Administrative & Regulatory Law News
Section of Administrative Law & Regulatory Practice
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Also In This Issue

Congress Considers Commission for Retrospective Rule Review
Nominations for 2014-2015 Section Officers
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Part V: Freedom of Information, Sunshine, Advisory Committees covers the various associated acts


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Halftime. The place in time that comes between the first and second half of a sporting event. As Chair of the Section, I am at the midpoint of my year as the “Coach” of the Section. So how are we doing? What are the metrics to measure this year against our aspirational objectives? As part of our AdLaw team, I need your help.

Section Committees
We are trying to make sure all of the Section Committees get “playing time.” Each Committee Chair is being asked to share recent accomplishments and upcoming publications, policy developments, and programming to be completed this year. To better keep score of your important membership-building initiatives and proactively manage committee production “on the court,” we ask that you share your plans now for inclusion in our post-game wrap-up at the Council Meeting on Saturday, August 9, 2014, held during the Annual Meeting in Boston. Please send your information to Anne Kiefer at anne.kiefer@americanbar.org.

It’s a new ballgame with the launch of the ABA’s new membership database, online registration, and web store. Watch your e-mail for an invitation to join a pre-game conference call where we will review the new state of play, diagram our opportunities, and give you the once-in-a-lifetime chance to star in the game!

Section Programs
Congratulations to Jeff Rosen for his efforts with the 10th Annual Administrative Law & Regulatory Practice Institute. This year’s program was held at the Omni Shoreham in Washington, D.C. on April 3-4 and was very well attended. The Section was proud to host Richard Cordray, Director of the Consumer Financial Protection Bureau (CFBP), and Congressman Doug Collins of Georgia, as keynote speakers (see Richard Cordray’s remarks in your next News issue). The program was videotaped, and portions of the program will be posted to the Section’s website in the coming weeks.

Council Spring Meeting in Atlanta & CLE
The Section sponsored a day-long Continuing Legal Education (CLE) program at the Administrative Law Spring Conference in Atlanta on April 25, 2014. A number of Section members attended the CLE program and participated on various panels that covered many timely and interesting topics. Council member David Hill, General Counsel of NRG Energy, Inc., and former General Counsel of U.S. Department of Energy, conducted a panel composed of representatives from the General Counsels’ offices at Coca-Cola, Home Depot, and UPS. David’s panel yielded numerous interesting insights as to how these companies address regulatory issues.

Mix & Mingle Calendar
We have had several successful Mix & Mingle events in recent months; the next one is scheduled for August 28, 2014, at the ABA Headquarters in Washington, D.C. Please join us if you are in the area. The Mix & Mingle concept provides an opportunity for members to gather over beverages and light food to discuss regulatory issues and to network with long-term, new, and potential members. Our Young Lawyers Committee Chair, Chris Fortier, is planning a one-hour complimentary program for young lawyers prior to this Mix & Mingle in August, entitled Agency Adjudication in Practice: The Social Security Hearing. You won’t want to miss it!

Homeland Security Law Institute—Rescheduled
The Section’s Homeland Security Law Institute has been moved to Thursday and Friday, August 21-22, 2014, at the Walter E. Washington Convention Center. This year’s program may prove to be the best ever with a number of high-ranking DHS officials participating as keynote speakers and panelists. Registration is now open; the program is very reasonably priced. Early registration rates and group discounts are available. Please help the Section spread the word about this program and encourage attendance. A copy of the topical agenda is included on page 39 of this issue.

Closing Comments
It continues to be my pleasure to be Chair of the Administrative Law & Regulatory Practice Section. There are great programs ahead—the 2014 Fall Conference, under the leadership of Co-Chairs Carol Ann Siciliano and Andrew Emery, promises to be a true blockbuster “Can’t Miss” event at the Omni Shoreham on October 16-17, 2014. Pencil it in on your calendar now.

Looking ahead to August, I will preside over my final Council Meeting as Chair of the Section at the ABA Annual Meeting in Boston, to be held on August 8-10. On Friday night, August 8, before our Council Meeting on Saturday, August 9, we will have the Section Dinner to which you are all invited. However, space is limited. Please contact Section Director Anne Kiefer at 202-662-1690 for more information. Please make your plans now to attend. Looking forward to seeing you there!

All the best,

Joe Whitley

By Jeffrey S. Lubbers

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

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

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

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Manuscripts should be e-mailed to anne.kiefer@americanbar.org. Articles should generally be between 1500 and 2500 words and relate to current issues of importance in the field of administrative or regulatory law and/or policy. Correspondence and changes of address should be sent to: ABA Section of Administrative Law & Regulatory Practice, 1050 Connecticut Avenue NW, Suite 400, Washington, DC 20036.

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I. INTRODUCTION

If you bought about $14,000 worth of Bitcoins in December 2012, they would have been worth over $1,000,000 the following year, but less than $500,000 today. Virtual currencies are a form of digital money, the most popular of which is currently Bitcoin, sometimes called Gold 2.0. Significant media attention has been paid to the rise of virtual currencies, and numerous U.S. regulatory agencies also have taken part in the dialogue. While speculators helped Bitcoin’s popularity skyrocket, its “ecosystem” appears to now be in a calmer phase of development. With a current market capitalization of over $5.5 billion, Bitcoin will continue to engage actors from all arenas.

Regulatory actions to date reflect a consensus that U.S. agencies will aggressively pursue illicit behavior but signal that authorities will allow virtual currencies like Bitcoin to persist, although not without passing through hurdles. In addition to a handful of state agencies, several federal regulatory agencies have taken some action thus far: the U.S. Securities and Exchange Commission (SEC), the U.S. Department of the Treasury Financial Crimes Enforcement Network (FinCEN), the U.S. Department of Homeland Security (DHS), the U.S. Department of Justice (DOJ), the U.S. Federal Election Commission (FEC), and the Internal Revenue Service (IRS). Foreign governments also are beginning to formulate their own positions. The fast-paced development of this virtual currency calls for coordinated oversight both domestically and internationally.

II. BITCOIN BACKGROUND

Bitcoin was first introduced in a “white paper” by an anonymous author (or authors) under the pseudonym “Satoshi Nakamoto” in 2008. Although the origins of Bitcoin remain mysterious, this decentralized digital currency has gained popularity worldwide. Satoshi Nakamoto’s paper presented the electronic cash system as a challenge to the existing financial institutions that process payments. Bitcoin operates on a peer-to-peer network, akin to file-sharing services, in which participants collaborate to develop the network by sharing records of Bitcoin transactions. While there is a public record and chain of custody of each Bitcoin, the identity of the owner may remain concealed, which is why it is sometimes described as “pseudonymous,” rather than truly anonymous. Bitcoins are initially generated by a process called “mining,” in which computers solve complex math problems based on cryptography, rewarding the “miners” with Bitcoins. The cryptographic algorithm applied by miners is known as SHA-256. Miners subsequently can distribute the Bitcoins to third parties through electronic wallets. Nakomoto’s paper mapped out how Bitcoin prevents double spending, but referenced the possibility that a “greedy attacker” could disrupt the system. The overall complexity of this “organism” is why some have analogized Bitcoin to the Internet in 1995.

The Bitcoin mining process is aimed to resemble the process of mining gold, in which value is derived from effort and scarcity. While government fiat is regulated through monetary policy that controls the money supply, Bitcoin does not have an equivalent counterpart. However, the total number of Bitcoins is capped at 21 million, leading some to argue that it is an inherently deflationary currency. Observing the development of this global currency and payment system in its primordial stages has been enthralling, but it remains to be seen whether Bitcoin can provide sufficient comparative advantages to offer a viable alternative for payments.

Bitcoin pushes regulators to weigh the risks and benefits of virtual currencies. Among the benefits championed by Bitcoin enthusiasts is the ability to move the currency quickly, cheaply, and privately. Currently, Bitcoin may be transferred across the globe almost cost free to anyone with an electronic wallet and Internet connection—not even a bank account is required. Some services allow Bitcoin transfers through texting. Individuals in developing countries are finding Bitcoin an attractive alternative to unstable domestic currencies.

Given the lack of any central authority to back Bitcoin, its value remains extremely volatile. For example, Bitcoin experienced a dramatic price drop after regulators in China prohibited banks and payment companies from dealing with Bitcoin, classifying it as a commodity rather than a currency. While Chinese regulators may not have banned individuals directly from transacting with Bitcoin, it sent a strong message and many suspect that flight of capital was a driving concern. Nonetheless, some Bitcoin exchanges have attempted to circumvent that regulation with
“recharge” codes, which provide “vouchers” for Renminbi (Chinese currency) and can later be exchanged for Bitcoin.

In addition to volatility, the complexity of cybersecurity promises that risks of digital theft will continue to pose a substantial threat to users. Numerous instances of Bitcoin theft where victims are left without recourse have been reported, most notable of which was the theft that led to the collapse of the largest Bitcoin exchange, Mt. Gox. At this time, it remains unclear whether regulators will be willing to offer more in the way of consumer protection for Bitcoin users or whether the industry will have to find its own solution — such as insuring bitcoin deposits on exchanges.

Perhaps the most widespread criticism of Bitcoin is that it enables illegal transactions to occur online and internationally, including the sale of drugs and illicit services. Given these risks, regulators rightly have been troubled by some of Bitcoin’s existing uses and have started to take action.

III. AGENCY ACTIONS AND IMPLICATIONS

A. DOJ Actions

The DOJ has pursued three actions against defendants for, among other things, money laundering with Bitcoin. In October 2013, prosecutors filed a criminal complaint in the Southern District of New York (SDNY) and obtained a grand jury indictment in the District of Maryland against Ross William Ulbricht, owner of the Silk Road website (Silk Road). The Silk Road was a secret marketplace where illegal goods and services could be purchased online with Bitcoins. The Silk Road operated on a Tor network, which allowed users to conceal their Internet Provider (IP) addresses and identities. Once users gained access to the network, they could purchase various drugs, guns, fake drivers’ licenses, pirated media content, malware, computer-hacking services, and even computer-hacking services, and even

murder for hire or “hitmen.” As alleged, Ulbricht himself offered an undercover federal agent $80,000 to murder a Silk Road employee who was arrested and whom Ulbricht feared would expose the network. The SDNY criminal complaint charged Ulbricht with narcotics-trafficking conspiracy, computer-hacking conspiracy, and money-laundering conspiracy. The Maryland indictment included counts for conspiracy to distribute a controlled substance and for attempted witness murder and attempted commission of murder-for-hire. Total sales on the Silk Road purportedly generated the equivalent of about $1.2 billion in revenue and $80 million in commissions. The FBI has seized over $164 million worth of Bitcoin from the website. Still, even after the Silk Road shut-down, illicit transactions with Bitcoin have been reported to take place on alternate sites.

Subsequently, charges were brought against two defendants who operated services exchanging dollars for Bitcoins and knew the Bitcoins were being used to purchase illegal goods and services on the Silk Road. The complaint identified numerous incriminating e-mails from Charlie Shrem, who served as CEO of a money exchange service, and alleges that Shrem deliberately violated the company’s anti-money laundering policies in order to earn profits. Robert Faella, whose identity was not known to Shrem, operated a Bitcoin exchange service on the Silk Road under the user name “BTCKing.” Faella used Shrem’s company’s services to maintain his anonymity and facilitate dollar-to-Bitcoin exchanges on behalf of Silk Road users. Both have pleaded not guilty. The action demonstrates that merely having anti-money laundering policies in place is insufficient; rather, regulators will demand a strong practice of compliance and will not tolerate transgressions. Even more recently, prosecutors in the Northern District of Illinois entered into a plea agreement with defendant

Cornelias Jan Slomp, a citizen of the Netherlands, for selling and importing massive amounts of drugs through the Silk Road website. Slomp’s fingerprints were cross-referenced in a criminal database as authorized by a Mutual Legal Assistance Treaty with the Netherlands; he was subsequently arrested upon arrival in Miami.

Interestingly, while prosecutors have previously stopped alternative private currencies dead in their tracks, the government’s treatment of Bitcoin has recognized its legitimate uses. In 2011, a federal jury in North Carolina convicted the Liberty Dollar founder, Bernard von NotHaus, for making, possessing, and selling his own coins under 18 U.S.C. §§ 485 and 486. Unlike Bitcoins, Liberty Dollar coins resembled U.S. coins in that they were marked with the dollar sign, and the words “dollar,” “USA,” “Liberty,” and “Trust in God.” NotHaus continues to challenge the verdict. More recently, a co-founder of another virtual currency, Liberty Reserve, pleaded guilty to money laundering violations alleged for his role in the creation and operation “of an anonymous digital currency system that provided cybercriminals and others with the means to launder criminal proceeds.” Conversely, the charges against Silk Road founder Ulbricht noted that “Bitcoins are not illegal in and of themselves and have known legitimate uses.” Overall, the regulatory enforcement concerning Bitcoin to date has sought to curtail behavior that was deemed illicit long before Bitcoin emerged as a currency and payment system. For example, like Ulbricht, Al Capone also ran secret marketplaces where illegal goods and services could be procured, and, like Trendon Shavers (discussed below), William Miller invented a scheme in the 19th Century that was copied by Charles Ponzi in the 20th Century. There are, of course, peculiarities of virtual currencies that will require education and special treatment by government actors, such as the challenges of confiscating, storing, and disposing of virtual currency earned by illegal activities.
B. SEC v. Shavers

One federal court has already recognized the SEC’s authority to regulate investments made with virtual currency. On July 23, 2013, the SEC filed a complaint against Trendon Shavers, founder and operator of “Bitcoin Savings and Trust” (BTCST), which, as the SEC alleged, was essentially a Ponzi scheme run entirely with Bitcoin. In a decision holding that the federal court had subject-matter jurisdiction, the Eastern District of Texas reasoned that Bitcoin Savings and Trust investments constituted “securities” even though no money exchanged hands with Shavers.

The SEC alleged that Shavers perpetrated the scheme by telling investors that he needed Bitcoins to sell to buyers who wanted to purchase large quantities of the virtual currency “off the radar.” In exchange, Shavers promised very large returns — about 1% daily or 7% weekly. Shavers obtained the equivalent of over $4.5 million in investments. However, as the government alleged, there were no “off-the-radar” buyers for this Bitcoin. Rather, Shavers was merely paying investors returns and withdrawals with other investors’ money — and also paying himself — until the scheme collapsed. The SEC alleged that Shavers committed securities fraud and sold securities without registration.

In order to violate the securities law provisions, a BTCST investment would need to constitute a security, and in order to constitute a security under the Howey test, there needs to be an “investment of money.” Shavers argued that the court did not have subject-matter jurisdiction because no money ever exchanged hands, only Bitcoins. However, the Eastern District of Texas did not agree; it found that Bitcoins “can be used to purchase goods or services . . . . The only limitation of Bitcoin is that it is limited to those places that accept it as currency. However, it can also be exchanged for conventional currencies, such as the U.S. dollar, Euro, Yen, and Yuan. Therefore, Bitcoin

is a currency or form of money, and investors wishing to invest in BTCST provided an investment of money.”

The opinion in Shavers provides the SEC with precedent to enforce the securities laws against the numerous emerging financial instruments that involve Bitcoin. Even more recently, the SEC issued a detailed investor warning to users of Bitcoin regarding potential risks. Moreover, the SEC has not foreclosed the possibility that Bitcoin may be regulated directly as a security. While some founders of Bitcoin-related investment vehicles are making efforts to start off on the right foot with the SEC, others appear to have crossed the line into securities law violations. The Winklevoss twins of Facebook fame, Cameron and Tyler, are a prominent example of the former category. For example, the Winklevoss twins filed a Registration Statement on Form S-1 with the SEC for the creation of an Exchange Traded Fund, which would allow parties to invest in Bitcoin, without actually purchasing and storing it. However, the SEC has noted that a rule change would first be required to permit such a listing, as stated in its August 12, 2013 response to a U.S. Senate Committee on Homeland Security and Governmental Affairs’ inquiry. Moreover, another company, SecondMarket, has taken advantage of the SEC’s recent lift of the ban on general solicitation in connection with certain Regulation D private placements of securities, allowing accredited investors to participate in a Bitcoin fund without registering the offering with the SEC. Continuing this trend, crowd-funded investments involving virtual currencies are likely to surface once the SEC issues final regulations under the Jobs Act. Nonetheless, some Bitcoin-related investment schemes were, at least previously, operating without regard to the SEC. Examples of this category include Bitcoin Trading Corp., BitFunder, and PicoStocks, where individuals could buy shares of companies, such as Bitcoin miners and tech startups, with Bitcoin. Those specific sites recently have ceased operations, but the demonstrated appetite for investors to engage with Bitcoin in this way signals that the SEC will have more virtual currency issues to consider in the future.

C. FinCEN Guidance

Even before the SEC filed the complaint against Shavers, FinCEN issued guidance clarifying the application of some existing laws and regulations to virtual currencies. FinCEN’s guidance extends existing anti-money laundering obligations to administrators and exchangers and requires such parties to register as money-services businesses. FinCEN subsequently issued administrative rulings specifying that certain users of Bitcoins—such as when miners and companies only buy and sell the virtual currency—would not be required to comply with the requirements imposed on money transmitters.

The demanding and expensive requirements of registering as a money-services business and complying with applicable laws has motivated some administrators and exchangers to avoid the United States altogether and develop services in countries with a less stringent regulatory environment. However, a few motivated actors are working to either partner with existing money-services business or seek their own licensing in conjunction with implementing the required anti-money laundering and know-your-customer rules. Many are concerned that regulatory burdens may chase such innovative services offshore.

D. IRS, FEC, and Miscellaneous State & Federal Actions

On March 25, 2014, the IRS provided guidance that treats “convertible virtual currency” like Bitcoin as property and subjects it to the capital gains tax. This adds additional hurdles to miners, exchanges, merchants, payment processors, employers, and some consumers, while it generally is recognized as beneficial for investors. With respect to transactions and income, Bitcoin’s

continued on page 8
Congress Considers Creating Independent Commission for Retrospective Rule Review

By Ronald M. Levin*

A healthy regulatory system must have the capacity to examine existing rules in order to consider, with the benefit of hindsight, whether they are out-of-date or are not working as well as originally contemplated. Beginning in 2011, the Obama Administration has made a concerted effort to translate this truism into practice. In Executive Order 13,563, 76 Fed. Reg. 3821 (2011), the President called on all executive agencies to submit plans for review of their “significant” regulations to the Office of Information and Regulatory Affairs (OIRA). A subsequent directive, Executive Order 13,579, 76 Fed. Reg. 41,587 (2011), urged independent agencies to comply (voluntarily) with a similar process. The Administration has claimed considerable success in eliminating unnecessary rules as a result of these initiatives. Finally, Executive Order 13,610, 77 Fed. Reg. 28,469 (2012), directs executive agencies to take “further steps . . . to institutionalize regular assessment of significant regulations.”

Critics claim, however, that an additional mechanism is needed. More specifically, some argue that an independent commission should be created and charged with identifying unneeded rules and making largely unchallengeable decisions to eliminate them. In the House of Representatives, a pending proposal for such a commission is embodied in the discussion draft of a bill that will be known as the “Searching for Unnecessary Rules and Cutting Regulations that are Unnecessarily Burdensome Act” or SCRUB Act. In the Senate, Senators Angus King (Me.) and Roy Blunt (Mo.) have introduced a comparable bill, S. 1390, to implement this commission idea.

The proposed SCRUB Act contains some particularly ill-considered provisions. For example, it would violate the Appointments Clause of the Constitution, because it would give the force of law to decisions made by commission members who have been appointed by the majority and minority leaders of the House and Senate. The invalidity of such a statute has been clear since Buckley v. Valeo, 424 U.S. 1, 129 (1976), which held that officials who exercise significant authority under U.S. laws must be appointed by the President, a court, or a department head. Moreover, under the proposed SCRUB Act, commission decisions would ultimately go into effect even if Congress were to pass a joint resolution to disapprove the commission report. Specifically, an agency would be prohibited from issuing any new regulation without offsetting its costs by eliminating or amending one or more rules on the Commission's list of “unnecessary” rules. Furthermore, the bill would allow four of the nine commissioners to nullify an agency’s major rule even if they were outvoted by the other five!

The Senate bill is drafted with greater restraint. Ultimately, however, both bills share some inherent flaws. Both are patterned after the independent commission model that was used to select military bases for closure pursuant to the Defense Base Realignment and Closure Act (BRAC), but the analogy is dubious. The BRAC system was defensible in its own context, because that commission was not called on to make fundamental policy choices. Political actors widely agreed on the need to close military bases. The point on which they disagreed was which bases should be closed, a matter that Congress could not effectively address on its own because Members from the affected locality would fiercely resist the closure of any particular base. In the context of retrospective review, however, fundamental regulatory policy judgments would have to be made at every turn. Assignment of these judgments to an independent commission would raise legitimacy questions that go far beyond the BRAC precedent.

Under both bills, the selection of commissioners would be made prior to any decision as to what subject areas the Commission would address. There would be no reason to expect most members to have expertise in those areas, nor any familiarity with the surrounding regulatory context. Clearly, their qualifications would compare poorly with those of administrative agency heads who interact on a daily basis with career staff who can bring longtime experience and expertise to bear on highly specialized problems. Thus, the bills would forego the very advantages that have led Congress to entrust these problems to administrative agencies in the first place.

Moreover, unlike the heads of administrative agencies, the commission members would have little or no political accountability for their choices. The Senate bill does provide that the Commission’s recommendations would have to be approved by Congress, but the legislative judgment would be limited to taking an up-or-down vote on the entire package, with no amendments allowed, after an extremely short period of review. These aspects of the plan for congressional consideration would prevent (indeed, are intended to prevent) the House and Senate from making...
decisions about the specific details of the package. Under the proposed SCRUB Act, the commission’s decisions would not require approval by Congress at all.

Furthermore, there presumably would be no judicial review to monitor the quality of the commission’s reasoning and the factual grounding of its conclusions. Nor would OIRA, the agency, or anyone else who could play a quality control role have the ability to constrain the Commission’s exercise of its powers. The situation would be completely unlike agency rulemaking, in which external reviewers insist that the agency support its decision, whether regulatory or deregulatory, with a comprehensive analysis. Those safeguards have been instituted precisely in order to ensure that an agency’s decisions will be rigorously analyzed and consistent with the legal regime that the agency is required to implement.

I would not dismiss entirely the potential value of a commission approach in identifying and formulating a plan to deal with problems of obsolescence in a regulatory program. A better model would be one in which a specific area is chosen for examination in advance, and members with expertise and experience in that particular area are selected for service on the commission. Furthermore, the proposals of such a group should serve as recommendations to the agency responsible for the regulatory program. The high-profile nature of the commission’s report would put pressure on the agency to consider it seriously, and other political actors could look to the report and lend support or voice opposition. Moreover, any stakeholder could petition the agency to adopt the commission’s recommendations and could appeal to the courts if the petition were denied. Thus, if the agency declined to follow some of the commission’s advice, it would likely have to justify that decision on judicial review. The agency would also be politically accountable to the oversight committees of Congress and to the public for that refusal. This approach, therefore, would realize much of the benefit of an independent appraisal without displacing the agency as the body that is responsible for fulfilling the overall program prescribed by its authorizing legislation.

A rocket launch that looks headed for failure is scrubbed, and my recommendation for the proposed SCRUB Act and its Senate counterpart would be about the same. ☐

**Bitcoin and Other Virtual Currencies continued from page 6**

fair market value in U.S. dollars should be assessed as of the date of payment for reporting purposes.

The FEC has finally approved Bitcoin donations to political candidates under limited circumstances. Bitcoins potentially could be used to circumvent political campaign spending limits in established democracies and to more easily promote opposition candidates in autocratic regimes. The ability to use Bitcoins in the political arena could affect policies and governance.

State regulators also have turned their attention to Bitcoins. A number of states, including Nevada, Maryland, New Mexico, Texas, and California, have issued varying levels of guidance on the subject. Most prominently, the N.Y. Department of Financial Services (NYDFS) has announced that it may issue its own “BitLicense” specifically tailored to virtual currencies. Benjamin Lawsky, head of NYDFS, previously issued subpoenas to numerous companies regarding their Bitcoin activities, stressing that “[v]irtual currencies remain a virtual Wild West for narco- traffickers and other criminals, that would threaten not only our country’s national security, but also the very existence of the virtual currency industry as a legitimate business enterprise.”

In November 2013, hearings were held by the Senate Committee on Homeland Security and Governmental Affairs and the Banking, Housing and Urban Affairs subcommittees on Economic Policy, on National Security, and on International Trade and Finance. The Senators who participated generally were open-minded and focused on taking a balanced and coordinated approach to the issue. Recent news reports reflect that federal regulators continue to think about the risks and benefits of virtual currencies in a variety of circumstances.

**IV. CONCLUSION**

Virtual currency has developed as a subject of shared regulatory space, in which agencies’ functions overlap. (Jody Freeman and Jim Rossi provided suggestions for agency coordination in such circumstances in the Summer 2013 issue of Administrative & Regulatory Law News at pp. 11-14. The need for such coordination was emphasized during the Senate committee hearings on the subject. While it is unclear exactly what a holistic regulatory framework will look like, actions thus far by the various agencies suggest that virtual currencies will be allowed to play a role in the U.S. financial markets. The most aspirational features of a virtual currency like Bitcoin, to serve as a supra-national currency or the “Internet of money,” are those that pose the most difficult regulatory challenges, requiring cross-border cooperation. If agencies both in the United States and abroad continue to clarify their positions, more merchants, investors, and promoters promise to incorporate virtual currencies into their financial frameworks. Coordinated regulation is necessary for the continued mainstreaming of Bitcoin and other virtual currencies. ☐
Emory Law Students Comment Successfully for Client on FDA’s Draft Produce Rule re: Need to Better Protect Farmers, the Environment, and Public Health

By Mindy Goldstein*

Each year, about 48 million Americans (1 in 6) are sickened, 128,000 are hospitalized, and 3000 die from foodborne diseases, according to the Centers for Disease Control and Prevention. Through the Food Safety Modernization Act (FSMA), Congress tasked the Food and Drug Administration (FDA) with lowering these numbers by effecting changes to America’s food system. FDA has proposed a series of regulations to accomplish this monumental task. One such proposal — the Produce Rule — purported to establish science-based minimum standards for safely growing and harvesting produce. When the draft rule was published in January 2013, however, many, including a new client of our environmental law clinic, believed that the proposed Produce Rule would likely do more harm than good.

Essentially, FDA’s draft Produce Rule would have encouraged farmers to chemically treat their water, tap into limited (and expensive) groundwater and municipal water sources, increase their use of synthetic fertilizers, and confine their farm animals. Because certain provisions of the draft rule conflicted with Department of Agriculture’s National Organic Program standards, many farmers would have been compelled to abandon sustainable farming practices. Moreover, the draft rule’s strict requirements would have forced some small and large farms to shut down altogether.

After publication of the draft rule, the National Sustainable Agriculture Coalition (NSAC) approached the Turner Environmental Law Clinic at Emory Law School (Clinic), to help prepare responsive comments to this rulemaking on its behalf. NSAC—an alliance of grassroots organizations that advocate for federal policy reform to advance sustainable agriculture, food systems, natural resources, and rural communities — was concerned that instead of preventing foodborne diseases, the draft Produce Rule’s overreaching would adversely affect the environment and sustainable farming operations across the country, which could in turn end up harming public health.

As director of the Clinic, I was excited to give law students the opportunity to work with the FDA to develop a better regulation. I wanted students to see how the public could help our government protect its citizens and the environment. And I wanted students to understand the important role administrative lawyers play in shaping the rule of law.

My students dove right in. As an initial matter, we believed the Produce Rule was based on false premises. FDA concluded that the National Environmental Policy Act (NEPA), the statute that requires federal agencies to consider the environmental impacts of their proposed actions, did not apply to the agency’s promulgation of the draft Produce Rule because the rule would not have a significant effect on the environment. But this conclusion seemed unfounded. The draft rule’s preferences for synthetic fertilizers and chemically treated water alone could have caused serious environmental harm. Clinic students worked closely with scientists to identify the rule’s effects. They then wrote a detailed legal memorandum to NSAC, explaining that these effects were sufficient to trigger NEPA’s mandates. NSAC took this message to FDA (presumably, other stakeholders did as well) and, in a first exciting victory, FDA agreed to conduct a NEPA analysis. We could now be assured that, in an effort to protect public health by reducing foodborne diseases, FDA would consider the negative health impacts of some of the draft Produce Rule’s provisions, including those resulting in increased public exposure to hazardous chemicals.

The Clinic then worked with NSAC to prepare comprehensive comments on the draft Produce Rule itself and on the requisite environmental analysis. We explained in these comments that FDA’s task was remarkably complex — the agency had been asked to change the entire way in which we farm in America. Given the magnitude of the task, it should be unsurprising that there is no one-size-fits-all set of proposed changes that could apply to all circumstances. Rather, we encouraged FDA to adopt a more flexible approach, with standards shifting depending on the food safety risk posed by the farm. Indeed, such flexibility has been important to Congress: Flexible requirements are found throughout FSMA’s mandates. In addition, we brought concerns about the economic impacts of the proposed Produce Rule to FDA’s attention, explaining that the rule

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Pursuant to Article IV, section 1 of the Section bylaws, the Nominating Committee of the ABA Section of Administrative Law and Regulatory Practice, composed of chair Michael Herz and members Jeff Litwak and Nancy Eyl, has made the following nominations for election at the Section’s 2014 Annual Membership Meeting. The meeting will take place on Saturday August 9, 2014, at 3:30 pm EDT in the Arlington Room, 3rd Floor, Boston Marriott Copley Place, Boston, Massachusetts.

Chair (by operation of the bylaws) – Anna Shavers

Anna is the Cline Williams Professor of Citizenship Law at the University of Nebraska Law School, where she teaches, among other things, administrative law and immigration law, and where she founded the school’s immigration clinic. Anna has her undergraduate degree from Central State University, her Master’s of Science from the University of Wisconsin, and her J.D. from the University of Minnesota. Anna has served the Section in many capacities over the years. She was Secretary from 2006-2009, served as chair of both the Publications Committee and the Immigration Committee, was the Section’s liaison to the ABA Commission on Immigration, and served as a council member. In the larger ABA, Anna has served as a member of the ABA Commission on Law and Aging and as a member of the ABA Coordinating Committee on Immigration Law.

Chair-Elect (by operation of the bylaws) – Jeffrey A. Rosen

Jeff is a partner with Kirkland & Ellis in Washington, D.C. A graduate of Northwestern University and Harvard Law School, he first joined the firm in 1982. During the George W. Bush Administration, he left Kirkland to serve as General Counsel of the U.S. Department of Transportation (2003-2006) and General Counsel and Senior Policy Advisor for the Office of Management and Budget (2006-2009). Jeff has served the Section in a variety of roles, including Executive Branch Liaison to the Council (2008), council member (2009-2012), co-chair of the Rulemaking Committee (2009-present), and organizer, speaker, or panelist at more than a dozen Section or other ABA-related institutes, programs, and meetings since 2004.

Last Retiring Chair (by operation of the bylaws) – Joe Whitley

Joe chairs the Atlanta White Collar Practice Group at Greenberg Traurig. Joe’s career has been marked by distinguished public service. He was appointed by Presidents Reagan and Bush, respectively, to serve as the United States Attorney in the Middle (Macon) and Northern (Atlanta) Districts of Georgia, making him the only person ever to be U.S. Attorney for two separate districts. In the George H.W. Bush Administration, he served as the Acting Associate Attorney General, the third-ranking position in the Department of Justice. In 2003, Joe was appointed by President George W. Bush as the first General Counsel of the U.S. Department of Homeland Security. He held that position for two years under Secretary Tom Ridge and Secretary Michael Chertoff. Joe has served as program chair or co-chair of the Section’s annual Homeland Security Law Institute, one of the Section’s largest and most successful undertakings, since its inception in 2006. He also chairs the Homeland Security Coordinating Committee and is co-editor of Homeland Security: Legal and Policy Issues.

Vice Chair – Renée Landers

Renée is Professor of Law at Suffolk University Law School in Boston, where she teaches administrative law, constitutional law, and health law. She also is the Faculty Director of the school’s Health and Biomedical Law Concentration. She is a graduate of Radcliffe College and the Boston College Law School and has served as President of the Harvard Board of Overseers. She worked in private practice and served as Deputy General Counsel for the U.S. Department of Health and Human Services and as a Deputy Assistant Attorney General in the Office of Policy Development at the U.S. Department of Justice during the Clinton Administration. This year she became a member of the Social Security Advisory Board Disability Review Panel. She previously served on the Massachusetts Commission on Judicial Conduct, of which she was vice chair from April 2009 until October 2010, and as a member of the Supreme Judicial
Court’s committees, studying gender bias and racial and ethnic bias in the courts. Renée was president of the Boston Bar Association in 2003-2004, the first woman of color and the first law professor to serve in that position. Renée is just concluding a three-year stint as secretary of the Section. She has also served as a council member (2000-2003), Nominating Committee member (2003-2004), Membership Committee chair (2004-2006), and vice chair of the Health and Human Services Committee (1998-2000). She is a frequent speaker at Section programs.

Section Delegate – Ronald Levin
Ron is the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis. A graduate of Yale College and the University of Chicago Law School, he began his career as an Associate at Sutherland, Asbill & Brennan. Ron’s involvement with the Section dates back three decades. He was Section Chair in 2000-2001 and a member of the Council from 1986 to 1989. More recently, Ron served as reporter for the Section’s Task Force on Lobbying Reform and as the ABA advisor to the drafting committee to revise the Model State Administrative Procedure Act. He received the Section Chair’s Award for Outstanding Volunteer Service in 2011. Ron is also a public member of the Administrative Conference of the United States and chair of its Judicial Review Committee. He has written many articles on administrative law, and the fourth edition of his casebook State and Federal Administrative Law (co-authored with Michael Asimow) will be published this summer.

Budget Officer – Edward Schoenbaum (Incumbent)
Ed was an Administrative Law Judge (ALJ) for the Illinois Department of Employment Security until his recent retirement; he continues as an ALJ under contract with a number of agencies. He is finishing his first year as budget officer, was assistant budget officer for the year before this, and is a longtime co-chair of the Section’s State Administrative Law Committee. Ed is also a past president of the National Association of Administrative Law Judges, past chair of the ABA’s National Conference of Administrative Law Judges (NCALJ), and past chair of the Senior Lawyers Division (2012-13). For six years he was the budget officer for the Judicial Division, and he is the only state ALJ ever to serve as NCALJ’s representative to the ABA House of Delegates.

Council Member – Jane Luxton
Jane is a partner in the Environment, Energy, and Natural Resources Practice Group of Clark Hill PLC, resident in Washington, D.C. She is a graduate of Harvard University and Cornell Law School. Her career has encompassed administrative law practice in government, law firm, and corporate law department settings. Jane’s government service includes appointments as General Counsel of NOAA, Senior Trial Attorney at the Department of Justice (Antitrust Division), Special Assistant Attorney General, and Attorney-Advisor at the Federal Trade Commission. She has served the Section as a speaker at the spring Rulemaking Institute, panelist on several “Rulemaking 101” programs, and member of the Nominating Committee (2013). She also serves as a Vice Chair at Large of the International Environmental Law Committee of the Section of Environment, Energy, and Natural Resources.

Secretary – Linda Jellum
Linda is the Ellison Caper Palmer Sr. Professor of Law in tax at the Mercer University School of Law, where she teaches Administrative Law, Statutory Interpretation, Federal Income Taxation, and Property, and has written extensively in those areas. She received both her law and undergraduate degrees from Cornell University. Linda serves or has served on many professional committees and boards; most recently, she was the Deputy Director of the Association of American Law Schools from January 2012 until July 2013. Within the Section, she was a council member from 2010 to 2013, co-chair or vice chair of the Judicial Review Committee from 2007 to 2010, co-chair of the Section’s 2014 spring meeting in Atlanta, and a selection committee member for the 2013 Gellhorn–Sargentich Law Student Essay Award.

Council Member – Bill Morrow
Bill is Executive Director of the Washington Metropolitan Area Transit Commission, an interstate compact agency regulating private-sector passenger carriers in the Washington Metropolitan Area. Before joining WMATC as its General Counsel in 1991, Bill was an associate with the Washington, D.C., law firm of Brand & Leckie. He is a graduate of the University of Maryland and Georgetown University Law School. Bill has been active in the Section since 1994. Most recently, he served as editor–in-chief of the Administrative & Regulatory Law News from August 2002 to August 2013, and is currently on its board of advisers. He also served as budget officer from 2006 to 2008, has chaired several committees over the past 20 years, and was co-chair of the Section’s Interstate Compact APA Project. Bill is a Section Fellow and was the recipient of the 2012 Chair’s Award for Outstanding Volunteer Service.

Council Member – Connor Raso
Connor is an Attorney-Advisor at the Consumer Financial Protection Bureau (CFPB), working on rule-making, statutory interpretation, administrative law, and cost-benefit
could force farms across the country to shut down. Finally, we highlighted our environmental concerns, including the draft rule’s potentially devastating impacts to imperiled water supplies, wildlife habitat, air, land, and human health. In drafting these comments, students worked closely with scientists, farmers, policy analysts, and others. We filed our comments in November 2013.

We were not alone in voicing our concerns; hundreds of other comments were filed. In a next exciting victory, FDA acknowledged the validity of many of these comments, including ones our students had made. In December 2013, Michael Taylor, FDA’s Deputy Commissioner for Foods and Veterinary Medicine, posted a blog entry with the first line, “You spoke. We heard you.” He then committed to making “significant changes” to the Produce Rule to better protect farmers and the environment. Of note, he acknowledged some of the concerns NSAC and the Clinic raised about water quality standards and testing, the use of synthetic fertilizers, and the large number of farms that would be harmed by the rule’s exacting requirements. Perhaps most importantly, he recognized that flexibility in the regulation is imperative, stating: “We always knew that the rules governing farms would be complex, in part because of the incredible diversity in the size and nature of farming operations. The standards we set must accommodate that diversity and be feasible to implement.” We couldn’t agree more.

FDA has committed to reissuing a new draft Produce Rule this summer. In the meantime, it is continuing to solicit comments on potential environmental impacts. NSAC and the Clinic submitted additional comments in April, and we are anxiously awaiting the revised rule.

But the Clinic’s students have already helped improve the regulation that will ultimately govern the growing of produce across the country. They have seen firsthand how effective public comments can force an agency to change course. As fledging administrative lawyers, their work has only just begun.
This quarter, the Court has already announced several important decisions with administrative law implications — most prominently, *McCutcheon v. Federal Election Commission*, on campaign finance regulation, and *EPA v. EME Homer City Generation, L.P.*, on the regulation of transboundary air pollution caused in large part by coal-fired power plants. Two other decisions addressed federal preemption, one clarified the scope of prudential standing, and four others involved statutory interpretation and deference. Finally, the Court has granted certiorari in nearly a dozen more cases with potential administrative law ramifications — some for this Term and some for next.

**Campaign Finance**

One of the most significant decisions this Term is *McCutcheon v. Federal Election Commission*, ___ U.S. ___, 134 S. Ct. 1434 (2014), which limits Congress’s ability to impose restrictions on campaign donations. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court held that the First Amendment protects the right to make political contributions. But it explained that this right is not absolute and that the government may regulate campaign contributions to prevent corruption if those regulations are “closely drawn” to minimize abridgement of First Amendment rights. Following *Buckley’s rationale*, the Court later upheld federal regulations imposing so-called base limits, which restrict how much a donor may contribute to a particular political candidate or committee. The question in *McCutcheon* was whether federal aggregate limits, which restrict how much money a donor may contribute in total to all political candidates or committees, comport with the First Amendment. Those aggregate limits restrict an individual to contributing no more than $123,200 to candidates and committees during each two-year election cycle, and they impose additional restrictions on how much may be contributed to federal candidates, state and local parties, and political action committees.

In a sharply divided decision, the Court struck down the aggregate limits as inconsistent with the First Amendment. Writing for a plurality of four justices, Chief Justice Roberts explained that when an individual makes a contribution, she exercises both her First Amendment right to express political views and her First Amendment right to associate with a particular candidate or committee. The aggregate limit impairs those First Amendment rights because it limits the number of candidates that a donor may support. Although acknowledging that a donor could simply contribute less money to more people, the Chief Justice rejected that solution as impermissibly penalizing those who robustly exercise their First Amendment rights.

The Chief Justice further concluded that the aggregate limit could not be upheld on the ground that it was targeted at preventing corruption. In his view, contribution regulations may target only *quid pro quo* corruption — campaign contributions given in exchange for political favors. He explained that the aggregate limits were not necessary to prevent such corruption, because once that limitation kicks in, it prohibits contributions of any amount. A donor who has reached the aggregate limit cannot contribute $1 to a candidate, even though Congress expressed in the base-limit provisions that donations of less than $5200 to a single candidate do not present a significant risk of corruption. Moreover, the Chief Justice noted, other campaign finance laws, such as the requirement that donations to committees earmarked for particular candidates be counted toward the base-limit for that candidate, adequately protect against corruption.

In addition, the Chief Justice concluded that the aggregate limit was not closely drawn to minimize interference with First Amendment rights. He explained that the purpose of the aggregate limit is to avoid circumvention of the base limits — for example, by giving money to a committee in the hope that it will reroute the money to a candidate for whom the donor has already maxed out the allowable contribution. The Chief Justice explained that the aggregate limits were not necessary to achieve that goal, because “experience suggests that the vast majority of contributions are likely to be retained and spent by their recipients.” *Id.* at 1457.

Justice Thomas concurred in the judgment. Like the plurality, he concluded that the aggregate limits violate the First Amendment. Unlike the plurality, he did not reach that conclusion based on the determination that the aggregate limit failed *Buckley’s requirement* that regulations on campaign contributions be closely drawn to prevent corruption. Instead, he would overrule *Buckley* and apply the more rigorous standard of strict scrutiny to contribution regulations.

Justice Breyer dissented, joined by Justices Ginsburg, Sotomayor, and Kagan. He disagreed with the plurality that the government may regulate only to prevent quid pro quo corruption. In his view, the government may also limit contributions to ensure that wealthy contributors cannot make large donations that may lead to “undue influence on an officeholder’s judgment, and the appearance of such influence.” *Id.* at 1470. He also disagreed with the plurality’s view that the aggregate limit was unnecessary to prevent circumvention of the base limits. He explained, for example, that under the aggregate limits, a person could donate only $74,600 to a party in an election cycle.

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But, without the aggregate limits, that amount increased to $1.2 million. This larger contribution, Justice Breyer surmised, may lead to more influence on officials and “perhaps even a quid pro quo legislative favor.” Id. at 1472.

Transboundary Air Pollution

Another major decision this Term is EPA v. EME Homer City Generation, L.P., 2014 WL 1672044 (U.S., Apr. 29, 2014). The Court in Homer upheld EPA’s effort to regulate transboundary air pollution under the Clean Air Act Amendments of 1990. The statutory section in question was the Act’s so-called “Good Neighbor Provision,” which “instructs States to prohibit in-state sources ‘from emitting any air pollutant in amounts which will . . . contribute significantly’ to downwind States’ ‘nonattainment . . . , or interfere with maintenance,’ of any EPA-promulgated national air quality standard.” Id. at *6 (quoting 42 U.S.C. § 7410(a)(2)(D)(i)). This provision thus seeks to prevent upwind (primarily Midwestern) states from causing downwind (primarily East Coast) states to fail to comply with the Act.

In a 6–2 opinion authored by Justice Ginsburg, the Court rejected several challenges to EPA’s new regulations under the Good Neighbor Provision—the agency’s “Cross-State Air Pollution Rule,” or “Transport Rule,” as it is commonly known. That Rule established a two-step process for determining what pollution reductions upwind states must make. In step one, the agency exempted states that contributed “less than one percent” to the relevant air pollution in downwind states. At step two, the agency assigned emission reduction mandates to upwind states, using a model that determined the most cost-effective pollution reductions.

The Court first dismissed the threshold claim that the statute did not authorize EPA to use “federal implementation plans” (FIPs) to implement the Transport Rule. Below, the D.C. Circuit had ruled that before EPA could not issue a FIP unless it first gave states a chance to address the downwind pollution problem themselves using “state implementation plans” (SIPs). The Court reversed the D.C. Circuit. It found the Clean Air Act definitive on this question, in EPA’s favor: “If EPA determines a SIP to be . . . absolute . . . . However sensible (or not) the Court of Appeals’ position, a reviewing court’s ‘task is to apply the text [of the statute], not to improve upon it.’” Id. at *13.

The Court next applied Chevron to the Transport Rule. Citing the Bible (“The wind bloweth where it listeth . . . .”) and noting that transboundary air pollution presents “a thorny causation . . . puzzle” that EPA must solve, the Court began by finding the Good Neighbor provision ambiguous. Id. at *16–17. That provision, the Court held, “delegates authority to EPA at least as certainly as the CAA provisions involved in Chevron” did: “The statute requires States to eliminate those ‘amounts’ of pollution that ‘contribute significantly to nonattainment’ in downwind States. . . . How is EPA to divide responsibility among . . . States? . . . Under Chevron, we read Congress’ silence as a delegation of authority to EPA to select from among reasonable options.” Id.

Having found the Good Neighbor provision ambiguous, the Court upheld EPA’s interpretation of it. The Court observed that the Transport Rule provides an “efficient and equitable solution” to transboundary pollution, particularly since requiring all upwind states to reduce their pollution proportionally, as the D.C. Circuit would have required, would effectively “toll[]” some upwind states “for having done more to reduce pollution in the past” than other states. Id. at *19. The Court also noted that applying a proportionality-based rule would be “elusive,” since the “realities of interstate air pollution . . . are not so simple,” with multiple upwind states’ pollution affecting multiple downwind states’ air quality in multifarious, variable ways. Id. at *18. The Court acknowledged, however, that its upholding of the Transport Rule is not without limits. The Rule is still subject to “as applied” challenges, and EPA “cannot require a State to reduce its output of pollution by more than is necessary to achieve attainment in every downwind State . . . .” Id. at *20.

Justice Scalia, joined by Justice Thomas, dissented on the ground that EPA had effected an “undemocratic revision of the Clean Air Act.” Id. at *22. Justice Scalia would have found the Good Neighbor provision unambiguous in its dictate that upwind states reduce only the “amount” of pollution they contribute to downwind noncompliance, viewing the statute as “pregnant” with intent that EPA cannot use a FIP “without first providing the States a meaningful opportunity to perform” pollution prevention through SIPs, and the Transport Rule’s use of cost-benefit analysis contrary to controlling precedent and EPA’s past interpretations of the Act. Id. at *22, 29. EPA’s “utterly fanciful ‘from each according to its ability’ construction sacrifices democratically adopted text to bureaucratically favored policy,” Justice Scalia wrote. “The statute’s history demonstrates that ‘significantly’ is not code for ‘feel free to consider compliance costs.’ . . . [And the majority’s] remarkably expansive reasoning makes a hash of the Clean Air Act, transforming it from a program based on cooperative federalism to one of centralized federal control.” Id. at *23, 24, 29.

Preemption

The Court also decided two cases involving preemption this quarter. The first is Chadbourne & Parke LLP v.
Justice Thomas concurred. He explained that the phrase “in connection” is indeterminate because it may extend to every remote connection, and that the majority opinion placed a limiting construction on the phrase.

Justice Kennedy, joined by Justice Alito, dissented. In his view, Congress enacted SLUSA for two reasons: (1) to preclude a broad range of state-law securities claims to prevent “abusive and multiplicitous class actions designed to extract settlements from defendants vulnerable to litigation costs;” and (2) to ensure “robust federal regulation of the national securities markets.” Id. at 1074. In light of these goals, he explained, the phrase “in connection with the purchase or sale of a covered security” should be interpreted broadly to include situations where, as in Chadbourne, misrepresentations about the purchase of covered securities leads the plaintiffs to purchase uncovered securities.

The second preemption decision is Northwest, Inc. v. Ginsberg, __ U.S. __, 134 S. Ct. 1422 (2014), which involved the scope of preemption under the Airline Deregulation Act (ADA). The ADA preempts state “law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier.” 49 U.S.C. § 41713(b)(1). The suit arose when Rabbi Ginsberg, a member of Northwest Inc.’s WorldPerks program for frequent fliers, had his “Platinum Elite” status revoked on the ground that he had violated the WorldPerks contract. Ginsberg sued Northwest, claiming, among other things, that Northwest had breached an implied covenant of good faith and fair dealing.

In an opinion written by Justice Alito, the Court unanimously held that the ADA preempted Ginsberg’s claim for breach of implied covenant. The Court explained that the ADA’s broad language preempts any state claim that has “a connection with” airline prices, routes, or service. Id. at 1428. According to the Court, Ginsberg’s claim met that standard because it challenged the enforcement of the WorldPerks program, which is connected to the airline’s “rates” by awarding “mileage credits that can be redeemed for tickets and upgrades.” Id. at 1431. The Court rejected the argument that the ADA did not extend to common-law rules, explaining that such rules are “other provisions having the force and effect of law.”

The Court also rejected Ginsberg’s argument that his implied covenant claim was not preempted, because that it was a product of the parties’ private agreement, rather than a requirement of state law. The Court explained that Minnesota law—the law under which Ginsberg brought his claim—imposed the implied covenant of good faith and fair dealing and that the parties could not contract around that covenant. The Court noted, however, that in those states that do not impose the implied covenant by law, preemption may not apply.

Standing

The Court clarified the scope of statutory and prudential standing in Lexmark Int’l, Inc. v. Static Control Components, Inc., __ U.S. __, 134 S. Ct. 1377 (2014). To bring a suit in federal court, a plaintiff must establish not only Article III standing (which includes the familiar injury-in-fact test), but also prudential standing. One of the traditional requirements of prudential standing is that the plaintiff’s interest raised in the suit fall with the “zone of interests” protected by the law invoked. The question in Lexmark was whether Static Control fell within the zone of interest
in bringing suit against a competitor, Lexmark, for false advertising under the Lanham Act.

In a unanimous opinion written by Justice Scalia, the Court concluded that Static Control could proceed with its claim under the Lanham Act. The Court began by observing that, although past opinions often described the “zone of interest” test as a form of “prudential” standing, the test does not actually involve prudential standing. Rather, the Court explained, prudential standing refers to situations where courts have discretion not to hear a claim by a plaintiff. According to the Court, the zone-of-interest test does not fit that definition, because the only inquiry is whether the plaintiff arguably falls within the “class of persons ha[ving] a right to sue” under the statute. Id. at 1387.

Applying that standard, the Court concluded that Static Control could pursue its claim under the Lanham Act. That Act authorizes “any person who believes that he or she is or is likely to be damaged by” false advertising to bring suit against the false advertiser. According to the Court, this statute extends an action to all individuals who suffer injuries proximately caused by another’s false advertising. Static Control had alleged injuries proximately caused by Lexmark by claiming that it had lost sales and suffered damage to its reputation as a result of Lexmark’s false statements.

Statutory Interpretation and Deferece

This quarter, the Court also issued several decisions involving statutory interpretation and deference. Perhaps the most notable is Lawson v. FMR LLC, ___ U.S. ___, 134 S. Ct. 1158 (2014). There, the Court construed the whistleblower protection provision of the Sarbanes-Oxley Act to include the employees of contractors, subcontractors, and agents of public companies—not just the employees of the public company in question itself. The Court’s opinion, authored by Justice Ginsburg, rested on several grounds.

First, the Court noted that the “ordinary meaning” of an employee is “the contractor’s own employee.” Id. at 1165. In other provisions of the Act, Congress expressly specified when it meant only an employee of the public company, but it did not in the whistleblower provision. Thus, the Court “presume[d] the operative language means what it appears to mean: A contractor may not retaliate against its own employee for engaging in protected whistleblowing activity.” Id. at 1166. Second, this reading makes sense, because contractors “are not ordinarily positioned to take adverse actions against employees of the public company with whom they contract,” although they would be against their own employees. Id. Third, the construction comports with the Act’s structure, which contemplates an employee-employer relationship in establishing various protections and remedies. And fourth, this construction furthers the Act’s purpose, which, as demonstrated by its legislative history, was to stop the kind of fraud engaged in by Enron—a company that utilized its contractors to perpetuate its wrongdoing.

The Court thus rejected the assertion that the provision’s header limited its meaning, noting that such “short-hand” references do not replace “the detailed provisions of the text.” Id. at 1169. The Court also declined to decide whether the interpretation of the provision by the Department of Labor’s Administrative Review Board was entitled to deference, because it “agree[d] with the . . . conclusion that § 1541A affords protection to a contractor’s employees.” Id. at 1165 n.6. Justice Scalia, joined by Justice Thomas, concurred “in principal part” with the Court’s opinion but wrote separately to highlight why reliance on legislative history is inappropriate. Justice Sotomayor, joined by Justices Kennedy and Alito, dissented, asserting that the Court’s interpretation of the statute gives it “stunning reach.” Id. at 1178. “As interpreted today,” Justice Sotomayor wrote, “the Sarbanes-Oxley Act authorizes a babysitter to bring a federal case against his employer—a parent who happens to work at the local Walmart (a public company)—if the parent stops employing the babysitter after he expresses concern that the parent’s teenage son may have participated in an Internet purchase fraud.” Id.

In United States v. Quality Stores, Inc., ___ U.S. ___, 134 S. Ct. 1395 (2014), a unanimous Court resolved whether severance payments made to terminated employees count as taxable wages under the Federal Insurance Contributions Act (FICA). The employees in question were terminated involuntarily; they received the payments as a result of the Chapter 11 bankruptcy of their employer, Quality Stores. Although Quality Stores argued that the payments were not subject to FICA withholding, the Court had little difficulty holding otherwise. In an opinion by Justice Kennedy, the Court explained that “Congress chose to define wages under FICA ‘broadly.’” Id. at 1399. Thus, severance payments clearly qualified as FICA “wages” under that term’s “plain meaning,” which includes “all remuneration for employment.” 26 U.S.C. § 3121(a). Indeed, the Court noted, these severance payments were similar to “many other benefits employers offer,” because they were designed in part to help the company’s post-bankruptcy operations and to delay employee job searches. Id. at 1400. Moreover, the fact that FICA includes a specific exemption for some termination-related benefits—severance payments made “because of . . . retirement for disability”—strengthens the conclusion that severance payments for involuntary termination should not be excluded from FICA taxation. Id. at 1397.
The Court thus concluded: “Severance payments are made to employees only. It would be contrary to common usage to describe as a severance payment remuneration provided to someone who has not worked for the employer.”

The Court just as easily reached a unanimous conclusion about the applicability of a criminal statute related to military bases in United States v. Apel, __ U.S. __, 134 S. Ct. 1144 (2014). At issue in Apel was the criminal conviction of an anti-war activist who repeatedly entered the Vandenberg Air Force Base in California despite being ordered not to do so. Section 1382 of Title 18 of the U.S. Code makes it a crime for any person who “reenters or is found within any [military] installation, after having been . . . ordered not to reenter by any officer or person in command or charge . . . .” Apel asserted that this provision did not apply to him because Vandenberg includes public roads and easements, and § 1382 applies only where the military has “exclusive possession and control” of the land. Id. at 1150. In an opinion by Chief Justice Roberts, the Court rejected that interpretation in favor of the “straightforward” one that § 1382’s prohibition applies to any federal military installation, whether owned, leased, or owned in part by the government: “[W]e decline Apel’s invitation to require civilian judges to examine U.S. military sites around the world, parcel by parcel,” the Chief Justice wrote, “to determine which have roads, which have fences, and which have a sufficiently important, persistent military purpose.” Id. at 1153. The Court acknowledged that the U.S. Attorneys’ Manual and some opinions of the Air Force Judge Advocate General had interpreted § 1382 in a manner favorable to Apel, but it declined to afford those interpretations deference because they were not intended to be “binding” and because the Court had “never held that the Government’s reading of a criminal statute is entitled to any deference.” Id. at 1151. Justice Ginsburg, joined by Justice Sotomayor, concurred but wrote separately to emphasize that the Court’s opinion did not address Mr. Apel’s constitutional claims. Justice Alito concurred and wrote separately for the same reason.

Finally, in BG Group PLC v. Republic of Argentina, __ U.S. __, 134 S. Ct. 1198 (2014), the Court settled the question of what level of deference an arbitrator’s interpretation of an international arbitration treaty deserves. At issue in BG Group was a treaty between the United Kingdom and Argentina encouraging investments by citizens of one country in the other. A group of British investors had infused significant funds into an Argentine natural gas distribution system, but when the country hit hard economic times, Argentina passed a series of laws that devalued the British investment. The British investors sought to arbitrate the dispute in Washington, D.C., but Argentina’s government asserted that the arbitrators lacked authority to hear the dispute.

In an opinion by Justice Breyer, the Court ruled that arbitrators’ interpretations of procedural aspects of treaties should receive “considerable deference,” whereas the interpretation of threshold questions of “arbitrability” are questions for the courts that receive de novo review. Id. at 1210. The Court then determined that the treaty provision in question—a requirement that the party seeking arbitration first file suit in local court—was procedural. “The litigation provision is . . . a purely procedural requirement—a claims-processing rule that governs when the arbitration may begin, but not whether it may occur or what its substantive outcome will be on the issues in dispute.” Id. at 1207. The Court was careful to point out that its holding did not extend to treaties that, unlike the one in question, expressly included “conditions of consent” for a sovereign to submit to arbitration. However, because the provision in question was procedural, the Court deferred to the arbitrators’ interpretation of it as not absolute, which allowed the British investors to arbitrate despite not first filing suit in Argentina.

Justice Sotomayor filed a concurring opinion emphasizing that the announced judgment does not extend to treaties that specify that consent is necessary to arbitrate. Chief Justice Roberts, joined by Justice Kennedy, dissented on the ground that, while the treaty provision in question might have shown Argentina’s consent to arbitrate with the United Kingdom, it did not evidence the country’s consent to arbitrate with the investors in question. “It should come as no surprise,” the Chief Justice wrote, “that, after starting down the wrong road, the majority ends up in the wrong place.” Id. at 1215.

**Certiorari Grants**

The Court this quarter also granted certiorari in several cases with potential import for administrative law. Some of these cases will be heard this Term, and some next.

**Grants for This Term**

Three of the four certiorari petitions granted this quarter involve questions related to intellectual property. In the first, American Broadcasting Companies v. Aereo, No. 13–461 (oral argument April 22, 2014), the Court will address whether a company that collects and records free over-the-air television programming using thousands of tiny, dime-sized antennas and computer storage can then retransmit those programs to its subscribers via the Internet without violating the Copyright Act. The question is whether such retransmissions constitute a public performance.
The second case, *Limelight Networks v. Akamai Technologies*, No. 12-786 (oral argument April 30, 2014), involves the question of “divided” patent infringement under 35 U.S.C. § 271—that is, whether separate actions taken by different parties that do not by themselves constitute an infringement can be added up to one. The Federal Circuit, in an en banc opinion with five dissenting votes, found that a party could be liable if it “knowingly induces” others to complete an infringement. The question presented is whether the Federal Circuit erred.

The third case, *Nautilus v. Biosig Instruments*, No. 13-369 (oral argument April 28, 2014), presents another challenge to a Federal Circuit doctrine: the governance of “indefinite” patent claims. The patent in question is for hand-grip electrodes on exercise machines used to measure the exerciser’s heart rate. The Federal Circuit held that ambiguous patent claims with multiple reasonable interpretations are valid so long as their ambiguity is not “insoluble” by a court. That test, plus the presumption of patent validity, is before the Court.

Finally, in *Lane v. Franks*, No. 13-483 (oral argument April 28, 2014), the Court will take up two questions involving public employees: first, whether the First Amendment inoculates the government if it retaliates against a public employee for truthful sworn testimony that was compelled by subpoena but was not given as part of the employee’s ordinary job responsibilities; and second, whether qualified immunity precludes damages in such a case.

**Grants for Next Term**

The Court has also granted review for next Term in several cases of importance to administrative law.

*Teva Pharmaceuticals USA v. Sandoz*, No. 13-854, continues the trend of resolving questions presented about intellectual property. The question in this case is whether the courts of appeals should review factual findings made by a district court in support of its construction of a patent—claim term de novo or for clear error.

The Court has also agreed to hear two cases involving securities law. The question in one, *Omnicare v. Laborers District Council Construction Industry Pension Fund*, No. 13-435, is whether for purposes of a claim under Section 11 of the Securities Act of 1933, a plaintiff may plead that a statement of opinion was “untrue” merely by alleging that the opinion itself was objectively wrong—or whether the plaintiff must also allege that the speaker subjectively believed that the statement was false. The question in the other, *Public Employees’ Retirement System of Mississippi v. IndyMac MBS*, No. 13-640, is whether filing a putative class action satisfies the three-year time limitation in Section 13 of the Securities Act for claims of putative class members who have not yet joined the case.

The scope of the state-action doctrine in federal antitrust law is the subject in *North Carolina Board of Dental Examiners v. Federal Trade Commission*, No. 13-534. Under the state-action doctrine, federal antitrust laws is not available to anticompetitive actions undertaken by the states in their sovereign capacities. That immunity does not apply, however, when the state acts in a private capacity as a market participant. The question in *North Carolina Board of Dental Examiners* is whether the state-action doctrine should extend to a state regulatory board created by state law, where a majority of the board’s members are also market participants who are elected to their board positions by other market participants.

The Court has also agreed to hear another case involving religious freedom in *Holt v. Hobbs*, No. 13-6827. Regulations of the Arkansas Department of Corrections prohibit inmates from growing a beard longer than 1/2 inch. The issue in *Holt* is whether that policy violates the rights of inmates under the Religious Land Use and Institutionalized Persons Act or the Free Exercise Clause of the First Amendment.

In *Integrity Staffing Solutions v. Busk*, No. 13-433, the Court will clarify the scope of the Fair Labor Standards Act (FLSA). That Act requires employers to pay at least a minimum hourly wage and to pay overtime when a covered employee works more than 40 hours in a work week. This provision does not apply to time spent on activities that are performed “postliminary” to an employee’s primary job responsibilities; and second, whether qualified immunity precludes damages in such a case.

Finally, another case involving statutory interpretation that the Court will hear next Term is *Yates v. United States*, No. 13-7451. During a routine inspection of a commercial fishing boat, law enforcement officers discovered undersized fish onboard. Following this discovery, the boat’s crew threw the fish overboard on the captain’s order. The question in *Yates* is whether throwing the fish overboard violates 18 U.S.C. § 1519, which makes it a crime when a person “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object” with the intent to obstruct an investigation.
By Bill Jordan*

D.C. Circuit finds “net neutrality” regulatory authority, but rejects rule in light of existing agency classifications

Verizon v. FCC, 2014 WL 113946 (D.C. Cir. Jan. 14, 2014), is a complex decision with a simple message: In taking new positions, agencies must be very careful to address prior agency decisions that may be relevant to their current action. In this litigation, the FCC initially stumbled over its own prior position, recovered, and ultimately stumbled again over another prior (and existing) position. The decision is also instructive in its examination of whether the statute authorized the rule at issue.

Verizon challenged the Open Internet Order in which the FCC sought to ensure open access to the Internet by imposing anti-blocking and anti-discrimination requirements on broadband providers such as Verizon. The rule arrose from concerns that broadband providers are in a position to favor their interests and the interests of related companies over content providers with which they are not affiliated.

This was the second round of litigation over whether § 706 of the Telecommunications Act of 1996 authorized regulatory action to achieve net neutrality. The Commission lost the first round, Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010), in large part due to its own previous determination that the provision “does not constitute an independent grant of authority.” This existing position had forced the agency to rely upon ancillary jurisdiction, which contravened an “axiomatic” principle: “[A]dministrative agencies may [act] only pursuant to authority delegated to them by Congress.”

When the issue of statutory authority returned to the D.C. Circuit on review of the Open Internet Order, the court emphasized that, “[r]egardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law,” and that the court’s “task . . . is not to assess the wisdom of the Open Internet Order regulations, but rather to determine whether the Commission has demonstrated that the regulations fall within the scope of its statutory grant of authority.” Noting that “the Commission need not remain forever bound” by its earlier restrictive reading of the statute, the court explained that, “so long as an agency ‘adequately explains the reasons for a reversal of policy,’ its new interpretation of a statute cannot be rejected simply because it is new.” Under the Supreme Court’s decisions in Brand X and FCC v. Fox Television Stations, the agency may change positions if it adequately explains its action. Here, the court accepted the agency’s explanation of its new reading of the statute.

The court also distinguished FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 121 (2000), in which the Supreme Court had rejected an FDA interpretation of its statutory authority based in part on prior FDA statements inconsistent with its latest interpretation. There, the FDA had disclaimed authority to regulate tobacco for more than eighty years, with congressional actions based upon those disclaimers, while here the agency had never disclaimed authority altogether, and there was no comparable history of congressional action. This is a useful example of rejection of an attempt to use Brown & Williamson to limit agency authority.

Agencies should be alert to the court’s related emphasis on the need to identify limits to the claimed authority: “Of course, we might well hesitate to conclude that Congress intended to grant the Commission substantive authority in section 706(a) if that authority would have no limiting principle.” This is a particular concern where, as in Verizon, an agency relies upon broad statutory language. Without a limiting principle, a court might well choose to characterize the provision as merely a “general statement of policy,” rather than a grant of authority. Here, the court found such limits in the statutory statement of purpose and by reading the provision in conjunction with other provisions of the statute. The court also rejected the invitation, derived from hints in Brown & Williamson, to reject the rule on its own judgment that Congress would not have made a decision of such “great economic and political significance” without clearer guidance from Congress. Acknowledging that “Congress does not . . . ‘hide elephants in mouseholes,’” the court had no difficulty holding that, “FCC regulation of broadband providers is no elephant, and section 706(a) is no mousehole.”

Ironically, having gone to great lengths to confirm the agency’s statutory authority and to uphold its reasoning, the court ultimately struck down the regulation because, once again, the FCC’s position conflicted with its own earlier and unchanged position. The anti-blocking and anti-discrimination provisions of the rule were essentially the same as the core requirements imposed on common carriers generally. But the FCC had previously determined that broadband providers were providers of “information services,” not providers of “telecommunications services.” Moreover, the statute prohibited treating a company as a common carrier unless it provided “telecommunications services.”
D.C. Circuit rejects IRS authority to regulate tax return preparers as “representatives”

Rejecting an argument for Chevron deference, the D.C. Circuit in *Loving v. Internal Revenue Service*, 2014 WL 519224 (D.C. Cir. 2014), affirmed a district court order striking down an IRS rule that would have regulated tax-return preparers as “representatives.” Responding to concerns about the performance of some paid tax-return preparers, the agency in 2011 had issued regulations that would require nearly 700,000 tax-return preparers to pass a certification exam, pay annual fees, and meet requirements for continuing education. The IRS relied upon a statutory provision authorizing it to “regulate the practice of representatives of persons before the Department of the Treasury.”

The court began with three dictionary definitions and two other statutory definitions of “representative,” all of which included the concept of agency and the ability to bind the principal—and neither of which is true of tax return preparers. The agency also stumbled over its own existing provisions since a different IRS regulation provided that a person cannot represent another before the IRS without power of attorney, a feature again missing from the function of tax-return preparers.

The court then turned to the meaning of “practice . . . before the Department of the Treasury.” Since practice and representation involve adversary process and “presenting their cases,” the court held that these terms did not reach tax return preparers.

The court supported these conclusions by reference to the original 1884 statute, which referred to “agents, attorneys, or other persons representing claimants,” and to the explicit congressional statement that later language changes were for simplification only, not to change the substance. The court also noted that the imposition of these requirements would effectively gut the existing—and unchanged—scheme that had long applied to those who prepare tax returns.

Not surprisingly, this decision rejecting rulemaking authority noted that the *Brown & Williamson* Court had “stated that courts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies.” The D.C. Circuit also emphasized the widespread impact of the new rule, concluding that, “as in *Brown & Williamson*, we are confident that the enacting Congress did not intend to grow such a large elephant in such a small mousehole.”

Finally, although noting that an agency may change its position, the court found “it rather telling that the IRS had never before maintained that it possessed this authority.”

D.C. Circuit on “logical outgrowth”: one outgrowth is logical, the other is not—context matters

Two recent D.C. Circuit decisions illustrate the importance of context in determining whether a final rule is a “logical outgrowth” of a Notice of Proposed Rulemaking. The first, *Agape Church, Inc. v. Federal Communications Commission*, 2013 WL 6819158 (D.C. Cir. Dec. 27, 2013), involved the rapidly changing television broadcasting industry. In 1992, Congress created so-called “must-carry” rights, under which cable television stations had to dedicate some of their channels to local broadcasters. The statute provided that must-carry broadcast signals “shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection.” Some fifteen years later, television broadcasting was changing from analog to digital. In order to implement the statutory must-carry mandate, the FCC in 2007 issued the “Viewability” rule, which required certain cable companies to “downconvert” their digital signals to analog so that subscribers could view the signals without any additional equipment. The Commission also stated that the “Viewability” rule would expire in 2012 unless extended by the Commission.

In February 2012, the Commission issued a Notice of Proposed Rulemaking (NPRM) in which it noted that the “Viewability” rule would soon expire if not extended and sought comment on “whether it would be in the public interest to extend” the rule for three more years. The FCC noted that, if the rule were not extended, subscribers “would be required to pay more for access to must-carry broadcast stations, by replacing existing and still-functional analog equipment with digital equipment or leasing set top boxes to view the complete service they currently pay for and receive in analog.” After the close of the comment period, the Commission issued a Final Rule allowing the “Viewability” rule to expire and replacing it with a requirement that cable operators “provide conversion equipment to analog customers, either ‘for free or at an affordable cost that does not substantially deter use of the equipment.’”

Although the NPRM had not mentioned the approach adopted in the Final Rule, the court rejected an argument that the Final Rule was not a logical outgrowth of the proposal. Explaining that the NPRM and the Final Rule need not be “coterminous,” the court said: “Whether the ‘logical outgrowth’ test is satisfied depends on whether the affected party ‘should have anticipated’ the agency’s final course in light of the initial notice. The broadcasters in this case certainly should have anticipated that the final rule was a viable result in light of the NPRM, and also
in light of the fact that the Viewability Rule was due to sunset unless extended.” Moreover, market developments such as the availability and low cost of signal converters had been discussed in the proceeding as “topics relevant to the Commission’s ultimate decision.” Thus, the context of the rapidly developing broadcast market and technology supported the conclusion that the Final Rule was a logical outgrowth of the proposal.

Context also appears to have been significant in Daimler Trucks North America, Inc. v. Environmental Protection Agency, 2013 WL 6487281 (D.C. Cir. Dec. 11, 2013), which involved Clean Air Act emissions standards governing heavy-duty vehicles and engines. The Act required EPA to issue standards governing such vehicles, but it also authorized EPA to permit manufacturers meeting certain requirements to pay Nonconformance Penalties (NCPs) in lieu of complying with the standards. In 1985, EPA by rule established criteria for qualifying to pay Nonconformance Penalties, including a requirement that “substantial work will be required to meet the standard.” In 2001, EPA adopted a new emission standard, with the compliance date of 2010. By 2010, all but one manufacturer had developed the technology necessary to comply with the new standard.

In 2012, EPA issued a proposed rule to establish Nonconformance Penalties, noting that the “substantial work” requirement had been met because manufacturers were using new treatment systems to comply with the standards. In issuing the final rule, EPA said that the “substantial work” criterion “is to be evaluated based on the total amount of work needed to go from meeting the previous standard to meeting the current standard, regardless of the timing of such changes.” In other words, EPA now indicated that it would look backwards to see whether “substantial work” had been involved, rather than merely looking forward to seeing whether “substantial work” was still necessary. This opened the door for the one non-complying engine manufacturer to pay Nonconformance Penalties in lieu of complying with the standard.

Competing manufacturers challenged the final rule on the ground that it was not a logical outgrowth of the proposal. The court agreed. In this case, it made sense that Nonconformance Penalties might be permitted if substantial work might otherwise be required to comply with the standards. But that logic did not support the proposition that the penalty payment alternative was authorized where the substantial work had already been completed. At a minimum, the agency had to give notice of this substantial change in its approach to Nonconformance Penalties.

D.C. Circuit—OSHA preemption-related rule change unreviewable

American Tort Reform Association v. OSHA, 2013 WL 6818711 (D.C. Cir. Dec. 27, 2013), is the latest development in the continuing struggle over whether federal regulatory programs preempt state tort law. The Occupational Safety and Health Act authorizes the Occupational Safety and Health Administration (OSHA) to issue standards that are “reasonably necessary or appropriate to provide for safe or healthful places of employment.” The Act also allows states to adopt workplace safety standards as long as they are as stringent as the federal standards.

In 1985, OSHA adopted preemptive hazardous chemical labeling standards. In 1987, OSHA asserted that the standards also preempted local labeling standards. In 1994, OSHA said that product liability concerns would prompt businesses to make additional appropriate disclosures. Together these assertions indicate that OSHA considered its standards to preempt any state or local standards or regulations, but its standards did not preempt common-law remedies. From 1992-2007, OSHA issued three letters disclaiming preemption of state tort law. In 2008, however, OSHA asserted that one of its standards did preempt state tort law. In 2010, OSHA withdrew its 2008 letter and restated its position that its standards did not preempt state tort law.

In 2011, OSHA stated that its hazardous chemical labeling standards did not preempt state failure-to-warn suits, and in 2012 OSHA issued a final rule in which it rejected requests to assert that its labeling standards preempted state tort law. In issuing the final rule, OSHA amended a specific provision of its regulation to make it clear that its standards “preempt any legislative or regulatory enactments,” but not broader legal requirements of state tort law.

The American Tort Reform Association challenged the final rule, arguing that it exceeded OSHA’s delegated authority and had been issued in violation of requirements for notice and comment. The court rejected these arguments because “[t]he petition for review is . . . much ado about nothing.” The court reached this conclusion because the parties agreed that OSHA “lacks legal authority to determine the preemptive effect of the OSH Act.” Thus, OSHA’s various statements about preemption and its specific regulatory language on the subject were nothing more than interpretive statements, which do not have the force of law. Thus, those statements and the change of regulatory language do not require notice and comment. Moreover, the challenge was not ripe for review because

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Edited by Jeffrey B. Litwak

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

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By William Funk*


Richard H. Fallon, Jr., Interpreting Presidential Powers, 63 Duke L.J. 347 (2013). Justice Holmes famously observed that “[g]reat cases . . . make bad law.” The problem may be especially acute in the domain of national security, where presidents frequently interpret their own powers without judicial review and where executive precedents play a large role in subsequent interpretive debates. On the one hand, some of the historical assertions of presidential authority that stretch constitutional and statutory language the furthest seem hard to condemn in light of the practical stakes. On the other hand, to credit the authority of executive precedent risks leaving the president dangerously unbound. To address the conundrum posed by executive precedent, this article proposes a two-tiered theory for the interpretation of presidential powers. Framed as an analogy to a position in moral philosophy known as “threshold deontology,” two-tiered interpretive theory treats rules that restrict executive power as normally inviolate, not subject to a case-by-case balancing analysis. Analogously to threshold deontology, however, two-tiered theory also recognizes that when the costs of adherence to ordinary principles grow exorbitantly high, extraordinary interpretive principles should govern instead and should result in the upholding of broad presidential power. For reasons that the article explains, resort to extraordinary reliance on second-tier justifications for assertions of sweeping executive authority involves a legal analogue to “dirty-handed” moral conduct and should be labeled accordingly. And executive precedents set in extraordinary, second-tier cases should not apply to more ordinary ones. Through its conjunction of elements, two-tiered interpretive theory furnishes analytical and rhetorical safeguards against executive overreaching, but also allows accommodations for truly extraordinary cases.

Abbe R. Gluck and Lisa Schultz Bressman, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part II, 66 Stan. L. Rev., available at http://ssrn.com/abstract=2358074. This is the second of two articles relating the results of the most extensive survey to date of 137 congressional drafters about the doctrines of statutory interpretation and administrative delegation. The first article focused on the respondents’ knowledge and use of the interpretive principles that courts apply. This second article moves away from the judicial perspective. The article’s findings here highlight the overlooked legislative underbelly: the personnel, structural and process-related factors that our respondents repeatedly volunteered, drive the details of the drafting process more than do judicial rules of interpretation. These factors range from the fragmentation caused by the committee system; to the centrality of nonpartisan professional staff in the drafting of statutory text; to the use of increasingly unorthodox legislative procedures—each of which, the respondents said, affects statutory consistency and use of legislative history in different and important ways. The respondents also painted a picture of legislative staffers in a primary
interpretive conversation with agencies, not with courts, and as using different kinds of signals for their communications with agencies than courts consider. Most of the structural, personnel, and process-related influences that the respondents emphasized have not been recognized by courts or scholars, but understanding them calls into question almost every presumption of statutory interpretation in current deployment. These findings have significance for textualism, purposivism, and beyond. They undermine the claims of proponents of each theory that theirs is the most democracy-enhancing, because none makes satisfactory efforts to really reflect congressional expectations. The findings challenge textualism’s operating assumption that text is the best evidence of the legislative bargain and suggest more relevant—but still formalist—structural features that might do better. They reveal that although purposivists or eclectic theorists may have the right idea with a more contextual approach, many of factors on which they focus are not the same ones that Congress utilizes. With respect to delegation, for both types of theorists, Chevron now seems too text– and court-centric, in light of the findings, to actually capture congressional intent to delegate, which has been its asserted purpose. In the end, the findings raise the question whether the kind of “faithful agent” approach to interpretation that most judges currently employ—one aimed at effectuating legislative deals and often focused on granular textual details—can ever be successful. The authors thus look to different paradigms less dependent on how Congress works, including rule-of-law and pragmatic approaches to interpretation. These alternatives respond to the problem of the sausage factory, but pose different challenges in light of the modern judicial sensibility’s pronounced concern with legislative supremacy.

Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, available at [http://ssrn.com/abstract=2357555](http://ssrn.com/abstract=2357555). A generation ago, it was common and uncontroversial for federal judges to rely upon legislative history when interpreting a statute. But since the 1980s, the textualist movement, led by Justice Scalia, has urged the banishment of legislative history from the judicial system. The resulting debate between textualists and their opponents—a debate that has dominated statutory interpretation for a generation—cannot be truly understood unless we know how legislative history came to be such a common tool of interpretation to begin with. This question is not answered by the scholarly literature, which focuses on how reliance on legislative history became permissible as a matter of doctrine (in the *Holy Trinity Church* case in 1892), not on how it became normal, routine, and expected as a matter of judicial and lawyerly practice. The question of normalization is key, for legislative history has long been considered more difficult and costly to research than other interpretive sources. What kind of judge or lawyer would routinize the use of a source often considered intractable? Drawing upon new citation data and archival research, this article reveals that judicial use of legislative history became routine quite suddenly, in about 1940. The key player in pushing legislative history on the judiciary was the newly expanded New Deal administrative state. By reason of its unprecedented manpower and its intimacy with Congress (which often meant congressmen depended on agency personnel to help draft bills and write legislative history), the administrative state was the first institution in American history capable of systematically researching and briefing legislative discourse and rendering it tractable and legible to judges on a wholesale basis. By embracing legislative history circa 1940, judges were taking up a source of which the bureaucracy was a privileged producer and user—a development integral to judges’ larger acceptance of agency-centered governance. Legislative history was, at least in its origin, a statist tool of interpretation.

David L. Markell and Robert L. Glicksman, *Regulatory Design in Context*, available at [http://ssrn.com/abstract=2360578](http://ssrn.com/abstract=2360578). This paper offers a constructive contribution to the debate about whether legal scholarship is (in)sufficiently tethered to the real world. To the extent there is a disconnect, the authors believe neither scholars nor the real world of governance are necessarily at fault. Instead, the disconnect stems from a failure to forge connections between theoretical constructs in the academic literature and their applicability to real-world conditions. In part, this article is an effort to make such connections through close attention to context in regulatory design. In an insightful recent article, “Agencies as Litigation Gatekeepers,” Professor David Freeman Engstrom offers a conceptual framework for reorienting the literature on regulatory enforcement by shifting the focus from a choice between public and private enforcement to analysis of how best to coordinate multiple, overlapping, and interdependent public and private enforcers by vesting in federal agencies “gatekeeping authority” over private enforcement lawsuits. This article evaluates and builds on Professor Engstrom’s important effort to rationalize government and private enforcement of regulatory norms by considering his effort in the context of challenges facing government enforcers in the real world, and the Environmental Protection Agency (EPA) in particular. The authors suggest that agencies such as EPA confront at least five design challenges in developing
pragmatic enforcement strategies: the inter-related character of different components of the regulatory process; the hybrid character of contemporary governance efforts; the importance of confronting “reality” in the form of past performance and future challenges and opportunities; the dynamic character of contemporary governance and responses to it; and the salience of possible design changes, which suggests the need to prioritize design improvements. The authors view is that pursuing sensible regulatory design, including mechanisms of the sort Professor Engstrom proposes, requires a sophisticated understanding of the regulatory landscape and that the authors’ conceptual framework provides a useful typology for developing such an understanding. In short, the article attempts a synthesis of Professor Engstrom’s valuable insights about the value of optimizing regulatory enforcement initiatives with our own conception of the manner in which the regulatory state operates in order to provide a contextually based, pragmatic framework for optimizing regulatory design to promote compliance with regulatory norms.

E. Donald Elliott and Charles W. Tyler, Administrative Severability Clauses, available at http://ssrn.com/abstract=2362452. This article explores a topic that has been overlooked by legal scholars: severability clauses in administrative regulations. Administrative severability clauses are an important tool for agencies to minimize the havoc wreaked by judicial review. Agencies should be encouraged to use them, and courts should give them more deference than they do severability clauses in legislation. The authors make two proposals that, if adopted, would bring the doctrine more in line with the overarching goals of administrative law. First, they propose that agencies should be encouraged to include severability clauses in their rules. They argue that severability clauses make the regulatory environment more participatory and predictable, by giving stakeholders the opportunity to comment and by explaining to regulatees how agency rules will affect them in the future. Second, they propose that federal courts should defer to severability clauses in administrative regulations. Federal courts tend to disregard administrative severability clauses because they have analyzed them through the distorting prism of the overarching goals of administrative law. First, deferring to administrative severability clauses because the severability clauses in a statute. By contrast, administrative agencies are more unified organizations that operate in a narrower regulatory space and whose staffs have the time and expertise to fully consider the potential consequences of a severability clause. The analogy between statutory and administrative severability clauses, therefore, is misplaced. Finally, the authors make the affirmative case for taking administrative severability clauses at face value. They argue that, as matters of both policy and law, courts should defer to administrative severability clauses, except when the remainder of a rule is tainted by other legal defects. As a matter of policy, courts should defer to severability clauses for two reasons. First, deferring to administrative severability clauses promotes political accountability, administrative expertise, and predictability in the law. Second, it reduces agency ossification. As a matter of law, courts should defer to administrative severability clauses because the severability of an administrative rule falls within an agency’s “informed discretion” and because severability clauses are valid interpretations of agency rules and thus deserve Auer deference.

Steven Kelman, Ronald Sanders, Gayatri Pandit, and Sarah Taylor, “I Won’t Back Down?” Complexity and Courage in Federal Decision-Making, available at http://ssrn.com/abstract=2366901. Senior government executives make many decisions, and not infrequently these are difficult. By “difficult” decisions, the literature generally means ones characterized by complicated and uncertain information, and hard tradeoffs among conflicting value objectives. In a range of interviews with high-level U.S. Federal Government executives, the authors found interesting differences among outstanding, noticeably successful executives and controls regarding their “most difficult” decisions, both how they defined them and how they made them. Outstanding executives characterized the hardest decisions they made not as ones characterized by complexity but as ones requiring courage. Several other notable differences in decisionmaking style also emerged.

Cole Taratoot, The Influence of Administrative Law Judge and Political Appointee Decisions on Appellate Courts in National Labor Relations Board Cases, available at http://ssrn.com/abstract=2365964. Scholars have long been simultaneously concerned with the factors that influence appellate court decisionmaking and the level of deference that the courts allow for agencies. However, scholars have treated administrative agencies as unitary actors with a single level of decisionmaking, but in reality
agency decisions involve input from multiple actors within the agency. The author argues that appellate courts rely more heavily on decisions made by actors in the bureaucracy with greater levels of expertise and who are less politically motivated as cues in their decisionmaking. This theory is bolstered by legal precedent in the area of administrative law that suggests courts should more heavily rely on the expert judgment of administrative judges. Thus, as a result of their increased expertise, appearance of political neutrality, and institutional support, courts will be more reliant on decisions issued by administrative law judges (ALJs) than on those issued by the political appointees as cues in their decisionmaking. Using over 300 unfair labor practice decisions issued by the federal appeals courts on review of cases from the National Labor Relations Board (NLRB or Board), the author develops a model of appeals court decisionmaking in unfair labor practice cases as a function of the initial decision of the ALJ, the final order of the political appointees of the NLRB, case characteristics, the ideology of the deciding appeals court panel, Supreme Court influence, and economic factors. Though the ideology of the court plays a role in its decisionmaking, cues from ALJ decisionmaking and that of the Board weigh more heavily in appellate court outcomes. However, cues from ALJ decisions play the most consistent role in appellate court decisionmaking, even in more difficult cases. This has important implications for agency strategy in court and suggests that future research should consider the influence of lower-level decisionmaking over appellate court decisionmaking in the area of administrative law.

Michael Herz, Using Social Media in Rulemaking: Possibilities and Barriers, available at http://ssrn.com/abstract=2371406. “Web 2.0” is characterized by interaction, collaboration, non-static websites, use of social media, and creation of user-generated content. In theory, these Web 2.0 tools can be harnessed not only in the private sphere but also as tools for an e-topia of citizen engagement and participatory democracy. Notice-and-comment rulemaking is the pre-digital government process that most approached (while still falling far short of) the e-topian vision of public participation in deliberative governance. The notice-and-comment process for federal agency rulemaking has now changed from a paper process to an electronic one. Expectations for this switch were high; many anticipated a revolution that would make rulemaking not just more efficient, but also more broadly participatory, democratic, and dialogic. In any event, the move online has not produced a fundamental shift in the nature of notice-and-comment rulemaking. At the same time, the online world in general has come to be increasingly characterized by participatory and dialogic activities, with a move from static, text-based websites to dynamic, multi-media platforms with large amounts of user-generated content. This shift has not left agencies untouched. To the contrary, agencies at all levels of government have embraced social media—by late 2013 there were over 1000 registered federal agency twitter feeds and over 1000 registered federal agency Facebook pages, for example—but these have been used much more as tools for broadcasting the agency’s message than for dialogue or obtaining input. All of which invites the questions whether agencies could or should directly rely on social media in the rulemaking process. This study reviews how federal agencies have been using social media to date and considers the practical and legal barriers to using social media in rulemaking, not just to raise the visibility of rulemakings, which is certainly happening, but to gather relevant input and help formulate the content of rules. The study was undertaken for the Administrative Conference of the United States and is the basis for a set of recommendations adopted by ACUS in December 2013. Those recommendations overlap with but are not identical to the recommendations set out here.

Richard M. Re, Should Chevron Have Two Steps?, available at http://ssrn.com/abstract=2331693. Prominent judges and scholars have criticized the familiar Chevron deference scheme on the ground that its two steps are redundant. But each step of traditional two-step Chevron actually does unique interpretive work. In short, step one asks whether agency interpretations are mandatory, whereas step two asks whether they are reasonable. Other judges and scholars defend two-step Chevron on the ground that the second step should be equated with arbitrary-and-capricious review. But that approach makes Chevron partially redundant with the Administrative Procedure Act and compresses the distinct mandatoriness and reasonableness questions into an artificially singular first step. This article identifies a new approach, called “optional two-step,” which first asks whether the agency’s view is reasonable and then gives courts discretion to determine whether the agency’s view is also mandatory. This discretionary decision procedure recognizes that important normative considerations underlie the choice between one- and two-step versions of Chevron. For example, two-step Chevron fosters the rapid development of precedent, whereas one-step enforces norms of judicial restraint. Chevron thus resembles qualified-immunity jurisprudence, which has likewise struggled to answer the normative question of whether unnecessary holdings should be impermissible, obligatory, or optional. Qualified-immunity case law also sheds much-needed
light on how courts should exercise their Chevron discretion. Finally, a review of all published federal appellate decisions citing Chevron in 2011 sheds light on current Chevron practice and suggests that optional two-step may best explain the tensions underlying current Chevron jurisprudence.

Anne Joseph O’Connell, Bureaucracy at the Boundary, available at http://ssrn.com/abstract=2379936. The traditional view of the federal administrative state imagines a bureaucracy consisting entirely of executive agencies under the control of the President as well as regulatory commissions and boards that are more independent of the White House. Administrative law clings to this image, focusing almost entirely on these conventional agency forms. The classic image, however, is inaccurate. The reality of the administrative state is more complex. Contrary to the traditional view, there exists a considerable bureaucracy outside of executive agencies and independent regulatory commissions: for example, the largest employer of non-military government employees, the U.S. Postal Service; the only major operator of passenger trains in the country, Amtrak; the organization that ended the career of cyclist Lance Armstrong, the U.S. Anti-Doping Agency; the primary responder to domestic emergencies, the National Guard; the major international lender to developing countries, part of the World Bank Group; and the federal government’s primary oversight agency, the Government Accountability Office. This bureaucracy lives largely at the boundaries. There are organizations at the border between the federal government and the private sector. There are organizations at the border between the federal government and other governments, including those of localities, states, foreign countries, and Native American tribes. And there are organizations entirely within the federal government that do not fit squarely within the Executive Branch, including but encompassing far more than independent regulatory commissions and boards. The variety, number, and importance of these organizations greatly complicate the structure of the federal bureaucracy as widely perceived. To widen the lens on the administrative state, while trying to retain some tractability, this article locates and classifies the missing federal bureaucracy along the borders of more conventional categories and other important boundaries. In addition to placing these missing parts on the bureaucratic map, it also considers movement to and from the center of these categories. The heart of the article theorizes about these missing components, specifically why political actors would create bureaucracy at the boundary. Under the theory advanced here—and seemingly in reality—these entities are actually the ordinary outcome of the agency design process. This article also considers whether their creation serves social welfare or democratic legitimacy objectives, suggesting that efficiency may not always trump accountability in these alternative agency structures. Finally, this article examines important legal issues surrounding these other bureaucracies and how these entities might shape already established law and governance of federal agencies.

Jack Michael Beermann, Chevron at the Roberts Court: Still Failing after All These Years, available at http://ssrn.com/abstract=2382984. This article looks at how Chevron deference has fared at the Supreme Court since John G. Roberts became Chief Justice. The article looks at Chevron deference at the Roberts Court from three distinct angles. First, the voting records of individual Justices in cases citing Chevron are examined to shed light on the strength of each Justice’s commitment to deference to agency statutory construction. Second, a select sample of opinions citing Chevron are qualitatively examined to see whether the Roberts Court has been any more successful than its predecessor in constructing a coherent Chevron doctrine. Third, the article looks closely at how the Roberts Court has handled one of the most important issues under Chevron, namely the boundary between Chevron deference and judicial review under other standards of judicial review such as the arbitrary, capricious standard that governs all reviewable agency action. On the first angle, in an earlier article, the author presented data on the Justices’ voting records. In that article, he looked at all of the Supreme Court decisions during Chief Justice Roberts’ first four terms in which Chevron was applied by the majority or referenced in a dissent. What he found was that the Court generally split along familiar ideological lines most of the time, with liberals deferring to liberal agency interpretations and conservatives deferring to conservative agency interpretations. The updated data presented in this article confirm this general pattern, although in recent years the Court has deferred to agency decisions in a higher proportion of the cases. On the second angle, a perusal of decisions citing Chevron shows that the Roberts Court has not been more successful than the Rehnquist Court in bringing a measure of coherence to the Chevron doctrine. On the third angle, the Roberts Court has failed miserably to clarify the boundary between Chevron and other standards of review such as arbitrary, capricious review. In short, there is no way to know in advance whether a case should be decided under the Chevron doctrine or under the arbitrary, capricious standard specified in the Administrative Procedure Act.
Matthew Schafer, Toll Gates to Public Information: Establishing a Broad Interpretation of the FOLs News Media Fee Waiver Provision, available at http://ssrn.com/abstract=2380354. The Freedom of Information Act (FOIA) allows for a “waiver” of certain fees if a requester is a “representative of the news media.” The tortured history of this term, however, has made benefitting from this “waiver” (actually the non-imposition of certain fees, as opposed to a general “public interest” waiver of all fees) unlikely, unless one can show that he or she is a bona fide member of a news outlet. This comes despite amendments to FOIA passed in 2007, which some say were intended to ensure that “anyone who gathers information to inform the public, including freelance journalist and bloggers, may seek a fee waiver when they request information under FOIA.” This paper traces the development of this nearly thirty-year-old waiver provision in the legislature, the courts, and the executive branch. It makes the argument that both the judicial and executive branches of the government have not followed the direction of Congress toward a broad interpretation of the provision and suggests how this can be remedied. It concludes that the availability of fee waivers should be determined not by the label applied to the requester, but by the function the requester serves. If that function is a journalistic one, the requester is entitled to a waiver under FOIA.

Kevin O. Leske, Between Seminole Rock and a Hard Place: A New Approach to Agency Deference, 46 Conn. L. Rev. 227 (2013). In Bowles v. Seminole Rock & Sand Co., the Supreme Court held that federal courts must defer to an administrative agency’s interpretation of its own regulation unless the interpretation is “plainly erroneous or inconsistent with the regulation.” Astoundingly, despite its doctrinal significance and practical importance to our administrative state, the Seminole Rock deference doctrine has gone largely unexamined both by the legal community and by the Supreme Court, particularly when compared to the landmark deference doctrines announced in Skidmore v. Swift & Co. and Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. This article explores the genesis of this deference regime and analyzes the Supreme Court’s articulation, application, and interpretation of the Seminole Rock doctrine from its inception in 1945 to the present day. The article then proposes a new approach to the Seminole Rock doctrine. Under this new approach, courts would apply a two-step test to determine whether to defer to an agency’s interpretation of its regulation. By relying upon objective factors, thereby limiting the subjective inquiry, this new approach falls comfortably between Chevron’s controlling deference and Skidmore’s less deferential treatment that courts currently apply when reviewing an agency’s interpretation of a statutory provision. Such an approach would refine the deference regime to achieve better workability, greater fairness, transparency, and increased public participation. It would also balance the competing regulatory and separation of powers concerns inherent in this critical deference question.

Kathryn E. Kovacs, Superstatute Theory and Administrative Common Law, available at http://ssrn.com/abstract=2386025. This article employs William Eskridge and John Ferejohn’s theory of superstatutes to argue that administrative common law that contradicts or ignores the Administrative Procedure Act is illegitimate. Eskridge and Ferejohn conceive of statutes that emerge from a lengthy, public debate and take on great normative weight over time as “superstatutes.” The APA is a paradigm superstatute. Eskridge and Ferejohn posit that superstatutes should be interpreted to evolve, even beyond Congress’s original intent. That assertion, however, is grounded on the assumption that a particular agency is at the center of a deliberative feedback loop that includes Congress, the President, the public, and the courts; the authors did not address superstatutes like the APA that are not implemented by a single agency. Importing superstatute theory into this new statutory context yields a surprising result. In the APA’s case, respecting and encouraging the civic-republican style of deliberation that Eskridge and Ferejohn espouse requires courts to adhere more closely to the compromises encoded in the statute’s text and hesitate before moving too far towards the boundaries of the text’s possible meaning. Venturing beyond those boundaries altogether is even more troubling. In the absence of an agency that spurs public deliberation about the meaning of the APA, administrative common law that contradicts or ignores congressional intent should be presumed to be illegitimate.

Nuno M. Garoupa and Jud Mathews, Strategic Delegation, Discretion, and Deference: Explaining the Comparative Law of Administrative Review, 62 Am. J. of Comp. L. 1 (2014). This paper offers a theory to explain cross-national variation in administrative law doctrines and practices. Administrative law regimes vary along three primary dimensions: the scope of delegation to agencies, agencies’ exercise of discretion, and judicial practices of deference to agencies. Working with a principal-agent framework, the authors show how cross-national differences in institutions’ capacities and the environments they face encourage the adoption of divergent strategies that lead to a variety of distinct, stable equilibrium outcomes. They apply their model to explain patterns of
administrative law in the United States, Germany, France, and Commonwealth jurisdictions.

Daniel A. Farber and Anne Joseph O’Connell, *The Lost World of Administrative Law*, Texas L. Rev., available at http://ssrn.com/abstract=2395276. The APA and leading judicial decisions embody a vision of the administrative process that is increasingly out of touch with reality. They envision a process of policymaking initiated by Congress and then delegated to discrete agencies, which are directed by Senate-appointed appointees. Courts then have the role of ensuring the rationality and statutory fidelity of the decision. This is the lost world of administrative law. Today, however, policy mandates come from both Congress and the White House; decisions may involve multiple agencies and White House officials; and formal APA procedures may be less significant than the independent process established within the executive branch. Most of this takes place outside of judicial purview or public oversight. The authors propose reforms to improve the match between current realities and administrative law, so as to further administrative law’s objectives of transparency, rule of law, and reasoned implementation of statutory mandates.

Glen Staszewski, *Statutory Interpretation as Contestatory Democracy*, 55 Wm. & Mary L. Rev. 221 (2013). This article provides a novel solution to the countermajoritarian difficulty in statutory interpretation by applying recent insights from civic republican theory to the adjudication of statutory disputes in the modern regulatory state. From a republican perspective, freedom consists of the absence of the potential for arbitrary domination, and democracy should therefore include both electoral and contestatory dimensions. The article argues that statutory interpretation in the modern regulatory state is best understood as a mechanism of contestatory democracy. It develops this conception of statutory interpretation by considering the distinct roles of legislatures, administrative agencies, and courts in making and implementing the law. The article claims that this understanding of statutory interpretation is both descriptively accurate and normatively attractive, and it explores some of the most important implications of recharacterizing statutory interpretation in this fashion. Specifically, this understanding of statutory interpretation sheds new light on the most fundamental problems with textualism, and it provides reasons to give serious consideration to proposals for increased judicial candor in statutory interpretation and for judicial review of at least some types of legislation for due process of lawmaking.

Jill E. Family, *Easing the Guidance Document Dilemma Agency by Agency: Immigration Law and Not Really Binding Rules*, 47 U. Mich. J.L. Reform 1 (2013). Immigration law relies on rules that bind effectively, but not legally, to adjudicate millions of applications for immigration benefits every year. This article provides a blueprint for immigration law to improve its use of these practically binding rules, often called guidance documents. The agency that adjudicates immigration benefit applications, the U.S. Citizenship and Immigration Services (USCIS), should develop and adopt its own Good Guidance Practices to govern how it uses guidance documents. This article recommends a mechanism for reform of the Good Guidance Practices and tackles many complex issues that USCIS will need to address in creating its practices. The recommended reforms promote increased accessibility, transparency, and fairness for immigration law stakeholders, including unrepresented parties. The article also contributes to the larger administrative law debate about guidance documents. Guidance documents present a conundrum for administrative law because they have powerful positive and negative features. Because the Administrative Procedure Act does not require agencies to consider public input in the crafting of these rules, agencies may respond more quickly and flexibly than notice-and-comment rulemaking would allow. On the other hand, an agency policy statement (a type of guidance document that explains an agency’s current thinking on a particular issue) is effectively binding even though it is not legally binding. Applicants are free to argue in an adjudication that a different approach should apply. Yet, stakeholders tend to follow the rule announced in the policy statement as if it were legally binding. Thus, there is a practically binding effect without the opportunity for notice and comment. In developing a prescription for USCIS, this article concludes that the best approach to reforming agency use of guidance documents is an agency-by-agency approach. It rejects a one-size-fits-all approach in favor of the opportunity for each agency to formalize its own practices. Such tailored reform recognizes that every agency is different, with its own guidance culture and communities of stakeholders. This approach is designed to ease the negative effects of guidance documents while maximizing their positive features.

Eric M. Fraser, David K. Kessler, Matthew J.B. Lawrence, Stephen A. Calhoun, *The Jurisdiction of the D.C. Circuit*, 23 Cornell J.L. & Pub. Pol’y 131 (2013). The U.S. Court of Appeals for the D.C. Circuit is unique among federal courts, well known for an unusual caseload that is disproportionally weighted toward administrative law. What explains that unusual caseload? This article
explores that question. The authors identify several factors that “push” some types of cases away from the circuit and several factors that “pull” other cases to it. They give particular focus to the jurisdictional provisions of federal statutes, which reveal congressional intent about the types of actions over which the D.C. Circuit should have special jurisdiction. Through a comprehensive examination of the U.S. Code, the authors identify several trends. First, Congress is more likely to give the D.C. Circuit exclusive jurisdiction over the review of administrative rulemaking than over the review of agency decisions imposing a penalty. Second, Congress is more likely to give the D.C. Circuit exclusive jurisdiction over the review of independent agency actions than over the review of executive agency actions. Finally, Congress tends to grant the D.C. Circuit exclusive jurisdiction over matters that are likely to have a national effect. In sum, this article explores what makes this court unique, from its history to its modern docket and jurisdiction.

Colin W. Maguire, Sackett v. EPA Six Months Out: a Wide-ranging Effect with an Uncertain Significance, 30 T.M. Cooley L. Rev. 59 (2013). In an era of contentious 5-4 splits in the Supreme Court, the Court’s unanimous decision in Sackett v. EPA is striking. The decision involved EPA’s breadth of authority in enforcing the Clean Water Act against a property developer—in this case, a couple building their dream home in Idaho. The decision verifies the strength of the Administrative Procedure Act, but to what end? This article focuses on how lower courts have used the decision in the first six months after it was issued. The decision has made an impact on cases involving a wide variety of agencies. Yet the decision’s impact on protecting “the waters of the United States”—whatever those might be, as Justice Alito’s concurrence wonders aloud—is a work in progress. The decision may hold special significance for the Sixth Circuit, and developers have to feel optimistic about this case. Though as it is still “business as usual” at the EPA, one can only wonder if this unanimous decision is the start of a movement to pump the brakes on agency authority in general—with a special focus on wetland regulation.

Elizabeth Chamblee Burch, Revisiting the Government as Plaintiff, 5 J. of Tort Law forthcoming, available at http://ssrn.com/abstract=2362013. This is a symposium essay dedicated to the late Richard Nagareda and written in response to Adam S. Zimmerman’s piece “The Corrective Justice State.” As Professor Zimmerman recognizes, the debate over governments acting as plaintiffs and “regulating by deal” has shifted from initial questions over whether litigation produces the best public policy and whether executive officials are acting within the scope of their authority to how government actors should pursue and allocate settlements. Yet, as this first wave of controversy suggests, the slate upon which executive officials currently write is neither clean nor uncontroversial. Instead, this new debate is playing out in an unsettled landscape where those first-order questions about legitimacy remain unresolved. When layered atop the existing controversy over the intermingling of government functions, executive officials’ relatively new allocative role may put their actions even further at odds with their traditional regulatory and proprietary functions, particularly when the action yielding the compensation is a public substitute for a private right of action. What principles should guide officials in this new role: traditional tort law, social welfare, or political equality principles such as one person one vote? More specifically, should executive officials look to tort law precepts to govern the settlement allocation process and retain concepts such as economic loss and the collateral source rule, or employ a governmental aid aspect, which would suggest a principle of equality that would not vary based on one’s income but would consider collateral sources of compensation? Zimmerman suggests that officials have attempted to justify both their regulatory and allocative decisions with ill-suited corrective justice principles that translate poorly from the private to the public sphere. Despite reservations about whether regulation through litigation results in the best policies or offers democratic checks, he seems more willing to accept executive officials’ increased litigation role in the wake of congressional failings and the difficulty of certifying a private class action. He thus tailors his reform proposals to target the government’s allocative function, suggesting ways to improve legitimacy and transparency in distributing recoveries, whatever the guiding principle might be. Still, certain concerns and questions linger. First, Zimmerman narrows his focus to the second-generation question of allocation, even though he raises and dismisses first-generation concerns over whether executive officials are properly acting within the scope of their authority and whether the regulatory solutions they generate through litigation are legitimate and optimal. Shoring up back-end allocation procedures, however, does not alleviate first-generation legitimacy questions or regulatory concerns. Second, Zimmerman opts not to iron out overarching systemic problems like legislative stalemates or mounting difficulty in certifying class actions, preferring instead (or perhaps more realistically) to work within the circumstances that prompt executive action. Yet, truly legitimizing process and adhering to corrective justice principles would require resolving systemic concerns about
who should litigate and who should regulate. Finally, given concerns that judges already “rubber stamp” class-action settlements and that parties tend to find innovative ways to gerrymander votes and stakeholder input in areas like bankruptcy, one might question the effectiveness of Zimmerman’s proposals for enhancing due process when allocating state recoveries to affected citizens.

In last year’s Term, the Supreme Court considered the question of the scope of Chevron deference in City of Arlington v. FCC. This article presents that decision as an example of the work of an activist Court. The case should have been resolved by a straightforward determination under the analysis of United States v. Mead that Chevron deference does not apply to the FCC’s legal determination. The Court ignored this restrained approach to the case and instead addressed the question the Justices desired to decide: the reach of Chevron deference. The article discusses and criticizes Justice Scalia’s approach writing for the majority and Chief Justice Roberts’s writing for three dissenting Justices. The Court’s decision has the potential to undercuts significantly the impact of Mead because it holds that Chevron deference applies to the question of whether Congress had delegated lawmaking power to the agency, and it is unlikely that many statutes will clearly limit the delegation of lawmaking power to an agency. City of Arlington may accordingly be read as establishing that a court must defer to an agency’s decision that it has received delegated authority when the statute is ambiguous. Such an approach may be defensible if defined as a presumption of legislative intent. The approach, however, directly conflicts with Mead if it is understood as a context for deference to the agency. The decision also undercuts Mead because application of the accepted, presumably proper Mead analysis would have foreclosed the application of Chevron deference. Practitioners of administrative law can only be confused by the application of Chevron deference, given the informal administrative action being reviewed in City of Arlington and the fact that neither reviewing court actually applied each of the two parts of the Mead test. Because none of the decisions properly frames the Mead analysis, perhaps the likeliest effect of the Court’s decision is that it will simply yield greater confusion about the proper standards for judicial review of agency legal determinations. Because the meaning of the decision is unclear, maybe its impact will be limited. That lack of clarity is a consequence of the Court’s activist agenda and its failure to be restrained in the application of previously decided rules.

Presidents check statutory mandates outside the legislative process in a variety of ways. They may hold up implementation of a law, decide not to enforce a law, or decline to defend a law, to name just a few of the ways. The article argues that these “extra-legislative vetoes” serve functions similar to the President’s Article I veto, only with respect to enacted law. The extra-legislative veto (1) requires that legal mandates maintain a threshold level of political support, (2) allows the President to protect the people from (in the President’s view) bad laws, and (3) encourages deliberation regarding controversial policies. But the extra-legislative veto also poses dangers to our Madisonian system because of distinct institutional constraints on its exercise. A unilateral check on congressional acts threatens to transform the President into a “Legislator in Chief” and undermine the stability and transparency of government policy. Based on this reconceptualization of the extra-legislative veto, the article reviews some of its most prominent forms. The article concludes that decisions not to defend a statute provide some of the benefits of an extra-legislative veto without raising significant concerns with transparency, executive lawmaking, or policy destabilization. Enforcement policies provide greater deliberation-forcing benefits, political responsiveness, and protection from “bad law,” but also increase executive lawmaking. While judicial review sets boundaries on policy instability, it does little to ensure the transparency of enforcement discretion. Conversely, judicial review of rulemaking does a better job promoting the transparency of statutory implementation, but limits the extra-legislative veto’s political responsiveness. Finally, the presidential non-enforcement theory recently advanced by some scholars would dramatically increase the President’s power to protect the people from unconstitutional laws, but risks greater executive lawmaking and oscillations in policy, without the same deliberative benefits or political responsiveness of other extra-legislative vetoes. Accordingly, the article proposes institutional mechanisms to preserve Congress’s voice in inter-branch policy deliberation, while leveraging the extra-legislative veto’s power to protect the people from “laws gone bad.”

Mila Sohoni, Agency Adjudication and Judicial Nondelegation: An Article III Canon, 107 Nw. U. L. Rev. 1569 (2013). The rules governing judicial review of adjudication by federal agencies are insensitive to a critical separation-of-powers principle. Article III jurisprudence requires different treatment of agency adjudication depending on whether the agency is adjudicating a “private right” or a “public right.” When
agencies adjudicate private rights, review of the agency adjudication must be available in an Article III court on a direct appellate basis. In contrast, Article III jurisprudence does not require review to an Article III court on a direct appellate basis of agency adjudications of purely public rights. That means that federal courts reviewing agency adjudications of private rights have a greater responsibility for vindicating Article III values than federal courts reviewing public rights adjudications. Administrative law’s deference doctrines do not reflect this distinction. The degree of deference courts owe to agencies does not vary depending on whether adjudication involves “public” or “private” rights, in the Article III sense of those terms. In either case, Article III courts review agency adjudication deferentially. This article challenges that deference. Courts should calibrate their degree of deference in accordance with the Article III line and apply more robust review to agency adjudication where private rights are at stake. This approach would vindicate separation-of-powers values, promote better administrative decisionmaking in private rights cases, and dovetail with entrenched doctrines of constitutional and administrative law. Interestingly, the logic of Article III elaborated here suggests one explanation for why some federal courts, in certain cases implicating quasi-private rights, are declining to defer to agency adjudications in a manner recognized to be inconsistent with the demands of ordinary administrative law.

John M. Golden, The USPTO’s Soft Power: Who Needs Chevron Deference?, 66 SMU L. Rev. 541 (2013). By many measures, the United States Patent and Trademark Office (USPTO) is no bureaucratic bantam. The USPTO compares well in size and budget to the Securities and Exchange Commission (SEC), which is commonly recognized to be a “powerful” and “respected” federal agency. In terms of employment and budgetary measures, one might say that in 2012 USPTO was about double the agency the SEC was. Nonetheless, in terms of recognized power to speak on substantive questions of law, the USPTO can seem an institutional mite. Like many other administrative agencies, the SEC can receive high-level Chevron deference when the courts review its interpretations of the statutes it administers. In contrast, courts view the USPTO as lacking any general grant of so-called “substantive rulemaking authority” and, thus, as generally not meriting high-level deference for its interpretations of substantive aspects of the Patent Act. A number of commentators have criticized this distinctive aspect of U.S. patent law’s institutional structure. But for the most part, need we care that much about it? This paper argues that an agency like the USPTO can do much to shape substantive law even without the benefit of Chevron deference.

Stephanie R. Hoffer and Christopher J. Walker, The Death of Tax Court Exceptionalism, available at http://ssrn.com/abstract=2393412. Tax exceptionalism—the view that tax law does not have to play by the administrative law rules that govern the rest of the regulatory state—has come under attack in recent years. In 2011, the Supreme Court rejected such exceptionalism by holding that judicial review of the Treasury Department’s interpretations of the tax code is subject to the same Chevron deference that applies throughout the administrative state. The D.C. Circuit followed suit by rejecting the Internal Revenue Service’s (IRS’s) position that its notices are not subject to judicial review under the Administrative Procedure Act (APA). This article calls for the demise of another instance of tax exceptionalism: the U.S. Tax Court’s longstanding view that it is not governed by the APA. In addition to presenting the legal case against Tax Court exceptionalism, the article explores administrative law and tax policy considerations that favor the Tax Court following traditional administrative law, including consistent application of the law, efficient allocation of resources, horizontal and vertical equity, comparative agency expertise, and a proper separation of powers. Moreover, by following administrative law principles that may be more deferential to the IRS in a particular case, the Tax Court can establish a richer dialogue with the IRS to improve agency procedures and decisionmaking—thus advancing tax policy’s interest in protecting less sophisticated taxpayers while increasing economic efficiency. With a growing circuit conflict as to whether the Tax Court is bound by the APA, the Tax Court should reverse course now before the Supreme Court intervenes to declare the death of tax exceptionalism in yet another area of tax law.

Michael C. Pollack, Judicial Deference and Institutional Character: Homeowners Associations and the Puzzle of Private Governance, 81 U. Cin. L. Rev. 839 (2013). Much of the study of judicial review of governing institutions focuses on the institutions of public government at the federal, state, and local levels. But the courts’ relationship with private government is in critical need of similar examination, and of a coherent framework within which to conduct it. This article uses the lens of homeowners associations—a particularly ubiquitous form of private government—to construct and employ such a framework. Specifically, the article proceeds from the premise that judicial deference is less appropriate the more unaccountable a governing institution is, and therefore develops a set of tests for institutional accountability. Applied to the homeowners association, this accountability analysis reveals that the analogy most often resorted to by state courts—that of the corporation—is inappropriate,
because homeowners associations and corporations have fundamentally different internal accountability mechanisms. They therefore require different sorts of judicial accountability tests to show that a more fitting deference regime for homeowners associations could be drawn from an analogy to administrative agencies.

Daxton R. Stewart, *Evaluating Public Access Ombuds Programs: An Analysis of the Experiences of Virginia, Iowa and Arizona in Creating and Implementing Ombuds Offices to Handle Disputes Arising under Open Government Laws*, 2012 J. Disp. Resol. 437 (2012). The federal government, the District of Columbia, and all 50 states have passed open government laws, which are intended to ensure public access to government records and meetings. Yet long after the earliest of these “sunshine laws” went into effect, citizens and journalists still struggle to consistently receive access to meetings and records as the laws require. An inherent tension exists in the relationship between a citizenry that wants to remain informed and agents of government who seek to control information, and this tension may be even greater between the government and those given special protection under the First Amendment to monitor government—the news media. While every state offers judicial remedies for parties who feel they have been wrongfully denied access to records or meetings under the law, alternative programs have been created in several jurisdictions. As of year-end 2009, 32 states (as well as the Federal Government, as of September 2009) have implemented some kind of alternative dispute resolution (ADR) program to handle public access issues, including administrative agencies, mediation programs, public access counselors, special duties for attorneys general, and groups to provide informal advisory opinions. Five states have created ombuds programs to scrutinize public access issues, and others have incorporated already existing ombuds programs to investigate complaints regarding public access matters. Though ombuds offices used to manage public access disputes have been in existence for nearly a decade, the process of creating and operating these programs has been the subject of little empirical research. This study, informed by Dispute Systems Design theory, includes the conclusions drawn from case studies of public access ombuds offices in three jurisdictions: Virginia and Iowa, two programs which have been in existence for nearly a decade, and the recently created Arizona program. The article begins with a review of literature regarding ombuds, public access laws, and dispute systems design. It follows with case studies of the development of public access ombuds offices in Virginia, Iowa, and Arizona. Finally, this article draws conclusions from those experiences, offering guidance to aid other jurisdictions in designing their own ombuds programs.

Philip A. Wallach, *When Can You Teach an Old Law New Tricks?*, 16 N.Y.U. J. Legis. & Pub. Pol’y 689 (2013). This article considers the distinctive legal and institutional dynamics involved when agencies interpret existing statutes for novel purposes. It argues that courts take into account policy-specific institutional factors, such as legislative dysfunction, when they consider the propriety of such novel interpretations, rather than employing universal ideas about institutional competencies. Where Congress has shown an inability to legislate in a policy area, courts are more likely to sympathize with changes in interpretation as partial substitutes for new legislation, but relying on old statutory language creates problems of statutory mismatch. The article contends that many arguments over statutory meaning mask disagreements about the appropriate roles of agencies, Congress, and courts—some of which could be resolved through systematic empirical investigation. The article’s institutional perspective is used to reconcile two of the most important statutory interpretation decisions in recent years, *FDA v. Brown & Williamson Tobacco Corp.* (2000) and *Massachusetts v. EPA* (2007).

Nancy Morawetz, *Convenient Facts: Nken v. Holder, the Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. Rev. 1600 (2013). In April 2012, facing a court order to disclose internal Justice Department e-mails, the Office of the Solicitor General (OSG) wrote a letter to the Supreme Court to admit that it had made a factual statement to the Court three years earlier in *Nken v. Holder* about agency policy and practice that was not accurate. The statement had been based on e-mail communications between Justice Department and agency lawyers. In fact, the statement neither reflected the content of the e-mails nor the actual policy and practice of the relevant government agencies. The letter promised remedial measures and concluded by assuring the Court that the OSG took its responsibility of candor seriously. The underlying factual representation by the OSG in the *Nken* case was unusual because it attracted attention and lengthy Freedom of Information Act (FOIA) litigation that led to the disclosure of the communications that served as the basis of the statement. But it is not at all unusual as an example of unsupported factual statements by government lawyers that are used to support legal arguments. Indeed, unsupported statements appear in OSG briefs on a wide range of issues. These statements benefit from the unusual position of the government: It has access to information not available to other litigants, and it benefits from a presumption of candor that endows
its statements with a claim of self-evident authority that no private litigant could match. The Nken case provides a unique opportunity to explore the consequences of judicial acceptance of fact statements provided by the OSG. Because of FOIA access, we have an opportunity to examine how the OSG gathered information as well as the role played by government counsel at the Justice Department and the interested agencies. This examination shows multiple dangers with unsupported statements about internal government facts. It also demonstrates the potential difficulty with relying on lawyers representing the government to seek out and offer information that will undermine the government’s litigation position. Finally, it shows that it can be dangerous to rely on the party that has misled the Court to develop an appropriate remedy. Prevention of misleading statements could be pursued through greater self-regulation, prohibition of extra-record factual statements, or through a model of disclosure and rebuttal. This article argues that the experience in Nken reflects the grave danger in presuming that self-regulation is an adequate safeguard against erroneous statements. It further argues that despite the appeal of a rigid rule that prohibits such statements, such an approach ignores the Court’s own interest in information about “real-world” facts that are relevant to its decisions. The article concludes by arguing that the best proactive approach is to adopt a formal system of advance notice combined with access to the basis of the government’s representations of fact. It further argues that courts should refuse to honor statements in court decisions that are based on untested statements of fact by the government.

Justin (Gus) Hurwitz, *Chevron and the Limits of Administrative Antitrust*, available at http://ssrn.com/abstract=2351858. Section 5 of the Federal Trade Commission Act makes “unfair methods of competition” illegal and gives the FTC authority to enforce this proscription. This term is undefined by the statute—indeed, Congress deliberately left the term ambiguous in order that judicial construction of the term would not prevent the FTC from restraining such conduct. Ordinarily, one would expect that courts would defer to agency interpretations of such inherently and deliberately ambiguous terms—this is about as clear a case for *Chevron* deference as one can imagine. Remarkably, however, the FTC has relied exclusively upon judicial construction of the term (viz., that proscription of “unfair methods of competition” allows the FTC to enforce antitrust laws as defined by the Sherman and Clayton Acts). Indeed, there is widespread consensus within the antitrust bar that *Chevron* does not apply to FTC interpretations of Section 5. This article explores the origins of this folk knowledge—how the antitrust bar has gotten things so wrong—and the implications this has for FTC enforcement of Section 5. In so doing, this article makes three distinct contributions. First, it explains that *Chevron* does apply to FTC interpretations of Section 5. Second, this article argues normatively that *Chevron* deference compounds already serious jurisprudential questions about the agency’s recently aggressive and informal approach to competition issues, and considers possible limits on a *Chevron*-supercharged Section 5. And third, this article provides a useful case study in how misunderstandings of the law propagate, and serves as a stark reminder of the need for different groups of lawyers—especially those who are highly specialized—to know the limits of their own expertise.

Jack Michael Beermann, *Rethinking Notice*, Boston Univ. School of Law, Public Law Research Paper No. 13-49, available at http://ssrn.com/abstract=2349716. The issue addressed in this paper is what standard reviewing courts should apply when deciding whether changes between a proposal and final rule render the notice inadequate under APA § 553. The author has written about this issue before, taking the position that courts should stick closely to the language of § 553 and generally allow agencies great leeway in making changes between proposals and final rules. In this essay, he raises some concerns about his earlier position that have led him to reconsider the issue. In short, there is a good instrumental case to be made against strict adherence to the text of the APA and in favor of requiring a new round of notice and comment when agencies make unanticipated changes to their proposals when promulgating final rules.

Robert Reinstein, *Is the President’s Recognition Power Exclusive?*, available at http://ssrn.com/abstract=2351966. The power of the Federal Government to recognize foreign states and governments is much broader than the authority merely to place a symbolic stamp of legitimacy on that state or government. Recognition allows foreign governments to establish diplomatic relations with the United States and also confers other substantial benefits on those governments. Despite its importance to foreign relations, the recognition power was not enumerated in the United States Constitution or discussed in the Constitutional Convention or ratification debates. A recent decision of the Court of Appeals for the D.C. Circuit, *Zivotofsky ex rel. Zivotofsky v. Secretary of State*, created a conflict between executive and congressional
policies over a controversial, and as yet unresolved, political issue: the status of Jerusalem. The court relied on post-ratification history that, it concluded, established that Presidents consistently claimed, and Congress consistently acknowledged, that the recognition power was exclusively an executive prerogative. The passport statute was held to unconstitutionally infringe on the Executive’s recognition power. This article provides the first in-depth analysis of the historical relationship of the executive and legislative branches to the recognition power in nearly a century. The article examines in detail the post-ratification recognition events discussed by the court of appeals, beginning with the decisions of the Washington Administration during the Neutrality Crisis in 1792-93. The article also examines events not addressed by the court of appeals, most significantly early congressional acts of recognition and the 1979 Taiwan Relations Act. The article concludes that post-ratification history establishes an authority in the President to recognize foreign states and governments, but provides little support for any claim of an exclusive recognition power. However, post-ratification history is not by itself dispositive. The legal importance of the history is examined through the lens of certain fundamental questions, including the significance of presidential and congressional inaction, acquiescence, and acknowledgement. The article analyzes these questions through constitutional doctrine and normative values, ultimately concluding that the constitutional text, original understanding, structure, and post-ratification evidence do not support an exclusive recognition power in the Executive. The President’s recognition power is subject to the legislative control of Congress.

News from the Circuits continued from page 21

“it is impossible to review ATRA’s challenge outside the context of a particular state tort action in which preemption is at issue.”

6th Circuit—Informal agency statement cannot add to statutory requirements

In Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722 (6th Cir. 2013), home buyers sued their real estate agent for violating the Real Estate Settlement Procedures Act (RESPA) prohibition on payments of fees in exchange for referrals. The basis for the action was not an actual fee paid by the title company to which the realtor referred the buyers, but the business relationship between the title company and the realtor — they shared common ownership. This would have constituted a RESPA violation but for a statutory exception for “affiliated business arrangements.”

The statute created a “safe harbor,” under which a business relationship qualifies for the statutory exception if it meets the following three criteria: “(1) [t]he person making the referral must disclose the arrangement to the client; (2) the client must remain free to reject the referral; and (3) the person making the referral cannot receive any ‘thing of value from the arrangement’ other than ‘a return on the ownership interest or franchise relationship.’” The parties agreed that the companies met these criteria, but the buyers argued that the title company involved in the arrangement must also constitute a “bona fide provider of settlement services” under a policy statement that had been issued by the Department of Housing and Urban Development. The policy statement set out ten factors to be weighed in determining whether the company was a bona fide provider. The buyers asserted that the title company did not satisfy this test.

The Sixth Circuit rejected this argument. First, the court did not consider the informal agency statement to be an interpretation or to be binding. The statement was simply “non-binding advice about the agency’s enforcement agenda, not a controlling interpretation of the statute.” Second, even if the “bona fide” requirement were a binding interpretation, Congress had established the three criteria for determining whether a business relationship is bona fide, and the ten-factor test was merely a nonbinding statement of policy. Finally, the court emphasized that where, as here, criminal penalties are possible, “[t]he government’s duty of fair notice precludes us from supplementing the safeguards expressed on the face of the statute with a multi-factor blend that the statute nowhere mentions.” This point was buttressed in a concurring opinion that addressed at length the relationship between Chevron deference and the rule of leniency, coming down strongly on the side of leniency.
9th Annual Homeland Security Law Institute
NEW DATES! ★ August 21–22, 2014
Walter E. Washington Convention Center, Washington, DC

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★ DHS – What to Expect from the Department in 2014
★ A Look at the Continuing Changes and Challenges at the National Protection and Programs Directorate (NPPD)
★ Homeland Security Legislative & Regulatory Outlook – 2014
★ Striking the Balance: Privacy vs. Security
★ Homeland Defense & Civil Support: Domestic Military Roles and Responsibilities
★ Financial Power and National Security: Intelligence Tools & Strategies
★ Law Enforcement Agenda 2014
★ Infrastructure Protection Regulations: Chemical Facility Anti-Terrorism Standards (CFATS)
★ Contracting Issues with DHS
★ The Foreign Corrupt Practices Act (FCPA): Doing Business Internationally
★ DHS General Counsel’s Office: New Technologies and Homeland Security
★ America’s Immigration Agenda
★ Support Anti-Terrorism by Fostering Effective Technology (SAFETY) Act
★ Protecting the Power Grid Against Threats Unknown or Unknownable
★ Export Control: What Role Does DHS Play?
★ Transportation and Cargo Supply Chain Security Screening
★ National Security Strategy for 2014 (NON-CLE)
★ Committee on Foreign Investments in the United States (CFIUS) – 2014 and Beyond
★ Executive Power in Immigration Law
★ National Response Framework: Legal Considerations in the Federal Emergency Management Agency (FEMA)
★ Cybersecurity Challenges and Changes 2014

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★ Interpreting The APA – Text and Common Law
★ Innovation Case Studies at the EPA, CFPB and DOD
★ International Administrative Law -- WTO and Implications for Rulemaking
★ International Comparative Law – Accountability Mechanisms
★ TTIP Enhanced Stakeholder Input
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★ The Future of Agency Guidance Documents and Policy Statements
★ Deference: Chevron turns 30 … and what about Auer?
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★ Government Information and Privacy Law Update
★ Administrative Adjudications, Federal and State
★ Regulatory Flexibility Act: A Guide for the Perplexed
★ The Puzzling Persistence of Secret Law
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