Also In This Issue

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9th Annual Homeland Security Law Institute

NEW DATES! ★ August 21–22, 2014
Walter E. Washington Convention Center, Washington, DC

TOPOCAL AGENDA

★ 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 Unknowable
★ 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


For more information and to register, please contact Angela Petro at (202) 662-1582 or angela.petro@americanbar.org
This is my final Chair's Corner. I thought it appropriate to reminisce on the simple acts of courage that occurred on September 11, 2001—now almost 13 years ago—and the senseless deaths and injuries to so many innocent people by unconscionable terrorists. Everyone older than 20 can recall where they were on that fateful day now simply known as “9/11.” I had gone to the Marine Base at Camp Lejeune, North Carolina, to represent a witness in a Marine Court Martial proceeding. My client and I entered the base without any checking of my client’s van—just a hand wave from the Marine at the gate. Of course, all of that would change drastically in a matter of hours.

While in the witness room, waiting for my client to be called to the stand for his testimony, we learned of the attacks on the World Trade Center and the Pentagon, and the crash of Flight 93 in Pennsylvania. It was somewhat surreal to be surrounded by military personnel whose only knowledge of those terrible events was coming from a television in the witness room.

DHS is Created

After saying good-bye to my client, I spent the balance of the day talking with friends and family from my cellphone on the long drive back to my home in Atlanta, Georgia. I was ready to return to government service and leave private practice, and many months later at the end of 2002, a call came from White House Personnel: “Would I be interested in being the General Counsel of the new Department of Homeland Security?” My initial answer was one of appreciation for being considered; however, I said that I was uncertain if I was the right person for this important position with so many other well-qualified attorneys who would have been outstanding in this post. After some personal reflection with family and friends, I told White House Personnel that I would be highly honored to meet with Tom Ridge, the former Governor of Pennsylvania, who was going to be tapped by the President to be the first Secretary of this new Department.

Becoming General Counsel

Meeting Ridge was a singular event for me—he was and is a patriot and an amazing leader. The meeting with him convinced me that I wanted to be the first General Counsel at DHS. I soon accepted the offer to be the President’s nominee to fill the General Counsel spot.

No merger and joinder of so many departments and agencies had occurred since the creation of the Department of Defense in the Truman Administration. In truth, no one really was in a place to share with us the thinking on the statutory and regulatory steps that were needed to unite twenty-two separate entities into one cabinet department.

The Homeland Security organic statute created the Office of General Counsel, in just two sentences:

“DEPUTY SECRETARY; UNDER SECRETARIES—There are the following officers, appointed by the President, by and with the advice and consent of the Senate: . . . A General Counsel, who shall be the chief legal officer of the Department.” 6 U.S.C. 113 § 103(a)(1)(j).

These few words provided very little guidance—so with the help of others, I drafted a memo that defined the General Counsel’s duties and responsibilities. It is still in existence today—and is only 2 pages long.

“Regs-R-Us”

After Senate confirmation, and with the help of a small cadre of DHS attorneys and many lawyers from other agencies sent to DHS, I set about building the architecture of the General Counsel’s office. Some of the original framework exists today. A number of attorneys were transferred with the incoming entities, and others were hired to oversee different components of the General Counsel’s office as Associate General Counsels. In those early days, and I’m sure today, the General Counsel Headquarters operations relied heavily on the historical talent in the components of the Counsels’ Offices from the many agencies that made up DHS.

Teamwork at DHS

We addressed the challenge of taking an informal ad hoc approach to rulemaking by building the formal regulatory infrastructure for a new Department and developing regulations for a daunting number of new DHS agencies in airports, seaports and at the borders—all it seemed at one time. This effort required substantial cooperation with the Office of Management and Budget (OMB) and Office of Information and Regulatory Affairs (OIRA) on a daily basis.

Right out of the chute we needed to develop regulations for statutes such as the Support Anti-Terrorism by Fostering Effective Technologies (SAFETY) Act, the Maritime Transportation Security Act (MTSA), and more. This incredible regulatory undertaking at DHS could not
have taken place without the help of our many components, such as Transportation Security Administration (TSA), U.S. Customs and Border Protection (CBP), U.S. Secret Service (USSS), Federal Emergency Management Agency (FEMA), U.S. Immigration and Customs Enforcement (ICE), U.S. Citizenship and Immigration Services (USCIS), U.S. Coast Guard (USCG), and the National Protection and Programs Directorate (NPPD)—and that is just a partial list.

**Administrative Law & Regulatory Practice Section and the Homeland Security Law Institute**

In the midst of this effort, I was asked to speak at the ABA’s Administrative Law Section Fall Conference. It was my first opportunity to talk about the building of the new Department’s regulatory infrastructure and my first exposure to the remarkable people in the Administrative Law Section. Later, in 2005, after I left the General Counsel’s post, former Section Chair Randy May approached me about putting together a program, and the Homeland Security Law Institute (HSLI) was born as a venue for the 2,000-plus lawyers at DHS and other federal and state agencies to come together and discuss with private sector lawyers the safety and security of America from a number of different perspectives. Nine years later, this year’s Institute will be held on August 21-22, 2014 at the Walter E. Washington Convention Center in Washington, DC. I have described the Institute as a winery filled with bottles of old and new wine, and I hope you will take this opportunity to attend the various discussions which will examine the latest cross-cutting issues and hot topics, and consider it to be like a wine-tasting. As our Section’s slogan says, ”Administrative Law – Everybody Does It!” Don’t forget to register today and help us in spreading the word about the program, encouraging others outside of our Section to attend. I look forward to seeing everyone at the Institute.

**Thanks To All**

So, as I pass the baton of Leadership to incoming Chair Anna Shavers, I do it with confidence that the Administrative Law Section will continue to flourish and be a place for the considered discussion and debate of the important legal underpinnings of every federal and state administrative law. DHS, where I served, is just one example of how the promulgation of regulations has served the American people in a way that hopefully enhances our freedom and security in all of our lives.

I close with appreciation to my friends at DHS and the colleagues I have had the pleasure to lead as Chair of the Administrative Law Section. It has been an honor and privilege to have been asked to serve as a leader in both organizations.

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Chair’s Message ................................................................. 1
Remarks of Consumer Financial Protection Bureau Director Richard Cordray .............................. 5
FTC Enforcement Actions Against HIPAA Covered Entities ......................................................... 9
2014 Winners of ABA’s Silver Gavel Awards for Media and Arts—History of Awards & Invitation to Attend Future Awards Presentations ................................................. 12
Supreme Court News .................................................................... 15
News from the Circuits .................................................................... 21
Recent Articles of Interest ..................................................................... 24

Administrative & Regulatory Law News

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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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t is a pleasure to be here and to have the opportunity to reflect more generally about the regulatory work we do day in and day out on behalf of consumers.

Not quite a century into this new experiment of our democratic republic, Abraham Lincoln felt the need to remind us at the Gettysburg battlefield that it remained an open question whether such a novel government “of the people, by the people, for the people” could long endure. Through many further tests—such as wars, economic crises, and dramatic changes in social norms—we have continued to answer that question successfully, though our model of representative government continues to evolve in various ways.

I am serving in a new role in the federal government, as the first Director of the Consumer Financial Protection Bureau. My colleagues and I are blessed with responsibility for a mission that seeks to further our society’s noblest aspirations. We are the first federal agency ever created with the sole purpose of protecting consumers and seeing that they are treated fairly in the financial marketplace. It is no easy task, but it is crucial because the financial marketplace can be no easy place for consumers. And for this generation of consumers, household credit services—which are often tantamount to the opportunity to improve one’s life chances—are taking on greater importance than ever before.

The Consumer Bureau was born out of the landmark financial reform legislation of 2010. As was true when the United States was coping with the dislocations of the Great Depression, Congress created this independent agency to treat some of the malignancies that caused so much pain and difficulty for millions of Americans. Our job is to understand and analyze the markets for consumer financial products and services that are pervasive in our modern world, and to act as necessary to ensure access to credit and fair treatment for individual Americans.

In approaching our work, we have made it very clear that we see ourselves as a 21st century agency. What does this really mean? Among other things, it means an agency built on a strong democratic foundation of public engagement. And it means an agency that prides itself on using technology and other new tools to achieve broad outreach to communities across the country and to the individual consumers we were created to serve. We work to educate consumers, to enforce federal consumer financial laws, and to write rules that will make these markets work better for consumers.

We also are an independent agency in the evolving traditions of American government. This model of administrative independence was developed more than a century ago to balance what was perceived as the growing power and influence of bigness in the economy. Out of the Progressive Era and later the New Deal, conceived and developed by practical theorists such as Woodrow Wilson and Louis Brandeis, this model is designed to bring greater expertise and more specialized focus into our system of government. One of the central questions it raises, to refer back to Lincoln for a moment, is how this new concept of the independent administrative agency can be squared with our democratic system of representative government.

Today, I am going to explore these issues by giving you an overview of how our rulemaking processes work, explain how we are doing some things differently, and talk about our evolving efforts to effectuate a new project that we call “regulatory implementation.”

So let us begin with how the rulemaking process works.

As many of you know very well, the Administrative Procedure Act lays out a defined process for agency rulemaking. Under our governing statute, however, the Consumer Bureau often has additional steps to follow. For example, where the rules we are contemplating would have a significant impact on a substantial number of small businesses, we must begin our process by creating small business review panels. We do this in conjunction with the Office of Management and Budget and the Small Business Administration’s Office of Advocacy. The goal is to gather input on our ideas from small financial services providers panels before we formulate a proposal. Concurrently, we have made it our practice to solicit the input of other stakeholders as well, including larger institutions, consumer advocates, vendors, government agencies, and other parties as appropriate depending on the nature of the rulemaking.

Absent exigent circumstances, any substantive rule must then be openly proposed through a notice in the
Federal Register. This publication of our initial proposal becomes the APA’s triggering mechanism for a period of public comment. We have a legal obligation to sift through the comments, digest them, and consider them carefully in the course of finalizing the rule. Under the APA, this process is intended to leaven our delegated authority to “fill in the details” of federal legislation with the insights that come from public participation in the process. This heightened transparency through greater participation is thus a means of helping to square the workings of expert agencies with the principles of democratic government.

A practical problem, however, is that, on the whole, people do not read the Federal Register. And while agency communications with the public have improved over the last 60 years, it is still the case that rulemaking remains largely inaccessible to the average citizen and most of the businesses to whom the rules apply. Unsurprisingly, many comments come from a cottage industry of trade associations, advocates, lobbyists, and regulatory lawyers who are fluent in agency processes. While such groups play an important role in the vetting of rules, individual citizens and smaller businesses may find it difficult to participate and present their experience and their views. So we have made serious efforts to seek more input from the broader public.

We believe it is important to do that because of the role fashioned for this new agency. Our job is to write rules intended to protect consumers of financial products and services, a universe that covers virtually everyone in this country. And so these rules need all of the input, understanding, and support that we can gather from a broad range of Americans. Indeed, the Bureau has many financial experts, but it is our everyday consumers who know the bottom line. Who are they? They are responsible working families that scrimp to save enough to pay their bills on time, but have trouble securing a mortgage. They are people who are harmed by predatory practices. They are students who increasingly are leaving college saddled with high levels of debt. Our goal is to make sure that their voices are heard in our regulatory processes.

At the same time, the rules that we are writing typically will cover a wide range of institutions, from trillion-dollar megabanks to small community banks or credit unions that may have just a few employees and assets counted in the millions of dollars rather than the trillions. Like the average consumer, these businesses have much to contribute to the rulemaking process, but they, too, may find it difficult to provide input.

So we are working to reimagine the notice-and-comment process for our rulemakings. This is not an easy job, since consumers and small businesses are inundated with information, and capturing their attention is no easy task. Moreover, government agencies are not typically known for communicating with consumers or small business in a clear fashion—but we want to change that.

One way is by experimenting with online pilot projects like Cornell University’s e-Rulemaking Initiative to reach broader audiences. Some brave souls at Cornell University Law School have designed what they call the Regulation Room, an online project aimed at increasing the breadth and quality of public participation in rulemaking. Their approach starts from an easy-to-read summary of the main issues or provisions and then allows people to comment, in a relatively informal way. A moderator is available to answer questions and, where appropriate, to frame questions to the commenter. Cornell then submits to us a detailed summary report, called “Discussion Summaries,” which are included on the public docket.

This interactive process produces a level of engagement that deepens knowledge on both sides, and allows citizens to participate in rulemaking by means of a controlled forum. We did this when we proposed mortgage servicing rules and we did it again in connection with an advance notice of proposed rulemaking on debt collection. The Cornell initiative had never previously provided feedback on a federal government rulemaking. We are finding it worth the effort to engage the public in new and different ways.

Even after the comment period on a proposal closes, we have been willing to meet frequently with various stakeholders. At this stage, as we work toward finalizing our rules, we are still thinking about how to solve some of the hard problems at hand. And we have found that we continue to benefit by meeting with people and groups representing a broad spectrum of views, as long as they are willing to include in our administrative record a summary of the meeting so that our processes remain transparent.

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During our first 18 months of existence, our rulemaking activities were largely ones mandated by the Dodd-Frank Act to implement provisions of the statute governing the mortgage market. That was clearly the right priority, since irregularities in the mortgage market were the primary cause of the financial crisis and economic meltdown. We were mandated to complete those rulemakings by January 2013, and through the tremendous efforts of our dedicated team we succeeded in meeting that hard deadline.

We are now in the process of considering other areas for rulemaking where we will be implementing federal law but without a specific congressional mandate or timeline. In these areas, before commencing the rulemaking process, we have sought to build our foundation of knowledge through a variety of means. This ranges from research that we have
learn from the comments we receive and our final rules are helpfully informed by that input on a consistent basis. But even after we issue a final rule, if we find over time that any of our substantive calls need to be reconsidered, we can and will face the issue frankly and address it. We will not let pride of authorship interfere with the serious task of policymaking. We feel that way especially because we fully appreciate how hard the task is, given the constant perils of unintended consequences, changes in circumstances, and the difficulty of predicting the future.

Indeed, that is exactly what we did with the first substantive rule we issued to implement the provisions of the Dodd-Frank Act, which regulated remittances or international money transfers for the first time. We issued a rule in January of 2012 mandating that remittance providers, in disclosing the cost of a transaction, include the costs of foreign fees and taxes. Even after we issued the rule, we continued to speak to stakeholders and ultimately determined that the requirements to disclose foreign fees and taxes would be so difficult to implement that they could cause significant curtailment in access to these services. Although we were reluctant to revise a rule so quickly, we believed that fixing this problem was the right thing to do for consumers and providers both. For as Justice Frankfurter observed: “Wisdom too often never comes and so one ought not to reject it merely because it comes late.” We have also taken and continue to take the same approach to our mortgage rules, as I will describe in more detail in just a moment.

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Let me now turn to another aspect of our approach that has proven to be vital to good rulemaking: regulatory implementation.

At the Consumer Bureau, our rulemaking process does not end with finalizing a set of rules. It is not good enough for us to take the view that once new rules are published, our work is done and we can say to financial institutions that “it is your problem now.” If the point of our regulations is to protect consumers and to promote fair, transparent, and competitive markets, then we should care a great deal about how well the rules are implemented.

Agencies routinely provide some period between issuance of a rule and its effective date to allow for an implementation period. This period allows a sensible transition time to adjust to the new regime, which includes the need to make operational changes, develop new processes, and train employees to understand and effectuate the changes that are being made. To focus more closely on operational changes, in this day and age one of the major projects is always to overhaul IT systems, not a factor at the time the APA was enacted but now a critical factor for both financial organizations and their service providers. But the entire range of operational changes poses interesting problems, which may not be fully understood until the process is underway and the problems are confronted directly.

Another dilemma is that it can be difficult for anyone to gauge the appropriate length of the implementation period for a given rule or set of rules. In our notices of proposed rulemaking, we typically seek comment on this issue. Industry representatives often seek a long implementation period, but they rarely provide any persuasive data to explain exactly why the estimated period is actually justified. Perhaps this is because they may not know themselves how to predict the future course of a brand-new project, which is understandable enough. Reasonable people might judge that we have set certain implementation periods either too long or too short, depending on how the steps in the process actually unfold. We have made it a point to have people at the Bureau with background and experience in financial operations, which helps, but we would clearly benefit by getting more and better information from regulated entities about these issues.

Despite our best efforts, we recognize that the outcome of any human process will be imperfect. We conducted and published, to market monitoring efforts that we have been developing, to processes of securing public input through requests for information and advance notices of proposed rulemaking. We also have made a point of going outside of Washington to hold monthly field hearings on subjects of general interest and concern, such as payday lending, debt collection, or credit reporting. These hearings enable us to get more perspective from consumers and other stakeholders located in diverse communities throughout the country.

We also are refining our approach to prioritizing different areas and issues to be addressed by our regulations. One of the ways we are doing this is by placing the voice of the consumer at the center of our consciousness. We are soliciting, receiving, and handling a growing volume of complaints directly from consumers on a wide range of financial products and services. When we inaugurated our consumer response function in July 2011, we began by taking complaints only about credit cards, and we received 520 complaints that month. Our program has now expanded and evolved, to the point where last month we received over 20,000 complaints on financial products including mortgages, credit cards, auto loans, student loans, banking account products, payday loans, debt collection, credit reporting, money transfers, and other consumer loans. The patterns formed by more than 300,000 consumer complaints received to date help to underscore the importance of various issues as articulated by consumers themselves, in real time, that are worthy of our careful attention. This intensive focus on the voice of the consumer is also important as long-term insurance against the possibility of agency capture, to keep us from losing sight of the mission Congress conferred on us.

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It is unclear how best to resolve this dilemma, but we are very committed to developing sensible and workable solutions. We will continue to learn more about these issues by deepening our outreach to vendors and taking other steps to set appropriate implementation periods.

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Regardless of its length, any such period creates an opportunity to facilitate implementation of the new rules. With our mortgage rules, we unveiled them in January 2013 and most took effect in January 2014. These were largely congressionally-mandated deadlines and we stuck to them, though we knew they were tightly drawn. But we made a conscious decision to use that year to the fullest by climbing into the trenches and working closely with those who had to implement our new rules. The goal was a successful rollout, with fewer problems for industry and less consumer harm. So during this period, we engaged in vigorous outreach and assistance to financial institutions. We viewed this as a joint enterprise. We wanted to make things go more smoothly and achieve better results.

Our efforts with the mortgage rules went much further than simply reacting passively to industry inquiries. We took affirmative steps to help the industry understand our rules. Among other things, we published plain-language compliance guides for small entities. We launched a series of videos explaining our rules. We worked closely with other regulators to develop examination guidelines that reflect a common understanding of what the rules do and do not require.

We made it a point to publish those exam guidelines months before the effective dates of the mortgage rules to give institutions the time and confidence to get themselves prepared. We also distributed a readiness guide with a checklist of things to do before the rules took effect—like updating policies and procedures and providing staff training. We attended industry conferences to spread the word and make ourselves available to the real people who would have to implement our changes. We participated in webinars attended by thousands of participants.

We opened up our phone lines and let industry talk to our regulatory experts about the rules. As we became aware of critical operational or interpretive issues, we addressed them. We pledged to work with stakeholders to resolve ambiguities, to discuss obstacles to implementation, and to work through any serious, unintended consequences. In this vein, we tweaked and clarified the rules where needed, which included reopening the notice-and-comment process several times in limited areas to revise them. We made these adjustments with one aim in mind: to ensure the effectiveness of our rules by making compliance easier. By addressing and clarifying industry questions, we reduced the need for individual institutions to spend time reaching their own uncertain judgments on these matters. And we recognized all along that if we could ease implementation without sacrificing any of our key objectives, the result would be better and more effective consumer financial protection.

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But implementation is not just about industry compliance. It is also about consumers knowing their rights and knowing how the rules of the road have changed. So our work on regulatory implementation for the mortgage rules included aggressive outreach to consumers, which again reflects the specific role and mission of this new agency. We consulted with consumer groups to determine how best to educate consumers with understandable information about how the new rules affect both current and prospective homeowners. This included sample letters that consumers could send to their mortgage servicers. We provided mortgage tips. We provided answers to mortgage-related questions through “Ask CFPB,” an interactive online tool designed to answer consumers’ most frequently asked questions in plain language. And we provided copies of consumer-facing mortgage materials in seven languages.

We also know that housing counselors are the leading source of expert advice for consumers who are having trouble with their mortgages. So we offered training and published a reference guide to help them in assisting people who are struggling to pay their mortgage. We wanted to ensure that housing counselors and others understood all about the new federal protections to help people avoid losing their homes to foreclosure.

With our remittance rule, we did many of these same things, including putting out a compliance guide for small entities, a video guide, and a plain-language translation of the regulations. We also engaged in broad outreach to various community organizations that serve people who send remittances. But we also tried something else new and different. We released “eRegulations,” a web-based, open source tool designed to make the provisions of the applicable regulation, known as Regulation E, easier to find, read, and understand. The eRegulations tool lets users identify and display definitions for specific terms within regulation text; move easily among past, present and future versions of a regulation; and smoothly navigate between regulation text, official interpretations, appendices, and section-by-section analyses contained within Federal Register notices. We have heard good feedback on this experiment, and we are now working to expand this initiative so that it encompasses a broader universe of consumer financial regulations.

The Bureau created the eRegulations tool with the goals of greater comprehension, increased compliance, more efficient supervision, and improved accessibility. When people are better able to understand the rules, it is more likely they will achieve the goal of protecting consumers. It is

continued on page 20
FTC Enforcement Actions Against HIPAA Covered Entities

By Stephanie E. Hudson*

The Federal Trade Commission (FTC) is most commonly associated with consumer protection actions. In this capacity, it regulates unfair and deceptive practices affecting consumers, including deceptive advertising, spam emails, and unfair debt collection practices.

Over the years, the FTC’s authority to regulate unfair and deceptive practices has grown to encompass data security practices and standards. The FTC uses its broad regulatory authority under 15 U.S.C. § 45, and in particular Section 5, to bring enforcement actions against companies experiencing data breaches.

The FTC leaves no stone unturned, filing administrative complaints against small and large companies alike. Its more notable actions have been against larger companies like Wyndham Resorts, the hotel empire, Fandango, and Credit Karma.

In undertaking these enforcement actions, the FTC has garnered substantial attention and criticism. Critics (and in particular the entities subject to such actions) often base their opposition to these enforcement actions on (1) the FTC’s lack of familiarity with data security standards, (2) it’s failure to engage in rulemaking to establish concrete data security regulations and practices, and (3) its conduct in rulemaking through adjudication.

The FTC has seemingly outdone itself, however, in filing an administrative complaint against LabMD in August 2013. The source of controversy is not the action itself, so much as whom the action is against. In particular, when the FTC filed its administrative complaint against LabMD, it filed it against an entity that, as it pertains to data security, is principally regulated by the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health (HITECH) Act. HIPAA specifically regulates and applies to entities that create, maintain, and store protected health information including, but not limited to, social security numbers, medical diagnoses, medical record numbers, and other similar sensitive health care information. Thus, HIPAA generally applies to healthcare clearing houses, health care providers such as physicians, and health plans.

The FTC’s decision to include LabMD, which is a HIPAA covered entity, within the scope of its enforcement authority raises substantial concern in the healthcare community about data breaches and their potential consequences. This article focuses on the seminal case In the Matter of LabMD, Inc., the FTC’s first major enforcement action against an entity principally subject to HIPAA and HITECH regulations.

1. The Federal Trade Commission

The FTC is a civil law enforcement agency vested with broad authority to protect consumers from unfair and deceptive practices. It also regulates anti-competitive behavior, and behavior that “affects commerce.” It derives much of its authority to regulate and enforce standards and laws from the Federal Trade Commission Act (FTC Act) codified at 15 U.S.C. §§ 41-58, and its rulemaking authority from the Magnuson-Moss Warranty Act of 1975.

More recently, Congress has vested the FTC with very specific and narrow authority to promulgate data security standards and regulations in particular areas of law. As a result, the FTC has promulgated data security standards under the Fair Credit Reporting Act (FCRA), the Children’s Online Privacy Protection Act (COPPA), and the Gramm-Leach-Bliley Act. None of these standards, however, purport to expressly regulate an entity subject to HIPAA and HITECH regulations.

In its recent actions, the FTC has relied heavily, if not almost exclusively on Section 5 of the FTC Act in order to regulate data security practices. In doing so, the FTC maintains that entities experiencing data breaches have violated Section 5 by engaging in “unfair practices.” Stated differently, the data breach itself is considered an unfair practice. The FTC Act defines an “unfair” practice as an “act or practice (1) causing or which is likely to cause substantial injury to consumers, (2) which cannot be reasonably avoided by a consumer, and (3) which is not outweighed by countervailing benefits or competition.” This definition is separate and apart from the definition of a “deceptive” practice under Section 5, such that an entity can be prosecuted for both an unfair practice and a deceptive act. The FTC Act vests the FTC with numerous tools to enforce its standards and laws. Thus, the FTC’s toolbox includes investigative authority, in addition to power to file administrative complaints against noncompliant entities, seek federal injunctions to enjoin noncompliant action, and pursue monetary restitution and penalties for any violations.

Rather than litigate an administrative complaint filed by the FTC, many entities choose to enter into consent orders. Under these consent orders, noncompliant entities are generally subject to periodic audits, FTC investigations, and mandated

*Sandberg Phoenix & von Gontard, St. Louis, Missouri.
reporting demonstrating compliance for upwards of twenty years after entering into a consent order. Many entities look to these consent orders as guiding documents regarding appropriate data security practices, in the absence of actual regulations.

2. In the Matter of LabMD, Inc.

LabMD is the first entity primarily regulated by HIPAA and HITECH to come under fire through the FTC’s new data security enforcement scheme. An Atlanta based company, LabMD is subject to HIPAA and HITECH in part because it regularly processes consumers’ clinical laboratory tests, and reports the results accordingly. The company also files insurance claims with health insurance companies for related testing charges.

Logically, then, LabMD routinely interacts with and manages sensitive information deemed “protected health information” under HIPAA and HITECH. Such information includes, but is not limited to, consumer birthdates, medical diagnoses, clinical histories, social security numbers, and consumer telephone numbers. The company also manages other sensitive information including credit card numbers, payment amounts, routing numbers, and bank account numbers.

In 2006, a LabMD billing department manager purportedly downloaded a file sharing application called Limewire to a company computer. Limewire (more commonly known for its ability to allow users to download music) allowed users to electronically share files. Once shared, a file can be repeatedly shared without having to access the original source for the same file.

In 2008, and then again in 2012, LabMD reportedly experienced data breaches. Specifically, in May 2008 the company was notified that a LabMD insurance file—along with hundreds of other files—had been downloaded to Limewire. Another breach was reportedly experienced in 2012, even though Limewire had been removed from the company’s computer in 2008. These breaches affected (at a minimum) 9,300 LabMD consumers.

The FTC filed its Complaint against LabMD in August 2013, primarily alleging LabMD had violated the “unfairness” provision in Section 5 of the FTC Act. The FTC determined LabMD was responsible for failing to employ “reasonable and appropriate measures” to prevent the alleged data breach. Its many failures included inadequate employee data security training, LabMD’s failure to correct foreseeable and commonly known network vulnerabilities, and LabMD’s deficient security practices. The FTC also alleged LabMD violated Section 4 of the FTC Act in that LabMD’s breach “affected commerce.”

Rather than subject itself to a twenty-year consent order, LabMD fought back, moving to dismiss the FTC’s Complaint. As expected, LabMD attacked the FTC’s authority to regulate a HIPAA covered entity. In this respect, LabMD’s argument was simple: Congress had already chosen its preferred means of regulation. The Department of Health and Human Services (HHS), through the Office of Civil Rights (OCR)—and these agencies alone—were entitled to enforce HIPAA and HITECH, not the FTC. The FTC had not only blatantly overstepped its prescribed bounds by pulling LabMD into its regulatory purview, but any such enforcement authority was superfluous considering the “clear distinction” drawn between data security practices for HIPAA covered entities and everyone else. LabMD went on to argue that, had Congress intended to provide the FTC with such authority, it would have directly instructed the FTC to act, much like Congress had already done with the FCRA and COPPA.

LabMD also highlighted the FTC’s lack of explicit authority to regulate even general data security standards, as supported by the notable lack of data security regulations promulgated by the FTC. It also pointed to the FTC’s repeated requests for authority to regulate data security practices, and Congress’s repeated refusals to grant the FTC such authority.

Like other entities subject to the same data security enforcement actions, LabMD attacked the FTC’s failure to provide sufficient ex-ante notice of what was required to avoid violating Section 5. For LabMD, simply engaging in rulemaking through adjudication and consent orders was not only insufficient notice, but constituted impermissible rulemaking under general APA standards.

Among its other arguments, LabMD pointed out that the FTC’s broad interpretation of its authority under Section 5 essentially amounted to authority to regulate any entity for any reason—something Congress could not have possibly have intended. LabMD reemphasized Congress’s repeated refusals to grant the FTC such authority, and censured the FTC’s conduct and interpretation of its authority as untenable.

The Court denied LabMD’s Motion to Dismiss countering almost every argument raised by the company. Most importantly, the Court found no issue with the FTC’s authority to regulate LabMD, notwithstanding its designation as a HIPAA covered entity. The Court found no “clear repugnancy” between HIPAA standards and Section 5 of the FTC Act. In support, the Court pointed to a recent meeting between HHS and the FTC to coordinate enforcement actions when entities experienced data breaches that would violate both HIPAA and FTC standards. Finally, the Court pointed to LabMD’s own failure to identify any provision within HIPAA that expressly denied the FTC authority to regulate health-care data security practices.

The Court also leaned on longstanding case law to reaffirm the FTC’s authority to regulate both unfair and deceptive practices under Section 5. It cited Congress’s amendments to the FTC Act in 1994 to emphasize Congress’s intent for the FTC to have broad, continued on page 14
A Blackletter Statement, 2nd edition has not only been updated, but also is better organized and more consistent in style and substance. This concise, up-to-date book articulates this important body of law with sufficient clarity and felicity that practitioners can effectively function within it. This edition includes:

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On July 22, 2014, American Bar Association President James R. Silkenat presented the ABA’s 2014 Silver Gavel Awards for Media and the Arts at the National Press Club, Washington, D.C. The awards recognize outstanding works in nine media that foster the American public’s understanding of law and the legal system. They are the ABA’s highest honor in recognition of such achievements for works published in 2013.

Selection Process, Criteria, and 2014 Award Winners

Earlier this year, the ABA Gavel Awards Screening Committee, composed of 47 ABA lawyer-members, selected 19 finalists from 169 entries received in nine eligible categories: (1) books, (2) newspapers, (3) magazines, (4) commentary, (5) documentaries, (6) drama and literature, (7) radio, (8) television, and (9) other media. No more than one Silver Gavel award is presented in each category.

Selection criteria include: (1) how the entry addresses the Gavel Awards’ purpose and objectives; (2) educational value of legal information; (3) impact on, or outreach to, the public; (4) thoroughness and accuracy in presentation of issues; (5) creativeness and originality in approach to subject matter and effectiveness of presentation; and (6) demonstrated technical skill in the entry’s production.

2014 winners of Silver Gavel Awards— For Books, Commentary, Documentaries, Newspapers, and Television

- **Books:** “The Terror Courts: Rough Justice at Guantanamo Bay,” by Jess Bravin (Yale University Press)
- **Commentary:** “An American Gulag,” *The Atlantic*, by Andrew Cohen (“ongoing watch of how mentally ill are treated throughout the prison system”)
- **Documentaries:** “Gideon’s Army,” Trilogy Films, by Dawn Porter, Director/Producer (stories of three young idealistic public defenders “challenging the assumptions that drive a criminal justice system strained to the breaking point”)
- **Newspapers:** “Twice Betrayed,” *The San Antonio Express-News*, by Kansa King and Sig Christenson (seven-month investigation into “pervasive and long-standing problem of sex assaults in the military”)
- **Television:** “The Invisible War,” Chain Camera Pictures, by Kirby Dick, Director (an Academy Award nominee for best documentary; among *Time* magazine’s Top Ten Films of the Year: “Women victimized by sexual abuse speak out in a poignant, powerful documentary that just might change the system”)

2014 winners of Honorable Mentions— For Books, Newspapers, Radio, and Television

- **Books:** “A Wild Justice: The Death and Resurrection of Capital Punishment,” by Evan J. Mandery (W.W. Norton & Co., Inc.)
- **Newspapers:** “Reinvestigating Rape: Old Evidence, New Answers,” *The Plain Dealer* (Cleveland, Ohio), by Rachel Dissell and Lellia Atassi (DNA collected in rape kits sometimes “sat in cardboard boxes for decades in police evidence rooms, as bureaucracy caught up to science and funneled into enough political will to finally test the cache of kits” that the county prosecutor called a “gold mine for law enforcement”)
- **Television:** “Constitution USA with Peter Sagal,” Twin Cities Public Television, by Stephen Ives, Director (“Traveling across the country by motorcycle, Sagal is in search of where the U.S. Constitution lives, how it works and how it doesn’t . . . how it unites us as a nation and how it has nearly torn us apart”)

History of Silver Gavel Awards

The ABA has continuously awarded Silver Gavel awards since 1958, when Sidney Lumet’s classic jury drama *Twelve Angry Men* became the first
film to win one. Through the decades since then, issues of constitutional and criminal law have presented recurring themes. For example, in early years the Perry Mason television series won a Silver Gavel for dramatizing “legal safeguards to the accused” (1960) and Universal-International Pictures’ feature film based on Harper Lee’s novel To Kill a Mockingbird won a Silver Gavel for its understanding of the “right to counsel and a lawyer’s duty to defend indigent persons accused of crimes” (1963).


Since 1998, Supreme Court coverage has been a recurring theme as well of a “new” or (now) “other” media category. For example, the first Silver Gavel was awarded in 1998 to Northwestern University’s early OYEZ multimedia resource website developed by a political science professor to convey a sense of the Court as an institution. A 2010 Silver Gavel was awarded to the subsequent SCOTUSBlog that now covers a similar “frontier.”

Silver Gavel Award-Winning Coverage of Administrative Law Issues—Especially 2013 Coverage of Military Sexual Assault Issues

Silver Gavel awardees’ groundbreaking coverage of significant administrative law issues has also been recognized—especially recently. This year, as noted above, of the six 2014 Silver Gavels awarded, two of them—those for both the categories “newspapers” (“Twice Betrayed”) and “television” (“The Invisible War”)—focus on the comprehensive, complex, and interwoven agency and adjudicatory crises that persist within the Department of Defense because of its treatment of its own “twice betrayed” military “family” members. These are service members (1) assaulted and/or raped by their fellow service members, often even by their commanding officers, and then (2) further victimized by a seemingly callous or indifferent bureaucratic system that does not seem capable of helping them to heal after such attacks—nor of bringing most perpetrators of these profoundly troubling crimes to justice.

President Obama last year vowed to end the “scourge” of military sexual assaults. He gave the military until December 14, 2014, to “make substantial improvements with respect to sexual assault prevention and response, including to the military justice system.” The portrayals in “The Invisible War” of ordinary service members (female and male) recounted how, despite their reporting “up” the “chain of command” their suffering such sexual assaults (including serious or permanent injuries resulting therefrom), assaulted service members subsequently suffered retribution within their commands for having done so—while their attackers often incurred little or no consequences for having assaulted and/or raped them.

After production of the powerful testimony contained in “The Invisible War,” the President signed a defense authorization bill late last year that made some two dozen changes to the present military system of handling sexual assaults. These include, for example, removing from commanders the authority to reduce sentences and overturn jury convictions; requiring those convicted of sexual crimes to be dismissed or discharged; and affording victims who report sexual assaults new counseling and legal protections.

Whether to entirely remove from commanders the authority for the decision to prosecute, as the British have done, remains under consideration by Congress.

Additional help has long been needed as well in many aspects of the recovery process for such victimized veterans. Like “The Invisible War,” “Twice Betrayed” also depicts the almost insurmountable administrative obstacles that discharged survivors of military sexual assaults often encounter. These include such “roadblocks” as those which the Section’s Veterans Affairs Committee has long “laboried in the vineyards” to help resolve: for example, lengthy delays in claims processing by the Department of Veterans Affairs (VA). (During the Section’s 2011 Fall Administrative Law Conference, an eminent panel analyzed the pros and cons as to whether Congress should expand the jurisdiction of the Court of Appeals for Veterans Claims and the Court of Appeals for the Federal Circuit as a means of helping reduce such delays.)

Moreover, as “Twice Betrayed” emphasizes, although the Pentagon estimates that as many as 26,000 military sexual assaults occurred last year, many victims of these assaults have encountered the deeply disturbing subsequent problems of (1) having their mental stability questioned after reporting that they were assaulted and/or raped, and (2) then as a consequence of the military’s pursuing such line of inquiry, losing their careers when subsequently being discharged from service. Per the director of the nonprofit Military Rape Crisis Center, of 1200 military sexual-trauma survivors who sought help there since 2003, 90% were involuntarily discharged from the military after reporting being assaulted and/or raped: “They’re saying the victims are not credible because they’re crazy.”

The impacts on the lives of the victims in dealing with the implications of such negative service records for the rest of their lives can be exceedingly detrimental. They may not be able to get any benefits at all if discharged less than “honorably.” They often face even longer delays in processing claims than is the “norm” for other veterans. In seeking disability benefits, it has
proven more difficult for them to get post-traumatic stress disorder (PTSD) ratings than it is for other veterans. For example, analysis of such records by the Service Women's Action Network showed that VA disability approvals for sexual-trauma cases “lagged behind approvals for other PTSD cases by between 17 and 30 percentage points every year. . . .” Per the Network—which only obtained these VA records after suing for release of them after the VA denied the Network’s Freedom of Information request—veterans “who survive in-service trauma also face discrimination in seeking compensation.”

Finally, as noted in “Reinvestigating Rape” (2014 Honorable Mention in “newspapers” category) in its investigation into the consequences for Ohio’s criminal justice system of the fact that many years’ worth of rape kits remained largely unprocessed, when serial rapists are not prosecuted and punished appropriately even though evidence exists that could help yield convictions, the additional violent crimes that such serial rapists still “at large” in society commit can continue to multiply. The military justice system’s longstanding “dereliction of duty” in not appropriately prosecuting, convicting, and punishing service member rapists thus likely does little but compound such problems not only within the military, but also for society as a whole—especially when those who in the military were permitted to “get away with” rape re-enter civilian life.

Recent other ABA award winners in media and the arts also focused their work on significant administrative law issues on both the national and state levels. These include: (1) the election law issues portrayed in Mo Rocca’s Electoral Dysfunction (2013 Silver Gavel for Television); (2) the Insider Trading issues presented in Bloomberg News’s report by

FTC Enforcement Actions Against HIPAA Covered Entities continued from page 10

flexible interpretive and regulatory authority to manage complex and evolving technology. It also interpreted Congress’s grants of specific authority in narrow areas of data security (such as COPPA and FCRA) as an affirmative call to the FTC to act in the area of data security, rather than a restriction of the FTC’s authority. The FTC’s consistent regulation of data security practices since 2005 only reaffirmed the FTC’s authority to regulate in the area.

Finally, and contrary to LabMD’s arguments, the Court found no due process violation. Instead, it ruled that the FTC’s rulemaking by adjudication and consent orders provided more than adequate notice. Moreover, any noncompliant entity received its requisite due process whenever the FTC filed an administrative complaint.

3. The Future of Enforcement

Critics of the FTC’s recent data security enforcement actions echo LabMD’s arguments. Critics also cite the potential for civil “double jeopardy,” namely that HIPAA covered entities may now be subject to fines and penalties for a singular breach, but under separate regulatory schemes. For critics, such an enforcement scheme is wholly unacceptable considering the potential monetary fines at stake, and clearly outside the scope of what Congress intended in enacting HIPAA. Critics also believe HIPAA covered entities are wrongfully penalized under this enforcement scheme. Thus, instead of pursuing HIPAA covered entities, the FTC should focus on the cause of these breaches i.e. hackers, citing covered entities as the true victims.

Proponents of the FTC’s enforcement scheme, on the other hand, believe this type of enforcement will inevitably result in stronger consumer protection standards. In fact, for proponents, the FTC has it exactly right. The burden of stronger data protection practices should be placed on the shoulders of those entities in a better—if not the best—position to protect consumers.

If a HIPAA covered entity experiences a breach it can, without a doubt, expect a call from the OCR and HHS. But now it can expect the FTC might be the next knock on the door thereafter. Thus, until a court or Congress definitively rules on this issue, HIPAA covered entities must anticipate the possibility of FTC enforcement actions for data breaches, as if the FTC properly retains such authority. This also means HIPAA covered entities must begin considering and analyzing FTC consent orders to determine what conduct will result in compliance with Section 5 of the FTC Act.
The Court has been quite active on the administrative law front this quarter, deciding a number of important cases reaching across a broad range of issues. The three highest-profile cases involve immigration law and agency deference, the territorial scope of tribal sovereign immunity, and a preemption provision in Superfund. In addition, the Court decided several other cases involving administrative law, including two related to qualified immunity and the powers of Article I courts, one related to the preclusion of Lanham Act claims, and three addressing provisions of intellectual property laws. Finally, the Court has granted certiorari in at least five administrative law cases of note.

**Immigration and Deference**

The Court resolved an important issue of immigration law in *Scialabba v. Cuellar de Osorio*, 2014 WL 2560467. Under federal immigration laws, a U.S. citizen or permanent resident may petition on behalf of closely related individuals (such as children or spouses, but not grandchildren or nieces) seeking a visa. If that petition is granted, the individual seeking the visa may apply for the visa after it becomes available. The minor children of individuals seeking visas are entitled to the same immigration status as their parents. 8 U.S.C. § 1153(d).

The question in *Scialabba* was what happens when a minor child turns 21 after the petition is granted but before a visa becomes available. Section 1153(h) provides that “[i]f the age of an alien is determined . . . to be 21 years of age or older . . . , the alien’s petition shall automatically be converted to the appropriate category and the alien shall retain the original priority date issued upon receipt of the original petition.” Interpreting this provision, the Board of Immigration Appeals concluded that “aged-out” children lose their place in line and had to begin the visa process again, unless they could be validly sponsored by the original petitioner because they had a qualifying relationship with the sponsor.

In a 5-4 decision, the Court upheld the Board’s interpretation.

Writing for a plurality of three justices, Justice Kagan explained that the Board’s interpretations of immigration law are entitled to *Chevron* deference where the statutes are ambiguous. Applying the *Chevron* framework, Justice Kagan concluded that § 1153(h) “does not speak unambiguously” about whether all aged-out children retain their place in line for visas but instead “addresses that issue in divergent ways.” *Scialabba*, at *10. Although the first clause of § 1153(h)—which refers to any “alien . . . determined . . . to be 21 years of age or older”—seems to suggest that all aged-out applicants retain their order of consideration, Justice Kagan reasoned, the second clause suggests that relief applies to “only a subset of those beneficiaries”—namely, those who have a sufficiently close relationship with the sponsor that the sponsor could have petitioned on their behalf in the first instance. *Id.* Given this ambiguity, she explained that the Board’s interpretation of § 1153(h) was reasonable and accordingly entitled to deference.

The Chief Justice, joined by Justice Scalia, concurred in the judgment. He disagreed with the plurality’s conclusion that there is an “internal tension” in § 1153(h). *Id.* Nevertheless, he also concluded that the statute is ambiguous because it does not sufficiently specify which petitions could “automatically be converted” once a child reaches the age of 21.

Justice Alito dissented. He argued that the aged-out petitioners in the case had a sufficiently close relationship with the sponsor and that they therefore should retain their priority in line.

Justice Sotomayor also wrote a dissent, in which Justice Breyer joined in full and Justice Thomas joined except as to a footnote. In her view, § 1153(h) unambiguously entitles all aged-out applicants to retain their place in line for a visa.

**Tribal Sovereign Immunity**

A divided Court grappled with the territorial scope of tribal sovereign immunity in *Michigan v. Bay Mills Indian Community*, 2014 WL 2178337.

At issue was Michigan’s lawsuit against the Bay Mills Tribe, which opened a casino in Vanderbilt, Michigan, a small village well outside Bay Mills’ tribal lands. The Tribe bought the casino land using funds from a federal “Land Trust” whose earnings the Tribe was to use to improve or purchase property, which under federal law “shall be held as Indian lands are held.” *Id.* at *3. Previously, Michigan and the Tribe had entered into a compact under the Indian Gaming Regulatory Act (IGRA) allowing the Tribe to run gaming facilities on its tribal lands. Michigan, however, did not believe the Vanderbilt land to be “Indian Land” under IGRA, the Department of the Interior issued an opinion agreeing, and the state sued to enjoin the casino’s operation.

In a 5-4 opinion authored by Justice Kagan, the Court ruled that sovereign immunity extended to the Tribe outside its tribal lands, based on IGRA, *stare decisis*, and fundamental notions of sovereignty.
IGRA, the majority noted, waives tribal sovereign immunity—but only for “gaming activity located on Indian lands and conducted in violation of any Tribal-State compact.” Id. at *7 (emphasis added). Thus, while Michigan identified “a (purported) anomaly” in the statute—states’ ability to sue tribes for gaming operations on tribal lands, where tribal sovereignty is at its zenith, but not for activities in state jurisdiction, where state authority controls—the majority found Michigan’s argument “com[ing] up snake eyes.” Id. “This Court has no roving license . . . to disregard clear language simply on the view that . . . Congress ‘must have intended’ something broader.” Id. at *8. Moreover, Congress did not speak broadly in this waiver of tribal immunity. Instead, “every-thing—literally everything—in IGRA” centers around regulating gaming on tribal lands. Id. Thus, extending IGRA’s sovereign immunity waiver outside tribal lands would run counter to IGRA’s aim.

Given that a “core aspect[]” of tribal self-governance is sovereign immunity, and that in order to “abrogate [such] immunity, Congress must “unequivocally” express that purpose,” the Court declined Michigan’s invitation to do so. Id. at *5. 6. Indeed, the Court noted, Congress had repeatedly had opportunities to revise the scope of tribal immunity since Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998), where the Court ruled that tribal immunity extended outside tribal land, but had never adopted the change Michigan wanted. Justice Sotomayor concurred in the majority’s opinion but wrote separately to emphasize why “history and comity” compelled upholding tribal immunity off tribal lands. Comity, Justice Sotomayor noted, quoting the principal dissent, “is about one sovereign respecting the dignity of another.” This Court would hardly foster respect for the dignity of Tribes by allowing States to sue Tribes for commercial activity on State lands, while prohibiting Tribes from suing States for Commercial activity on Indian lands.” Id. at *15.

Justice Thomas dissented, joined by Justices Scalia, Ginsburg, and Alito. Justice Thomas reasoned that the Court’s earlier decision in Kiowa to extend tribal immunity to nontribal lands was “wrong to begin with,” and “has only worsened with the passage of time” because “tribal commerce has proliferated and the inequities engendered by unwarranted tribal immunity have multiplied.” Id. at *19. Justice Thomas noted that sovereign immunity does not apply of its own force, but rather in foreign jurisdictions persists only at the pleasure of the host jurisdiction. Thus, he believed, tribal sovereignty should be a question of state law, “not a freestanding ‘right’ that applies” whenever “a sovereign faces suit.” Id. at *20. Further, giving tribes off-reservation immunity acts as “a substantial affront to a different set of sovereigns—the States, whose sovereignty is guaranteed by the Constitution,” and who often want to use lawsuits to enforce their laws against tribes. Id. Thus, Justice Thomas would overrule Kiowa and subject the Bay Mills Indian Community to Michigan’s suit.

Justices Scalia and Ginsburg also each wrote separately in dissent.

Superfund

In CTS Corp. v. Waldburger, 2014 WL 2560466, the Court determined that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) does not preempt state statutes of repose for personal injury and property damage suits, even though it does preempt state statutes of limitations for such actions.

The case arose when successor owners of an allegedly contaminated property brought suit against CTS, the prior owner of an electronics plant in Asheville, North Carolina that had occupied the property. The property owners sued “in 2011, 24 years after CTS sold the property.” Id. at *4. CTS asserted that North Carolina’s statute of repose barred the suit, and plaintiffs retorted that Superfund preempted state law.

The provision in question was Superfund § 9658. That provision specifies that if a state statute of limitations “provides a commencement date which is earlier than the federally required commencement date”—that is, when “the plaintiff knew (or reasonably should have known) that the personal injury or property damages were caused”—then the federal date controls. 42 U.S.C. § 9658. Courts long have used this provision to preempt state statutes of limitations, but the circuits and state courts had divided on whether it also preempted state statutes of repose.

The Supreme Court said “no.” In a 7-2 opinion authored by Justice Kennedy, the Court drew a line between statutes of limitations and statutes of repose, while acknowledging that commentators and cases sometimes refer to the two in overlapping, fluid ways. “Although there is substantial overlap between the policies of the two types of statute,” the Court reasoned, “each has a distinct purpose and each is targeted at a different actor.” Id. at *5. Statutes of limitations, the Court said, “require plaintiffs to pursue ‘diligent prosecution of known claims.’” Id. Statutes of repose, by contrast, “effect a legislative judgment that a defendant should ‘be free from liability after the legislatively determined period of time.’ . . . Like a discharge in bankruptcy, a statute of repose can be said to provide a fresh start or freedom from liability.” Id.

Relying on this difference, the Court found Superfund’s preemption provision inapplicable to state statutes of repose for numerous reasons. Section 9658 refers to

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Administrative and Regulatory Law News 16 Volume 39, Number 4
statutes of limitations expressly but not to statutes of repose. The congressionally commissioned Study Group Report that § 9568 responded to referenced statutes of limitations and statutes of repose separately. Section 9568 speaks in the singular, not the plural as if it should if it were referring to both kinds of time bars. Section 9658 deals with the time period when causes of action accrue—the focus of statutes of limitations but not of statutes of repose. And the presumption against preemption weighs against construing § 9658 liberally, since the causes of action in question are traditional areas of state law and concern.

Justice Scalia, joined by Chief Justice Roberts, Justice Alito, and Justice Thomas, wrote separately. They concurred in all of Justice Kennedy's opinion, except its reliance on a presumption against preemption.

Justice Ginsburg, joined by Justice Breyer, dissented. She believed that the Court was “fight[ing a] straightforward reading” of § 9658 that makes it applicable to both kinds of time bars. “[T]he Court allows those responsible for environmental contamination, if they are located in the still small number of States with repose periods,” Justice Ginsburg wrote, “to escape liability for the devastating harm they cause, harm hidden from detection for more than 10 years.” Id. at *14.

Qualified Immunity and Article I Court Powers

The Court in Wood v. Moss, 2014 WL 2178340, addressed whether qualified immunity can extend to Secret Service agents who move protestors in order to protect the President from a potential security threat. To overcome the protections afforded to government actors by the qualified immunity doctrine, claimants must show that the actors violated “clearly established law.” Applying that prong of the analysis, the Court observed that no prior “decision of this Court so much as hinted that [the Secret Service’s] on-the-spot action was unlawful because they failed to keep the protesters and supporters . . . equidistant from the President.” Id. at *4. Thus, the agents were entitled to qualified immunity.

The situation in Wood arose in October 2004, when President George W. Bush, campaigning in Oregon, decided at the last minute to stop at a local restaurant for supper. Beforehand, both supporters and protesters of President Bush had obtained local police permission to line each side of the street through which the President’s motorcade planned to pass. When the President changed those plans, local law enforcement, acting under Secret Service orders to secure the area, moved both sets of demonstrators to locations equidistant from the open-air patio where the President was to dine. After the President arrived, however, the Secret Service directed local police to move the protesters, because they remained within line-of-sight and weapons range of the patio. The President’s supporters, however, remained closer to the patio than the protesters, because an inn physically blocked their location from the restaurant. Subsequently, the protesters filed a Bivens action against the Secret Service agents, based on a theory that the agents had violated their First Amendment rights through viewpoint discrimination.

The Court, in an opinion authored by Justice Ginsburg, unanimously overruled the Ninth Circuit’s decision that qualified immunity was unavailable to the Secret Service agents. The Court “assumed without deciding” that Bivens actions extend to First Amendment claims. Id. at *7. Nevertheless, it found that the qualified immunity doctrine protected the Secret Service agents’ actions. Numerous factors militated in favor of this conclusion. The nation has a “valid, even . . . overwhelming, interest in protecting the safety of its Chief Executive.” Id. at *8. No preexisting law made the agents aware that they bore a “First Amendment obligation ‘to ensure that groups with different viewpoints are at comparable locations at all times.’” Id. No law, likewise, compelled the agents to “interfere with even more speech than security concerns would require” by moving the President’s supporters “in an attempt to keep opposing groups” the same distance from the President. Id. at *9. Thus, the Court held, “the agents are entitled to qualified immunity.” Id. at *12.

In Executive Benefits Insurance Agency v. Arkison, No. 12-1200 (June 9, 2014), the Court clarified the limits of Article III on the power of Article I bankruptcy judges. Under 28 U.S.C. § 157(b), non-Article III bankruptcy judges were to enter final judgments in so-called “core” bankruptcy proceedings—proceedings arising under Title 11. In Stern v. Marshall, the Court held that this provision violated Article III insofar as it allowed non-Article III bankruptcy judges to enter final judgments for claims involving private rights. The issue in Arkison was what procedures should apply in core bankruptcy proceedings given that Stern struck down the provision directing bankruptcy judges to enter final judgments in those proceedings.

In a unanimous opinion written by Justice Thomas, the Court concluded that in such cases bankruptcy judges should submit proposed findings of fact and conclusions of law for de novo review by a district court. The Court explained that, although § 157(b) did not establish this procedure for core bankruptcy proceedings, § 157(c) established this procedure for non-core bankruptcy proceedings. In the Court's view, this provision for non-core proceedings extended to core proceedings after Stern. This was because the bankruptcy laws contain a severability provision that accounts for decisions like Stern;
if a portion of the bankruptcy laws are struck down, the remainder of the laws “is not affected.” 28 U.S.C. § 151 note. According to the Court, to ensure that bankruptcy judges could still act in core proceedings after Stern struck down §157(b), the severability provision required that the non-core procedures in § 157(c) should apply to core proceedings.

Preclusion of Lanham Act Claims

In POM Wonderful LLC v. The Coca-Cola Company, 2014 WL 2608859, the Court held that an individual may bring a private cause of action under the Lanham Act to challenge misleading food labels. POM, a juice producer, sued Coca Cola, arguing that Coca Cola labeled its “Pomegranate Blueberry” juice in a misleading way. POM based its suit on § 43(a) of the Lanham Act, which creates a private action against anyone that uses “any word” on a “container” that misrepresents the nature of the goods in the container. 15 U.S.C. § 1125(a). Coke responded that the Food, Drug, and Cosmetics Act (FDCA), which prohibits labeling foods in a “false or misleading” way, precluded POM’s Lanham Act claim, because the FDCA authorizes only the United State to bring FDCA enforcement actions. 21 U.S.C. § 343.

In a unanimous opinion written by Justice Kennedy, the Court ruled that POM could maintain its Lanham Act claim. The Court began by stating that the case did not involve preemption, because preemption occurs when federal law conflicts with state law, while the alleged conflict in POM was between two federal statutes. Accordingly, the ordinary “presumption against preemption” did not apply. POM, at *7.

Even so, the Court concluded that the FDCA did not preclude the Lanham Act claim. It pointed out that “neither the Lanham Act nor the FDCA, in express terms, forbids or limits Lanham Act claims challenging labels that are regulated by the FDCA.” Id. at *8. The absence of an express limitation was “of special significance” because the Lanham Act and the FDCA have coexisted for 70 years, and Congress had not enacted a provision limiting Lanham Act claims during that time. Id. The Court further noted that the FDCA contains a provision precluding state actions, and that the absence of a comparable provision precluding federal actions suggests that Congress did not mean to prohibit those actions.

In addition, the Court noted that the Lanham Act and the FDCA do not conflict, but rather complement each other in various ways. “The Lanham Act protects commercial interests against unfair competition, while the FDCA protects public health and safety.” Id. at *9. Moreover, the Court reasoned, the two laws establish complementary enforcement schemes. The FDCA authorizes government actions, while the Lanham Act allows actions by private individuals, who may have more information about competitors’ unlawful actions than the government does.

The Court also rejected the government’s argument that a Lanham Act claim is precluded “to the extent the FDCA or FDA regulations specifically require or authorize the challenged aspects of [the] label.” Id. at *11. The Court reasoned that neither the FDCA nor FDA regulations imposes a “ceiling on the regulation of food and beverage labeling,” but instead work together with the Lanham Act. Id.

Intellectual Property

The Court also decided three important cases involving intellectual property this quarter—two involving the interpretation of the Patent Act, and another involving laches and the Copyright Act.

In Nautilus, Inc. v. Biosig Instruments, Inc., 2014 WL 2440536, the Court clarified the standard that applies to patent validity challenges for lack of definiteness. Under the Patent Act, a patent specification must by sufficiently definite: It must “conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as [the] invention.” 35 U.S.C. § 112, ¶ 2 (emphasis added).

At issue in Nautilus was a patent for a hand-grip heart rate monitor used on exercise equipment. The patent claim included “an ‘elongate member’ (cylindrical bar) with a display device; electronic circuitry including a difference amplifier; and, on each half of the cylindrical bar, a live electrode and a common electrode ‘mounted . . . in spaced relationship with each other.’” Nautilus, at *4. The challenge was whether the term “spaced relationship” was sufficiently definite under § 112, ¶ 2. The Federal Circuit ruled that patent claims are sufficiently definite so long as they are “amendable to construction” and are not, as construed, “insolubly ambiguous.” 715 F.3d 891, 898-99 (Fed. Cir. 2013).

In a unanimous opinion authored by Justice Ginsburg, the Court vacated and remanded. Patent claims, it said, are adequately definite under the Act when, “viewed in light of the specification and prosecution history,” they “inform those skilled in the art about the scope of the invention with reasonable certainty.” Nautilus, at *7. Thus, the Act’s “definiteness requirement . . . mandates clarity, while recognizing that absolute precision is unattainable.” Id. This standard, the Court reasoned, requires enough preciseness to “afford clear notice of what is claimed” and to guard against “powerful incentives [for patentees] to inject ambiguity into their claims,” while also recognizing “the inherent limitations of language.” Id.
The Court thus rejected the Federal Circuit’s “insolubly ambiguous” standard: “It cannot be sufficient that a court can ascribe some meaning to a patent’s claims; the definiteness inquiry trains on the understanding of a skilled artisan at the time of the patent application, not that of a court viewing matters post hoc.” Id. at *8. The Court declined, however, to apply the definiteness standard it enunciated to the facts of the case. It remanded instead.

In Limelight Networks, Inc. v. Akamai Technologies, Inc., 2014 WL 2440535, the Court determined whether a defendant can be liable for inducing a patent infringement under 35 U.S.C. § 271(b), when “no one has directly infringed the patent under § 271(a) or any other statutory provision.”

In a unanimous opinion authored by Justice Alito, the Court answered this question in the negative. “[O]ur case law leaves no doubt,” the Court held, “that inducement liability may arise if, but only if, there is . . . direct infringement.” Limelight, at *4.

The patent in question in Limelight was a method patent for steps taken to store and transfer data electronically on servers over the internet. Akamai, the patent holder, stores large files, such as video and music, for other website operators. It “tags” the website content to ensure that the files will play quickly when accessed by website viewers. Limelight runs a similar business, but rather than “tagging” the content itself as Akamai does, it “provides instructions and offers technical assistance’ to its customers regarding how to tag.” Id. at *2. The Court held that merely providing instructions to customers is not enough to violate § 271(b), because under applicable Federal Circuit case law, there is no direct infringement unless a single defendant “actually performed those [infringing] steps or controlled others who performed them.” Id. at *4. “A method patent claims a number of steps; under this Court’s case law, the patent is not infringed unless all the steps are carried out.” Id.

Applying standard rules of statutory construction, the Court also noted that in another provision of the Patent Act—§ 271(f)(1)—Congress had provided for inducement claims even though there was not a direct infringement. Thus, “when Congress wishes to impose liability for inducing activity that does not itself constitute a direct infringement, it knows precisely how to do so.” Id. at *5. Congress did not do so in § 271(b), so the Court reversed and remanded the Federal Circuit’s decision.

Finally, In Petrella v. MGM, 134 S. Ct. 1962 (2014), the Court clarified the applicability of laches to infringement actions brought under the Copyright Act.

In 1963, Frank Petrella copyrighted the screenplay for Raging Bull. MGM later acquired that copyright and released the film in 1980. MGM continues to market and profit from the film today. Upon Frank Petrella’s death in 1981, the right to renew the copyright reverted to his daughter, Paula Petrella, who renewed the copyright in 1991. On January 9, 2009, Petrella sued MGM, seeking damages for infringement, as well as equitable relief of disgorgement of unjust gains and an injunction against future infringement. Because the Copyright Act’s statute of limitations requires actions to be “commenced within three years after the claim accrues,” 17 U.S.C. § 507(b), Petrella limited her claim for damages to infringement occurring on or after January 9, 2006. MGM sought to dismiss the suit as barred by laches—an affirmative defense that traditionally bars suit for equitable relief when a plaintiff unreasonably delays in asserting her rights.

In a 6–3 decision written by Justice Ginsburg, the Supreme Court held that laches did not bar the claim. The Court began by explaining that laches does not apply to claims for damages based on infringement. It reasoned that laches is an equitable defense, applicable only to “claims of an equitable cast for which the Legislature has provided no fixed time limitation.” Petrella, 134 S. Ct. at 1973. Because a claim for damages is legal, not equitable, and because Congress prescribed a three-year limitation period, laches did not apply.

Although concluding that laches did not bar Petrella’s suit, the Court explained that Petrella’s delay in bringing suit could provide a basis to limit equitable relief and remanded for the lower court to make that assessment.

Justice Breyer, joined by the Chief Justice and Justice Kennedy, dissented. In his view, laches should not be limited to equitable relief, but should be available to prevent the inequities that may result whenever a plaintiff unreasonably delays in asserting her copyright. In this case, he explained, Petrella waited 18 years to assert her rights, and during that time, MGM had spent millions on promoting the film, had entered into various licensing agreements, and important witnesses had died.

**Certiorari Grants**

The Court this quarter also has granted certiorari in several cases dealing with administrative law—one on political districting, another on the dormant Commerce Clause, and three on statutory interpretation.

Whether Alabama engaged in unlawful racial gerrymandering is the issue in Alabama Democratic Conference v. Alabama (No. 13–1138) and Alabama Legislative Black Caucus v. Alabama (No. 13–895). In 2012, Alabama drew new legislative districts based on the 2010 Census. In drawing those districts, Alabama sought to maintain the same relative racial proportions in the pre-existing districts. For example, because African-Americans constituted a supermajority of 76% in one of the preexisting...
districts, one of the new districts was drawn also to create a 76.8% supermajority of African-Americans. Under this arrangement, several new districts have African-American supermajorities. The question before the Court is whether drawing districts to maintain these supermajorities is lawful.

The Court will also decide a case examining whether the Commerce Clause places limits on a state’s power to tax in *Maryland State Comptroller of the Treasury v. Wynne* (No. 13-485). Although the Commerce Clause is written as an affirmative grant of power to Congress, the Supreme Court has held that the clause also imposes limits on the states. This so-called dormant Commerce Clause prohibits states from enacting legislation that unduly burdens interstate commerce. In *Wynne*, the Court will decide whether the dormant Commerce Clause prohibits a state from taxing its residents for income earned in another state to the extent that the other state already taxes that income.

In *T-Mobile South, LLC v. City of Roswell* (No. 13-975), the Court will take up the question whether a flat denial of a zoning permit, without any explanation, from a state or local government can satisfy the Telecommunications Act of 1996’s “in writing” requirement for such denials. By letter, the city of Roswell, Georgia denied T-Mobile’s permit application to build a cell phone tower. The letter referenced the City Council’s hearing on the matter and told T-Mobile it could obtain the minutes of the hearing. The Eleventh Circuit held that this was enough to satisfy the Act’s “in writing” requirement.

Another case presenting an issue of statutory interpretation is *Department of Homeland Security v. MacLean* (No. 13-894). There, Robert MacLean, then a Transportation Security Administration air marshal, disclosed information about the deployment of air marshals that he believed demonstrated that the TSA was not acting in the public interest. The TSA subsequently dismissed MacLean on the ground that this disclosure violated its regulations implementing the Aviation and Transportation Security Act. Under 5 U.S.C. § 2302(b)(8)(A), an employee cannot be terminated for disclosing information that he believes shows a violation of law, unless that disclosure is “specifically prohibited by law.” The question is whether the TSA’s regulations constitute a specific prohibition by law.

Finally, in *M&G Polymers USA, LLC v. Tackett* (No. 13-1010), the Court will resolve the question of what language, if any, a collective bargaining agreement must contain under the Labor Management Relations Act to address the vesting of health-care benefits. The Sixth Circuit has ruled that silence in the agreement expresses the parties’ intent for the benefits to vest. The Third Circuit has held that a clear statement of the benefits’ survival is necessary. And the Second and Seventh Circuits have concluded that some language that can reasonably be interpreted as supporting vestment needs to be included. The grant is to review the Sixth Circuit’s decision.

reported that during the decline of the Roman Empire, Caligula complied with the law requiring publication of his edicts by having them written in very small script and posted on high pillars where they could not be read by anyone. Our regulations should be handled very differently. They are meant to be understood by the general public, including both consumers themselves and small providers like community banks and credit unions, which cannot afford an army of lawyers poring over the Federal Register.

In short, our rulemaking process is designed to produce rules that deliver tangible value to consumers and make the financial markets work better. But without effective implementation, that cannot happen. Consumers and industry both win—as does the agency—when our rules can be understood consistently and applied effectively.

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So these are some of the ways we are trying to reimagine the administrative state. At the Consumer Financial Protection Bureau, the vision we have adopted is for a consumer financial marketplace where customers can see prices and risks up front and where they can easily make product comparisons; in which no one can build a business model around unfair, deceptive, or abusive practices; and that works for American consumers, responsible providers, and the economy as a whole. We recognize this vision is shared by many of our diverse stakeholders, and we can work together to make this vision a reality.

And so we will continue to aim for our rulemaking process to be both innovative and sustainable. Both robust and transparent. Both expert and also broadly participatory to reflect and sustain our democratic traditions. Thank you.
D.C. Circuit finds no “logical outgrowth” where agency said proposal would “clarify” the issue at hand.

As many of us did in school, the Department of Health and Human Services has difficulty with fractions. In order to account for the higher costs of treating low-income patients, the Medicare statute provides for a “disproportionate share percentage” payment to hospitals treating a disproportionate share of patients with lower incomes. The higher the percentage produced by the statutory formula, the more funds will be paid to the hospitals in question. In Allina Health Services v. Sebelius, 2014 WL 1284834 (D.C. Cir. 2014), the D.C. Circuit struck down the agency’s attempt to reduce the percentage produced by the statutory formula.

Unfortunately, the Medicare program is complicated, and the statutory language is not entirely clear. The core of Medicare is Part A, which covers “fee for service hospital payments.” But Medicare beneficiaries may choose instead to enroll in a qualifying private health insurance program under Part C. The fraction crucial to determining the disproportionate share percentage involves dividing the number of “patient days” for patients who were “entitled to benefits under Part A” and were entitled to supplemental security income benefits (low-income patients) by the total number of “patient days” which were made up of patients who (for such days) were entitled to benefits under Part A (essentially, the general Medicare population). The fraction changes depending upon whether those who enroll in Part C (and could have but did not enroll in Part A) are considered “entitled to benefits under Part A.” If the Part C enrollees are not included, the fraction is larger, and the percentage share is greater. In other words, the affected hospitals receive more money if the term “entitled to benefits under Part A” does not include those enrolled in Part C.

Before 2003, the agency did not consider Part C enrollees to be “entitled to benefits under Part A.” Apparently due to some confusion, the agency proposed “to clarify that once a beneficiary elects Medicare Part C, those patient days attributable to the beneficiary should not be included in the Medicare fraction of the DSH patient percentage.” Thus, the proposed rule indicated that the agency would continue to interpret the statute such that the affected hospitals would receive more funds than under the competing interpretation. In estimating the financial impact, the proposal stated that “there should not be a major impact associated with this proposed change.”

Much to the consternation and apparent surprise of the affected hospitals, the final rule took the opposite position — that Part C enrollees should be included in the fraction because they are “in some sense, entitled to benefits under Medicare Part A.” The combination of this reversal and the resulting significant financial consequences prompted the District Court to hold that the final rule was not a logical outgrowth of the proposal.

“A final rule is a logical outgrowth if affected parties should have anticipated that the relevant modification was possible.” The Secretary argued that where, as here, there are only two possible outcomes (including or not including the Part C enrollees), interested parties are necessarily on notice of both possibilities. The D.C. Circuit disagreed, noting that, “[t]he word ‘clarify’ does not suggest that a potential underlying major issue is open for discussion.” Thus, the hospitals could not reasonably have anticipated that “the Secretary was open to reconsidering existing policy.” Also, the proposal’s indication of no major impact was inconsistent with the substantial financial effect of the final rule.

Although these points were quite specific to the language to be used in this proposal, the court also articulated principles that may be useful in addressing these disputes. First, the proposal favored the hospitals, and they had no reason to fear comments contrary to the proposal. This distinguished this rulemaking proceeding from environmental rules, for example, in which the prospect of “fierce opposition” makes it “prudent to submit comments in support of favorable proposed rules.”

Second, the court generally accepted the proposition that “logical outgrowth” issues should not be judged from the perspective of the “average reader,” but from the perspective of “a reasonable member of the regulated class.” On these facts, however, the court found that even the sophisticated participant—“even a good lawyer”—could not have anticipated this turnabout.

Finally, the court rejected the agency’s argument that this was somehow harmless error under 5 U.S.C. §706(2)(f) (courts must take “due account . . . of the rule of prejudicial error”). Remarkably, the Medicare statute specifically provides that a final rule that is not a logical outgrowth of a proposed rule “shall be treated as a proposed regulation and shall not take effect until” full opportunity for notice and comment. More generally, the court noted that it has been inhospitable to claims of harmless error in this context, analogizing a denial of any notice and comment to a denial of a formal hearing under § 554 of the APA, where the court would not consider the likelihood of success had the hearing been provided.

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Where, as here, the agency provided for some notice and comment, albeit perhaps inadequate, the court acknowledged some tension between the D.C. Circuit’s requirement that agencies disclose “critical material on which” they rely and the Vermont Yankee admonition that courts should not interfere in informal rulemaking procedures. Where notice was given but was inadequate, the court requires not a showing of harm, but a showing that “an opportunity to comment regarding an agency’s important information created ‘enough uncertainty’ as to its possible effect on the agency’s disposition.”

Interestingly, the court left room for a finding of harmless error where the party raising the “logical outgrowth” argument had itself filed a comment on the matter at issue, or where another party had filed such a comment. After all, “all that is necessary in such a situation is that the agency had an opportunity to consider the relevant views.” Thus, “the concepts of logical outgrowth and harmless error merge if the final rule is, in fact, anticipated, whether or not that anticipation was objectively foreseeable.”

**D.C. Circuit holds SEC requirement to disclose use and origin of “conflict minerals” violates company First Amendment rights.**

An agency seeking judicial language favorable to agency authority could do worse than examine National Association of Manufacturers v. SEC, 2014 WL 1408274 (D.C. Cir. 2014). The court upheld broad SEC application and interpretation of the Dodd-Frank Act and rejected arguments that an SEC rule was arbitrary and capricious, but the court ultimately struck down the particular statutory requirement as a violation of the First Amendment.

The Dodd-Frank Act requires the SEC to “issue regulations requiring firms using ‘conflict minerals’ to investigate and disclose the origin of those minerals.” Conflict minerals are mined in areas controlled by armed groups. Trade in such minerals generally benefits those groups.

The SEC’s conflict minerals rule requires relevant firms to (1) determine whether they are governed by the rule, with no de minimis exception for firms using very small amounts of such minerals, (2) investigate to determine the country of origin of their conflict minerals, and (3) in the exercise of due diligence, report on the country of origin of the firm’s conflict minerals.

The court first upheld the absence of a de minimis exception because Congress had been concerned with very small amounts of conflict minerals. Thus, the absence of an exception was not arbitrary and capricious. The court then upheld the due diligence requirement despite the absence of a specific statutory requirement to that effect. In language derived from *Chevron* and attractive to agencies, the court wrote that, “if a statute ‘is silent or ambiguous with respect to the specific issue at hand’ then ‘the Commission may exercise its reasonable discretion in construing the statute.’ And that discretion may be exercised to regulate circumstances or parties beyond those explicated in a statute.”

The court took a similarly broad approach in upholding the regulation’s reach to firms that “contract to manufacture” items with conflict materials (although those firms were not specifically mentioned in the statute), as well as to firms (specifically referenced in the statute) that manufacture such items. According to the court, statutory “silence allows the Commission to use its delegated authority in determining the rule’s scope, just as with the due diligence provision.” In so doing, the court noted that “the canon *expressio unius est exclusio alterius . . . is* ‘an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved.’” For essentially the same reason, that aspect of the rule was not arbitrary or capricious.

Finally, in its last ruling favoring the agency, the court upheld the agency’s assessment of the likely benefits of the rule despite the agency’s acknowledgment that it was “unable to readily quantify” those benefits. The court held that an agency “need not conduct a ‘rigorous, quantitative economic analysis’ unless the statute explicitly directs it to do so,” and that here the benefits would occur half a world away and relate to “a subject about which the Commission has no particular expertise.”

Despite having prevailed against challenges to its own actions, the Commission was unable to sustain the congressional requirement that firms disclose the use of conflict minerals. Pursuant to the statute, the rule required that firms using conflict minerals describe their products as not “DCR conflict free” and post that description to their websites. Industry challenged this requirement is a violation of its members’ First Amendment rights to free expression.

The court first examined the standard of review of such disclosure requirements, noting that “rational basis review applies to certain disclosures of ‘purely factual and uncontroversial information.’” But that standard relates “to cases in which disclosure requirements are ‘reasonably related to the State’s interest in preventing deception of consumers,’” which is not the issue with respect to the use of conflict minerals. Since “th[e] general rule . . . that the speaker has the right to tailor the speech, applies . . . equally to statements of fact the speaker would rather avoid,” the firms using conflict minerals could not be compelled to make a statement that “conveys moral responsibility for the Congo
war.” Under intermediate scrutiny, the government had failed to show that it could not achieve its goals through alternatives such as having the government create a list of products containing conflict minerals.

Judge Srinivasan concurred in the rulings favorable to the SEC but dissented as to the required disclosure. He would have deferred consideration of the First Amendment issue pending the outcome of a case then pending before the en banc court.

8th Circuit reviews FAA Administrator, not ALJ, and holds that voluntary informal disclosure program is reviewable.

The Eighth Circuit’s recent decision in GoJet Airlines, LLC v. FAA, 2014 WL 814769 (8th Cir. 2014), provides two useful lessons. First, a challenger must attack an agency’s actual decision, which may not be the same as the decision reached by an Administrative Law Judge. Second, an agency’s informal statement or program may support judicial review where review would not otherwise be available.

In GoJet, mechanics working on one of the airline’s planes placed a restraining bolt in the landing gear to prevent the landing gear from retracting during maintenance. Unfortunately, the plane took off with the restraining bolt still in place. Unable to retract the landing gear, the pilot was forced to return to the airport.

GoJet immediately disclosed the incident to the Federal Aviation Administration under the agency’s Voluntary Disclosure Reporting Program (VDRP). The program provides that in the event of a voluntary disclosure, the agency will issue “a letter of correction in lieu of a civil penalty action” if the airline satisfies the requirements of the program, including a requirement to develop and implement a “comprehensive fix” to prevent the problem from occurring again. After an FAA inspector rejected a proposed comprehensive fix, the company failed to meet the deadline for proposing an acceptable alternative, and the agency initiated a civil penalty proceeding.

In the initial phase of the proceeding, the ALJ concluded that the airplane had been “unairworthy” due to the risk of landing an overweight airplane in that condition. The FAA Administrator held against the company on a different ground—that the airplane was considered unairworthy because it was not operated in conformance with its airworthiness certificate.

As a threshold matter, the court rejected GoJet’s argument that the ALJ’s unairworthiness conclusion was not supported by substantial evidence. This was simply not at issue because the Administrator decided against the airline for a different reason. Whatever an ALJ decides, the only action that can be challenged is the action of the agency head if the agency head considers the matter after the ALJ.

The court then addressed the airline’s claim that the agency had improperly decided to initiate a civil penalty proceeding despite the company’s participation in the Voluntary Disclosure Reporting Program. Since this agency action constitutes the exercise of prosecutorial discretion, it is normally unreviewable because it is “committed to agency discretion by law” under § 706(a)(2) of the APA. Here, however, the agency had constrained itself by making “clear its intent that a policy statement or set of enforcement guidelines impose binding limitations on the exercise of its enforcement discretion.” Particularly where, as here, an agency program or statement is “intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion,” the agency’s own statement provides the constraints necessary to support judicial review. On the merits, however, the court held that the airline had failed to take advantage of an opportunity to revise its inadequate “comprehensive fix.”

D.C. Circuit upholds EPA Hazardous Air Pollutant standards and denies “zone of interests” standing to competitor seeking stringent standards.

White Stallion Energy Center, LLC v. EPA, 2014 WL 1420294 (D.C. Cir. 2014) (per curiam), is a good example of general judicial deference to agencies on highly complex technical topics. The case involved disputes over a recent rule setting hazardous air pollution standards for electric generating units. The court upheld EPA under the arbitrary and capricious standard of review on a wide range of issues. Among other things, the court said that, “EPA is not obligated to conclusively resolve every scientific uncertainty before it issues regulation,” that “[w]hen EPA evaluates scientific evidence in its bailiwick, we ask only that it take the scientific record into account in a rational manner,” and that in this case, “EPA’s data-collection process was reasonable, even if it may not have resulted in a perfect dataset.”

The court also upheld EPA’s decision not to consider costs in the particular context where the statute required EPA to determine whether it was “appropriate” to impose the air quality regulations in question. The court accepted EPA’s explanation of why the ambiguous term “appropriate” did not require consideration of costs. Dissenting on this issue, Judge Kavanaugh, in an essentially common sense argument, asserted that the term “appropriate” necessarily requires consideration of costs.

continued on page 35
By William Funk*


Kathryn A. Watts, Rulemaking as Legislating, Georgetown L. J. (forthcoming), available at http://ssrn.com/abstract=2433742. Federal administrative agencies make far more legally binding policy decisions than Congress. Yet the Supreme Court refuses to embrace the notion that agency rulemaking constitutes an exercise of Article I legislative power. Instead, the Court has long insisted that agency rulemaking represents an exercise of executive power so long as Congress sets forth an intelligible principle. This position, which is driven by the nondelegation doctrine’s central premise prohibiting Congress from delegating legislative power, was reaffirmed by the Court as recently as the 2012 Term. Various judges and scholars have decried the fictional nature of the Court’s current nondelegation doctrine, and some have called for the Court to abandon the doctrine’s central premise prohibiting delegations of legislative power. These calls, however, have been narrowly focused on the constitutional contours of the nondelegation doctrine itself. Scholars, accordingly, have paid little attention to how the nondelegation doctrine has created doctrinal inconsistency that reverberates throughout administrative law. This article aims to fill that gap. Specifically, this article is the first to systematically explore how administrative law’s most central doctrines — including Chevron and Auer deference, arbitrary and capricious review, procedural constraints on agency rulemaking, procedural due process and the test used to define legislative rules — have been influenced by the Court’s nondelegation jurisprudence, and how these various doctrines would be impacted if the Court jettisoned the nondelegation doctrine and frankly acknowledged rulemaking as an exercise of delegated legislative power. This article concludes that some key administrative law doctrines at least implicitly recognize that agency rules flow from delegations of legislative power, putting those doctrines in tension with the nondelegation doctrine. In contrast, other key administrative law doctrines refuse to view agency rulemaking through a legislative lens, aligning them with the nondelegation doctrine’s central premise. Thus, the Court would need to change some administrative law doctrines and clarify others if the Court rejected its current approach and held that Congress constitutionally can and routinely does delegate legislative power. Although these doctrinal changes would have their costs, the changes would be normatively desirable. By openly recognizing that rulemaking flows from a delegation of legislative power, many of administrative law’s disparate doctrines, which have long been operating under a clouded view of rulemaking, would gain a more unified, coherent lens. In addition, the Court would free itself of the longstanding doctrinal fiction that legislative rules constitute the exercise of executive power.

Daniel A. Farber and Anne Joseph O’Connell, The Lost World of Administrative Law, 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-confirmed appointees. Courts then have the role of ensuring the rationality and statutory fidelity of the decision. This is the lost world
Recent Articles of Interest

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. We 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.

William Sherman, The Deliberation Paradox and Administrative Law, available at http://ssrn.com/abstract=2399920. Deliberation is a linchpin of administrative decisionmaking, and is a key basis for judicial deference to the agency’s interpretation of law. But deliberation has a dual valence in other areas of administrative law: it triggers the right to access to agency information in public meeting laws, but bars access in public records laws. This is the first article to identify and explain what I call the Deliberation Paradox in administrative law. This longstanding but unexplored dichotomy has roots in common law history, separation of powers, the purposes of public access statutes, and assumptions about how the government works. But the development of deference doctrines since Chevron v. NRDC sets deliberation at cross-purposes, confusing agencies about what is publicly accessible and denying the public information about vast swaths of government decisionmaking. This article contends that the Deliberation Paradox should be recognized and discarded in favor of an approach that grants deference only to deliberation that is publicly disclosed, with significant implications for judicial deference to agency interpretations of law and for inter-agency collaboration.

Cass R. Sunstein, The Real World of Cost-benefit Analysis: Thirty-six Questions (And Almost as Many Answers), 114 Colum. L. Rev. 167 (2014). Some of the most interesting discussions of cost-benefit analysis focus on exceptionally difficult problems, including catastrophic scenarios, “fat tails,” extreme uncertainty, intergenerational equity, and discounting over long time horizons. As it operates in the actual world of government practice, however, cost-benefit analysis usually does not need to explore the hardest questions, and when it does so, it tends to enlist standardized methods and tools (often captured in public documents that are binding within the executive branch). It is useful to approach cost-benefit analysis not in the abstract but from the bottom up, that is, by anchoring the discussion in specific scenarios involving tradeoffs and valuations. In order to provide an understanding of how cost-benefit analysis actually works, thirty-six stylized scenarios are presented here, alongside an exploration of how they might be handled in practice. A recurring theme is the importance of authoritative documents, which may be altered only after some kind of formal process, one that reflects a form of “government by discussion.” Open issues, including the proper treatment of nonquantifiable values, are also discussed.

Eric Biber and J.B. Ruhl, The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State, 64 Duke L. J. (forthcoming), available at http://ssrn.com/abstract=2397425. Two decades ago, Professor Richard Epstein fired a shot at the administrative state that has gone largely unanswered in legal scholarship. His target was the “permit power,” under which legislatures prohibit a specified activity by statute and delegate administrative agencies discretionary power to authorize the activity under terms the agency mandates in a regulatory permit. Describing the permit power, accurately, as an “enormous power in the state,” Epstein bemoaned that it had “received scant attention in the academic literature.” He sought to fill that gap. Centered on his premise that the permit power represents “a complete inversion of the proper distribution of power within a legal system,” Epstein launched a scathing critique of regulatory permits in operation, condemning the practice as a “racket” for administrative abuses and excesses. Epstein’s assessment of the permit power was and remains accurate in three respects. First, the permit power is vast. Regulatory permits reach into all corners of modern society and are one of the primary workhorses of the administrative state’s exercise of authority. Second, the permit power is ripe for administrative abuse. Like any government power, it must be closely monitored. Third, the permit power has been largely ignored in legal scholarship. Indeed, it does not stretch things to say that Epstein has had the first and last words on the permit power. The problem is that, beyond what he got right about the permit power, most of Epstein’s critique was based on an incomplete caricature of permitting in theory and practice. This article is the first to return comprehensively to the permit power since Epstein’s critique and to offer a deep account of the theory and practice of regulatory permits in the administrative state. Part I positions regulatory permits within the administrative state. We define what a regulatory permit is, outline the scope and scale of permitting in the regulatory state, and explain the different types and characteristics of permits. Part II compares the pros and cons of different permit design approaches and identifies the conditions under which one type of permit, known as the “general permit,” is most likely to offer significant advantages, including mitigating many of the concerns
Epstein advanced. Using environmental degradation problems as examples, Part III applies the theoretical model in concrete policy settings, concluding that general permits, if carefully designed and administered, could be deployed and used to effectively respond to many of the complex policy problems looming in the future. The article closes by proposing a set of default rules and exceptions for permit design and suggesting how they apply to such problems.

Gary E. Hollibaugh, Gabriel Horton, and David E. Lewis, Presidents and Patronage, Am. J. of Pol. Science (forthcoming), available at http://ssrn.com/abstract=2406471. Gary E. Hollibaugh, Naive Cronyism and Neutral Competence: Patronage, Performance, and Policy Agreement in Executive Appointments, J. of Pub. Admin. Research and Theory (forthcoming), available at http://ssrn.com/abstract=2405163. Gary E. Hollibaugh, Vacancies, Vetting, and Votes: A Unified Dynamic Model of the Appointments Process, J. of Theoretical Politics (forthcoming), available at http://ssrn.com/abstract=2406469. These three related articles address executive appointments. The first presents a theory explaining where presidents place different types of appointees and why, focusing on differences in ideology, competence, and non-policy patronage benefits among potential appointees. The authors develop a formal model and test its implications with new data on 1307 persons appointed in the first six months of the Obama Administration. The empirical results broadly support the theory, suggesting that President Obama was more likely to place appointees selected for nonpolicy patronage reasons in agencies off his agenda, in agencies that shared his policy views, and where appointees are least able to affect agency performance. We conclude that patronage continues to play an important role in American politics with important consequences for campaigns, presidential politics, and governance. The second article examines a model of bureaucratic appointments that allows for informationally imperfect agencies. It shows that when legislative assent is required, tradeoffs between ideology and either patronage or agency performance — or both — are often required to ensure legislative confirmation. The same dynamics are not present for unilateral appointments. The third article develops a formal model that seeks to explain the causes and consequences of delays in filling executive and judicial vacancies.

Catherine M. Sharkey, State Farm ‘with Teeth’: Heightened Judicial Review in the Absence of Executive Oversight, 90 N.Y.U. L. Rev. (forthcoming), available at http://ssrn.com/abstract=2414734. While courts and commentators have considered the information-forcing role of executive oversight and/or judicial review of agency action, the dynamic relationship between the two has yet to be considered. This article presents a novel justification for heightened judicial scrutiny in the absence of meaningful executive oversight. Agency cost-benefit analyses and agency conflict preemption determinations — two realms rarely if ever considered together — are compared in terms of their underlying reliance on factual predicates and contrasted in terms of the existing framework for executive oversight and judicial review of agency determinations. A heightened judicial review standard — what the article terms “State Farm with teeth” — should guide courts’ evaluations of the cost-benefit analyses performed by independent agencies not subject to executive oversight. This article is the first to draw the distinction between independent and executive agencies in the State Farm “hard look” context. It is also the first to explore the recent Business Roundtable decision by the D.C. Circuit through this analytical lens. The stringent “State Farm with teeth” standard should likewise be applied to judicial review of agency determinations of conflict preemption. This article’s discussion of recent developments involving the Office of Comptroller of the Currency’s assertion of preemption of state banking laws shows why. This article also points to a potential new information-forcing role for Congress. Using the Dodd-Frank Act as an example, this article further shows how Congress can set parameters for judicial review of the fact-based conflict preemption determination on the part of an agency.

Gideon Parchomovsky and Alex Stein, Catalogs, 114 Col. L. Rev. (forthcoming), available at http://ssrn.com/abstract=2412045. It is a virtual axiom in the world of law that legal norms come in two prototypes: rules and standards. The accepted lore suggests that rules should be formulated to regulate recurrent and frequent behaviors, whose contours can be defined with sufficient precision. Standards, by contrast, should be employed to address complex, variegated, behaviors that require the weighing of multiple variables. Rules rely on an ex ante perspective and are therefore considered the domain of the legislator; standards embody a preference for ex post, ad-hoc, analysis and are therefore considered the domain of courts. The rules/standards dichotomy has become a staple in economic analysis of the law, as well as in legal theory in general. The essay seeks to contribute to the jurisprudential literature by unveiling a new form of legal command: the catalog. A catalog, as the authors define it, is a legal command comprising a specific enumeration of behaviors, prohibitions, or items that share
a salient common denominator and a residual category — often denoted by the words “and the like” or “such as” — that empowers courts to add other unenumerated instances. The article demonstrates that the catalog formation is often socially preferable to both rules and standards and can better enhance the foundational values of the legal system. In particular, catalogs are capable of providing certainty to actors at a lower cost than rules, while avoiding the costs of inconsistency and abuse of discretion inimical to standards. Moreover, the use of catalogs leads to a better institutional balance of powers between the legislator and the courts by preserving the integrity and autonomy of both institutions. The article shows that these results hold in a variety of legal contexts, including bankruptcy, torts, criminal law, intellectual property, constitutional law, and tax law — all discussed throughout the essay.

David L. Markell and Robert L. Glicksman, A Holistic Look at Agency Enforcement, available at http://ssrn.com/abstract=2404930. The law review literature has long recognized that effective enforcement is an essential component of effective regulation. Yet much of the literature focuses on one aspect of the enforcement challenge or another. The purpose of this article is to fill a gap in the law review literature by considering agencies’ enforcement and compliance promotion function holistically. In doing so, the article approaches the challenge from an “inside-out” perspective, a perspective that administrative law scholars have found to be lacking in the literature. The article proposes a three-layered conceptual framework for considering options for structuring the administrative agency enforcement and compliance promotion function. The first layer consists of five components of effective enforcement and compliance: norm clarity, norm achievability, verifiability, an appropriate mix of sanctions and rewards, and indicia of legitimacy. The second involves the inter-related character of these components and highlights the importance of fitting each into a particular enforcement and compliance regime so that agencies may gain synergistic benefits and consider the need to make difficult trade-offs. Third, and finally, the conceptual framework includes four contextual design issues that create additional challenges in determining the appropriate content of each of the five key components of effective enforcement and compliance: the hybrid character of contemporary governance efforts; the importance of “reality-checking” enforcement options through close attention to past performance as well as future challenges and opportunities; the dynamic character of environmental governance challenges; and the salience of possible design changes and the need to prioritize design improvements. The article suggests that it is important to consider all three layers in developing an effective enforcement and compliance promotion regime. The article tests the conceptual framework by including a case study of an ongoing Environmental Protection Agency (EPA) effort to reinvent its enforcement and compliance promotion program and by applying our framework to EPA’s initiative. This case study illustrates the value of the framework in evaluating regulatory design options for the enforcement and compliance promotion function.

James R. Hines, Jr. and Kyle D. Logue, Delegating Tax, available at http://ssrn.com/abstract=2402047. Congress delegates extensive and growing lawmaking authority to federal administrative agencies in areas other than taxation, but tightly limits the scope of IRS and Treasury regulatory discretion in the tax area, specifically not permitting these agencies to select or adjust tax rates. This article questions why tax policy does and should differ from other policy areas in this respect, noting some of the potential policy benefits of delegation. Greater delegation of tax lawmaking authority would permit policies to benefit from the expertise of administrative agencies, and afford timely adjustment to changing economic circumstances. Furthermore, delegation of the tax reform process to an independent commission or agency offers the prospect of Congress committing itself to rational reform and long-run budget sustainability in a way that is more apt to succeed than are piecemeal legislative efforts. The article concludes with an analysis of the constitutionality of tax delegation, noting the applicability of recent Supreme Court interpretations that Congress has broad discretion to delegate rulemaking authority to federal agencies, and that tax policy is of a kind with other federal policies.

Patrick A. McLaughlin and Richard A. Williams, The Consequences of Regulatory Accumulation and a Proposed Solution, available at http://ssrn.com/abstract=2403602. The American regulatory system has no working, systematic process for reviewing regulations for obsolescence or poor performance. Over time, this has facilitated the accumulation a vast stock of regulations. Regulatory accumulation can negatively affect GDP growth, labor productivity, innovation, and safety — perhaps explaining why every president since Jimmy Carter has recognized it as a problem. This article examines previous, presidentially-led efforts to initiate a review of existing regulations in the United States and shows that these efforts have not materially altered the stock of regulations. In contrast, it examines other, successful government reform efforts in order to identify their characteristics. After outlining the obstacles to regulatory cleanup that previous efforts in the United
States failed to address, the article suggests a process that could be adopted in order to eliminate or modify obsolete or otherwise undesirable regulations. Finally, the article evaluates the proposal alongside other recent proposals with regard to how well they overcome the previously identified obstacles to regulatory review and cleanup.

Amanda C. Leiter, *Soft Whistleblowing, Georgia L. Rev. (forthcoming),* available at http://ssrn.com/abstract=2407095. This article explores the underappreciated role that agency insiders play in directing outside oversight of their employer agencies and, in turn, manipulating agency policy development. Specifically, the article defines, documents, and evaluates the phenomenon of “soft whistleblowing”—an agency employee's deliberate, unsanctioned, substantive, and instrumental disclosure of nonpublic information about issues of policy. This phenomenon is ubiquitous but has received no systematic attention in the academic literature. As the article demonstrates, agency employees regularly engage in soft whistleblowing to congressional staff, journalists, and agency watchdog groups, in an effort to bring outside pressure to bear on their employer agencies to shift policymaking direction. The phenomenon results in a high-volume, employee-generated flow of information out of agencies. This flow has significant implications for the distribution of policymaking power within agencies and for the direction and efficacy of agency oversight. For example, the article posits that soft whistleblowing empowers those agency professionals whose codes of ethics encourage some information disclosure (engineers are one example), while disempowering agency lawyers, whose code of ethics all but forbids unsanctioned disclosures about their client agencies’ activities. With respect to outside oversight, soft whistleblowing increases agency transparency, and strengthens congressional oversight, but undermines so-called “presidential administration.” Consequently, the activity likely serves a keel-like function, keeping the agency on a relatively steady policymaking course in the face of shifting political winds.

Kent H. Barnett, *Codifying Chevron, N.Y.U. L. Rev. (forthcoming),* available at http://ssrn.com/abstract=2405016. This article considers the significance and promise of Congress’s unprecedented codification of administrative law’s well-known *Chevron* and *Skidmore* judicial-deference doctrines (to which it refers collectively as “Chevron”). Congress did so in the Dodd-Frank Act by instructing courts to apply the *Skidmore* deference factors when reviewing certain agency preemption decisions and by referring to *Chevron* throughout. This codification is meaningful because it informs the delegation theory that undergirds *Chevron* (i.e., that Congress intends either to delegate interpretive primacy to agencies or, at least, allow courts to defer to agency views when courts retain interpretive primacy). Scholars and at least three Supreme Court justices have decried the judicial inquiry into congressional intent as “fictional” or “fraudulent.” They argue that Congress doesn’t think about interpretive primacy, courts don’t really try to divine congressional intent, and courts use broad assumptions when deciphering congressional intent. Dodd-Frank provides the best direct evidence to date that *Chevron* is not a fiction. Dodd-Frank reveals that Congress knows of *Chevron*, legislates with it in mind, and acquiesces to it. But Dodd-Frank’s preemption provisions—giving an agency rulemaking power but subjecting its decisions to *Skidmore* review—undermine the Supreme Court’s recent statement in *City of Arlington v. FCC*, that Congress intends agencies to receive interpretive primacy (via *Chevron*’s more deferential review) whenever they use rulemaking. These insights support the delegation theory and earlier precedents (like *United States v. Mead*) that did not treat rulemaking as a talisman. If courts apply these earlier precedents, *Chevron* is neither fiction nor fraud. Dodd–Frank also shows *Chevron* codification’s promise for addressing longstanding administrative-law issues. With “*Chevron* rewards” and “*Skidmore* penalties,” Congress — as it did in Dodd–Frank — can clarify how agencies must act to obtain *Chevron* deference, balance “hard look” judicial review with regulatory ossification, and respond to regulatory capture. *Chevron* codification thereby can become a key legislative tool for overseeing the administrative state.

Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight, available at http://ssrn.com/abstract=2404548*. This article offers a novel explanation of divergent congressional and executive behavior and legal doctrine in oversight disputes. It constructs a unified theory of congressional oversight, but it is one that requires a degree of conflict, tension, and disagreement between the political branches to endure. Practical, day-to-day congressional oversight disputes betray a deep canyon between Congress and the President that cuts to the very foundations of our constitutional structure. Hierarchy and entitlement characterize the congressional perspective, with Congress in the role of overseer with fixed substantive rights to obtain desired information. Congress cloaks itself in the language of criminal investigation and litigation. In contrast, equality and competing interests characterize the Executive Branch view, such that congressional oversight requests are the opening salvo in an iterative, negotiation process between co–equal branches. The executive branch sees no presumptive congressional right to define the manner,
form, quantity, or messenger of the information to be provided. Among the formal and informal remedies to enforce its oversight prerogatives, Congress prefers contempt. However, contempt is problematic when the resisting party is an executive branch official following executive branch policy. Because the constitutional scheme places a premium on good-faith negotiation between Congress and the Executive Branch, congressional self-help is more appropriate than litigation for interbranch oversight disputes. While abstention and restraint should be the hallmark of Article III courts presented with bickering political branches, there is an important role for the Judiciary. As such, this article offers principles that should guide courts to facilitate, or approximate, accommodation and compromise.

Jordan M. Barry and John William Hatfield, 

The Coase Theorem predicts that, if there are no transaction costs, parties will always contract their way to an efficient outcome. Thus, no matter which legal rules society chooses, “Coasean bargains” will lead to efficient results. There are always some transaction costs. However, transaction costs are often thought to be low when there are no structural impediments to negotiation, such as large numbers of parties or barriers to communication. When these obstacles are not present, it is commonly assumed that the parties will achieve an efficient result through Coasean bargaining. This article shows that this assumption is incorrect. In particular, it demonstrates that transaction costs can be high, even when there are no structural impediments to bargaining, because the parties themselves may intentionally create transaction costs. Intuitively, an individual may prefer the Coasean bargain that is struck when certain parties are excluded from negotiations. Accordingly, that individual will wish to create transaction costs that keep those parties — potentially including herself — away from the negotiating table. The article shows that there are many contexts in which the parties will choose to create these “voluntary transaction costs,” including environmental litigation, multilateral treaty negotiations, and creditor-debtor relationships. Because of the prevalence of voluntary transaction costs, Coasean logic applies to a significantly smaller class of cases than has previously been recognized. This renders law very important: Legal rules provide the starting point for the parties’ negotiation; the article finds that when the parties’ starting point is closer to the efficient result, they are more likely to achieve an efficient outcome through Coasean bargaining. This insight favors reasonable use rules and other legal rules that attempt to assign entitlements in an efficient manner. The article also finds that liability remedies are more likely to encourage efficient outcomes than injunctive remedies are.

Nadelle Grossman, The Sixth Commissioner, available at http://ssrn.com/abstract=2408558. The federal securities laws grant broad rulemaking authority to the Securities and Exchange Commission (SEC). In promulgating rules, the SEC must not only ensure that its rules protect investors and the public interest, but also consider the effects of its rules on efficiency, competition, and capital formation (the ECCF mandate). However, the SEC’s rulemaking authority has recently been frustrated. In two decisions striking down SEC rules, the D.C. Circuit held that the ECCF mandate requires a quantitative cost-benefit analysis. This contrasts with the SEC’s historic practice of qualitatively assessing the effects of its rules. While these D.C. Circuit decisions have been criticized for applying an inappropriately high standard of review to SEC rulemaking, this article identifies a more fundamental problem with these decisions: they interfere with the SEC’s power to administer the securities laws. This interference frustrates administrative law principles that lie at the heart of the division of power among the three branches of government. Requiring the SEC to engage in a quantitative analysis in rulemaking is especially troubling in a context where the SEC must pass numerous rules under the Dodd-Frank and JOBS Acts. These analyses will surely fail to capture the unquantifiable effects of SEC rules, such as their effect on firm wealth-creating strategic management processes. For these reasons, this article urges the SEC to exert its authority under securities laws and issue an explicit interpretation of the ECCF mandate in a way that best captures the full impact of its rules.

Miriam Seifter, States, Agencies, and Legitimacy, 62 Vanderbilt L. Rev 441 (2014). Scholarship on the administrative process has scarcely attended to the role that states play in federal regulation. This article argues that it is time for that to change. An emerging, important new strand of federalism scholarship, known as “administrative federalism,” now seeks to safeguard state interests in the administrative process and argues that federal agencies should consider state input when developing regulations. These ideas appear to be gaining traction in practice. States now possess privileged access to agency decisionmaking processes through a variety of formal and informal channels. And some courts have signaled support for the idea of a special state role in federal agency decisionmaking. These developments have important implications for administrative law and theory. In particular, they bear on the paramount question of administrative legitimacy—the
decades-long effort to justify the exercise of lawmaking power by unelected administrators in our constitutional democracy. A robust state role in the administrative process, this article shows, is in tension with the models of legitimacy that have come to serve as administrative law’s North Star. Whereas the two reigning legitimacy models alternatively prize (1) centralized presidential control to ensure responsiveness to majority preferences, and (2) apolitical application of expertise, state input raises the specter of regional factionalism and home-state politics. Two types of solutions could alleviate this tension: reforming state involvement in the regulatory process, or updating legitimacy models. The article concludes by charting both courses—identifying potential reforms and sketching possibilities for a new understanding of administrative legitimacy that would better accommodate the state role.

David J. Arkush, The Original Meaning of Recess, available at http://ssrn.com/abstract=2410851. This article reevaluates the original meaning of “recess” in the Recess Appointments Clause. The dominant view holds that “recess” refers only to breaks between formal Senate sessions. By identifying new evidence and correcting mistaken interpretations of older evidence, this article and finds strong support for the view that the Clause uses “recess” in its ordinary, general sense, to mean any time when a legislative body is not conducting business. The article next considers whether the divergence in views on “recess” can be attributed to methodological differences and finds that explanation improbable. Finally, the article makes two general points that arise from its analysis: it may be more difficult than is widely appreciated to establish a specialized original meaning, and scholars making originalist claims should provide clear accounts of the scope and limitations of their research.

Matthew Steilen, Judicial Review and Non-Enforcement at the Founding, U. Penn. J. of Const. Law (forthcoming), available at http://ssrn.com/abstract=2403956. This article examines the relationship between judicial review and presidential non-enforcement of statutory law. Defenders of non-enforcement regularly argue that the justification for judicial review that prevailed at the time of the founding also justifies the president in declining to enforce unconstitutional laws. The argument is unsound. This article shows that there is essentially no historical evidence, from ratification through the first decade under the Constitution, in support of a non-enforcement power. It also shows that the framers repeatedly made statements inconsistent with the supposition that the president could refuse to enforce laws he deemed unconstitutional. In contrast, during this same period the historical record contains hundreds of discussions of judicial review. The article then advances an explanation of why there was considerable support for judicial review but none for non-enforcement. Judicial review followed from what that generation called “expounding” the law, which meant explaining it. A court was supposed to explain the law in the course of deciding a case. Explaining the law involved examining all potentially relevant legal rules and showing how they fit together to deductively justify the judgment reached. In that context, if a statute could not be reconciled with the Constitution, it would not be given effect. Since the president neither decided cases nor expounded the law, he did not enjoy a power of non-enforcement parallel to the power of judicial review.

Adrian Vermeule, Optimal Abuse of Power, Northwestern U. L. Rev. (forthcoming), available at http://ssrn.com/abstract=2425287. This article argues that in the administrative state, in contrast to classical constitutional theory, the abuse of government power is not something to be strictly minimized, but rather optimized. An administrative regime will tolerate a predictable level of misuse, even abuse of power, as the inevitable byproduct of attaining other ends that are desirable overall. There are three principal grounds for this claim. First, the architects of the modern administrative state were not only worried about misuse by governmental officials. They were equally worried about “private” misuse—misrule effected through the self-interested or self-serving behavior of economic actors wielding and abusing power under the rules of the 18th-century common law of property, tort, and contract. The administrative state thus trades off governmental and “private” misuse. Second, the rate of change in the policy environment, especially in the economy, is much greater than in the late 18th century—so much greater that the administrative state has been forced, willy-nilly, to speed up the rate of policy adjustment. The main speeding-up mechanism has been ever-greater delegation to the executive branch, accepting the resulting risks of error and abuse. Third, the costs of enforcing legal rules against executive officials are necessarily positive and plausibly large, in part because any institutional monitors created to detect and punish abuses must themselves be monitored for abuse. The architects of the administrative state believed that a government that always forms undistorted judgments, and that never abuses its power, will do too little, do it too amateurishly, and do it too slowly. In that sense, the administrative state constantly gropes towards an institutional package solution that embodies an optimal level of abuse of power.
Adam Candeub, Transparency in the Administrative State, 51 Houston L. Rev. (forthcoming), available at http://ssrn.com/abstract=2414411. Conventional wisdom holds that government, especially in its executive and administrative capacity, must be “transparent,” disclosing how and why it makes decisions. Transparency, it is believed, limits corruption and encourages public participation. While legal scholarship has examined in detail the policy and legal questions about how much transparency agencies should provide in light of other concerns like deliberative latitude, privacy, or national security, scholarship has not examined the question of what is transparency—a concept that is not, well, transparent. This article forwards a working definition of transparency and examines the central challenges in creating an administrative transparency regime. Most legal scholars define transparency as access to information. Finding this definition incomplete, this article argues that transparency involves two primary elements: one cost-based and the other normative. First, transparency is about lowering the cost of accessing information, particularly the cost of physical access to information in real-time data. In other words, “transparency” or “access” does not really exist if obtaining and securing information is costly in either time or effort. Second, transparency has a “computational” or “complexity” dimension, which has an inevitable functional or normative dimension. In the administrative context, there is basic agreement about transparency’s normative or political purposes: Transparency limits corruption, protects against opportunistic behavior by officials, and encourages public participation. This article examines the form of transparency used by numerous statutory and regulatory regimes and suggests reform focused upon lowering the cost of information, both temporally and geographically. “Real time” disclosure will open the smoke-filled rooms to a more democratic cast of special interests. Finally, this article examines the role of Big Data and its possibly profound effect upon government openness and the relationship between the government and the governed.

Kevin O. Leske, Between Seminole Rock and a Hard Place: A New Approach to Agency Deferece, 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.

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 to 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 indifference. 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.

**Eric Messinger, Transparency and the Office of Legal Counsel, 17 N.Y.U. J. of Legis. and Public Policy 239 (2014).** Recent scrutiny of the Office of Legal Counsel (OLC) in the Department of Justice has led to a consensus across ideological lines that its work must become more transparent. Commentators both sympathetic to and skeptical of OLC’s role have recommended greater publication of its written legal opinions. Insufficient attention has been paid, however, to the inherent functions of public written legal opinions, and their suitability (or lack thereof) for OLC. Examining the existing comparison point of judicial written opinions reveals several core functions served by public written legal opinions, including efficiency, guidance, persuasion, authority, and accountability. Yet the purposes served by publishing written opinions are either met by existing OLC practices or would conflict with OLC’s institutional responsibilities, in ways deleterious to its value and effectiveness. Given the importance of OLC’s work, an opaque status quo is therefore preferable to a more transparent future. Appreciating the limits of transparency as a tool for governance can also point toward more productive roads for institutional reform.

**Chad Deveaux, The Fourth Zone of Presidential Power: Analyzing the Debt-Ceiling Standoffs Through the Prism of Youngstown Steel, Conn. L. Rev. (forthcoming), available at http://ssrn.com/abstract=2423404.** This article uses the Youngstown Steel Seizure Case to assess the recent series of debt-ceiling standoffs between Congress and the White House. If the Treasury ever reaches the debt limit and Congress fails to act, the president will be forced to choose between three options: (1) cancel programs, (2) borrow funds in excess of the debt limit, or (3) raise taxes. Each of these options violates a direct statutory command. In Youngstown, Justice Jackson offered his famous three-zone template, which evaluates executive power by fixing it on “a spectrum running from explicit congressional authorization to explicit congressional prohibition.” Congress can sanction presidential action, it may be silent, or it may prohibit it. But by engaging in the standoffs, Congress directed the president to take specified action and forbade him from taking that very same action. Such contradictory legislative instructions cannot find a home anywhere within Youngstown’s existing taxonomy. As such, the standoffs require expansion of Youngstown’s spectrum to accommodate a fourth zone of presidential power. In this new zone, the author argues that Congress, by confronting the president with a no-win scenario, increased his power. Conflicting legislative commands necessarily invest the executive with a measure of discretion that resembles law making. By commanding the president to implement particular programs, while denying him the funds necessary to pay for those endeavors, Congress tacitly afforded the president the discretion to take any of the three corrective actions suggested above.

**Richard M. Re, Should Chevron Have Two Steps?, 89 Ind. L.J. 605 (2014).** 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 mandates of普通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.

**Melissa F. Wasserman, Deference Asymmetries: Distortions in the Evolution of Regulatory Law, 93 Texas L. Rev. (forthcoming), available at http://ssrn.com/abstract=2416516.** An unevaluated phenomenon in administrative law is what this article terms deference asymmetries. These asymmetries occur when an administrative agency’s decision that overly favors its regulated constituency is either less likely to be subjected to judicial reexamination, or if it is subjected
to judicial challenge, will be afforded a more deferential standard of review than a decision that overly disfavors its regulated constituency. Because decisions that are afforded a more deferential standard are more likely to be upheld, deference asymmetries could potentially function as a one-way ratchet, pushing the development of regulatory law in the pro-regulated-constituency direction. In addition to providing the theoretical basis for the substantive drift that may arise from deference asymmetries, this article identifies the formal and informal structures in the administrative state that give rise to the skewed application of deference regimes. In doing so, this article demonstrates that deference asymmetries is not isolated to a few areas of regulation but instead a surprising number of agencies that regulate fields ranging from the environment, to patent law, to disability benefits face asymmetric deference with respect to their decision making. Finally, this article explores the implications of these asymmetries for administrative law.

**Ian R. Turner, Reviewing Procedure vs. Judging Substantive: The Effect of Judicial Review on Agency Policymaking, available at [http://ssrn.com/abstract=2417981](http://ssrn.com/abstract=2417981).** Bureaucratic policymaking is a central feature of the modern American political system. Administrative agencies not only make policy choices, they must also implement policy effectively. Courts play an integral role in the policymaking process by monitoring, through judicial review of agency policy actions, both policymaking tasks. This article analyzes two variants of a model of policymaking between an agency and a court. In the first case—procedural review—the court only takes agency effort in policy implementation into account when making its review decisions. At times judicial review can induce higher effort from the agency than would otherwise be obtained. At other times judicial review can also dissuade agencies from exerting high effort. In the second case—substantive review—the court reviews both the agency’s policy choice and the effort exerted in implementing policy. Surprisingly, this additional information in the review process precludes fully revealing policy choices from the agency even when the agency is perfectly faithful.

**David H. Moore, Taking Cues from Congress: Judicial Review, Congressional Authorization, and the Expansion of Presidential Power, Notre Dame L. Rev. (forthcoming), available at [http://ssrn.com/abstract=2419657](http://ssrn.com/abstract=2419657).** In evaluating whether presidential acts are constitutional, the Supreme Court often takes its cues from Congress. Under the Court’s two most prominent approaches for gauging presidential power—Justice Jackson’s tripartite framework and the historical gloss on executive power—congressional approval of presidential conduct produces a finding of constitutionality. Yet courts and commentators have failed to recognize that congressional authorization may result from a failure of checks and balances. Congress may transfer power to the President against institutional interest for a variety of reasons. This key insight calls into question the Court’s reflexive reliance on congressional authorization. Through this reliance, the Court overlooks failures of checks and balances and constitutionalizes the transfer of power to the President. Possible solutions include congressional or judicial development of a jurisprudence of independent presidential power, adoption of a presumption against authorization, and treatment of presidential power controversies that turn on congressional authorization as political questions. At a minimum, courts and commentators should be less sanguine about the leading approaches to assessing presidential power.

**Cass R. Sunstein, The Limits of Quantification, Cal. L. Rev. (forthcoming), available at [http://ssrn.com/abstract=2424878](http://ssrn.com/abstract=2424878).** The problem of nonquantifiability is a recurrent one in both public policy and ordinary life. Much of the time, we cannot quantify the benefits of potential courses of action, or the costs, or both, and we must nonetheless decide whether and how to proceed. Under existing executive orders, agencies are generally required to quantify both benefits and costs, and (to the extent permitted by law) to show that the former justify the latter. But agencies are also permitted to consider apparently nonquantifiable factors, such as human dignity and fairness, and also to consider factors that are not quantifiable because of the limits of existing knowledge. When quantification is impossible, agencies should engage in “breakeven analysis,” by which they explore how high the nonquantifiable benefits would have to be in order for the benefits to justify the costs. Breakeven analysis can be used and potentially disciplined in three different ways. (1) Sometimes agencies are able to identify lower or upper bounds, either through point estimates or through an assessment of expected value. (2) Agencies can often make progress by exploring comparison cases in which relevant values have already been assigned (such as for a statistical life). (3) When agencies cannot identify lower or upper bounds, and when helpful comparisons are unavailable, breakeven analysis requires agencies to identify what information is missing and to specify the conditions under which benefits would justify costs (“conditional justification”). In admittedly rare cases, regulators, no less than individuals, might have to “pick” or instead to “opt.”
Administrative and Regulatory Law News

Zachary J. Gubler, *Experimental Rules*, 55 B.C. L. Rev. 129 (2014). When forming policy under conditions of extreme uncertainty, the optimal approach seems to be a process by which the policy decision is divided into multiple stages, or in other words, an experimental approach. The optimal legal vehicle for such policy experimentation is what this article refers to as “experimental rules,” which are rules that terminate automatically and are designed for the express purpose of generating data during the sunset period that can then be used to determine the optimal policy strategy for the long run. Yet it turns out that agencies rarely adopt such “experimental rules” in the real world. This article argues that the reason has to do with the political economy, which appears to disfavor experimental rules either because they are more temporary and therefore less valuable to interest groups or because they are more costly to adopt. To overcome these political economy constraints and encourage policy experimentation, this article proposes having courts apply greater deference to experimental rules (at least during the initial, experimental phase of the multi-stage process). This approach would have the effect of nudging actors in the political economy toward experimental rules, thereby avoiding the possibility of sub-optimal policies becoming entrenched in permanent rules. It would also preserve rules that might otherwise be vacated by courts at least long enough to generate the necessary learning to determine whether they should be implemented on a more permanent basis.

Daniel Mensher, *With Friends Like These: The Trouble with Auer Deference*, 43 Envtl. L. 849 (2013). One of the central issues at stake in *Decker v. NEDC* was whether logging operations and their related road systems fell within EPA’s “Industrial Stormwater Rule.” In deciding that they did not, the Supreme Court invoked *Auer v. Robbins* to defer to EPA’s interpretation of its rule. While deference to agency interpretations of regulations is not new and has garnered little academic interest, what makes *Auer* deference particularly troubling in *Decker* is that EPA offered its interpretation for the first time in an amicus brief in *Decker*. This is problematic for several reasons, including that this application of *Auer* essentially allows an agency to change its regulations without going through any public process at all, as Justice Scalia, the lone dissenting Justice in *Decker*, explained. The question is, without *Auer*, what should courts do with agency interpretations of their regulations? This article suggests that the rationales for deferring to agency interpretations of statutes provide a sensible way to shape deference to regulatory interpretations. As a result, the article concludes that a flexible, sliding scale approach to weighing agency regulatory interpretations would be a fairer, more logical, and legally defensible approach.

Michael Ramsey, *A Return Flight for Due Process? An Argument for Judicial Oversight of the No-Fly List*, 84 Miss. L. J. (forthcoming), available at http://ssrn.com/abstract=2414659. Since 2001, thousands of people have been placed on the No-Fly List by mistake. Even more have been confused with individuals on the list based on watchlist mismanagement. To make matters worse, the FBI never informs travelers of their status on the list and the process for removing one’s name from the list is often unfruitful. Because of the difficulties facing travelers placed on the No-Fly List, the past decade has brought several cases to various federal courts over the right to travel and the No-Fly List. While many of these cases have been unsuccessful in providing any answers to plaintiffs, recently two cases have arisen that have called into question the way in which the No-Fly List is compiled and the redress available to those placed on the list in error. In August 2013, the District Court of Oregon held for the first time that the No-Fly List affects a constitutional interest. Also, in January 2014 the District Court for the Northern District of California held that the government must disclose to a citizen of Malaysia her status on the No-Fly List. These legal victories for travelers note the importance of the right to travel and the necessity for more accurate and judicious management the No-Fly List. This comment proposes that a court order, similar to a warrant, be required prior to placement on the No-Fly List. This requirement would add a layer of judicial review to reduce the amount of people placed on the list in error. It would require the government to have evidence of a person’s probable guilt or danger to society before depriving them of a fundamental constitutional right. This comment also proposes a reform to the redress process, providing information to those placed on the list, but limiting that information in the interest of national security. These proposals seek to strike a healthy balance between allowing the government to pursue its interest in national security while also securing the constitutional rights of individuals.

Ron Etemi, *To Defer or Not to Defer: Why Chief Justice Roberts Got it Right in City of Arlington v. FCC*, 118 Penn St. L. Rev. Penn Statim 22 (2014). As we approach the thirtieth anniversary of the landmark decision of *Chevron, U.S.A., Inc. v. NRDC*, we are reminded of its continued vitality in modern administrative law, as well as the polarizing effect it has on judges, commentators, and practitioners alike. While most applaud the *Chevron* decision for introducing simplicity to the deference rules, others have called for terminating the
Recent Articles of Interest

Doctrine altogether. Not startling, then, is the Supreme Court’s recent decision in City of Arlington v. FCC, which presented a fractured decision concerning the applicability of the Chevron framework. This essay has three primary tasks. The first is to synthesize cogently the law regarding judicial deference to agency interpretations of statutory ambiguities. The second task is to provide an analysis of each of the opinions in the City of Arlington decision. Finally, the author concludes that Chief Justice Roberts’ dissenting opinion offers a more realistic approach than that offered by the majority that is also consistent with the Court’s precedent, and more faithful to the separation of powers doctrine.

Laurance Tai, Interagency Information Sharing with Resource Competition, available at http://ssrn.com/abstract=2399052. This paper presents a game-theoretic model to examine executive branch agencies’ incentives to share or withhold information given that resources are scarce. A political principal allocates support to two agencies based on their capabilities and also benefits when they provide information to each other. Based on agency outputs in one period, she can readjust her allocation in the next based on her beliefs about these capabilities. Since each agency prefers to receive the other’s information but also wants more support from the principal, cooperation in equilibrium is relatively easy in the last period, but more difficult to achieve in any preceding periods. The model informs discussions about how more information sharing might be achieved among agencies and provides empirical implications for the circumstances under which agencies are expected to have shared information.

News from the Circuits continued from page 23

Perhaps more interesting is the court’s discussion of standing. Julander Energy Company, an oil and natural gas firm, sought to challenge EPA’s failure to adopt more stringent requirements that would mandate “fuel switching” by electric power plants. Fuel switching would arguably improve the environment by replacing coal oil or natural gas in producing electricity. But as an energy company, Julander’s real interest was in enhancing demand for oil and natural gas at the expense of coal. Predictably, the majority held that Julander did not fall within the zone of interests of the Clean Air Act, even given that the zone of interests test “is not meant to be especially demanding.” Judge Kavanaugh concurred in opinion highly critical of what he considered the D.C. Circuit’s “inconsistent and unpredictable” case law on the zone of interests test. Arguing that the Supreme Court’s 2012 decision in Match–E–Be–Nash–She–Wish Band of Potawatomi Indians v. Patchak, —— U.S.———, 132 S. Ct. 2199 (2012), had established “that the plaintiff need not be among a class that Congress intended to benefit in the statute at hand,” he complained of the D.C. Circuit’s continuing “crabbed approach” to the zone of interests test. In particular, he expressed concern that the D.C. Circuit had “still continued since Match–E to hold—at least in some cases—that the zone of interests test prevents businesses from complaining about allegedly illegal agency under-regulation of their competitor businesses.”

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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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