2d 394 (S.D.N.Y. 2012). Although it continued to refuse to defend DOMA, the United States appealed, and the Second Circuit affirmed. *See* 699 F.3d 169 (2d Cir. 2012).

In a 5–4 decision affirming the Second Circuit, the Supreme Court concluded that the United States’ decision not to defend DOMA did not foreclose jurisdiction for lack of Article III standing. After reciting the familiar injury-in-fact test, the Court, in an opinion by Justice Kennedy, explained that the United States had standing because “[t]he judgment in question orders the United States to pay Windsor the refund she seeks” and an “order directing the Treasury to pay money is a real and immediate economic injury.”

The Court also refused to dismiss the appeal on prudential grounds. It explained that, even when Article III is satisfied, “prudential considerations demand that the Court insist upon that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” The Court acknowledged “the Executive’s agreement with Windsor’s legal argument raises the risk that instead of a real, earnest and vital controversy, the Court faces a friendly, non-adversary, proceeding.” But the Court deemed this concern insufficient to demand dismissal of the appeal

because an intervenor — the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives — had “present[ed] a substantial argument for the constitutionality of § 3 of DOMA.” Moreover, the Court explained, prudence counseled against dismissing the appeal because “[r]ights and privileges of hundreds of thousands of persons would be adversely affected” if immediate judicial review were withheld.

Justice Scalia dissented, joined by the Chief Justice and Justice Thomas. In the dissent’s view, federal courts “cannot pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding; absent a real, earnest and vital controversy between individuals, we have neither any work to do nor any power to do it.”

In a separate dissent, Justice Alito argued that the BLAG itself had standing to seek review of the district court order. In his view, the House of Representatives had suffered an injury when its legislation had been struck down; it had authorized BLAG to represent its interests.

In the other standing case, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (June 26, 2013), the Court ruled that proponents of Proposition 8 (Prop 8) — a citizen ballot initiative amending the California Constitution to prohibit same-sex marriage — did not have standing to appeal a district court decision finding Prop 8 unconstitutional.

Perry began when several same-sex couples wishing to marry brought suit challenging Proposition 8’s constitutionality. The suit named as defendants California’s Governor, attorney general, and other state officials. When those officials refused to defend the law, the proponents of Prop 8 — those who sponsored the ballot initiative — intervened to defend its constitutionality. The district court ruled Prop 8 unconstitutional, *see Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), and the proponents appealed. Uncertain of the proponents’ standing to appeal, the Ninth Circuit certified to the California Supreme Court the question whether the official proponents of an initiative have the authority under California law to defend the initiative’s constitutionality. *See Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011). Based on the California Supreme Court’s affirmative answer, *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011), the Ninth Circuit concluded that the proponents had standing. *See Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

The Supreme Court reversed. In a 5–4 opinion by Chief Justice Roberts, the Court explained that, for a litigant to have standing to appeal, he must seek relief for injuries that affect him in a “personal and individual way”; proponents did not meet that requirement because the district court “had not ordered them to do or refrain from doing anything.” Instead, the Court held, the proponents’ “only interest in having the district court order reversed was to

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Supreme Court News

vindicate the constitutional validity of a generally applicable California law”: a generalized grievance “insufficient to confer standing.”

The Court also rejected the proponents’ argument that they had a sufficient interest to support standing based on the California Supreme Court’s opinion. Although recognizing that a state may “designate agents to represent it in federal court,” per the Court, the California Supreme Court had “never described petitioners as agents of the people, or of anyone else.” The Court also found that the proponents did not have the characteristics of an agent. According to the Court, “[a]n essential element of agency is the principal’s right to control the agent’s actions. Yet petitioners answer to no one,” nor are they elected or subject to removal. Similarly, the proponents did not have a fiduciary obligation to California — another essential aspect of agency — because they had “taken no oath of office.”

Justice Kennedy dissented, joined by Justices Thomas, Alito, and Sotomayor. In the dissent’s view, “the [California] Supreme Court’s definition of proponents’ powers is binding on this Court. And that definition is fully sufficient to establish the standing and adversity that are requisites for justiciability under Article III of the United States Constitution.” In response to the majority’s argument that the intervenors lacked standing because they were not elected nor had a fiduciary duty to the state, Justice Kennedy argued that the intervenors’ independence was an “essential qualification[] to defend the initiative system,” whose purpose is “to establish a lawmaking process that does not depend upon state officials.”

Ripeness

The Supreme Court addressed ripeness this quarter in *Horne v. Department of Agriculture*, 133 S. Ct. 2053 (2013). In *Horne*, the Court held that petitioners’ takings-based defense in an administrative enforcement proceeding was ripe. Under the Agricultural Marketing Agreement Act (AMAA), ch. 296, 50 Stat. 246, and the California Raisin Marketing Order implementing that Act, 7 C.F.R. pt. 989, raisin handlers must allocate a portion of their raisins for a reserve pool to allow the government to maintain a stable raisin price. They do not receive market compensation for those raisins. Failure to allocate the raisins is punishable by civil penalties imposed through administrative enforcement proceedings in the Department of Agriculture. See 7 U.S.C. § 608c(14).

In *Horne*, several raisin handlers had refused to allocate raisins for the reserve pool. The Department imposed penalties in a subsequent administrative enforcement proceeding, rejecting the handlers’ argument that the requirement to allocate a portion of their raisins violated the Fifth Amendment’s prohibition on the taking of property without just compensation. The handlers then filed suit in federal district court seeking review of the enforcement order. The district court granted summary judgment for the Department, and the Ninth Circuit affirmed. According to the Ninth Circuit, under the Tucker Act, 28 U.S.C. § 1491(a), “a takings claim against the federal government must be brought [in the Court of Federal Claims] in the first instance.” 673 F.3d at 1079 (9th Cir. 2012).

In an opinion written by Justice Thomas, the Supreme Court reversed 9–0. It opined that, although under the Tucker Act “a claim for just compensation under the Takings Clause usually must be brought to the Court of Federal Claims in the first instance,” Congress created an exception to that jurisdiction for handlers’ takings claims in the AMAA. That is because the AMAA establishes a “comprehensive remedial scheme” under which raisin handlers may challenge the “content, applicability, and enforcement of marketing orders” in administrative proceedings. Per the Court, this comprehensive scheme “affords handlers a ready avenue to bring takings claims against the [government],” and “withdraws Tucker Act jurisdiction” over handlers’ takings claims. Because the handlers could not bring their claim in the Court of Claims, the Court concluded, their claim presented to the Ninth Circuit was “not premature.”

The Court also rejected the argument that the AMAA did not authorize handlers to raise a takings defense in an administrative enforcement hearing. It reasoned that, under the AMAA, handlers must be given “notice and an opportunity for an agency hearing on the record,” and the text of that provision “does not bar handlers from raising constitutional defenses to the USDA’s enforcement action.”

By contrast, the Court did find an argument unripe in *American Trucking Ass’n, Inc. v. City of Los Angeles*. As noted above, that case presented the question whether the FAAAA preempted requirements adopted by the Port of Los Angeles. One of challenged requirements dealt with “financial-capacity and truck-maintenance.” The Court found this challenge premature because the Port had not enforced these provisions yet. ○

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News from the Circuits

By Bill Jordan*

D.C. Circuit clarifies the role of reliance in *Paralyzed Veterans/Alaska Professional Hunters* analysis

Section 553(b) of the APA requires agencies to use the notice-and-comment process to issue rules, and section 551(4) defines the term “rule” so broadly that it encompasses practically anything an agency says about its statutes, rules, or policies. Section 553(b)(3)(A) provides an exception to notice and comment for “interpretative rules.” Thus, an agency may informally (in a letter or manual, for example) issue an interpretation of a statute or regulation. This allows agencies to explain (and regulated entities to understand) the meaning of regulatory or statutory language in a timely and efficient manner.

But what if an agency issues such an informal interpretation, later decides the interpretation is incorrect, and supersedes the original informal interpretation with a new one? Must the agency use notice and comment to issue the later interpretation? The D.C. Circuit in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) held that an agency must use notice and comment to change an “authoritative interpretation.” In *Alaska Professional Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999), the court reached the same conclusion where the agency has issued “a definitive interpretation, and later significantly revises that interpretation.” There, the court emphasized that the affected industry had relied heavily upon the agency’s informal position for several decades.

In *MetWest, Inc. v. Secretary of Labor*, 560 F.3d 506 (D.C. Cir. 2009), the D.C. Circuit rejected an argument for notice and comment where the agency had never previously issued an authoritative interpretation. In so doing, the court explained that, “[a] fundamental rationale of *Alaska Professional Hunters* was the affected parties’ substantial and justifiable reliance on a well-established agency interpretation.” This seemed to provide a theoretical basis for a doctrine that otherwise appeared to violate the APA provision exempting interpretive statements from notice and comment, and that therefore seemed to violate *Vermont Yankee*.

The court’s latest decision in this area, *Mortgage Bankers Ass’n v. Harris*, —F.3d—, 2013 WL 3305719 (D.C. Cir. 2013), clarified that the *Paralyzed Veterans/Alaska Professional Hunters* doctrine does not require a showing of reliance in order to trigger notice and comment. The doctrine “contains just two elements: definitive interpretations (‘definitiveness’) and a significant change (‘significant revision’).” On the facts of *Alaska Professional Hunters*, decades of

reliance had demonstrated the definitiveness of the agency’s initial informal position, but that did not render reliance “an independent third element.” By contrast, in *MetWest* the agency had never issued a definitive interpretation, so there was no basis for reliance.

In a footnote, the court asserted that the “doctrine’s operative assumption—the belief that a definitive interpretation is so closely intertwined with the regulation that a significant change to the former constitutes a repeal or amendment of the latter—is established law in this Circuit, see, e.g., *Environmental Integrity Project v. EPA*, 425 F.3d 992, 997–98 (D.C. Cir. 2005).” Despite the court’s reference to “established law,” this asserted “operative assumption” does not appear in the cited case. It seems to be a new articulation of principle that would support the court’s position that notice and comment may be required without regard to any reliance by regulated entities.

The citation raises some interesting questions. The previous “definitive interpretation” in *Environmental Integrity Project* had been embodied in two formal adjudications, which were by their nature definitive and were not mere informal statements. The net result of these decisions appears to be, once an agency has issued a definitive interpretation through an informal statement or a formal adjudication, the agency may not change that interpretation without going through notice and comment or addressing the issue in a later formal adjudication. This means that an agency may not warn regulated entities of the likelihood that it might adopt a new interpretation in a later formal adjudication. The decision may even raise questions about whether an agency may, in a later formal adjudication, adopt an interpretation different from that taken in a previous formal adjudication. Black letter law authorizes such changes without notice and comment if agencies provide adequate explanations, but that principle is in tension with the *Mortgage Bankers* opinion.

4th Circuit narrowly reads National Labor Relations Board (NLRB) rulemaking authority—D.C. Circuit concurrence agrees

In 1973, the D.C. Circuit in *National Petroleum Refiners Ass’n v. FTC*, 482 F.2d 682 (D.C. Cir. 1973), upheld a Federal Trade Commission rule requiring the posting of octane ratings on service station gas pumps. The court found statutory authority for this substantive rule in language providing that the “Commission shall also have the power . . . (g) . . . to make rules and regulations for the purpose of carrying out the provisions” of the Act. In so doing, the court noted that the “need to interpret liberally broad grants of rule-making authority . . . has been emphasized time and again by the Supreme Court.”

*Associate Dean of Academic Affairs, University of Akron Law School. (See also *Ripeness and Standing — Maintain the Distinction*, this issue.)

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Despite seemingly broad language granting rulemaking authority, the Fourth Circuit in *Chamber of Commerce of the United States v. NLRB*,—E.3d—, 2013 WL 2678592 (4th Cir. 2013) struck down a rule in which the NLRB had required employers to post notices informing employees of their rights under the National Labor Relations Act (NLRA). The Board had relied on a statutory provision granting it “authority from time to time to make, amend, and rescind, . . . such rules and regulations as may be necessary to carry out the provisions” of the NLRA. The Board reasoned that the rule was necessary to carry out the NLRA because “American workers are largely ignorant of their rights under the NLRA, and this ignorance stands as an obstacle to the effective exercise of such rights.” Only once workers know their rights are they in a position to seek representation in elections or to complain to the Board about unfair labor practices.

Although the term “necessary” is undoubtedly ambiguous, the court refused to apply *Chevron* deference to the NLRB’s broad interpretation. Looking to the “the specific context in which that language is used, and the broader context of the statute as a whole,” the court found “no provision that a notice-posting rule is ‘necessary’ to carry out.” The Board is a “reactive” agency, responding to petitions for elections or to complaints of unfair labor practices. Although such a notice might be necessary to generate such petitions or complaints, the notice is not necessary for the agency to perform its specific, narrowly construed, reactive functions. As the court put it, employee rights under the Act are not “functions or provisions to be ‘carried out.’” The court also relied upon the legislative history of the NLRA and contrasted the Act with other federal labor statutes that specifically grant authority to require posting of notices.

The D.C. Circuit in *National Ass’n of Manufacturers v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013), reached the same outcome through a somewhat different analysis. For the court, Judge Randolph found that the rule violated certain specific provisions of the NLRA, but did not decide whether the agency had the authority to issue the notice-posting rule. His colleagues, however, agreed that the rule was not “necessary” for essentially the same reasons as those given by the Fourth Circuit in *Chamber of Commerce*.

It seems likely that these narrow readings of a seemingly broad grant of rulemaking authority are limited to this statute. But the spirit of limiting federal authority is certainly consistent with the tenor of our times.

D.C. Circuit emphasizes standing analysis in ripeness discussion

See *Ripeness and Standing—Maintain the Distinction*, this issue.

D.C. Circuit rejects arbitrary and capricious claim—good example of breadth of agency discretion

In *National Shooting Sports Foundation, Inc. v. Jones*, 716 F.3d 200 (D.C. Cir. 2013), the D.C. Circuit rejected an arbitrary-and-capricious challenge to demand letters issued by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). In the process, the court provided an instructive discussion of the breadth of agency discretion in framing the scope of an agency’s action and of the extent of an agency’s responsibility to address potential alternatives to its actions.

Pursuant to statutory authority (upheld against various challenges), ATF issued demand letters requiring firearms retailers in California, Arizona, New Mexico, and Texas to report “two or more sales of a specific type of firearm to the same buyer within five business days,” identifying the retailer, the customer, and the firearm. The purpose of these demand letters was to provide information that could help stem a growing flow of firearms from those four states to Mexico, where such weapons were increasingly used in the drug trade and threatened the public safety.

The National Shooting Sports Foundation (NSSF) challenged the ATF action as arbitrary and capricious because ATF had blanketed all retailers in the states in question, rather than considering “actual geographic proximity to the border with Mexico, evidence of established patterns of illegal trafficking activities, and evidence of actual sales of firearms by identified retail sellers under circumstances that ATF considers indicative of illegal firearms trafficking.” The NSSF asserted that the vast majority of retailers in those states had never sold a firearm that had been recovered in Mexico. It argued that the 1) ATF had improperly gone beyond what was necessary to address the problem, and 2) failed to explain why it had rejected the approach of targeting retailers based upon geographic proximity and patterns of illegal activity.

The court first upheld the scope of the agency’s directive, noting that an “agency has ‘wide discretion’ in making line-drawing decisions and [t]he relevant question is whether the agency’s numbers are within a zone of reasonableness, not whether its numbers are precisely right.” The question is not whether the agency has identified “the optimal threshold with pinpoint precision,” but whether the agency has identified “the standard and explain[ed] its relationship to the underlying regulatory concerns.” To succeed, a challenger must show that the “lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem.” Here, the states in question were the top four sources of firearms recovered in Mexico, enough to sustain the action.

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Ripeness and Standing— Maintain the Distinction

By Bill Jordan★

Prompted by a recent D.C. Circuit decision, this essay urges courts to distinguish more clearly between ripeness and standing in reviewing agency actions. Easy to state, but difficult to implement, since the doctrines of ripeness and standing seem similar, but they serve different purposes. Ripeness ensures that a matter is suitable for judicial consideration, particularly that the facts have developed to the point where judicial involvement is appropriate, and there is enough potential for harm to the party challenging agency action that a court should consider the claims. In essence, ripeness addresses the question of whether review is premature. The finality of an agency's action is only one aspect of that question. But even a final action may be unripe.

By contrast, standing addresses the question of whether a challenger is a proper party to bring the action. The challenger must allege that it has suffered or will suffer “injury-in-fact” at the hands of the agency and that a judicial order could redress the alleged injury. This is a constitutional threshold for review because Article III requires a “case or controversy.” The focus is on the allegation of injury, not on whether the action is premature. Although ripeness doctrine is “drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction,” *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57, n.18 (1993), the emphasis is on prematurity.

In assessing ripeness, a court must “evaluate the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration.” *Abbot Labs v. Gardner*,

387 U.S. 136 (1967). The fitness test involves (1) whether the issue is purely legal and (2) whether agency action is “final.” The hardship test examines whether “the impact of the administrative action could be said to be felt immediately by those subject to it in conducting their day-to-day affairs.” *Toilet Goods Ass’n v. Gardner*, 387 U.S. 158 (1967). Typically, a final rule is ripe for review, but *Toilet Goods* denied ripeness as to a final rule because “judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific application of th[e] regulation than could be the case in the framework of the generalized challenge” to the rule.

The D.C. Circuit could easily have resolved *Chlorine Institute, Inc. v. Federal Railroad Administration*, 2013 WL 2477012 (D.C. Cir. 2013), on these principles without regard to the language of standing doctrine. In *Chlorine Institute*, the Federal Railroad Administration had adopted a final rule requiring that “positive train control” (PTC) systems be installed on any train tracks “used for passenger service or for transporting ‘poison- or toxic-by-inhalation’ hazardous [TIH] material” such as chlorine. The final rule also (simplifying somewhat) provided for an exception to the PTC installation requirement where a railroad shows that stretches of track will no longer carry the triggering traffic as of the implementation date in 2015.

Representing companies that ship chlorine, the Chlorine Institute challenged certain aspects of the rule that it believed made it too easy for railroads to exempt portions of their trackage from the requirement to install positive train control systems. Expecting that railroads would exempt much of their trackage to avoid the expense of installing PTC systems, the Institute

asserted that the effect of the final rule was “to injure chlorine and other TIH shippers by limiting or eliminating their ability to ship their products by rail.”

The D.C. Circuit held that the challenge was not ripe for review. It began by noting that,

ripeness doctrine is “designed ‘to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.’” *Nat’l. Park Hospitality Ass’n v. Dep’t. of Interior*, 538 U.S. 803, 807–08, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003) (quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 148–149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)).

The court could simply have relied upon this language and the *Abbott Laboratories* test to reach its ultimate conclusion. At that point, no one knew how the routings would change as a result of the rule or whether they would affect any particular members of the industry. Industry members might all still have access to shipping by rail. Thus, the situation was not yet fit for judicial involvement. As in *Toilet Goods*, further developments would clarify the impact of the rule, including whether anyone would suffer the alleged industry. The point of ripeness in this regard is that review is premature, not because the party cannot yet show injury-in-fact, but because the facts have not gelled sufficiently for judicial involvement. As the deadline approaches and

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★ Associate Dean of Academic Affairs, University of Akron Law School. (See also *News from the Circuits*, this issue).

the impacts of the rule become clear, “such an injury may indeed emerge and the Institute’s challenge may thereby ripen.” But it was not yet ripe.

By contrast, the court’s approach essentially requires a constitutional judgment about standing, when a non-constitutional analysis will do the job perfectly well.

The D.C. Circuit chose to frame the discussion using the language of standing doctrine, noting that the Institute had failed to show that industry faced “an imminent or certainly impending injury.” The court explained that, “[r]ipeness, while often spoken of as a justiciability doctrine distinct from standing, in fact shares the constitutional requirement of standing that an injury in fact be certainly impending.” Indeed, the court directly applied the language of standing to the determination of ripeness:

To establish such an injury, the Institute must show that “at least one of its members ‘is under threat of suffering ‘injury in fact’ that is concrete and particularized [and] the threat must be actual and imminent, not conjectural or hypothetical.”

Applying those principles to the facts, the court characterized the impact on the chlorine industry as “at most — speculative.”

The court’s conclusion is correct and supports a determination that the challenge was not yet ripe, but the court’s strong emphasis on the injury-related language of standing threatens to blur still further the boundaries between and purposes of these already complex doctrines. Although the cases cited by the court discuss standing and Article III constraints in the context of ripeness, the *Chlorine Institute* decision

appears to emphasize standing language more than other courts have done in the determining ripeness (although this essay does not reflect a comprehensive review of all such decisions).

The purpose of the fitness and hardship prongs of ripeness is to ensure that the facts have evolved to the point that judicial involvement is appropriate and that the situation matters enough to the parties to call upon judicial resources. Even with the Article III “case or controversy” patina, it may be helpful to conceive of ripeness doctrine as essentially assuming standing — or, perhaps more precisely, relegating standing to separate analysis. The *Chlorine Institute* facts are instructive. There is no doubt that the allegation — denial of rail services to some in the chlorine industry — asserts injury in fact. The problem is not whether that would constitute an injury. The problem is whether the facts have developed to the point where it is possible to determine the injury will occur — a question of ripeness. And that question will definitely be answered at some point. Ripeness doctrine dictates that we should wait for that answer.

The situation contrasts with *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), for example, in which the allegation of harm was extremely tenuous. The assertion that those particular individuals would be harmed could fairly be characterized as rank speculation. On the facts as alleged, no amount of waiting could answer the question of whether the complaining individuals would truly be harmed. This is not true of *Chlorine Institute*. As rail carriers sought exemptions, it would become clear whether any chlorine shippers would be harmed by the rule.

The difference is important. Where we know that the speculation will eventually be resolved, judicial involvement is premature. We can wait until the facts evolve to the point where we can determine fitness and hardship. There is no need to invoke and apply the language of a distinct constitutional doctrine — a very messy one at that — when we can leave the decision on the windowsill and wait until it ripens.

Although Judge Kavanaugh joined the court’s opinion, he did not use the language of standing. Instead, he noted that the applicable statute requires “the Surface Transportation Board [(STB) to] ensure that chlorine shippers continue to receive common-carrier transportation on railroads when such transportation is reasonably requested.” He thus emphasized the essential ripeness point, that much or all of this dispute will go away once the STB grants chlorine industry requests to ensure rail transportation of its products. Thus, there was no need to grapple with the contentious and highly charged constitutional concept of injury-in-fact. We could just wait and see what happens.

Surely this is the prudent approach to the distinction between ripeness and standing. At least where it is certain that we will eventually know with certainty that agency action will or will not cause harm, we should eschew the language of standing and rely upon ripeness doctrine to withhold review until the likelihood of the alleged harm is sufficiently definite. This would allow the courts to simplify discussions of the two separate doctrines and focus attention on the distinct concerns: prematurity in the case of ripeness, and the complex issues of injury-in-fact in the case of standing. ○

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The court then rejected the argument that ATF had failed to explain its rejection of the proffered alternative. While an agency must consider and explain its rejection of “reasonably obvious alternative[s],” the challenger had failed even to suggest this approach in its comments, and the record did not fairly suggest this alternative. It is difficult to argue that an alternative was obvious “when the ‘alternative was not so ‘obvious’ as to occur’” to the party now challenging the agency. NSSF relied on *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983), which had overturned the National Highway Transportation Safety Administration’s elimination of the passive restraint requirement because the agency had failed to consider the alternative of requiring airbags in place of ineffective seat belts. But, in *State Farm*, the agency itself had previously acknowledged the effectiveness of the airbag alternative. In *State Farm*, as in decisions by many courts, the Supreme Court insisted that the agency explain why it had abandoned a policy rather than taking “a more limited action.”

5th Circuit denies *Seminole Rock* deference to agency interpretation of manual interpreting regulation

Normally, agency interpretations of their own regulations are entitled to so-called *Seminole Rock* deference, under which an agency’s interpretation of its own regulation “becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.” Such interpretations of regulations often appear in manuals designed to guide implementation of the regulations. But what if the dispute involves an interpretation of such a manual, as opposed to an interpretation of a regulation—a “third level of interpretation,” as the Fifth Circuit put it in *Elgin Nursing & Rehabilitation Center v. U.S. Department of Health & Human Services*, 2013 WL 2149873 (5th Cir. 2013).

Pursuant to a statutory requirement to regulate nursing facilities, the agency issued a regulation requiring that food be served “under sanitary conditions.” This was, in effect, the first level of interpretation—interpreting the statute.

To provide guidance in the implementation of this regulation, the agency issued the State Operations Manual (SOM), which provided that, “[u]npasteurized eggs when cooked to order in response to resident request and to be eaten promptly after cooking—145 degrees F for 15 seconds—until the white is completely set and the yolk is congealed.” This was the second level of interpretation—interpretation of the regulation.

Relying upon this manual, a Texas inspector charged the Elgin facility with a violation when he saw “egg yolk ‘smear[ed] around the plate.’” Elgin appealed this charge through the various levels, losing at every turn. As

characterized by the court, the agency appeared “to interpret the SOM as imposing a conjunctive requirement; that is, the egg must be cooked at 145° F, and the white must be completely congealed and the yolk firm” (emphasis by the court). This was the third level of interpretation—interpretation of the manual that had interpreted the regulation.

The agency argued that its interpretation of the SOM should receive *Seminole Rock* deference, but the Fifth Circuit would have none of it. Reflecting concerns expressed by the Supreme Court in *Christopher v. SmithKline Beecham Corp.*, — U.S. —, 132 S. Ct. 2156, 2168 (2012), the Fifth Circuit rejected the agency’s attempt to achieve what it called “*Seminole Rock* squared.” First, granting deference to such a manual would allow agencies to issue ambiguous regulations, followed by ambiguous interpretations, requiring courts to “interpret not only interpretations but interpretation of interpretations.” Second, this third level of interpretation would be subject to only limited judicial scrutiny, “effectively insulat[ing] agency action” from judicial review. Third, this “would allow agencies to punish ‘wrongdoers’ without first giving fair notice of the wrong to be avoided,” which was particularly troubling in light of the potential monetary penalties and other consequences of a finding of violation.

The third point is particularly important. This interpretive issue arose in the context of an enforcement proceeding, the interpretation having been imposed, seemingly for the first time, in that proceeding. There may be a way that the “*Seminole Rock* squared” issue could arise outside of that context, in which case the notice issue would be less significant. Very likely, however, the other policy concerns would produce the same result.

9th Circuit applies *Brand X* and provides guidance in determining when *Mead* requires *Chevron* deference without notice and comment or formal adjudication

Two continuing mysteries in the application of the increasingly complex *Chevron* doctrine are 1) when a court must defer to an agency interpretation contrary to an earlier decision of the same court, and 2) when *Chevron* requires deference to an agency interpretation where the agency has not reached its decision through notice-and-comment rulemaking or formal adjudication. The principles seem straightforward, but their application is often challenging.

In *Managed Pharmacy Care v. Sibelius*, 716 F.3d 1235 (9th Cir. 2013), the Ninth Circuit considered challenges to California’s effort to reduce payments to health care providers under Medi-Cal, the state’s version of Medicaid. Under the applicable statute, the Department of Health and

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Human Services (HHS) could approve such reductions only if the state's plan would "assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers." Relying on studies addressing a wide range of factors, HHS approved the reductions. However, the various studies "did not review cost data with respect to most of the services subject to the rate reduction."

Health care providers challenged the reductions, relying upon *Orthopaedic Hospital v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), in which the Ninth Circuit had previously struck down similar reductions for failure to consider the costs of providing services. In determining whether the system would "enlist enough providers," the court had said: "It stands to reason that the payments for hospital outpatient services must bear a reasonable relationship to the costs of providing quality care incurred by efficiently and economically operated hospitals."

But the Ninth Circuit's precedent was not enough to carry the day. In *Orthopaedic Hospital*, the Secretary had not been a party, and the court had noted that its review might have differed if it had had the benefit of the Secretary's view of the matter. As the court explained, "Chevron's policy underpinnings emphasize the expertise and familiarity of the federal agency with the subject matter of its mandate and the need for coherent and uniform construction of federal law nationwide." In *Orthopaedic Hospital*, the court had been on its own.

By contrast, the Secretary was a party to *Managed Pharmacy Care*, and the court had the benefit of the Secretary's views, reached in the process of approving the California plan. Since the court did not believe that its previous decision "represented the only reasonable interpretation" of the

statute, that decision was not binding in the face of an agency interpretation qualifying for *Chevron* deference. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs. (Brand X)*, 545 U.S. 967, 982 (2005).

The court then held that the Secretary's interpretation—that the statute did not specifically require consideration of the cost of providing services—qualified for *Chevron* deference. Under *United States v. Mead Corp.*, 533 U.S. 218 (2001), congressional delegation of interpretive authority "may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent." The process for Secretarial review of state Medicaid plans almost qualified for *Chevron* deference by virtue of the extensive procedures available to a state if the Secretary disapproves its Medicaid plan. The challengers seized upon the absence of any such procedures for those opposed to the Secretary's approval of a state Medicaid plan, arguing that this showed that *Chevron* deference was not appropriate.

The court disagreed, noting that procedures were only one source of evidence that "Congress intended deference to an agency decision." The court turned to the various factors articulated in *Barnhart v. Walton*, 535 U.S. 212 (2002): "the interstitial nature of the legal question, the related expertise of the [a]gency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the [a]gency has given the question over a long period of time." Here, the amorphous statutory language, complexity of the program, need for agency expertise, and authorization to engage in rulemaking all supported *Chevron* deference even in the absence of formal procedures. ○

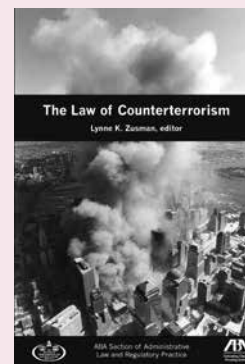
From the ABA Section of Administrative Law and Regulatory Practice The Law of Counterterrorism

Lynne K. Zusman, Editor

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By William Funk*

Forty-Third Annual Administrative Law Symposium: A Happiness Approach to Cost-Benefit Analysis. 62 *Duke L.J.* 1503-1745 (2013). Matthew D. Adler, *Happiness Surveys and Public Policy: What's the Use?*; John Bronsteen, Christopher Buccafusco and Jonathan S. Masur, *Well-Being Analysis vs. Cost-Benefit Analysis*; Carol Graham, *An Economist's Perspective on Well-Being Analysis and Cost-Benefit Analysis*; Jennifer Nou, *Happiness Institutions*; Lisa A. Robinson, *Cost-Benefit Analysis and Well-Being Analysis?*; W. Kip Viscusi, *The Benefits of Mortality Risk Reduction: Happiness Surveys vs. The Value of a Statistical Life*.

Gillian E. Metzger, *Administrative Constitutionalism*, 91 *Tex. L. Rev.* 1897 (2013). Administrative constitutionalism includes not just the application of established constitutional requirements by administrative agencies, but in addition the elaboration of new constitutional understandings by administrative actors and the construction of the administrative state. Attention to administrative constitutionalism is overdue, as it represents a main mechanism by which constitutional meaning is elaborated and implemented today. But central to it is a legitimacy dilemma: What justifies administrative efforts to move the nation beyond recognized constitutional requirements to develop new constitutional understandings, especially if doing so means pushing at the limits of agencies' delegated authority and acting in ways not initiated by political leaders? In this essay, the author argues that administrative constitutionalism in fact represents a particularly legitimate and beneficial form of constitutional development. But the accountability challenges it poses are real, particularly given the frequent difficulty involved in identifying instances of administrative constitutionalism in action. Agencies' constitutional engagement occurs in the context of implementing programs and enforcing statutes, and often agencies do not expressly engage with the constitutional dimensions of their actions—indeed, these dimensions may become apparent only over time. Similarly, courts are rarely open about the constitutional or law-creative aspects of their development of administrative law. Given administrative constitutionalism's attenuated democratic accountability, greater transparency about this method of constitutional development is essential for its legitimacy.

Brian D. Feinstein, *Congressional Control of Administrative Agencies*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304497. Conventional wisdom holds that Congress has limited ex post means of controlling the administrative state. This Article examines the efficacy of oversight hearings—a relatively understudied potential

mechanism for congressional control—to determine the extent to which these hearings can alter agency activity. It then examines the specific conditions under which oversight is likely to occur. Leveraging original data on agency behavior, the Article finds that agency “infractions” that are subject to congressional oversight are approximately 22% less likely to reoccur, compared to similar actions that do not receive oversight attention. It then examines how structural features of the administrative and congressional environments are associated with oversight activity, suggesting that these institutions may be designed with an eye to altering congressional involvement in administration. These findings show that oversight hearings offer a significant means of congressional control over administration under specific circumstances.

David T. Zaring, *Against Being Against the Revolving Door*, 2013 *U. Ill. L. Rev.* 507 (2013). The revolving door between jobs in the public and private sectors supposedly incentivizes government regulators to regulate on behalf of the industry interests for whom they will eventually work. It is a critical building block of the critique of government solutions to modern problems and has, in the last two years, been the subject of one of the Obama Administration's first executive orders, made an appearance in financial regulatory reform legislation, and been blamed for the government's failure to prevent the Gulf oil spill. But the revolving door's explanatory power is remarkably overstated, especially when the subject is law enforcement. Most government officials have plenty of reasons to do a good job, and sometimes a successful stint in the public sector enhances private-sector earning potential, to say nothing of more immediate civil service prospects. The revolving door may also foster citizen participation in government. A study of the careers of a tranche of elite Manhattan prosecutors does not reveal any evidence that those who leave do the bidding of those they regulate while in public service. Moreover, as a legal matter, eliminating the revolving door would raise serious legal and even constitutional questions. The revolving door has become an overused shorthand for—at its worst—a toxic cynicism about government. It is time to deeply qualify the critique.

Peter M. Shane, *The Rule of Law and the Inevitability of Discretion*, 36 *Harv. J.L. & Pub. Pol'y* 21 (2013). Responding to Richard Epstein's writings on the rule of law in the administrative state, this paper argues that it is impossible to advance a compelling conception of the rule of law that relies entirely on confining government discretion through clear rules. What is needed is a conception of the rule of law rooted in institutional practice, in which “the written documents of law [are] buttressed by a set of norms, conventional expectations, and routine behaviors

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*Distinguished Professor of Law, Lewis and Clark Law School.

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that lead officials to behave as if they are accountable to the public interest and to legitimate sources of legal and political authority,” even when relevant rules are vague and enforcement prospects are remote. Administrative rulemaking may well advance these values better than congressional legislation.

Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, **65 Stan. L. Rev. 901 (2013)**. What role should the realities of the legislative drafting process play in the theories and doctrines of statutory interpretation and administrative law? The ongoing debates frequently turn on empirical assumptions about how Congress drafts and what interpretive rules Congress knows, but, until now, there has been almost no testing of those assumptions. This is the first of two Articles reporting the results of the most extensive empirical study to date—a survey of 137 congressional staffers drawn from both parties, both chambers of Congress, and spanning multiple committees—on topics ranging from their knowledge and use of the canons of interpretation, to legislative history, the administrative law deference doctrines, the legislative process, and the courts–Congress relationship. The findings have implications for virtually every swath of the interpretive debates. For instance, there are some canons that 1) our drafters know and use—*Chevron* and the presumption against preemption, for example; 2) some that many drafters know but consciously reject in favor of political or other considerations, including the presumption in favor of consistent usage, the rule against superfluities, and dictionary use; and 3) still others that, like *Mead* and *noscitur a sociis*, are not known as legal rules but seem to be accurate judicial reflections of how Congress drafts. The interviews also elicited a treasure trove of information about key influences on the drafting process that legal doctrine rarely acknowledges. These findings also allow one to press for a more precise answer to a foundational question: What should be the purpose of these rules? Judges, often using the unhelpful generalization that they are Congress’s “faithful agents,” have legitimized such rules using conflicting justifications, some of which turn on empirical reality, some of which do not, and most of which treat together many different types of rules that do very different types of work. Do the canons reflect how Congress drafts and so effectuate legislative supremacy? Or do judges use the canons for more dialogical reasons, such as to encourage Congress to draft more precisely—and does Congress listen? Might the canons instead best be understood to effectuate judicial responsibilities that are external to the legislative process, such as advancing constitutional values or legal coherence? The study disaggregates the canons, revealing the variety of justifications for the current regime and how each rests

on different visions of the judicial power and the courts–Congress relationship.

Jennifer Nou, *Agency Self-insulation under Presidential Review*, **126 Harv. L. Rev. 1755 (2013)**. Agencies possess enormous regulatory discretion. This discretion allows executive branch agencies in particular to insulate their decisions from presidential review by raising the costs of such review. They can do so, for example, through variations in policy-making form, cost-benefit analysis quality, timing strategies, and institutional coalition-building. This Article seeks to help shift the literature’s focus on court-centered agency behavior to consider instead the role of the President under current executive orders. Specifically, the Article marshals public-choice insights to offer an analytic framework for what it calls agency self-insulation under presidential review, illustrates the phenomenon, and assesses some normative implications. The framework generates several empirically testable hypotheses regarding how presidential transitions and policy shifts will influence agency behavior. It also challenges the doctrinal focus on removal restrictions and highlights instead a more functional understanding of agency independence. Finally, these dynamics suggest a role for courts to help enforce separation-of-powers principles within the executive branch and also, along with Congress, to facilitate political monitoring by encouraging information from sources external to the presidential review process.

Ronald M. Levin, *Administrative Judges and Agency Policy Development: The Koch Way*, **22 William & Mary Bill of Rights J. (forthcoming)**, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2288821. Among the creative contributions that the late Charles H. Koch, Jr., made to administrative law thinking was his exploration of the present and potential role of administrative judges as policymakers. Koch stood in firm opposition to recent trends that, in his view, had served to strengthen the policymaking role of administrative judges at the expense of agency heads. He insisted that ultimate control over the policy direction of a program should rest with the officials who have been appointed to administer that program. While adhering to this baseline, however, Koch gravitated over time toward a nuanced view that sought to define an affirmative role for administrative judges in the policy-making process. He suggested, for example, that these judges could be helpful to agencies by initiating proposals for new directions and by building records that would enable agencies to appraise those proposals. In this sense, he argued, administrative judges could work in collaboration, rather than at cross-purposes, with the agencies to which they are answerable. This memorial essay aims to review Koch’s analysis of this generally neglected topic and to contribute a few additional insights to the discussion. After examining the background issue of where ultimate policy control should

rest, the essay describes and evaluates several of Koch's ideas for refinement of the role of administrative judges as policymakers. In addition, the essay takes up related questions regarding agencies' use of regulations and guidance documents to circumscribe the policy choices that administrative judges make.

Cass Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 *Harv. L. Rev.* 1838 (2013). Since its creation in 1980, the Office of Information and Regulatory Affairs (OIRA), a part of the Office of Management and Budget, has become a well-established institution within the Executive Office of the President. This commentary, based on public documents and the author's experience as OIRA Administrator from 2009 to 2012, attempts to correct some pervasive misunderstandings and to describe OIRA's actual role. Perhaps above all, OIRA operates as an information aggregator. One of OIRA's chief functions is to collect widely dispersed information—information that is held by those within the Executive Office of the President, relevant agencies and departments, state and local governments, and the public as a whole. Costs and benefits are important, and OIRA does focus closely on them (as do others within the executive branch, particularly the National Economic Council and the Council of Economic Advisers), especially for economically significant rules. But for most rules, the analysis of costs and benefits is not the dominant issue in the OIRA process. Much of OIRA's day-to-day work is devoted to helping agencies work through interagency concerns, promoting the receipt of public comments on a wide range of issues and options (for proposed rules), ensuring discussion and consideration of relevant alternatives, promoting consideration of public comments (for final rules), and helping to ensure resolution of questions of law, including questions of administrative procedure, by engaging relevant lawyers in the executive branch. OIRA seeks to operate as a guardian of a well-functioning administrative process, and much of what it does is closely connected to that role.

Kirti Datla and Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 *Cornell L. Rev.* 769 (2013). Volumes have been written—both by courts and commentators—about the so-called independent agencies. These agencies are thought to be distinct from executive branch agencies and constitutionally insulated from presidential influence. Yet few have paused to ask what features make an agency “independent” as opposed to “executive.” To answer that question, this Article systematically surveys administrative agencies for a broad set of indicia of independence: removal protection, multimember structure, partisan balance requirements, budget and congressional communication authority, litigation authority, and adjudication authority. This Article also examines the

functional differences between independent and executive agencies. As it turns out, there is no single feature, structural or functional, that every agency considered independent shares—not even the for-cause removal provision commonly associated with independence. The authors therefore reject the binary distinction between independent and executive agencies. Instead, all agencies should be regarded as executive and seen as falling on a spectrum from more independent to less independent. From this new understanding of administrative agencies flows a simple theory of presidential control: A President can take any action with respect to an agency (assuming it is within his Article II powers) unless Congress has prohibited that action by statute (in a manner that does not encroach upon the President's Article II powers). There is no tenable argument to justify an extra layer of constitutional or statutory limits to presidential interaction with agencies.

Nicole Schwartzberg, *What Is a “Recess”? Recess Appointments and the Framers' Understanding of Advice and Consent*, 23 *J. of L. & Pol.*, 231 (2013). Article II, Section 2, Clause 3 of the U.S. Constitution (commonly referred to as the “Recess Appointments Clause”) confers upon the President the “Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” President Obama's January 2012 recess appointments, made while the Senate attempted to block the President from making any recess appointments over the holiday break by holding “pro forma” sessions, raised new questions about the scope of the President's power to avoid Senate confirmation. Can the Senate successfully prevent the President from making a recess appointment by convening every three days for sessions, even when no business is actually conducted? Although a growing literature has sought to address this question, surprisingly little attention has been paid to the Framers' intent. This Article argues that, while there is little direct evidence of the Framers' intent concerning the Recess Appointments Clause, attending to adjacent provisions of the Constitution that require the Senate's advice and consent, such as the Appointments Clause and the Treaty Clause, sheds light on the scope of unilateral power the Framers intended the clause to confer on the executive branch. Examining the history of the Appointments Clause reveals that the Framers modeled the Senate's role after the practice of advice and consent that existed in the Commonwealth of Massachusetts under British rule prior to the federal Constitutional Convention. That model prized an active role for the Senate in restraining the executive branch, and interpreted the Senate's failure to act on Executive proposals as a valid rejection of those measures. Similarly, the Treaty Clause contemplated that the Senate

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would serve as a firm check on the President's power to sign multilateral agreements. The history of these adjacent constitutional provisions, this Article argues, provides compelling evidence that the recent use of "pro forma" sessions is a constitutional method in the contemporary separation of powers arsenal for the Senate to preserve its right to reject a President's nominees.

Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2273761. Since 1903, when Bruce Wyman drew a distinction between external and internal administrative practice, administrative law scholarship has focused almost exclusively on political and judicial oversight. This perspective, which reflects rational choice institutionalism, ignores the influence of normative and discursive institutionalism, which can deter agency employees from acting in a self-interested manner. The narrow focus has resulted in a failure to justify expertise, displacement of expertise, and deterioration of expertise. Displacement occurs because the White House operates under different institutional norms than agencies and employs a less robust discursive process. Despite Cass Sunstein's recent defense of White House review, this analysis reveals that the White House allows political considerations to influence its decisions to a greater extent than do agencies. The Article concludes that administrative law scholarship should address these failures by ending the separation that dates back to 1903, proposing that an institutional awareness can supply the missing internal analysis.

Peter L. Strauss, *In Search of Skidmore*, In a coup en banc, Justice Scalia appears to have converted his lonely and furious dissent from *United States v. Mead Corp.* into the eight-to-one majority holding in *City of Arlington v. FCC*. Much will doubtless be said about this opinion, as about all *Chevron* matters generally, but of note here is that 186 years of precedent for the proposition that judges interpreting statutes involving agency authority should give substantial weight to agency views has simply disappeared. Whether agencies have authority to act, a legal question, is either all *Chevron* (the majority) or no deference at all (Chief Justice Roberts' dissent). The centuries-old proposition Justice Jackson captured in *Skidmore v. Swift & Co.* receives passing mention only in the solitary opinion of Justice Breyer. Perhaps as remarkable is that the statutory command that agency conclusion must be reasonable has disappeared alongside *Skidmore*. If this opinion is to be believed, "permissible" is now the judicially enforceable limit.

Connor Raso, *When Do Agencies Comply with Rulemaking Process Requirements?*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2293455. This Article analyzes when and why administrative agencies comply

with rulemaking procedures imposed by statutes such as the Administrative Procedure Act. This Article's original empirical analysis shows that agency noncompliance with such procedural requirements increases as the threat of a successful lawsuit challenging such noncompliance declines. While agency compliance increases with litigation risk, judicial enforcement is an inconsistent and highly imperfect enforcement mechanism. Such inconsistency provides a new basis for skepticism about allowing courts to develop additional procedural requirements via common law interpretation. This Article also contributes to the debate over whether the rulemaking process has become so burdensome that rulemaking is unduly delayed or discouraged entirely. Agency noncompliance with rulemaking procedures—which are often assumed to be an important cause of such burden—provides an additional basis to doubt these claims. At the same time, agency noncompliance suggests that rulemaking procedures do less to promote public deliberation in the rulemaking process, foster agency expertise, guard against agency arbitrariness, and make agencies accountable to the Congress and to the public. Thus, agency noncompliance with rulemaking procedures has some benefits, but also many costs.

Thomas M. Susman, Ashwini Jayaratnam, David C. Snowden, and Michael Vasquez, *Enforcing the Public's Right to Government Information: Can Sanctions Against Officials for Nondisclosure Work?*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295466. In 1974, the U.S. Freedom of Information Act was amended to include a provision allowing the imposition of sanctions against individual agency employees. The provision requires a court finding that the withholding of information was arbitrary and capricious, referral of the matter to the federal employee disciplinary agency, investigation by that agency, and a determination by that agency to impose an employment-related sanction on the employee. No wonder not a single sanction has ever been imposed in the ensuing 37 years. Both states within the U.S. and other countries have also adopted sanctions provisions in their access and right-to-know laws. Some of these have been utilized; others have not. This Article endeavors to catalog the sanctions provisions in the laws of those states and countries that have them and include, where information is available, some comments on the use of those provisions. Its initial goal was to assess what works and what does not, so that recommendations might be made regarding effective sanctions; however, the many cultural and statutory variables have combined to defeat this goal. Nonetheless, the authors conclude that inclusion of sanctions in freedom of information laws leads to better training of government employees and probably provides a positive incentive to comply with the disclosure mandates of those laws. Additional research into the attitudes of

government employees in the face of potential sanctions is recommended.

Paul P. Craig, *A General Law on Administrative Procedure, Legislative Competence and Judicial Competence*, **19 European Public Law 503 (2013)**. The desirability of having a general law on administrative procedure in the European Union has been debated in the past and has now come back on the agenda, at least in part because of support from the Committee on Legal Affairs of the European Parliament. If such a law, or something equivalent thereto, were developed, there would be a range of issues to address concerning its scope and content. This Article considers the rationale for such an instrument and the type of subject matter that might be included. The principal focus is, however, on the logically prior issue as to the competence to enact such an instrument. This was previously questioned, and question marks remain. It will moreover be seen that resolution of this question raises interesting and important issues concerning the relationship between legislative and judicial competence within the European Union.

Michael Healy, *The Past, Present and Future of Auer Deference: Mead, Form and Function in Judicial Review of Agency Interpretations of Regulations*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298806. For many years, courts have deferred to an agency's interpretation of its own regulations by utilizing a standard of review that has the same effect as *Chevron* deference. Although this review standard—commonly referred to as *Auer* or *Seminole Rock* deference—has been widely accepted, the Supreme Court has provided very little theoretical support for the standard. The Court's decision in *United States v. Mead* has recently reshaped the application of *Chevron* deference. *Mead*'s effect has now begun to be felt when the Court reviews an agency's interpretation of its regulations. A quintet of recent Supreme Court decisions has had a cumulative effect on *Auer* deference that resembles the impact that *Mead* has had on *Chevron* deference. This Article assesses this developing area of administrative law. The first part describes the past of the long-accepted rule of deference to an agency's interpretation of its own regulations. The second part discusses the Court's recent changes in its approach to the traditional rule of deference, highlighting its incompatibility with *Mead*. The final part of the Article discusses the future of judicial review in this context and presents a new standard of review that accommodates form and function. The Article supports a two-step standard that would first apply the clear meaning of the regulation. If the regulation were ambiguous, a new standard of review, analogous to *Skidmore* review, would apply. Under this regime, an agency would not bind a court by its interpretation, but would have an opportunity to convince the court that the court should adopt the agency's interpretation, informed as it may be by the agency's

experience and expertise. The Article makes the case that the judicial exercise of interpretive power in this context is consistent with the Constitution, the APA, and the structure of administrative law.

Vicki Lens, Astraea Augsberger, Andrea Hughes, and Tina Wu, *Choreographing Justice: Administrative Law Judges and the Management of Welfare Disputes*, **40 J. of Law & Soc., 199 (2013)**. A significant form of civil justice is administrative hearings, used to resolve individual disputes in the provision of government welfare benefits. Drawing from ethnographic observations, analysis of recorded transcripts of the hearings, and interviews with administrative law judges in the United States, the article examines two contrasting approaches to judging, one a "bureaucratic" approach which replicates the style of decisionmaking on the front lines, and the other an "adjudicatory" approach which relies on the norms and conventions of judicial decision making. To understand how each approach manifests in the hearing room, the authors use the methodology of conversation analysis to compare and contrast the different verbal strategies and techniques that characterize each approach. To understand why a judge may choose one approach over another, the Article explores how judges construct their professional identity and manage the tasks of judging.

Jason Marisam, *Interagency Administration*, **45 Ariz. St. L.J., 183 (2013)**. Interagency relationships are a central feature of the modern administrative state, which must continually address regulatory problems that implicate multiple agencies' expertise and agendas. Drawing on organization theory in political science and real-world examples of agency behavior, this Article provides a general theory of what the author calls "interagency administration"—or, the emerging system of governance created by agencies' increasingly complex relationships with each other. This interagency administration framework reorients the conception of power in the administrative state by showing that agencies are not just competitors for power but are also secondary sources of power for each other (after the primary sources of Congress and the White House). The framework also subverts the conventional separation of powers view that interagency decisionmaking tends to decentralize power in the executive, and thus weaken the President, by showing that interagency decisionmaking also tends to benefit the President through improvements in what organization theorists call departmentalization, or the structuring of an agency so that it has influence over the set of tasks that relate to its general purpose. Furthermore, this Article uses the interagency administration framework to argue that courts, under hard look review, should reject agency rationales that are based on factors outside of the agency's core expertise

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if the agency has failed to consult with other agencies that have superior, more relevant expertise.

David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 *Yale L. J.* (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290843. A central challenge in the modern regulatory state is rationalizing and coordinating multiple, overlapping, and interdependent public and private enforcement mechanisms. To that end, recent years have seen mounting calls to vest administrative agencies with litigation “gatekeeper” authority across a range of regulatory areas, from environmental protection and civil rights to antitrust and securities. Agencies, it is said, can use their expertise and synoptic perspective to weigh costs and benefits and determine whether private rights of action should lie at all. Alternatively, agencies might be given the power to evaluate lawsuits on a case-by-case basis, blocking bad cases, aiding good ones, and otherwise husbanding available private enforcement capacity in ways that conserve scarce public resources for other uses. Yet despite the proliferation of such calls, there exists strikingly little theory or evidence on how agency gatekeeper authority either should or would work in practice. This Article aims to fill that gap by offering a systematic account of this often-invoked—but under-theorized—role for agencies. Drawing on theories of agency behavior and empirical analysis of the gatekeeper regimes currently in existence, this Article sketches the case for and against vesting agencies with litigation gatekeeper authority across a range of regulatory contexts and elaborates some functional design principles that policymakers can use to weigh competing models or determine whether agency gatekeeping makes sense at all. There are other pay-offs as well. Anatomizing agency gatekeeping allows us to reimagine the agency role in some of our most consequential regulatory regimes, among them a system of job discrimination regulation that seems especially ripe for revision following the Supreme Court’s decision in *Wal-Mart v. Dukes*. More broadly, this Article makes a novel contribution to the otherwise oceanic literature on “litigation reforms” and reorients scholarly debate around optimal regulatory design and the contours and purposes of the administrative state itself by exploring the increasingly blurred boundary between administration and litigation.

Cass R. Sunstein, *The Value of a Statistical Life: Some Clarifications and Puzzles*, *Journal of Benefit-Cost Analysis* (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2278402.

Many people have wondered why the U.S. government conducts cost-benefit analysis with close reference to the value of a statistical life (VSL). It is helpful to answer that question by reference to the “Easy Cases,” in which those who benefit from regulatory protection must pay for it. In

such cases, willingness to pay (WTP) is usually the right foundation for VSL, because beneficiaries are hardly helped by being forced to pay for regulatory protection that they believe not to be in their interests. In the Easy Cases, arguments from both welfare and autonomy support the use of WTP and VSL (with potentially important qualifications involving imperfect information and behavioral market failures). The analysis is less straightforward in harder cases, in which beneficiaries do not pay for all of the cost of what they receive (and may pay little of that cost). In such cases, arguments from welfare and autonomy might not lead in any clear direction. In the harder cases, regulation might be justified on welfare grounds even if the cost-benefit analysis (based on VSL) suggests that it is not. In principle, a direct inquiry into welfare (the master concept) would be preferable to use of cost-benefit analysis. In the harder cases, distributional considerations might also count in favor of proceeding (as prioritarianism suggests). But at the current time, direct inquiries into welfare consequences and into distributional effects are challenging in practice, and hence regulators should generally rely on cost-benefit analysis, making welfarist adjustments, or adjustments based on distributional considerations, only in compelling cases.

Daphne Barak-Erez and Oren Perez, *Whose Administrative Law Is It Anyway? How Global Norms Reshape the Administrative State*, 46 *Cornell Int’l L.J.* (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295550. The emergence of global norms of administrative law reshapes the administrative state. In many areas, covering diverse topics such as trade, financial regulation, public health, and the environment, various international agencies have acquired increasing influence over domestic regulatory processes. The integration with the global arena requires the state to forgo some of its regulatory powers. This Article focuses on the normative challenges posed by this new reality. Part I explicates the way in which the argument presented differs from the global administrative law literature. Whereas global administrative law studies the meta-norms that regulate the activities of global administrative bodies, this Article focuses on the way in which international norms reshape decisionmaking processes within domestic bureaucracies. This Article develops an analytical schema that captures the distinct impacts of global administrative law on the domestic level. This schema distinguishes between three forms of influence: the substitution of domestic administrative discretion by global standards, the emergence of universal standards of administrative due process, and the globally inspired transference of enforcement responsibilities. Part II maps the various mechanisms through which transnational regulatory processes intervene in the local realm, reshaping the contours of domestic administrative law. The Article takes a

pluralistic approach by highlighting the diverse sources and paths through which global law influences the domestic realm. Thus it focuses both on the influence of the WTO system, as reflected in the three recent rulings against the U.S. (the Tuna-Labeling, Clove Cigarettes, and Country of Origin Labeling Requirements cases) and on the influence of private transnational institutions such as the International Organization for Standardization, certification bodies such as Social Accountability International, and regulatory scientific institutions such as the International Commission on Non-Ionizing Radiation Protection. Part III proceeds to examine the normative challenges posed by these transnational regulatory processes. It starts by exploring the hidden ideological agendas of this new global normative body, highlighting especially its neo-liberal, capitalist origins. It then moves to discuss the problematic of fragmented accountability regimes. These reflections question the legitimacy of the new body of globalized administrative law and point to the need to adapt our democratic conceptions and practices to this new reality. This approach steers a middle course between the extremes of sovereign exceptionalism and global constitutionalism, focusing on the potential of administrative law for democratic innovativeness.

Shruti Rana, *Chevron Without the Courts?: The Supreme Court's Recent Chevron Jurisprudence Through an Immigration Lens*, 26 Geo. Immigr. L.J. 313 (2012). The limits of administrative law are undergoing a seismic shift in the immigration arena. *Chevron* divides interpretive and decisionmaking authority between the federal courts and agencies in each of two steps. The Supreme Court may now be transforming this division in largely unrecognized ways. These shifts, currently playing out in the immigration context, may threaten to reshape deference jurisprudence by handing more power to the immigration agency just when the agency may be least able to handle that power effectively. An unprecedented surge in immigration cases—now approximately 90% of the federal administrative docket—has arrived just as the Court is whittling away the judicial role while expanding agency authority, significantly transforming traditional deference doctrine. In its immigration docket, the Court is shifting the judicial role away from questions of statutory interpretation and towards a mere evaluation of when the agency's interpretation should be granted deference. Assessment of the "reasonableness" of the agency's action has given way to marking the outer boundaries of agency action, merging the court's traditional oversight analysis into a form of "arbitrary and capriciousness" review. The costs of the Court's reformulation of *Chevron* are particularly visible in immigration law because recent legislation and structural changes at the immigration agency have already constrained judicial review. However, the reformulation of *Chevron* that is occurring in immigration law may threaten

to remake administrative law generally. Unfortunately, these developments have received little scholarly attention. Understanding this transformation is imperative as ultimately we may be heading towards "*Chevron* without the Courts"—wherein the judicial interpretive role is being constrained in the very instances where agencies are least able to function effectively.

Heidi K. Page, *What Process Is Due? Reversal of Diagnosis in Veterans Benefits Claims and Procedural Due Process*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2273340. An increasing number of service members who have been deployed now suffer from "invisible wounds of war" including Post-Traumatic Stress Disorder (PTSD). Some of those veterans' diagnoses were reversed through nothing but a review by a team of psychologists who never personally met or examined the veterans. This paper examines the general attitude towards PTSD at a particular Army medical center, the PTSD diagnostic criteria, and the reasons for diagnosis reversals. Due process and VA administrative procedures are analyzed and applied to diagnosis reversals. Lastly, an additional layer of due process for veterans with PTSD is suggested.

Maximillian L. Feldman, *The Domestic Implementation of International Regulations*, 88 N.Y.U. L. Rev. 401 (2013). In response to the challenges of globalization, U.S. agencies at times reach agreements on regulations with their foreign counterparts and then subsequently implement those regulations domestically. Some have suggested that this model of rulemaking gives agencies determinative incentives to implement the international regulation as negotiated—and thus to ignore public comments in the domestic rulemaking process. In this Note, the author uses the Basel Accords as case studies to show that agencies do not necessarily implement international agreements as a *fait accompli*. Nevertheless, he argues that international agreements may illegitimately influence the domestic rulemaking process and that courts must therefore be more vigilant in reviewing these types of regulations.

Paul P. Craig, *The Nature of Reasonableness Review*, 66 Current Legal Problems 1 (2013) (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298612. While there is a voluminous literature on proportionality, there is considerably less on reasonableness as a test for judicial review of discretionary determinations. This paper examines the nature of reasonableness as a test for judicial review of discretion in UK law. The paper is not predicated on the assumption that reasonableness always bears the same meaning whenever it is used in constitutional and administrative law in any legal system. Subject to this caveat, it is argued that reasonableness as a test for judicial

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Recent Articles of Interest

review of discretion in UK law is concerned with review of the weight and balance accorded by the primary decision-maker to factors that have been or can be deemed relevant in pursuit of a prima facie allowable purpose; that this is borne out through examination of the case law; that insofar as incommensurability is perceived to be a problem in the context of proportionality, then this is also true in relation to reasonableness review; that the incommensurability problem is less problematic than is commonly perceived; and that a proper appreciation of reasonableness review has implications for the debate concerning reasonableness and proportionality as tests for judicial review in administrative law.

William H. Simon, *The Republic of Choosing: A Behaviorist Goes to Washington*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2288734. Cass Sunstein's book *Simpler* recounts the author's efforts during his tenure in the first Obama Administration to apply the policy tools he helped derive from behavioral economics. In this review, the author suggests that, while Sunstein reports some notable achievements, he exaggerates the utility of the behaviorist toolkit. The author argues that behaviorist-inspired interventions are marginal to most of the largest policy problems and played little role in the Obama administration's most important initiatives.

Eric Posner and Adrian Vermeule, *Inside or Outside the System?* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2232153. In a typical pattern in the literature on public law, the diagnostic sections of a paper draw upon political science, economics or other disciplines to offer deeply pessimistic accounts of the motivations of relevant actors in the legal system. The prescriptive sections of the paper, however, then issue an optimistic proposal that the same actors should supply public-spirited solutions. Where the analyst makes inconsistent assumptions about the motivations of actors within the legal system, equivocating between external and internal perspectives,

an inside/outside fallacy arises. The authors identify the fallacy, connect it to an economics literature on the "determinacy paradox," and elicit its implications for the theory of public law.

Sopan Joshi, *The Presidential Role in the Constitutional Amendment Process*, **107 Northwestern U. L. Rev. 963 (2013)**. The President should have the power to veto constitutional amendment proposals. After all, Article I, Section 7 of the Constitution provides that "[e]very Order, Resolution, or Vote" requiring "the Concurrence" of both Houses of Congress must be "presented to the President" for approval or veto. Constitutional amendment proposals unmistakably require the concurrence of both Houses of Congress (by two-thirds majorities, no less). Yet all three branches of the federal government, with varying degrees of consistency, have decided that constitutional amendment proposals need not be presented to the President. The author argues that Article V, which defines the amendment process, is bound by Article I, Section 7's strictures and the President is thus empowered to veto congressional amendment proposals as both a textual and a normative matter. Recognizing the implications of this conclusion, the author proposes broad definitions of presentment and approval to rescue the validity of the existing twenty-seven amendments while requiring all future constitutional amendment proposals to be presented to the President for approval or veto.

Victor Byers Flatt, *Frozen in Time: The Ossification of Environmental Statutory Change and the Theatre of the (Administrative) Absurd*, **24 Fordham Envtl. L. Rev. 125 (2013)**. The author argues that environmental law is becoming more complex because the executive branch continues to stretch existing environmental laws to accommodate new policies. Without Congressional intervention to craft tailored laws, the author believes that we run the risk that our environmental administration will become too complex, making policymaking difficult delegitimizing government environmental action. ○

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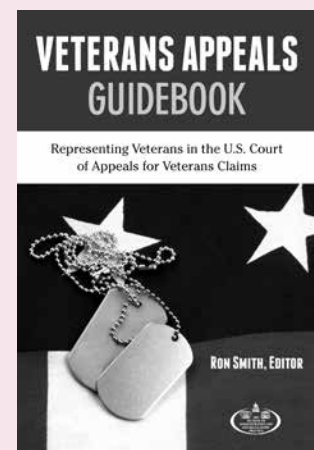
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