Can the President Do That?

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“Rulemaking as Politics,” Thirty Years On

The last few decades have seen a surge in “citation studies.” No doubt these are driven in part by the ease with which citations can now be counted—as elsewhere, we value what we can measure rather than measuring what we value. And simply counting citations can be misleading, overlooking things such as the percentage of times the citation begins with, say, “But see” or “the source of this error was.” Still the quality and influence of an article or opinion do have some correlation with the number of times it is cited. And our field does well in such studies in that we can lay claim to the most-cited Supreme Court decision of all, Chevron.

At the opposite end of the spectrum from Chevron are, I fear, Chair’s Messages. These quarterly efforts are not written for the ages. But this issue of the News marks the 30th anniversary of a Chair’s Message that deserves study and citation, and has perhaps only become more interesting with the passage of time. I thought I would mark the anniversary by returning to that message from a distinguished predecessor and offering a few comments in light of subsequent developments.

Section Chairman Antonin Scalia entitled his Spring 1982 Message Rulemaking as Politics.1 His topic was the relationship between rulemaking and democracy; “unless I miss my guess,” he wrote, “we have entered a period in which the relationship will be probed and tested, if not precisely defined.” He was certainly right about that—both the “probed and tested” part and the “not precisely defined” part.

Chairman Scalia’s basic point was that agencies “may make some decisions in rulemaking not because they are the best or the most intelligent, but because they are what the people seem to want.” This principle, he complained, was being undercut by a cluster of doctrinal developments. Laxer rules on ripeness and the “not precisely defined” part.

The article appeared after the D.C. Circuit decision, but before the Supreme Court’s grant of certiorari, in State Farm. Chairman Scalia invoked that case in his conclusion:

More needs to be done to bring the political, accommodationist, value-judgment aspect of rulemaking out of the closet. When NHTSA comes to reconsider the passive-restraint rule . . . , and if it chooses to adhere to its prior course, it would be refreshing and instructive if, instead of (or at least in addition to) blowing smoke in our eyes with exhaustive technical and economic data, it said flat-out: “It is our judgment that people should not be strapped in cars if they don’t want to be; nor should they have to spend substantial sums for air-bags if they choose otherwise.” A political judgment, the retribution or reward for which will be meted out by Congress, or at the polls, but not in the courts.

So what happened? In the short term, the Scalia position failed to carry the day. The air bags case went not back to NHTSA but, instead, up to the Supreme Court. A year after the Scalia article was published, the Supreme Court rejected exactly the approach he urged.2 However, the vote was close, and Scalia’s approach found support in a dissent by Justice Rehnquist.

The dissent does not cite the Scalia article but one suspects Rehnquist had seen it (though that suspicion may just be Section Chair delusions of grandeur). Rehnquist, pointing out that the agency’s enthusiasm for the passive restraints rule had ebbed and flowed with changes in presidential administrations, urged that the Court accept the most recent reassessment precisely because it reflected a dominant national opinion expressed through the electoral process.3 Strikingly, Justice White’s opinion for the Court did not contradict Justice Rehnquist’s description of the political setting or conclude that it was outweighed by other factors. Rather, he ignored it altogether, implicitly deeming the politics of the rescission irrelevant.

But State Farm was not, of course, the end of the story. Just a year later came Chevron, which resonates powerfully with Scalia’s message. Like State Farm, Chevron involved a deregulatory policy shift by the new administration, but in this case the Court accepted the change, emphasized agencies’ electoral accountability (as well as their expertise), and got out of the jurisdiction.

1 Antonin Scalia, Chairman’s Message: Rulemaking as Politics, 34 ADMIN. L. Rsv. v (1982). I did check, incidentally, and this article has been cited 27 times in the legal literature (though zero times in judicial opinions). Not exactly John Rawls territory, but probably a Chair’s Message record.


3 Id. at 59 (Rehnquist, J., dissenting in part).
way. Chevron is perhaps the Court’s most honest opinion about the breadth of congressional delegations, a frank recognition that the legislature has left some questions of policy, or value, or politics undecided, as Scalia emphasized.

In the intervening decades, Chevron has flourished while State Farm has been in eclipse, at least in Supreme Court opinions. In the lower courts the picture is more complex. A number of commenters, including Elena Kagan, Christopher Edley, and Kathryn Watts, have endorsed something like the Scalia position. This has been a period of increased presidential authority and centralization, a key aspect of which is an emphasis on the president’s status as the one elected official with a national constituency. An essential, though not the only, argument for presidential control is that it legitimizes discretionary agency decisions that are non-technical and involve values and preferences.

The specific doctrinal proposition Chairman Scalia pressed, however, remains contested. Is it “reasoned decisionmaking” if an agency does something simply because the White House, or Congress, or certain Members of Congress wants it to? This question is remarkably unsettled. Massachusetts v. EPA suggests that the answer is no. As Jody Freeman and Adrian Vermeule have written, that opinion is in the State Farm tradition. FCC v. Fox Television Stations, on the other hand, arguably points the other way, though really the issue split the justices right down the middle. A statute prohibits television broadcast of “indecent” material. Certain four-letter words are “indecent,” but the FCC had a longstanding position that a single, unscripted, fleeting expletive was permissible. During the second Bush Administration (and thus with a new Republican chair), and under significant congressional pressure, the Commission changed its position; under the new policy, even fleeting expletives were prohibited. In a 5–4 decision, the Court held that the change was not arbitrary and capricious. As in State Farm, one question was whether a relevant (or perhaps even sufficient) justification for the change was changed preferences in the White House and/or Congress. Writing for four justices, Justice Scalia explicitly noted the political factors behind the change and essentially endorsed them. The opinion does not cite his 1982 Chairman’s Message, but it is no surprise that the two had the same author.

Justice Breyer, on the other hand, insisted that the “law grants … independent administrative agencies broad authority to determine relevant policy. But it does not permit them to make policy choices for purely political reasons nor to rest them primarily upon unexplained policy preferences.” “Where does, and why would, the APA grant agencies the freedom to change major policies on the basis of nothing more than political considerations or even personal whim?” For Breyer, then, “politics” is a dirty word, to be uttered, at least by judges, not even fleetingly.

And where was Justice Kennedy, the fifth vote? He joined almost all of Justice Scalia’s opinion, but not the portion where Scalia disagrees with Justice Breyer about the role of politics. And Kennedy’s own opinion skirts that question. So we must stay tuned. However, one important change, a change that Chairman Scalia could not have anticipated in 1982, brings an added dimension to this perennial debate. That is the shift to electronic rulemaking.

Moving rulemaking on-line creates the opportunity (to date, generally unrealized) for large-scale public participation. If an agency can (indeed should) make decisions that reflect “what the people seem to want,” as Chairman Scalia put it, then arguably e-rulemaking enables it to do so with new found accuracy and fervor. Most lay comments do not tell the agency anything it does not already know other than indicating something about public opinion, but they do accomplish that. For that reason, more than one observer has expressed concern that mass public commenting could transform rulemaking from a process of gathering information and arguments into a sort of referendum. That possibility is generally decried. But if rulemaking “is” politics, why not have a referendum via notice and comment?

Three reasons come to mind. First, even a large number of comments may be an inaccurate guide to public opinion since they may be unrepresentative. Second, as Chairman Scalia said, rulemaking is not always or only politics; in some settings political accommodation and value judgments are out of place. Third, in a representative rather than direct democracy, the existing mechanisms for accommodating public preferences, i.e. White House and congressional oversight, may be more appropriate, if not constitutionally required. Suppose large-scale lay comments support a different approach than that favored by the White House; what should the agency do? I have complete confidence that Chairman Scalia and Professor Scalia and Justice Scalia would all say that the agency should follow White House preferences. In the 1982 article he stated that “[w]hen I say ‘what the public wants’ I refer not to the latest Gallup poll, but to the manifestations of the popular will through the political process.” Substitute “the weight of public comments” for “latest Gallup poll” and the proposition stands.

The exact role of politics in rulemaking is yet to be resolved. E-rulemaking makes the question more salient, and more difficult, than ever. But, as Chairman Scalia pointed out, the problem exists independently of the technology of rulemaking, and what really makes it so hard is that the relationship is not constant. Like so much else in law, the answer, frustratingly, is “it depends.”

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8 Those who are interested in the particular question of the role of the public in rulemaking will want to attend the Section’s Spring Meeting in Princeton, New Jersey, which will include a panel devoted to just this topic on April 20. Details can be found elsewhere in this issue.
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Can He Legally Do That? Does the President Have Directive Authority Over Agency Regulatory Decisions?

By Robert V. Percival*

On September 1, 2011, President Obama summoned EPA Administrator Lisa Jackson to the White House. “The half-hour meeting in the Oval Office was not a negotiation; the president had decided against” tightening controls on smog. John M. Broder, Re-election Strategy Is Tied to a Shift on Smog, N.Y. TIMES, Nov. 16, 2011. Jackson was directed by the president to withdraw a draft final rule lowering ozone limits that EPA had submitted for final clearance to the Office of Management and Budget (OMB). Like most regulatory statutes, the Clean Air Act specifies that an agency head, rather than the President, shall make regulatory decisions. Yet for more than four decades every President has established a program to require pre-decisional review and clearance of agency regulatory decisions, usually conducted by the OMB. On January 18, 2011, President Barack Obama joined his seven predecessors in expressly endorsing regulatory review when he signed Executive Order 13,563, President Obama’s regulatory review program generally emulates those of his two most recent predecessors, relying on OMB’s Office of Information and Regulatory Affairs (OIRA) to review only the most significant agency rulemaking actions.

Pursuant to this executive order, Cass Sunstein, President Obama’s OIRA Administrator, sent Administrator Jackson a “return letter” the day after the Oval Office meeting. “The President has instructed me to return this rule to you for reconsideration. He has made it clear that he does not support finalizing the rule at this time.” The Times reported that the ozone rule “provided the perfect opportunity for Mr. Sunstein to make his mark.” A Sunstein confidant revealed, “Cass was itching, itching, itching to send a return letter.”

Three Views of Presidential Directive Authority

There are three principal approaches to the question of whether the President has directive authority over regulatory decisions entrusted by statute to agency heads. First, the unitary executive theory holds that presidential directive authority is constitutionally required (unitary executive approach). The second approach argues that statutes entrusting regulatory decisions to agency heads should be interpreted to grant the President directive authority unless they expressly restrict it (“directive authority” as an “interpretive principle”). The third approach, which the author has advocated, is that the President does not have directive authority unless a statute expressly gives it to him (“not-so-unitary executive” or “disunitary executive” approach).

Proponents of the unitary executive theory view it as self-evident that the President should have directive authority over agency heads. OMB review of rulemaking is now well established, but a critical, unresolved legal question is whether the President has the authority to dictate the substance of regulatory decisions entrusted by statute to agency heads. While proponents of a unitary executive argue in favor of presidential directive authority, each President’s regulatory review program has purported to disclaim such authority, even though OIRA often has tried to displace agency decisionmaking, as occurred with the ozone rule.

After describing three principal views on whether the President has directive authority, this Article discusses the constitutional foundations of this debate. It then explains why, even though the President has unfettered removal authority over the heads of non-independent agencies, it matters that this removal power does not imply the power to control decision making entrusted by law to agency heads.

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* Robert F. Stanton Professor of Law and Director of the Environmental Law Program, University of Maryland Francis King Carey School of Law. This article is derived from a lengthier article by this author, Who’s in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions? 79 FORDHAM L. REV. 2487 (2011).
The President, “includes the power to remove and direct all lower-level executive officials.” Reviewing the history of presidential oversight of the executive, Calabresi and Yoo claim that no President has acquiesced to any legislative or judicial encroachment on the unitary executive, despite the Supreme Court’s upholding of the constitutionality of Congress’s creation of independent agencies and placement of limitations on the President’s power to remove their leaders.

In the two decades since Morrison was decided, the Court has become more sympathetic to claims of broad presidential removal power. In 2010, by a 5–4 majority, the Court invalidated a restriction on the President’s ability to remove members of the Public Company Accounting Oversight Board (PCAOB) created by the Sarbanes–Oxley Act. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151 (2010). The Act provided that the members of the PCAOB could be removed only for cause by the Securities and Exchange Commission whose members themselves can be removed by the President only for cause. Although the Court determined that this double “for-cause” restriction on the President’s removal authority violated Article II’s vesting of executive power in the President, it did not question the constitutionality of independent agencies whose members can be removed only for cause.

The second approach to the question of presidential directive authority was proposed by Elena Kagan, prior to becoming a Supreme Court Justice. In an influential article entitled Presidential Administration, 114 Harv. L. Rev. 2245 (2001), Kagan argued that where Congress has not acted expressly to restrict the President’s ability to direct an agency decision, regulatory statutes should be interpreted to permit the President to do so. She argued that such an interpretive principle (“presuming an undifferentiated presidential control of executive agency officials”) is a more accurate interpretation of congressional intent when Congress has not restricted the President’s removal powers. As discussed below, precisely the contrary assumption prevails now and did at the time Congress enacted most of the current federal regulatory statutes. Because it was thought that the President did not have the authority to dictate regulatory decisions entrusted to agency heads by law, all of the executive orders establishing regulatory review programs expressly disclaimed such authority. While OIRA often has tried to dictate the substance of regulatory decisions entrusted to agencies by statute, it has disclaimed such directive authority whenever its actions have been challenged in court.

Yet constitutional text cuts against the notion that the President has directive authority over decisions entrusted by statute to the heads of executive agencies.

Based on a detailed historical review of presidential oversight of agencies, I have described a third vision of our constitutional scheme as reflecting a “not-so-unitary executive” in which the President does not have directive authority over decisions entrusted by statute to agency heads. Although the President’s ability to remove non-independent agency heads at will gives him enormous power to persuade them to accede to his wishes, presidential directive authority cannot be inferred from the removal power. If an agency head refuses to accommodate the President’s policy preferences, there is no constitutional problem with the President removing him from office. But this does not imply that the President has the authority to dictate the substance of agency decisions that regulatory statutes entrust to agency heads.

Directive Authority, the Constitution, and Statutory Interpretation

As the Supreme Court repeatedly has reaffirmed, the President’s authority over the agencies under him flows from Article II of the Constitution, but can be channeled—within limits—by congressional enactment. However, neither the Constitution nor the regulatory statutes support presidential directive authority.

Directive authority and the Constitution

Article II of the Constitution vests the executive power in the President. Proponents of the unitary executive theory maintain that Article II’s vesting clause and the rejection of a plural executive should be interpreted to give the President both removal at will and directive authority over all executive branch officers, rendering independent agencies unconstitutional.

Yet constitutional text cuts against the notion that the President has directive authority over decisions entrusted by statute to the heads of executive agencies. The establishment of executive agencies is left entirely to legislation in Article II, Section 2, leaving it to Congress to define “the functions, powers, and duties of the heads of such Departments. . . .” Article I, Section 8’s Necessary and Proper Clause refers to “Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,” suggesting that there is no constitutional barrier to Congress vesting powers in agency heads. When the first U.S. Congress established the Department of the Treasury as the second federal agency, it directed the Treasury Secretary to submit reports directly to Congress, and it reserved the right to require information from him unfiltered by the President.

The President’s power under Article II, Section 2 to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices,” implies presidential supervisory authority over agency heads. However, if the Framers deemed it necessary to make this power explicit, it would seem strange not to mention expressly an even more significant directive authority. Article II, Section 2 also provides the President with authority to

continued on next page
appoint officers of the U.S. “by and with the Advice and Consent of the Senate.” This serves as an important check on presidential power that is inconsistent with the notion of presidential directive authority. If the President can control the substance of every agency decision, why would it be necessary to have the Senate confirm his nominees to lead the agencies?

The Take Care Clause of Article II, Section 3 requires that the President “take Care that the Laws be faithfully executed.” This clause also is frequently cited as support for a unitary executive with presidential directive authority. However, in 1823 Attorney General William Wirt issued an opinion declaring that the Take Care Clause had precisely the opposite effect. “If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it . . . he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.” Wirt maintained that if a statute provides for a decision to be made by an agency head, the Take Care Clause does not allow the President “to perform the duty, but to see that the officer assigned by law performs his duty faithfully.”

Directive authority and statutory interpretation

Even if the Constitution does not support the unitary executive theory, proponents of directive authority as an interpretive principle maintain that such authority should be inferred from legislation that does not expressly disclaim it. Yet some statutes specify that the President is to make certain decisions, while providing that other decisions are to be made by agency heads. Justice Kagan maintains that these delegations should be viewed only as establishing who has initial responsibility for the decision, without foreclosing the President from assuming ultimate responsibility for decisions initially entrusted to agency heads.

However, some regulatory statutes expressly specify the circumstances under which the President can suspend decisions made by agency heads. These include conditional delegations that “expressly condition the grant of authority to an official on the oversight of the President” and agency-specific delegations that specify “the agent through whom the President must act.” Traditional principles of statutory interpretation dictate that if Congress deems it necessary in some circumstances to specify when the President may exercise authority to override an agency decision, such authority should not be inferred when Congress has not so specified. Indeed, the case for inferring that Congress meant something different when it chose not to mention the President or to grant him express directive authority in regulatory statutes is compelling enough to suggest that there is no ambiguity justifying application of principles of constitutional avoidance.

Does Directive Authority Matter?

Proponents of the unitary executive theory claim that because the President has authority to remove executive officers at will, it makes little or no difference whether the President has directive authority because he can remove any officer who resists his direction. Yet the historical record demonstrates that, despite the President’s broad removal authority, the answer to the separate directive authority question matters greatly. It determines whether agency heads have a legal entitlement to refuse to comply with a presidential directive when it directs them to act in a way they believe is illegal, improper, or unwise. The historical record powerfully supports the notion that the absence of directive authority provides an important check on potentially egregious abuses of presidential power. Even if the President’s removal authority enables him to fire the heads of executive agencies at will, requiring him to fire a resistant officer and replace him with an officer who will take the action he desires invariably has substantial political costs.

Directive authority to override Congress’s choice of regulatory decision maker also would undermine the U.S. Senate’s advice and consent power over the confirmation of agency heads, an important constitutional qualification on the President’s appointment power established by Article II, Section 2. The process of confirmation of agency heads now frequently is used to obtain assurances that presidential nominees will implement their statutory responsibilities with some degree of independence from the President’s political preferences. If the President had directive authority over decisions entrusted by statute to agency heads, it would make little difference whether he appointed officials acceptable to the Senate because he always could override their judgments.

Time after time when White House officials tried to persuade agency heads to make decisions for reasons that deviated from statutory commands, agency heads have resisted. From White House requests for EPA to drop its first enforcement actions against Republican campaign contributors to orders seeking to countermand climate science, the absence of directive authority has afforded the moral high ground to agency officials who are willing take a stand when the White House crosses the line. This is well demonstrated by the refusal of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus to fire Special Prosecutor Archibald Cox when President Nixon was trying to avoid further inquiry into the Watergate scandal. Most recently, the threat of mass resignations by top Bush Administration officials over the President’s domestic surveillance program forced that administration to make substantial modifications in the program.

As a practical matter the absence of presidential directive authority means that presidents must persuade agency heads when they want to influence regulatory decisions entrusted by law to them. Given the President’s authority to remove at will the principal officers of executive agencies, agency heads usually comply voluntarily with White House directives, even if the President does not have directive authority. This is what EPA Administrator Jackson chose to do with respect to the ozone standard. However, removals have political costs and in the rare case where a presidential appointee so fundamentally disagrees with what the President wants that she resigns rather than complying, the absence of a legal entitlement to direct the appointee’s action provides an important check on presidential abuses of power.
Chevron Deference and the Dodd-Frank Act

By John F. Cooney*

The Dodd-Frank regulatory reform law will generate substantial litigation challenging the authority of the federal financial supervisory agencies. The issues presented may well include the question, long identified but not decided by the Supreme Court, concerning which agency’s interpretation of a statute, if any, is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when Congress has delegated equal and overlapping authority to multiple agencies.

In Dodd-Frank, Congress directed as many as seven agencies to issue joint regulations implementing some of the law’s most important provisions. These include vital measures, such as the Volcker Rule limiting short-term trading by insured depository institutions for their own accounts, and the Credit Risk Retention provision, which requires covered entities to retain five percent of the credit risk of the assets collateralizing any asset-backed securities they originate.

This article describes how Congress has allocated overlapping authority to multiple agencies under Dodd-Frank and the principal Supreme Court decisions governing application of Chevron deference when several agencies have the power to implement a single provision of law. Litigation raising this issue is likely to be filed in the D.C. Circuit, in response to its decision in *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), which overturned an SEC proxy rule after a withering cost-benefit analysis.1

Overlapping Jurisdiction under Dodd-Frank

To implement its preferred allocation of authority among the supervisory agencies, Congress repeatedly declined to give any one agency primacy in implementation of a statutory provision. Rather, it granted equal authority to multiple agencies, each of which was directed to issue joint regulations carrying out ambiguous statutory provisions, and it empowered each of them to apply those rules separately to the specific types of institutions subject to its jurisdiction.

The scope of this phenomenon is illustrated by five joint regulatory actions that the Federal Reserve Board (“Board”) took between March and October:

1. On March 29, the Board and five other agencies (the Comptroller of the Currency (“OCC”), the Federal Deposit Insurance Corporation (“FDIC”), the Federal Housing Finance Agency (“FHFA”), the Securities and Exchange Commission (“SEC”), and the Department of Housing and Urban Development) issued a proposed rule to implement the Credit Risk Retention provision, which would require the sponsor of asset-backed securities to retain at least five percent of the credit risk of the underlying assets in order to remedy the prior practice by which the originator could ignore the quality of the loans collateralizing the securities and concern itself only with whether it could close the transaction before the assets began to decline in value (Section 941).2

2. On March 30, the Board and six other agencies (the OCC, the FDIC, the former Office of Thrift Supervision, the National Credit Union Administration (“NCUA”), the SEC, and the FHFA) issued a proposed rule that would prohibit incentive-based compensation arrangements that would provide excessive pay or that could cause financial institutions to take inappropriate risks that could lead to material financial loss (Section 956).3

3. On June 14, the Board, the OCC, and the FDIC adopted a joint final rule that established a floor for the risk-based capital requirements for the largest, internationally active bank organizations (Section 171(b)).4

4. On October 11, the Board, the OCC, the FDIC, and the SEC issued a proposed regulation to implement the Volcker Rule, which would restrict the ability of banking institutions to engage in short-term proprietary trading of any security or derivative for its own account and prohibit investment in or sponsorship of private equity funds and hedge funds (Section 619).5 The prohibitions are subject to a series of complex exceptions, including risk-mitigating hedging activity and trading on behalf of customers, but the exemptions do not apply if a transaction would create a material conflict of interest between the bank and its clients or counterparties.

5. On October 17, the Board and the FDIC issued a final rule implementing the “Living Will” provision, which requires each bank holding company with assets of $50 billion or more to maintain plans for its rapid and orderly resolution in the event it suffers material financial distress or fails and to report on the nature and extent of its credit exposure to significant bank and nonbank holding companies (Section 165(d)).6

These regulatory actions have several features in common. First, the underlying statutory provisions are enormously broad in scope, grant substantial discretion to each of the agencies in implementing the rules within their respective spheres of authority, and may significantly impact the profitability continued on next page

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1 The first major lawsuit filed under Dodd-Frank was NACS v. Board of Governors of the Federal Reserve System, No. 11-2075 (D.D.C. filed Nov. 22, 2011), which challenges a Federal Reserve rule establishing the interchange fee that an issuing bank may charge for a debit card transaction. [Editor’s Note: See News From the Circuits in this issue for a discussion of the *Business Roundtable* decision.]


and competitiveness of the financial institutions to which they apply. Second, the rules will require each supervisory institution to insert itself deeply into the operations of the entities it regulates and interpret and apply the statute and rules on a transaction-by-transaction basis. Third, development of the joint regulatory actions requires extensive, time-consuming negotiations among agencies with overlapping authority, each of which has its own understanding of the proper construction of the law and unique concerns dictated by the problems presented by the entities it regulates.

Chevron Deference and Shared Authority

Federal courts traditionally have refused to grant Chevron deference to agency interpretations of laws of general applicability, such as the Freedom of Information Act or the National Environmental Protection Act, that no specific agency is granted authority to implement.  With increasing frequency, however, Congress has adopted statutes that expressly share administrative and enforcement authorities among multiple federal agencies. Courts in turn have had to consider difficult questions regarding whether Chevron deference should be afforded to the interpretation of one of the several agencies with delegated authority to implement the law.

The Supreme Court has long recognized the existence, but never decided, the question of how Chevron deference should be applied when multiple agencies have joint or overlapping authority to implement the same statutory provision. The question arose explicitly in the late 1990s in two cases involving application of the Americans with Disabilities Act.  In Bragdon v. Abbott, 524 U.S. 624 (1998), and Sutton v. United Airlines, Inc., 527 U.S. 471 (1999), the Court recognized that Congress split implementation authority among three agencies (Equal Employment Opportunity Commission, Department of Justice, and Department of Transportation) for specifically defined parts of the law. However, no agency was given authority to issue regulations implementing the generally applicable provisions of the ADA. In particular, no single agency was delegated authority to interpret the term “disability,” which is central to implementation of the entire statute. In each case, the Court found an escape route that allowed it to avoid resolution of the Chevron question.

In Bragdon, the Court considered whether HIV infection constituted a “disability” under the ADA when the infection had not progressed to the symptomatic phase. It declined to determine whether the split-implementation mechanism should cause it to withhold Chevron deference from the interpretations of the various agencies that had construed the term. Rather, the Court found that the definition of “disability” had been carried forward from the Rehabilitation Act and that all interested agencies interpreted the term as applying to asymptomatic HIC. Accordingly, the Court found that the uniformity of administrative and judicial interpretations, both before and after passage of the ADA, provided a sufficient basis to uphold their interpretation under Skidmore v. Swift & Co., 323 U.S. 134 (1944). Sutton presented the question of whether “disabilities” should be determined without reference to mitigating measures. The EEOC had interpreted the term “disability” as not including such measures. The Court concluded that since both parties to the case had accepted the EEOC regulations as valid, it was not necessary to consider what deference, if any, was due the agency.

In cases in which it has been forced to address inconsistent agency interpretations, the Court has drilled down extensively on the structure and history of the statute to find a basis on which it could conclude that Congress had intended to delegate to one agency predominant authority to implement the specific statutory provision at issue. The issue first arose in Martin v. Occupational Safety and Health Review Commission, 499 U.S. 144 (1991). The Occupational Safety and Health Act creates a “split enforcement” scheme, in which the Department of Labor Occupational Safety and Health Administration (“OSHA”) issues regulations to enforce the statute and the Occupational Safety and Health Review Commission applies the rules in adjudications. OSHA issued a citation to an employer for violation of its rules, but the Commission disagreed with that interpretation and vacated the penalty. In the Supreme Court, the two agencies presented reasonable but conflicting interpretations of the regulation and claimed a right to deference. The Court inferred from the structure and history of the statute that the power to issue authoritative interpretations of the Occupational Safety and Health Act was a necessary adjunct of the Secretary’s powers to issue health and safety standards. Accordingly, it found that Congress had intended to invest interpretive power in OSHA, the administrative actor in the best position to develop historical familiarity and policymaking expertise with the problem.

A similar question arose in Gonzales v. Oregon, 546 U.S. 243 (2006), concerning the Attorney General’s authority under the Controlled Substances Act to prohibit doctors in Oregon from prescribing regulated drugs for use in physician-assisted suicides permitted by state law. The Attorney General issued an interpretive rule, based on an Office of Legal Counsel opinion that restricted use of controlled substances in such suicides. The Supreme Court rejected Justice’s argument that its interpretation of the statute was entitled to deference under Chevron and accordingly refused to grant deference under Skidmore and invalidated the rule. It held that Chevron deference applies only if the reviewing court first finds that the statute delegated authority to the agency and thereafter finds that the statute was ambiguous. Based on careful analysis of the structure and language of the law, the Court found that Congress had given the Attorney General only limited powers and authorized him to issue rules relating only to certain “regulation” and “control” functions. It further found that the Secretary of Health and Human Services, not the Attorney
General, had been delegated authority to issue rules governing medical practice. Based on Martin, the Court concluded that since Congress had not empowered Justice to enforce the part of the statute under which it had issued its rule, its interpretation was not entitled to Chevron deference and was invalid.

In USPS v. Postal Regulatory Commiss., 599 F.3d 705 (D.C. Cir. 2010), the court of appeals rejected an argument that the statute delegated authority to implement a split-enforcement scheme to two agencies and that neither agency’s interpretation was entitled to deference. It held that Congress had clearly delegated to the Commission the authority to implement, and thereby to interpret, the specific statutory provision at issue. In reaching that conclusion, however, the court noted that in Salleh v. Christopher, 85 F.3d 68 (D.C. Cir. 1996), it had found that conflicting provisions of the same statute conferred on both the Department of State and the Foreign Service Grievance Board the final say in whether a foreign service officer should be discharged. Under those circumstances, the court held that it could not afford deference to the interpretations of either agency. Salleh thus may provide the paradigm for the concerns presented by many joint delegations in Dodd-Frank.

Implications for the Implementation of Dodd-Frank

Congress’s decision to delegate authority equally to various supervisory agencies will create a series of problems in implementing the financial reform statute.

With respect to the interpretations of the statutory provisions that are reflected in the joint rules, courts likely will follow the approach taken in Bagdon and defer to the unanimous view of the agencies involved. The problems will arise in specific interpretations of the statute or the joint rules in case-by-case application—for example, whether a particular supervisory agency will deem that a specific transaction constitutes short-term proprietary trading of a security or derivative for the bank’s own account or creates a material conflict of interest with its customer.

As in Martin and Gonzales, a court called upon to review a challenge to a regulator’s interpretation will first seek to determine whether Congress gave exclusive or predominant authority to implement, and thus to interpret, the underlying provision to any one agency. In performing this analysis, the court will look carefully at the techniques Congress had adopted in prior statutes to address the fragmentation of authority among the bank supervisory agencies and determine if that historical context suggests that Congress intended that deference be given to the interpretations of any one agency. In many cases, this approach will not provide a solution. To preserve the independence of the supervisory agencies and to preserve competitive equality among financial institutions regulated by different agencies, Congress appears to have delegated equal and overlapping authority to multiple agencies under various provisions of Dodd-Frank.

In a situation of truly shared authority, at least two alternatives are available. First, a court might find that the individual agency’s interpretation of the statute or the joint rule is not entitled to Chevron deference, but will receive only the lesser Skidmore deference. To lessen the risk that its action would not be upheld if challenged in court, the agency might anticipate the problem and impress upon the regulated entity that a “safety and soundness” regulator has discretionary tools in its arsenal that could later make the regulated entity wish it had not filed suit.

Second, the supervisory agencies might determine that they disagree or potentially disagree with each other about the proper interpretation of the statute or the joint rule under the circumstances highlighted by a specific application. To avoid political criticism and complaints of regulatory favoritism among different sectors of the financial industry, the agencies might decide to negotiate common guidance or interpretations to govern all entities subject to their joint rule. There is recent precedent for this approach. In June 2005, in response to such objections and actions by financial institutions that threatened to weaken the federal anti-money laundering program, the five bank supervisory agencies issued common guidance as to how they would implement the Bank Secrecy Act through the examination process. The negotiations proved grueling and consumed substantial resources that the agencies otherwise could have devoted to direct implementation of the Anti-Money Laundering program.

For these reasons, any legal challenges to supervisory actions that are actually filed under provisions of Dodd-Frank implemented by joint rules will bear careful review, because judicial application of Chevron under these circumstances may force resolution of the legal process question. Moreover, they may affect the continued viability of the approach Congress has adopted to preserve the equality and independence of the regulatory agencies under the fragmented financial regulatory system it has chosen to establish.

The Regulatory Accountability Act of 2011: Way Too Much of a Good Thing

By Sidney Shapiro*

The Regulatory Accountability Act of 2011 (HR 3010), a bill to extensively amend the Administrative Procedure Act (APA), was passed by the House of Representatives on December 2, 2011, by a vote of 253–167 and referred to the Senate Committee on Homeland Security and Governmental Affairs on December 5 in the face of great opposition by the administrative law community. The Administrative Law Section sent a letter to the House opposing nearly all of the proposed changes contained in HR 3010. A letter from 51 administrative law professors to the House expressed even stronger opposition to the bill.

This opposition is warranted. The administrative process should balance fairness, accountability, and agency efficiency. The system is already out of balance, with rulemaking delays of 5 to 8 years common, and HR 3101 would add 2 to 2.5 years additional delay. Moreover, the justifications offered for this ossification are unsupported by the evidence.

The idea that there can be too much of a good thing also applies to administrative procedure. Administrative procedures are vital to ensuring fairness and promoting accountability. But it is equally important to accomplish these goals in a way that will not unduly delay or frustrate substantive regulatory programs. Administrative efficiency is an equally important value in administrative law. After all, the legitimacy of the regulatory process also depends on whether agencies can efficiently implement their statutory mandates. When necessary regulation is unduly delayed, the result is to frustrate the democratic will. For this reason, we need a regulatory process that balances efficiency, accountability, and fairness.

When I testified against HR 3101 in the House, I offered calculations that demonstrated significant rules currently take approximately 4 to 8 years to complete. This estimate assumes the comment period takes only 3 months, which is usually not the case, and that an agency can respond to rulemaking comments, which can number in the hundreds or even thousands, in 12 months. It also assumes the agency does not have to: hold an informal hearing; utilize small business advocacy review panels under the Small Business Regulatory Enforcement Fairness Act (SBREFA); consult with advisory committees, or go through the Paperwork Reduction Act process at OIRA. Some of these activities might be undertaken simultaneously with the development of a rule or responding to rulemaking comments, but they have the potential to delay a rule by at least another 6 to 12 months.

HR 3101 would make more than 30 pages worth of changes to the existing APA, which currently totals about 45 pages in length (not counting its Freedom of Information Act provisions). It would add over 60 new procedural and analytical requirements to the agency rulemaking process. As a result, I calculated it would cause an additional 2 to 2.5 years (21–33 months) of delay. Under HR 3010, the longest rulemakings could take more than 12 years—spanning potentially four different presidential administrations—to complete. Conceivably, Congress could help to mitigate the impact of these new requirements by appropriating additional resources to the agencies. There is no indication, however, that the current Congress is considering taking this step. To the contrary, agencies face shrinking budgets, which suggests the timeline for completing a rulemaking, discussed previously, could be significantly underestimated.

Agencies are currently subject to ample requirements to promote fairness and accountability. In 2000, Professor Mark Seidenfeld counted 110 different rulemaking steps, when one takes into account analytical and procedural requirements. Additional procedures have been added since 2000. A flowchart developed by Public Citizen to document the rulemaking process covers several square feet. Because of the many steps involved, the chart uses a tiny font despite its massive size. Of course, an agency will not have to comply with all of the steps identified by Seidenfeld and Public Citizen, but these charts demonstrate that we are not short on analytical and procedural requirements.

Besides procedural requirements, agencies are the subject of extensive lobbying, particularly by corporations and their trade groups. Moreover, we know that corporate and business lobbying of agencies far exceeds that by groups representing the public. For example, when Professors Wendy Wagner and Elizabeth Fisher examined 39 hazardous air pollutant rulemakings at EPA, they found that industry interests (companies and industrial associations) participated in substantially more rulemaking proceedings than public interest groups, filed many more comments in each proceeding, and had far more informal contacts with the agency prior to the notice of proposed rulemaking.

Of the total comments filed in an average rulemaking, business interests accounted for 81 percent of the total. Moreover, while business interests filed comments in every rulemaking proceeding, public interest groups submitted comments in only 48 percent of the rulemakings. In rulemaking with both business and public interest comments, business interests filed many more comments. Business interests submitted an average of 35 comments per rule, while public interest groups filed an average of 2.4 comments per rule.

Business interests also dominated the pre-rule stage involving meetings, phone calls, and letters. They had an average of 170 times more informal communications with EPA prior to the notice of

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proposed rulemaking than did public interest groups.

The same imbalance can be found at the Office of Management and Budget (OMB). When Professor Rena Steinzor and staffers at the Center for Progressive Reform (CPR) studied 6,194 separate OIRA reviews of regulatory proposals, they found that 65 percent of the attendees represented industry interests, which was about 5 times the number of attendees who represented public interest groups. Additionally, while nearly 95 percent of the lawyers, consultants, and lobbyists who attended these meetings represented business interests, only 2.5 percent represented public interest groups.

These data unequivocally confirm that regulated industries have fair access to agencies and OIRA to lobby concerning proposed rules. If there is a problem with accountability and fairness, it is that the public is drastically underrepresented in rulemaking proceedings. Moreover, since agencies have to justify rules by responding to every comment they receive, it is simply not plausible to contend that they are not accountable for the decisions that they make. Finally, since agencies are subject to a host of analytical requirements, it is beyond dispute that they have to think before they act.

Despite current ossification, the proponents of HR 3101 insist that additional procedures are necessary for three reasons. All three justifications, however, have been thoroughly refuted.

The proponents of HR 3101 point to a study on regulatory costs, authored by Nicole and Mark Crain for the SBA Office of Advocacy, which claims regulation cost the U.S. economy $1.75 trillion in 2008. The Congressional Research Service, the Economic Policy Institute, and the Center for Progressive Reform have all demonstrated the unreliability of the Crain and Crain estimate. Cass Sunstein, testifying before the Senate Committee on Homeland Security and Governmental Affairs on June 23, said the study was “deeply flawed and should not be relied on,” and he referred to the $1.75 trillion figure as “an urban legend.”

Another problem is that judgments about regulatory policy should not be based solely on costs. The issue is whether regulatory benefits exceed regulatory costs. While we do not have complete data we can use to compare total regulatory benefits and costs, existing studies show aggregate regulatory benefits exceed aggregate costs and by a considerable margin.

The focus on costs is misguided for an even more fundamental reason. The implication of citing cost estimates is that regulation creates costs for the economy and that the failure to regulate does not. But regulations do not impose new costs on society. Rather, they simply re-allocate who pays the costs. In other words, when a regulation is blocked, the costs to industry of that regulation do not vanish into thin air. Instead, those costs continue to be imposed on the general public, in terms of lives lost, preventable cancers, and serious injuries. So, we do not save money by failing to regulate. Usually it costs us money not to do so. Of course, the failure to regulate Wall Street demonstrates this reality.

The supporters of HR 3101 also claim that regulation is a “job-killer,” but this claim is also not backed up by the data. Economic studies indicate that regulation is not a drag on employment and may actually increase the number of jobs. This is because the number of jobs created by spending on regulatory compliance offsets, and sometimes exceeds, the number of jobs lost in companies that have to comply with the regulation. Thus, when Richard Morgenstern and his colleagues studied the impact of EPA regulation in four large polluting industries, they found that there was an increase in jobs in two industries (petroleum and plastics) and no statistically measurable impact on jobs in the other two industries (pulp and paper and steel). Consider too a study by Stephen Meyer that compared the economic performance of states with strong environmental regulation to states with weaker regulations after the 1990-1991 recession. He found that “[e]nvironmentally stronger states [did] not experience more precipitous declines in employment during the recession. Nor do they demonstrate a higher rate of business failure.”

Finally, there are claims that regulatory uncertainty is holding back the economy, preventing the United States from emerging from the current recession. The idea here is that businesses, not knowing what additional regulation may be promulgated, are holding back from making new capital investments and from hiring additional workers. Again, a number of studies refute this claim, as reports by the Environmental Policy Institute have pointed out. A report by the Treasury Department agrees, and Treasury Secretary Geithner has testified, “I don’t think there’s good evidence in support of the proposition that it’s regulatory burden or uncertainty that’s causing the economy to grow more slowly than any of us would like.”

Even if this allegation were true, HR 3101 would increase regulatory uncertainty, not decrease it. As noted earlier, the bill would add 2 to 2.5 years to the rulemaking ossification, thereby increasing regulatory uncertainty for that period of time. If the proponents of HR 3101 were actually interested in decreasing regulatory uncertainty, they should work to decrease ossification, not increase it.

While HR 3101 is offered as an amendment to the APA, it has a Trojan horse aspect. The proponents are attempting to pass the bill off as procedural reform, but it would also make an important change concerning cost-benefit analysis for significant rules. The legislation would require agencies to prove that benefits exceeded costs as a condition of regulating. This cost-benefit “supermandate” would therefore overrule more than 25 environmental, health, and safety statutes, which currently adopt a more precautionary approach that a cost-benefit requirement would permit. This would wipe out the current levels of protection in at least 25 different environmental, health, and safety laws. Proponents of HR 3101 argue that this drastic and radical change is necessary for the three reasons discussed earlier. But, as argued above, the evidence refutes their claims.

Rep. John Dingell (D-Michigan) once remarked, “I’ll let you write the substance . . . you let me write the procedure, and I’ll screw you every time.” HR 3101 indicates that Rep. Dingell knew what he was talking about. The regulatory system is out of balance, but not in the way that the supporters of the legislation contend. The problem is the inability to get regulations out in a timely fashion. HR 3101 would substantially increase this problem, and the evidence contradicts the justifications for the additional burdens.
Inspectors General and National Security Oversight

By Shirin Sinnar

Courts and Congress are often unwilling to constrain the executive branch when it limits individual rights in pursuit of national security. For courts, restrictive standing doctrine, heightened pleading requirements, state secrets claims, and various judicial deference norms often block meaningful review. Meanwhile, congressional oversight is also limited; apart from significant informational barriers to monitoring executive conduct, lopsided political incentives frequently disfavor individual rights concerns against competing national security claims. Recognizing these constraints, a number of scholars have advocated internal checks on executive power—Neal Katyal famously proposed the development of an “internal separation of powers” as a second-best solution to the apparent failures of the classic “Madisonian” separation of powers. And yet, surprisingly little attention has been paid, at least in academic circles, to how most executive branch mechanisms actually function to protect individual rights, one of the core concerns behind the separation of powers.

I argue that one set of oversight institutions located within federal agencies—Inspectors General (“IGs”)—is sometimes playing a surprisingly significant role in monitoring and protecting individual rights. At their best, IGs ended abuses of individual rights that had completely escaped judicial review. For instance, after a Department of Justice IG review exposed the FBI’s use of a previously secret investigative practice to illegally acquire Americans’ phone records, the FBI ended that practice altogether. That IGs are playing a role in rights protection is surprising for two reasons: first, because many of us are fundamentally skeptical about internal oversight, and second, because IGs are typically seen as auditors of fraud, waste, and abuse—not as monitors of individual rights.

Yet from a rights-protection perspective, it would be unwarranted to celebrate IGs without recognizing the significant diversity in their performance and key limitations in their capacity. Indeed, the five cases of IG reviews on questions of individual rights that I analyze in this article suggest both the strengths and limitations of IG rights oversight. Ultimately, IGs are a contingent and partial solution to the problem of weak protection for individual rights in the national security context—not a replacement for robust external review.

**IGs 101**

IGs now exist in over 50 federal agencies, including every major agency charged with a national security mission—the Departments of Defense, Homeland Security, Justice, and State, and the CIA among them. Most of these agencies have IGs subject to the Inspector General Act of 1978, which established IGs throughout the federal government as part of a series of post-Watergate congressional reforms; the CIA IG enjoys largely comparable powers pursuant to a separate statute. The broad mandate of IGs is to promote efficiency and effectiveness in government programs and uncover fraud and abuse. Statutory IGs are appointed by the President and confirmed by the Senate; the President can remove an IG at will, though he must inform Congress in writing of reasons for a removal decision.

Among executive oversight institutions, IGs stand out in two ways. First, the design of IGs insulates them from important ways from the executive and gives them a special relationship with Congress. IGs are required to report serious problems not just to agency heads, but also directly to Congress. In practice, this gives Congress access to precious information from within agencies and gives the IGs certain political leverage to encourage agency cooperation. The direct congressional relationship also distinguishes IGs from other oversight structures such as the President’s Intelligence Oversight Board or the Justice Department Office of Professional Responsibility, which report only to the executive. In most circumstances, agencies are prohibited from interfering with IG investigations or reports, though national security agencies can invoke special clauses to intervene, subject to congressional notification, in the interest of national security. Recent legislative changes also provide IGs access to independent counsel and require the President to include in budget submissions any statement from an IG who believes her office’s budget allocation would substantially inhibit its effectiveness. Second, IGs enjoy broad investigative powers to access information within federal agencies. That includes access to documents, witnesses, classified information, and information that would be subject to the state secrets privilege in court.

Although a primary impetus behind the Inspector General Act was concern over fraud and government waste, there was recognition even in the 1970s that IGs in intelligence agencies could also address concerns of a constitutional nature. In the post-9/11 period, many have. To determine how these reviews operated and what they achieved, I examined five IG investigations across four federal agencies: Justice, Homeland Security, Defense, and the CIA. These reviews addressed the post-9/11 detentions of hundreds of Muslim immigrants, the FBI’s use of National Security Letters...
to gather phone and email records, CIA extreme interrogations, the rendition of a Canadian citizen to Syria, and the military’s monitoring of domestic protests. These investigations varied significantly and together suggest important strengths and limitations of IG reviews.

**Strengths and Limitations of IG Rights Oversight**

The core strength of national security IGs is in increasing transparency about government conduct—and misconduct—that might otherwise evade scrutiny. IGs can access information without the procedural and substantive barriers that often block judicial review, exposing violations of the law that would otherwise go undetected. A striking example is the Justice Department IG’s exposure in 2007 of the FBI’s secret use of an investigative tool, known as “exigent letters,” to obtain Americans’ phone records. In that case, the FBI had convinced phone companies on hundreds of occasions to hand over customer phone records by falsely claiming that the agency had already requested grand jury subpoenas for the same information and that exigent circumstances demanded immediate compliance, even when no emergency existed. Before the investigation, the practice was secret: no private litigant would have had the knowledge, let alonestanding, to sue. But following the IG investigation, the FBI banned the use of exigent letters. In fact, even before that point, the mere knowledge that the IG was investigating had led to a sharp drop in the practice.

In fact, IGs may be most significant in areas where secrecy is greatest, as in intelligence operations. For instance, in 2004, the CIA IG issued a report criticizing the agency’s extreme interrogations of high-level suspected terrorists, which in practice had exceeded even the Justice Department Office of Legal Counsel’s (“OLC’s”) permissive legal guidance authorizing coercive methods. The report was publicly blocked during the Bush Administration and not released (even in redacted form) until President Obama took office. But even the limited release of the report within the executive branch apparently had impact.

The report’s grisly depictions of actual CIA interrogations—including a case where the CIA waterboarded a detainee 183 times, despite representing that any repetition of the practice would not be substantial—reportedly contributed to the OLC’s decision to temporarily withdraw legal support for coercive interrogations. Years later, the IG report again played a role. Current Attorney General Eric Holder said that reading the report helped convince him to reopen criminal investigations into the use of unauthorized interrogation techniques.

A second strength is that IGs can challenge government restrictions on liberty where existing law is sparse or undeveloped. In the national security context, the fact that courts do not review many cases often leaves gaps in legal doctrine. But IGs can evaluate compliance with other norms—such as internal agency rules, international norms, or even broader conceptions of fairness—where enforceable law is silent. For instance, in 2003, the Justice Department IG sharply criticized the post-9/11 detentions of hundreds of immigrants who were arbitrarily deemed suspects and subjected to prolonged confinement under very harsh conditions. At the time, it was an open legal question whether the government could hold immigrants for investigative purposes beyond a certain statutory removal period; a legal challenge was pending in federal court, while the OLC had deemed the detentions lawful. But rather than treat the absence of a judicial ruling as a free pass for the executive, the IG still faulted the detention policies for profoundly harming innocent individuals—and criticized government lawyers for not vigorously questioning their legality. That critique had enormous rhetorical impact, attracting widespread media and congressional attention and even helping some former detainees secure a monetary settlement against the government.

As institutions located within executive agencies, IGs can also develop institutional expertise and legitimacy that allows them to recommend tailored structural reform. For instance, in the exigent letters and post-9/11 detentions reviews, the Justice Department IG recommended numerous specific procedural reforms, largely adopted by the executive, that created stronger internal oversight. A court attempting to impose similar structural relief might find it difficult to acquire the institutional knowledge—or legitimacy—to patrol agencies at that level of detail.

As one might imagine, there are nonetheless important limitations to IG rights oversight. First, despite statutory protections, the President and agencies can still undermine IG independence. A prominent example of such intervention occurred after the CIA IG released his report on CIA interrogations and continued to investigate detainee abuse. In 2007, the CIA launched an unprecedented investigation into the IG office itself, leading to changes in the way the office conducted inquiries, including the adoption of an ombudsman to receive complaints against the IG and the establishment of a new “quality control” officer within the IG office. While that intervention was particularly dramatic, the executive can take more subtle steps to undermine IGs, including delaying access to information, as occurred in the DHS IG’s protracted investigation of the rendition of Canadian citizen Maher Arar to Syria. Other IGs might be co-opted by agencies, such that they fail to conduct thorough reviews even in the absence of official obstruction. A further threat to IG independence stems from the long vacancies in IG positions, which leaves these institutions in the hands of acting IGs who may lack the institutional authority and incentive to conduct hard-hitting reviews. Thus, a crucial question for future research relates to the on-the-ground factors that affect IG independence, including the staffing, structure, and budget of IG offices, the susceptibility of particular IGs to capture by the agencies they are charged with overseeing, agency norms and culture, and gaps in oversight resulting from IG vacancies.

A second limitation on the capacity of IGs to protect individual rights stems from the type of legal interpretation that IGs conduct. In the case studies I examined, IGs did not evaluate questions **continued on next page**
of constitutional rights compliance. Rather, IGs assessed compliance with sub-constitutional rules contained in statutes, regulations, or internal guidelines, or evaluated the propriety of national security conduct, irrespective of legality. As noted earlier, the ability of IGs to evaluate the propriety of government conduct—where courts only assess compliance with justiciable law—is an important strength. On the other hand, IGs may refrain from evaluating violations of constitutional rights, at least in the great many cases where the scope of such rights is highly contested. IGs might view independent analyses of constitutional questions as outside their core expertise, or might view such a function as blurring jurisdictional lines with the OLC. Whether or not such hesitation is institutionally prudent, it does suggest that IGs cannot simply compensate for the scarcity of judicial review; if one believes that constitutional law ought to constrain executive national security conduct, IGs are likely not filling the gap in constitutional compliance.

A third limitation is that lacking the power to enforce recommendations, IGs rely on political actors to implement reforms. But these political actors—agencies and Congress—may be particularly unwilling to implement reforms or enforce rights where the costs of national security policies are borne by unpopular and politically weak minorities—such as immigrants, foreigners, or Muslims. In addition, IGs, as internal actors, might themselves refrain from proposing the strongest reforms in order to preserve their working relationships with agencies or agency leadership.

Even the strongest IG reviews described here did not lead to accountability for high-level agency officials or to significant constraints on agency discretion. While IGs facilitated accountability for lower-level agency employees, they generally did not recommend discipline for senior agency leadership, even when faulting them for serious mismanagement, as in the review of exigent letters. Moreover, even the most critical IG reviews did not lead agencies or Congress to significantly constrain agency legal discretion: IG investigations did not lead to new policies prohibiting extreme interrogation methods, limiting immigration detention powers, or curbing the FBI’s power to seek new voluntary disclosures of phone records. In the CIA case, the OLC temporarily rescinded legal support for coercive interrogations, but under new leadership once again sanctioned harsh interrogations at the CIA’s behest. In the FBI case, while the agency banned exigent letters in response to the IG investigation, the FBI then asserted a new legal basis for asking phone companies to hand over customer phone records, and Congress has not yet followed through on the IG’s request to control that legal authority.

Of course, the optimal liberty-security balance on each of these issues is sharply contested, and there is further disagreement on the specific remedial measures that ought to result from even an acknowledged rights violation. But whether or not one views the outcome in any of these particular cases as appropriate, the broader point is that the reliance of IG rights enforcement on political processes may limit their ability to protect individual rights, particularly those of stigmatized or politically unpopular communities.

**Strengthening IGs**

While IGs will remain a partial solution to the problem of inadequate rights enforcement in the national security context, modest reforms can buttress their capacity to protect rights. First, Congress could further institutionalize the rights-monitoring role of national security IGs, explicitly requiring IGs to examine additional controversial policies implicating rights. Second, Congress could amend the IG Act to require greater disclosure of IG reports, subject to legitimate secrecy concerns. Third, Congress could strengthen IGs’ investigative authority by empowering them to issue subpoenas for the testimony of former government officials related to their time in government. Fourth, Congress could expand the jurisdiction of the DOJ IG, which currently must refer allegations relating to attorney misconduct to the less independent DOJ Office of Professional Responsibility. While such reforms would support IG rights oversight, we should tread carefully in increasing IG powers—not just to ensure that the IGs themselves remain accountable, but also to preserve their ability to do what they now do well. For instance, the existing restriction on IG remedial power—the fact that IGs cannot directly enforce the recommendations they issue—almost certainly contributes to the IGs’ relative freedom to issue strong critiques. Ultimately, carefully calibrated rather than dramatic expansions in IG power may make them most effective as monitors of individual rights.

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Sunshine! The New FOIA.gov

By Gretchen Frizzell*

The Department of Justice (DOJ) launched the new FOIA.gov website in March 2011 as the “flagship initiative” of its Open Government Plan and in commemoration of Sunshine Week, “a national initiative to promote a dialogue about the importance of open government and freedom of information.” The new FOIA.gov, which aims to make information about the Freedom of Information Act accessible, interactive, and easy to understand, is a website that any lawyer who deals with the federal government should explore and utilize.

DOJ’s Open Government Plan was developed as part of the Administration-wide Open Government Initiative begun during President Obama’s first year in office. This initiative includes a directive requiring federal agencies to take immediate steps toward achieving greater transparency, participation, and collaboration. In formulating its Plan, DOJ sought the input of Department employees, stakeholders, and members of the public, inviting ideas via a new e-mail address and temporary website. The Plan’s stated goals are to improve the availability and quality of information, work better with others inside and outside the government, and be more efficient and innovative. According to DOJ, FOIA.gov was inspired by the public feedback it received in response to that appeal for input.

The new FOIA.gov compiles, centralizes, and streamlines mountains of FOIA information on a single user-friendly website complete with video lessons presented by Melanie Pustay, Director of DOJ’s Office of Information Policy. The site advises the public on how it may utilize FOIA and describes how agencies are complying with it. It offers a plain-language explanation of the Act and how to submit a request. It also describes generally how requests are processed, as well as where to direct a request. FOIA.gov shares basic data on the number of FOIA requests received by the federal government, the disposition of those requests, and the extent of the government’s backlog of requests, as well as much more detailed data and reports.

FOIA.gov now serves as a central repository for information contained in federal agencies’ FOIA reports, which must be submitted annually to the Attorney General pursuant to 5 U.S.C. § 552(e). In addition, the site allows its users to search, sort, and compare data from those reports. Each agency’s FOIA data is available at a glance, and there is even a feature that makes it possible to generate one’s own report of detailed agency information, e.g., a report comparing all agencies’ FOIA-request processing times. A handy glossary defines obscure terms like “Non-Commercial Scientific Institution,” as well as the term “FOIA” itself (oddly, the glossary seems to be the site’s only avenue to the actual text of the Act, which one can reach by clicking a link within the definition of “FOIA”). Finally, a Frequently Asked Questions page offers answers accompanied by more video lessons from Ms. Pustay.

Attorneys seeking to access the vast array of federal information should consult the FOIA Contacts page. This single source provides the FOIA contact information for every federal agency, i.e., the contact information (typically name, title, mailing address, phone number, fax number, e-mail address, and website) of the person to whom a request for information from a given federal agency—or a particular office within an agency—should be sent. Every agency’s FOIA contact information is available individually as well as in the form of a spreadsheet compiling information across all agencies. If the name of the FOIA contact for a given office is not identified directly on FOIA.gov, it may be available on the specific agency website listed on FOIA.gov. In this manner, DOJ has consolidated this vital contact information on FOIA.gov. Typically, the website listed on the FOIA Contacts page for each agency or office—including, for example, each of EPA’s regional offices—provides access to that specific agency’s Electronic Reading Room. Visiting the appropriate Electronic Reading Room before submitting a FOIA request may obviate the need to make a request at all, since it houses documents specifically required for inclusion under FOIA along with frequently requested documents. For attorneys and members of the public seeking federal information, the aggregation of all federal agencies’ FOIA contact information and access to Electronic Reading Rooms in one place should yield noticeable savings in both time and money.

For practitioners, the FOIA Contacts page is perhaps the most useful part of the new FOIA.gov. Although the site is indeed user-friendly, it seems to have been designed primarily with lay users in mind. Practitioners may consider much of it dispensable, while finding other aspects deficient. Where FOIA.gov offers a plain-language explanation of the Act and video presentations, attorneys or other professionals might also like to see the actual text of the Act in a more prominent location on the site and would probably prefer readable text over videos. In addition, helpful FOIA resources like DOJ’s own Guide to the Freedom of Information Act or a link to the website of the Office of Government Information Services, the “FOIA ombudsman,” inexplicably are nowhere to be found on FOIA.gov. Furthermore, while some may find the site’s compilations of data on federal agencies’ FOIA-related activities to be useful, there are other tools that attorneys would probably deem more practical. For example, FOIA.gov might be of greater use to practitioners if it went one step beyond how and to whom to make a FOIA request by including a centralized, real-time system for checking the status of a FOIA request using its assigned tracking number.

By consolidating diverse information about FOIA in a single website, DOJ has cast sunshine on a sometimes dark area of federal law. Yet there is room for improvement, particularly from a practitioner’s perspective. Fortunately, DOJ continues to seek input on FOIA.gov. To keep the site up to date, federal agency employees are asked to send contact changes and other updates to agencyfeedback@foia.gov. Those working outside of the federal government are also encouraged to share feedback on the website. If you think of a way to improve the new FOIA.gov, send an e-mail to feedback@foia.gov. 

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Water and Shale Gas Development in Appalachia

By Armando Benincasa*

In this article, I provide a broad overview of the issues and regulations affecting water use and wastewater handling and shale gas development in Northeast Appalachian Region of the United States, including New York, Ohio, Pennsylvania, and West Virginia (“Appalachia”). Due to the limitations of length, a full discussion of these issues is not possible. For a more in-depth discussion of these issues and complete examination of the state and federal regulations surrounding water use and wastewater handling in shale gas development in Appalachia, go to: http://www.steptoe-johnson.com/know-how/docs/waterandshalegasdevelopment.aspx

Introduction

Horizontal oil and gas well drilling has become commonplace in Appalachia. Likewise, hydraulic fracturing, also known as “fracing” or “fracking,” has become a key element of natural gas development. Combining horizontal drilling with hydraulic fracturing has resulted in the development of unconventional shale plays, like the Marcellus and Utica in states such as West Virginia, Pennsylvania, Ohio, and New York.

Fracturing shale gas reserves requires large volumes of water, sometimes more than five million gallons of water, much larger than traditionally required. The water is mixed with chemicals and a propping agent, and wells are stimulated by pumping millions of gallons of this fluid into the desired rock formation at high pressure to fracture the rock and release the gas.

The process of hydraulic fracturing raises significant issues related to water use and handling:

- Appropriate sources of water that may be utilized for fracting must be identified, with corresponding measures taken to protect the water source from depletion.
- Once the fracturing process is complete and a portion of the fluid is returned to the surface as flowback or produced water, adequate treatment and/or disposal of the wastewater must be ensured.

Regulatory Agencies in Appalachia

There are a number of regulatory agencies that play a role in regulating the development and production of oil and gas in Appalachia, including:

- The Pennsylvania Department of Environmental Protection;
- The New York State Department of Environmental Conservation;
- The West Virginia Department of Environmental Protection; and
- In Ohio, two agencies have some what joint jurisdiction:
  - The Ohio Department of Natural Resources (“ODNR”); and
  - The Ohio Environmental Protection Agency

Also, there are two river basin commissions in Appalachia that have jurisdiction over water issues, such as rate and volume of water withdrawals:

- The Delaware River Basin Commission, which manages the water resources within the basin of the Delaware River, covering portions of Delaware, New Jersey, New York, and Pennsylvania; and
- The Susquehanna River Basin Commission, a similar interstate/federal agency that governs the water resources of the Susquehanna River throughout New York, Maryland, and Pennsylvania.

In addition to these agencies and commissions, there are other commissions and interstate compacts that potentially are at least tangentially involved in the development and production of oil and gas in Appalachia, as well as the federal government through agencies such as the United States Environmental Protection Agency. This short article will concentrate on the various state programs only.1

Water Resources and the Common Law in Appalachia

The development of water use law and water management principles in Appalachia begins with the common law. “Riparian rights” is a system of allocating water among those who own land bordering a source of surface water. The doctrine of riparian rights varies slightly depending upon jurisdiction, but there are several fundamental principles that are uniform. First, a “riparian right” is the right of an owner of land bordering a source of water, the “riparian” landowner, to extract and use that water on his adjoining “riparian” land. Second, a riparian right is a right of use, meaning that the riparian landowner does not own the water, but merely has the right to use the water, subject to the rights of other riparian owners.

The Appalachian states have all adopted in one form or another a version of the “reasonable use” doctrine, which states that a riparian owner may make any use of water, irrespective of its effect on the natural flow of the watercourse, as long as each user does not interfere with other users’ rights to reasonable use. The only real limitation on a user’s particular use is that it must not impose any “substantial harm,” or in other words “unreasonable harm,” on any other riparian owner. Several factors must be considered in weighing the benefit of the use to the prospective user against the detriment of the use to other riparian owners. Additionally, a court will

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1 This article will review Pennsylvania, Ohio, and West Virginia generally, given space constraints and the current lack of final rules in New York related to high-volume hydraulic fracturing.
consider the cost to the defendant user of modifying his conduct to accommodate the plaintiff. Courts have, in the past, strongly favored domestic uses, which will normally prevail over other uses.

**Water Use Regulation in Appalachia**

The common law has been supplemented in Appalachia generally with a series of statutes and regulations which address the use of water resources. These water-resource management statutes and regulations are primarily resource-management tools for the states whereby potential users of water resources must register those uses and in very limited circumstances must obtain permits for large consumptive uses.

These statutes were developed largely in reaction to natural events such as droughts and were meant as planning tools to allow the states to track water uses and develop state and regional water-management plans to address water shortages. These programs were not developed to address water use as it related to specific industry needs and uses.

With the growth of the oil and gas industry in Appalachia, water use and particularly water use in smaller watersheds became a substantial issue and concern for the states. As a result, a more comprehensive water-management regulatory structure has been developed in West Virginia and Pennsylvania\(^2\) that is meant to be protective of existing uses of streams and waters being used as source water for hydraulic fracturing operations.

These programs, created through policy and guidance initially and now through statutory changes, now require the submission of water-management plans with well-work permits for review and approval. The goal of the plan is to protect the existing uses and aquatic habitat of the source water by assuring minimum flow rates are retained in the water during the water withdrawal. The plans require the disclosure of the amount of water proposed to be withdrawn, the rate of withdrawal, and the time of the withdrawal. These requirements are designed to ensure that a use does not adversely impact the existing established uses of the source water or the aquatic habitat.

These programs further require water users to maintain records, notify the state when they intend to commence a use, and identify the point of withdrawal for the public.

**Wastewater Handling**

Wastewater generated from the fracturing process contains hydrocarbons, salts, dissolved solids, chemicals, and naturally occurring radioactive material.

Typically, this water will contain from 4 to 35 percent salts, plus oil and gas and chemicals added during the well-development process. Total dissolved solids ("TDS") may exceed 100,000 mg/L. Once the water reaches the surface, proper treatment and/or disposal must be addressed.

Federal effluent guidelines do not allow for the direct discharge of oil and gas exploration-related wastewater directly from the site to surface waters east of the Mississippi river. As a result, the industry must rely on other options for the treatment and disposal of its wastewater.

**Treatment options**

Traditional wastewater treatment options in Appalachia such as the land application of wastewater and the treatment and disposal of oil and gas exploration-related wastewater through third-party facilities and surface water discharges are no longer feasible either from a practical or legal perspective.

While natural pond evaporation is a common and historical means of controlling and addressing oil and gas wastewater in dry parts of the country such as Texas and the Southwest, it is no longer a feasible alternative in Appalachia given the amount of rainfall received in Appalachia and the increased volumes of wastewater that are produced as a result of shale gas exploration.

Discharges of wastewater through third-party surface-water discharge facilities are controlled and must be approved by the individual states through each state’s National Pollution Discharge Elimination System program, which was established in Title IV of the Federal Water Pollution Control Act Amendments of 1972, also known as the Clean Water Act. While each state in Appalachia has primacy and maintains state permit programs, each has been reticent to allow for the discharge of oil and gas-related wastewater to surface waters.

Concerns, whether proven or not, regarding the impact of TDS-laden waters on receiving streams has resulted in the adoption of stringent new TDS water-quality standards which have resulted in extremely stringent new discharge standards in Pennsylvania for facilities willing to accept the wastewater and a further request by the state that the industry discontinue the use of these surface water discharge facilities as a means of treatment and disposal of its wastewater. Similarly, West Virginia and Ohio have indicated their positions that while there is no statutory prohibition to the use of third-party surface-water discharge facilities as a means of treating and disposing of oil and gas-related wastewater, such requests will not be looked upon favorably.

All the states have adopted policies that promote the recycling/reuse of fracturing wastewater and in fact, most wastewater generated today is treated and then reused. In order to reuse wastewater, it must be treated and/or diluted with fresh water to lower the total dissolved solids, sulfides, chlorides, and other constituent concentrations. The ability to reuse wastewater is determinant of the desired water quality characteristics of the operators, which may vary depending on drilling techniques.

Recycling/reuse of wastewater is clearly the preferred choice of the states and the industry to address wastewater handling issues. Still, most recycling processes result in a certain volume of very saturated wastewater that must be addressed.

**Underground injection**

The Federal Underground Injection Control ("UIC") Program is set forth in the Federal Safe Drinking Water Act. The UIC Program was established to prevent

\(\text{continued on page } 23\)
Introduction

In direct response to the devastating terrorist attacks of September 11, 2001, the United States Congress began significantly revising the government’s surveillance and investigative powers. The first, and perhaps the most well known of these revisions, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (the “USA PATRIOT Act” or “PATRIOT Act”), passed with substantial majorities in both houses of Congress and was signed into law approximately six weeks after the attacks. Congress continued to modify, and in many cases extend, the government’s surveillance authority over the next decade. This article examines several of the important post-9/11 changes to the government’s surveillance powers, focusing on the government’s surveillance powers in terrorism and foreign intelligence investigations.

General Procedural Requirements for Criminal Surveillance

The federal government must follow certain rules and procedures in order to conduct criminal surveillance. These procedural safeguards, designed to prevent the government from abusing its investigative authority, fall into four broad categories: (1) before the fact (or ex ante) court involvement; (2) particularity in the surveillance applications submitted by the government; (3) a threshold evidentiary showing to justify the surveillance; and (4) particularity in the order issued by the court authorizing the surveillance. As an illustrative example, consider the procedures the government must follow to obtain a telephone wiretap in a typical criminal investigation. The officer must first apply to a court for a warrant authorizing the wiretap and requiring the telephone company to install the tap. The court will issue such a warrant only where the government is able to establish “probable cause” that the defendant has engaged in or is likely to engage in certain criminal conduct. Furthermore, the court will not typically grant blanket authority to install wiretaps; rather, the warrant (and the application) must generally identify with particularity the telephone line (or target) to be wiretapped.

The procedural requirements for conducting surveillance represent an attempt by Congress, the Executive, and the Judiciary to strike a balance between the government’s need to conduct investigations in the interest of public safety, on one hand, and the need to maintain certain areas of individual liberty inviolate (or at least strongly protected) from unwarranted governmental intrusion, on the other. The United States Supreme Court addressed the challenges inherent in achieving this balance almost 40 years ago when examining the use of electronic surveillance in domestic security context:

The issue before us is an important one for the people of our country and their Government. It involves the delicate question of the President’s power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval. Successive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the Congress or a definitive decision of this Court. This case brings the issue here for the first time. Its resolution is a matter of national concern, requiring sensitivity both to the Government’s right to protect itself from unlawful subversion and attack and to the citizen’s right to be secure in his privacy against unreasonable Government intrusion.

The debate over the government’s surveillance powers can therefore be understood as an attempt by the various branches of government to strike a balance between public safety and individual liberty. Because the established procedures for conducting surveillance represent a carefully drawn compromise between the three branches of government on the appropriate way to balance public safety and individual liberty, any modification or gloss on one of these procedures is guaranteed to generate some significant measure of controversy.

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1 The PATRIOT Act passed the House by a margin of 357-66 and the Senate by a margin of 98-1.
3 Although this article focuses on portions of the PATRIOT Act that govern investigations involving international terrorism and foreign intelligence gathering, not all sections of the PATRIOT Act are limited to such investigations. See generally The Law of Counterterrorism.

and debate. It is not surprising then that the changes in surveillance procedures for foreign intelligence and terrorism investigations generate a significant amount of controversy.

There are two primary reasons why typical surveillance procedures are modified in foreign intelligence and terrorism investigations. First, technological innovations coupled with constantly evolving terrorist tactics often require novel solutions that modify the procedural requirements for conducting surveillance in a traditional criminal investigation. Second, unlike ordinary criminal investigations, terrorism and foreign intelligence investigations are complicated by a unique set of concerns—including the need to protect the national security and the interests of the nation as a whole; to avoid diplomatic embarrassment; and, in particular, to avoid compromising sensitive (and often highly classified) intelligence sources and methods. Therefore, the procedures for conducting surveillance in terrorism and foreign intelligence investigations must necessarily depart, to some degree, from the procedures in traditional criminal investigations.

Government Surveillance Laws Prior to 1978

For the majority of the nation's history, the Executive Branch has taken the position that laws regulating government surveillance activities do not apply where national security is implicated. And the Legislative Branch has, until fairly recently, offered only token resistance to this notion. Indeed, it was only in 1978 in passing Foreign Intelligence Surveillance Act (“FISA”) that Congress sought to truly regulate government surveillance involving foreign intelligence. Prior to FISA, Congress imposed regulations on the government’s surveillance authority on two primary occasions: first through the Communications Act of 1934 (the “Communications Act”) and again 30 years later in Title III. In both instances, however, the government’s purported regulation of communications surveillance was directed at traditional criminal investigations and not at foreign intelligence or terrorism investigations.

Foreign Intelligence Surveillance Act of 1978

Background

Congress passed FISA in 1978 in response to two developments: (1) the 1972 Supreme Court decision in United States v United States District Court of the Eastern District of Michigan (Keith); and (2) the congressional investigation into government surveillance practices following the Watergate scandal. First, in Keith, the Supreme Court held that the Fourth Amendment required the government—at least in the specific circumstances presented in that case—to obtain a warrant in order to conduct what the Court termed “domestic security surveillance,” i.e., surveillance where the government did not assert that the surveillance related to a foreign power or its agents. In doing so, however, Keith expressly left open the question whether the government could conduct warrantless surveillance in an investigation of a foreign power or its agents. Then, a few years after Keith, the Watergate scandal led to a series of congressional investigations into government surveillance practices. These congressional investigations revealed extensive programs of government surveillance directed at prominent political and social figures, as well as the revelation of a highly classified government program to intercept international telegraph traffic in peacetime. In 1976, the Church Commission published its final report concluding that the government had engaged in extensive (and arguably questionable) surveillance practices in the name of national security for almost 50 years:

Since the early 1930’s, the intelligence agencies have frequently wiretapped and bugged American citizens without the benefit of a judicial warrant. ..[P]ast subjects of these surveillances have included a United States Congress man, Congressional staff members, journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisors and anti-Vietnam War protest group. These relatively unflattering revelations about government surveillance practices, coupled with the open questions after the Keith decision—namely whether the government could conduct warrantless surveillance in the United States where a foreign power or its agents were involved—ultimately led Congress to take up the Supreme Court’s invitation in Keith and establish, with the agreement of the Carter White House, a statutory framework for conducting surveillance to gather foreign intelligence.

FISA surveillance: 1978-2001

Congress passed FISA to “provide a procedure under which the Attorney General can obtain a judicial warrant authorizing the use of electronic surveillance in the United States for foreign intelligence purposes.” FISA, as originally passed, represented “a genuine attempt . . . to think through and balance the citizen’s competing claims to security from foreign powers, their agents and international terrorists, and to security from electronic surveillance by his own Government.” Indeed, FISA was specifically drafted to exclude “the vast majority of overseas foreign intelligence surveillance activities” that the government undertook. FISA accomplished this goal through the careful definition of key terms used in the statute, in continued on next page

5. See Keith, 407 U.S. at 320–22.

6. Church Report, vol. II, at 71; see also id. at 10–11 (“Investigations of groups deemed potentially dangerous – and even group suspected of associating with potentially dangerous organizations—have continued for decades despite the fact that those groups did not engage in unlawful activity.”).


particular, the definition of “electronic surveillance.”

In crafting FISA, Congress was aware that the unique issues associated with investigating foreign powers and their agents—notably the need to maintain a fairly high level of secrecy as to the targets of surveillance and to protect highly sensitive sources and methods—raised particular concerns given the public nature of typical judicial proceedings. Rather than forego ex ante court approval, Congress created a special court—the Foreign Intelligence Surveillance Court (“FISC”)—to consider requests from the government to conduct electronic surveillance under FISA. The FISC is comprised of sitting federal district court judges selected by the Chief Justice of the United States for a single seven-year term. To protect the confidentiality of the investigations, the proceedings in the FISC are typically conducted ex parte and in camera, that is, with only the government appearing before the court in a non-public session.

The FISC is authorized to issue an order (a FISA order) granting, denying, or modifying the government’s request to conduct the surveillance activities authorized by FISA. As originally enacted, FISA required the government to establish probable cause to believe that “the target of the surveillance is a foreign power or an agent of a foreign power,” and that “each of the facilities or places at which the electronic surveillance is being directed is being used, or is about to be used, by a foreign power or an agent of a foreign power.” In addition, the FISC was only authorized to issue orders for the government to conduct “electronic surveillance” (as that term is defined by the statute). However, by September 2001, Congress had amended FISA to permit the FISC to authorize a wider range of surveillance activities, including orders to obtain certain types of business records, employ pen register and trap-and-trace devices, and conduct physical searches.

Expansion of FISA surveillance post-2001: the PATRIOT Act and IRTPA

Following the attacks of September 11, 2001, Congress provided the government with additional authority to conduct surveillance under FISA, as well as with broader authority to use information from such surveillance, by passing the PATRIOT Act in 2001 and the Intelligence Reform and Terrorism Prevention Act of 2004 (“IRTPA”). Notably, the PATRIOT Act and IRTPA expanded the surveillance tools available under FISA in three important ways by: (1) providing the government with so-called “roving” or “multipoint” wiretap authority; (2) permitting the surveillance of “lone wolf” terrorists; and (3) expanding the FISA business records provision to permit the government to obtain all manner of tangible things from third parties pursuant to court orders. These three changes to FISA surveillance are among the most controversial (or at least among the most hotly debated) surveillance law modifications made by Congress in the aftermath of the September 11 attacks and, as a result, have been subject to numerous reviews and repeated reauthorization by Congress. In addition to these three changes, the Protect America Act, passed in 2007, and the FISA Amendments Act, passed in 2008, provided the government with expanded surveillance authority. Indeed, by June 2011, Congress had recently renewed—after significant debate on both sides of the aisle—the roving wiretap, lone wolf, and business records changes made by the PATRIOT Act, and it is now set to consider the reauthorization of the changes made by the FISA Amendments Act in the next year.

Conclusion

In sum, the PATRIOT Act and other post-9/11 legislative provisions have, in many ways, made fundamental changes to the nation’s surveillance laws and have provided the government with expanded authority to assist it in protecting the nation against foreign threats. At the same time, modifications have been made and procedural requirements increased to address privacy and civil liberties concerns. On balance, however, the shift in favor of additional government authority since September 11 has been significant, and the counterterrorism and foreign intelligence toolkit is perhaps stronger than it has ever been since the advent of legislative regulation in this area.

10 See 50 U.S.C. §§ 1801(a), (b); 1805(a)(2).


Regulation-Induced Innovation for Sustainable Development

By Nicholas A. Ashford and Ralph P. Hall*

This article argues that regulation—properly fashioned—can transform products and processes in ways that confer economic, health, safety, and environmental benefits—not only costs. In contrast, classical economic analysis of the relationship between health, safety, and environmental regulation, on the one hand, and competitiveness, on the other, maintains that stringent regulation invariably increases production costs, diverting resources from R&D and hindering innovation. This assumption was challenged first in the late 1970s at MIT and made popular in 1991 by the so-called “Porter hypothesis.”

The Porter hypothesis and the relevant literature indicate that environmental, health, and safety regulation can induce dramatic innovations, not only by spurring the development of new products or services by incumbent producers, but also by creating conditions in which new producers can enter the field. Regulation can do this when firms have, or are induced to have, the willingness, opportunity, and capacity to innovate. This literature, and the insights gleaned from it, provide an important set of clues for how regulation can be used to foster sustainability.

Based upon his research into the competitive advantage of nations, Porter claimed that “[s]trict environmental regulations do not inevitably hinder competitive advantage against foreign rivals; indeed, they often enhance it. Tough standards trigger innovation and upgrading.” He observed that “[p]erhaps constructed regulatory standards, which aim at outcomes and not methods, will encourage companies to re-engineer their technology. The result in many cases is a process that not only pollutes less but lowers costs or improves quality, …” Strict product regulations can also prod companies into innovating to produce less polluting or more resource-efficient products that will be highly valued internationally. Porter’s hypothesis is that firms which respond to stringent regulation by developing new technologies have a “first mover” advantage and can capture the market for their products/services. Comparison of national competitiveness with good environmental governance and private-sector responsiveness supports the Porter hypothesis. Good economic management and good environmental management are related, and firms which succeed in developing innovative responses to environmental challenges benefit both environmentally and economically.

Earlier empirically based work on this concept dates back twelve years before Porter’s work, to research undertaken at MIT. This earlier work showed how stringent and focused regulations in the U.S. chemical-producing and -using industries had the effect of stimulating fundamental product and process innovations. The MIT studies revealed that environmental and health and safety regulation—if appropriately designed, implemented, and complemented by economic incentives—can lead to radical technological developments that can significantly reduce exposure to toxic chemicals in the natural and working environments and in consumer products. Examples include regulation-induced replacement of poly-chlorinated biphenyls used in transformers by a silicone-based fluid, a new polymerization process for polyvinylchloride, and textile-weaving innovation eliminating the need for a formaldehyde-containing resin that impaired permanent press properties to cloth.

A limitation of Porter’s hypothesis is that it focuses on how incumbent firms respond to more stringent regulations, but it ignores the important dynamics of new entrants. Porter and van den Linde argue that regulation, properly designed, can cause a regulated firm to undertake innovations that not only reduce pollution—which is a hallmark of production inefficiency—but also save on materials, water, and energy costs, conferring what Porter calls “innovation offsets” to the innovating firm (and what Ashford and his MIT colleagues called “ancillary benefits”). This can occur because the firm, at any point in time, is sub-optimal. If the firm is the first to comply with regulation in an intelligent way, other firms will later have to rush to comply and do so in a less thoughtful and more expensive way. Thus, there are learning curve advantages to being first and early.

Given Porter’s focus on innovation offsets—i.e., the cost savings due to induced innovation that could exceed the cost of the regulation—he is mainly concerned with the costs to incumbent firms. However, it is possible to differentiate between “weak” and “strong” forms of the regulation-induced innovation hypothesis—a distinction that Porter does not make. In its weak form, as Porter observes, firms subject to more stringent regulation respond with product and process innovations. However, while environmental and worker health and safety improvements may be realized, the offending products and processes are only incrementally changed.

In contrast, in the strong form of the regulation-induced innovation hypothesis, stringent regulation can stimulate

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the entrance of entirely new products and processes into the market, thereby placing dominant technologies. In this situation, unless incumbent firms have both the willingness and the capability to produce and compete with the new forms of technology, they too are likely to be displaced from the market. The figure below provides a simple diagram of the likely technological responses to the strong and weak forms of the regulation-induced innovation hypothesis. Empirically based examples were researched by Ashford and his colleagues in their work.

While some question whether environmental regulation does generate a positive effect on innovation, their analyses tend to miss the essence of the strong form of the regulation-induced innovation hypothesis. Although it is likely that stringent regulation will not stimulate technological innovation in most firms, some firms are likely to rise to the challenge and become technological leaders in the process. Hence, the evidence is necessarily anecdotal. The Schumpeterian notion of “waves of creative destruction” leading to succeeding advances in technological development describes the process by which dominant technologies are being continually displaced as new technologies become available.

The design challenge facing governments is how existing undesirable technologies can be retired (or displaced) through a combination of regulation and market incentives. These ideas thus challenge the notion that incumbent firms will reinvent themselves in a significant way and should have a major role in setting the targets for future regulation. Incumbents will not set targets that they do not expect they can meet.

With regard to the weak form of the regulation-induced innovation hypothesis, ambitious environmental policies in developed nations can lead to the formation of lead markets for environmental technologies. However, the evidence suggests that the international diffusion of environmental innovations must be accompanied by international policy diffusion, or the adoption by other countries of the induced innovation must be economically reasonable. Both of these factors make it difficult to predict with certainty whether an ambitious environmental policy is likely to create a lead market for the international diffusion of innovations. The uncertainty surrounding the likely impacts on national industries of more stringent environmental, health, and safety regulation is seen as one reason why governments hesitate to implement such policies.

Stringent regulation can stimulate new entrants to introduce entirely new products and processes into the market—products and processes that will displace dominant technologies. One of several vivid examples is the displacement of Monsanto’s PCBs in transformers and capacitors by an entirely different dielectric fluid pioneered by Dow Silicone. Regulation can thus encourage disrupting innovations by giving more influence to new customer bases, in which demands for improvements in both environmental quality and energy use and efficiency are more sharply defined and articulated. Of course, industries that would fear being displaced by new entrants would not be expected to welcome this regulation. This explains in part their resistance to regulation and their propensity to try to capture regulatory regimes, surreptitiously or through direct negotiation with government.

In principle, regulation can be an effective and proper instrument for government to guide the innovation process. Well-designed regulation that sets new rules changes the institutional framework of the market. It can thus be an important element in creating favorable conditions for innovation that will enhance environmental sustainability and create incentives for the development of powerful lead markets, which pull innovation towards that sustainability. With regard to regulation, what seems to matter is not only the stringency, mode (specification versus performance standards), timing, uncertainty, focus (inputs versus product versus process) of the regulation, and the existence of complementary economic incentives—but also the inherent innovativeness (usually in new entrants) or lack of it (usually in the regulated firms) that the regulation engenders.

In order for innovation to occur, the firm (or government itself) must have the willingness, opportunity/motivation, and capability/capacity to innovate. These three factors affect each other, of course; but each is determined by more fundamental factors.

Willingness is determined by the following factors: (1) attitudes towards changes in production in general; (2) an understanding of the problem; (3) knowledge of possible options and solutions; and (4) the ability to evaluate alternatives. Improving factor (3) involves aspects of capacity building through the diffusion of information, through trade associations, government-sponsored education programs, inter-firm contacts, and the like. Changing attitudes towards changes in production, factor (1), often depends on the attitudes of managers and on the larger culture and structure of the organization, which may either stifle or encourage innovation and risk taking. Factors (2) and (4) depend on internal intellectual capacities. In the context of disrupting innovation by firms representing the dominant technology, willingness
is also shaped by the rare commitment of management to nurture new approaches that are at odds with its traditional value network or customer base.

Opportunity and motivation involve both supply-side and demand-side factors. On the supply side, technological gaps can exist between the technology currently used in a particular firm and the already-available technology that could be adopted or adapted (known as diffusion or incremental innovation, respectively), or alternatively the technology that could be developed (i.e., significant sustaining or disrupting innovation). Consciousness of these gaps can prompt firms to change their technology, as can the opportunity for cost savings. Regulatory requirements can also define the changes that would be necessary to remain in the market. On the demand side, three factors could push firms towards technological change. These are: (1) opportunities for cost savings or expansion of sales; (2) public demand for more environmentally sound, eco-efficient, and safer industry, products, and services; and (3) worker demands and pressures arising from industrial relations concerns. The first factor could result from changes in the customer value networks. However, all these factors may stimulate change too late in the dominant technology firms, if new entrants have already seized the opportunity to engage in developing disrupting innovations.

Capability or capacity may actually be the most important and limiting factor and can be enhanced by: (1) an understanding of the problem; (2) knowledge of possible options and solutions; (3) the ability to evaluate alternatives; (4) resident/available skills and capabilities to innovate; and (5) access to, and interaction with, outsiders. Knowledge enhancement/learning, factor (2), can be facilitated through deliberate or serendipitous transfer of knowledge from suppliers, customers, trade associations, unions, workers, other firms, and the available literature. The skill base of the firm, factor (4), can be enhanced through the education and training of operators, workers, and managers, on both a formal and informal basis, and through the deliberate creation of networks and strategic alliances that are not necessarily confined to a geographical area, nation, or technological regime.

Interaction with outsiders can stimulate more radical and disrupting changes. This last method of enhancing the capacity of firms to undertake technological change involves new outsider firms and stakeholders with which the firm has not traditionally been involved. Capacity to change may also be influenced by the innovativeness (or lack thereof) of the firm as determined by the maturity and technological rigidity of a particular product or production line. Some firms find it easier to innovate than others. The heavy, basic industries, which are also sometimes the most polluting, unsafe, and resource-intensive industries, change with great difficulty, especially when it comes to core processes. New industries, such as computer manufacturing, can also be polluting, unsafe (for workers), and resource and energy intensive, although they may find it easier to meet environmental demands. Government should not miss the opportunity to loosen the creative forces that bring about innovative changes that can simultaneously benefit the economy, the environment, and the general welfare.

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Water and Shale Gas Development in Appalachia continued from page 17

contamination of underground drinking water sources. Significantly, “underground injection” does not encompass the injection of fluids related to hydraulic fracturing. However, this exemption is limited solely to frac fluids: it “does not extend to the disposal of any wastes, including drill cuttings, flowback water, or production brines.”

Both West Virginia and Ohio have primacy and administer the UIC programs within their respective states. Pennsylvania does not; UIC permits issue from the USEPA in that state. Following reuse/recycling, disposal by and through a permitted UIC well is the preferred means of disposal for oil and gas-related wastewater. In fact, in Ohio, the use of UIC wells is the only specific means of wastewater handling approved by statute. All other means of wastewater disposal must be approved on a case-by-case basis by the ODNR.

As a result of geology and other factors, these wells are located primarily in the state of Ohio, though development in West Virginia continues.

The permitting process includes the analysis of an “area of review” for each injection well, which must be conducted prior to injecting any fluids underground. This analysis includes the identification of a “zone of endangering influence” (“ZEI”), being the radius around the point of injection where, due to the pressure from injection, the potential exists for migration of the injection fluid, or fluids native to the injection formation, into an underground source of drinking water. The ZEI is calculated based upon the life expectancy of the well or pattern.

All permit applications must identify all wells within the “area of review” that penetrate formations that will be affected by the pressure increase from the injection, and address corrective actions in the event of such fluid migration. All proposed UIC wells “must be constructed to meet specific casing, cementing, logging and testing standards” and be “subsequently tested to demonstrate mechanical integrity.” Class II wells are also subject to long-term monitoring.

While the use of UIC wells continues to be the preferred means of addressing wastewater which is not reused or recycled, concerns regarding potential seismic activity related to underground injection may result in the development of additional safeguards to be part of the UIC permitting process.
## Schedule At-a-Glance

### FRIDAY, APRIL 20, 2012

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<thead>
<tr>
<th>TIME</th>
<th>SESSION</th>
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<tbody>
<tr>
<td>9:30 – 10:15 am</td>
<td>Continental Breakfast &amp; Registration</td>
<td>Friend Center, Princeton University</td>
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<tr>
<td>10:15 – 10:30 am</td>
<td>Welcome and Introductions</td>
<td>Friend Center, Princeton University</td>
</tr>
<tr>
<td>10:30 am – 12:00 pm</td>
<td>Maximizing the Value of Agency Websites (NON-CLE PANEL)</td>
<td>Friend Center, Princeton University</td>
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<tr>
<td>12:00 – 1:30 pm</td>
<td>Lunch (NON-CLE PANEL)</td>
<td>Friend Center, Princeton University</td>
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<tr>
<td>1:45 – 3:15 pm</td>
<td>Effective Public Engagement in eRulemaking and Beyond (CLE PANEL)</td>
<td>Friend Center, Princeton University</td>
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<tr>
<td>3:15 – 3:30 pm</td>
<td>Break</td>
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<tr>
<td>3:30 – 5:00 pm</td>
<td>Ubiquitous Monitoring, Information Flows, and Privacy (CLE PANEL)</td>
<td>Friend Center, Princeton University</td>
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### SATURDAY, APRIL 21, 2012

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<td>8:00 am – 12:00 pm</td>
<td>Continental Breakfast &amp; Council Meeting</td>
<td>Chauncey Conference Center</td>
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<tr>
<td>12:00 – 5:30 pm</td>
<td>Activities</td>
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<tr>
<td>6:30 – 9:30 pm</td>
<td>Section Dinner with special guest</td>
<td>Chauncey Conference Center</td>
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### SUNDAY, APRIL 22, 2012

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<tr>
<td>8:00 am – 12:00 pm</td>
<td>Continental Breakfast &amp; Council Meeting</td>
<td>Chauncey Conference Center</td>
</tr>
</tbody>
</table>
Program Faculty

Michael Herz, PROGRAM CHAIR | Chair, ABA Section of Administrative Law and Regulatory Practice, Visiting Research Scholar, Program in Law and Public Affairs, Princeton University, Princeton, NJ, Arthur Kaplan Professor of Law, Cardozo School of Law, New York, NY

Cary Coglianese | Edward B. Shils Professor of Law and Professor of Political Science; Director, Penn Program on Regulation, University of Pennsylvania Law School, Philadelphia, PA

Kathy P. Conrad | Principal Deputy Associate Administrator, GSA Office of Citizen Services and Innovative Technologies, US General Services Administration, Washington, DC

Mariano-Florentino Cuéllar | Professor of Law and Deane F. Johnson Faculty Scholar, Stanford Law School, Stanford, CA

Laura DeMartino | Assistant Director for the Enforcement Division of the Federal Trade Commission’s Bureau of Consumer Protection, Washington, DC

Neil R. Eisner | Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation, Washington, DC

Cynthia R. Farina | William G. McRoberts Research Professor in Administration of the Law, Cornell Law School, Ithaca, NY

Edward W. Felten | Director, Center for Information Technology Policy and Professor of Computer Science and Public Affairs, Princeton University, Princeton, NJ

Gregg Macey | Assistant Professor of Law, Brooklyn Law School, Brooklyn, NY

Theresa Pardo | Director, Center for Technology in Government, University at Albany (invited)

Frank Pasquale | Schering-Plough Professor in Health Care Regulation and Enforcement, Seton Hall University School of Law, Newark, NJ

Carol Ann Siciliano | Associate General Counsel, U.S. Environmental Protection Agency, Washington, DC

Kevin Werbach | Associate Professor of Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania

Jeff Weiss | Associate Administrator, Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, Washington, DC

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Call 202.662.1582 to Register or visit www.americanbar.org/adminlaw for more information. Advance registration is available until April 13, 2012. On-site registration will be available unless maximum capacity is reached. A credit card or check is required for on-site in-person registration.

Cancellations will be accepted without charge until April 13, 2012. No refunds are possible after that date – substitutions only. Email antonia.martinez@americanbar.org or fax request to 202-662-1529.

Scholarships are available for meeting registration. Contact anne.kiefer@americanbar.org or 202-662-1690 to request a scholarship. Decisions are based upon individual circumstances.

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All Friday programs will be held in the Friend Center Convocation Room (Room 113) at Princeton University. Visit Princeton’s website, www.princeton.edu, for driving directions and a map of the campus.

Chauncey Hotel & Conference Center

Chauncey Hotel & Conference Center Address: 1 Chauncey Road, Princeton, NJ 08541. Phone: 609-921-3600. Fax: 609-683-4958.

Council meetings will be held at the Barn at the Chauncey Hotel. Chair’s hospitality gatherings will take place at the Laurie House.

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3 hours of professional practice credit have been requested, but cannot be guaranteed. Contact your state or local MCLE board to verify requirements. All CLE materials will be distributed on a flash drive at registration. Please contact antonia.martinez@americanbar.org if your local MCLE board/state requires a hard copy of materials.

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Program in Law and Public Affairs, Princeton University

Center for Information Technology Policy, Princeton University
By Robin Kundis Craig*

The Supreme Court has already decided several cases this term of relevance to administrative law practitioners. Most of these cases reinforce some of the basics of administrative law, such as “arbitrary and capricious” review under the Administrative Procedure Act (APA), the respective roles of the Supreme Court and Congress in interpreting statutes subject to agency implementation, and federal court jurisdiction under federal statutory schemes.

Arbitrary and Capricious Review

In *Jujulang v. Holder*, — U.S. —, 132 S. Ct. 476 (Dec. 12, 2011), the Supreme Court unanimously held that the Board of Immigration Appeals’ (BIA’s) comparable-grounds approach for determining whether an alien is eligible for discretionary relief from deportation was arbitrary and capricious. As Justice Kagan’s opinion for the Court explained, the case involved the BIA’s “policy for deciding when resident aliens may apply to the Attorney General for relief from deportation under a now-repealed provision of the immigration laws.” 132 S. Ct. at 479. “Until repealed in 1996, § 212(c) of the Immigration and Nationality Act, 66 Stat. 187, 8 U.S.C. § 1182(c) (1994 ed.), authorized the Attorney General to admit certain excludable aliens . . . . The Attorney General could order this relief when the alien had lawfully resided in the United States for at least seven years before temporarily leaving the country, unless the alien was excludable on one of two specified grounds. See § 1182(c) (1994 ed.). But by its terms, § 212(c) did not apply when an alien was being deported.” Id. at 479-80. When Congress repealed § 212(c) in 1996, it substituted a new, limited, discretionary remedy that applied to excludable and deportable aliens alike. Id. at 480. However, the Supreme Court concluded in 2001 that § 212(c) must remain available for resident aliens with old criminal convictions. Id. at 481.

As a result, the BIA still had to wrestle with how to apply § 212(c) in deportation proceedings. In 2005, it adopted the policy at issue in *Jujulang*, known as the “comparable-grounds” rule. Id. (citing *De la Rosa v. U.S. Attorney Gen.*, 579 F.3d 1327, 1332 (11th Cir. 2009)). As the Supreme Court explained:

That approach evaluates whether the ground for deportation charged in a case has a close analogue in the statute’s list of exclusion grounds. See *In re Blake*, 23 I. & N. Dec. 722, 728 (2005); *In re Brieu–Perez*, 23 I. & N. Dec. 766, 772–773 (2005). If the deportation ground consists of a set of crimes “substantially equivalent” to the set of offenses making up an exclusion ground, then the alien can seek

§ 212(c) relief. *Blake*, 23 I. & N. Dec., at 728. But if the deportation ground charged covers significantly different or more or fewer offenses than any exclusion ground, the alien is not eligible for a waiver. Such a divergence makes § 212(c) inapplicable even if the particular offense committed by the alien falls within an exclusion ground.

Id. at 481-82.

The issue for the Court was whether this policy is “arbitrary and capricious” under the APA. Id. at 483 (citing 5 U.S.C. § 706(2)(A)). According to the Court, “When an administrative agency sets policy, it must provide a reasoned explanation for its action. That is not a high bar, but it is an unwavering one.” Id. at 479. The Court articulated the contours of the arbitrary and capricious standard in familiar terms:

The scope of our review under this standard is “narrow”; as we have often recognized, “a court is not to substitute its judgment for that of the agency.” *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L.Ed.2d 443 (1983); see *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 28 L.Ed.2d 136 (1971). Agencies, the BIA among them, have expertise and experience in administering their statutes that no court can properly ignore. But courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decision-making. When reviewing an agency action, we must assess, among other matters, “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *State Farm*, 463 U.S., at 43, 103 S. Ct. 2856 (quoting *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281, 285, 95 S. Ct. 438, 42 L.Ed.2d 447 (1974)). That task involves examining the reasons for agency decisions—or, as the case may be, the absence of such reasons. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800, 173 L.Ed.2d 738 (2009) (noting “the requirement that an agency provide reasoned explanation for its action”).

Id. at 483-84. As the Court further emphasized, however, “[t]he BIA has flunked that test here. By hinging a deportable alien’s eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien’s fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner.” Id. at 484. In more detail, it explained:

The BIA may well have legitimate reasons for limiting § 212(c)’s scope in deportation cases. But still, it must do so in some rational way. If the BIA proposed to narrow the class of deportable aliens eligible to seek § 212(c) relief by flipping a coin—heads an alien may apply for relief, tails he may not—we would reverse the policy in an instant. That is because

* Attorneys’ Title Professor of Law and Associate Dean for Environmental Programs, Florida State University College of Law; and Contributing Editor, *Administrative & Regulatory Law News*. The author may be reached at robinckcraig@gmail.com from January to June 2012 and otherwise at rrcraig@law.fsu.edu.
agency action must be based on non-arbitrary, “relevant factors,” State Farm, 463 U.S. at 43, 103 S. Ct. 2856 (quoting Bowman Transp., 419 U.S., at 285, 95 S. Ct. 438), which here means that the BIA’s approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system. A method for disfavoring deportable aliens that bears no relation to these matters—that neither focuses on nor relates to an alien’s fitness to remain in the country—is arbitrary and capricious. And that is true regardless of whether the BIA might have acted to limit the class of deportable aliens eligible for § 212(c) relief on other, more rational bases.

The problem with the comparable-grounds policy is that it does not impose such a reasonable limitation. Rather than considering factors that might be thought germane to the deportation decision, that policy hinges § 212(c) eligibility on an irrelevant comparison between statutory provisions. Recall that the BIA asks whether the set of offenses in a particular deportation ground lines up with the set in an exclusion ground. But so what if it does? Does an alien charged with a particular deportation ground become more worthy of relief because that ground happens to match up with another? Or less worthy of relief because the ground does not? The comparison in no way changes the alien’s prior offense or his other attributes and circumstances. So it is difficult to see why that comparison should matter. Each of these statutory grounds contains a slew of offenses. Whether each contains the same slew has nothing to do with whether a deportable alien whose prior conviction falls within both grounds merits the ability to seek a waiver.

Id. at 485. As a result, the Supreme Court remanded the case to the BIA. Id. at 490.

**Separation of Powers and Statutory Implementation**

On January 11, 2012, the Supreme Court decided *Pacific Operators Offshore, LLP v. Valladolid*, — U.S. —, 132 S. Ct. 680 (Jan. 11, 2012), which addressed the applicability of the Longshore and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. §§ 901 et seq., via the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333(b), to a worker (Valladolid) who spent 98% of his time working at an offshore facility but who was killed in an accident while working at his employer’s onshore facility. *Valladolid*, 132 S. Ct. at 684. The OCSLA extends LHWCA coverage to injuries “occurring as the result of operations conducted on the Outer Continental Shelf” for the purpose of extracting resources. 43 U.S.C. 1333(b).

The U.S. Department of Labor, through an ALJ and the Department’s Benefits Review Board rejected the widow’s claim for compensation. As the Supreme Court summarized, “The ALJ reasoned that Valladolid’s fatal injury was not covered under § 1333(b) because his accident occurred on land, rather than on the Outer Continental Shelf. On appeal, the United States Department of Labor’s Benefits Review Board affirmed, concluding that Congress intended to limit the coverage provided by the OCSLA to injuries suffered by employees within the ‘geographical locale’ of the Outer Continental Shelf.” *Valladolid*, 132 S. Ct. at 685. On appeal, however, the Court of Appeals for the Ninth Circuit reversed, allowing the claim and creating a three-way circuit split with decisions in the Third and Fifth Circuits. According to the Ninth Circuit, the claim would be allowed if the claimant could “establish a substantial nexus between the injury and extractive operations on the shelf.” 604 F.3d 1126, 1139 (9th Cir. 2010). The Third Circuit had adopted a “but for” test for coverage, *Curtis v. Schlumberger Offshore Serv., Inc.*, 849 F.2d 805 (3d Cir. 1988), while the Fifth Circuit had adopted a bright-line geographical or “situs of injury” test, allowing coverage only for injuries that occurred on the Outer Continental Shelf. *Mills v. Dir., Office of Workers’ Comp. Programs*, 877 F.2d 356 (5th Cir. 1989) (en banc).

As a matter of statutory interpretation, the Supreme Court affirmed the Ninth Circuit and adopted its test for compensation coverage, remanding the case to the Benefits Review Board. Justice Thomas authored the 7–2 opinion, joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan. As the Court explained:

The question before us is the scope of coverage under § 1333(b). The parties agree that § 1333(b) covers employees, such as oil rig and drilling platform workers, who are injured while working directly on the OCS to extract its natural resources. They disagree, however, whether employees who are involved in extraction operations but who are injured beyond the OCS are also covered under the OCSLA. This dispute focuses on the meaning of the phrase “any injury occurring as the result of operations conducted on the outer Continental Shelf” in § 1333(b).

*Valladolid*, 132 S. Ct. at 685–86. The Court rather quickly eliminated the Fifth Circuit’s “situs of injury” interpretation, noting that “nothing in that language suggests that the injury to the employee must occur on the OCS. Section 1333(b) states only two requirements: The extractive operations must be ‘conducted on the outer Continental Shelf,’ and the employee’s injury must occur ‘as the result of’ those operations.” Id. at 687. In addition:

Congress’ decision to specify, in scrupulous detail, exactly where the other subsections of § 1333 apply, but to include no similar restriction on injuries in § 1333(b), convinces us that Congress did not intend § 1333(b) to apply only to injuries suffered on the OCS. Rather, § 1333(b) extends LHWCA workers’ compensation coverage to any employee injury, regardless of where it happens, as long as it...
occurs “as the result of operations conducted on the outer Continental Shelf.”

Id. at 688. Finally, the Supreme Court was unwilling to accept the “situs of injury” interpretation on policy grounds, citing basic principles of statutory interpretation and separation of powers in its rejection of those arguments:

Pacific also makes several policy arguments in favor of a situs-of-injury requirement, but policy concerns cannot justify an interpretation of § 1333(b) that is inconsistent with the text of the OCSLA. “[I]f Congress’ coverage decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them.” The language of § 1333(b) simply does not support a categorical exclusion of injuries that occur beyond the OCS.

Id. at 690 (quoting Herb’s Welding, Inc. v. Gray, 470 U.S. 414, 427 (1985)).

Finally, the Court considered the Third Circuit’s “but for” test too broad an interpretation. As it explained:

The Third Circuit’s “but for” test is nominally based on causation, but it is also incompatible with § 1333(b). Taken to its logical conclusion, the “but for” test would extend workers’ compensation coverage to all employees of a business engaged in the extraction of natural resources from the OCS, no matter where those employees work or what they are doing when they are injured. This test could reasonably be interpreted to cover land-based office employees whose jobs have virtually nothing to do with extractive operations on the OCS. Because Congress extended LHWCA coverage only to injuries “occurring as the result of operations conducted on the outer Continental Shelf,” we think that § 1333(b) should be interpreted in a manner that focuses on injuries that result from those “operations.”

Id.

Justice Scalia concurred in part and concurred in the judgment, joined by Justice Alito. These two Justices would have adopted a proximate cause test rather than the “substantial nexus” test that the majority adopted, based on greater certainty of meaning. As Justice Scalia explained:

The Court indulges in considerable understatement when it acknowledges that this test “may not be the easiest to administer[.]” . . . “Substantial nexus” is novel legalese with no established meaning in the present context. I agree with the Court’s rejection of some of the clearer rules proposed by the parties—which, though easier to apply, are unmoored from the text of § 1333(b). But if we must adopt an indeterminate standard (and the statute’s “as the result of” language leaves us no choice) I prefer the devil we know to the devil of the Ninth Circuit’s imagining. I would hold that an employee may recover under § 1333(b) if his injury was proximately caused by operations on the Outer Continental Shelf (OCS).

Id. at 691 (Scalia, J., concurring in part and dissenting in part).

Federal Jurisdiction

The Supreme Court has decided a series of cases this term that touch on the jurisdiction—constitutional and statutory—of the federal courts. For example, in early January, the Supreme Court supplied some basic definitions for federal court “jurisdictional rules.” Gonzalez v. Thayer, — U.S. —, 132 S. Ct. 641 (Jan. 10, 2012). This 8-1 decision authored by Justice Sotomayor (Justice Scalia dissenting) addressed the federal courts’ habeas jurisdiction, concluding that the provision of the Antiterrorism and Effective Death Penalty Act of 1996 that requires that a prisoner identify specific constitutional issues in order to obtain Certificate of Appealability, 28 U.S.C. § 2253(c)(3), was not jurisdictional, even though the requirement that the Certificate be obtained, 28 U.S.C. § 2253(c)(3), was, Gonzalez, 132 S. Ct. at 646, 649-50. With regard to identifying statutory provisions that are jurisdictional, the Court adhered to its “clear statement principle”: “A rule is jurisdictional ‘[i]f the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional.’ But if ‘Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional.’” Id. at 648-49 (quoting Arbaugh v. Y & H Corp., 546 U.S. 515, 516 (2006)).

On the same day, in CompuCredit Corp. v. Greenwood, — U.S. —, 132 S. Ct. 665 (Jan. 10, 2012), in a 6-2-1 decision authored by Justice Scalia (Justice Sotomayor concurred in the judgment, joined by Justice Kagan; Justice Ginsburg dissented), the Court emphasized that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., requires the federal courts to enforce agreements to arbitrate on their own terms, even when there is a relevant federal law cause of action—unless Congress has explicitly overridden the FAA’s command in that other federal statute. CompuCredit Corp., 132 S. Ct. at 668-69 (citations omitted). According to the majority, Congress had not overridden the FAA in the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679 et seq., because neither CROA’s disclosure requirements nor its civil cause of action displaced arbitration agreements. CompuCredit Corp., 132 S. Ct. at 669-73. As a result, “[i]n the absence of an overt congressional direction to the contrary, the FAA requires the arbitration agreement to be enforced according to its terms.” Id. at 673.

A unanimous Supreme Court, in an opinion by Justice Ginsburg, concluded that state courts and federal courts have concurrent jurisdiction to hear private causes of action under the Telephone Consumers Protection Act of 1991 (“TCPA”), 47 U.S.C. § 227, abrogating decisions of the Courts of Appeals for the Second, Third, Fourth, Fifth, Ninth, and Eleventh

continued on page 32
D.C. Circuit Limits Scope of Preclusion from Proxy Exhaustion

Congress sought to manage judicial review of Medicare decisions by mandating that “[n]o action against the United States, the [Secretary of Health and Human Services], or any officer or employee thereof shall be brought under section 1331 . . . of title 28 [federal question jurisdiction] to recover on any claim arising under” the Medicare Act. Instead, claims are to be channeled through the administrative process. Problems arise, however, when certain claims cannot be pressed in the administrative process or when affected parties have no role in that process. Emphasizing the “strong presumption that Congress intends judicial review of administrative action,” the Supreme Court held in *Bouwen v. Michigan Academy of Family Physicians* that this provision did not preclude a District Court challenge to regulations that could not be challenged in the administrative process. In a later decision (*Shalala v. Illinois Council on Long Term Care, Inc.*), the Court emphasized that the above provision is intended to postpone review, not to preclude it entirely. Applying that principle, the D.C. Circuit, in *American Chiropractic Association v. Leavitt*, held that federal question jurisdiction was not available to the Chiropractic Association because at least some chiropractors could obtain administrative review of the challenged regulations. Under this concept of “proxy exhaustion,” a person unable to exhaust may be unable to obtain judicial review if a party with similar interests is able to participate in and exhaust the administrative process.

*Council for Urological Interests v. Sebelius*, No. 11–5030, 2011 WL 6450767 (D.C. Cir. Dec. 23, 2011), posed the question of whether this provision precluded review by certain urologists where the hospitals where they provided services were able to obtain review. In effect, the question was whether the hospitals could be considered proxies for the urologists. The question arose when HHS tightened a regulation prohibiting physicians from referring patients to facilities owned by the physicians. The new rule extended that prohibition to physician-owned facilities operating within hospitals.

The urologists faced two primary hurdles. First, HHS argued that the principles of *Block v. Community Nutrition Institute* precluded review because, like the consumers who were precluded from review in *Block*, the urologists had no role in the administrative scheme. The court distinguished *Block* on the ground that the consumers in that case had an indirect interest in the amounts paid by milk handlers, while the urologists have a direct interest in their ability to provide services under Medicare. Thus, the lack of an administrative rule for the urologists did not indicate congressional intent to prevent them from obtaining judicial review.

The second hurdle was the statutory preclusion provision quoted above, particularly the question of whether the hospitals where the urologists provided services were proxies who could exhaust by participating in the administrative process and then seek judicial review. If the hospitals were proxies, the urologists would be precluded from seeking review. On this score, the court said that the “inquiry is fundamentally a practical one. The exception [permitting review] applies not only when administrative regulations foreclose judicial review, but also when roadblocks practically cut off any avenue to federal court.” One of those roadblocks would be the prospect that the “only entities able to invoke Medicare Act review are highly unlikely to do so.” Applying that principle to the hospital-urologist relationship, the court noted that the Council (whose factual assertions the court had to accept at that stage of the litigation) had argued that the hospitals resented the urologists’ control over their own equipment and that the hospitals wanted to reassert control, all indicating the hospitals would be unlikely to serve as proxies for the interests of the urologists. The absence of any hospital challenges in three years bolstered that conclusion.

Eighth Circuit Says You Must State the Issue Correctly to Exhaust It

In *Friends of the Notrebeck v. U.S. Forest Service*, 661 F.3d 969 (8th Cir. 2011), the Eighth Circuit refused to accept substantive challenges in three years bolstered that conclusion.

In the course of developing its proposal to conduct selective logging and controlled fires in a wilderness preserve, the Forest Service determined that the habitat needs of various species conflicted, such that it was not possible “to design management activities around every species.” To address this complexity, the agency identified twelve species “that use key habitat elements,” so that management for those species would address the needs of all animals and birds in the preserve. This group of species is known as the “focus species list.”

When the agency issued an EIS for its proposed activities, the challengers submitted comments asserting “the focus species list is ‘heavily weighted towards ‘weedy species’ that can tolerate or even thrive amid human disturbances’; that predators ‘known to be secretive and averse to human disturbance . . . were dismissed’; and that ‘[t]he list needs to be reformulated.’” The agency then issued a Final EIS, and the challengers sued, arguing that the agency had violated the National Environmental Policy Act by not preparing a separate EIS for the focus species list.

continued on next page
Unfortunately for the challengers, general principles of administrative law, and 7 U.S.C. § 6912(e) (specifically applicable to the Department of Agriculture), require that anyone exhaust administrative remedies before suing the agency. Here, the court held that the challengers’ comments on various substantive points did not adequately raise the procedural question of whether the agency should prepare an EIS for the focus species list in addition to the general project EIS. As the court put it: “These comments challenge which species were included in the list, not the process of developing the list.” As a result, the comments were “insufficient to give the Forest Service an opportunity to consider their claim that NEPA required an EIS for the focus species list.”

D.C. Circuit Denies Discovery for Possible Bad Faith of Agency Heads

Because agency heads are appointed because of their views on important, often contested, matters of policy, it is extremely difficult to disqualify an agency head or invalidate a rulemaking decision on charges of bias. As illustrated in Air Transport Ass’n of America, Inc. v. National Mediation Board, No. 10-5253, 2011 WL 6266355 (D.C. Cir. Dec. 16, 2011), it is even more difficult to obtain discovery in an effort to prove improper bias. In Air Transport, the airline industry challenged a National Mediation Board rule providing that a union may win an election with a majority of votes cast, rather than having to achieve a majority of all eligible voters. In the midst of the rulemaking proceeding, the lone Republican member of the Board wrote to several senators complaining that she had been excluded from the decisionmaking process, given only a short time to review the final rule, and denied the opportunity to include dissenting views in the Federal Register. She asserted that she had “the impression” that her colleagues had prejudged the outcome.

The airlines sought discovery as to the internal working of the agency, arguing that the publicly available information showed that the two Democratic members had coordinated the rulemaking effort with two large unions. The airlines asserted this indicated that the two Democratic members met the “unalterably closed mind” standard for disqualification.

The D.C. Circuit upheld the District Court’s refusal to grant discovery. Discovery would be available only “if a party makes a significant showing—variously described as a strong, substantial, or prima facie showing—that it will find material in the agency’s possession indicative of bad faith or an incomplete record.” A mere “impression” of closed minds was not enough. Indeed, even where an agency member has announced his position, “that impropriety . . . gives no indication of a mind that has been closed to the evidence in the past or that would disregard any significant new material subsequently introduced.” Although the majority’s behavior was unfortunate, and perhaps inappropriate, it did not justify ordering discovery in this partisan political squabble.

D.C. Circuit Declares FDA Warning Letters Not Final Agency Action

In 2010, the FDA sent warning letters to participants in the ear candle industry asserting that ear candles, as labeled and marketed, appeared to be medical devices for which the industry had not sought appropriate approvals from the FDA. Ear candles are small hollow tubes soaked in paraffin or beeswax. The user places one end in the ear and lights the other end. The industry says that ear candles are “used for and intended to be used for relaxation, comfort, reduction of stress and for the natural furtherance of the well-being of the user,” but the FDA said in its letters that, “[b]ased on the labeling . . . , it appears” the candles are to be used for medical purposes, including treatment of allergies, headaches, colds, flu, sinus congestion, and a variety of other conditions. The FDA also reported injuries, including burns, from these devices. Accordingly, the FDA “requested” that the industry cease marketing the candles and seek the necessary reviews and approvals before returning them to the market.

In response to the letters, industry representatives met with FDA officials, who allegedly reiterated that the candles were medical devices subject to FDA regulation and that the agency did not intend to approve ear candles for use in the market. The FDA Deputy Director concluded the meeting by saying, “we look forward to your response[,] . . . and we will evaluate that response and make decisions on what we are going to do, going forward.” Rather than responding to the FDA, the industry challenged the warning letters and later FDA oral statements as violating the Food Drug and Cosmetics Act and the First Amendment. In Holistic Candlers and Consumers Association v FDA, 664 F.3d 940 (D.C. Cir. 2012), the D.C. Circuit reversed the District Court’s finding of no standing, but it upheld that court’s conclusion that the warning letters did not constitute the final agency action needed to support judicial review under § 704 of the APA.

The court held that the candlers could not meet either of the two requirements for finality: “FDA’s warning letters fail to satisfy either condition: they neither mark the consummation of the agency’s decisionmaking process nor determine the appellants’ legal rights or obligations.” As to the first point, the court noted that an FDA manual describes warning letters as “giving ‘firms an opportunity to take voluntary and prompt corrective action before it initiates an enforcement action.’” The manual also states that warning letters “‘may lead to enforcement action . . . , not that they inevitably will.’” Moreover, the letters themselves said “‘it appears’ that the candles are subject to regulation, that FDA ‘will evaluate’ information submitted by the company, and that failure to correct ‘may result in regulatory action.’” The conditional language undermined the candlers’ claims that the agency had completed its decisionmaking process.

As to the second point, the court again referred to the manual, which emphasizes that the letters were part of the effort to achieve “‘voluntary compliance,’ that they do not ‘commit FDA to taking enforcement action,’ and that some
circumstances may preclude the FDA from taking enforcement action. Thus, the warning letters do not determine outcomes for either the FDA or the recipient. Moreover, the letters’ conditional language, including a statement that the “deviations may result in regulatory action,” demonstrates that the letters do not require the recipient to do anything.

The fact that the warning letters were included under the general heading of “enforcement” on the FDA’s web page was not enough to overcome the above conclusions. Similarly, informal oral statements by FDA employees did not represent a formal position of the FDA and did not bind the agency or the recipient of that communication.

D.C. Circuit Holds Arbitrary and Capricious EPA’s Failure to Coordinate Related Rulemaking Efforts

In Portland Cement Ass’n v. EPA, No. 10-1358, 2011 WL 6118574 (D.C. Cir. Dec. 9, 2011), the D.C. Circuit addressed a complex rulemaking concerning cement kilns. EPA issued the Notice of Proposed Rulemaking in 2008. In 2009, EPA initiated a rulemaking on commercial and industrial solid waste incinerators. EPA issued the later proposed rule ten months after the comment period had closed for the previous rule but three months before EPA issued the final rule in the earlier proceeding. Although EPA considered the later rulemaking “relevant” to the previous one, the agency denied a request to reconsider the earlier rule.

Industry challenged the original rule on the ground that it was arbitrary and capricious not to coordinate the two rulemaking efforts given the nature of their relationship to each other. Because industry did not raise this issue in the initial rulemaking proceeding, it faced a jurisdictional hurdle. Under the Clean Air Act, “[b]efore an objection can be raised in this Court, it must be ‘raised with reasonable specificity during the period for public comment.’” This prevented direct review of the earlier rule, but industry got around that problem by seeking review of EPA’s denial of reconsideration. In that regard, the Clean Air Act provides that, “[i]f the person raising an objection can demonstrate . . . that it was impracticable to raise [an] objection within [the comment period] or if the grounds for [the] objection arose after the period for public comment . . ., the Administrator shall convene a proceeding for reconsideration of the rule.” That proceeding is then subject to review in the appropriate court of appeals.

On the merits, the court rejected EPA’s defense that it did not yet know the likely outcome of the second rulemaking, so it could not consider the two together, particularly because that would delay standards necessary to protect the public health and safety. As to the first point, the court said, “[t]he impeding definition of an undeniably related source category is clearly a ‘relevant factor’ or an ‘important aspect of the problem’ that must be considered.” Because EPA had full control over the timing of both proceedings, “[t]he refrain that EPA must promulgate rules based on the information it currently possesses simply cannot excuse its reliance on that information when its own process is about to render it irrelevant.”

As to EPA’s health and safety claim, the court insisted that “reasoned decisionmaking is not a dispensable part of the administrative machine that can be blithely discarded even in pursuit of a laudable regulatory goal.” Ultimately, the court remanded the original rule but did not stay its effectiveness (except on a particular point as to which EPA acknowledged inadequate notice).

On another point, the court held that the agency’s notice was inadequate, but the court found harmless error because that proposal was similar to another on which the party had commented. The court could not see how repeating comments already made “would have resulted in a ‘substantial likelihood’ that NSPS standards would have ‘significantly changed.’”

3d Circuit Rejects Industry Use of Primary Jurisdiction Doctrine to Avoid Citizen Suit

In Baykeeper v. NL Industries, Inc., 660 F.3d 686 (3d Cir. 2011), an industrial polluter responded to an RCRA/Clean Water Act citizen suit by convincing a district court to abstain from jurisdiction in light of the involvement of state and federal agencies. The New Jersey Department of Environmental Protection (NJDEP) had investigated the matter and agreed with the company that a regional solution was needed to the problem of sediments in the river. U.S. EPA then ordered remediation of sediments upstream from the site in question, after which Baykeeper brought this citizen suit against the industrial polluter.

On these facts, the Third Circuit reversed the lower court’s application of the doctrine of primary jurisdiction. Generally, the prospect of primary jurisdiction arises when a claim is cognizable in court but resolution of the claim involves expertise of an agency that also has regulatory jurisdiction over the issue. When the doctrine applies, the court refers the matter to the agency for its review and response.

The court applied the following four-factor test: (1) Whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency’s particular field of expertise; (2) Whether the question at issue is particularly within the agency’s discretion; (3) Whether there exists a substantial danger of inconsistent rulings; and (4) Whether a prior application to the agency has been made. Applying these factors, the court found: (1) the courts are competent as to such issues, and Congress specifically authorized these actions in court, (2) these issues are not particularly within the competence of the NJDEP and the statutes specifically authorize judicial involvement, (3) there was no likelihood of inconsistent rulings because the NJPED was not doing anything, and (4) although application had at one time been made to the agency, nothing had happened for a long time, so this cannot outweigh the other factors.
Law and Politics in Land Use Decisionmaking

By Michael Asimow*

Local land use decision-making often boils down to politics rather than law. This is particularly true when local planning agencies grant a variance or a conditional use permit to a well-connected applicant. There is little that disgruntled neighbors can do about it, given the presumption of validity of local government action. The problem is at its worst when an elected body takes over the functions of the planning staff or planning commission. Exactly this occurred in West Chandler Boulevard Neighborhood Ass’n v. City of Los Angeles, 130 Cal. Rptr. 3d 360 (Cal. Ct. App. 2011).

Chabad of the Valley wished to tear down an existing synagogue building and construct a much larger one consisting of 16,100 square feet on a small, irregularly shaped parcel of land in a residential neighborhood of North Hollywood. The building violated the height limitations of the zoning ordinance. It also lacked the requisite number of parking spaces (Chabad claimed that its orthodox Jewish members would walk rather than drive to services so they would not need parking).

The zoning administrator granted a variance and a conditional use permit for a building much smaller than Chabad had asked for (10,300 square feet with 40% of it in the basement). The approved building had only five parking spaces (instead of the 68 required by the ordinance). Under the L.A. city charter, the local area planning commission serves an appellate function; it is supposed to decide on the record whether the zoning administrator’s decision was an abuse of discretion. Exercising that power, the area planning commission overturned the zoning administrator’s decision and disapproved the whole project. It found that the building was much too large for the lot and that the parking ordinance should be enforced.

That would have ended the case except that the Los Angeles City Council took over the case. The city charter allowed it to do so but provided that the Council had the same limited appellate powers as the planning commission. In the Chabad case, a member of the Council representing North Hollywood engineered a “compromise” which the Council approved. It allowed a building of 12,000 square feet (only 20% of it in the basement) and five parking places—a larger building than the zoning administrator had approved (and an even more extreme departure from the parking standards).

The Court of Appeal overturned the City Council’s decision because the Council had obviously gone far beyond its limited powers as an appellate body. The Council’s decision was not based on the record made by the zoning administrator and it failed to explain how the administrator’s decision was an abuse of discretion. Moreover, California law requires that a land use agency granting a variance must explain how it got from the raw facts to a decision applying the statutory standards. It must explain the “analytic route by which the agency traveled from evidence to action.” Broad statements that the application satisfies the statutory standards are insufficient. Topanga Ass’n for a Scenic Community v. County of Los Angeles, 522 P.2d 12 (1974).

The West Chandler case is a rare victory for neighbors seeking to challenge a decision by an elected body that grants land use permission to a politically powerful applicant. The court adeptly based its decision on violations of the charter and lack of proper findings. This allowed the court to avoid having to decide numerous due process arguments based on ex parte contacts and lack of a proper hearing. A decision that the Council’s procedure violated due process would have seriously disrupted the way local government business gets done. In any event, the case is a graphic illustration of how law and justice can be subverted when an elected body takes responsibility for making individualized land use decisions.

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Circuits that concluded that the federal district courts lack subject matter jurisdiction to hear such claims, resolving a circuit split involving eight circuits. Mims v. Arrow Fin. Servs. LLC., — U.S. —, 132 S. Ct. 740, 747 (Jan. 18, 2012). Although the federal courts are, constitutionally, courts of limited jurisdiction, id. (citations omitted), “[b]ecause federal law creates the right of action and provides the rules of decision, Mims’s TCPA claim, in 28 U.S.C. § 1331’s words, plainly ‘aris[es] under the ‘laws . . . of the United States.’” Id. at 748. Indeed, “there is no serious debate that a federally created claim for relief is generally a ‘sufficient condition for federal-question jurisdiction.’” Id. (quoting Gable & Sons Metal Prods., Inc. v. Dame Eng’g & Mfg., 545 U.S. 308, 317 (2005)). Moreover, “when federal law creates a private right of action and furnishes the substantive rules of decision, the claim arises under federal law, and district courts possess federal-question jurisdiction under § 1331. That principle endures unless Congress divests federal courts of their § 1331 adjudicatory authority.” Id. at 748–49. According to the Court, “Nothing in the text, structure, purpose, or legislative history of the TCPA calls for displacement of the federal-question jurisdiction U.S. district courts ordinarily have under 28 U.S.C. § 1331,” id. at 753, and hence the Court reversed the Eleventh Circuit’s dismissal of Mims’TCPA claim for lack of subject-matter jurisdiction.
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