

ADMINISTRATIVE & REGULATORY LAW NEWS



Section of Administrative Law & Regulatory Practice

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E-Cigarettes: The Importance of a Preventive Approach

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Implementation of Congressional Review Act and Possible Reforms

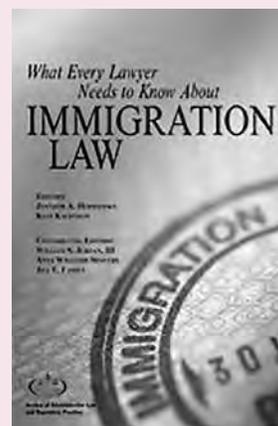
Judicial Review of Final Rules and Administrative Record Problem

Interpreting the Affordable Care Act

What Every Lawyer Needs to Know About Immigration Law

by Anna Williams Shavers, Jennifer Hermansky, Jill E. Family, Lillian Katherine Kalmykov, William S. Jordan III

This practical guide provides legal practitioners with tips on issues that they may encounter when representing clients that may necessitate an examination of immigration-related issues. The book is meant to provide attorneys working in various areas of law with enough information to identify problematic immigration issues, counsel their clients accordingly and if the matter is advanced to know when to advise the client to consult with immigration counsel. It will also introduce attorneys to the myriad of agencies involved in the immigration process. Given the many ways in which immigration law can affect a single individual as well as large corporation, most lawyers will encounter a client needing immigration law advice. Yet for the non-specialist, immigration law can be daunting, particularly because it is governed by a complex mix of statutes, regulations, and federal and administrative court guidance—as well as by adjudicatory policies from multiple administrative agencies. Thus, it is important for lawyers to understand how best to spot immigration issues for clients, and when to involve an immigration attorney for assistance with a client. This book was written by immigration law specialists whose insights, guidance, and practice tips can offer help in understanding these issues.



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Chair's Message



Anna W. Shavers

As I assume the role of Chair of the Section for the coming year, I am both excited and apprehensive. It is my responsibility to continue the excellence in policy development, programming, and activities that has been carried out by my predecessors. My excitement stems from my confidence that you, the members of the Section, are there to create and assist with these tasks. My apprehensiveness is based upon the fact that there is so much now happening in the world of Administrative Law that it may be difficult to focus our energies and formulate the authoritative and consensus voice that is needed on policy issues. This focus can come from you the Section members. I welcome your ideas. You can contact me at annashavers.aba@gmail.com.

I have already received the assistance of some of you with one issue that I want to address in my year. In my view, all present and future administrative lawyers in the private or public sector, as well as academia must begin to appreciate the implications of the global network of rules and regulations that will affect their clients, their agencies, and their scholarship and research. This can be assisted by having dialogue between the general counsels of agencies and the general counsels of companies along with input from their counterparts in other countries. Identifying the international regulatory issues will increasingly become essential in our consideration of administrative law issues, as will knowledge of the various types of adjudications and tribunals that actions may be subjected to as a result of these regulations.

Only so much can be accomplished in a year, so I welcome your suggestions for the creation of a list of priority issues that we can tackle this year. We can add this to our ongoing list of issues which includes:

Incorporation by Reference: The practice which allows federal agencies to comply with the publication requirement for rules by referring to materials already published elsewhere.

Immigration: The standards used in the processing of immigration removal and detention cases.

Regulatory Accountability Act of 2013, S. 1029: A bill to amend the Administrative Procedure Act with respect to the rulemaking process.

Section Matters: Identifying the essential services for our members such as publications, CLE programs, an improved webpage, and membership plans. Collaborating with other entities which share some of our interests such as the Administrative Conference of the United

States (ACUS) (<http://www.acus.gov/>), the Association of American Law Schools (AALS) Administrative Law Section and the National Conference of the Administrative Law Judiciary (NCALJ) (http://www.americanbar.org/groups/judicial/conferences/administrative_law_judiciary.html).

Decisions on these and other issues are made by your Council. The list of Council members and Officers can be found here http://www.americanbar.org/groups/administrative_law/about_us.html. One way of receiving timely information on the issues before the Council is to join the "ALCOUNCILPLUS" email list. I hope many of you will try opting in (just contact anne.kiefer@americanbar.org)—and if you do not like it, you can always drop off. If you prefer not to receive more email, remember that current matters are also presented on Section's blog, "Notice and Comment" (<http://regulatorypractice.blogspot.com/>) maintained by the editors, Shannon Allen, Nina Hart, Elisabeth Ulmer, and Lynn White.

Finally, I want you to consider taking an active role in the leadership officers and committee positions for the section. One revision of the website will be the inclusion of a link that will provide a form for your submission of interest in leadership positions.

Anna W. Shavers ○

Developments in Administrative Law and Regulatory Practice 2013

By Jeffrey S. Lubbers

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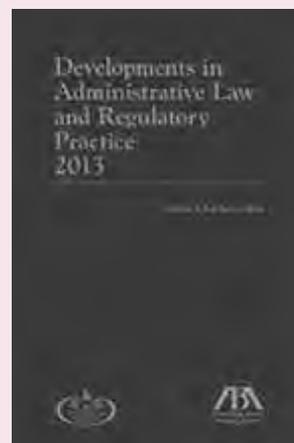
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E-Cigarettes: The Importance of a Preventive Approach

By Craig Oren*

E-cigarettes have boomed in popularity in recent years. Sales in 2014 may be close to \$3 billion. Tobacco companies are moving rapidly into the e-cigarette market to take advantage of projected growth. But there are concerns that the use of e-cigarettes carries substantial risks to health.

The Food & Drug Administration (FDA) is now considering whether and how to regulate e-cigarettes. (79 Fed. Reg. 23142 (Apr. 25, 2014)). In doing so, the FDA will have to address two important questions that apply to other agencies as well. First, what should be done when there are uncertainties about how much risk a substance carries? Second, how should the agency deal with a substance that may carry health benefits as well as risks?

An e-cigarette consists of an oblong cartridge called a vaper that often looks like a cigarette or pen. The user fills the cartridge with liquid nicotine. A battery-operated atomizer vaporizes the nicotine, and the user inhales the vapor. The user then exhales, producing a stream of what looks like cigarette smoke, but which lacks, for instance, the carbon monoxide and tar found in cigarette exhaust. Users call the process “vaping” rather than smoking.

The FDA’s authority to regulate e-cigarettes comes from the Family Smoking Prevention and Tobacco Control Act of 2009 (the “Tobacco Act”) (Pub. L. No. 111-31, 123 Stat. 1776 (2009), codified at 21 U.S.C.A. §387a *et. seq.*). This statute overturns the United States Supreme Court’s decision in *FDA v. Brown v. Williamson*, 529 U.S. 120 (2000), that the Federal Food, Drug & Cosmetic Act (FDCA) (21 U.S.C.A.

§351 *et. seq.*) does not authorize FDA regulation of tobacco. The FDA subsequently claimed that e-cigarettes could nonetheless be regulated under the FDCA independent of the Tobacco Act. The FDA’s argument was that *Brown & Williamson’s* rationale—that Congress had passed multiple statutes regarding smoking,—did not apply to e-cigarettes, a relatively new product. This contention was rejected by the D.C. Circuit in *Sottera, Inc. v. FDA*, 627 F.3d 891 (2010)), thus leaving the FDA with the Tobacco Act as its jurisdictional basis. Interestingly enough, the e-cigarette companies in *Sottera* denied making any claim that their product had therapeutic value; such a claim would have subjected them to the FDCA’s drug provisions discussed below.

The Tobacco Act defines as a “tobacco product” any product made or derived from tobacco for human consumption other than a drug, device or combination product. (The latter remain regulated under the FDCA’s other provisions.) Nicotine comes from tobacco, and so e-cigarettes are “tobacco products.” E-cigarettes are not “cigarettes,” though, because they do not contain tobacco. But FDA regulation under the Tobacco Act applies not only to cigarettes, but also to any other tobacco products that the FDA deems by regulation to be desirable for regulation.

The FDA proposed in April to deem e-cigarettes, among other products, as tobacco products. Deeming e-cigarettes would mean that adulteration or misbranding of the products would be banned; all manufacturing facilities would have to register with the FDA, thus making it easier for the agency to inspect these facilities;

premarketing review of new products would be required; manufacturers could not describe the products as, for instance, “mild” or “low tar” without studies demonstrating to the FDA that the claims are true; distributing free samples of products would be banned; manufacturers would have to disclose ingredients and potentially harmful constituents; and the FDA would have the authority to propose product standards (such as standards for the vapor exhaled by the user) to protect public health. More importantly, the sale of e-cigarettes to individuals under age 18 would be prohibited, and e-cigarettes would have to include a warning that the product contains nicotine and that nicotine is addictive.

The agency is concerned about e-cigarettes partly because of the dangers of nicotine—some e-cigarettes contain more nicotine than cigarettes—which some evidence shows to contribute to heart disease and to promote the growth of cancer cells. The FDA is also troubled by the growing use of e-cigarettes by adolescents, who are those most likely to become nicotine addicts and therefore likely to go on to cigarettes and other more traditional nicotine products. Thus e-cigarette use may lead to the use of even more harmful products. This concern is especially great because e-cigarettes are increasingly flavored (for instance with chocolate, cherry, or gum flavors) in ways that attract adolescents. Moreover, young people underestimate the risk that they will become addicted, so their use of e-cigarettes is especially risky. Thus use of e-cigarettes among middle and high school students doubled between 2011 and 2012. The FDA is also concerned by studies that have shown toxic substances in what the user inhales

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and exhales—for instance, one study found formaldehyde, a potent carcinogen, in the exhaled vapor from some e-cigarettes—although in amounts much less than conventional tobacco products and comparable to those produced by, say, a Nicorette inhaler. (On the other hand, such inhalers are intended to be used for only a short time.) Finally, there have been accidents in which a small child ingests nicotine from an e-cigarette, thus forcing a visit to a hospital emergency room.

Proponents of e-cigarettes argue that they are not as dangerous as other tobacco products. The FDA has acknowledged this contention. The agency recognized in its proposal that e-cigarettes may pose a lesser risk than other tobacco products, and asked specifically for comment on how e-cigarettes should be regulated. Some advocacy groups have already suggested that flavorings and TV advertising be barred as with cigarettes.

Proposed and final FDA rules must pass through the Office of Information and Regulatory Affairs, which requires a statement of costs and benefits. There is controversy about how this statement will be done. The agency has prepared an estimate of costs, but, as is typical in regulation, industry costs will be much higher. There is also controversy about the agency's proposal to discount benefits to reflect the "pleasure" that will be lost by users of the newly-deemed tobacco products.

Moreover, the benefits of regulation are essentially unquantifiable. One reason is that, as the FDA acknowledges, there are many gaps in our knowledge. There has not been extensive research on, for example, exactly what is in e-cigarette exhaust or how much long a session with an e-cigarette lasts and thus how much nicotine the user inhales. (Because e-cigarette use does not result in a butt, the user receives no signal about how much he or she has used the product.) Thus the FDA might have a difficult

time proving that e-cigarettes are harmful. Hence the most important question is one common to regulation of possibly harmful substances: Who has the burden of proof?—that is, does the burden of resolving uncertainty fall upon the agency or the regulated party?

The answer, under current law and policy, is that the burden falls on the proponents of e-cigarettes. One parallel is EPA regulation of lead in gasoline under the Clean Air Act. That involved the 1970s controversy about whether the lead in fuel harmed children, or instead added nothing to the risks from other sources of lead. In the D.C. Circuit's seminal *en banc* decision in *Ethyl Corp. v. EPA*, 541 F.2d.1 (D.C. Circuit) (*en banc*), *cert. denied*, 426 U.S. 971 (1976), the court held that EPA could proceed on the basis of reasonable projections that a substance will prove to be shown harmful. The court reasoned that Congress expected that an agency like EPA would regulate preventively so that the public can be safeguarded from danger. To quote the court:

Undoubtedly, certainty is the scientific ideal to the extent that even science can be certain of its truth. But certainty in the complexities of environmental medicine may be achievable only after the fact, when scientists have the opportunity for leisurely and isolated scrutiny of an entire mechanism. Awaiting certainty will often allow for only reactive, not preventive, regulation. Petitioners suggest that anything less than certainty, that any speculation, is irresponsible. But when statutes seek to avoid environmental catastrophe, can preventive, albeit uncertain, decisions legitimately be so labeled? [footnotes omitted]

To put it a little differently, Congress thought a mistake of under-regulation was more serious than a mistake of over-regulation. While over-regulation, of course, carries harms, under regulation could risk

possibly irreversible damage to health. Thus, in effect, Congress has chosen to buy insurance against the chance of harm to health.

Congress adopted language ratifying *Ethyl* in the Clean Air Act Amendments of 1977. (Pub. L. 95-95 (1977)). Thus EPA can act in the face of scientific uncertainty. The same is true of the FDA. It has long been considered to have the power to act preventively under the FDCA. This extends to the Tobacco Act—after all, it is formally named the Family Smoking **Prevention** Act—which recites finding after finding about the importance of diminishing smoking. In effect, this puts the burden on the industry to show that lenient treatment is justified.

The industry might, for instance, argue that e-cigarettes are actually good for public health. Proponents of e-cigarettes assert that they are an important way to induce smokers to switch to a more benign product, or even to cease nicotine use altogether, and that the FDA ought to take this into account in deciding how strictly to regulate e-cigarettes.

Certainly consideration by the FDA of the health benefits of e-cigarettes is appropriate. After all, a benefit to public health is as significant as a threat. Again, the Clean Air Act is a parallel. EPA regulates the air pollutant known as ozone, an important and harmful ingredient in summer smog. Some opponents of strict regulation argued in the 1990s that EPA, in deciding the levels of its air quality standards for ozone, ought to take into account the substance's role in blocking harmful ultraviolet radiation from the Sun. The D.C. Circuit agreed that EPA had a legal obligation under the Clean Air Act to do this. The agency acquiesced, but found that ozone's beneficial role was very limited and did not justify revising the standards.

As with ozone, it is not clear that e-cigarettes offer substantial health benefits. The FDA acknowledges that there are some studies indicating that e-cigarettes have the potential to help smokers quit, but asserts that

“[t] here is no evidence to date that e-cigarettes are effective cessation devices.” On the other hand, the agency’s proposal discusses little about research on whether e-cigarettes offer a less harmful alternative to those who smoke and are unable or unwilling to quit, although it does note that any benefits from e-cigarettes need be weighed against the public health concerns summarized above.

An assertion that e-cigarettes are useful in decreasing the number of smokers is in effect an argument that e-cigarettes have therapeutic effect. Such an assertion would make e-cigarettes drugs, devices or combination products, and therefore subject them to long-standing provisions of the FDCA rather than under the Tobacco Act; recall that the Tobacco Act does not apply to tobacco products that are drugs, devices or combination products. Indeed, this is undoubtedly why the e-cigarette importers in *Sottera* denied that their product had beneficial effects.

The FDCA allows a drug, device, or combination product to move in interstate commerce only if the product is “safe and effective.” The proponent must show “substantial evidence” of effectiveness. This evidence must consist “at least one adequate and well-controlled study, clinical investigation, and confirmatory evidence.” (In practice, the FDA requires more than one.) The study or studies must allow the experts to fairly and responsibly determine that the drug does what it purports to do and that its benefits outweigh the drawbacks when used under the conditions

provided by the label. Again, the burden is on the proponents of the product. Tobacco cessation products such as nicotine patches and gum have passed through this process, and there seems no reason why e-cigarettes should not if health claims are made on their behalf.

Thus there are potential arguments for relatively lenient treatment for e-cigarettes. It might be, for instance, that the industry can persuade the FDA that e-cigarettes can be labeled as having relatively low risks. But, again, the burden will largely be on the proponents of e-cigarettes.

There is room for argument about whether this is appropriate. As Cass Sunstein has argued so eloquently, there are risks on all sides of a social situation. This is particularly true here, where claims of health benefit can be made. Present law in effect favors one kind of health claim—that e-cigarettes are harmful—over another kind—that e-cigarettes are helpful in diminishing use of a more dangerous product.

This kind of asymmetry is characteristic of public health regulation in the United States. After all, all proposed drugs claim health benefits. Yet we put the burden of proof on these claims, and in effect favor claims that a proposed drug is harmful.

This approach has been criticized, as for instance, giving special harsh treatment to new sources of risk—something endemic in environmental law. For instance, very stringent regulation of new coal-fired power plants can cause utilities to keep older, riskier, plants on line longer. Thus

strict regulation may actually raise the magnitude of a risk.

But more than the size of a risk figures into public attitudes toward risk. Public perceptions of risk rest not only on the risk’s magnitude, but also on “outrage factors”: Is the risk encountered voluntarily? Is the risk created by humanity or by nature? Is the risk a familiar one? Can individuals protect themselves against the risk? Might the risk cause a catastrophe? Does it result in a memorable event (e.g. the birth defects from thalidomide, an event that resulted in important changes to FDCA)? These factors generally argue for special focus on new risks from drugs and similar products.

That focus seems appropriate applied to e-cigarettes. Arguably, their use may decrease people’s use of cigarettes. On the other hand, they appear to pose a risk to the young who lack the sophistication to protect themselves. It might be that many new nicotine addicts—at least some of whom may go on to more dangerous products—could be created. We have an offsetting benefit to current cigarette users, but people do successfully stop smoking through other means. Perhaps it would not be unreasonable for the public to favor preventing new addicts over weaning smokers off cigarettes.

Thus e-cigarette regulation implicates many of the fundamental issues in risk regulation. We will have to see how the FDA chooses to respond. ○

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Implementation of the Congressional Review Act and Possible Reforms

By Curtis W. Copeland*

What if Congress enacted legislation giving itself new authority to oversee and reverse the actions of federal agencies, but agencies could avoid congressional oversight simply by not doing what the law requires them to do? And what if Congress wrote the legislation in such a way that the courts were not permitted to review the propriety of the agencies' inaction? Finally, what if no one even checked to see if the agencies were actually taking the required action?

Although the above sounds unlikely and almost Kafkaesque, it is reality. The Congressional Review Act (CRA, 5 U.S.C. §§801-808) was enacted in March 1996 as a way to reestablish a measure of congressional control over agency rulemaking. The CRA generally requires federal agencies to send almost all of their final rules to both houses of Congress and the Government Accountability Office (GAO) before they can take effect. As soon as a rule is "received by Congress," any Member of Congress may introduce a CRA resolution of disapproval that, if signed into law, prevents the rule from taking effect (or continuing in effect). The CRA established expedited legislative procedures (primarily in the Senate) to facilitate the disapproval process.

However, it appears that federal agencies have not submitted hundreds of final rules to GAO or Congress in recent years, and the agencies are enforcing those rules even though they are technically not in effect. Nevertheless, the CRA states that Members of Congress cannot introduce a CRA resolution of disapproval regarding these unsubmitted rules because they were not "received by Congress." Also, because Section

805 of the CRA prohibits judicial review of any "determination, finding, action, or omission under this chapter," it appears that no one can take the agencies to court and challenge the implementation of the unsubmitted rules. Finally, although GAO used to determine whether all

In August 1997, the ABA Section of Administrative Law and Regulatory Practice and Section of Business Law jointly recommended that Congress amend the Congressional Review Act to "limit automatic application of the resolution of disapproval process to major rules and such other defined classes of rules as are likely to have important impacts, while establishing an alternative process by which the action of any congressional committee or subcommittee may bring any other pending rulemaking within the process. At a minimum, routine and frequent rules should be excluded from the automatic application of the Act."

covered rules were being submitted, and periodically notified the Office of Management and Budget (OMB) about missing rules, GAO stopped doing most of those checks and notifications in November 2011. Shortly thereafter, the number of unsubmitted rules skyrocketed.

Because only one CRA resolution of disapproval has been signed into law during the past 18 years, some

consider the CRA to be a failure. But the CRA has arguably had other, less discernable effects. The introduction of a disapproval resolution has been used to gather support for other legislation, to force agencies to withdraw or suspend the implementation of certain rules, to delay rules until further information is obtained, and to even speed up the implementation of rules. The CRA has also helped keep Congress informed of agency rulemaking actions, and may have prevented some rules from being developed. Therefore, to improve the operation of the CRA, it is important to understand how the current situation came to be, and how it can be corrected.

What Rules Does the CRA Cover?

The CRA generally defines the word "rule" as having the same meaning as in Section 551 of the Administrative Procedure Act (APA, 5 U.S.C. §551(4)), but excludes certain types of rules (e.g., rules of particular applicability, and rules relating to agency management or personnel). These limits notwithstanding, the scope of the CRA is extremely broad, including rules that are exempt from APA notice-and-comment rulemaking procedures (e.g., interpretive rules, statements of policy, and rules that fall under the "military" or "foreign affairs" exemptions in the APA). Historically, about 70% of the final rules submitted to GAO under the CRA are non-substantive "administrative" or "informational" rules (e.g., Federal Aviation Administration (FAA) airworthiness directives, and Coast Guard rules establishing safety or security zones).

Recognizing that the broad scope of the CRA could be a problem, in August 1997, the American Bar

*Special Counsel, Administrative Conference of the United States (retired from Congressional Research Service in 2011).

Association's (ABA's) Section of Administrative Law and Regulatory Practice and Section of Business Law adopted a series of recommendations to "provide a more practical process for Congressional review of agency regulations." (Report No. 2 of the Section of Administrative Law and Regulatory Practice, Presented Jointly with the Section of Business Law, 1997, 122-2 ABA Ann. Rep. 465). Among other things, the ABA sections recommended that Congress amend the CRA to

limit automatic application of the resolution of disapproval process to major rules and such other defined classes of rules as are likely to have important impacts, while establishing an alternative process by which the action of any congressional committee or subcommittee may bring any other pending rule-making within the process. At a minimum, routine and frequent rules should be excluded from the automatic application of the Act.

The report accompanying this recommendation noted that a "rule" as defined in the CRA includes more than just the 3,000 to 4,000 final rules that are published annually in the *Federal Register*, and includes "tens of thousands" of such items as interpretive rules, general statements of policy, guidance to field offices, suggested enforcement strategies, and other actions affecting a member of the public and relied upon by the agency.

Were agencies to comply fully with the [CRA's] requirement that *all* these matters be filed with Congress as a condition of their effectiveness (as it appears, thus far, they are not), Congress and the GAO would be swamped with filings. Burying Congress in paper might even seem a useful means of diverting attention from larger, controversial matters; haystacks can be useful for concealing needles. However, no one believes many, if any, of

these rules will be the subject of a resolution of disapproval. Yet requiring their submission could impose significant aggregate costs, both in encouraging agencies to cease providing such information and in dollars, well beyond their possible benefit.

Unfortunately, Congress never acted on the ABA sections' recommendations. Therefore, in order for the Coast Guard to establish a safety zone under a fireworks display at Seaworld, or in order for the FAA to require the inspection of certain types of aircraft engines, the implementing rule must first be submitted to the House of Representatives, to the Senate, and to GAO.

Evidence That Rules Are Not Being Submitted

Shortly after the CRA was enacted, GAO voluntarily developed a database of submitted rules, and began checking the *Federal Register* to ensure that all covered rules were being submitted. From 1997 through 2011, federal agencies submitted an average of about 3600 rules to GAO each year, which was about 88% of the final rules that were published in the *Federal Register* in those years. (The percentage of published rules submitted to GAO varied from year to year, but never fell below 82% in any year.) During that period, GAO periodically notified OMB about hundreds of missing rules that had been published in the *Federal Register*, and most of those rules were ultimately submitted. This process worked; by 2009 and 2010, only a few dozen rules published during those years went unsubmitted.

However, in November 2011, in response to reductions in its requested appropriations, GAO decided to reduce its voluntary checks of the *Federal Register*, and to stop notifying OMB about missing rules. (GAO informed OMB about this change in its procedures, but did not tell the public or anyone in Congress.) Shortly thereafter, the number of rules in the GAO database fell sharply.

Federal agencies submitted 2660 final rules that were published in the *Federal Register* during 2012, and submitted 2586 rules that were published in 2013—only about 71% of the rules that were published during those two years, and 1242 fewer rules than would have been submitted to GAO at the 88% historical rate of submission. For the first half of 2014, federal agencies submitted 835 final rules to GAO—less than half of those published during this period, and 647 fewer rules than would have been submitted at the 88% rate of submission.

Although most of the missing rules from 2012 through the first half of 2014 appear to be routine or informational in nature, they also included at least six rules that were considered "major" under the CRA (e.g., rules with a \$100 million annual effect on the economy) and at least 37 other rules that were considered "significant" under Executive Order 12866. These included:

- Three Department of Defense (DoD) rules published in January 2012 and April 2013 implementing the department's sexual assault prevention and response program.
- A February 2012 Department of Commerce (DOC) rule that completely revised regulations concerning the authorization and regulation of foreign-trade zones and zone activity in the United States.
- A March 2013 Department of Education rule regarding the "Investing in Innovation Fund" that was expected to involve annual transfers of more than \$140 million.
- Two DOD rules published in August and December 2013 involving the TRICARE health program that were each expected to produce annual budgetary savings of more than \$100 million.

Most of the 43 missing major and significant rules also did not appear to have been received by both houses of Congress—thereby preventing

a Member of Congress from introducing a resolution of disapproval under the CRA. Even if a covered rule is submitted to both houses of Congress, the CRA generally indicates it cannot take effect until it is also submitted to GAO.

However, because Section 805 of the CRA prohibits judicial review of any “action” or “omission,” it appears that a court may not prevent an agency from enforcing a covered rule that was not reported to GAO and Congress. In 1997, the Department of Justice (DOJ) characterized the language in Section 805 as “unusually sweeping,” and argued that it prevented judicial review of an agency’s failure to report a covered rule. (Letter dated June 11, 1997, to the Honorable Lamar Smith, Chairman, Subcommittee on Immigration and Claims, Senate Judiciary Committee, from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, DOJ, and accompanying analysis dated June 10, 1997, at pp 9–11.) In 2007 and 2009, federal appeals courts dismissed claims that rules relied on by defendant agencies were not reported to Congress and were therefore unenforceable. (See *Via Christie Regional Medical Center v. Leavitt*, 509 F. 3d 1259, 1271 n. 11 (10th Cir. 2007); and *Montanans for Multiple Use v. Barbouletos*, 568 F. 3d 225, 228 (D.C.Cir. 2009).

This interpretation appears to be at odds with what the principal authors of the CRA wanted. In a joint explanatory statement issued about two weeks after enactment (because the CRA contained almost no real legislative history), the principal authors stated that the limitation on judicial review in Section 805 “in no way prohibits a court from determining whether a rule is in effect. For example, the authors expect that a court might recognize that a rule has no legal effect” due to the failure to submit a rule to Congress and GAO. (See Joint statement of House and Senate Sponsors, 142 Cong. Rec. S3683, at S3686, daily ed. April 18, 1996.)

Possible Solutions

To improve the operation of the CRA, Congress could take several actions. For example, it could require GAO (either in freestanding legislation or as a condition to its appropriation) to resume its annual reviews of the *Federal Register* to identify *all* covered rules that have not been submitted (and not just focus on *major* rules). Congress could also require GAO to (1) resume its notifications to OMB (and possibly to the rulemaking agencies themselves) about the covered rules that were not submitted, (2) publish a list of unsubmitted rules in the *Federal Register* (as it did shortly after the CRA was enacted), and/or (3) notify the congressional committees of jurisdiction regarding unsubmitted rules.

Congress could also implement the recommendations made by the two ABA sections in 1997, and not require nonsubstantive administrative and informational rules to be submitted to Congress and GAO before they can take effect. Eliminating the submission requirement for such minor rules (even if Congress retained the ability to overturn all covered rules through the expedited CRA process) would greatly reduce the time and costs associated with sending rules to GAO and both houses of Congress. Doing so could also allow rulemaking agencies to better ensure that the covered rules are, in fact, submitted, and could allow Congress to better focus on the rules that are most likely to be the subject of a resolution of disapproval.

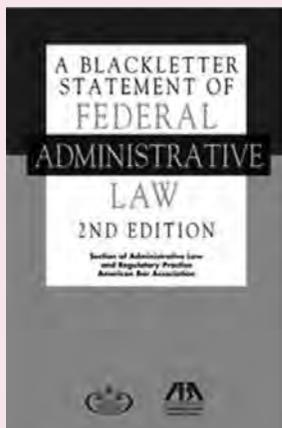
In addition, or as an alternative, Congress could re-engineer the CRA rule submission process. In June 2009, the House of Representatives unanimously passed H.R. 2247, the “Congressional Review Act Improvement Act,” which would have eliminated the requirement that federal agencies submit their covered rules and related reports to both Houses of Congress before such rules can take effect. (Because

the agencies’ rules are considered “executive communications,” House and Senate procedures require that they be submitted in hard copy with an original signature. As a result, agencies must hand-carry the rules to Congress, or hire couriers to do so.) Agencies would have still been required to submit covered rules to GAO (which has always accepted them electronically), and GAO would have been required to submit to each house of Congress a weekly report containing a list of the rules received. After passage by the House, H.R. 2247 was referred to the Senate Committee on Homeland Security and Governmental Affairs, but the bill was not acted on during the remainder of the 111th Congress. Enactment of this legislation would greatly simplify the rule submission process.

Finally, Congress may want to consider explicitly permitting some type of judicial review of agency compliance with the CRA’s rule submission requirement. Judicial review would permit any affected party to take the issuing agency to court to prevent enforcement of a covered rule until it is submitted to GAO (and currently, to both houses of Congress). The threat of such legal action could result in greater agency compliance with the submission requirement, and less need for GAO to alert agencies when rules are not submitted.

Congress could make it clear that judicial review of the submission requirement does not permit judicial review of other aspects of the CRA process (e.g., congressional decisions to disapprove certain rules). Also, to help ensure that agency rulemaking does not become mired in court, Congress may want to permit judicial review of agency rule submission only after GAO has formally notified the agency that the rule had not been submitted, and the agency has had a certain period of time (e.g., 60 or 90 days) to submit the rule to GAO and Congress. ○

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Judicial Review of Final Rules and the Administrative Record Problem

Leland E. Beck*

The Administrative Procedure Act (APA) requires that courts “review the whole record or those parts of it cited by a party” to determine the lawfulness of challenged final agency action, 5 U.S.C. § 706, including informal rulemaking. The APA does not define the “whole record.” The United States Supreme Court, in *Citizens to Preserve Overton Park v. Volpe*, set the basic parameter for judicial review “to be based on the full administrative record that was before the Secretary at the time he made his decision.”

In the *Camp v. Pitts* formulation, the Supreme Court has made clear that under the APA “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.” The courts have filled out the deceptively simple concept of the “whole record” over the past seven decades through sometimes confusing and inconsistent decisions resolving complex embedded questions on what is now called the “administrative record.”

In light of judicial precedent and to illuminate and understand agency practice, last year the Administrative Conference of the United States (ACUS) undertook a bi-decennial review of the administrative recordkeeping in informal rulemaking and provided the profession with practical recommendations. Administrative Conference of the United States, *Administrative*

Conference Recommendation 2013-4, The Administrative Record in Informal Rulemaking (Adopted June 14, 2013), 78 Fed. Reg. 41,352 (July 10, 2013), also available at www.acus.gov/2013-4. The ACUS recommendations do not establish a “standard of care,” and the courts may not enforce those recommendations as procedural requirements under *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978). Yet agencies may consider ACUS recommendations as “best practices” as they develop administrative records, and both private parties assessing litigation and courts reviewing challenges to final agency action may consider them as guidance.

The Whole Record Standard

The “whole record,” or the operative “administrative record,” includes all of the matters “considered” by the agency in reaching the final decision. The scope of what an agency “considered” is subject to interpretation. For a final rule, the administrative record would naturally include the proposed rule and the public comments on that proposed rule, but also may contain a host of documents reflecting agency data, experience, and judgment. At the same time, no one can realistically expect the head of an agency (or all commissioners in a multi-member board) to review an entire regulatory file before approving a final rule, although they may unquestionably access and review any part of that record they choose. Agency principals work through subordinates and, therefore, material “considered” by those subordinates also forms a part of the administrative record and may vary with the structure, delegations, and operations of each agency. ACUS suggests that material be included if it was “review[ed] by an individual with

substantive responsibilities in connection with the rulemaking. To say that material was considered also entails some minimum degree of attention to the contents of a document.”

The administrative record is temporally limited to the information possessed by the agency at the time it makes its final decision—*post hoc* information (in most cases) and *post hoc* justification or argument are not acceptable. In rare instances, *post-decision* information confirming or negating a predictive standard may be reviewed by the court, but *post hoc* rationalization can almost never be justified.

Some agencies, as illustrated by the ACUS agency survey, historically by policy limited their administrative records to information “relied” upon in reaching a decision or material that they deem “relevant.” These attempts to help define what the agency has considered and therefore included in the administrative record can be problematic by creating exclusions that are not necessarily supported by judicial interpretation. Ultimately, a court must decide whether the agency failed to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made’” under *Motor Veh. Mfrs. Ass’n v. State Farm Ins.*, 463 U.S. 29 (1983).

The requirement that the courts review this “whole” administrative record or those parts cited by the parties as the basis for judicial review of final agency rulemaking has limiting implications as well. In APA litigation the administrative record is the “trial” record; both the United States District Courts and Courts of Appeal act as appellate bodies. Indeed, the familiar “summary judgment” mechanism of Federal Rule of Civil

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Procedure 56 for resolving APA litigation in the district courts may be more aptly referred to as “judgment on the administrative record.”

These considerations are based, of course, on the default provisions of the APA. Numerous agency- and program-specific statutes supplant or modify the APA requirements with more specific requirements. Some statutes command that the agency consider or not consider specific matters, or specifically include or exclude specific matters in the administrative record. Both the APA and the specific agency and program statutes must be understood.

Agency Development & Timing Issues

ACUS’s agency survey revealed a wide range of policies and practices, and lack thereof, on the compilation of administrative records in rulemaking. Some agencies begin the process early and have a complete rulemaking record when the final decision is made, while others begin to compile an administrative record only when ordered to do so by a court. A few agencies have developed highly specific policies for the ongoing collection of administrative records in rulemaking, while others have no policy at all. Court decisions and experience suggest that some agency policies are aspirational. Two examples illustrate the risks borne by agencies that do not begin compilation until late in the process.

First, an administrative record may be needed almost immediately for judicial review of pre-enforcement challenges to agency regulations. For example, if the plaintiff seeks a stay under 5 U.S.C. § 705 of a final rule’s 30-day after-promulgation effective date (the default minimum effective date under 5 U.S.C. § 553), the agency may need to produce the administrative record in short order. Without the administrative record, the court may not be able to effectively determine whether the plaintiff has met its burden for preliminary relief under two of the traditional and

familiar stay or preliminary injunction standards—whether the plaintiff is likely to succeed on the merits and whether plaintiff is likely to suffer irreparable harm in the absence of relief. At the same time, the other two factors—the balance of equities and the public interest—may shift more heavily in the agency’s favor on the rule’s effective date. This scenario is not far-fetched, although no court has faced it squarely to date.

On the other hand, there exists a very real possibility that an administrative record of a final rule may be required many years after the rule is promulgated. A final rule may be challenged up to six years after it has been promulgated under 28 U.S.C. § 2401, or the legal efficacy of a rule may be raised as a defense to enforcement even later. Throughout that time, portions of the administrative record may be lost or the ability to produce an administrative record may diminish due to the loss of information—documents, emails, analyses, notes—as staff members depart, computer systems are replaced or crash, etc. Experience shows that agencies have taken months to collect far-flung documents for an administrative record, and core documents have been completely lost in the mists of time. In light of these practical difficulties in after-the-fact record assembly (and attendant problems for on-the-record judicial review), ACUS suggested that the National Archives and Records Administration amend its agency guidance to address the official status and legal value of administrative records.

ACUS also recommended that agencies designate a specific official to manage the rulemaking record and begin compiling the rulemaking record “no later than the date on which an agency publishes the notice of proposed rulemaking.” This compilation timing was a compromise; “no later than” strongly suggests that agencies may wish to begin record compilation earlier.

The Privilege Problem

Courts have been inconsistent on whether privileged material—e.g., attorney-client, work product, and, of course, pre-decisional—may be excluded from an administrative record or is not a part of the administrative record at all. Agencies generally do not include what they perceive to be privileged information in an administrative record, although some agencies may opt to waive their privilege in some instances.

“Privilege,” however, begs the question of who decides what is privileged. The question of privilege is often litigated under the disclosure provisions of the Freedom of Information Act (FOIA), and is generally subject, as an evidentiary matter under Federal Rule of Evidence 501, to common law (i.e., judicial) development. An agency’s view of its privilege may be correct (even presumptively correct), but, as quintessentially reinforced in *United States v. Nixon*, 418 U.S. 683 (1974), it is the “province and duty of this Court ‘to say what the law is’ with respect to the claim of privilege.”

Excluding privileged information, or redacting privileged information in documents, from the administrative record, leaves the administrative record as something less than the “whole record” before the agency. A variant on the FOIA solution may be appropriate here, and the courts have occasionally utilized a parallel tool—requiring the agency to submit a privilege (or *Vaughn*) index so that the reviewing court may determine the appropriateness of the exclusions and redactions *in camera*. Several agencies more generally index all materials internally, and some even voluntarily provide privilege logs to litigants and to the reviewing court. ACUS urged agencies to formulate and inform the public of their “general policy regarding the treatment of protected and privileged materials, including indexing, in public rulemaking dockets and in certification of the administrative record for judicial review.”

External Constraints

External constraints may limit an administrative record and pose challenges to the agencies, private parties, and the courts. For example, the Copyright Act does not permit an agency to republish a copyrighted work on a public forum such as the court's docket merely because the agency has considered that work in formulating a final rule. Some agencies have adjusted well to this limitation, for example, by including a bibliography in the public administrative record, while others may not have considered the issue. Agencies may need to purchase (to pay royalties) at least two additional copies of a copyrighted work—one for the court and one for the plaintiff—to make the administrative record whole.

Privacy issues, and some confidentiality issues, are governed by other laws limiting what the agency may publicly release. Here again, agencies can be innovative in complying with disclosure limitations by providing non-public copies to the court and litigants, and the courts may issue appropriate protective orders to assist both the agency and the private litigant in preserving confidentiality.

Completeness and Supplementation

The federal courts presume that the agency has acted in conformity with the law both in making its decision and assembling the administrative record, but this presumption can be challenged by litigants. For example, the presumption may be limited by a concrete showing that the agency acted in violation of ethics standards. Such showings are infrequent, however, and courts rarely will look beyond an administrative record presented by an agency. Questions do arise as to whether the record is actually complete—that it contains all material considered by the agency—or whether it should be supplemented with other material not considered by the agency.

Completion issues arise when a credible allegation is made that the

administrative record for judicial review lacks some information that the agency possessed and considered, but failed to include in the administrative record. Judicial decisions that have required the agency to complete the record have ranged from inclusions of documents referred to by a deciding official during a speech while the rule was being considered, to critical records of litigation that informs the rulemaking decision, to underlying data on which conclusions were based. An agency may not limit the record to those matters that favor its position in the final rule. The administrative record must contain known contrary or adverse information.

Supplementation of the administrative record with information not held, and therefore not considered, by the agency may be appropriate when litigants rebut the presumption of regularity with a strong showing that technical or background information is necessary for effective judicial review; the information is necessary to support or rebut predictive judgments; or the information demonstrates bad faith on the part of the agency decision-maker. These types of documents are not lightly added to the court's consideration of the efficacy of a final rule, but some case law demonstrates that the presumption of regularity is not always appropriate.

Conclusion

The deceptive simplicity of the notion of the administrative record as the “whole record” for judicial review generates many complicated procedural and substantive issues. The administrative record concept is well-established, but the actual agency development of administrative records and regulatory litigation based on administrative records remains both daunting and complicated for the agencies, practitioners, and courts. ACUS's recommendation provides some best practices for agencies and some guidance for both litigants and the courts to consider. ○

Upcoming Section Events

ABA Mid-Year Council Meeting

Saturday, February 7, 2015
from 8 am–4 pm
Houston, Texas

Spring Conference & Council Meeting

May, 2015 (*dates to be confirmed*)
Orlando, Florida
(*location to be confirmed*)

11th Annual Administrative Law & Regulatory Practice Institute

Thursday, April 23, 2015, Full day
Institute CLE Program
Friday, April 24, 2015, Half Day
Rulemaking 101 and Judicial Review
Walter E. Washington Convention Center, Washington, DC

ABA Annual Meeting Council & Membership Meeting

Saturday, August 1, 2015
from 8 am–4 pm
Chicago, Illinois

10th Annual Homeland Security Law Institute

Thursday, August 27–
Friday, August 28, 2015
Hyatt Regency Washington on
Capitol Hill, Washington, DC

Administrative Law Conference

Thursday, October 29–
Friday, October 30, 2015
Walter E. Washington Convention Center, Washington, DC

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

At the close of October 2013 Term, the Supreme Court issued several decisions with deeply important implications for administrative law. These decisions touched on nearly all aspects of the field and include rulings on recess appointments, the EPA's scope of power to regulate climate change under the Clean Air Act, standing and ripeness, and First Amendment rights of government employees. The Court also decided several important cases involving statutory interpretation, including the *Hobby Lobby* decision, which implicated the Affordable Care Act and the Religious Freedom Restoration Act, and *Aereo*, which addressed the Copyright Act's role on the internet.

Recess Appointments

One of the most important administrative law decisions from the 2013 term is *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which involved the scope of the President's power to make recess appointments.

On January 3, 2012, the Senate convened for the Second Session of the 112th Congress. It thereafter adjourned until January 20th, reconvening only for several pro forma sessions at which no business was conducted. Between two of these pro forma sessions, President Obama made three recess appointments to the NLRB pursuant to his recess appointments power under Article II § 2, which gives the President the power "to fill . . . Vacancies that may happen during the Recess of the Senate." The question in *Noel Canning* was whether the President exceeded his powers because these appointments were made during a recess that occurred during a session of the Senate instead of during a recess that occurs between enumerated Senate sessions. In addition, the parties pressed that the appointments were improper because the vacancies first occurred before the recesses began.

The Court unanimously concluded that the appointments were improper. In a majority opinion authored by Justice Breyer, the Court began by rejecting the argument that the President is empowered to make recess appointments only during inter-session recesses. Although acknowledging that the definite article in the phrase "the Recess" might "suggest that the phrase refers to" only inter-session recesses, the Court argued that it could also be read to refer to intra-session recesses. That broader reading, the Court continued, better aligned with the Clause's purpose of allowing the President to "ensure the continued functioning of the Federal Government when

the Senate is away." It also was consistent with the long history of intra-session recess appointments. *Id.* at 2560-62. The Court limited this interpretation, however, by stating that the Clause does not allow appointments during very short recesses. In particular, the Court stated that the Clause does not allow recess appointments for recesses of 3 days or less. Moreover, a recess of less than ten days is presumptively too short, though that presumption may be overcome in "very unusual circumstances." *Id.* at 2565-66.

The Court also rejected the argument that the President has the power to make recess appointments only to fill vacancies that first arise during the recess in which the appointment is made. Although acknowledging that the "most natural" reading of the recess appointments Clause is to limit it only to vacancies that initially occur during a recess, the Court reasoned that the Clause could be read to include vacancies that occur before the recess begins. The Court supported this broader reading by again pointing to the Clause's purpose to "permit the President to obtain the assistance of subordinate officers when the Senate . . . cannot confirm them"—a purpose underscored by a substantial historical practice of applying the Clause to pre-recess vacancies. *Id.* at 2568-70.

Nevertheless, the Court deemed the appointments improper because they were made during a three-day recess. In so holding, the Court rejected the argument that pro forma sessions should not count as sessions. Noting that the Constitution gives the Senate broad control over its conduct of business, the Court stated that the Senate "is in session when it says it is, provided that . . . it retains the capacity to transact Senate business," and that pro forma sessions fall within this definition. *Id.* at 2574.

Justice Scalia concurred in the judgment, joined by Chief Justice Roberts and Justices Thomas and Alito. In their view, the President has the power to make recess appointments only during a recess that occurs between enumerated sessions of the Senate, and the power to make recess appointments only to fill vacancies that first arise during the recess in which the appointment is made.

Clean Air Act and Climate Change

Another headlining case from this Term is *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014). There, the Court addressed the EPA's authority under the Clean Air Act to regulate greenhouse gas emissions from stationary sources (such as power plants and buildings). The EPA had found its earlier determination that greenhouse gases from mobile sources (such as cars, trucks, and the like) endanger the environment and compelled it to regulate this pollution from stationary sources. Specifically, the agency concluded that greenhouse gas emissions triggered "Prevention of Significant Deterioration" (PSD)

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regulations for the construction and modification of stationary sources, including use of “Best Available Control Technology” (BACT), as well as Title V permitting regulations for facility operation.

In an opinion by Justice Scalia, the Court ruled 5–4 that EPA cannot apply PSD and Title V regulations to stationary sources simply because they emit substantial greenhouse gas emissions. The Court further determined, however, by a 7–2 margin, that stationary sources that are already subject to regulation under the Act for “traditional” pollutants can be subject to BACT regulations for non-*de minimis* greenhouse gas emissions. Thus, although the Court substantially circumscribed EPA’s reading of the statute, it left the agency free as a practical matter to regulate virtually all the greenhouse gas emitters it sought to control.

In concluding that PSD and Title V regulations did not apply, the Court pointed out at length that EPA itself acknowledged that interpreting the statute to extend to greenhouse gas emissions under PSD and Title V would drastically expand the statute beyond its traditional scope: Applications under the PSD program “would jump from about 800 to nearly 82,000,” and “annual administrative costs [for Title V] would balloon from \$62 million to \$21 billion.” *Id.* at 2443. Without an express directive from Congress allowing such an expansion, the Court found EPA’s effort to create it by administrative fiat untenable.

Thus, at step one of the *Chevron* analysis, the Court noted numerous ways in which EPA long has interpreted different parts of the Clean Air Act to use narrower definitions of “air pollutant” than the statute might potentially allow. This defeated EPA’s argument that the Supreme Court’s ruling in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that greenhouse gases are pollutants under the Act forced the agency to regulate this pollution for stationary sources. “It takes some cheek for EPA to insist that it cannot possibly give ‘air pollutant’ a reasonable, context-appropriate meaning in the PSD and Title V contexts when it has been doing precisely that for decades.” *Utility Air Reg. Group*, 134 S. Ct. at 2440. Then, at step two of the *Chevron* analysis, the Court reaffirmed that while the power to execute laws by definition includes the authority to gap fill, it “does not include a power to revise clear statutory terms that turn out not to work in practice.” *Id.* at 2446. The Court was thus unimpressed with the EPA’s so-called “Tailoring Rule,” which sought to trim the way PSD and Title V regulations would apply to greenhouse gas regulation of stationary sources. “We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery.” *Id.*

The Court was, however, willing to let EPA apply BACT regulations to greenhouse gas emissions for

stationary sources already subject to the Clean Air Act’s PSD strictures for “conventional” pollutants. This conclusion, the Court noted, flowed from the BACT provision’s text, which references “each pollutant subject to regulation” under the Act rather than a narrower class of pollutants as the PSD and Title V provisions do. In the Court’s view, construing the statute in this way would be reasonable because it would not “extend[] EPA jurisdiction over millions of previously unregulated entities,” but instead would “moderately increase[e] the demands EPA (or a state permitting authority) can make of entities already subject to its regulation.” *Id.* at 2448. Notably, according to the Solicitor General, EPA’s regulation of these sources sweeps in 83 percent of stationary source greenhouse gas emissions in the country, as opposed to the 3 percent of such emissions the Court ruled EPA cannot regulate under PSD and Title V rules.

Justice Alito, joined by Justice Thomas, wrote separately to disagree with the Court’s conclusion that BACT regulations could apply to already-regulated stationary sources. Justice Breyer, joined by Justices Ginsburg, Kagan, and Sotomayor, dissented from the Court’s holding that PSD and Title V regulations could not apply to greenhouse gas pollution generally.

Standing and Ripeness

The Court once again addressed the imminence requirement of Article III standing in *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014).

Ohio law prohibits deliberate false statements about candidates for political office. Invoking this law, Congressman Driehaus filed suit in the Ohio Election Commission against the Susan B. Anthony List (SBAL) when the SBAL sought to erect a billboard containing the arguably false statement that Driehaus supported “taxpayer-funded abortion” by voting for the Affordable Care Act (“ACA”). Although Driehaus withdrew his suit after losing the election, SBAL filed suit in federal district court for declaratory and injunctive relief prohibiting the future enforcement of the Ohio law on First Amendment grounds, explaining that it intended to make similar statements in future elections about officials who supported the ACA. The question before the Court was whether SBAL had Article III standing to pursue its claim.

In a unanimous opinion by Justice Thomas, the Court concluded that SBAL had standing. It reiterated that a plaintiff has standing to challenge a law before enforcement only if the plaintiff alleges “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution.” *Id.* at 2342. The Court concluded that this standard had been met. It

explained that SBAL had alleged an intent to “engage in a course of conduct arguably affected with a constitutional interest” namely, an intent to make similar statements in future elections about officials who supported the ACA, statements arguably covered by the First Amendment. Further, the Court said, SBAL faced a “substantial” threat of future enforcement actions for these statements. It supported that conclusion by noting that a panel of the Ohio Commission had concluded that SBAL’s statements about Driehaus violated the Ohio law, that the Ohio law authorizes anyone to bring suit in the Commission, and that Commission actions enforcing the law are a common occurrence. Finally, the Court buttressed SBAL’s standing by pointing out that SBAL faced the threat of criminal prosecution for its contemplated statements. *Id.* at 2345.

The Court also rejected the argument that SBAL’s claims should be dismissed for lack of prudential ripeness on the grounds that the factual record was not “sufficiently developed”—and that SBAL would not face “hardship” if judicial relief were not immediately given. It explained that, even assuming those prudential factors could support dismissal, neither supported dismissal, because SBAL’s claim was purely legal and would not benefit from further factual development and because SBAL would face the hardship of choosing to refrain from speech or face another law suit if judicial relief were not immediately granted. *Id.* at 2347.

First Amendment Rights of Public Employees

In *Lane v. Franks*, 134 S. Ct. 2369 (2014), the Court resolved the scope of First Amendment protections for public employees who provide truthful testimony compelled by subpoena outside the course of their normal employment duties.

Edward Lane was director of an Alabama state program for underprivileged youth. He testified under subpoena in a criminal proceeding against another Alabama employee who had been charged with defrauding the program. Steve Franks, Lane’s supervisor, subsequently fired Lane, allegedly for providing that testimony. In turn, Lane sued Franks under 42 U.S.C. § 1983 for violating his First Amendment rights by retaliating against him for testifying.

In a unanimous opinion by Justice Sotomayor, the Court held that the First Amendment prohibits the government from retaliating against a government employee who provides truthful testimony compelled by a subpoena. It explained that public employees retain First Amendment rights because they are still citizens of the United States, but that the government has an interest in exercising some control over its employees’ speech. To accommodate these interests, the Court set forth a two-part test to determine

whether an employee’s speech is protected. The first is whether the employee spoke “as a citizen on a matter of public concern.” If so, the second question is whether the government had “an adequate justification” for controlling the employee’s speech. *Id.* at 2377.

Applying that test, the Court concluded that Lane’s dismissal violated the First Amendment. It explained that Lane had testified as a citizen instead of as an employee because his job did not include testifying in court, and because the obligation to testify truthfully in court arose independently of his employment. Moreover, that testimony was about a matter of public concern because it involved public corruption. Finally, the government had not identified any legitimate interest for preventing that testimony.

Nevertheless, the Court concluded that the case should be dismissed based on qualified immunity. It explained that, at the time of Lane’s firing, it was not “clearly established” that the First Amendment prohibited a government employer from firing an employee for his testimony given under oath and outside the scope of his normal job responsibilities. It noted that neither the Supreme Court nor the Eleventh Circuit (from which the case originated) had decided that issue. *Id.* at 2381.

Although joining the majority, Justice Thomas filed a concurrence, joined by Justices Scalia and Alito. He noted that the opinion did not resolve whether similar protections would extend to a public employee whose job does involve providing testimony. *Id.* at 2384.

Statutory Interpretation

The Court decided several cases involving statutory interpretation this quarter. Two of the cases, involving the Affordable Care Act and the Copyright Act, sharply divided the Court. One case, involving IRS summonses, was more straightforward, with a unanimous result.

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, addressed whether the Religious Freedom Restoration Act (RFRA) exempts closely held corporations that object to providing contraceptives on religious grounds from agency regulations requiring employers to provide insurance coverage for contraceptives. Under regulations promulgated by the Department of Health and Human Services implementing the Affordable Care Act (ACA), employers with more than fifty employees generally must provide health insurance that includes no-cost access to contraception for female employees. 45 C.F.R. § 147.130. Several closely held corporations that have religious objections to providing certain contraceptives challenged this mandate as violative of RFRA, which prohibits the government from “substantially burden[ing] a person’s exercise of religion” unless the burden “(1) is in furtherance of a compelling governmental interest; and (2) is

the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1.

In a 5-4 decision written by Justice Alito, the Court held that applying the contraception regulation to objecting corporations violates RFRA. The Court began by concluding that RFRA protects corporations, explaining that the Dictionary Act, 1 U.S.C. § 1, which provides default statutory definitions, defines “person” to include corporations and nothing in RFRA indicated an intent to change that definition. In so concluding, the Court rejected arguments that corporations cannot exercise religion and that RFRA does not extend to businesses that seek to turn a profit in exercising their religion. The Court limited its holding, however, to closely held corporations, explicitly leaving open the question whether RFRA applies to public companies.

Next, the Court concluded that the contraception mandate substantially burdened the corporations’ exercise of religion. It explained that enforcing the mandate would require the corporations either to violate their religious beliefs against supporting contraception or to incur substantial penalties for not providing contraception coverage.

Finally, the Court concluded that this substantial burden was unwarranted. Assuming that the mandate serves the compelling interest of ensuring access to all contraceptives, the mandate did not further that interest in the “least restrictive” way. The Court noted that the government could bear the cost of providing contraceptives or establish some other mechanism for exempting closely-held corporations with religious objections.

Justice Kennedy concurred separately to stress that the Court’s opinion did not find that the mandate did not serve a compelling interest. Instead, he explained, the Court assumed there was a compelling interest, but found the mandate was not narrowly tailored to further that interest.

Justice Ginsburg dissented, joined in full by Justice Sotomayor, and in part by Justices Breyer and Kagan. In her view, RFRA does not protect corporations’ exercise of religion. Moreover, she argued, the contraception mandate did not substantially burden the rights of the corporations in the case because the employees who receive contraception coverage might not use those contraceptives. She further contended that the government had shown that there is no less restrictive means of ensuring employees’ access to contraceptives while satisfying employers’ potential religious objections.

American Broadcasting Companies v. Aereo, 134 S. Ct. 2498 (2014), also sharply divided the Court. Aereo is a subscription service that transmits broadcasted material over the internet. When a subscriber wishes to view a program through Aereo, he selects that show from Aereo’s website.

Aereo then receives the broadcasted show on an antenna dedicated to the subscriber, translates that material into data that can be transmitted over the internet, and then streams that copy to the subscriber a few seconds later. This process is individualized for each subscriber. When two subscribers request the same show, Aereo obtains the show from two separate antennae and sends the data to the subscribers in separate transmissions. The issue before the Court was whether Aereo’s transmission of copyrighted works violates the Copyright Act, which confers on copyright holders the exclusive right to “perform” the copyrighted work “publicly.” 17 U.S.C. § 101.

The Court held, 6-3, that Aereo’s service violates the Copyright Act. In an opinion by Justice Breyer, the Court first concluded that Aereo’s service constitutes a performance. Noting that to “perform” an audiovisual work means “to show its images in any sequence or to make the sounds accompanying it audible,” the Court reasoned that Aereo performs because it uses its equipment to send programs to its subscribers. The Court rejected the argument that Aereo did not perform because subscribers—instead of Aereo—selected which programs to transmit.

The Court further concluded that Aereo’s transmissions were public. It reasoned that the subscribers to whom Aereo transmits constituted the public because they are made up of “a large number of people who are unrelated and unknown to each other.” The Court found it of no consequence that Aereo sent separate transmissions to each subscriber instead of sending one transmission to the general public: “[A]n entity may transmit a performance through multiple, discrete transmissions.” *Id.* at 2508-09.

Joined by Justices Thomas and Alito, Justice Scalia dissented. In his view, Aereo did not perform copyrighted material by transmitting it; instead, he argued, subscribers perform by choosing which shows to transmit while Aereo simply provides the means for subscribers to access copyrighted material.

In *United States v. Clarke*, 134 S. Ct. 2361 (2014), the Court clarified what showing is necessary to challenge an Internal Revenue Service (IRS) summons. The Court concluded that parties wishing to challenge such summonses must point to specific facts that might show bad faith on the agency’s part in issuing the summons, though that evidence can be circumstantial.

At issue in *Clarke* were tax summonses issued by the IRS to individuals associated with a limited partnership. The individuals asserted that the IRS was using the summonses for bad faith, including to gain an upper hand in related tax court litigation where discovery was more limited. The Eleventh Circuit had ruled that a bare allegation of

impropriety was enough to challenge the summonses. The Supreme Court disagreed.

In a unanimous opinion authored by Justice Kagan, the Court ruled that specific facts are necessary to challenge an IRS summons. Such summons are issued pursuant to 26 U.S.C. § 7602(a), which provides that the IRS can command taxpayers to appear, provide sworn testimony, or produce documents “or other data . . . relevant or material to [a tax] inquiry.” If the taxpayer refuses, then under the statute, the IRS may bring an enforcement action in district court, which the Court has held requires the agency to show it acted in good faith in issuing the summons. The Court previously had characterized that proceeding as a “summary” one, given that a summons’ purpose is not to accuse but to inquire.

Consequently, the Court ruled that simply allowing a taxpayer to make an allegation of impropriety without backing it up would unbalance the limited purpose of that summons–challenge proceeding: “As part of the adversarial process concerning a summons’s validity, the taxpayer is entitled to examine an IRS agent when he can point to specific facts or circumstances plausibly raising an inference of bad faith. Naked allegations of improper purpose are not enough: The taxpayer must offer some credible evidence supporting his charge.” *Id.* at 2367. Acknowledging that direct evidence of administrative bad faith typically will be hard to come by, the Court clarified, however, that “circumstantial evidence can suffice to meet [this] burden.” *Id.*

Certiorari Grants

This quarter, the Court also has granted certiorari in several cases dealing with administrative law. These include cases on separation of powers, agency procedure and deference, and statutory construction.

Separation of Powers

U.S. Dep’t of Transportation v. Ass’n of American Railroads (No. 13-1080) presents the question of whether the Passenger Rail Investment and Improvement Act of 2008 unconstitutionally delegates congressional power. That Act asks the Federal Railroad Administration and Amtrak to jointly develop standards applicable to Amtrak and, if they cannot not agree, to utilize an arbitrator. The D.C. Circuit held that this delegation was unconstitutional.

The Court will once again consider Article III limits on bankruptcy courts in *Wellness Int’l Network v. Sharif* (No. 13-935). To avoid violating Article III, which assigns the judiciary power to the federal courts, a bankruptcy court may decide only those actions that “stem[] from the bankruptcy itself.” The question in *Sharif* is whether an action presenting a state law issue about whether particular

property is part of the bankruptcy estate stems from the bankruptcy and therefore may be decided by a bankruptcy court. The Court will further consider whether Article III permits bankruptcy courts to exercise the judicial power based solely on litigant consent, and if so, whether that consent may be implied.

Agency Procedure and Deference

Perez v. Mortgage Bankers Ass’n (No. 13-1041) raises the question whether an agency must engage in notice-and-comment rulemaking under the Administrative Procedure Act before it changes an interpretative rule that states a “definitive” interpretation of an agency regulation, or instead may change that interpretation through a less formal process.

In *B&B Hardware, Inc. v. Hargis Industries, Inc.* (No. 13-352) the Court will consider the weight of findings made by the Patent and Trademark Office’s Trademark Trial and Appeal Board in subsequent litigation. There, the Board refused to register Hargis Industries’ trademark based on the Board’s determination that use of the mark was likely to cause confusion with a previously registered mark owned by B&B Hardware. The question for the Court is whether that finding precludes relitigation of that issue in a subsequent infringement action and, if not, whether the trial court should nevertheless defer to the board’s finding.

Statutory Construction

In *Oneok, Inc. v. Learjet, Inc.* (No. 13-271), the question is whether the Natural Gas Act preempts state antitrust claims for alleged manipulation of natural gas prices. Under the Natural Gas Act, the Federal Energy Regulatory Commission has exclusive jurisdiction over wholesale gas prices, but the Ninth Circuit ruled that the state law claims in this case could stand because they also implicated retail natural gas prices.

Alabama Dep’t of Revenue v. CSC Transportation, Inc. (No. 13-553) raises the question of how to determine the “comparison class” for determining if a state tax regime impermissibly discriminates against railroads under the Railroad Revitalization and Regulatory Reform Act (the 4-R Act). An Alabama law taxes railroads for diesel fuel but exempts road and water carriers. The case also presents the question whether only the challenged provision should be considered in determining discrimination, or instead the state’s broader tax regime.

In *Mellouli v. Holder* (No. 13-1034), the Court will consider when a non-citizen is removable based on a conviction for possessing drug paraphernalia. Immigration

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By Bill Jordan*

D.C. Circuit recognizes inherent authority for agency coordination and urges simplification of review of guidance documents—does it also simplify review?

In *National Mining Association v. McCarthy*, 2014 WL 3377245 (D.C. Cir. 2014), Judge Kavanaugh urged “the Executive Branch, the courts, the administrative law bar, and the legal academy—and perhaps . . . Congress” to achieve such a degree of “clarity and predictability” in the law governing guidance documents that everyone involved would “immediately know the procedural and substantive requirements and consequences” governing agency issuances. His language suggests that we have not yet reached that favored state, but has he contributed to that simplification?

National Mining Association involved two aspects of the Clean Water Act, §404, under which the Corps of Engineers issues certain permits subject to ultimate EPA veto authority, and the National Pollution Discharge Elimination System (NPDES), under which states issue permits subject to ultimate EPA objection. This complex scheme prompted EPA to take two informal actions challenged as violating the CWA and the Administrative Procedure Act.

EPA’s first action raised issues requiring little simplification. The agency adopted an Enhanced Coordination Process, under which the EPA would screen certain §404 applications submitted to the Corps, and initiate discussions about those applications, rather than waiting and exercising a veto at the end of the Corps’ consideration of the applications. Industry and some states argued that the Enhanced Coordination Process violated the Clean Water Act, which explicitly articulated only a veto function for EPA, and that the creation of that Process without notice and comment violated the Administrative Procedure Act (APA).

As to the substantive challenge, the court noted that the new Process had not changed the “statutory criteria or statutory responsibilities” of the two agencies. The mere fact that the agencies’ roles were described in particular ways did not prevent the agencies from coordinating with each other in implementing the statutory regime. To the contrary, “this kind of inter-agency consultation and coordination is commonplace and often desirable, [and] . . . restricting such consultation and coordination would raise significant constitutional concerns” under Article II. . . . “In a ‘single Executive Branch headed by one President,’

we do not lightly impose a rule ‘that would deter one executive agency from consulting another about matters of shared concern.’”

The court did “not dally” on the procedural challenge. This was a “rule[] of . . . procedure” under §553 (b)(3)(A) of the APA. Procedural rules “do not themselves alter the rights or interests of parties, although [they] may alter the manner in which the parties present themselves or their viewpoints to the agency.” The Enhanced Coordination Process was such a rule.

EPA’s second informal action was the issuance of a Final Guidance document recommending, among other things, “that States impose more stringent conditions for issuing” NPDES permits. Industry and the affected states challenged the Final Guidance document as violating the Clean Water Act and the Surface Mining Control and Reclamation Act. Their challenge failed because, despite its name, the Final Guidance document did not constitute “final agency action” under §704 of the APA. Finality requires “both ‘the consummation of the agency’s decision-making process’ and a decision by which ‘rights or obligations have been determined’ or from which ‘legal consequences will flow.’” EPA had conceded that the Final Guidance document represented the consummation of its decision-making process on the matters addressed in the document, but the court ultimately found that the document did not determine rights or obligations or result in legal consequences.

Judge Kavanaugh began by noting that “legislative rules and sometimes even interpretive rules may be subject to pre-enforcement judicial review, but general statements of policy are not.” This could raise questions about cases like the old chestnut, *National Automatic Laundry & Cleaning Council v. Schultz*, 443 F.2d 689 (D.C. Cir. 1971), and the more recent *Appalachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015 (D.C. Cir. 2000), both of which found statements of policy to be reviewable final agency actions without quite holding that they constituted legislative rules. On the other hand, the D.C. Circuit in *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (2006), has already recognized that the question of whether an agency pronouncement constitutes “final agency action” and the question of whether such a pronouncement is truly a legislative rule requiring notice-and-comment are really “alternative ways of viewing” the issue.

Judge Kavanaugh’s straightforward formulation forced attention to the question of whether the Final Guidance document constituted a legislative rule, an issue that Judge Kavanaugh characterized as badly needing simplification. But this formulation actually helps simplify the analysis. It emphasizes that the question is not simply whether

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the document creates rights or obligations (or, perhaps, substantially affects behaviors), but whether it does so in a way that is equivalent to the force of a legislative rule. This turns attention away from general arguments about practical effects and burdens to the much more specific question of whether the agency has truly left no alternative to compliance with the language of the guidance document. This is necessarily a practical inquiry because, strictly speaking, an informal agency statement cannot legally affect “rights or obligations” or result in “legal consequences.” If, in practical terms, a regulated entity or participating state must do exactly what the agency says, the guidance document is actually a legislative rule issued without notice and comment.

Turning to this practical inquiry, Judge Kavanaugh first addressed the “most important factor”—whether the guidance document had any “actual legal effect.” Since the agency could not rely upon it as a basis for enforcement or defense, and since state authorities “are free to ignore it,” the guidance was legally “meaningless.” In particular, “The Final Guidance does not tell regulated parties what they must do or may not do in order to avoid liability.”

This characterization of the lack of legal effect of the guidance document can also be applied to the crucial practical question of whether regulated entities and the relevant states really have no choice but to follow the guidance. Here, although the challengers insist that EPA will require compliance with the guidance document, “there has been no ‘order compelling the regulated entity to do anything,’ . . . States and permit applicants may ignore the Final Guidance without suffering any legal penalties or disabilities,” and “permit applicants ultimately may be able to obtain permits even if they do not meet the recommendations in the Final Guidance.” This final point is determinative. The guidance document simply presents a number of ways that regulated entities may comply with requirements and that states may implement qualifying programs. It leaves open, however, the possibility that there may be other ways to comply with the applicable requirements or to implement a qualifying program. For example, EPA’s Brief to the D.C. Circuit quotes the guidance document as stating that the recommendations to EPA staff “d[o] not represent the only acceptable permitting approaches.” This is classic guidance, informing interested parties of various possible ways to achieve compliance, but not imposing any requirements or excluding other possible ways to achieve compliance. This may well be the consummation of EPA’s consideration of possible approaches to compliance, but that does not exclude the possibility that regulated entities or states will come up with other acceptable approaches.

It is important to note that the finality decision depends upon the particular context. Here, the guidance was not final because as to these challengers because these challengers have the opportunity to propose other ways to comply with the underlying requirements. By contrast, this sort of guidance document can be viewed in a very different way—essentially as providing safe havens for those complying in the manners identified by the agency. But consumers, nearby residents, or others may claim that the compliance methods approved by this sort of guidance document do not achieve the requirements of the underlying regulation or statute. This sort of guidance should be final as to such challengers because they have no comparable opportunity to convince the agency to the contrary.

D.C. Circuit applies *de novo* review to FCC “good cause” argument and demonstrates the limits of deference to agency predictive judgments.

As other companies have done, Sorenson Communications adopted a technology that allows smart phone users to make and receive captioned telephone calls, calls in which the words being spoken scroll across the screen. This Internet Protocol Captioned Telephone Service (IP CTS) is a great benefit to the hearing-impaired. Unlike other IP CTS providers, Sorenson made its phones available free with the captioning function turned on. Other companies charged for their captioned phones and provided them with the default of the captioning turned off.

Sorenson’s practice caused great concern among other service providers and the FCC, who charged that it threatened to deplete a special fund used to pay providers of telecommunications relay services (TRS) serving the hearing impaired. As provided by statute, common carriers and other communications companies pay into a fund to compensate TRS providers. The fund provides compensation at rates ranging from \$1.2855 to \$6.2390 per minute, depending upon the type of service provided. The fund compensates IP CTS providers at the rate of \$1.7877 per minute.

Driven by concern about depletion of the fund, the FCC, without notice and comment, issued an Interim Rule requiring that new IP CTS users register and self-certify their hearing loss unless they had paid \$75 or more for their equipment. Users paying less than \$75 also had to submit third-party certification of their hearing impairment. The Interim Rule also required that IP CTS-capable phones be distributed with the captioning turned off, such that users would have to turn the captioning on for each use.

The FCC relied upon the “good cause” exception to justify issuing the Interim Rule without notice and comment. The agency considered immediate action necessary to protect the TRS support fund. Having sought notice and comment when it issued the Interim Rule, the FCC shortly thereafter issued a Final Rule in which it required phones to cost at least \$75 to qualify for reimbursement (unless provided through a state-run program) and required that phones be provided with the default of the captioning turned off unless the user provided a certification by an appropriate professional supporting need for the captioning.

Sorenson challenged the “good cause” justification for the Interim Rule and attacked the Final Rule as arbitrary and capricious. As to the “good cause” challenge, the D.C. Circuit for the first time in *Sorenson Communications Inc. v. FCC*, 755 F.3d 702 (D.C. Cir. 2014), addressed the standard of review of such challenges. The court rejected the agency’s argument for deference as contrary to congressional intent and circuit case law. Under established *Chevron* principles, no agency has interpretive authority over the Administrative Procedure Act. Moreover, applicable precedent requires that the court’s inquiry be “meticulous and commanding” and that the court “narrowly construe and reluctantly countenance” the exception. Thus, review was *de novo*.

Turning to the merits of the “good cause” claim, the court rejected the FCC’s argument that it would be impracticable to seek notice and comment. Noting that this exception is available where “delay would imminently threaten life or physical property” (as with a threat to aircraft safety or to miners faced with a mine explosion), the court found no such threat here. Cause for concern, perhaps, but “hardly a crisis.” There was no evidence of when the fund might run out of money, whether that would have occurred before the expiration of a notice-and-comment period, or whether there were “reasonable alternatives available,” such as increasing contributions to the fund to avoid the crisis. The court did not exclude the possibility that a “fiscal calamity” might justify applying the exception, but the facts did not support that conclusion here.

The paucity of record support that doomed the “good cause” argument also rendered the Final Rule arbitrary and capricious. Indeed, the court found the \$75 requirement to be “mystifying.” There was no evidence suggesting the existence of any fraud in the use of the IP CTS equipment, and there was no evidence supporting the proposition that the \$75 charge would deter such fraud if it existed. The concept had apparently been suggested by a letter from a Sorenson competitor. The agency relied heavily upon that letter in issuing the Interim Rule and

upon similar conjecture submitted by competitors during the notice-and-comment process. Ultimately, there was no evidence about the need for the price floor or its efficacy.

Rejecting the agency’s reliance upon its predictive judgment (generally entitled to some deference), court noted that “deference to such . . . judgment[s] must be based on some logic and evidence, not sheer speculation,” and that, “the Commission may hoist the standard of common sense, of course, but the wisdom of agency action is rarely so self-evident that no other explanation is required.”

Finally, the court found that the caption-off default requirement was not only not supported by the evidence in the record, but also contradicted by it. Among other things, the FCC failed to address a study’s conclusion that, “this survey of . . . special captioned telephone users does not support either fraud or misuse as the source of growth in IP CTS.”

It seems well worth examining what happened in this situation. This was not a narrow loss on difficult arguments, but a disaster that the court characterized as an effort “to defeat a bogeyman whose existence was never verified.” How could a seemingly competent agency produce what can only be described as a miserable failure in court?

9th Circuit upholds ALJ reliance on regulatory preamble.

After 39 years as a coal miner and 52 years as a pack-and-a-half per day smoker, Robert Opp applied for disability benefits under the Black Lung Benefits Act of 1972, alleging that his condition constituted legal pneumoconiosis. The Act provides that pneumoconiosis is “a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.” The applicable regulation provides that, “Legal pneumoconiosis refers to ‘any chronic lung disease or impairment,’ including ‘chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.’”

Before the Administrative Law Judge (ALJ), an independent physician provided by the Department of Labor and the claimant’s treating physician both testified that his condition was attributable to his work as a coal miner. Four witnesses for the coal mining company employer testified in various ways that the claimant’s condition was not attributable to his work in the coal mine. One of these four witnesses was Doctor Fino, who had submitted comments in the rulemaking proceeding that had resulted in the applicable regulation. Those comments had asserted that there was “no evidence of a clinically significant reduction in lung function resulting from coal mine dust exposure.”

The ALJ ruled that Opp's condition arose out of his coal mining employment. The ALJ based his decision in large part on the preamble to the applicable regulation, which had characterized Doctor Fino's opinion as "not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature." The preamble also discussed several studies containing "overwhelming scientific and medical evidence demonstrating that coal mine dust exposure can cause obstructive lung disease."

In *Peabody Coal Company v. Director, Office of Workers' Compensation Programs*, 746 F.3d 1119 (9th Cir. 2014), the coal company employer challenged the award on two grounds, (1) that the agency had improperly given the preamble the force of law, and (2) that the decision was not supported by substantial evidence. As to the 1st challenge, the court agreed that the preamble, which had not been subjected to notice and comment, cannot have the force of law. Rejecting the argument that the preamble had created a presumption that those who had smoked would still be eligible for benefits, the court found that the ALJ had "simply—and not improperly—considered the regulatory preamble to evaluate conflicting expert medical opinions." Thus, the ALJ had appropriately used the preamble in a factual analysis and had not treated it as legally binding.

The broader lesson is that "A preamble may be used to give an ALJ understanding of a scientific or medical issue." This makes sense because the agency's factual discussion in a preamble is comparable to an agency's determination of facts in a formal adjudication. The various interested parties all have an opportunity to address the factual issues in the rulemaking process. Although any factual statements do not become binding as a matter of law, as with the regulation itself, is appropriate that an ALJ should later be able to refer to the factual determinations underlying the regulation. In this case, the preamble discussed "the medical and scientific literature" in the record, and that evidence "supports the conclusion that coal dust exposure contributes to chronic obstructive disease."

The court also held that substantial evidence supported the conclusion that Opp's condition was attributable to coal dust exposure. In reaching that conclusion, the ALJ appropriately considered the preamble in "rationally discount[ing] the testimony of Peabody's medical experts" because they "proffered only one of several interpretations of the evidence." Accordingly, the ALJ's decision survived substantial evidence review.

D.C. Circuit upholds country-of-origin labeling requirement, overruling a recent distinct panel decision.

In April 2014, the D.C. Circuit in *National Association of Manufacturers v. SEC*, 2014 WL 1408274 (D.C. Cir. 2014), invalidated an SEC requirement that firms reveal their use of so-called "conflict minerals." Applying intermediate scrutiny, the two-judge majority held that the government had failed to justify compelling these disclosures given the firms' rights to freedom of expression under the First Amendment.

Just three months later, on July 29, the *en banc* D.C. Circuit in *American Meat Institute v. United States Department of Agriculture*, 2014 WL 3732697 (D.C. Cir. 2014) (*en banc*), overruled the April decision in upholding a requirement to provide country-of-origin information on meat product labels. Specifically, the *en banc* court overruled the prior decision to the extent that it could be read as limiting government disclosure requirement authority to correcting deception.

In a decision that prompted two concurring opinions and two dissents, the majority emphasized *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), in which the Supreme Court had struck down Ohio's restrictions on attorney advertising. The majority viewed *Zauderer* as having rejected the application of the test previously formulated by the Supreme Court in *Central Hudson*, 447 U.S. 557 (1980), "in light of the 'material differences between disclosure requirements and outright prohibitions on speech.'" As indicated in its overruling of the April decision, the majority's essential point was that interests other than preventing deception could justify the requirement to provide country-of-origin information on product labels. Having reached that conclusion, the court upheld the requirement due to legitimate interests in information related to health and safety and due to the long-standing and widely accepted practice of requiring such information.

The dueling opinions provide an instructive discussion of the intricacies of 1st Amendment protection of commercial speech. ○

Interpreting the Affordable Care Act: How to Explain the Radical Differences?

By Bill Jordan*

Two recent decisions interpreting the Affordable Care Act (ACA) are remarkable for an amusing coincidence and for the range of opinions they produced on the same statutory question. The coincidence: the decisions were released on the same day, July 22, 2014. The range of opinions: two judges held that clear statutory language invalidated the applicable regulation, dictating an outcome they acknowledged would “have significant consequences” for millions of individuals in the health insurance market, three judges found the statutory language ambiguous and would uphold the challenged regulation, and one judge held that clear statutory language dictated an outcome in favor of the challenged regulation. What explains this remarkable range of outcomes?

Under the scheme established by the ACA, the various states were expected to establish so-called health insurance exchanges (Exchanges) through which those not covered by employment-based insurance would be able to purchase individual insurance policies. The ACA also contemplated that where a state does not establish an Exchange, the federal government would create and operate an Exchange within the state.

Both recent decisions involved §36B of the Internal Revenue Code, which had been enacted as part of the ACA. Section 36B subsidizes the purchase of health insurance through tax credits designed to assure that the cost of health insurance does not exceed 8% of income. According to §36B, the tax credits are available to those who purchase health insurance through so-called Exchanges “established by the State under section 1311” of the Act. In light of the possibility that the federal government would establish Exchanges where states refused to do so, the Internal Revenue Service (IRS) issued a regulation interpreting the ACA as providing that the tax credits shall be available to anyone “enrolled in one or more qualified health plans through an Exchange,” including an Exchange operated by the federal government.

ACA opponents challenged the IRS regulation as contrary to the statutory reference to Exchanges “established by the State.” The logic is simple. The federal government is not a state, so tax credits are not available in any of the 36 states that refused to establish their own Exchanges.

In *Halbig v Burwell*, 2014 WL 3579745 (D.C. Circuit 2014) (petition for rehearing en banc filed Aug. 1, 2014), the majority, Judges Griffith and Randolph, accepted this argument. Their decision hinged on the conclusion that the states in question had not established Exchanges as provided by §1311 of the ACA. Among other things, the IRS argued that §1321 of the ACA directed that where a state does not establish an Exchange, the Secretary of Health and Human Services shall “establish and operate such Exchange within the State.” The *Halbig* majority rejected the argument that the reference to “such Exchange” meant that the federal government stepped into the shoes of the state in creating the Exchange. According to the majority, Congress knew perfectly well how to say when a non-state should be treated as a state because it had done precisely that in providing that a U.S. Territory establishing an Exchange “shall be treated as a State.” The majority acknowledged the need to read §36B in the context of other provisions of the statute, but it found nothing else requiring “‘established by the State’ to mean anything other than what it plainly says.”

The majority also rejected arguments that the legislative history dictated a different outcome at Step I of the *Chevron* analysis. Reluctant to give any role to legislative history at this stage of the analysis, the majority nonetheless addressed the issue because “both paths lead to the same destination.” Even so, the majority narrowed its consideration of legislative history as follows: “[W]e ask only whether the legislative history provides evidence that this literal meaning is ‘demonstrably at odds with the intentions’ of the ACA’s drafters. Unless evidence in the legislative record establishes that it is, we must hew to the statute’s plain meaning, even if it compels an odd result.” The majority then found little guidance in the legislative history, and it rejected the dissent’s arguments based upon the broad ultimate goals of the statute. The majority could not “ignore the best evidence of Congress’s intent—the text of section 36B—in favor of assumptions about the risks that Congress would or would not tolerate—assumptions doubtlessly influenced by hindsight.”

Dissenting, Judge Edwards got straight to the point, describing the challenge as a “not-so-veiled-attempt to gut the” ACA. Emphasizing that the clarity or ambiguity of statutory provisions must be “determined by reference to the language itself, the specific context in which that

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language is used, and the broader context of the statute as a whole,” Judge Edwards found that the language of §36B had no plain meaning when read in conjunction with sections 1311 (referring to state establishment of Exchanges) and 1321 (referring to federal establishment of “such Exchange”) of the ACA. He asserted that the use of the term “such Exchange” could reasonably be interpreted to mean that when the federal government establishes an exchange, it does so “on behalf of the State.”

Judge Edwards made similar arguments with respect to various other provisions of statute. His overriding point, however, was that the success of the Affordable Care Act scheme depends upon “three interrelated and independent reforms:” (1) the “guaranteed issue” provision, under which insurance companies may not deny coverage for pre-existing conditions and must develop insurance ratings on a community-wide basis, (2) the “individual mandate,” requiring that everyone purchase health insurance if not otherwise covered, and (3) the tax credit subsidies. As he explained, the individual mandate is necessary to address the problem of adverse selection when insurance companies are required to provide coverage to everyone. Without the mandate, healthy people might stay out of the insurance pool until they become sick, so insurance rates skyrocket because they were based on a relatively unhealthy insurance pool. And the subsidies, which were at issue in this challenge, are necessary to assure that everyone will be able to comply with the mandate to purchase insurance. Thus, elimination of the subsidies would “cause ‘the structure of the ACA [to] crumble.’” As Judge Edwards saw it, “It is unfathomable that Congress intended to allow States to effectively nullify the individual mandate” and thereby destroy the scheme established by the ACA by refusing to establish exchanges. Thus, he concluded that the §36B of the Internal Revenue Code is at worst ambiguous on the question of whether tax credits are available in states where the federal government has established health insurance Exchanges. He then found that the IRS’ regulatory interpretation was reasonable.

On the same day as this decision, the Fourth Circuit upheld the IRS regulation in *King v. Burwell*, 2014 WL 3582800 (4th Cir. 2014) (petition for certiorari filed July 31, 2014). Judge Gregory, for himself and Judge Thacker, found that the statute was ambiguous on the point at issue and upheld as reasonable the interpretation that tax credit subsidies are available in states where the federal government establishes the healthcare Exchange. The majority’s reasoning was similar to Judge Edwards’, except that the majority initially found ambiguity in the “such Exchange” language of §1321 of the ACA as it relates to the “established by the State” language of §36B of the Internal Revenue Code. In finding ambiguity, the majority also

considered various other provisions of the statute and the unhelpful legislative history. Ultimately, it concluded that, “the statute is ambiguous and subject to at least two different interpretations.”

By contrast to Judge Edwards, the majority in *King v. Burwell* examined the broad purposes of the statute only after finding that the statute was ambiguous. At that point, the majority said it was “primarily persuaded by the IRS Rule’s advancement of the broad policy goals of the Act.” Since Congress intended a major reform of the health insurance system, and since Congress understood that all three aspects of that reform, and particularly the availability of the tax credits in all states, were essential to the success of that reform, the IRS interpretation was reasonable.

Concurring in the outcome, Judge Davis took a stand at the other end of the spectrum from Judges Griffith and Randolph in *Halbig*. Employing what may become known as the Pizza Hut principle of statutory interpretation, Judge Davis concluded that the ACA requires that tax credits be available to those purchasing health insurance from any health insurance exchange, whether established by a state or by the federal government. As he put it, “When a state elects not to establish an Exchange, the contingency provision [of §1321] authorizes federal officials to establish and operate ‘such Exchange’ and to take any action adjunct to doing so.”

Asserting that, “No case stands for the proposition that literal readings should take place in a vacuum, acontextually, and untethered from other parts of the operative text,” Judge Davis turned to pizza:

If I ask for pizza from Pizza Hut for lunch but clarify that I would be fine with a pizza from Domino’s, and I then specify that I want ham and pepperoni on my pizza from Pizza Hut, my friend who returns from Domino’s with a ham and pepperoni pizza has still complied with a literal construction of my lunch order.

As that principle is applied here, the ACA provides for tax credits for health insurance exchanges, and the specific reference to State exchanges (as with the specific reference to Pizza Hut) does not limit the tax credits to State exchanges.

Using reasoning similar to the *Halbig* majority, but to the opposite effect, Judge Davis charged that attempting to narrow the reach of the ACA through a “tortured, nonsensical” reading of a few words in the statute constituted attempting to “squeeze the proverbial elephant into the proverbial mousehole.” On an issue this important, Congress would have explicitly said that it wanted to limit the availability of tax credits “rather than tinkering with the formula in a subprovision governing how to calculate the amount of the credit.”

News from the Circuits

What explains this wide range of outcomes and approaches—opposite readings of clear statutory meaning and different approaches to determining ambiguity? At the most basic (and most unfortunate) level, it could simply be politics. Judges Griffith and Randolph were appointed by Presidents George W. and George H. W. Bush, respectively. Judge Edwards was appointed by President Carter, Judge Gregory by President Clinton, and Judges Thacker and Davis by President Obama.

Giving the benefit of the doubt to all of these judges, we should ask whether they seem to adhere to relatively neutral principles, principles probably arising from ideological views consistent with, but not necessarily driven by, politics. The Griffith-Randolph discussion of the effects of the IRS interpretation seems to reflect something of a presumption against interpretations that restrain or impose burdens upon individuals or employers. For example, they note that the availability of tax credits actually increases the number of people subject to a penalty for not purchasing health insurance. This is an interesting way of taking the intended benefit (the tax credit) and turning it against the very people it is intended to help. These judges do not like the fact that people are required to participate in a program intended for their own benefit. These judges also emphasize that the availability of the tax credits effectively triggers the possibility of penalties upon employers who fail to offer health insurance as provided in the Act. These characterizations of the effects of the IRS interpretation on individuals and employers suggest that these judges see these potential coercions as a basis for something of a presumption against interpreting the statute to uphold such results. This appears to be consistent with the concept of Libertarian Administrative Law currently being examined by Professors Cass Sunstein and Adrian Vermeule. (See also Recent Articles this issue, pages 32–33, Cass R. Sunstein and Adrian Vermeule, *Libertarian Administrative*

Law, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2460822.) This is also consistent with an insistence upon attention to particular and even somewhat obscure statutory language and refusal to construe a statute based upon its ultimate aims. Both of these attitudes tend to require greater clarity from Congress and thus stand as obstacles to the creation or implementation of broad government programs under complex statutes. These judges would claim fealty to congressional primacy, but that primacy would be based largely, if not entirely, upon the specific language used by Congress, not upon the apparent purpose of the statute.

By contrast, the other judges, to somewhat varying degrees, emphasize fealty to the apparent, and in this case essentially undisputed, overall purpose of the statute. They seem more prepared to find ambiguity, and thus more willing to empower agencies through the doctrine of *Chevron* deference. For example, Judge Gregory noted the Supreme Court's recent "admonition that courts avoid revising ambiguously drafted legislation out of an effort to avoid 'apparent anomal [ies]' within a statute." Thus, he said, "Wary of granting excessive analytical weight to relatively minor conflicts within a statute of this size, we decline to accept the defendants' arguments as dispositive of Congress's intent." Judge Edwards is equally concerned with achieving apparent congressional goals, from his opening charge of a "not-so-veiled attempt to gut" the ACA to his assertion that this interpretive "poison pill . . . [s]urely is not what Congress intended." Finally, Judge Davis emphasized attention to the ultimate congressional purpose in asserting that the challengers missed "the forest for the trees by eliding Congress' central purpose in enacting the Act: to radically restructure the American health care market with 'the most expansive social legislation enacted in decades.'" ○

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Going for the Record: Judicial Review of California Development Projects

By Michael Asimow*

California's version of the National Environmental Policy Act (NEPA), the California Environmental Quality Act (CEQA), has proved to be a potent weapon for challengers who wish to block or at least delay local development projects. The flow of CEQA litigation is never-ending. CEQA and NEPA assure that decision-makers consider environmental impacts when they approve major land development projects, but whether the statutes (and the resulting litigation) are over-protective of the environment is an important public policy issue. Do we really want to empower challengers (often protecting purely parochial interests) to hold up virtually any controversial development project during long years of litigation, vastly increasing the cost of the projects?

Two recent cases, both concerning the record on judicial review, exemplify how CEQA litigation turns into costly trench warfare between challengers, developers, and local authorities. In *Citizens for Ceres v. Superior Court*, 159 Cal. Rptr.3d 789 (2013), challengers sought to overturn a small town's approval of a Wal-Mart superstore. In *San Francisco Tomorrow v. City and County of San Francisco*, 2014 Cal.App. LEXIS 735 (2014), challengers sought to block the owner of Parkmerced (a high-rise mini-city within San Francisco built in the 1940s) from refurbishing the area. Both projects required local authority approval. This entailed a lengthy and highly politicized planning process, including the preparation of detailed and costly environmental impact reports. These, of course, were promptly challenged in court.

Before the judges could even get to the merits of whether the local authorities had satisfied CEQA, they had to deal with question of what documents should go into the record for judicial review. As in federal law, California has a *closed record* policy (meaning that record for judicial review includes only materials that were before the agency when it made its decision). But what does this include, given that the process of approval of a big project can consume many years and generate hundreds of thousands of documents?

Unlike federal law, California has a statute prescribing the record for judicial review in CEQA cases. (Pub. Res.

Code §21167.6(e).) This statute is so comprehensive that, as several courts have put it, the record includes "pretty much everything that ever came near a proposed development." The statute dispenses with the "deliberative process" privilege by requiring that the record include "all internal agency communications, including staff notes and memoranda related to the project. . . ."

In *Citizens for Ceres*, the agency excluded 3311 documents from the record, claiming they were all subject to the attorney-client and work-product privileges. In desperation, the trial judge threw up his hands and declared the documents were all privileged. The Court of Appeal had to decide whether these privileges apply to CEQA litigation, given that the record-defining statute applies "notwithstanding any other provision of law." The court ultimately decided that the attorney-client and work-product privileges do apply to CEQA litigation; the Legislature would have to use more explicit language if it wanted to abolish them.

The attorney-client and work-product privileges are waived if documents otherwise subject to the privileges are disclosed. However, there's an exception to this waiver if privileged documents are disclosed to another party *if* both parties share a "common interest." During the *pre-approval stage*, the city and the developer do *not* share a common interest; the developer wants to get the project approved, but the city must be neutral and objective in applying CEQA. Consequently, if during the pre-approval stage, the city discloses privileged documents to the developer, or the developer discloses privileged documents to the city, the documents are not privileged and must be included in the record. However, once the project has been approved, the city and the developer share a common interest (in protecting the project against challenge), so the common-interest exception to waiver does apply.

In *San Francisco Tomorrow*, the issue was whether the record should include a transcript of four hearings conducted by the Land Use and Economic Development Committee (LUEDC), a committee of the San Francisco Board of Supervisors. The last of the LUEDC four hearings occurred on the morning of the same day that the Board of Supervisors approved the project—the final step in a process that had extended over many years. No transcript of the LUEDC hearings was prepared before the

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supervisors acted, but it was possible to view a videotape of the hearings at the city planning office. Should the transcript be considered “other written materials . . . relative to the public agency’s compliance with” CEQA? If so, the transcript (finally prepared long after the Supervisors had acted) must be included in the record. Broadly construing the statute, the court held that the transcript should be included in the record because the testimony given at the

hearings was “available to” the decision-makers when they approved the project.

No doubt the Court of Appeal’s decision in *San Francisco Tomorrow* (which included many important issues in addition to the dispute over the record) will be appealed to the California Supreme Court, and no ground will be broken for the long-overdue Parkmerced redevelopment for years to come. Is this the right way to conduct local land use planning? ○

Supreme Court News

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laws provide that a non-citizen may be removed if he has been convicted of violating “any law relating to a controlled substance.” The question in *Mellouli* is whether removal requires the government to prove a connection between a drug paraphernalia conviction and a controlled substance.

In *United States v. June* (No. 13-1075), the Court faces the question whether the Federal Tort Claims Act’s two-year time limit for filing an administrative claim, see 28 U.S.C. § 2401(b), is subject to equitable tolling. The Ninth Circuit ruled that this provision is not jurisdictional and can be equitably tolled.

In *Direct Marketing Assoc. v. Brohl* (No. 13-1032), the Court will consider whether the Tax Injunction Act—which prohibits federal courts from enjoining a state

law for the “assessment, levy or collection of any tax,” 28 U.S.C. § 1341—precludes federal jurisdiction over a suit to a state law that imposes only informational notice and reporting requirement for taxes.

The power of the federal courts to review decisions of the Equal Employment Opportunity Commission is at issue in *Mach Mining, LLC v. EEOC* (No. 13-1019). Under federal law, before bringing a suit for an unlawful employment practice, the EEOC “shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.” 42 U.S.C. § 2000e-5(b). The question in *Mach* is whether the EEOC’s failure to seek conciliation is an affirmative defense in the action for the unlawful employment practice. ○

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Recent Articles of Interest

By William Funk*

Executive Discretion and the Rule of Law. 37 Harv. J.L. & Pub. Pol’y 377-628 (2014). Kyle West, *Preface*; Curt A. Levey and Kenneth A. Klukowski, *Take Care Now: Stare Decisis and the President’s Duty to Defend Acts of Congress*; John D. Graham and Cory R. Liu, *Regulatory and Quasi-Regulatory Activity Without OMB and Cost-Benefit Review*; Nina A. Mendelson and Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*; Stuart Shapiro, *Agency Discretion as “Whac-a-mole”: the Challenge of Restricting Agency Use of Nonlegislative Rules*; Jerry Brito, *“Agency Threats” and the Rule of Law: An Offer You Can’t Refuse*; Henry Butler and Nathaniel J. Harris, *Sue, Settle, and Shut out the States: Destroying the Environmental Benefits of Cooperative Federalism*.

Edward H. Stiglitz, *Unaccountable Midnight Rulemaking? A Normatively Informative Assessment*, 17 N.Y.U. J. Legis. & Pub. Pol’y 137 (2013-2014). Under a common view, the administrative state inherits democratic legitimacy from the President, an individual who is envisioned both to control administrative agencies and to be electorally accountable. Presidents’ administrations continue issuing rules, however, even after Presidents lose elections. Conventional wisdom holds that Presidents use the “midnight” period of their administrations—the period between the election and the inauguration of the next President—to issue unpopular and controversial rules. Many regard this midnight regulatory activity as democratically illegitimate. Yet we have scant evidence that presidential administrations in fact issue controversial or unpopular rules during the midnight period. In this Article, the author examines the content of notice-and-comment rules issued between 1983 and 2010—roughly 20,000 rules—to assess whether midnight regulatory activity plausibly reflects a failure of political accountability. Consistent with a simple theory of political incentives, the author finds that the administrations of last-term Presidents issue considerably more controversial rules, as measured by the level of public commenting on rules, the level of dissent associated with rules, and the size of rules. However, the author departs from the conventional account in finding suggestive evidence that presidential administrations sometimes use the midnight period to “rise above” ordinary politics rather than exclusively to dole out regulatory favors to interest groups. Industry groups, for example, challenged President G.W. Bush’s midnight rules in court at aberrational rates. The author

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discusses the implications of these patterns for the unitary executive theory and the democratic legitimacy of the administrative state.

Rachel Bayefsky, *Dignity as a Value in Agency Cost-Benefit Analysis*, 123 Yale L.J. 1732 (2014). President Obama’s 2011 Executive Order 13,563 on cost-benefit analysis (CBA) authorizes agencies to consider “human dignity” in identifying the costs and benefits of proposed regulation. The notion of incorporating dignity into CBA, this Note points out, highlights the importance of choosing between different conceptions of CBA: one that aims to derive a monetary figure for dignity, and one that seeks to take dignity into account in unmonetized form. This Note illuminates the stakes of the choice between monetized and unmonetized CBA by drawing attention to various ways in which dignity might be incorporated into CBA. The Note then argues that CBA can and must include dignity in unmonetized form. In doing so, agencies should embrace “qualitative specificity,” which involves elucidating in qualitative terms the nature and gravity of dignitary considerations in a particular regulatory context. Qualitative specificity, the Note indicates, enables agencies more transparently to assess the positive and negative consequences of government regulation, and it facilitates public participation in the process of defining the nature of dignity in the senses relevant to the effects of government regulation. In response to the critique that qualitative specificity is indeterminate and fails to constrain administrative discretion, the Note contends that qualitative specificity provides only as much determinacy as is actually available; this approach is preferable to monetization that emerges with a determinate number but fails to accommodate the complex and malleable nature of dignity.

Lesley K. McAllister, *Harnessing Private Regulation*, 3 Mich. J. Env’tl. & Admin. L. 291 (2014). In private regulation, private actors make, implement, and enforce rules that serve traditional public goals. While private safety standards have a long history, private social and environmental regulation in the forms of self-regulation, supply chain contracting, and voluntary certification and labeling programs have proliferated in the past couple decades. This expansion of private regulation raises the question of how it might be harnessed by public actors to build better regulatory regimes. This Article tackles this question first by identifying three forms of strong harnessing: public incorporation of private standards, public endorsement of self-regulation, and third-party verification. It then analyzes eight third-party verification programs established by six federal regulatory agencies to derive lessons about what makes a program successful and

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to develop recommendations to federal agencies about when and how they should use third-party verification.

Lisa Heinzerling, *Classical Administrative Law in the Era of Presidential Administration*, 92 *Tex. L. Rev.* 171 (2014). As Dan Farber and Anne Joseph O’Connell explain in their excellent article, *The Lost World of Administrative Law*, “[t]he actual workings of the administrative state have increasingly diverged from the assumptions animating the [Administrative Procedure Act] and classic judicial decisions that followed.” Whereas, they observe, classical administrative law assumes a discrete, judicially reviewable agency decision made by a Senate-confirmed presidential appointee based on statutorily mandated procedures and criteria as applied to the evidence before her, the contemporary operation of the administrative state frequently involves unreviewable agency decisions made by unconfirmed acting agency heads or unconfirmed presidential aides, based on procedures and criteria enunciated in presidential executive orders rather than statutes. The aspect of contemporary practice that figures most prominently in their analysis is the White House’s expansive control over agency, overseen by the Office of Information and Regulatory Affairs (OIRA). Regulatory review by OIRA alters the classical vision of administrative law by giving pride of place to presidential executive orders, non-statutory decision-making processes and criteria, and personnel outside the action agency. The large cast of characters involved in OIRA review means that the agency charged by statute with making a particular decision may not actually be the decision maker and that factors outside statutory bounds will likely be brought to bear on the decision. In addition, the secrecy and coziness of this process stand in sharp contrast to the transparency and inclusiveness of classical administrative law. Yet administrative law itself is also split from within. Indeed, White House control over agency decisions takes full advantage of a cross-current in contemporary administrative law doctrine: the D.C. Circuit’s endorsement, over thirty years ago, of politically motivated rulemaking. The court’s decision in *Sierra Club v. Costle* creates a large fissure within administrative law doctrine itself. Agencies must, in order to survive judicial review, apply statutory criteria to the evidence before them, but their decisions need not be motivated by those criteria and that evidence. The author believes this is a tension that must be resolved, not accommodated, and that either classical administrative law or *Sierra Club v. Costle* has to go.

Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 *Vand. L. Rev.* 671 (2014). Recent Presidents have claimed wide-ranging authority to decline

enforcement of federal laws. The Obama Administration, for example, has announced policies of abstaining from investigation and prosecution of certain federal marijuana crimes, postponing enforcement of key provisions of the Affordable Care Act, and suspending enforcement of removal statutes against certain undocumented immigrants. While these examples highlight how exercises of executive enforcement discretion—the authority to turn a blind eye to legal violations—may effectively reshape federal policy, prior scholarship has offered no satisfactory account of the proper scope of, and constitutional basis for, this putative executive authority. This Article fills that gap. Through close examination of the Constitution’s text, structure, and normative underpinnings, as well as relevant historical practice, this Article demonstrates that constitutional authority for enforcement discretion exists—but it is both limited and defeasible. Presidents may properly decline to enforce civil and criminal prohibitions in particular cases, notwithstanding their obligation under the Take Care Clause to ensure that “the Laws be faithfully executed.” Congress also may expand the scope of executive enforcement discretion by authorizing broader nonenforcement. But absent such congressional authorization, the President’s nonenforcement authority extends neither to prospective licensing of prohibited conduct nor to policy-based nonenforcement of federal laws for entire categories of offenders. Presuming such forms of executive discretion would collide with another deeply rooted constitutional tradition: the principle that American Presidents, unlike English kings, lack authority to suspend statutes or grant dispensations that prospectively excuse legal violations. This framework not only clarifies the proper executive duty with respect to enforcement of federal statutes, but also points the way to proper resolution of other recurrent separation of powers issues.

Leandra Lederman, *(Un)appealing Deference to the Tax Court*, 63 *Duke L.J.* 1835 (2014). The U.S. Tax Court (Tax Court), which hears the vast majority of litigated federal tax cases, occupies an unusual place in the federal government. It is a federal court located outside of the judicial branch, but its decisions are appealable to the federal courts of appeals. This odd structure, coupled with the court’s history as an independent agency in the executive branch, can give rise to important questions, such as the standard of review that should apply to its decisions. In particular, should the courts of appeals treat Tax Court decisions the same as those of district courts in tax cases, or should they apply a more deferential standard analogous to review of agency decisions, as the U.S. Supreme Court held in 1943 in *Dobson v. Commissioner*? Answering the standard-of-review question implicates issues of both law

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and policy. Contrary to some scholarship, this Article argues that, as a doctrinal matter, no vestige of the *Dobson* rule remains and that courts of appeals must apply the same standard of judicial review that they apply to district courts in nonjury cases. The Article further argues that appellate review theory supports that result. The *Dobson* rule was a largely instrumental one designed by U.S. Supreme Court Justice Robert Jackson to reduce the volume of tax litigation. Although tax litigation is unusually decentralized and the Tax Court has unique expertise, those differences do not support departing from the policies underlying appellate review. Appellate courts therefore should not defer to the interpretations of the Tax Court any more than they do to those of the district courts.

Bryan T. Camp, *A History of Tax Regulation Prior to the Administrative Procedure Act*, 63 *Duke L.J.* 1673 (2014). The relationship of the Administrative Procedure Act (APA) to tax administration has been the subject of increasing scrutiny from scholars and courts. Some of this scrutiny has critiqued the long-held view of the Department of Treasury that tax regulations issued under the general grant of authority in I.R.C. § 7805(a) are interpretative regulations within the meaning of the APA. This Article reviews the almost 150-year history of tax administration before the enactment of the APA to show the origins and basis for this long-held view. The Article also argues that the application of the general terms of the APA to tax administration must be informed by this pre-APA history of tax regulation.

Jason Marisam, *The Internationalization of Agency Actions*, *Fordham L. Rev.* (forthcoming) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2437917. U.S. agencies routinely base their domestic regulations on international considerations, such as the benefits of coordinating U.S. and foreign standards or the foreign policy advantages of a particular policy. The author refers to this phenomenon as the internationalization of agency actions. This Article examines what the internationalization of agency actions means for agency decision-making processes, institutional design, and legal doctrine. It creates a stylized model of how agencies determine whether to coordinate their standards with foreign regulations. Among other institutional design findings, it shows that court opinions that reduce the stringency of judicial review when agencies implement internationally coordinated standards make such coordination more likely to occur, but they simultaneously deprive the executive of bargaining power because U.S. agencies cannot credibly threaten that any coordinated agreement must align more closely with U.S. values or else risk being overturned in U.S. courts. This Article also develops a taxonomy of

international factors relied on by agencies and applies that taxonomy to help clarify the doctrinal issue of whether and when agencies can use international factors to justify their actions in court. This taxonomical approach shows how the Supreme Court's opinion in *Massachusetts v. EPA* can reasonably be read to allow agencies to invoke a far broader range of foreign policy rationales than some prevailing views suggest.

Nestor M. Davidson and Ethan J. Leib, *Regleprudence—At OIRA and Beyond*, 103 *Georgetown L.J.* (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2442413. There are significant domains of legality within the administrative state that are mostly immune from judicial review and have mostly escaped the attention of legal theorists. While administrative law generally focuses on the products of agency action as they are reviewed by the judiciary, there are important aspects of regulatory activity that are legal or law-like but rarely interrogated by systematic analysis with reference to accounts about the role and nature of law. In this Article, the authors introduce a category of analysis they call “regleprudence,” a sibling of jurisprudence and “legisprudence.” Once they explore some “regleprudential” norms, they delve into one case study—the Office of Information and Regulatory Affairs and the legal work it undertakes through regulatory review—and suggest how more general attention to “regleprudence” can improve our understanding of important corners of the Executive Branch.

Patrick M. Garry, *The Values and Viewpoints Affecting Judicial Review of Agency Actions: A Focus on the Hard-Look Doctrine*, 53 *Washburn L.J.* (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2439465. The administrative state has proliferated since the New Deal, and in the near future, particularly with sweeping legislative enactments regarding health care and financial services reform, the growth of administrative regulations will continue to escalate. With more and more agencies promulgating more and more regulations, the chances are almost certain that more and more agency actions will be subject to judicial review. Therefore, with the courts becoming more active in reviewing agency actions, it is more important to explore the purposes and values affecting the determination of the scope and nature of that review. In producing rules or guidelines for agency decision-making, courts often maneuver between various interests and concerns. Ever since, for instance, the Supreme Court decisions in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (producing the *Chevron* Doctrine) and *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile*

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Insurance Company (producing the Hard-Look Doctrine), the scope of judicial review and the application of the standards for reviewing administrative action has been controversial and often times inconsistent and confusing. In the course of judicial review, courts may strive to accomplish an array of concerns, such as achieving fairness, transparency, accountability, or policymaking autonomy; or the court might see its role as mediating the needs of both political branches for control of agency decision-making, consistent with separation of powers. Given these various concerns and interests, it is difficult to arrive at a clear definition of the role and scope of judicial review of administrative agencies. Thus, a complex web of competing theories and viewpoints interact to produce confusing or conflicting standards of judicial review. To examine this complex web of theories and viewpoints, this Article focuses on the hard-look doctrine. Although the *Chevron* doctrine is highly relevant in this regard and has been widely examined, this Article does not examine that doctrine. Although both doctrines can be used to illustrate the complexities of judicial review, the hard-look and *Chevron* doctrines appear to differ in a fundamental manner. While the *Chevron* doctrine, at least on its surface, seems to confer greater deference to administrative agencies, the hard-look doctrine subjects agencies to greater judicial scrutiny. In addition, while the hard-look doctrine entails greater judicial scrutiny of agency action, it also seems to diverge from the rule laid down in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*

Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 Col. L. Rev. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2444396. This Article sets forth the theory of an enduring, evolving separation of powers, one that checks and balances state power in whatever form that power happens to take. It shows how this constitutional commitment was first renewed and refashioned in the 1930s and 1940s, wherein the construction of a secondary regime of administrative checks and balances triangulated regulatory power among politically appointed agency leaders, an independent civil service, and a vibrant and pluralistic civil society. And, it supplies the legal precedent, corrective blueprint, and normative imperative for subsequent generations (including ours) to reaffirm that commitment whenever new threats to limited government arise. This commitment to an enduring, evolving separation of powers helps explain our past and our present—and it readies us for the future. First, reframing the administrative state through the lens of an enduring, evolving separation of powers provides a more seamless

connection to the Founding. The twentieth-century shift to administrative governance toppled the Framers' tripartite constitutional regime and concentrated federal power within the Executive Branch. But the subsequent construction of an administrative separation of powers represented an act of constitutional restoration, anchoring New Deal governance firmly within the constitutional tradition of employing rivalrous institutional counterweights to promote democratic accountability and compliance with the rule of law. Second, this reframing resolves seemingly intractable normative and jurisprudential struggles in contemporary administrative law, harmonizing today's leading (but conflicting) theories and doctrines of public administration. And, third, this reframing prepares us for life after the administrative state, a reality that is already beckoning. Increasingly, the forces of privatization are consolidating state and commercial power in ways that compromise administrative separation of powers. Understanding privatization not as a sui generis phenomenon but instead simply as the latest, perhaps greatest, threat to an enduring, evolving separation of powers enables (and obligates) us to conjure up new institutional counterweights that reestablish limited, rational, and rivalrous government notwithstanding the remarkable, seemingly inexorable, turn to the market.

David Pozen, *Self-Help and the Separation of Powers*, 124 Yale L.J. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2440991. Self-help doctrines pervade the law. They regulate a legal subject's attempts to cure or prevent a perceived wrong by her own action, rather than through a third-party process. In their most acute form, these doctrines allow subjects to take what international lawyers call countermeasures—measures that would be forbidden if not pursued for redressive ends. Countermeasures are inescapable and invaluable. They are also deeply concerning, prone to error and abuse and to escalating cycles of vengeance. Disciplining countermeasures becomes a central challenge for any legal regime that recognizes them. How does American constitutional law meet this challenge? This Article contends that a robust set of unwritten, quasi-legal norms shapes and constrains retaliation as well as cooperation across the U.S. government, and it explores how these conventions of self-help correspond to regulatory principles that have emerged in public international law. Re-envisioning intragovernmental conflict through the lens of self-help gives us new descriptive and critical purchase on the separation of powers outside the courts. By attending to the phenomenon of constitutional countermeasures and the conventions of self-help, the Article

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tries to show, we can advance familiar debates over “historical gloss,” legislative obstruction, and presidential adventurism, and develop richer models of constitutional contestation within and beyond the branches.

Wentong Zheng, *The Revolving Door*, 90 *Notre Dame L. Rev.* (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446642. The revolving door between the government and the private sector has long been presumed to lead to the capture of regulators by industry interests. A growing body of empirical literature, however, either finds no conclusive evidence of a capture effect or finds evidence of an opposite effect that the revolving door indeed results in more aggressive, not less aggressive, regulatory actions. To account for these incongruous results, scholars have formulated and tested a new “human-capital” theory positing that revolving-door regulators have incentives to be more aggressive towards the regulated industry as a way of signaling their qualifications to prospective industry employers. But even with the insights offered by the human-capital theory, the prevailing analyses of the revolving door are still incomplete. This Article theorizes on yet another incentive created by the revolving door that deserves being recognized as a structural force inherent in the regulatory process: the incentive for regulators to expand the market demand for services they would be providing when they exit the government. This “market-expansion” incentive may manifest itself differently in different regulatory settings. In the enforcement setting, it may result in more enforcement actions, broadened jurisdictional reach of the enforcement actions, and higher penalties in the enforcement actions. In the rulemaking setting, it may result in agencies’ expanded rulemaking authority, the use of flexible standards rather than bright-line rules, and agencies’ preference for complex as opposed to simple rules or standards. This market-expansion theory represents a paradigmatic shift in conceptualizing the role of individual regulators in the regulatory process. Contrary to the prevailing analyses, which posit that revolving-door regulators take the industry’s needs as given and merely respond to those needs, the market-expansion theory suggests that revolving-door regulators may exert efforts to expand the industry’s needs. Recognizing this market-expansion incentive has important implications for a wide range of policy issues, including agency aggrandizement, over-enforcement versus under-enforcement, regulatory settlements, compliance monitors, private rights of action, and professional responsibility.

Ryan David Doerfler, *Mead as (Mostly) Moot: Predictive Interpretation in Administrative Law*, *Cardozo L.Rev.* (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2459078. In *National Cable & Telecommunications Association v. Brand X Internet Services*, the Supreme Court explained that, within the domain of unclear agency-administered statutes, a federal court is subordinate to an administering agency. When an administering agency speaks authoritatively, federal court practice reflects this. When an agency speaks only informally, however, federal court practice does not. Specifically, when construing an agency-administered statute absent an authoritative agency interpretation, a federal court errs, given its subordinate status, when it exercises independent judgment concerning what interpretation is best. Instead, that subordinate status requires a court to predict what authoritative interpretation the administering agency would adopt—just as a federal court would predict how a state’s highest court would answer some unsettled question of state law. Adhering to this predictive approach requires in turn that a court assign significant—in most cases dispositive—evidentiary weight to agency interpretations contained within certain legally nonbinding instruments, in particular legal briefs. This is because the non-authoritative interpretations contained in such instruments will most often constitute the best available evidence concerning what an administering agency would say if it were to speak authoritatively. This conclusion is surprising given the central holding of *United States v. Mead Corp.* that interpretations contained in nonbinding instruments are not entitled to controlling deference under *Chevron USA Inc. v. Natural Resources Defense Council, Inc.* What this article will suggest is that the central holding of *Mead* ought to be mostly moot since, even where controlling deference is not owed *de jure*, it is most often owed *de facto*.

Cass R. Sunstein and Adrian Vermeule, *Libertarian Administrative Law*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2460822. In recent years, several judges on the nation’s most important regulatory court—the United States Court of Appeals for the District of Columbia Circuit—have given birth to libertarian administrative law, in the form of a series of judge-made doctrines that are designed to protect private ordering from national regulatory intrusion. These doctrines involve non-delegation principles, protection of commercial speech, procedures governing interpretive rules, arbitrariness review, standing, and reviewability. Libertarian administrative law can be seen as a second-best option for those who believe, as some of the relevant judges openly argue, that the New Deal and the modern

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regulatory state suffer from basic constitutional infirmities. Taken as a whole, libertarian administrative law parallels the kind of progressive administrative law that the same court created in the 1970s, and that the Supreme Court unanimously rejected in the Vermont Yankee case. It should meet a similar fate. Two cases to be decided this Term provide an opportunity for the Court to repudiate libertarian administrative law.

Paul Daly, *Administrative Law: A Values-Based Approach*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2460264. The author focuses in this essay on judicial review of administrative action, looking at the subject “from the inside, trying to make sense of lawyers’ reasons and arguments as they are actually presented and defended”. Rather than starting from the constitutional basis of judicial review and working backwards to practice, he starts by identifying the core values revealed by the practice of administrative law and then work forwards to analyze how they influence the shape and trajectory of the law. His focus is on administrative law doctrine. He contends that administrative law in this sense is best understood by reference to several core values: the rule of law, good administration, democracy and separation of powers. He traces the contours of these values in Part II. These values inform doctrinal choices that courts make in the areas of process, substance and remedial discretion, a body of law considered in Part III. Occasionally they must be complemented by institutional considerations centering on the need to conserve scarce judicial resources, an issue also considered in Part III. He takes the time in this paper to discuss important areas of administrative-law doctrine and determine whether judicial decisions are influenced by a set of values. Identifying these values is a useful task. Explaining doctrinal rules and outcomes in particular cases is valuable, all the more so if common themes can be traced across very different areas of administrative law. A values-based framework is capable of accommodating the development of doctrine over time, an urgent matter given the rapid growth of the administrative state and legal constraints on it in recent decades. It may also help to account for convergence and divergence across the common-law world: Commonwealth countries have (largely) a common heritage, one which they treat in different ways, but (generally) in a fashion that is comprehensible to all common lawyers, not just the natives of a particular jurisdiction.

Max Minzner, *Should Agencies Enforce?* *Minnesota L. Rev.* (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153097. This Article explores an important but understudied structural choice: the decision to vest enforcement

authority in administrative agencies. Each year, agencies routinely bring enforcement actions producing billions of dollars in civil penalties and industry-reshaping consent decrees. Where do they get this power? Congress grants enforcement authority to administrative agencies because it believes that agency subject matter expertise will generate appropriate enforcement choices. Similarly, the Supreme Court has strongly deferred to agency enforcement because it sees it as intimately intertwined with other agency regulatory decisions. Scholars have also generally taken for granted that specialist agencies will be enforcement experts because they are experts in their industry. We assume enforcement expertise follows regulatory expertise. Does it? This Article argues, contrary to the conventional wisdom, that enforcement itself is a specialization. While enforcement choices have aspects that are subject-matter specific, other components, particularly the effective exercise of prosecutorial discretion, are independent of the industry regulated. As a result, giving enforcement authority to a specialized agency rather than a generalist enforcer like the Department of Justice involves a decision to select one form of expertise over another. Similarly, the choice requires selecting between the structural strengths and weaknesses that come with enforcement specialization. Political pressures on specialized enforcers and the narrow scope of their authority produce undesirable effects on enforcement outcomes. However, specialist agencies have a wider range of alternatives and bring a deeper understanding of industry norms to the enforcement process than a generalist enforcer. These comparative strengths and weaknesses of generalist and specialist enforcement provide important lessons for legislators, judges, and agencies. Congress needs to consider the enforcement tradeoff when determining the scope of agency enforcement authority. Courts should recognize these costs and benefits in setting the level of deference to enforcement decisions. Finally, agencies themselves should recognize their strengths and weaknesses in coordinating enforcement choices.

Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 *Ala. L. Rev.* 1205 (2014). Legal and political uncertainty continues to surround the independent agencies. Courts and scholars have recognized that control over administration usually depends on political realities rather than on legal categories of “independence.” This perspective, however, tends to disregard the constitutional boundaries for administration. Contrary to the conventional view, I explain why Congress’s authority over agency structure must have judicially enforceable limits in order to prevent encroachment on the executive power. In light of the constitutional text and structure, this

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Article demonstrates that the ability to remove principal officers is necessary and sufficient for presidential control of the executive branch. This means that all agencies, including the so-called independent agencies, must answer to the President. The principle allows Congress and the President to operate within their respective spheres while leaving most questions about actual administrative control to the political process. Limits on the President's removal authority have always been in tension with the basic constitutional design and in recent years there has been growing dissatisfaction with the meaning, structure, and effects of independence. The precedents and functional justifications for supporting agency independence have largely collapsed. The issue is ripe for reconsideration. The constitutional structure requires presidential control and supervision over administration and the removal power provides the mechanism for the possibility of such control.

Peter L. Strauss, *The Administrative Conference and the Political Thumb*, *Geo.Wash. L. Rev.* (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2468589. Two recent drafts posted on SSRN identify very different yet canonical lines of cases, both prominent in the teaching of administrative law, as the source of ills stemming from the pre-notice period of contemporary rulemaking. That period has assumed a determinative importance in seeming conflict with the assumptions of flexibility inherent in the Administrative Procedure Act's provisions

for public comment on notices once published. In "The Administrative Conference and Empirical Research," <http://ssrn.com/abstract=2435638>, Richard Pierce celebrates the catalyzing effect the Administrative Conference of the United States has had on hands-on empirical research about administrative law. He finds in two recent studies of the pre-notice period evidence that imbalance in industrial contacts during that time produces inflexible, biased proposals. He lays much of the blame at the feet of judicial review doctrines imposing detailed requirements of notice and explanation, while asymmetrically limiting standing. In "Classical Administrative Law in the Era of Presidential Administration," <http://ssrn.com/abstract=2449258>, on the other hand, Liza Heinzerling agrees that pre-notice considerations create conditions for inflexibility in rulemaking proposals. But she attributes this to presidential influence via OIRA's administration of regulatory impact analysis requirements—influence blessed and protected from judicial review by Judge Patricia Wald's canonical decision in *Sierra Club v. Costle*, 657 F.2d 298 (1981). Taking off from Professor Pierce's celebration of ACUS's contribution to empirical research about administrative law, this essay reviews ACUS's distribution of research and recommendation topics. It suggests that, like Judge Wald in *Sierra Club* and perhaps understandably, ACUS has been hesitant to explore or comment on the role of politics in administrative law—and particularly so where OIRA is concerned.

The ABA Guide to Federal Agency Rulemaking, 5th Edition

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

This **Fifth Edition** retains the basic four-part organization of the previous four editions: Part I is an overview of federal agency rulemaking and describes the major institutional "players" and historical development of rulemaking. Part II describes the statutory structure of rulemaking, including the relevant sections of the APA and other statutes that have an impact on present-day rulemaking. Part III contains a step-by-step description of the informal rulemaking process, from preliminary considerations to the final rule. Part IV discusses judicial review of rulemaking. Appendices include some key rulemaking documents.

This edition explores the dramatic rise of "e-rulemaking" since 2006 and the many ramifications it has wrought that were not present in the era of "paper" rulemaking. This edition also examines court decisions concerning rulemaking procedure and the judicial review of rules.



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IN MEMORIAM: WILLIAM H. ALLEN, 1926-2014

William H. Allen, a longtime Section member who served as Chair of the Section of Administrative Law from 1982 to 1983, passed away on October 11, 2014. He was a proficient regulatory lawyer who practiced for many years with the law firm of Covington & Burling in Washington, D.C.

Bill also was a leader in the administrative law community. Within the Section of Administrative Law, he played a prominent role in shaping the Section's efforts on legislative reform issues. Moreover, one of his "Chair's Message" columns in the *Administrative Law Review* provided the inspiration for the first in a series of descriptive projects on administrative law doctrine; these Section projects have continued down to the present day. Bill also served from 1972 to 1982 as Chair of the Committee on Judicial Review of the Administrative Conference of the United States. In that capacity he provided insightful, gracious, and effective leadership in developing a series of recommendations on subjects ranging from hybrid rulemaking procedures, to the appropriate scope of judicial review and venue provisions, to solving the "race to the courthouse" problem.

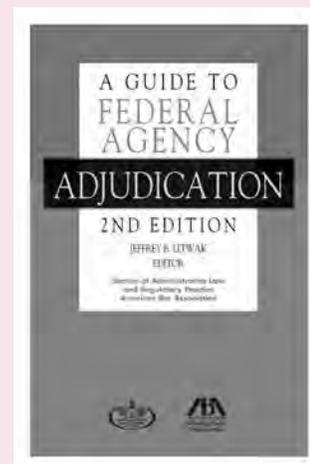
Bill was among the most scholarly of administrative law practitioners. He graduated first in his class at Stanford Law School and was a law clerk to Chief Justice Earl Warren. He taught classes at the Cornell, Stanford, and Howard Law Schools and compiled an enviable record of law review publications, displaying his erudition and provocative insights on a variety of topics related to regulation and its improvement. In addition, his good humor and breadth of interests (including, for example, an encyclopedic knowledge of track and field) made him, along with his late wife, Joan, excellent company at Section gatherings over the course of many years.

He will be greatly missed.

A Guide to Federal Agency Adjudication, 2nd Edition

Edited by Jeffrey B. Litwak

A Guide to Federal Agency Adjudication, now in its second edition, retains the structure and much of the text of the original edition but also includes updates on important changes and developments in the law. In addition to updates, the 2nd edition includes expanded footnotes that give more depth and understanding to issues requiring more than a single sentence explanation. Also, the authors and editor highlight circuit splits and subjects that courts have not yet conclusively addressed. Newly added is a chapter on Adjudication in the 2010 Model State Administrative Procedure Act (MSAPA). Whether a private or government lawyer who engages in adjudication before federal agencies, or an administrative law judge deciding federal adjudication cases, you will not want to be without this invaluable handbook.



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