

ADMINISTRATIVE & REGULATORY LAW NEWS

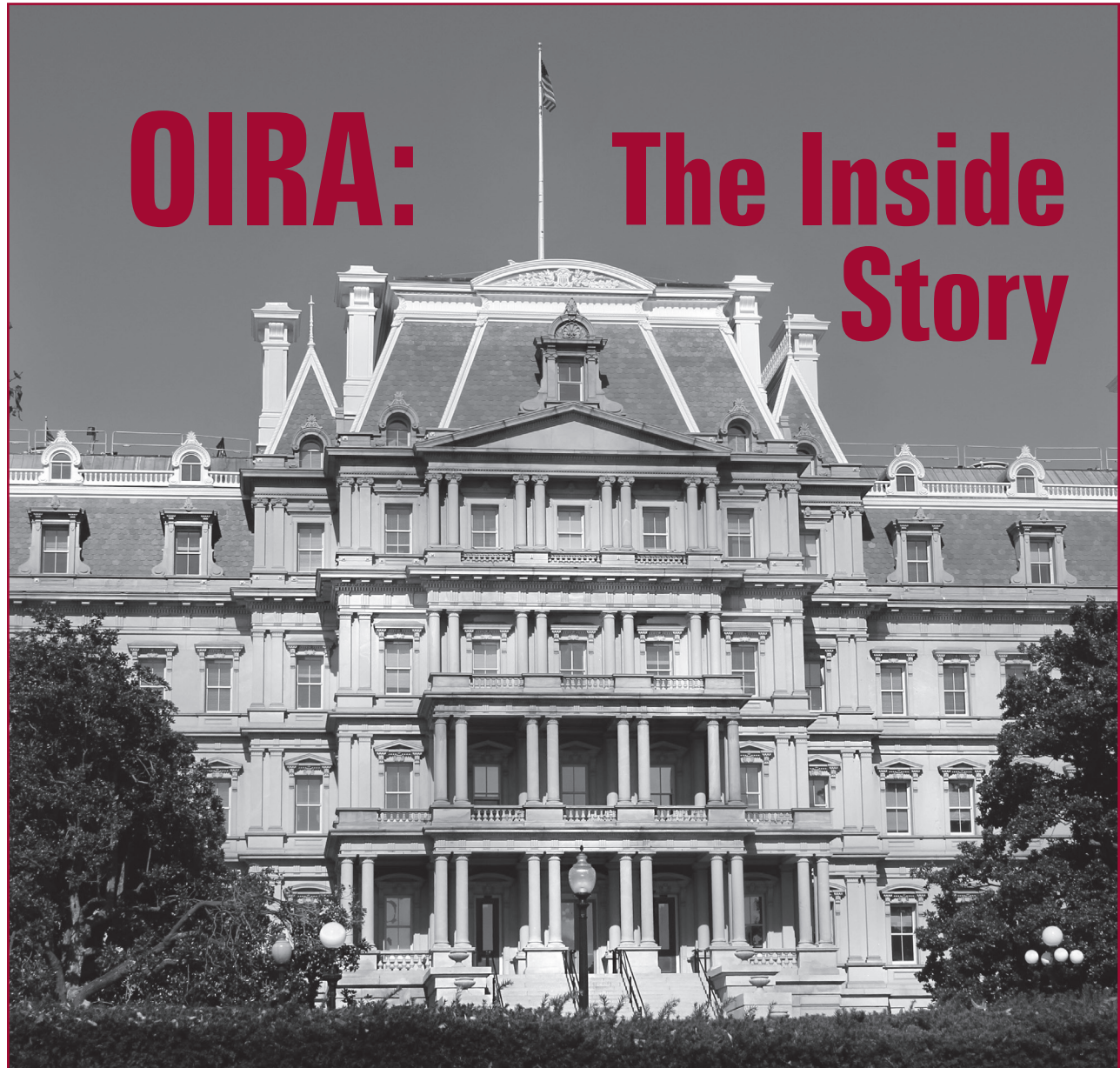


Section of Administrative Law & Regulatory Practice

Vol. 38, No. 4

American Bar Association

Summer 2013



OIRA: The Inside Story

Also In This Issue

Improving Interagency Coordination

Agency Self-Insulation

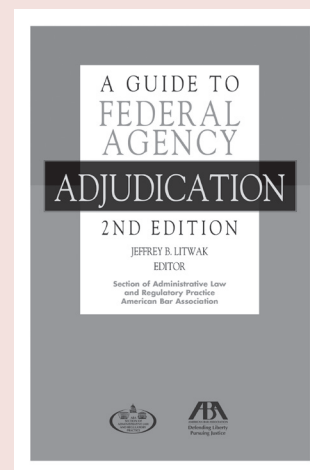
Executive Branch Legal Decisionmaking

ANNUAL MEETING ■ AUGUST 9 - 11, 2013 ■ SAN FRANCISCO, CALIFORNIA

A Guide to Federal Agency Adjudication, 2nd Edition

Edited by Jeffrey B. Litwak

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



2012 320 pages 6X9 PC: 5010072

\$75.95 – general public

\$59.95 – Ad Law Section member price

To order or for more information, visit www.ShopABA.org or call the ABA Service Center at 1.800.285.2221.



For more information, or to order, visit our website www.ababooks.org or call (800) 285-2221.



Chair's Message



Jamie Conrad

Waxing Philosophical

1. Ludwig Wittgenstein was the most important philosopher of the 20th Century.¹ He published two hugely influential books. The first, the *TRACTATUS*, was an attempt to systematically describe what could and could not be said about the world. After a decade or so, he decided that the whole attempt was the product of mistaken thinking. The rest of his career he spent writing questions and insights on little slips of paper that he would shuffle into lists. A sheaf of these was published as *PHILOSOPHICAL INVESTIGATIONS*.

2. For this last Chair's Message, I'm definitely going with the *INVESTIGATIONS* approach.

3. A former colleague, a speechwriter, said the ideal speech was one in which the sentences could be put in any order and it would still make sense. Hopefully, I can do better than that.

4. Membership organizations like the ABA ostensibly exist to serve the interests of their members. But because they are organizations, and have staff, they inexorably focus foremost on maintaining and growing the organization (and its budget). The members with leadership roles often take on that mission as well. As membership organizations grow, there is a tendency to see members as sources of revenue and marketing targets. As Section leaders, my predecessors and I have striven to avoid that Stockholm Syndrome and to remain focused on how well the Section serves its members. As well as I know my successors, I believe they will continue to do likewise.

5. The sequester, and tightening federal budgets generally, present a challenge for the ABA and even more so for the Section, given the high percentage of federal employees in its membership. The GSA (and now IRS) scandals have exacerbated that challenge by deterring agencies from spending any money on "conferences." Many lawyers have CLE requirements, though, and need to go to conferences to retain their licenses. I am sure the same is true for doctors and many other types of licensed professionals who are federal employees. I have started exploring to what extent the ABA might partner with the AMA and similar organizations to make this point to Congress and the Administration. While it is admittedly self- (i.e., organizationally) serving, it is also clearly member-serving.

¹ Sorry, I was a philosophy major. If I were more knowledgeable about sports maybe I'd use that as a hook instead.

6. We saw the effect of the federal budget squeeze in attendance at our 2013 Spring Institute, which despite programming and promotion at least equal to 2012 had half the attendance. Early indications are that the Homeland Security Law Institute is facing similar pressures. Notwithstanding, and despite suggestions that we scale back, we have decided to maintain the 2013 Fall Conference as a two-day event. So long as we can continue to sell publications and manage our expenses overall, we can afford to lose (some) money on events, and the Fall Conference is our flagship event. Ultimately, we concluded that it was in the members' interest to continue to offer the sort of quality and scale of programming that we have offered in the past. So please attend!

7. That said, we could do more for our members if we had more members. Please feel it incumbent upon yourself to talk up the Section among your colleagues and acquaintances and encourage them to join.

8. People in the leadership ladder are advised that they should have "their" projects all lined up before they assume the chair because once that happens they'll be consumed with the day-to-day business of addressing the matters that events conspire to put on their plate. This is largely true, especially if you also have a day job. On the other hand, one can fairly question whether the membership benefits maximally from an organization that veers each year from one chair's (or president's) priorities to the next's. While I would have liked to have spent more time this year on election-related reforms, I think the membership probably was better served by my seizing the opportunity to help repeal the web disclosure aspects of the STOCK Act, or by negotiating with the Tax Section and others to push through our hanging-fire resolution and report on equalizing the disclosure of political contributions to organizations. Plus, soon enough I'll have a bunch more free time and will be able to go back to things I'm particularly interested in (like trying to get the ABA's lobbying reform proposal introduced in Congress).

9. The Section was not the main group pushing the STOCK Act reform. But I was repeatedly told how much influence our letter was having. I might have written that off to flattery except that, in my work on behalf of clients, I regularly heard (and saw) how seriously staff took the comments we prepared in 2011 on the Regulatory Accountability Act and the comments we submitted last year to OMB on incorporation by reference. The thought and time the Section has historically put into generating

continued on page 21

Table of Contents

Chair's Message	1
Letter from the Editor.	3
Letter to the Editor and Response	4
2013 Nominations	6
The Office of Information and Regulatory Affairs: Myths and Realities.	8
Improving Interagency Coordination in Shared Regulatory Space	11
Agency Self-Insulation Under Presidential Review	15
Human Rights, National Security, and Executive Branch Legal Decisionmaking	19
2013 ABA Annual Meeting	22
Supreme Court News.	23
News from the Circuits.	28
Recent Articles of Interest.	32

ADMINISTRATIVE & REGULATORY LAW NEWS

Editor-in-Chief: William S. Morrow, Jr., Executive Director/General Counsel, Washington Metropolitan Area Transit Commission

Advisory Board Chair: Michael Asimow, Visiting Professor of Law, Stanford Law School; Professor of Law Emeritus, UCLA Law School

Advisory Board Members: Warren Belmar, Managing Director, Capitol Counsel Group, LLC; Daniel Cohen, Assistant General Counsel for Legislation, Regulation, and Energy Efficiency, U.S. Department of Energy; John Cooney, Partner, Venable, LLP; Cynthia A. Drew, Associate Professor of Law, University of Miami School of Law; William Funk, Professor of Law, Lewis & Clark Law School; Philip J. Harter, Earl F. Nelson Professor of Law, University of Missouri–Columbia School of Law; William S. Morrow, Jr., Executive Director/General Counsel, Washington Metropolitan Area Transit Commission; James T. O'Reilly, Professor of Law, University of Cincinnati College of Law

Contributing Editors: Robin Kundis Craig, Professor of Law, S.J. Quinney College of Law; William S. Jordan III, C. Blake McDowell Professor of Law, The University of Akron School of Law; Daniel J. Metcalfe, Adjunct Professor of Law, Washington College of Law, and Executive Director of its Collaboration on Government Secrecy; Edward J. Schoenbaum, Administrative Law Judge, Contract

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

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

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

Nonmembers of the Section may subscribe to this publication for \$28.00 per year or may obtain back issues for \$7.00 per copy. To order, contact the ABA Service Center, 321 North Clark Street, Chicago, IL 60610, Tel. 800/285-2221.

©American Bar Association 2013. Articles appearing in this publication may not be reprinted without the express permission of the ABA.

Letter From the Editor

This is the final issue for me as Editor in Chief of the *Administrative & Regulatory Law News*. After 11 years and 44 issues, the time has come to pass the baton.

As readers know, the *News* is provided to members of the Administrative Law and Regulatory Practice Section of the American Bar Association as a benefit of Section membership. It is one of several such publications. The others currently include the quarterly *Administrative Law Review* and the annual *Developments in Administrative Law and Regulatory Practice*.

All three are the offspring of volunteers who have generously contributed their time to support the Section's mission of educating members and keeping them informed of shifts in the substance and practice of administrative and regulatory law. The *News* and *Developments* are produced by Section members, the *Law Review* by students at American University Washington College of Law.

Volunteerism is the heart and soul of the Section. Membership dues alone

are not enough to ensure that the Section fulfills its vital role in developing and maintaining the standards of practice expected—no, demanded—of our profession. It has been a privilege and honor to be associated with so many committed individuals.

My first issue as Editor in Chief—Fall 2002—introduced the new lineup of the *News* and declared: “Together, we are committed to bringing our readers timely reporting of the events and trends shaping administrative law, provocative essays advocating or heralding change, and, of course, news of the Section's actions and activities.” “[W]e hope you find this publication informative, stimulating and enjoyable. If that is the case, then we will have done our job.”

Although our readers have the final say on this, I believe that those of us responsible for getting out the *News* achieved a measure of success over the years in publishing informative and stimulating coverage of matters of interest to our readers. Hopefully, our readers found the past 44 issues enjoyable, as well.

As I look back, I will not miss the deadlines, but I will miss interacting with the authors whose work has graced these pages, foremost among whom were the authors of the *News*'s regular features: Robin Craig (Supreme Court News), Bill Jordan (News from the Circuits), Michael Asimow (News from the States), Yvette Barksdale (Recent Articles of Interest), and Bill Funk (Supreme Court News and Recent Articles of Interest). And I cannot forget the able assistance of Section staff, currently headed by Anne Kiefer. You all have my everlasting thanks.

Looking forward, I am confident that the *News* will be in good hands under the stewardship of Cynthia Drew, a charter member of the *News* Advisory Board and long-time active Section member. The *News* lives on.

With that, I bid our readers farewell.

Oh. And keep reading the *News*.

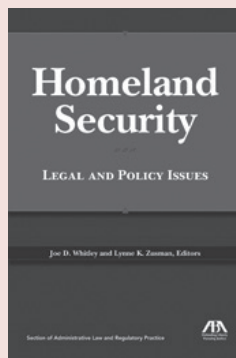
Bill Morrow 

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

Joe D. Whitley and Lynne K. Zusman, Editors

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

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



*“To be well informed on
Homeland Security law
this book is a must read.”*

—The Honorable Tom Ridge, Chair of
Ridge Global, Former Secretary of the
U.S. Department of Homeland Security
and Former Governor of Pennsylvania

\$99.95 Regular price
\$89.95 Administrative Law and
Regulatory Practice section members

Product code: 5010060
2009 6 x 9 284 pages paperback



For more information, or to order, visit our website www.ababooks.org or call (800) 285-2221.



Letter to the Editor and Response

April 5, 2013
Re: Winter 2013 Issue

Dear Editor,

For more than a quarter century, I have made a career out of the field of law known as Social Security Disability Law. Over this span of time, I have personally represented more than a thousand individuals in their efforts to convince the Social Security Administration (SSA) that they were indeed disabled and entitled to disability benefits under the law. I am the past chair of the Social Security Law Committee of the Chicago Bar Association and a longstanding sustaining member of the National Organization of Social Security Claimants' Representatives. I am also a current member of the ABA. I am writing to you, however, at this time in my individual capacity regarding what I consider to be significant errors in your Winter 2013 issue of the *Administrative & Regulatory Law News*.

There has always been the requirement that individuals must establish that they have a severe medical impairment or impairments and the Administration has established regulations and rules whereby an individual's impairments are evaluated. Claims proceed through various levels of review, with the third level being a hearing before an Administrative Law Judge in Social Security's Office of Disability Adjudication and Review (ODAR). Currently about 800,000 claims a year are heard by ALJs. Because of my longstanding practice in the field of Social Security law, if there were a worsening current backlog crisis at the hearing level of adjudication, my clients would be impacted by this current crisis. But for all the problems which exist at the ODAR offices now, a huge backlog is not one of them. That was not always the case. Three years ago, often there was about a two-year wait before an individual who had requested a hearing would receive one. But now, wait times have been reduced significantly with hearings

often taking place within the first year after the filing of the request for hearing.

So, with what I know to be true based on the experience of my own clients, I was taken aback recently after seeing the cover of the *Administrative & Regulatory Law News* put out by the Administrative Law and Regulatory Practice Section of the ABA. If you are an attorney practicing in a different field of law seeing the cover you would likely think "my my there is A CRISIS brewing now given the Social Security backlog." This is because on this month's cover of this ABA publication there is an older guy in a wheelchair with bold black letters to the left "Solving the SSA Backlog CRISIS" with the White House in the background. Of course this issue is dated Winter 2013, yet the articles inside which purportedly justify the cover are so out of touch and dated, one wonders why they were even published (except possibly to create the impression of a crisis).

The lead article "Thinking Outside the APA Box: A New Social Security Tribunal" cites 2010 data about the huge two-year backlog that claimants wait before having a hearing. The article basically calls for an entirely new system based on the false premise of an ongoing huge backlog. This article states, "(o)ne thing however is clear. There remains an ongoing need for concerted action to resolve the Social Security backlog." Actually (in my best Jon Stewart voice): "ehhhhh . . . NOT SO CLEAR." It would only be clear if you ignore the 2012 testimony of the former Commissioner of Social Security, Michael Astrue, that wait times were down to less than a year, a trend which has only continued through the end of 2012 into 2013. It would only be clear if you ignore this thing called reality. The second article "Should Congress Create a Special Category of SSA ALJs" similarly catastrophizes: "There is no end in sight to the rapidly expanding caseload and its attendant backlogs."

Again, actually, the backlogs? (in my best Stewart voice again) "not that bad anymore guys . . . still could be better . . . but really not like it was . . . not so much of a CRISIS . . . unless you want to paint one for political purposes."

The focus of my complaint here is not on the merits of the authors' proposals, which is beyond the scope of this letter, only the false notion that there is a worsening backlog CRISIS spiraling out of control, justifying radical reforms to the adjudicatory system. I emphasized again the word crisis in capital letters because that is how you as editor of the publication chose to feature the articles together with that older gentleman sitting in a wheelchair with the White House looming in the background. Notwithstanding the fact that the guy would likely not even have a disability claim, but rather a retirement claim not subject to any backlog, even if he is just an older-looking fellow with a disability claim, any representative not able to obtain benefits at the initial stages of the application process for this wheelchair-bound claimant would not be worth his salt. Assuming hypothetically that this poor guy did somehow have a claim that rose to the hearing level after SSA's initial and reconsideration failure to determine the obvious disability here, any competent attorney would be able to direct the hearing office to a quick on-the-record favorable decision within a month or two of the hearing request.

Is the one-year wait time for a resolution still too long? Of course. Does this one year represent a crisis? Yes to that, as well—for on a very real personal level, every day a claimant has to wait for any benefits which he or she deserves represents a form of crisis. Today in my law office a 54-year-old gentlemen denied for the second time asked me how long will it take at the hearing level before the case would resolve. I confidently told him no longer than a year. On average my clients are now receiving hearings around eight months after the hearing

request. Some cases are even being scheduled within five months of the request for hearing. This is quite a different picture than what existed in 2007-2008 when wait times often approached two years. Indeed, as noted above, former Commissioner of Social Security Michael Astrue testified at the end of June 2012 to Congress that the average waiting time peaked in 2008 at 532 days and that this had been significantly reduced down to 350 days. A 2011 article published by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University indicated that as of September 2011, SSA reported that it took an average of about a year (360 days) to process a case during FY 2011. Indeed SSA's FY 2011 Performance and Accountability Report specifically stated: "The average processing time for FY 2011 was 360 days compared to 426 days in FY 2010."

My complaint with the cover and the articles inside was that they painted an improper picture of an out-of-control-backlog. The lead article specifically referenced the two-year wait times without mentioning the great progress SSA had achieved in reducing the backlog. The lead article forecasts that the backlog will be increasing given demographic trends. However, as noted, my own experience with my clients is otherwise, and the data over the last few years suggests that the Administration wisely prepared for this, in part through additional ALJ hiring but also through the use of their senior attorneys, and has decreased the backlog in spite of increased filings. If there is a risk of returning to the bad old days of near-two-year backlogs, it would come from budget cutbacks and inadequate funding. Just two days ago on a Wednesday, I was trying to file something at the local Social Security field office shortly before 3 pm, which had been their closing time after a prior trimming of hours in 2011 from what had been 4 pm. There was a sign on the door that effective January 3, 2013 the office would be closed on Wednesdays at 1 pm. If similar early

shutdowns happen at Social Security hearing offices, one might reasonably expect some impact on wait times. However, thus far, increases to the backlog do not square with the 2013 reality that I know or the data that I have referenced here from the last few years.

In this era of sequester, fiscal cliff, budget crisis, the 47 percent, the transformation of the word entitlement into a dirty word, the individual filing for disability is up against a lot. Recent statistics show that denials of claims have increased at all levels of the adjudicatory process, including at the hearing level. The recent March 2013 draft report of the Administrative Conference of the United States, which had been commissioned and funded by SSA, documents an ALJ allowance rate of 61 percent in fiscal year 2009, reduced to 41 percent in fiscal year 2012. As of the first quarter of 2013, judges' allowances remained similarly depressed at 43 percent. The law has not changed in the interim. The standards for disability have not changed. What has changed is the subtle pressure on judges given the fiscal crisis in this charged political climate to simply deny more claims.

Given the 800,000 claims adjudicated by ALJs on an annual basis and comparing the 2009 allowance rate to the 2012-13 rate, approximately 150,000 more unfavorable decisions were issued in 2012, and another 150,000 are going to be denied this year, representing significant increases over what would have been denied in 2009. What does this mean? What this means is that every working day across America, 580 people are receiving ALJ denials of benefits, whereas just four years ago in 2009, they were being approved. Every day—580 individuals, 580 families, 580 stories of devastation. Now that is a real crisis.

Very truly yours,

N. David Kornfeld, former
Chairman of the Social Security
Law Committee of the Chicago
Bar Association

Reforming Social Security Adjudication

(Response to N. David Kornfeld)

By Michael Asimow, Jeffrey S. Wolfe, and
Jeffrey S. Lubbers 1*

In the Winter 2013 edition of the *Administrative and Regulatory Law News*, we published two articles about Social Security. The first article² suggested that Congress create a new tribunal independent of Social Security to adjudicate disability disputes. The tribunal would employ existing Social Security ALJs but would also hire a new class of Social Security Judges who would not be covered by the various provisions of the Administrative Procedure Act (APA) relating to ALJs. The article pointed to the United Kingdom's successful experience with a Social Security Tribunal. The second article suggested that Congress authorize the Social Security Administration (SSA) to hire its own ALJs rather than having to rely on the OPM hiring process and made several other reform suggestions.³

Both articles began by discussing the existing backlog of disability cases. The backlog is a longstanding problem that has caused a great deal of friction between the SSA and its ALJs. Applicants for disability must endure lengthy delays while their claims are considered by the state and federal

continued on page 31

¹ * Michael Asimow is Visiting Professor of Law, Stanford Law School, and Professor of Law Emeritus, UCLA School of Law. He is a former chair of the Section of Administrative Law and Regulatory Practice. Jeffrey S. Wolfe is an Administrative Law Judge with the Social Security Administration Office of Disability Adjudication and an Adjunct Professor of Law at University of Tulsa College of Law. Jeffrey S. Lubbers is Professor of Practice in Administrative Law, Washington College of Law, American University.

² Michael Asimow and Jeffrey S. Wolfe, *Thinking Outside the APA Box: A New Social Security Tribunal*, 38 ADMIN. & REG. L. NEWS, Winter 2013, at 3. The opinions and views in the article and this response article are solely those of the authors in their respective private capacities and not the United States government or the Social Security Administration or any of its components.

³ Jeffrey S. Lubbers, *Should Congress Create a Special Category of SSA ALJs?*, 38 ADMIN. & REG. L. NEWS, Winter 2013, at 5.

2013 Nominations

The Annual Membership Meeting of the Administrative Law and Regulatory Practice Section will take place on Sunday August 11, 2013, from 11:30 am—12:00 pm in the Ralston Room of The Palace Hotel, San Francisco, California. The Nominating Committee, composed of Jonathan Rusch, William Luneburg, and Jane Luxton, has nominated the following persons for the following positions:



Chair — Joe Whitley

(by operation of the bylaws)

Joe chairs the Atlanta White Collar Practice Group at Greenberg Traurig. Joe has served as program chair or co-chair of the Section's annual Homeland Security Law Institute since its inception in 2006. The Institute has become one of the most successful Section programs under Joe's capable leadership. Joe's career has been marked by distinguished public service. Joe was appointed by President George W. Bush as the first General Counsel of the United States Department of Homeland Security (DHS) in 2003. He held that position for two years, working for Secretary Tom Ridge and Secretary Michael Chertoff, before returning to private practice. Before that, in the George H. W. Bush Administration, he served as the Acting Associate Attorney General, the third-ranking position in the Department of Justice. He was appointed by Presidents Reagan and Bush, respectively, to serve as the United States Attorney in the Middle (Macon) and Northern (Atlanta) Federal Districts of Georgia. Earlier in his career, he served as an Assistant District Attorney in the Chattahoochee Judicial Circuit in Columbus, Georgia.



Chair-Elect — Anna Shavers

(by operation of the bylaws)

Anna is the Cline Williams Professor of Citizenship Law at the University of Nebraska Law School, where she teaches, among other things, administrative law and immigration law, and where she founded the school's immigration clinic. She served as Secretary of the Section from 2006–2009, was a long-time Chair of both the Publications Committee and the Immigration Committee, was the Section's Liaison to the ABA Commission on Immigration, and served as a Council Member. In the larger ABA, Anna has served as a member of the ABA Commission on Law and Aging and a member of the ABA Coordinating Committee on Immigration Law. Anna received her undergraduate degree from Central State University, her Master of Science from the University of Wisconsin, and her J.D. from the University of Minnesota.



Vice Chair — Jeffrey A. Rosen

Jeff is a partner with Kirkland & Ellis in Washington, D.C. He was General Counsel of the U.S. Department of Transportation (2003–2006) and General Counsel and Senior Policy Advisor for the Office of Management and Budget (2006–2009). Jeff has served the Section in a variety of roles, including Executive Branch Liaison to the Council (2008), Council Member (2009–2012), Co-Chair of the Section's Rulemaking Committee (2009–present), and organizer, speaker, or panelist on more than a dozen Section or other ABA-related Institutes, programs, and meetings since 2004.



Last Retiring Chair — Jamie Conrad

(by operation of the bylaws)

Jamie is the principal of Conrad Law & Policy Counsel, a solo law practice that he established in 2007, where he provides regulatory and legislative representation of associations, companies, and coalitions in the areas of environment, homeland security, and science/information policy. He was in-house counsel at the American Chemistry Council for 14 years and previously practiced with the D.C. offices of Cleary, Gottlieb, Steen & Hamilton and Davis, Graham & Stubbs. Jamie is a frequent speaker and author. He conceived and edits the Environmental Science Deskbook (Thomson West). Jamie was a member of the council 2008–2010 and served as secretary 2005–2008. He has chaired the Legislation Committee and Environmental & Natural Resources Regulation Committee and co-chaired the Regulatory Policy Committee. Jamie has organized, moderated, and spoken at numerous Section programs. He has authored and coauthored Section reports and recommendations and blanket authority letters. Jamie also has held various leadership positions in the Section of Environment, Energy & Resources. He is a fellow of the American Bar Foundation. Jamie received a B.A. from Haverford College and a J.D. from George Washington Law School.

Secretary — Renée Landers (Incumbent)

Renée is Professor of Law at Suffolk University Law School and teaches administrative law, constitutional law, and health law. She also is the Faculty Director of the school's Health and Biomedical Law Concentration. Renée was president of the Boston Bar Association in 2003–2004, the first woman of color and the first law professor to serve in that position. She has worked in private practice and served as Deputy General Counsel

for the U.S. Department of Health and Human Services and as Deputy Assistant Attorney General in the Office of Policy Development at the U.S. Department of Justice during the Clinton Administration. Renée recently completed a term as a member of the Massachusetts Commission on Judicial Conduct, serving as vice chair from April 2009 until October 2010. She was a member of the Supreme Judicial Court's committees studying gender bias and racial and ethnic bias in the courts. She is a graduate of Radcliffe College and has served as President of the Harvard Board of Overseers. Renée has held the following Section leadership positions: council member, 2000–2003, Nominating Committee member, 2003–2004; Membership Committee chair 2004–2006; co-vice chair, Health and Human Services Committee 1998–2000.

Budget Officer — Edward Schoenbaum

(Currently Assistant Budget Officer)


Ed is an Administrative Law Judge for the Illinois Department of Employment Security. He is currently the ex officio Council Member on behalf of State Administrative Law and is a long-time co-chair of the State Administrative Law Committee. Ed is also a past President of the National Association of Administrative Law Judges and past Chair of the ABA's National Conference of Administrative Law Judges (NCALJ). He is currently the Chair-Elect of the Senior Lawyers Division. For six years he was the Budget Officer for the Judicial Division, and he served as NCALJ's representative to the House of Delegates.

Council Members:

Jack Beermann. Jack is Professor of Law and Harry Elwood Warren Scholar at Boston University School of Law in Boston. Jack has served the Section as Vice-Chair of the Adjudication Committee (2012–present), Co-Chair (2001–2004) and member (2012–present) of the Scholarship Committee, author or contributor to various Section publications, and a panelist or presenter at the Section's Fall Conferences (2006, 2010).

Tracy K. Genesen. Tracy is a partner with ReedSmith in San Francisco. Tracy has served the Section as Co-Chair of the Beverage Alcohol Practice Committee (2012–present), Co-Chair of the Section's Annual Meeting Program Committee (2010), an organizer and panelist on Section Spring Meeting panels (2011, 2013), and a past member of the Nominating Committee (2011).

James P. Gerkis. Jim is a partner with Proskauer Rose LLP in New York. Jim has served the Section as a Council Member (2011), Co-Chair of the Securities, Commodities and Exchanges Committee, Vice-Chair of the Homeland Security and National Defense Committee (2004–2010), Liaison Member of the ABA Task Force on Financial Markets Regulatory Reform, and moderator or panelist on various Section or other ABA-related Institutes and programs.

Carol Ann Siciliano. Carol Ann is Associate General Counsel in the Cross-Cutting Issues Law Office at the Environmental Protection Agency's Office of General Counsel. She has served as Co-Chair of the Section's Fall Conference (2012, 2013). 

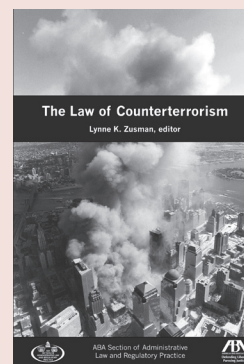
From the ABA Section of Administrative Law and Regulatory Practice The Law of Counterterrorism

Lynne K. Zusman, Editor

Counterterrorism is defined as “offensive measures taken to prevent, deter, pre-empt, and respond to terrorism”. In contrast, anti-terrorism is defined as “defensive measures used to reduce the vulnerability to terrorist acts”. This important, ground-breaking work addresses the multiple facets of legal authority that affect our ability to fight transnational terrorism.

Over the last decade, the American public has benefited from the work of many federal agencies. This book examines in detail the roles they play, the highly esoteric nature of counterterrorism law, and the importance of adhering to the rule of law when engaged in counterterrorism.

Among areas examined in detail are Afghanistan; the Taliban and Al-Qaeda; the DOJ torture memo; the philosophy of terrorism; war crimes jurisdiction; the 9/11 Commission; current and future national security principles; the National Security Act and IC reform; the National Counterterrorism Center; the organization and structure of the intelligence community; the National Security Council system; communications surveillance; the PATRIOT Act, and more. Order your copy today.



\$99.95 Regular price

\$79.95 Administrative Law and Regulatory Practice Section members

Product code: 5010069

2011 6 x 9

320 pages paperback



The Office of Information and Regulatory Affairs: Myths and Realities

By Cass R. Sunstein*

The Office of Information and Regulatory Affairs (OIRA), a part of the Office of Management and Budget (OMB), has become a well-established, often praised, and occasionally controversial institution within the federal government. OIRA was initially created by the Paperwork Reduction Act in 1980, with (among other things) the particular responsibility of approving (or disapproving) information collection requests from federal agencies. In one of his early actions, taken less than a month after assuming office, President Ronald Reagan gave the OMB an additional responsibility, which is to review and approve (or decline to approve) federal rules from executive agencies, with careful consideration of costs and benefits. Within OMB, that responsibility is exercised by OIRA. The Administrator of OIRA is often described as the nation's "regulatory czar." While it is an understatement to say that this term is an overstatement (and that is one of my major claims here), it does give a sense of the range and responsibility of the office.

From September 2009 until August 2012, I was privileged to serve as OIRA Administrator. I had taught and written about administrative law for over two decades, and much of my work focused explicitly on OIRA. Nonetheless, there was a great deal that I did not know, and much of what I thought I knew turned out to be wrong or at best incomplete. Even among close observers—in the media, in the business and public interest

communities, and among academics, including professors of law—the role of OIRA and the nature of the OIRA process remain poorly understood.

It is frequently and mistakenly thought, for example, that OIRA review almost exclusively involves the views and perspectives of OIRA itself; that when rules are delayed, it is almost always because of OIRA's own concerns; that when rules are long delayed or ultimately not issued, it is generally because OIRA opposes them; that analysis of costs and benefits is the dominant feature of OIRA review; and that OIRA review is highly political. Much of the discussion of OIRA focuses on OIRA's role as part of White House oversight of agency rulemaking. To be sure, that role is quite important, and it will receive considerable attention here. At the same time, it overlooks key features of OIRA's day-to-day operations, which largely involve interagency coordination and highly technical questions.

My primary goal here is to dispel current misunderstandings. One of my central themes is that OIRA helps to collect widely dispersed information—information that is held throughout the executive branch and by the public as a whole. OIRA is largely in the business of helping to identify and aggregate views and perspectives of a wide range of sources both inside and outside the federal government. While the President is ultimately in charge, the White House itself is a "they," not an "it." Outside of the White House, numerous agencies are also involved, and they may well be the driving forces in the process that is frequently misdescribed as "OIRA review." It would not be excessive to describe OIRA as, in large part, an information aggregator.

For example, the Department of Agriculture will know a great deal about how rules affect farmers, and

the Department of Transportation will know a great deal about how rules affect the transportation sector, and the Department of Energy will know a great deal about implications for the energy sector; the OIRA process enables their perspectives to be brought to bear on rules issued by other agencies. Part of OIRA's defining mission is to ensure that rulemaking agencies are able to receive the specialized information held by diverse people (usually career officials) within the executive branch.

Another defining mission is to promote a well-functioning process of public comment, including state and local governments, businesses large and small, and public interest groups. OIRA and agencies work together to ensure that when rules are proposed, important issues and alternatives are clearly and explicitly identified for public comment. OIRA and agencies also work closely together to ensure that public comments are adequately addressed in final rules, where appropriate by modifying relevant provisions in proposed rules. Indeed, a central function of OIRA is to operate as a guardian of a well-functioning administrative process, to ensure not only respect for law but also compliance with procedural ideals, involving notice and an opportunity to be heard, that may not always be strictly compulsory but that might be loosely organized under the rubric of "good government."

In explaining these points, I emphasize four propositions that are not widely appreciated and that are central to an understanding of OIRA's role.

1. *OIRA helps to oversee a genuinely interagency process, involving many specialists throughout the federal government.* OIRA's goal is often to identify and convey interagency views and to seek a reasonable

* Robert Walmsley University Professor, Harvard University and Harvard Law School; former Administrator, Office of Information and Regulatory Affairs. This article is drawn from the author's longer work published under the same title at 126 HARV. L. REV. 1838 (2013), available at http://www.harvardlawreview.org/media/pdf/vol126_sunstein.pdf.

consensus, not to press its own positions. While OIRA's own views sometimes matter, OIRA frequently operates as a conveyor and a convener. The heads of the various departments and agencies are fully committed to the process; they understand, and agree, that significant concerns should be heard and addressed, whether or not they are inclined to agree with them.

2. *When a proposed or final rule is delayed, and when the OIRA review process proves time-consuming, it is usually because significant interagency concerns have yet to be addressed.* Frequently, there will be general agreement that a rule is a good idea, and the delay will be a product not of any sense that it should not go forward but a judgment that important aspects require continuing substantive discussion. The relevant concerns may be highly technical; they may, for example, involve a complex question of law, or one or several provisions that are difficult to get right. One goal is to ensure that if a rule is formally proposed to the public, or finalized, it does not contain a serious problem or mistake. A final rule containing a problem or mistake creates obvious difficulties, perhaps above all if it is a mistake of law. But (and this is a more subtle point) even a proposed rule can itself significantly alter people's behavior, and thus create difficulties as well, if people believe that it is likely to be finalized in the same form.

3. *Costs and benefits are exceedingly important, and OIRA (along with others in the Executive Office of the President, including the Council of Economic Advisers and the National Economic Council) does focus on them, but they are not usually the dominant issues in the OIRA process.* Especially for economically significant rules, the analysis of costs and benefits receives careful attention; to the extent permitted by law, the benefits must justify the costs, and agencies must attempt to maximize net benefits. But most of OIRA's day-to-day work is usually spent not on

costs and benefits but on working through interagency concerns, promoting the receipt of public comments (for proposed rules), ensuring discussion of alternatives, and promoting consideration of public comments (for final rules). OIRA also engages lawyers throughout the executive branch to help resolve questions of law, including questions of administrative procedure.

4. *Much of the OIRA process is highly technical.* OIRA may seek, for example, to ensure careful consideration of the views of the Department of Justice on a legal issue, or the views of the United States Trade Representative on an issue that involves international trade, or the views of the Department of Homeland Security and the National Security Council on an issue with national security implications, or the views of the Department of Energy on the effects of a rule on the energy supply. In such cases, career officials, with technical expertise, are frequently the central actors. When rules are delayed, it is often because technical specialists are working through the technical questions. Much of the time, the problem is not that OIRA, or anyone else, has a fundamental objection to the rule and the agency's approach. It is that the technical questions need good answers.

To the extent that the OIRA process produces controversy, it is often because of a concern that "politics," in some pejorative sense, plays a role in that process. To sharpen the concern, let us describe that concern in the most stark fashion. Agencies consist of specialists. Their concerns are the facts and the law. They attempt to implement statutes faithfully, applying their technical (and sometimes scientific) expertise. By contrast, OIRA consists largely of unelected bureaucrats, who may have agendas of their own. OIRA is also part of the White House, and for that reason, it is necessarily part of a politicized process. OIRA lacks the specialized competence of the agencies.

Insofar as other White House offices, with their own agendas, are involved in the OIRA process, the problem of comparative ignorance may be compounded.

The result—in the view that I am describing—is that agencies are sometimes unable to achieve their goals, and to implement their understanding of the law, simply because of the interference from either unelected bureaucrats at OIRA or political actors at the White House. Note that so summarized, the concerns involve two different points. The first has to do with the role of OIRA itself and in particular its career staff. The second has to do with the role of the White House as such.

What this account ignores is that most of the OIRA process is technical, not political, and it is technical in an appropriate sense, involving an extraordinarily wide range of officials, many of them outside of the White House. I have emphasized that not infrequently, the underlying issues involve the law, and the rulemaking agency's lawyers work closely with the Department of Justice, White House Counsel, the OMB General Counsel's office, and other relevant offices to produce the best judgments about what the law requires. Here OIRA's role will involve convening, not deciding. If the issue is one of economics, OIRA is likely to play a substantive role, but as I have emphasized, a number of other economists will be involved.

Not infrequently, a question of science will be relevant, and scientific assessments will be made after consultation of specialists throughout the government. Here, too, OIRA will play the role of convener. When scientific issues are engaged, there is no "political interference with science" (in my experience). Scientific issues are explored as such by people who are competent to explore them. Some questions can be seen as those of "science policy," in the sense that they involve not strictly scientific questions, but questions about how to proceed in the face of scientific uncertainty. Those questions will also be engaged as such.

continued on next page

Technical work is the bread-and-butter of daily life at OIRA.

It is true, of course, that OIRA has a good deal of formal authority under Executive Orders 12866 and 13563. That authority matters. But in important cases, the agency convinces OIRA and others, on the merits, that its position is indisputably correct, or that it is reasonable enough even if not indisputably correct. And in important cases, the agency concludes that the views suggested by OIRA, and pressed by interagency reviewers, are clearly correct, or that they are reasonable enough even if not clearly correct. In a well-functioning process, the substance is what matters. Of course any OIRA Administrator will pay a great deal of respectful attention to the views of others. The Administrator is not likely to feel so confident about his personal judgment, and that of his staff, if it differs from the considered judgments of the agency and lacks substantive support within other offices and agencies involved in the interagency process.


What about “politics”? If the term refers to public reactions and electoral factors, consideration of “politics” is not a significant part of OIRA’s own role. To be sure, political issues might be taken into account by other offices. The White House Office of Legislative Affairs and OMB’s Office of Legislative Affairs work closely with Congress, and those offices have the lead in coordinating discussions between the Administration and Congress, including discussions about

regulations. For example, a member of Congress may send letters to the OIRA Administrator, and members and their staffs may seek a 12866 meeting. OMB’s Office of Legislative Affairs or the White House Office of Legislative Affairs might help coordinate that meeting. Members of Congress may have valuable information about the likely effects of rules. The White House Office of Intergovernmental Affairs is in charge of relations with state and local governments, and it might help to ensure that the views of state and local officials are communicated to OIRA, usually through public comments, but sometimes through 12866 meetings. State and local officials may also have important information to convey. The White House Office of Communications and the OMB Office of Communications are in charge of relationships with the media, and when proposed and final rules need to be explained to the public, they help develop press releases and other relevant documents.

In addition, others in the White House—including the Chief of Staff’s Office—will be alert to a wide range of considerations, including the relationship between potential rulemakings and the President’s overall priorities, goals, agenda, and schedule. It is important to emphasize that with respect to the Administration as a whole, the Office of the Chief of Staff has an important role insofar as it works to advise on and help coordinate executive branch activity with close reference to the President’s own

commitments. All executive offices, including OIRA, work under the President and are subject to his supervision, to the extent permitted by law. Insofar as the President and his closest advisers are clear on their priorities, OIRA will of course be made aware of their views and act accordingly. Those involved in the OIRA process are alert to the concerns and priorities of the President himself, and they take direction from him.

To return to my most general point: One of OIRA’s most important missions is to increase the likelihood that rulemaking agencies will benefit from dispersed information inside and outside the federal government. OIRA sees itself as a guardian of a well-functioning administrative process. Federal officials, most of them nonpolitical, know a great deal, and the OIRA process helps to ensure that what they know is incorporated in agency rulemakings. In addition, those outside of the federal government often have indispensable information, and OIRA understands one of its crucial tasks as encouraging receipt and careful consideration of that information.

In these respects, OIRA does not so much promote centralized direction of regulatory policy as it does incorporation of decentralized knowledge. Of course, OIRA plays an important role in the process of White House oversight of executive branch rulemaking. What I have emphasized here is that a key part of that role is the function of information aggregator. 

LOOKING FOR MORE INFORMATION ABOUT THE SECTION?

Go to http://www.americanbar.org/groups/administrative_law.html

Improving Interagency Coordination in Shared Regulatory Space

By Jody Freeman & Jim Rossi*

As President Barack Obama quipped in his 2011 State of the Union address: “The Interior Department is in charge of salmon while they’re in freshwater, but the Commerce Department handles them when they’re in saltwater. I hear it gets even more complicated once they’re smoked.” Indeed, many areas of regulation are characterized by fragmented and overlapping delegations of authority. They can be found throughout the administrative state, in virtually every sphere of social and economic regulation, in contexts ranging from border security to food safety to financial regulation. Presidents have often decried such delegations as redundant and inefficient and have consistently targeted them for elimination or consolidation in proposals for executive branch reorganization. Yet such proposals fail to appreciate how pervasive and durable “shared regulatory space” among multiple agencies proves to be. As a result, interagency coordination is one of the central challenges of modern governance.

The Benefits of Shared Regulatory Space

Congress bears primary responsibility for creating these overlapping functions in the first place. Such delegations may reflect congressional dysfunction, or may be a byproduct of the legislative committee process. Or they may result from purposeful design choices or from compromises necessary to pass legislation. Whatever their origins, these delegations can be difficult for administrative agencies to navigate and for future Congresses to oversee, and they present a monumental management challenge for any president. Perhaps this explains the widely shared concerns that overlapping agency delegations are redundant and that they produce inefficiency and gaps.

Yet we eschew such uniformly negative characterizations. Overlapping delegations are not always inefficient. They can create distinct advantages, including the potential to harness the expertise and competencies of specialized agencies. Many seemingly “redundant” delegations reflect complex administrative regimes in which the agencies play unique roles. Sometimes agency functions overlap; sometimes agencies possess related but distinct jurisdictional assignments and sometimes their jurisdictional assignments require them to cooperate or concur with each other. Not all of these arrangements are the same, and relatively few are literally “redundant.” Thus, to capture the full range of such multiple agency delegations, we favor the more nuanced concept of “shared regulatory space.”

Still, in the absence of strong interagency coordination, multiple agency delegations create the potential for considerable dysfunction. The challenge in managing such related authorities is to enable the agencies to bring their relative competencies

to bear while ensuring that they do not pursue conflicting or incompatible policies that would undermine their larger shared mission. For this, coordination is essential. Not only can formal coordination efforts improve on the informal coordination that occurs as a matter of course in the administrative state, but it also can be superior to merely consolidating numerous agencies into a single bureaucracy, which does not guarantee that they will work together cooperatively.

In particular instances, efforts at coordination might conflict with a clear congressional purpose, as when Congress intentionally separates a prosecutorial and an adjudicative function. But generally, greater interagency coordination will be desirable to the extent it can help agencies and the executive branch capitalize on the benefits of shared authority, while minimizing potential losses of efficiency, effectiveness, and accountability. For example, coordination can be helpful when it opens the decisional process to multiple perspectives and specialized knowledge; when it structures opportunities for agencies to test conflicting information and ideas; or when it provides agencies with a forum for resolving disagreements early in a multi-stage decisional process. Although shared authority might raise decision costs, coordination can help to control them. Formal coordination mechanisms may also incentivize and equip agencies to monitor each other, which can help to control shirking and drift, thereby easing the monitoring burden for Congress. In addition, coordination can help to produce policy compromises that are consistent (or at least not inconsistent) with congressional intent. At least one rationale for why Congress disperses regulatory authority in the first place

continued on next page

* Respectively, Archibald Cox Professor, Harvard Law School, and Professor of Law, Vanderbilt University Law School. The authors originally wrote about interagency coordination in a law review article, Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012). This essay stems from a consultants’ report on the topic they prepared for the Administrative Conference of the United States, *Improving Coordination of Related Agency Responsibilities*, online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2199990. Professor Freeman worked on a number of policy initiatives described in the report when she served as Counselor for Energy and Climate Change in the White House in 2009–2010. The discussion of these examples is based exclusively on documents available to the public.

is that members cannot decide on a specific policy course and expect the stakeholder agencies to work it out. Greater coordination may also, at least under some conditions, make it harder for interest groups to capture the administrative process or to play agencies against each other.

But, as is commonly observed, opportunities for coordination can be squandered if the agencies work at cross-purposes or fail to capitalize on one another's unique strengths and perspectives. A fundamental challenge for administrative law is not to avoid these multiple agency delegations altogether, but to address how their operation and management can be improved.

A Survey of Coordination Tools and Their Challenges

A number of tools are commonly used to facilitate coordination and allow agencies to work together. Yet, as the Administrative Conference of the United States suggested in its 2012 recommendation, *Improving Coordination of Related Agency Responsibilities* (Recommendation 2012-5, adopted June 15, 2012), agencies can improve how they coordinate with each other. In describing these opportunities for improvement, we divide the primary coordination instruments into four categories: consultation provisions, inter-agency agreements, joint policymaking, and centralized White House review.

Consultation Provisions

Congress often requires one agency to consult or take comment from another before it makes a final decision on a matter of common interest. Some statutes merely offer the consulting agency an opportunity to provide input to the "action" agency, which the latter must consider but may reject, while other statutes require the consulting agency to concur in the action agency's decision, giving it effective veto power. Arguably, such interagency consultation requirements serve the interests of Congress by supplementing congressional oversight with inter-agency monitoring, or

by providing members of multiple congressional committees with some influence over the decisionmaking process. But the benefits of these tools are not restricted to Congress. The President may also demand that executive branch agencies consult with each other, and with willing independent agencies, in order to pursue his policy interests. Indeed, barring a statutory prohibition, the presumption should be that agencies may engage in coordination as part of their discretionary authority, in order to carry out their statutory responsibilities.¹

Memoranda of Understanding

Perhaps the most pervasive instrument of coordination in the federal government, however, is the memorandum of understanding (MOU). A typical MOU assigns responsibility for specific tasks, establishes procedures, and purports to bind the agencies to fulfill mutual commitments. These agreements resemble contracts yet they frequently are not considered binding and thus are generally unenforceable and unreviewable by courts. Most are negotiated by agencies voluntarily in furtherance of their statutory duties, though Congress could explicitly require them, and the President presumably could request or direct that executive agencies sign such agreements if he wished. Nevertheless, there appears to be no generally applicable statutory or executive branch policy regarding the use of MOUs, leaving their content largely to the discretion of the agencies. A few agencies choose to publish some of their MOUs in the *Federal Register* or on their websites, but there is no single interagency database where these agreements are collected, making them hard to track and compare.

Agencies may also coordinate through commonplace policymaking instruments, including jointly issued policy statements and guidelines. For example, in 2010, the Department

of Justice (DOJ) and Federal Trade Commission released new "horizontal merger" guidelines, which outline how the two agencies will evaluate the likely competitive impact of mergers under federal antitrust law. The main advantage to the regulated community of such joint guidance is that it signals the agencies' current thinking regarding enforcement policy.

Joint Rulemaking

Among the most formal and transparent coordination instruments is joint rulemaking, through which agencies promulgate legally binding regulations together. The most prominent example of joint rulemaking to date is the Obama administration's fuel efficiency and greenhouse gas standards for cars and trucks, which were issued jointly by the Environmental Protection Agency (EPA) and Department of Transportation (DOT) in 2010 (for model years 2012-2016) and 2012 (for model years 2017-2025).

This example illustrates some of the benefits of coordination where agencies share overlapping or closely related authority. In this instance, joint rulemaking provided a forum for EPA and DOT to resolve a number of potential inconsistencies and conflicts stemming from their different statutes, and from their traditional regulatory roles. According to a Government Accountability Office (GAO) report reviewing the 2010 process, the agencies worked much more closely together than ever before during the joint rulemaking, sharing responsibility for the rule from preamble to conclusion. Joint rulemaking not only led the agencies to pool resources and share expertise, it also provided a forum for designing workable program elements and settling important legal and policy questions. This interaction benefited industry by aligning and simplifying the regulatory and enforcement process. Had the agencies set standards independently, they might have designed quite different, and potentially inconsistent, substantive regulatory programs. Better integration of their approaches not only reduced transaction costs and compliance costs

¹ The D.C. Circuit recently rejected the argument that agency coordination must be explicitly authorized by Congress. See *Mingo Logan Coal Co. v. EPA*, No. 12-5150 (D.C. Cir. Apr. 23, 2013).

for the auto industry but also created a more robust, legally defensible, and manageable program for the agencies.

Though they have been relatively sparingly used historically, the number of joint rulemakings among federal agencies appears to be on the rise. For example, the Dodd–Frank Wall Street Reform and Consumer Protection Act, which calls for numerous new and revised financial regulations, requires joint rulemaking in many provisions and mandates interagency consultation prior to rule promulgation in several others.

The President's Role

Overlapping and fragmented delegations present the President, whose constitutional duty it is to faithfully execute the laws, with both a significant management challenge and a unique opportunity. The President is well situated to exert more control over dispersed authority through centralized White House coordination efforts, including not only regulatory review but also deployment of a variety of councils, task forces, and other mechanisms largely under his control. As ACUS recognized in its 2012 recommendations on improving interagency coordination, there are considerable opportunities for the President to improve coordination among agencies. At the same time, coordination may be a vehicle through which the President may seek to put his stamp on policy. The President is uniquely motivated and relatively well equipped to impose coordination on executive (and to some extent even independent) agencies. Seen from this perspective, efforts to “coordinate” the bureaucracy must be understood as part of the power struggle between the President and Congress to control administrative agencies.

Recommendations to Improve Coordination in Shared Regulatory Space

Key among our recommendations, as endorsed by ACUS, is that the President adopt a comprehensive management strategy to promote coordination, which might most effectively be done via a new Executive order. The

Office of Management and Budget could adopt a coordination agenda as part of its implementation of the Government Performance and Results Act, and certain targeted reforms could be adopted voluntarily by the agencies and those in the executive branch charged with managing agency decisions. These reforms include development of agency policies on coordination, sharing of best practices, ex post evaluation of at least a subset of coordination processes, and tracking of outcomes and costs.

Even absent direction from the President, however, agencies could adopt reforms aimed at improving coordination. In addition to tracking and evaluating their coordination efforts, some additional targeted improvements could help to make coordination tools more transparent and effective. These include:

1. *Developing Agency Coordination Policies.* As an initial matter, all federal agencies should develop and adopt policies and procedures for facilitating coordination with other agencies. Some agencies already have such policies, but many do not. Agencies should be required to identify any areas of jurisdiction or operation that might implicate or benefit from interagency coordination generally or with respect to specific sister agencies. For example, a recent GAO report on the implementation of the Dodd–Frank Act faulted the financial regulatory agencies for not pursuing coordination more systematically and noted that the majority of agencies reviewed had not developed internal policies on coordination. Such policies should address, among other things, how to reduce duplication of effort in complying with the numerous analytic requirements imposed by statute and Executive order and how to resolve conflicts with other agencies over their application.

2. *Sharing Best Practices.* A government policy on coordination should establish a mechanism through which agencies may share best practices and provide for ex post evaluation. For MOUs, best practices might include suggestions that agencies include progress metrics and sunset provisions,

which might help to ensure that agencies revisit MOUs regularly. The policy should also include best practices for joint rulemaking and recommend when agencies should consider using the process even when not statutorily required to do so. Among other things, best practices might include establishing joint technical teams for developing the analytic underpinnings of the rule, requiring early consultation among agency legal staff and lawyers at DOJ who may need to defend the rule, and requiring early consultation with OIRA regarding joint production of cost-benefit analyses.

3. *Supporting and Funding Interagency Consultation.* Optional or voluntary interagency consultation provisions can be fairly easy for an agency to ignore or to comply with only pro forma. Agency officials may be tempted to treat these obligations as hoops to jump through, rather than as important vehicles for feeding valuable information into their decisionmaking processes. A duty to respond publicly and in writing to comments by other agencies would raise the costs of dismissing other agencies' input without sufficient consideration and would signal the importance of taking that input seriously. Where Congress does not explicitly require written responses with reasons, executive branch and independent agencies could adopt such a requirement as a matter of good governance. In addition, interagency input often comes too late to be of maximum benefit—such as when agencies are invited to comment on analyses that have already been substantially designed or completed. To ameliorate this problem, it is important to ensure that consultations occur early in the decisionmaking process, before initial positions are locked in, and that the consultations be ongoing and integrated rather than periodic and reactive. This can be accomplished, for example, by establishing cross-cutting agency teams to produce and analyze data together over the course of the decisionmaking process. It thus may be appropriate to revive the Regulatory

continued on next page

Working Group, established by Executive Order 12,866, or to develop other structures to assist agencies in identifying opportunities for coordination. Action agencies, on whom the duty to consult falls, should commit to contribute a share of resources to support joint technical and analytic teams, even if those resources will be consumed in part by other agencies.

4. *Increasing the Visibility of MOUs.* The relative informality that makes MOUs so appealing and easy to deploy also makes them generally unenforceable and, in most cases, entirely insulated from judicial review. While it seems unnecessary to publish or catalog MOUs that address internal matters of agency organization and resource deployment, agreements that have broad policy implications or that may affect the rights and interests of the general public ought to be more visible and easier for both Congress and the public to track. This additional transparency will be not only valuable to the public but also useful to agencies wishing to learn from each other and to executive branch officials who currently lack a central mechanism for overseeing MOU implementation. It would also be beneficial to establish a government-wide mechanism for

periodically revisiting a subset of highly significant MOUs to assess the extent of their implementation.

5. *Tracking Total Resources.* To better evaluate the costs of coordination, it would be helpful to develop methods for monitoring total resources spent on interagency consultations, MOUs, joint rules, and other similar instruments. At the outset, this effort might be limited to high-priority, high-visibility interagency coordination efforts, such as important joint rulemakings. For example, given that the volume of joint rulemakings will likely increase as a result of the Dodd-Frank Act and possibly other federal legislation such as the Affordable Care Act, it would be worthwhile to begin tracking and gathering data about these efforts soon. Without creating an enormous burden, it might be possible to compare the average cost of major rules that are jointly produced to that of major rules that are produced by agencies acting independently. GAO, Congressional Research Service, and various agency inspectors general already evaluate certain interagency efforts, largely on a piecemeal basis. A more comprehensive set of studies, perhaps with the assistance of ACUS

or other academic bodies, could help to integrate and augment this work

Conclusion

In sum, there is no silver bullet to improve agency decisions in situations involving complex, technical problems and multiple agencies. We should be wary of premature calls to consolidate and eliminate agencies, especially when there are considerable gains to be had from agencies coordinating. No single procedural device for coordination will be suitable for every circumstance, but both Congress and the President have toolboxes of versatile mechanisms at their disposal with which they can address coordination challenges. As ACUS recognized in its 2012 recommendation, a number of modest initial steps adopted by the federal government could improve coordination, including development of agency policies on coordination, sharing of best practices, ex post evaluation of at least a subset of coordination processes, and tracking of outcomes and costs. Even without strong central leadership, agencies should be free to adopt many of these reforms on their own, and courts will likely defer to agency coordination efforts providing they are not explicitly barred by statute. ◯

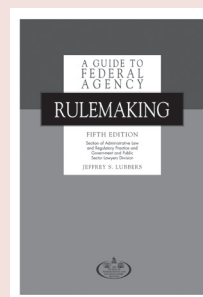
The ABA Guide to Federal Agency Rulemaking, 5th Edition

By Jeffrey S. Lubbers

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

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

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



\$139.95 General Public price
\$119.95 Administrative
Law and Regulatory Practice
section member price

Product code: 5010073
2012 7 x 10 500 pages
paperback



To order, visit www.ShopABA.org or call the ABA Service Center at 1.800.285.2221.



Agency Self-Insulation Under Presidential Review

By Jennifer Nou*

Administrative agencies, like trial judges facing appellate review, dislike having their decisions reversed. Reversals are costly. They can upend months, even years, of work spent gathering data, reaching out to stakeholders, and responding to public comments. Reversals can also send agencies back to the drawing board in settings where resources are already constrained, budgets consistently threatened. That agencies may act to avoid costly reversals, then, is hardly a surprise, nor is it a novel insight. For the most part, however, this insight has been explored with respect to the anticipated effects of judicial review: How do agencies interpret statutes or make policy decisions to avoid reversal by the courts?

But the vast majority of rulemaking agencies—the executive branch agencies—face not only the courts’ review of their decisions, but also review by the President. Agencies must first survive presidential review, that is, before issuing any significant regulatory pronouncement that constitutes or may lead to a final rule (including notices of inquiry, advance notices of proposed rulemaking, notices of proposed rulemaking, and, pursuant to a recent Office of Management and Budget memorandum, significant guidance documents as well). For decades, Presidents have institutionalized such review through Executive orders, which currently require agencies to submit “significant” regulatory actions to the Office of Information and Regulatory Affairs (OIRA), along with a more thorough cost-benefit analysis (CBA) for those actions deemed

“economically significant” under Executive Order Nos. 12866 and 13563. Once an agency submits a draft regulatory action to OIRA, OIRA then coordinates a review process with other agencies and White House offices to help ensure, among other things, the regulatory action’s consistency with presidential priorities; the prevention of interagency conflicts; and the careful consideration of regulatory costs and benefits. Should the review process fail to resolve disagreement along any of these dimensions, OIRA can effectively reverse an agency action on behalf of the President and his interagency reviewers through return letters, negotiations backed by the President’s at-will removal power, or requests for withdrawals.

Given the prospect of presidential review and reversal, it is useful to think about agency behavior relative to the President’s in terms of their respective resource constraints and the differential costs and payoffs for the options available to actors (like agencies) that initiate review and the actors (like the institutional President) that review them. Administrative agencies are bureaucracies as traditionally conceived, and such bureaucracies have long been known to create routines and strategies for dealing with new requirements imposed upon them. Indeed, presidents and agencies—like trial judges and appellate courts—make decisions with limited resources. To avoid costly reversals, resource-constrained agencies can choose among various regulatory forms and strategies to achieve their desired results, while at the same time making it more difficult for the President to reverse them. Agencies, in other words, can make such review more difficult by increasing the costs of review, thereby forcing the President to spend his limited resources more selectively

such that he reverses fewer decisions and affirms the rest. In this manner, agencies that increase reviewing costs effectively serve to insulate discrete decisions within a rule or across rules.

When would one expect agency self-insulation to occur? One central factor is the probability that the President will be likely to disagree with the agency at the conclusion of review, thus raising the probability of reversal. That is, holding resources constant, agencies will be more likely to self-insulate the greater the chance that the President will have different preferences, thus resulting in likely reversal. By contrast, if the agency expects the President to agree with its decisions, then the agency will be less likely to self-insulate. Because agencies are repeat players that would undoubtedly earn the executive branch’s displeasure after recurrent and brazen attempts to self-insulate, they are most likely to do so when it would be the most valuable to them: when the probability of reversal is greatest but not certain or when the costs the agency incurred in arriving at a decision are relatively high.

Agencies, of course, consist of career staff with tenure protections, as well as agency heads appointed by the President, subject to typically deferential Senate approval and removable at will. But if the President appoints executive branch agency heads and can fire them without cause, why would one ever expect agency and presidential preferences to diverge? The short answer is that the President and his agency heads suffer from familiar principal-agent problems, which can be exacerbated by similar issues between agency heads and their career staff. First, even the most faithful civil servants and loyal agency heads may have divergent preferences due to knowledge about what they perceive (rightly or wrongly) as more refined

continued on next page

* Public Law Fellow, University of Chicago Law School; former policy analyst and special assistant to the Administrator of the Office of Information and Regulatory Affairs. This article is drawn from the author’s article of the same title published at 126 HARV. L. REV. 1755 (2013).

information about implementation difficulties or political sensitivities. There is also the well-known prospect of bureaucratic capture—the notion that agency actors, both career and political, may become beholden to external special interests, whether the regulated industry or broader public interest groups. Alternatively, career staff may have been hired or may have self-selected due to the agency's single-mission orientation, bringing to the job a narrowly focused zeal. They may in turn influence political appointees who may end up supporting the views of their entrenched staff. Finally, the difficulties of the confirmation process, especially under divided government, may also result in appointees whose preferences are not fully aligned with the President's due to the compromises struck with Congress. For any of these reasons, the potential for disagreement between the agencies and the President abounds.

Agencies, in turn, have many self-insulation mechanisms at their disposal. These mechanisms include variations in policymaking form, CBA quality, timing strategies, and institutional coalition-building efforts, among others.

1. *Policymaking forms.* First, agencies can choose to advance or delay a policy through inaction, adjudication, or guidance documents which, as a class, are more likely to bypass presidential review altogether. To illustrate, say that the Environmental Protection Agency (EPA) is required by statute to ensure that cooling water intake structures reflect the “best technology available for minimizing adverse environmental impact.” In considering how to fulfill this statutory mandate, the EPA might engage in outreach through public meetings or conduct research on how cooling water intake structures damage the environment. After it has decided on an outcome, the EPA must also decide what means, or instruments, it will use to pursue and communicate that outcome, if at all—for example, through discrete, permitting decisions; a

guidance document describing various available technologies for facility-specific determinations; or by eventually undertaking a rulemaking to set a standard or to mandate a particular technology. In making this decision, agencies will consider the costs they incurred to reach their decisions, as well as the costs the chosen instrument imposes on the reviewing executive branch. Returning to our simplified example, say there is a President in power who has campaigned on reducing the number of regulations and blocking the number of costly new ones. The EPA knows that if it decides to pursue a policy through adjudication, permitting decisions, that policy will not be subject to presidential review and reversal. Similarly, if the EPA chooses to issue a guidance document, the EPA knows that the executive branch might review the document but that it will be more difficult to reverse since the document is not legally binding, and so its effects are more uncertain and unpredictable, thus stymying meaningful debate about the potential regulatory impacts. Either of these routes, relative to a rulemaking, will increase the likelihood that an agency will be able to insulate its decisions from presidential review.

2. *Non-significant rules.* Even if an agency pursues a rulemaking, it can still insulate its rule by avoiding a determination that the rule is “significant” as defined by Executive order. To be “significant,” a regulatory action must meet at least one of four sets of flexible criteria: It might raise potential inconsistencies with other agencies, “materially alter the budgetary impact of” certain programs, invoke “novel legal or policy issues,” or be “economically significant.” To qualify as economically significant, the main criterion is that a rule must be expected to result in an annual effect on the economy of more than \$100 million. Many of these standards for significance determinations (such as “novelty”), however, are not self-defining.

Because the burden is initially on agencies to highlight significant rules, OIRA must thus rely on agencies to flag them as significant, or at least give enough information to enable OIRA to make an independent determination. Even then, the Executive order gives OIRA just ten days to contest significance, a narrow window of time in which to resolve staff-level disagreements and elevate them if necessary. Rules that an agency does not initially identify as significant are thus more likely to go unnoticed. By choosing a non-significant rulemaking form, agencies can limit the amount of information for review, as well as make such review less likely.

3. *Scrutiny Calibration.* And even if an agency is unable to bypass review, it can also attempt to calibrate the level of scrutiny the regulatory action receives. Economically significant rules are more likely than non-economically significant rules to garner scrutiny because higher cost or benefit rules are more likely to be politically salient. They are the rules to which the President will pay the most attention. Accordingly, agencies can self-insulate by avoiding a regulatory action's designation of economic significance, thus lowering the scrutiny of review. Reports from former OIRA officials, for example, suggest that agencies do so by splitting rules into parts—each of which falls beneath the \$100 million threshold. Similarly, agencies could also choose discount rates that decrease expected costs or benefits, or place greater weight on particular cost-benefit studies in the literature that predict minimal economic impacts. Since economically significant rules require a thorough CBA, agencies can also present lower-quality CBAs, which are less clear, inconsistent, or not analytically rigorous. Submitting a poor-quality CBA will impose higher reviewing costs as OIRA will have to spend more time and resources attempting to improve the quality of the CBA, rather than focusing on the merits of a regulatory action.

4. *Timing strategies.* In addition to choosing regulatory instruments designed to bypass review or calibrate its scrutiny, agencies can also effectively truncate the amount of time available for review by submitting regulatory actions to OIRA close to statutory or judicial deadlines. Executive orders currently impose a 90-day cap on the presidential review process, with the possibility of extensions. After 90 days, however, there are increased political costs for extending the review, including greater scrutiny from interest groups or congressional oversight hearings. A number of courts have held, on the other hand, that the presidential review process cannot delay the promulgation of regulations subject to deadlines imposed by Congress or the courts. Thus, agencies can wait to submit rules to OIRA less than 90 days before a statutory or judicial deadline, thereby reducing the amount of time available for review. Shortening the amount of time reduces the number of issues that can be raised and resolved during the process, thereby insulating the issues that might have otherwise been subject to reversal.
5. *Coalition-building.* Finally, even if an agency is unable to bypass review, calibrate its scrutiny, or truncate the amount of time available, it can also insulate its decisions by building coalitions with the multiple actors involved in the review process—career civil servants, other executive branch agencies, or various entities within the Executive Office of the President (EOP). This overall strategy would amount to increasing the costs of presidential review, given that more resources will need to be spent mediating disagreements between more actors, or elevating them to increasingly higher levels of decisionmakers. Concretely, these resource costs could include the staff time required to brief relevant policy officials, as well as the efforts required to plan, schedule, and attend meetings. In this manner, the self-insulating agency can work

during the review process to garner support for a policy decision from particular reviewers that might hold sway in the White House. When successful, such coalition-building efforts will raise the cost of review by increasing the amount of capital necessary to reverse the agency, as well as the time and resources necessary to resolve disputes.

From the President's perspective, agency self-insulation is disconcerting because many of the strategies, such as preventing significance determinations or obfuscating costs, serve only to exacerbate the information asymmetries that presidential review seeks to mitigate in the first place. Self-insulation also undermines the potential for robust interagency deliberation about the technical effects of a rule. Moreover, instruments to bypass review can impose consequences that conflict with the presidential agenda. Instruments to calibrate scrutiny can undermine the public legitimacy of cost-benefit analysis. Timing strategies and coalition-building attempts only exacerbate the potential for adversarial antagonism.

At the same time, note that the President's interest in minimizing self-insulation is itself constrained. Even with full information, the President will not always seek to maximize control at all times and, indeed, may sometimes find it beneficial not to do so. Because the review process is costly and his resources similarly constrained, the President must be selective about which regulations to review and how much time to spend reviewing them. His limited interest may arise from a judgment that spending resources reviewing a particular rule would be wasteful given clear signals that reversal would be highly unlikely. Or it may be due to a desire to seek distance from rules that are politically unpopular, but are nevertheless required by statute. Finally, a credible promise to engage in limited review can also be a valuable carrot when bargaining over some policy choice, either for current or future regulatory actions.

If agency self-insulation can both subvert and serve the President's

goals, what are some implications of these dynamics, if any, for the courts? As an initial matter, how one thinks this question is best answered will likely track what one thinks about the general merits of presidential control. If one believes that the presidential control model has been a valuable, even necessary, development for legitimizing the administrative state, then agency self-insulation is cause for concern, and courts should act to minimize it. Here, supporters often cite the President's electoral accountability and national constituency as reasons to check agency over-zealousness and capture. Only the President, they argue, has the bird's-eye view necessary to coordinate and harmonize agency efforts; he is also the best situated to respond dynamically to changed circumstances. On the other hand, if one believes that presidential review is illegitimate, then self-insulation is cause for celebration, and courts should seek to encourage it. In this view, that executive branch agencies can fend for themselves helps to alleviate an otherwise worrisome state of affairs. The risk of capture, these critics argue, is equally likely for EOP entities and presidential review is unduly shrouded in secrecy. Agencies are more expert relative to the White House in fulfilling their statutory missions, particularly for issues with longer time horizons.

There is, however, a likely and necessary middle ground between these two camps at their most extreme, that is, between those who believe that presidential involvement is always legitimate, even necessary, and those who believe it is never so except in the narrowest of circumstances. As a practical matter, presidents have sought to influence their agency heads through ad hoc and informal means for centuries, with interventions becoming increasingly institutionalized through formal review only in the last three decades. Against this backdrop, one relevant question is how and when such involvement can be made legitimately transparent such that other institutions like courts and Congress can serve as effective checks,

continued on next page


when necessary. To the extent that transparency provides some common ground, such a position recognizes that presidential review is often constructive and valuable—allowing, say, for greater information-sharing, the benefit of interagency expertise, and oversight to prevent unnecessarily conflicting policies. At other times, however, it may be unambiguously inappropriate—for example, if a President directs an agency head to conceal or fabricate scientific data in support of some outcome.

Despite provisions under current Executive orders for agencies and OIRA to disclose the changes made as a result of the presidential review process, however, such disclosures are not regularly made in practice, leading some to suggest more forceful statutory disclosure requirements. Until such changes occur, courts will have to rely on various second-best signals or heuristics, like indicia of agency self-insulation, to evaluate the nature of presidential involvement against the relevant statutory backdrop. Thus, for example, when courts observe signs of self-insulation, such as abrupt shifts in policymaking form, poor-quality CBA, or truncated presidential review time, then such efforts, taken together, could reflect signs of resistance or “danger signals” of undue politicization efforts that invite greater judicial scrutiny under “hard look” or *Chevron’s* Step Two reasonableness review. Such signals would, of course, need to be understood within their broader context, an inquiry that would benefit from further investigation as

to whether agencies systematically self-insulate and the conditions under which they are most likely to do so.

The prospective dynamics of agency self-insulation also highlight a number of avenues through which Congress could more effectively insulate agencies from the President beyond formal removal restrictions, in recognition of the more functional nature of agency independence. For starters, ever since President Reagan’s Executive Order No. 12291, presidential review has covered any “agency” as defined by the Paperwork Reduction Act of 1980 (PRA) and expressly excludes those defined as “independent regulatory agencies” under that Act. Since 1981, then, Congress has had the ability to circumscribe the coverage of presidential review through statutory amendments to the PRA. Recent provisions contained in the Dodd-Frank Act—placing the Consumer Financial Protection Bureau and the Office of the Comptroller of the Currency on the PRA’s list of “independent regulatory agencies”—reflect this strategy. In addition, Congress could also dictate specific policymaking forms that are more likely, as a class, to bypass presidential review; for example, prohibiting rulemaking would channel policymaking to other forms such as guidance documents. Congress could also use statutory deadlines to help empower executive agencies against the President, or provide for overlapping agency jurisdictions or joint rulemakings that would create and foster coalitions

among agencies that, together, could provide greater resistance to the President. Finally, because self-insulation is ultimately a resource-centered strategy, Congress’s budgeting decisions for OIRA, the EOP, and various other executive agencies would also help to determine the relative bargaining power within the executive branch.

Ultimately, the question of when and whether agencies self-insulate is an empirical one that merits further study as more data become available. Are there, for example, observable patterns of self-insulation for different groups of agencies, such as those with more costly or contentious rules? How do these patterns shift under different political configurations, when different parties are in power, or under periods of divided or unified government? If the realities of agency independence transcend the form of an agency, then courts and observers need other tools and more systematic ways to think about the concept. To shield agencies is not only to structure them the right way. While agency institutional design choices can certainly help to determine the degree of presidential control, executive branch agencies can engage in autonomous and selective self-insulation from such influence even within these bounds. The question of insulation, therefore, can be a function of rules as well as the resulting realities. Because agencies possess self-help tools through which to insulate their decisions, future accounts of agency independence and insulation would be remiss to ignore them. 

**IS YOUR
LIBRARY
COMPLETE?**

Check the list of Administrative Law publications at www.ababooks.org to be sure.

Human Rights, National Security, and Executive Branch Legal Decisionmaking

By Rebecca Ingber*

In the spring of 2006, the U.S. government found itself in the midst of scandals over detainee abuse, reports of internal clashes over legal and policy decisions, setbacks in the courts over many wartime policies concerning detention and trial of detainees, and widespread criticism of the Bush Administration's relationship with the international community and human rights bodies in particular. In that charged atmosphere, a high-level delegation of officials from several agencies throughout the U.S. executive branch traveled to Geneva to present and answer questions regarding the U.S. report to the U.N. Committee Against Torture. Much of the U.S. team's presentation to the Committee was likely unsurprising, and followed from positions the Administration had long espoused, such as the inapplicability of the Convention to situations of armed conflict and to military detention in particular. One particular position, however, was not yet established at the time of the treaty reporting process, though it was nevertheless an issue of pressing importance and great controversy. That issue was the admissibility in legal proceedings of statements derived from torture of detainees held at Guantánamo and elsewhere in connection with armed conflict. The U.S. delegation did not initially address this question directly. But once it did, its position likely shocked the Committee and others who had studied the Admin-

istration's detainee policies. This story and the broader theoretical framework for how external and internal triggers influence executive legal process and positions are the subject of my recent article, *Interpretation Catalysts and Executive Branch Legal Decisionmaking*, 38 Yale J. Int'l L. 359 (2013).

Recent years have seen much speculation over executive branch legal interpretation and internal decisionmaking, particularly in matters of national security and international law. Debate persists over how and why the Executive arrives at particular understandings of its legal constraints, the extent to which the positions taken by one presidential administration may bind the next, and, indeed, the extent to which the President is constrained by law at all. Current scholarship focuses on rational, political, and structural arguments to explain executive actions and legal positioning, but it has rarely taken account of the diverse ways in which legal questions arise for the executive branch. In fact, these distinct triggers for legal decisionmaking have a significant effect on executive process and on the resulting substantive decisions themselves. In *Interpretation Catalysts*, I identify and explore the role of these triggers for legal interpretation—which I term “interpretation catalysts”—in driving and shaping executive branch decisionmaking, particularly at the intersection of national security and international law.

Consider the following scenarios in which the United States government must establish its legal authority to detain in a non-traditional conflict such as that with al Qaeda. First, envision exigent combat circumstances: U.S. military operatives find themselves confronting individuals connected to al Qaeda whom they would like to capture and detain and must determine the scope of their legal authority to

do so. Now imagine this question arises in the context of a major report the United States is due to provide to the monitoring committee for a human rights treaty, explaining its understanding of its obligations under and compliance with the provisions of that treaty. Finally, consider how this interpretation might play out if U.S. officials were first asked to state the government's legal authority for detention in the context of litigation, brought by individuals who allege that the government has unlawfully detained them. Might the executive's position on its legal authority, or even its willingness to stake out a position, differ depending on which of these contexts first triggers the question for legal decisionmakers? If so, why?

Each of these scenarios presents a different type of “interpretation catalyst”—a distinct triggering event compelling the U.S. government to consider, determine, and potentially assert an interpretation of its obligations and authority under domestic or international law. Interpretation catalysts exist in countless forms and play a significant and at times decisive role in shaping the executive's legal and policy decisionmaking processes and ultimate decisions. Interpretation catalysts can drive the executive branch to crystallize a legal view on a matter that is entirely novel; can bring a formerly identified but dormant issue into urgent focus; and can transfer an issue from one decisionmaking forum to another. The resulting processes triggered by these catalysts then have dramatic—and often predictable—effects on the executive's ultimate position. That position and the catalyst that influences it are all the more important because of the stickiness of executive decisions, and legal positions in particular, once taken. *Interpretation*
continued on next page

* Associate Research Scholar in the Faculty of Law, Columbia Law School. While the focus of this article is the role of interpretation catalysts in shaping international law and national security legal interpretation within the executive branch, this phenomenon is by no means limited to government action, national security, or legal interpretation. The “interpretation catalyst” phenomenon and its implications might be applied to decisionmaking of any kind within any sufficiently complex bureaucracy.

Catalysts explores the critical role of these triggers in influencing the executive's ultimate substantive legal decisions, by (for example): determining a particular question's point of entry within the government, framing the task, shaping the interpretive process, establishing the relative influence of the relevant actors, and informing the contextual pressures and interests that may bear on the decision.

The executive does not bind itself easily to new legal constraints, nor does it ordinarily do so in the absence of a forceful catalyst. This is all the more true in matters of national security. Nevertheless, due to broad judicial deference and sufficient congressional acquiescence (with some notable exceptions), executive branch legal positions are often the critical (and at times the only) relevant substantive statements of law in this area. The executive's interpretation of its national security authority is therefore extremely significant and can often serve not only as one step in an inter-branch interpretive dance but as lawmaking itself. How this legal decisionmaking occurs remains fairly opaque, even despite great speculation in recent years. Yet process—and the catalysts for decisionmaking that help shape that process—has a significant impact on the executive's view of its own authority.

In *Interpretation Catalysts*, I advance two primary arguments: First, I argue that *how* a legal question arises for the executive shapes the process of decisionmaking and thus the substantive outcome, which typically becomes the executive's entrenched position going forward. Second, I contend that within executive branch legal decisionmaking, some processes—and thus the interpretation catalysts that trigger them—are better suited for certain kinds of decisionmaking than are others and that the results are often predictable.

Countless triggers for executive branch decisionmaking exist, and *Interpretation Catalysts* focuses on three: lawsuits filed against the U.S. government; obligatory U.S. reports to human rights treaty bodies; and the act of speechmaking by government officials. Each of these distinct catalysts

significantly influences the process the government employs to answer a particular legal question, including by determining who holds the pen in crafting the executive's position, the extent to which a particular agency or type of actor (e.g., civil servants or political appointees) exerts influence over the process, the time pressures at issue, the level of coordination, and who will ultimately decide the course of action. For example, domestic litigation generally shifts decisionmaking authority and the power of the pen toward career litigators at the Department of Justice, places ultimate responsibility in the Attorney General, and involves significant time constraints and other pressures that may limit both the level of possible coordination and the potential for changes in policy or legal positions. This has a range of positive and negative implications discussed in the article, some expected and some potentially surprising. Speechmaking, on the other hand, is likely to implicate higher-level political appointees, engage policymakers and those lawyers focused on legal policy in addition to or in lieu of litigators, and operate on a timetable that is more amenable to deliberation and big policy-shifting decisions. Moreover, each process highlights distinct proclivities inherent in the kind of trigger or the particular agencies or actors involved. Defensive litigation often presses the executive to assert expansive authority in order to defend past actions. The process of preparing reports to a human rights treaty body, on the other hand, prompts decisionmaking in a forum in which U.S. officials seek to highlight human rights and international law compliance.

This comparison of the effects of distinct interpretation catalysts on decisionmaking—in particular, the propensity of each toward different results—demonstrates that which catalyst first triggers executive decisionmaking can have a significant influence on the ultimate position going forward. This phenomenon is well illustrated through the case study noted above involving the Bush Administration's 2005–06 report to the monitoring committee of the

Convention Against Torture (CAT). In that case, as discussed in much greater detail in my article, the Administration had long argued that the CAT did not apply to armed conflict and in particular to U.S. detention operations in Guantánamo, Afghanistan, and Iraq. And in the context of domestic litigation in which the U.S. government was defending itself against allegations of detainee abuse at Guantánamo at the time of the CAT report, the government was aggressively fighting any extension of judicially enforceable rights to detainees at Guantánamo. Yet one question had not yet directly arisen in litigation and was therefore up for grabs: the application to detainee operations at Guantánamo of the CAT prohibition on the use in legal proceedings of statements derived from torture. The Committee raised it directly, and considering the U.S. position on the CAT's inapplicability to detainee operations, might have reasonably assumed that the U.S. officials would take the position that the CAT simply did not apply to these proceedings. Instead the Administration—in a response that may have shocked the Committee—conceded the applicability of the CAT prohibition to detainee proceedings at Guantánamo. And going forward, the executive and Congress built on the approach taken at that CAT committee meeting and worked to prohibit the use in any detainee proceedings of evidence derived from torture. Ultimately, when this question did arise in litigation in 2009, in the context of a Guantánamo habeas case, the executive continued to take the position espoused by the Bush delegation years earlier.

Executive decisions such as this one are almost always over-determined, and I discuss in my article the range of factors that likely influenced and facilitated the executive's decision to take this position before the CAT committee. It would be foolish to try to point to one particular factor and argue that it is the sole reason for a chain of events taking place and the eventual output. Interpretation catalysts are factors that influence processes; it is unlikely

and certainly impossible to prove that they are the *sole* deciding factors in any given decision. But, as explored in this brief essay and discussed in greater detail in *Interpretation Catalysts*, they do exert an undeniable influence. While no one could have predicted with certainty that the Bush delegation would have reached this conclusion in the CAT reporting process, one *can* be fairly confident that the Administration would *not* have taken this position had the issue first arisen in litigation.


Regardless of the outcome of any one decisional moment, the broader conceptual point is that decisionmaking—including legal decisionmaking—does not reside within one individual or office within the executive and that decision authority is not necessarily constant. In fact a vast architecture of actors within the executive have significant and shifting authority to determine and announce the positions of the U.S. government, and that authority is shaped considerably by the nature of how the decisionmaking process is triggered.

The interpretation catalyst phenomenon has wide-ranging implications for scholars, advocates, courts, and the executive itself. Among them, the article explores the implications of this phenomenon for private advocates,

who can maximize their efforts to challenge executive legal positions and policies by understanding which pressure points are more or less likely to produce the outcomes that they support. It also suggests a rethinking of the current state of judicial deference to executive positions in the area of national security and international law because of the inordinate influence of litigation itself on the process and results of executive decisionmaking. And it suggests a roadmap for officials working within the executive branch to rise above institutional design challenges and take advantage of interpretation catalysts that facilitate and maximize effective decisionmaking.

Contrary to conventional views of executive lawyering, which posit a bilateral tension between law and principles, on the one hand, and the President's wishes and policies on the other, the legal architecture of the U.S. executive is in fact a complex, dynamic, and multithetic community of players and decision mechanisms that engage or retreat according to the unique task at hand and the forum in which it arises. How a question is first raised and framed affects the processes employed to address it, the nature of the players at the table, their authority,

and the contextual pressures that shape the enterprise. Interpretation catalysts, which trigger and frame these questions, thus play a dramatic role within the executive branch in forcing a decision to the fore and shaping every step of the process toward the ultimate substantive result.

The significant role of interpretation catalysts in executive branch legal decisionmaking may provoke different reactions depending on one's view of a commanding Oval Office or a centralized executive legal process. The reality of executive legal decisionmaking described in this article is neither one of perfect unitary cohesion nor is it completely ad hoc. Rather, the picture is richly textured and provides fodder for theorists on all sides of debates about executive lawyering. For those seeking greater political control over executive legal process, the picture this article presents should be a call to arms to implement greater top-down order on decisionmaking channels and to assign weight to legal decisions according to the particular process taken. For those seeking greater internal constraints on executive action, this article demonstrates not only that these constraints do exist but that external actors and events can and do influence the internal balance of power. 

Chair's Message *continued from page 1*


informed, articulate, and fairly representative policy documents has produced an impressive reputation that we should be careful to uphold.

10. It does take a lot of time to be chair—I'd say 15 hours/week to do a self-respecting job. But it is hugely rewarding. Of course, it's ego-boosting to sign documents and to be recognized or introduced as Chair of the Section. But what's most rewarding about it, to loosely paraphrase Woody Allen, is that 80% of the public part of the job is standing up and saying nice things about people who deserve to have nice things said about them.

11. In that connection, the leadership are careful, at all our events, to acknowledge the absolutely crucial role of our staff: Section Director Anne Kiefer and her able assistants Angela Petro and Alisha Dixon. Only as the Chair, however,

do you see exactly how much they do and appreciate how nonfunctional the Section would be without them. So I now say "thank you" from a more informed perspective.

12. By definition, everything that the Section does that is not done by the staff is done by the members. Committee leaders and other volunteers draft and edit all the publications, organize and moderate all the programs, and otherwise do a great deal of work that is never adequately recognized at the time. Be aware, however, that the rest of us do indeed appreciate it.

13. Any challenge to agency action can be expressed in jurisdictional terms.² Discuss. 

² *City of Arlington, Texas v. FCC*, No. 11-1545, slip op. at 5-10 (U.S. May 20, 2013).

★ Section Chair: James W. Conrad, Jr.

Please Join Us for:

- ★ Annual Section Dinner & Reception
- ★ Annual Meeting of the Membership & Elections
- ★ Section Council Meetings

Friday • August 9, 2013	
<i>Merryvale Winery, 1000 Main Street, St. Helena, CA</i>	
5:30 p.m. – 11:30 p.m.	Section Dinner Bus transportation provided. 5:30 p.m. departure from Palace Hotel.
Saturday • August 10, 2013	
<i>Palace Hotel, Ralston Room, 1st Floor — 2 New Montgomery Street, San Francisco, CA</i>	
8:00 a.m. – 12:30 p.m.	Council meeting with breakfast Section members are invited to attend at no charge, but advance registration is required.
10:00 p.m. – 11:00 p.m.	Hospitality Suite, French Parlor, 2nd Floor All Section Members are welcome to participate.
Sunday • August 11, 2013	
<i>Palace Hotel, Ralston Room, 1st Floor</i>	
8:00 a.m. – 11:30 a.m.	Council meeting with breakfast Section members are invited to attend at no charge, but advance registration is required.
11:30 a.m. – 12:30 p.m.	Annual Meeting of the members of the Administrative Law and Regulatory Practice Section Election of Council Members and Officers. All Section members are welcome to participate.



By Robin Kundis Craig*

Mootness was much before the U.S. Supreme Court this quarter. While the Court generally upheld federal court jurisdiction in the face of mootness arguments, it did also affirm that, in the appropriate circumstances, mootness does require the dismissal of federal litigation. The Court also issued important opinions regarding *Auer* deference to federal agencies' interpretations of their own regulations; federal preemption of state administrative schemes; and standing.

Deference to Federal Agency Interpretations

The U.S. Supreme Court once again debated the appropriate level of deference to accord to agency interpretations of federal law in *Decker v. Northwest Environmental Defense Center*, — U.S. —, 133 S. Ct. 1326 (Mar. 20, 2013), a case brought under the federal Clean Water Act, 33 U.S.C. §§ 1251–1387. The basic issue in the case was whether the collection of stormwater in ditches along logging roads requires a National Pollutant Discharge Elimination System (NPDES) permit under Section 402 of the Act, 42 U.S.C. § 1342. *Decker*, 133 S. Ct. at 1330–31. In a 7–1 decision authored by Justice Kennedy (Justice Breyer took no part), the Court accorded the EPA's interpretation of its Industrial Stormwater Rule *Auer* deference and concluded that no permit was required. *Id.* at 1336–38.

Under the Clean Water Act's structure, the Court explained, "petitioners were required to secure NPDES permits for the discharges of channeled stormwater runoff only if the discharges were 'associated with industrial activity,' 33 U.S.C. § 1342(p)(2)(B), as that statutory term is defined in the preamendment version of the Industrial Stormwater Rule, 40 C.F.R. § 122.26(b)(14) (2006). Otherwise, the discharges fall within the Act's general exemption of 'discharges composed entirely of stormwater' from the NPDES permitting scheme. 33 U.S.C. § 1342(p)(1)." *Id.* at 1336. The Court rejected the Northwest Environmental Defense Center's argument that the Act's phrase "associated with industrial activity" unambiguously included stormwater collection in logging operations for purposes of *Chevron* deference, emphasizing

the multiple definitions of the terms "industrial" and "industry." These words can refer to business activity in general, yet so too can they be limited to "economic activity concerned with the processing of raw materials and manufacture of goods in factories." Oxford Dict. 887. The latter definition does not necessarily encompass

*William H. Leary Professor of Law, University of Utah S.J. Quinney College of Law, Salt Lake City, UT; and Contributing Editor, ADMINISTRATIVE & REGULATORY LAW NEWS. The author may be reached at robin.craig@law.utah.edu.

outdoor timber harvesting. The statute does not foreclose more specific definition by the agency, since it provides no further detail as to its intended scope.

Id. The Court then rejected the argument that EPA's Stormwater Rule unambiguously covered stormwater collected at outdoor logging sites, concluding that the EPA's interpretation—that the permit requirement was restricted to traditional *industrial* sources associated with logging, such as sawmills—was plausible, especially because the rule defined "discharges associated with industrial activity as discharges 'from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.' 40 C.F.R. § 122.26(b)(14) (2006)." *Id.* at 1337. All in all, the Court concluded, the EPA's interpretation clearly warranted *Auer* deference:

It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail. When an agency interprets its own regulation, the Court, as a general rule, defers to it "unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Chase Bank USA, N.A. v. McCoy*, 562 U.S. —, —, 131 S.Ct. 871, 880, 178 L.Ed.2d 716 (2011) (quoting *Auer*, 519 U.S., at 461, 117 S.Ct. 905). The EPA's interpretation is a permissible one. Taken together, the regulation's references to "facilities," "establishments," "manufacturing," "processing," and an "industrial plant" leave open the rational interpretation that the regulation extends only to traditional industrial buildings such as factories and associated sites, as well as other relatively fixed facilities.

There is another reason to accord *Auer* deference to the EPA's interpretation: there is no indication that its current view is a change from prior practice or a post hoc justification adopted in response to litigation. See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. —, —, 132 S.Ct. 2156, 2166–2167, 183 L.Ed.2d 153 (2012). The opposite is the case. The agency has been consistent in its view that the types of discharges at issue here do not require NPDES permits.

Id. at 1337–38. Moreover, the State of Oregon was actively working to regulate the stormwater at issue, *id.* at 1338, supplying a federalism rationale for deferring to the EPA's interpretation.

Nevertheless, the *Decker* decision also hinted that the future of *Auer* deference may be in question. Chief Justice Roberts concurred, joined by Justice Alito, to note that there might be reason to reconsider *Auer* and *Seminole Rock* deference, but only in a case where the issue had been properly raised and briefed, as it had not been in *Decker*.

continued on next page

Id. at 1338–39 (Roberts, C.J., concurring). Justice Scalia dissented from the deference discussion, declaring: “Enough is enough.” *Id.* at 1339. More specifically, Justice Scalia found it absurd that the Court “gives effect to a reading of EPA’s regulations that is not the most natural one, simply because EPA says that it believes the unnatural reading is right. It does this, moreover, even though the agency has vividly illustrated that it can write a rule saying precisely what it means—by doing just that while these cases were being briefed.” *Id.* Indeed, Justice Scalia’s dissent may have called both *Auer* deference and *Chevron* deference into question, as he actively equated the two:

The canonical formulation of *Auer* deference is that we will enforce an agency’s interpretation of its own rules unless that interpretation is “plainly erroneous or inconsistent with the regulation.” . . . But of course whenever the agency’s interpretation of the regulation is different from the fairest reading, it is in that sense “inconsistent” with the regulation. Obviously, that is not enough, or there would be nothing for *Auer* to do. In practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes. . . . The agency’s interpretation will be accepted if, though not the fairest reading of the regulation, it is a plausible reading—within the scope of the ambiguity that the regulation contains.

Id. at 1339–40 (Scalia, J., dissenting) (citations omitted).

Federal Preemption

In a 6–3 decision authored by Justice Kennedy, the Supreme Court concluded that the Medicaid statute’s anti-lien provision preempts a North Carolina statute that requires a Medicaid beneficiary to pay the state one-third of any damages recovered in a tort action, affirming the Court of Appeals for the Fourth Circuit. *Wos v. E.M.A. ex rel. Johnson*, — U.S. —, 133 S. Ct. 1391, 1402 (Mar. 20, 2013). As the majority explained the issue:

A federal statute prohibits States from attaching a lien on the property of a Medicaid beneficiary to recover benefits paid by the State on the beneficiary’s behalf. 42 U.S.C. § 1396p(a)(1). The anti-lien provision pre-empts a State’s effort to take any portion of a Medicaid beneficiary’s tort judgment or settlement not “designated as payments for medical care.” . . . North Carolina has enacted a statute requiring that up to one-third of any damages recovered by a beneficiary for a tortious injury be paid to the State to reimburse it for payments it made for medical treatment on account of the injury. See N.C. Gen. Stat. Ann. § 108A–57 (Lexis 2011) . . . The question presented is whether the North Carolina statute is compatible with the federal anti-lien provision.

Id. at 1394–95 (citations omitted).

Under North Carolina’s interpretation of its statute, “when the State’s Medicaid expenditures on behalf of a beneficiary exceed one-third of the beneficiary’s tort recovery, the statute establishes a conclusive presumption that one-third of the recovery represents compensation for medical expenses. Under this reading of the statute the presumption operates even if the settlement or a jury verdict expressly allocates a lower percentage of the judgment to medical expenses.” *Id.* at 1397–98. As a result, the Medicaid anti-lien statute preempted the North Carolina statute, because “it sets forth no process for determining what portion of a beneficiary’s tort recovery is attributable to medical expenses. Instead, North Carolina has picked an arbitrary number—one-third—and by statutory command labeled that portion of a beneficiary’s tort recovery as representing payment for medical care.” *Id.* at 1398.

Both the concurrence and the dissent, however, were more interested than the majority in the roles Congress gave to the Department of Health and Human Services and, for the dissent, the states. Thus, Justice Breyer concurred to emphasize that “[m]y concurrence in the Court’s views rests in part upon the fact that the federal agency that administers the Medicaid statute, known as the Centers for Medicare & Medicaid Services, has reached the same conclusion.” *Id.* at 1402. Chief Justice Roberts dissented, joined by Justices Scalia and Alito, on the grounds that “[t]he Court’s reading of the Act, while plausible, is not compelled by the statutory text or our precedent. It has the unfortunate consequence of denying flexibility to the States—and, by necessary implication, the Secretary of Health and Human Services—in resolving a policy question with broad significance for this complicated program. In short, the result is both unnecessary and unwise.” *Id.* at 1404 (Roberts, C.J., dissenting).

In contrast, the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 49 U.S.C. § 14501(c)(1), did *not* preempt New Hampshire’s Consumer Protection Act or common-law tort causes of action against bailees in connection with the auctioning of stored cars. *Dan’s City Used Cars, Inc. v. Pelkey*, 2013 WL 1942398 (May 13, 2013). The FAAAA preempts state laws “related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.” 49 U.S.C. § 14501(c)(1). The plaintiff, Pelkey, alleged that Dan’s City, a towing company, violated New Hampshire law in towing Pelkey’s car away from his landlord’s parking lot and then auctioning it off without notice to Pelkey. The New Hampshire Supreme Court held that the FAAAA did not preempt Pelkey’s claims, and in a unanimous opinion authored by Justice Ginsburg, the Court affirmed. According to the Court:

[S]tate-law claims stemming from the storage and disposal of a car, once towing has ended, are not sufficiently connected to a motor carrier's service with respect to the transportation of property to warrant preemption under § 14501(c)(1). The New Hampshire law in point regulates no towing services, no carriage of property. Instead, it trains on custodians of stored vehicles seeking to sell them. Congress did not displace the State's regulation of that activity by any federal prescription.

Dan's City, 2013 WL 1942398, at *4.

Standing

This quarter, the Supreme Court produced the next installment in its continuing examination of whether alleged future injuries can give plaintiffs standing in federal courts. Specifically, *Clapper v. Amnesty International USA*, — U.S. —, 133 S. Ct. 1138 (Feb. 26, 2013), involved a constitutional challenge to the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. § 1881a, as it was amended in 2008. In a 5–4 decision authored by Justice Alito, the Court concluded that Amnesty International lacked standing to challenge the Act, reversing the decision of the Court of Appeals for the Second Circuit that the plaintiffs *had* standing because of “the objectively reasonable likelihood that their communications will be intercepted at some time in the future” and because the plaintiffs “have established that they are suffering ‘present injuries in fact—economic and professional harms—stemming from a reasonable fear of future harmful government conduct.’” *Clapper*, 133 S. Ct. at 1146.

While reciting the traditional three elements of constitutional standing in the federal courts—*injury-in-fact*, causation, and redressability—the *Clapper* majority emphasized the role that standing plays in honoring constitutional separation-of-powers principles. Thus, “[t]he law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches,” and relaxing standing requirements leads directly to the expansion of judicial power. *Id.* at 1146–47 (citations omitted). As a result, the federal courts must be especially strict regarding standing when plaintiffs seek to have federal legislation declared unconstitutional. *Id.* at 1147.

As is typical of Supreme Court standing decisions, the *Clapper* Court's decision focused on the *injury-in-fact* requirement. The Court determined first that the Second Circuit had used the wrong test in evaluating Amnesty International's standing, because “the Second Circuit's ‘objectively reasonable likelihood’ standard is inconsistent with our requirement that ‘threatened injury must be certainly impending to constitute injury in fact.’” *Id.*

(citations omitted). It then characterized the plaintiffs' asserted claim of injury—the reasonable likelihood that the government would intercept their communications with foreign contacts in the future—as a “highly speculative fear” that “relies on a highly attenuated chain of possibilities” *Id.* at 1148. Nor could the plaintiffs establish an *injury-in-fact* based on the fact that “they are suffering ongoing injuries that are fairly traceable to § 1881a because the risk of surveillance under § 1881a requires them to take costly and burdensome measures to protect the confidentiality of their communications.” *Id.* at 1151. According to the Court, this claim was still based on improper speculation:

The Second Circuit's analysis improperly allowed respondents to establish standing by asserting that they suffer present costs and burdens that are based on a fear of surveillance, so long as that fear is not “fanciful, paranoid, or otherwise unreasonable.” . . . This improperly waters down the fundamental requirements of Article III. Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.

Id.

Justice Breyer dissented, joined by Justices Ginsburg, Sotomayor, and Kagan. According to the dissenters, “[t]he plaintiffs' standing depends upon the likelihood that the Government, acting under the authority of 50 U.S.C. § 1881a (2006 ed., Supp.V), will harm them by intercepting at least some of their private, foreign, telephone, or e-mail conversations. In my view, this harm is not ‘speculative.’ Indeed it is as likely to take place as are most future events that commonsense inference and ordinary knowledge of human nature tell us will happen.” *Id.* at 1155 (Breyer, J., dissenting). Specifically, the dissenters emphasized four reasons why they thought that the government's alleged future interceptions were likely to occur. “First, the plaintiffs have engaged, and continue to engage, in electronic communications of a kind that the 2008 amendment, but not the prior Act, authorizes the Government to intercept.” *Id.* at 1157. “Second, the plaintiffs have a strong motive to engage in, and the Government has a strong motive to listen to, conversations of the kind described.” *Id.* at 1158. “Third, the Government's past behavior shows that it has sought, and hence will in all likelihood continue to seek, information about alleged terrorists and detainees through means that include surveillance of electronic communications.”

continued on next page

Id. “Fourth, the Government has the capacity to conduct electronic surveillance of the kind at issue,” review of such requests by the intelligence court was very narrow and formal, and “compared with prior law, § 1881a simplifies and thus expedites the approval process, making it more likely that the Government will use § 1881a to obtain the necessary approval.” *Id.* at 1158–59.

Mootness

The Supreme Court addressed mootness arguments in four opinions this quarter, finding continuing federal court jurisdiction in three of them and mootness in one. For example, in *Chafin v. Chafin*, — U.S. —, 133 S. Ct. 1017 (Feb. 19, 2013), the Court decided, 9–0, that a father’s appeal of an order under the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601 et seq., was not moot even though the mother had already taken the child back to Scotland. The Act implements the Hague Convention on the Civil Aspects of International Child Abduction of 1980, T.I.A.S. No. 11670, which “seeks ‘to secure the prompt return of children wrongfully removed to or retained in any Contracting State’ and ‘to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.’ Art. 1, S. Treaty Doc. No. 99–11, at 7.” *Chafin*, 133 S. Ct. at 1021.

In *Chafin*, Mrs. Chafin, a United Kingdom citizen, took their daughter to Scotland in 2007 while Mr. Chafin, a U.S. citizen and soldier, was deployed in Afghanistan. When Mr. Chafin returned to Alabama in 2010, Mrs. Chafin and their daughter visited him, whereupon Mr. Chafin filed for divorce and sued for custody. In 2011, Mrs. Chafin was deported, but the daughter remained in Alabama. Mrs. Chafin filed her lawsuit under ICARA and the Convention in May 2011 in the U.S. District Court for the Northern District of Alabama, seeking the return of her daughter to Scotland. The district court granted her request in October 2011, and Mrs. Chafin took her daughter to Scotland within hours. As a result, the Court of Appeals for the Eleventh Circuit dismissed Mr. Chafin’s appeal as moot.

The Supreme Court reversed in an opinion authored by Chief Justice Roberts. Citing the “Case or Controversy” requirement in Article III of the Constitution, the Court explained the mootness issue as follows:

There is thus no case or controversy, and a suit becomes moot, “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Already, LLC v. Nike, Inc.*, 568 U.S. —, —, 133 S. Ct. 721, 726, 184 L. Ed. 2d 553 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982) (*per curiam*); some internal quotation marks omitted). But a case “becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.”

Knox v. Service Employees, 567 U.S. —, —, 132 S. Ct. 2277, 2287, 183 L. Ed. 2d 281 (2012) (internal quotation marks omitted) . . . “As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” *Knox, supra*, at 1019, 132 S. Ct., at 2287 (internal quotation marks and brackets omitted).

Chafin, 133 S. Ct. at 1023. It then concluded that “[t]his dispute is still very much alive. Mr. Chafin continues to contend that his daughter’s country of habitual residence is the United States, while Ms. Chafin maintains that E.C.’s home is in Scotland. Mr. Chafin also argues that even if E.C.’s habitual residence was Scotland, she should not have been returned because the Convention’s defenses to return apply.” *Id.* at 1023–24.

Most interestingly for practitioners in other fields, the Court carefully distinguished mootness issues from issues regarding the merits and the enforceability of any order on appeal. Thus, when Mrs. Chafin argued that the district court would lack authority under ICARA to order her daughter’s return to the United States, the Court concluded that “that argument—which goes to the meaning of the Convention and the legal availability of a certain kind of relief—confuses mootness with the merits.” *Id.* at 1024. Similarly, when Mrs. Chafin argued that the Scottish courts would not enforce any such order, rendering it useless as a remedy, the Court answered that “[e]nforcement of the order may be uncertain if Ms. Chafin chooses to defy it, but such uncertainty does not typically render cases moot. Courts often adjudicate disputes where the practical impact of any decision is not assured.” *Id.* at 1025; *see also Federal Trade Commission v. Phoebe Putney Health System, Inc.*, — U.S. —, 133 S. Ct. 1003, 1009 n.3 (Feb. 19, 2013) (holding that an action to enjoin the acquisition of a hospital on grounds that a monopoly would be created did not become moot when the acquisition transaction was complete “because the District Court on remand could enjoin respondents from taking actions that would disturb the status quo and impede a final remedial decree”).

In *Decker v. Northwest Environmental Defense Center*, — U.S. —, 133 S. Ct. 1326 (Mar. 20, 2013), the Court similarly declined to find that the case had become moot. As noted above, the case involved the application of the Environmental Protection Agency’s (EPA’s) Industrial Stormwater Rule, and the EPA issued a new version of its rule three days before oral argument at the Court. In a 7–1 decision authored by Justice Kennedy (Justice Breyer took no part), the Court concluded that the new regulation did not render the case moot:

“A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.” *Knox v. Service Employees Int’l*, 567 U.S. —, —,

132 S.Ct. 2277, 2287, 183 L.Ed.2d 281 (2012) (internal quotation marks omitted). Here, despite the recent amendment, a live controversy continues to exist regarding whether petitioners may be held liable for unlawful discharges under the earlier version of the Industrial Stormwater Rule.

Decker, 133 S. Ct. at 1335.

Conversely, the Court concluded, in a 5-4 decision authored by Justice Thomas, that the plaintiff's claims *had* become moot in *Genesis Healthcare Corp. v. Symczyk*, — U.S. —, 133 S. Ct. 1523 (Apr. 16, 2013). The case involved the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 et seq., which “provides that an employee may bring an action to recover damages for specified violations of the Act on behalf of himself and other ‘similarly situated’ employees.” *Genesis Healthcare*, 133 S. Ct. at 1526. This issue for the Court was “whether such a case is justiciable when the lone plaintiff’s individual claim becomes moot.” *Id.* The plaintiff had complained that her employer deducted 30 minutes for meals each shift even when employees performed compensable work during their mealtimes. Her employer made an offer of judgment pursuant to Federal Rule of Civil Procedure 68, mooting the plaintiff’s case and, according to the district court, the entire case, given that no other employee had joined the lawsuit. The Court of Appeals for the Third Circuit reversed, concluding that, although the individual plaintiff’s case was moot, dismissal in these circumstances would undermine the FLSA’s collective action provisions—in the Supreme Court’s words, “that calculated attempts by some defendants to ‘pick off’ named plaintiffs with strategic Rule 68 offers before certification could short circuit the process, and, thereby, frustrate the goals of collective actions.” *Id.* at 1527.

The Supreme Court reversed. It emphasized that “[i]f an intervening circumstance deprives the plaintiff of a ‘personal stake in the outcome of the lawsuit,’ at any point during litigation, the action can no longer proceed and must be dismissed as moot.” *Id.* at 1528 (citing *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477–78 (1990)). Moreover, although the federal Courts of Appeals are split on whether an unaccepted Rule 68 offer of judgment moots a plaintiff’s case, the Third Circuit had found the individual plaintiff’s case moot, foreclosing on procedural grounds review of that decision at the Supreme Court. *Id.* at 1528–29. As for the plaintiff’s collective-action allegations, the Court expressly distinguished mootness rulings in class action litigation, finding instead that:

A straightforward application of well-settled mootness principles compels our answer. In the absence of any claimant’s opting in, respondent’s suit became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action. While the FLSA authorizes an aggrieved employee to bring an action on behalf of himself and “other employees similarly situated,” 29 U.S.C. § 216(b), the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied.

Id. at 1529.

Justice Kagan dissented, joined by Justices Ginsburg, Breyer, and Sotomayor. The dissenters argued that the majority’s opinion rested on a potentially false premise—that the plaintiff’s claim was moot—and that the Court should have addressed that very fundamental issue first. *Id.* at 1532–37 (Kagan, J., dissenting). Instead, the Court should have resolved the circuit split and the Rule 68 issue, concluding that a rejected Rule 68 offer of judgment cannot moot a plaintiff’s case. *Id.* at 1536–37. ○

MAKE YOUR OPINION COUNT

The Section values the input of all its members. Make your opinion count. Contact us at anne.kiefer@americanbar.org. Also, please let us know how we can help you get more involved with Section activities.

By William S. Jordan III*

8th Circuit Holds EPA Letters to Senator are Reviewable “Promulgated” Rules

In 2010, the Iowa League of Cities sought review of six EPA letters, memoranda, and other informal issuances addressing implementation of the Clean Water Act and related regulations. At the time, the D.C. Circuit denied review for lack of subject matter jurisdiction. Shortly thereafter, the League sought the assistance of Iowa Senator Grassley, who asked EPA to address the issues of concern to the League. EPA responded with two letters. The first acknowledged state regulatory discretion in the area in question but said that the practice at issue “should not be permitted.” The second letter advised that a certain practice failed to “meet the minimum requirements” of the applicable regulations. This time the League succeeded in obtaining review.

Under the Clean Water Act, the courts of appeals have exclusive jurisdiction to review an EPA action “promulgating any effluent limitation or other limitation.” The threshold issue was whether EPA’s letters constituted “promulgating” the positions stated in the letters. In *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), the Eighth Circuit held that “whether an agency announcement is binding on regulated entities or the agency should be the touchstone of [its] analysis.” Undertaking a “functional analysis” to determine whether words or deeds “bind legally or as a practical matter,” the court noted as to the first letter that EPA’s earlier unreviewable letter had been “one office director’s view of a regulatory requirement,” while the letter to Senator Grassley purported to state “the EPA’s position.” EPA’s “should not” language was not enough to overcome EPA’s indication that it would object to permits inconsistent with its policy. The court characterized EPA’s defense as “Orwellian Newspeak.” As to the second letter, the court rejected EPA’s assertion that its statement was subject to change, noting that “[h]edging a concrete application of a policy within a disclaimer about hypothetical future contingencies does not insulate regulated entities from the binding nature of the obligations and similarly cannot serve to inoculate the agency from judicial review.”

The court undertook a similar analysis in holding the letters ripe for review. On the threshold issue of whether the issues were purely legal and final or would benefit from factual development, the court noted that nothing in the letters indicated “that the EPA’s posture will vary based on each applicant’s specific factual circumstances.”

* C. Blake McDowell Professor of Law, The University of Akron School of Law; Chair, Publications Committee, Section of Administrative Law and Regulatory Practice; and Contributing Editor, ADMINISTRATIVE & REGULATORY LAW NEWS.

Turning to the merits of the League’s procedural challenge, the court first adopted a de novo standard of review of whether an agency statement constitutes a legislative rule (subject to notice and comment) or interpretive statement or other agency action not subject to notice and comment. The court emphasized that exceptions to the APA’s requirements for notice and comment must be narrowly construed: “As agencies expand on the often broad language of their enabling statutes by issuing layer upon layer of guidance documents and interpretive memoranda, formerly flexible strata may ossify into rule-like rigidity. An agency potentially can avoid judicial review through the tyranny of small decisions.” Applying those principles to the two letters, the court vacated both agency statements for failure to follow the APA’s requirements for notice and comment.

For the most part, the principles articulated by the court are not new, but references to “Orwellian Newspeak” and the “tyranny of small decisions” suggest increasing resistance to agency use of informal issuances. The League’s success in obtaining review of answers to Senator Grassley also suggests a potentially useful approach to achieving review. Courts may well reject agency arguments that such statements made to legislators are not the sort of “culmination” of agency deliberation necessary to constitute final action. It is unlikely that any such communications to legislators had not been carefully considered before they were sent.

D.C. Circuit Upholding Threatened Species Listing Offers Excellent Example of Hard Look by Agency

In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litigation-MDL No. 1993, 709 F.3d 1 (D.C. Cir. 2013), in which the D.C. Circuit recently upheld the listing of the polar bear as a threatened species, is an excellent example of thorough agency consideration and explanation of the various issues involved in a complex scientific rulemaking. After years of deliberation and consideration of reams of scientific data, the Fish and Wildlife Service found (as described by the court) that, “due to the effects of global climate change, the polar bear is likely to become an endangered species and face the threat of extinction within the foreseeable future.” Industry groups, states, and environmental organizations attacked the finding as too stringent or too lenient. Ultimately, the court concluded that the challenges “amount to nothing more than competing views about policy and science.”

Ultimately, perhaps because the agency apparently did an excellent job of marshaling the facts and addressing comments, the decision appears to contribute little to doctrines of judicial review. The court’s description captures why this is so:

Our principal responsibility here is to determine, in light of the record considered by the agency, whether the Listing Rule is a product of reasoned decisionmaking. It is significant that Appellants have neither pointed to mistakes in the agency's reasoning nor adduced any data or studies that the agency overlooked. In addition, Appellants challenge neither the agency's findings on climate science nor on polar bear biology. Rather, the principal claim advanced by Appellants is that FWS misinterpreted and misapplied the record before it.

With no identification of "mistakes in the agency's reasoning" and challenges to the science, the court's conclusion is not surprising. It is worth noting a particular aspect of the record. According to the court:

Thirteen of the fourteen peer reviewers to whom FWS submitted the proposed rule found that it generally "represented a thorough, clear, and balanced review of the best scientific information available from both published and unpublished sources of the current status of polar bears" and that it "justified the conclusion that polar bears face threats throughout their range."

The dissenter peer reviewer expressed concern that the proposal was "flawed, biased, and incomplete," but the challengers pointed to "no scientific findings or studies that FWS failed to consider in promulgating the Listing Rule." Indeed, they did not dispute that the FWS used the "best scientific and commercial data available," as required by the statute. Ultimately, as characterized by the court, the challengers "merely disagree with the implications of the data for the species' continued viability." It would be difficult to find weaker ground for an arbitrary and capricious challenge to an agency rule.

9th and D.C. Circuits on "Sue and Settle" Attempts to Resolve Rulemaking Disputes

Two circuits recently addressed the "sue and settle" practice in which rule opponents threaten to or actually challenge a rule and reach a settlement with the agency under which a consent decree directs the agency to take particular actions with respect to the rule at issue. In both cases, a third party sought to intervene to challenge the settlement. Oversimplifying somewhat, the resulting principles are that (1) such an opponent has no standing to intervene if the consent decree merely directed the initiation of the statutory process, even if the decree imposed deadlines not imposed in the statute, and (2) other than directing a return to the *status quo*, a court may not enter a consent decree that effectively amends the existing rules without going through the statutorily required process.

Defenders of Wildlife v. Perciasepe, 2013 WL 1729598 (D.C. Cir. 2013), involved a Clean Water Act requirement that EPA review effluent limitations and effluent limitation guidelines every five years and revise them as appropriate. In 2009, Defenders of Wildlife threatened to sue EPA to compel such reviews. After Defenders and EPA apparently negotiated a settlement, Defenders sued EPA on November 8, 2010, and on the same day the parties filed a joint motion to enter a proposed consent decree. The consent decree would have required that EPA sign a Notice of Proposed Rulemaking by July 1, 2012, and issue a final decision by January 13, 2014. Eight days later, the Utility Water Act Group (UWAG) petitioned to intervene.

Upholding the District Court's denial of standing, the D.C. Circuit addressed the application of FRCP 24(a)(2) (establishing standards for intervention) and principles of standing. Rule 24(a)(2) authorizes intervention by anyone who claims a relevant interest or whose ability to affect that interest "may as a practical matter" be impaired by the outcome of the action. A "relevant interest" is necessarily limited to an interest sufficient to support standing, so the court's decision ultimately hinged on a lack of standing.

UWAG argued first that its members were harmed by the decree's imposition of a strict deadline for initiating the rulemaking process. According to UWAG, this violated its members' rights to be subject to a rulemaking process "to the extent the statute commands it or authorizes EPA, in its informed discretion, to undertake it." The court disagreed. As long as the decree did not require EPA to violate a statutory procedure, the decree's constraint on agency discretion did not constitute injury to UWAG's members. It is also worth noting that the decree was the result of a settlement to which EPA had agreed, so it actually reflected the agency's exercise of discretion.

Second, UWAG argued that its members were harmed by the judicially imposed thirteen-month comment period, said to be shorter than EPA's previous rulemakings. But the fact that one rulemaking is shorter than another "does not mean that it results in procedural injury," and the consent decree does not require a stricter rule, only "a specific timeline." Standing requires more than "the possibility of potentially adverse regulation." Of course, UWAG's members would be able to participate fully in process imposed by the consent decree.

The denial of standing in *Defenders* contrasts instructively with the Ninth Circuit's rejection of a "sue and settle" agreement in *Conservation Northwest v. Sherman*, 2013 WL 1760807 (9th Cir. 2013). Conservation Northwest, an environmental organization, challenged changes to the so-called "Survey and Management Standard," which is part of the National Forest Plan governing federal forests in the Pacific

continued on next page

Northwest. D.R. Johnson Lumber Company intervened as a defendant. After the District Court ruled on some claims, Conservation Northwest and EPA negotiated a settlement that included “a lengthy description of ‘New Exemptions from Pre-disturbance Surveys,’ and a list of ‘Species and Category Assignment[s],’ including an explanation of new management requirements for certain species.”

On appeal from the district court’s rejection of its challenge, D.R. Johnson argued that the court had abused its discretion by effectively amending the Survey and Management Standard without going through the procedures required by several statutes and their regulations. This time the appellate court agreed with the challenger. By contrast to *Defenders of Wildlife*, in which the consent decree merely set a timeline for a process in which all could participate, this decree actually changed the applicable rules. Moreover, this decree contrasted with a previously upheld decree that had changed the new rule by vacating it and returning to the status quo ante. In *Conservation Northwest*, the consent decree imposed requirements that had not been part of the challenged rule or the previous status quo. The bottom line is that a consent decree may vacate a challenged rule and reopen or require process, but it may not impose new requirements.

2d, 4th, and 9th Circuits Address Reviewable “Agency Action”

Section 704 of the Administrative Procedure Act, 5 U.S.C. § 704, provides that “final agency action for which there is no other adequate remedy in a court” is subject to judicial review. Challengers rely on this provision when no other statute specifically authorizes review. The threshold question is whether whatever the agency has (or has not) done constitutes “agency action,” under § 551(13) of the APA: “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” Similar statutory provisions authorize review of agency “orders,” which requires an analysis very similar to the question of agency “action.” Three recent challenges addressed these questions, one characterizing an agency letter as an “order,” the other two asserting “failure to act.”

In *Paskar v. U.S. Dept. of Transportation*, 2013 WL 1405863 (2d Cir. 2013), a pilot and an organization concerned about aviation safety challenged a plan to reopen a marine trash transfer station near LaGuardia Airport on Flushing Bay in New York City. Trash would be hauled to the transfer station, where it would be processed and shipped elsewhere by water. This gave rise to concerns about hazards from water fowl and other birds that would be attracted to the transfer station.

After various studies undertaken pursuant to federal regulations, the Federal Aviation Administration had issued a No Hazard determination that ultimately became final.

Then Captain Sullenberger landed a U.S. Airways flight in the Hudson River after an encounter with a flock of geese. Shortly thereafter, a local congressman expressed concern about the dangers posed by birds circling above the proposed transfer station. The FAA responded with assurances that the facility would be safe, but the Secretary of Transportation then appointed a blue ribbon panel of experts to “study the impact of the proposed [Station] on safe airport operations at LaGuardia Airport.” The blue ribbon panel studied the situation at length, ultimately making recommendations that it said would “achieve compatibility between the [Station] and LaGuardia Airport with respect to bird strikes and safe air operations” and “greatly reduce the risk of a bird strike as compared to the present situation.”

The FAA sent the panel’s report to New York authorities, stating that “the technical panel’s approach to the issue presented was appropriate and its analysis and conclusions are sound.” The FAA urged the City to commit to implementing the recommendations in full. The City agreed with the recommendations and proceeded to construct the facility.

In response to the challenge, the Second Circuit held that the FAA’s letter to New York was not a “final order.” Much like a “final agency action,” a “final order” “imposes an obligation, denies a right, or fixes some legal relationship.” The letter did none of these. The City may have accepted the letter’s recommendations, but it was not required to. The letter contained nothing more than some recommendations. It contained no requirements. It did not even meet the Fifth Circuit’s “moral suasion” test (which the Second Circuit did not adopt), under which such a letter could be final action if it imposed “a practical stumbling block” to those on either side of the issue. Sometimes, a letter is just a letter. Were it otherwise, every agency letter might trigger litigation.

By the same token, sometimes when an agency does not do what someone wants it to, it is just disappointing inaction, not a reviewable “failure to act.” That was so in *San Luis Unit Food Producers v. U.S.*, 709 F.3d 798 (9th Cir. 2013), and *Village of Bald Head Island v. U.S. Army Corps of Engineers*, 2013 WL 1501995 (4th Cir. 2013), both of which emphasized the Supreme Court’s admonition that courts should not hear “broad programmatic attack[s]” and should not inject themselves “into day-to-day agency management.” *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004).

San Luis involved a unit of the California Central Valley Water Project, a massive system of dams, reservoirs, and related facilities that Congress dictated “shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and fish and wildlife mitigation, protection and restoration purposes; and, third, for power and fish and wildlife enhancement.” Various farmers who had benefited from irrigation waters sued the

Bureau of Reclamation as irrigation allocations declined, arguing that the Bureau had unlawfully “transmute[d] the Unit from an irrigation project into a fish and wildlife enterprise.” Citing several statutes, they argued that the Bureau was required to provide them with the amount of water they had historically put to beneficial use.

The problem with the *San Luis* claim is relatively straightforward. They could not identify “a single contract” as a cause of their harm, nor could they “describe any specific action the Bureau is required to take” with respect to irrigation water supplies. They simply challenged the Bureau’s discretionary implementation of the Central Valley Project in a way that did not favor their interests.

Village of Bald Head Island seemed a better prospect for reviewable action. There, the Corps of Engineers had proposed various a channel clearing activity and related dredging and maintenance activities that threatened beaches in nearby communities. After several studies and negotiations, the Corps developed a plan under which it would monitor the effects of its actions and would dispose of dredged beach-quality sand on the various beaches on a six-year cycle. It sent a letter describing these proposed

actions and a second letter stating that its actions “shall be in accordance with” the earlier letter. The Corps then approved and undertook the project, with maintenance continuing as projected for several years, until the Corps informed the communities that it did “not have the funding for dredging the portion of the Channel nearest Bald Head Island or for disposing of beach-quality sand onto Bald Head Island beaches.”

Bald Head sued, arguing that the Corps’ failure to fulfill its monitoring plan was a reviewable “failure to act.” Despite the Corps’ stated commitment to take the arguably “discrete” actions described in its monitoring plan, the court emphasized it could review only an inaction the agency was “required to take.” Neither statutes, regulations, nor the Corps’ letter imposed any requirement to act. Ultimately, Bald Head was asking the court to involve itself in a “day-to-day managerial role over agency operations,” which it could not do. According to the court, final agency action occurred when the Corps approved the plan. After that point, the agency was engaged in implementation of the program, with which the court could not interfere. ○

Letter to the Editor and Response *continued from page 5*

disability processing system and must then await an ALJ hearing if their claims are rejected. By definition, these applicants are often desperately ill and destitute. Yet the number of applications for Social Security continues to increase each year. According to SSA’s FY 2012 *Performance and Accountability Report*,⁴ in 2006 there were 559,000 disability hearings; in 2012 there were 820,000. Demographic trends will undoubtedly continue to swell the number of applications and thus the backlog.⁵

After these articles were published, the ABA received a letter from David Kornfeld that criticized our articles. Mr. Kornfeld is a lawyer who specializes in Social Security disability cases. He observed that delays in providing Social Security hearings have recently declined. He is right. Largely because Social Security hired 145 new ALJs, but also because of diligent efforts by SSA to increase the productivity of its existing judges, it was able to reduce the delays. According

to SSA’s FY 2012 *Performance and Accountability Report*, in 2012 it took about one year (362 days) to get a hearing. This is certainly a substantial improvement from FY 2008 (509 days). Of course, these figures are just averages, and many applicants wait a much longer period for their hearing.⁶

Unfortunately, the backlog is rising again because SSA is unable to hire as many ALJs as it needs through the cumbersome OPM hiring process. Thus the delay crept up from 345 days in 2011 to 362 days in 2012. In 2012, SSA fell well short of providing its targeted number of hearings. The target was 875,000 hearings but SSA was able to provide only 820,000.⁷

Consequently, in our opinion, it would be a mistake to dismiss proposed reforms of the Social Security adjudicatory system because of a belief that the backlog is no longer a problem. The backlog is severe, the delays are still too long, and there is every reason to believe they will get worse. ○

⁴ <http://www.ssa.gov/finance/>.

⁵ The backlog rose from 705,000 in FY 2010 to 771,000 in FY 2011, and the Appeals Council backlog rose from 106,000 to 153,000 between FY 2010 and FY 2011. See <http://ssa.gov/policy/docs/statcomps/supplement/2012/2f8-2f11.pdf>.

⁶ Many regional offices average delays of well over 400 days, with a high of 482 days in St. Louis. See http://www.ssa.gov/appeals/DataSets/05_Average_Processing_Time_Report.html

⁷ See *Performance and Accountability Report* *continued on next page* cited in note 3.

Recent Articles of Interest

*Edited by William Funk**

Aziz Z. Huq, *Removal as a Political Question*, 65

STAN. L. REV. 1 (2013). When should courts be responsible for designing federal administrative agencies? In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court invalidated one specific mechanism that Congress employs to insulate agencies from presidential control. Lower federal courts have discerned wider implications in the decision's linkage of presidential power to remove agency officials with democratic accountability. Applied robustly, the *Free Enterprise Fund* principle casts doubt on many agencies' organic statutes. As the judiciary starts exploring those implications, this article evaluates the effects of judicial intervention in administrative agency design in light of recent political science work on bureaucratic behavior, historical studies of state development, and comparative analyses of other countries' civil services. Judicial intervention in agency design, the author concludes, will not generate consistent and predictable outcomes and instead risks diluting majoritarian control and fostering policy uncertainty. In light of the tenuous correlation between changes in presidential removal power and the underlying constitutional good of democratic accountability, the author argues that removal power questions should be ranked as "political questions" beyond federal court competence.

Michael D. Sant' Ambrogio and Adam S.

Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992 (2012). The number of claims languishing on administrative dockets has become a "crisis," producing significant backlogs, arbitrary outcomes, and new barriers to justice. Reformers appropriately call for more resources, administrative law judges, and attorneys' fees. But surprisingly, commentators have ignored tools long used by courts to resolve common claims raised by groups of people: class actions and complex litigation procedures. Almost no administrative agency allows groups to aggregate and resolve common claims in adjudication. Accordingly, in a variety of adjudicatory proceedings, agencies routinely (1) waste resources on repetitive cases, (2) reach inconsistent decisions for similar claims, and (3) deny individuals access to fair representation that aggregate procedures promise. Moreover, procedural hurdles often prevent courts from providing class-wide relief to parties in agency adjudication. This article argues that agencies themselves should adopt aggregation procedures, like those under Rule 23 of the Federal Rules of Civil Procedure, to adjudicate common claims. After surveying current tools by which agencies could

* Robert E. Jones Professor of Law, Lewis & Clark Law School; former Chair, ABA Section of Administrative Law and Regulatory Practice; and Advisory Board Member and Contributing Editor, ADMINISTRATIVE & REGULATORY LAW NEWS.

promote more efficiency, consistency, and legal access, this article finds that agency class action rules more effectively resolve common disputes by: (1) efficiently creating ways to pool information about recurring problems; (2) achieving greater equality in outcomes than individual adjudication; and (3) securing legal and expert assistance at a critical stage in the process.

Note, *The SEC Is Not an Independent Agency*, 126

HARV. L. REV. 781 (2013). The widely held assumption that the President cannot remove an SEC commissioner except for good cause is wrong. The text of the 1934 Act is silent on this issue, but an analysis of the prevailing rules of construction demonstrates that SEC commissioners serve at the pleasure of the President, and the legislative history does not suggest that Congress understood the statute differently. Meanwhile, alternative approaches to interpreting the 1934 Act produce ambiguous results, rest on dubious legal grounds, and risk undermining important compromises made by Congress. The conclusion that SEC commissioners are removable at will has potentially broad implications. For instance, the 2008 election shows that presidential candidates may be willing to make the proper management of the SEC a campaign issue. Such criticism may inspire incumbent presidents to take a more active role in overseeing the SEC, especially if they can no longer hide behind a popular perception that the SEC is an independent agency. Additionally, cases like *Free Enterprise Fund* show that the independence of the SEC can be implicated indirectly, even without a deliberate challenge by the executive branch. Finally, there are several other agencies that are traditionally considered independent, such as the Federal Communications Commission and the Federal Election Commission, even though they lack explicit statutory removal protection. The analysis in this note suggests that where the statute is silent on the question, courts, litigants, and government officials should more critically examine traditional assumptions about an agency's independence.

Drew A. Swank, *An Argument Against Administrative Acquiescence*, 88 N.D. L. REV. 1 (2012). Administrative law is different. It is a code-based system, normally without any role for legal precedent as found in the common law. As such, when the decisions of an administrative agency are reviewed by a court, friction can result if the court creates a legal precedent which the agency does not follow, as it is not part of the agency's rules or regulations. This result is called non-acquiescence, where the administrative agency ignores the precedential value of a court's ruling. This article suggests that, based on the Social Security Act and the decisions of the Supreme Court of the United States, there are very few instances in which the Social Security Administration should alter its rules or regulations to accommodate a circuit court ruling. Following a brief introduction, Part II

of this article describes the standard adjudication of a Social Security disability case to provide an example of administrative workings. Next, Part III further articulates the problems created by non-acquiescence. Finally, Parts IV and V discuss the impact of non-acquiescence from a policy and legal perspective.

Stephen M. Griffin, *A Bibliography of Executive Branch War Powers Opinions Since 1950*, 87 TUL. L. REV. 649 (2013). While there is extensive literature on presidential war powers, there has never been a comprehensive listing of the relevant legal opinions provided by the executive branch. This bibliography of executive branch legal opinions on war powers since the beginning of the Korean War in 1950 is therefore intended as an aid to future scholarship. Most have been published as public documents, although some were confidential at the time they were written. The once-confidential documents are available from presidential libraries, and the information necessary for the library archivists to retrieve them is provided. This bibliography is limited to opinions that are related to the initiation of war, including the interpretation of the 1973 War Powers Resolution. Eight opinions that were previously unknown or not easily accessible have been included as appendices to this bibliography. A commentary on the various items in the bibliography is provided at the end.

Nathan A. Olson, *A Wayward Circuit: The Development of Duplicate Policy Statement Exception Tests Among Circuits and the Necessary Corrective Action*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2242047. The author provides a discussion of tests developed by circuit courts of the United States to distinguish between interpretative rules and policy statements promulgated by administrative agencies. The author details tests developed by certain circuit courts and the intra-circuit inconsistencies inherent in these tests.

Adrian Vermeule, *Rationally Arbitrary Decisions (in Administrative Law)*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2239155. How should administrative law cope with genuine uncertainty in which probabilities cannot be attached to outcomes? The author argues that there is an important category of agency decisions under uncertainty in which it is rational to be arbitrary. Rational arbitrariness arises when no first-order reason can be given for the agency's choice one way or another within a certain domain, yet the agency has valid second-order reasons to make some choice or other. When these conditions obtain, even coin-flipping may be a perfectly rational strategy of decisionmaking for agencies. Courts should defer to rationally arbitrary decisions by agencies. There is a proper role for courts in ensuring that agencies have adequately invested resources in information gathering, which may dispel uncertainty. Yet in some cases the value

of further investments in information gathering will itself be genuinely uncertain. If so, courts should defer to agencies' second-order choices about informational investments on the same grounds that justify deference to agencies' first-order choices under uncertainty.

Adrian Vermeule, *Recess Appointments and Precautionary Constitutionalism*, 126 HARV. L. REV. F 122 (2013), <http://www.harvardlawreview.org/forum/>. In *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), the D.C. Circuit held that the President's constitutional power to make recess appointments does not include recesses during a session of the Senate ("intrasession recesses"), as opposed to recesses between sessions ("intersession recesses"). Many commentators have taken *Canning* to be principally a textualist and originalist decision. This article argues to the contrary that *Canning's* textualism and originalism are derivative strategies by which the court attempted to fashion a precautionary rule against presidential aggrandizement. As such, *Canning* is best understood to exemplify a mode of constitutional adjudication that we might call precautionary constitutionalism. As a normative matter, *Canning* illustrates the major problem of precautionary constitutionalism: Myopic focus on a target risk may cause the rulemaker to ignore or underestimate countervailing risks, resulting in unintended, counterproductive, or perverse consequences.

Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465 (2013). In 2011, in *Mayo Foundation for Medical Education & Research v. United States*, the Supreme Court held that general authority Treasury regulations adopted using notice-and-comment rulemaking carry the force of law and thus are eligible for *Chevron* deference. In the wake of *Mayo*, courts and scholars are now struggling with its implications for whether temporary Treasury regulations and IRS guidance documents (revenue rulings, revenue procedures, and notices) that lack notice and comment but are enforceable through civil penalties are likewise eligible for *Chevron* deference and, relatedly, whether these formats are in fact subject to APA notice-and-comment rulemaking requirements. Currently prevailing judicial tests for evaluating these questions do not offer clear or easy answers for the tax context. Ultimately, both questions turn on whether the agency actions in question carry "the force of law." The purpose of this article is to take a step back from existing doctrinal standards and to sort through the basic administrative law principles and Supreme Court precedents that drive those standards in an effort to develop a coherent approach to Treasury and IRS rulemaking and judicial review thereof.

Christopher J. Walker, *Administrative Common Law Toolbox for Enhancing Court-Agency Dialogue*, <http://papers.ssrn.com/sol3/papers>.

continued on next page

Recent Articles of Interest

cfm?abstract_id=2242869. When a court concludes that an agency's decision is erroneous, the ordinary rule is to remand to the agency to consider the issue anew (as opposed to the court deciding the issue itself). Despite that the Supreme Court first articulated this ordinary remand rule in the 1940s and has rearticulated it repeatedly over the years, little work has been done to understand how the rule works in practice, much less whether it promotes the separation-of-powers values that motivate the rule. This article is the first to conduct such an investigation—focusing on judicial review of agency immigration adjudications and reviewing the over 400 published court of appeals decisions that have addressed the remand rule since the Court rearticulated it in 2002. The article finds that courts generally fail to appreciate the dual separation-of-powers values of Article I legislative and Article II executive authority at issue and that some circuits have not been faithful to this command. Courts that refuse to remand seem to do so when they believe the petitioner is entitled to relief and remand would unduly delay or, worse, preclude relief because the petitioner would get lost in the process. In refusing to remand, courts express perceived Article III concerns of abdicating their authority to say what the law is and to ensure that procedures are fair and rights are protected in the administrative process. In reviewing the cases, however, this article uncovers a novel set of administrative common law tools that courts have developed to preserve their role in the process and enhance the court-agency dialogue. Instead of ignoring the remand rule, this article suggests that courts look to and further develop this dialogue-enhancing toolbox to exercise their constitutional authority while preserving the delicate balance of powers between courts and agencies via the ordinary remand rule.

Cass R. Sunstein, *Nonquantifiable*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2259279. 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 when agencies lack relevant information, they cannot quantify certain benefits. If this is so, how should agencies decide whether and how to proceed? As a matter of actual practice, agencies often 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 is most useful when the agency is able to identify lower or upper bounds, either through point estimates or through an assessment of expected value. If lower and upper bounds are not readily available, agencies might be able to make progress by exploring comparison cases in which relevant values have already been assigned (such as for a statistical life). When agencies cannot identify lower or upper bounds, and when helpful comparisons are

unavailable, breakeven analysis may not be a great deal more than a hunch or a conclusion, or perhaps (when agencies choose to proceed) a way of announcing a decision in favor of precaution. Even if so, breakeven analysis does have the virtues of helping to identify what information is missing, of specifying the conditions under which benefits would justify costs (“conditional justification”), and of explaining why some cases are especially hard.

Cass R. Sunstein, *Nudges.gov: Behavioral Economics and Regulation*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220022. Behavioral economics is influencing regulatory initiatives in many nations, including the United States and the United Kingdom. The role of behavioral economics is likely to increase in the next generation, especially in light of the growing interest in low-cost, choice-preserving regulatory tools. Choice architecture—including default rules, simplification, norms, and disclosure—can affect outcomes even if material incentives are not involved. For example, default rules can have an even larger effect than significant economic incentives. Behavioral economics has helped to inform recent and emerging reforms in areas that include savings, finance, distracted driving, energy, climate change, obesity, education, poverty, health, and the environment.

Jill E. Family, *Easing the Guidance Document Dilemma Agency by Agency: Immigration Law and Not Really Binding Rules*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2261297. Immigration law relies on rules that bind effectively, but not legally, to adjudicate millions of applications for immigration benefits every year. This article provides a blueprint for immigration law to improve its use of these practically binding rules, often called guidance documents. The agency that adjudicates immigration benefit applications, United States Citizenship and Immigration Services (USCIS), should develop and adopt its own Good Guidance Practices to govern how it uses guidance documents. This article recommends both a mechanism for reform, the Good Guidance Practices, and tackles many complex issues that USCIS will need to address in creating its practices. The recommended reforms promote increased accessibility, transparency, and fairness for immigration law stakeholders, including unrepresented parties. This article also contributes to the larger administrative law debate about guidance documents. Guidance documents present a conundrum for administrative law because they have powerful positive and negative features. Because the Administrative Procedure Act does not require agencies to consider public input in the crafting of these rules, agencies may respond more quickly and flexibly than notice-and-comment rulemaking would allow. On the other hand, an agency policy statement (a type of guidance document that explains an agency's current thinking on

a particular issue) is effectively binding even though it is not legally binding. Applicants are free to argue in an adjudication that a different approach should apply. But stakeholders tend to follow the rule announced in the policy statement; they follow the rule as if it were legally binding. Thus, there is a practically binding effect without the opportunity for notice and comment. In developing a prescription for USCIS, this article concludes that the best approach to reforming agency use of guidance documents is an agency-by-agency approach. It rejects a one-size-fits-all approach in favor of the opportunity for each agency to formalize its own practices. Such tailored reform recognizes that every agency is different, with its own guidance culture and communities of stakeholders. This approach is designed to ease the negative effects of guidance documents while maximizing their positive features.

Michael Kagan, *Dubious Deference: Reassessing Appellate Standards of Review in Immigration Appeals*, 5 Drexel L. Rev. 101 (2012). The longstanding doctrine of deferential review by appellate courts of findings of fact by administrative agencies is seriously flawed for two main reasons. First, the most prominent justification for deference relies on the empirical assumption that first-instance adjudicators are best able to determine the truth because they can directly view witness demeanor. Decades of social science research has proven this assumption about the value of demeanor false. Second, in principle, the deference rule applies to all types of administrative adjudication, with no attention to the relative gravity of interests at stake in different types of cases or to the varying levels of actual expertise that different executive agencies bring to bear. These weaknesses are particularly acute in immigration appeals and help explain why the 2002 streamlining of the Board of Immigration Appeals has proven problematic for the federal courts. Appellate courts often take advantage of the inherent ambiguities of the deference doctrine to prevent unacceptable results, but this approach does little to repair the essential flaws in the doctrine and exposes courts to criticism that they are acting arbitrarily. A more coherent way to understand how appellate courts use deference in practice would be to apply a balancing analysis similar to the procedural due process doctrine.

Peter L. Strauss, *Private Standards Organizations and Public Law*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2194210. Simplified, universal access to law is one of the important transformations worked by the digital age. With the replacement of physical by digital copies, citizens ordinarily need travel only to the nearest computer to find and read the texts that bind them. Lagging behind this development, however, has been computer access to standards developed by private standards development organizations, often under the umbrella of

the American National Standards Institute (ANSI), and then converted by agency actions incorporating them by reference into legal obligations. For example, to discover what colors OSHA requires for use in workplace caution signs, one must purchase from ANSI the standard OSHA has referenced in its regulations, at the price ANSI chooses to charge for it. The regulations governing incorporation by reference as a federal matter have not been revised since 1982 and so do not address the changes the digital age has brought about in what it means for incorporated matter to be “reasonably available,” as 5 U.S.C. § 552(a)(1) requires. This essay seeks to bridge that gap, suggesting a variety of approaches that might bring the use of incorporation by reference into conformity with modern rulemaking practices and respect the general proposition that documents stating citizens’ legal obligations are not subject to copyright, while at the same time both honoring clear federal statutory policy favoring the use of privately developed standards in rulemaking and respecting the needs standards organizations have to find reasonable means to support the costs of their operations. Business models created in the age of print need to change; the challenge is to find ways to permit the market in privately developed voluntary standards to thrive without thereby permitting the monopoly pricing of access to governing law.

Nina A. Mendelson, *Private Control Over Access to Public Law: The Puzzling Federal Regulatory Use of Private Standards*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2264321. To save resources and build on private expertise, federal agencies have incorporated private standards into thousands of federal regulations—but only by “reference.” These rules encompass water-sampling protocols, bike helmet safety standards, and pipeline spill notification requirements; they are written by private organizations from the American Public Health Association to the American Petroleum Institute. An individual who wishes to read this binding federal regulatory law cannot access it for free online or in a government depository library, as she can the U.S. Code or Code of Federal Regulations. Instead, the individual is referred to the private organization, which typically asserts a copyright and charges a significant access fee. In assessing the arguments why law needs to be public, previous analyses have focused almost wholly on whether regulated entities have notice of their obligations. In the setting of incorporation-by-reference rules, this article evaluates several other considerations, including notice to those who expect to benefit from government programs and the way government regulates others. The text of these rules might affect the choices made, for example, by consumers of dangerous products, neighbors of gas pipelines,

continued on next page

Recent Articles of Interest

and Medicare recipients. Ready public access also is critical to ensure that federal agencies are accountable to the courts, Congress, and the electorate for the regulatory power they exercise. Given the institutional dynamics, the need for ready public access is at least as strong in this collaborative governance setting as when agencies act alone. Existing agency and private organizational procedures may not suffice to avoid potential rulemaking pitfalls, and agencies may face significant incentives to pursue incorporation of less-than-perfect private standards. Finally, expressive harm is likely to flow from government adopting regulatory law that is, in contrast to American law generally, significantly more costly to access and harder to find. Full consideration of the importance of public access both strengthens the case for reform and limits the range of acceptable reform measures.

Richard Murphy, *Chenery Unmasked: Reasonable Limits on the Duty to Give Reasons*, 80 U. CIN. L. REV. 817 (2012). Eighty years ago in *SEC v. Chenery*, the Supreme Court declared, “an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained.” Translation: Courts and agencies must not deploy post hoc rationales during judicial review to save discretionary administrative actions. Over time, this contemporaneous-rationale rule has seeped deep into the marrow of administrative law. But this *Chenery* rule is wrong—or at least not quite right. *Chenery’s* basic, procrustean mistake was to state a categorical rule even though reliance on post hoc rationales is sometimes sensible. Courts have reasonably responded to this overreach by cheating on *Chenery*. The law in this area is therefore more confused than it should be, which impedes clear thinking about how post hoc rationales could be integrated into administrative and judicial procedures to improve them both. *Chenery’s* bar is, at bottom, a judicially crafted, common-law style rule designed to encourage agency responsibility and judicial efficiency. It is not constitutionally compelled. Courts therefore can change it, and they should do so, giving up *Chenery’s* misleading clarity for a pragmatic, rule-of-reason approach.

Sarah L. Brinton, *Toward Adequacy*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2228386. Each year, hundreds of people, companies, organizations, and associations sue the federal government for injuries they have suffered at the hands of federal agencies. Such suits are often brought under the judicial review provisions of the Administrative Procedure Act (APA), which Congress enacted expressly to allow broad access to courts in an age of increasing administrative agency action. By the terms of the APA itself, all final agency action for which there is no other adequate remedy in a court is reviewable under the APA. But the very language meant to welcome such suits into court also acts as a bar: To be eligible for judicial

review under the APA, agency actions must have “no other adequate remedy in a court” (NOARC). Despite the facial ambiguity of the NOARC requirement—“adequacy is in the eye of the beholder,” as one scholar recently wrote—NOARC is a provision that has long been ignored by academia, treatise writers, and the Supreme Court. The Justices have explicitly addressed the meaning of NOARC in only one case, *Bowen v. Massachusetts*, 487 U.S. 879 (1988), with a patchwork opinion marked by its meandering analysis and muddled reasoning. With only *Bowen* as a guide, confusion has abounded—in the Court’s own jurisprudence, in the lower courts, and in the active advocacy of practitioners. Recent cases demonstrate that the question of NOARC is not an esoteric one. And yet, no consensus about NOARC exists. In light of the NOARC requirement’s wide impact and high stakes, our anemic NOARC jurisprudence must be replaced with robust dialogue about the meaning of NOARC and its implications for judicial review under the APA. This dialogue should be informed by a close and faithful reading of the NOARC provision itself.

Cary Coglianese, *Enhancing Public Access to Online Rulemaking Information*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216918. One of the most significant powers exercised by federal agencies is their power to make rules. Given the importance of agency rulemaking, the process by which agencies develop rules has long been subject to procedural requirements aiming to advance democratic values of openness and public participation. With the advent of the digital age, government agencies have engaged in increasing efforts to make rulemaking information available online as well as to elicit public participation via electronic means of communication. How successful are these efforts? How might they be improved? This article investigates agencies’ efforts to make rulemaking information available online. Drawing on a review of current agency uses of the Internet, a systematic survey of regulatory agencies’ websites, and interviews with managers at a variety of federal regulatory agencies, the article identifies both existing “best practices” as well as opportunities for continued improvement. The findings of this research suggest that there exist both considerable differences in how well different agencies are making rulemaking information available online as well as significant opportunities for the diffusion of best-practice innovations that some agencies have adopted. This research also provides a basis for seven recommendations for enhancing both the accessibility and quality of rulemaking through online technology. A commitment to well-accepted democratic principles applicable to regulatory agencies should lead federal web designers to strive to create websites that are as accessible to ordinary citizens, including individuals with limited English proficiency, vision impairments, and low-bandwidth

connections, as they are to the sophisticated repeat players in Washington policymaking circles.

Sapna Kumar, *The Accidental Agency?*, 65 FLA. L. REV. 229 (2013). This article presents a new model for examining the role of the Court of Appeals for the Federal Circuit (Federal Circuit) with regard to patent law, positing that the Federal Circuit behaves like an agency and serves as the de facto administrator of the Patent Act. The Federal Circuit has traditionally engaged in a form of substantive rulemaking by issuing mandatory bright-line rules that bind the public. In reviewing patent agency appeals, the Federal Circuit acts more like an agency than a court by minimizing agency deference through the manipulation of standards of review and administrative law doctrines. This position of administrator raises several concerns. Supreme Court intervention has jeopardized the Federal Circuit's ability to continue engaging in substantive rulemaking, calling into question the sustainability of the lower court's role as administrator. Furthermore, the Federal Circuit is caught between the Supreme Court's goal to unify administrative law and Congress's goal to unify patent law. These problems suggest that a confrontation between the Supreme Court and Congress is inevitable.

Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185 (2013). In prescribing de novo judicial review of agencies' decisions to withhold requested information from the public under the Freedom of Information Act (FOIA), Congress deliberately and radically departed from the typical deferential treatment courts are required to give to agencies. Nonetheless, empirical studies demonstrate that the de novo review standard on the books in FOIA cases is not the standard used in practice. Notably, FOIA decisions are upheld at a substantially higher rate than agency decisions that are entitled to deferential review. This article posits that although courts recite the appropriate standard in FOIA cases, they have created a collection of practices unique to FOIA cases that have the effect of deferring to the government's secrecy positions. First, in some cases, courts expressly defer to particular representations made by the government, even though these representations are themselves crucial to the overall determination of the legality of the withholding. Second, in every FOIA case, certain procedural practices have become part of the body of case law governing how FOIA cases are adjudicated, and these practices stack the deck in favor of the government. This article concludes that these procedural practices, which are departures from the federal procedural system's trans-substantive design, may be the more consequential of the deference doctrines under FOIA, as they hide the true nature of the rulings, make it more difficult for the political branches to respond, and diminish public confidence in the judiciary.

Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship between the Obama EPA and the Obama White House*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262337. The Obama administration has continued and deepened a longstanding practice of White House control over rules developed by the Environmental Protection Agency (EPA), with cost-benefit analysis as the guiding framework. The Office of Information and Regulatory Affairs (OIRA) is the central player in this structure: It reviews, under a cost-benefit rubric, all agency rules that it deems "significant" under Executive orders mandating this review. EPA rules deemed significant by OIRA are not issued without OIRA's imprimatur. As explained in this article, OIRA's actual practice in reviewing agency rules departs considerably from the structure created by the Executive orders governing OIRA's process of regulatory review. The distribution of decisionmaking authority is ad hoc and chaotic rather than predictable and ordered; the rules reviewed are mostly not economically significant but rather, in many cases, are merely of special interest to OIRA staffers; rules fail OIRA review for a variety of reasons, some extra-legal and some simply mysterious; there are no longer any meaningful deadlines for OIRA review; and OIRA does not follow—or allow agencies to follow—most of the transparency requirements of the relevant Executive order. Describing the OIRA process as it actually operates today goes a long way toward previewing the substantive problems with it. The process is utterly opaque. It rests on assertions of decisionmaking authority that are inconsistent with the statutes the agencies administer. The process diffuses power to such an extent—acceding, depending on the situation, to the views of other cabinet officers, career staff in other agencies, White House economic offices, Members of Congress, the White House Chief of Staff, OIRA career staff, and many more—that at the end of the day no one is accountable for the results it demands (or blocks, in the case of the many rules stalled at OIRA). And, through it all, environmental rules are especially hard hit, from the number of such rules reviewed to the scrutiny they receive to the changes they suffer in the course of the process. Misunderstandings of the OIRA process abound. Too often these misunderstandings are perpetuated by, or not contradicted by, the very personnel who have been involved in the process. The descriptive account provided here, aimed at correcting the misimpressions that have grown up around OIRA review, will help to renew the debate over the role of OIRA and the larger White House in agency rulemaking.

John A. Sautter and Levente Littvay, *Environmental Judicial Interpretation and Agency Review: An Empirical*

continued on next page

Recent Articles of Interest

***Investigation of Judicial Decision-making in the Clean Water Act and the Clean Air Act*, 19 BUFF. ENVTL. L.J. 269 (2012).**

Political ideology has long been associated with the manner in which judges make judicial decisions. Extensive empirical research has established the link between a judge's political ideology and how he or she rules on cases. However, little research has been conducted specifically in environmental law. Indeed, what research is available looks at environmental law in general and has not asked any questions concerning how political ideology might affect decisionmaking concerning specific environmental statutes. This article seeks to partially fill this void by looking specifically at how political ideology affects whether judges affirm or reverse agency action with respect to the Clean Water Act versus the Clean Air Act. The data used in this analysis were collected from seventy environmental law cases, which include 116 instances of statutory interpretation and 347 judicial votes concerning cases appealed to the U.S. Courts of Appeals over a three-year period from 2003 to 2005. Findings indicate that political ideology is a much more important factor in Clean Water Act cases as compared to Clean Air Act cases. Furthermore, evidence shows that panel composition was much more important for Clean Water Act decisions as opposed to Clean Air Act decisions. These findings are placed within the general framework of understanding legal decisions as a product of both legal interpretation and political preferences.

David J. Barron and Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013). Congressional delegation of broad lawmaking power to administrative agencies has defined the modern regulatory state. But a new form of this foundational practice is being implemented with increasing frequency: the delegation to agencies of the power to waive requirements that Congress itself has passed. It appears, among other places, as a central feature of two signature statutes of the last decade, the No Child Left Behind Act and the Patient Protection and Affordable Care Act. The authors call this delegation of the power to unmake major statutory provisions "big waiver." This article examines the basic structure and theory of big waiver, its operation in various regulatory contexts, and its constitutional and policy implications. While delegation by Congress of the power to unmake the law it makes raises concerns, the authors conclude that the emergence of big waiver represents a salutary development. By allowing Congress to take ownership of a detailed statutory regime—even one it knows may be waived—big waiver allows Congress to codify policy preferences it might otherwise be unwilling to enact. Furthermore, by enabling Congress to stipulate a baseline against which agencies' subsequent actions are measured, big waiver offers a sorely needed means by which Congress and the executive branch may overcome gridlock.

And finally, in a world laden with federal statutes, big waiver provides Congress a valuable tool for freeing the exercise of new delegations of authority from prior constraints and updating legislative frameworks that have grown stale.

Kent H. Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2211475. The U.S. Constitution imposes three key limits on the design of federal agencies. It constrains how agency officers are appointed, the extent of their independence from the President, and the range of issues that they can decide. Scholars have trumpeted the importance of these safeguards with soaring rhetoric. And the Supreme Court has permitted regulated parties to vindicate these safeguards through implied private rights of action under the Constitution. Regulated parties, for their part, have been successfully challenging agency structure with increased frequency. At the same time, regulated parties, courts, and scholars have largely ignored the practical question of "structural remedies"—i.e., how to remedy the violation of structural safeguards for prevailing regulated parties. This inattention may arise because courts often provide what seems at first blush to be an appropriate remedy: severing the structural defect from an agency's "organic" act. In fact, however, structural remedies often fail to satisfy core remedial values relevant to regulated parties—namely, compensating past harm, preventing future harm from the past defect, incentivizing regulated parties to seek redress, and deterring structural violations—and may leave regulated parties in a worse place than they occupied before asserting the challenge. These ineffectual remedies thereby undermine the very safeguards that judicial decisions purport to vindicate and render any "private right" potentially illusory. Courts, in response, can improve the status quo. They could select (or Congress could provide) better remedies, and this article considers how they could do so. But if structural remedies cannot be sufficiently improved, courts should either become more candid about the underlying safeguards' limitations or reconsider altogether the nature of the safeguards and regulated parties' relationship to them.

Diana R. H. Winters, *False Certainty: Judicial Forcing of the Quantification of Risk*, 85 TEMP. L. REV. 315 (2013). Risk, which is by definition only the possibility of harm, is speculative and amorphous. To transform risk into something more concrete and measurable, courts reviewing risk determinations by agencies or individuals in certain contexts will insist that the parties quantify this risk. However, the quantification of risk does not fulfill its promise; beneath the veneer of objectivity and certainty is a messy and subjective process. Instead of ensuring that agencies adhere to their legislative mandates, quantifying risk may force agencies to contradict precautionary directives. Moreover,

the quantification of risk leaves room for political and self-interested maneuvering by obscuring the role of policy in agency decisionmaking. The quantification of risk becomes a proxy for reasonableness and a rhetorical reinforcement against the accusation of judicial overreach and extrajudicial action. This article analyzes the judicial forcing of the quantification of risk in two contexts: first, the review of agency action, and second, the determination of whether probabilistic injury satisfies the injury-in-fact standing requirement. By juxtaposing these two contexts, the article illuminates the work expected of the quantification of risk and the flaws in the process. It then turns to proposals for improving the judicial review of risk determinations.

Kristen Eichensehr, *Treaty Termination and the Separation of Powers*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201322. The President, Congress, and the courts have long disagreed about who has the power to terminate treaties. Presidents have claimed the power to terminate treaties unilaterally, while Congress and particularly the Senate have argued that because the political branches share the power to make treaties, they should also share the power to terminate them. Unilateral presidential treaty terminations have prompted lawsuits by congressmen and private parties, Senate hearings and reports, and a divided academic literature. Meanwhile, the courts have deemed treaty termination to be a nonjusticiable political question. This article reframes the debate over treaty termination by looking to treaty formation and analogizing to the Supreme Court's precedents on the Appointments Clause and removal power. The Appointments Clause uses the same "by and with the advice and consent of the Senate" language as the Treaty Clause and is found in the same sentence of the Constitution. Proponents of presidential power have relied on the Supreme Court's Appointments Clause jurisprudence to argue that Congress cannot limit the President's termination power. This article agrees that the oft-proposed requirement of Senate consent prior to treaty termination would be unconstitutional by analogy to the Appointments Clause. However, the Appointments Clause analogy points toward a new solution to the termination debate—namely, that the Senate could impose a "for-cause" restriction on the President's termination power. In particular, this article proposes a "for-cause" limitation implemented via a reservation, understanding, or declaration at the time of a treaty's ratification. Recognizing the constitutionality of a "for-cause" termination reservation alters the terms of the ongoing debate about the interchangeability of congressional-executive agreements and Article II treaties. Both proponents and opponents of interchangeability have noted that the President's ability to terminate Article II treaties unilaterally makes treaties unreliable as compared to congressional-executive agreements, which

cannot be terminated absent action by both Congress and the President. A "for-cause" termination reservation would increase the reliability of Article II treaties and so would shift the comparative utility of congressional-executive agreements and Article II treaties.

Robin Kundis Craig and J.B. Ruhl, *Designing Administrative Law for Adaptive Management*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2222009. Administrative law needs to adapt to adaptive management. Adaptive management is a structured decision-making method the core of which is a multi-step iterative process for adjusting management measures to changing circumstances or new information about the effectiveness of prior measures or the system being managed. It has been identified as a necessary or best-practices component of regulation in a broad range of fields, including drug and medical device warnings, financial system regulation, social welfare programs, and natural resources management. Nevertheless, many of the agency decisions advancing these policies remain subject to the requirements of either the Administrative Procedure Act or the states' parallel statutes. Adaptive management theorists have identified several features of such administrative law requirements—especially public participation, judicial review, and finality—as posing barriers to true adaptive management, but they have put forward no reform proposals. This article represents the first effort in adaptive management theory to go beyond complaining about the handcuffs administrative law puts on adaptive management and to suggest a solution. The article begins by explaining the theory and limits of adaptive management to emphasize that it is not appropriate for all or even most agency decisionmaking. For its appropriate applications, however, the authors argue that conventional administrative law has unnecessarily shackled effective use of adaptive management. The authors show that the core values of administrative law can be implemented in ways that better allow for adaptive management through a specialized "adaptive management track" of administrative procedures. Going further, the authors propose and explain draft model legislation that would create such a track for the specific types of agency decisionmaking that could benefit from adaptive management.

Neal Kumar Katyal, *Stochastic Constraint*, 126 HARV. L. REV. 990 (2013). (Book review of *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* by Jack Goldsmith.) With *THE TERROR PRESIDENCY*, Professor Jack Goldsmith wrote, hands down, the very best analysis of the national security issues surrounding President George W. Bush's tenure. In *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, Goldsmith returns

continued on next page

Recent Articles of Interest

to the same set of problems, but adopts a different tack. He argues that the modern wartime Executive is constrained in new ways beyond the traditional system of checks and balances, and that these new constraints combine to create an effective system that checks executive power. Though the modern wartime Executive may disregard traditional limits on presidential power and attempt to act unilaterally, new checks from an aggressive press, a watchful and technologically enabled public, and the legalization of warfare combine to constrain the executive branch. Goldsmith argues that this system is the type of reciprocal restraint of which our Founders would have approved. Goldsmith's claim ultimately boils down to one about how presidential constraint arises from a stochastic mélange produced by these newly empowered actors. But in his analysis of the constraint imposed on the modern Executive by this new system of checks and balances, Goldsmith fails to account for the values served by good process. Just as with a student's four-page exam (which might reach a correct result but probably will not), the path by which the Executive is constrained matters, because it will significantly affect the substantive quality and sustainability of that end result. Goldsmith's new system of accountability relies on a combination of government leaks and self-checking out of fear of reprisal, whereas the traditional system trusts "[a]mbition . . . to counteract ambition." The latter system—the one envisioned by the Founders—has significantly fewer side effects attached to the process of checking the Executive. This review argues that the particular process employed to constrain the Executive has consequences beyond the mere fact of achieving some level of constraint, and the "new" system of checks and balances has more costs associated with it than the traditional, constitutionally envisioned system, which primarily relies on government officials. In the end, many different methods might be used to achieve "constraint," broadly conceived, but the process chosen to reach that constraint has substantive implications. Part I discusses the relationship between the process used to check the Executive and the substance of the constraints imposed. It contends that, just as the Coase Theorem predicts, the initial set of entitlements will strongly influence the eventual result, and that Coasean analysis provides a helpful frame through which to assess Goldsmith's claim that the new constraints he identifies can substitute for Madisonian checks and balances. Part II analyzes Goldsmith's speculation that the modern cycle of permission and constraint is likely to continue and suggests that future inquiry should examine whether particular policy solutions could be developed, in advance of the next crisis, that might break this cycle.

Matthew C. Stephenson, *Can the President Appoint Principal Executive Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940 (2013). It is generally assumed that the Constitution requires the Senate to vote to confirm the

President's nominees to principal federal offices. This essay argues, to the contrary, that when the President nominates an individual to a principal executive branch position, the Senate's failure to act on the nomination within a reasonable period of time can and should be construed as providing the Senate's tacit or implied advice and consent to the appointment. On this understanding, although the Senate can always withhold its constitutionally required consent by voting against a nominee, the Senate cannot withhold its consent indefinitely through the expedient of failing to vote on the nominee one way or the other. Although this proposal seems radical, and certainly would upset longstanding assumptions, the essay argues that this reading of the Appointments Clause would not contravene the constitutional text, structure, or history. The essay further argues that, at least under some circumstances, reading the Constitution to construe Senate inaction as implied consent to an appointment would have desirable consequences in light of deteriorating norms of Senate collegiality and of prompt action on presidential nominations.

Jennifer Nou, *Happiness Institutions*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262058.

Subjective well-being, or happiness, measures will not reside in sterile vacuums but rather will thrive within policymaking institutions. This commentary argues that such measures necessarily implicate issues of deep disagreement that must be resolved by legitimate actors and procedures. Given the current lack of methodological consensus, individual agencies should thus experiment with happiness measures in discrete rulemakings when the available well-being data are robust and could usefully supplement a rule's cost-benefit analysis.

Josh Chafetz, *The Phenomenology of Gridlock*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200478. Assertions that our legislative process is gridlocked—perhaps even “hopelessly” so—are endemic. So many more of our problems would be fixed, the thinking goes, if only our political institutions were functioning properly. The hunt for the causes of gridlock is therefore afoot. This brief essay argues that this hunt is fundamentally misguided because gridlock is not a phenomenon. Rather, gridlock is the absence of phenomena; it is the absence, that is, of legislative action. Rather than asking why we experience gridlock, we should be asking why and how legislative action occurs. We should expect to see legislative action, the essay argues, when there is sufficient public consensus for a specific course of action. “Sufficient,” in this context, is determined with reference to our specific constitutional structure. And “public consensus” should be understood dialogically, as a function of political actors' engagements in the public sphere. In short, before we declare legislative inaction to be evidence of dysfunction, we should first be sure that the conditions sufficient to trigger legislative action in our constitutional regime have been satisfied. ○

OFFICERS, COUNCIL AND COMMITTEE CHAIRS

OFFICERS, COUNCIL, & LIAISONS

Officers

Chair: James W. Conrad, Jr.*
Chair-Elect: Hon. Joe D. Whitley*
Vice Chair: Anna Williams Shavers*
Secretary: Renée M. Landers*
Budget Officer: Ronald L. Smith*
Asst. Budget Officer: Hon. Edward J. Schoenbaum
Section Delegates: Randolph J. May*
Hon. H. Russell Frisby, Jr.*
Last Retiring Chair: Michael E. Herz*

* Executive Committee Member

Council

Member 2013: Linda D. Jellum
Vanessa Burrows
Nina A. Mendelson
Gus Coldebella
Member 2014: David R. Hill
Jill E. Family
Shawne McGibbon
Jennifer Alisa Smith
Member 2015: Jeffrey Clark
Louis George
Kathryn Watts
TBD

Ex-Officio

State Administrative Law: Hon. Errol Powell
Executive Branch: Jeffrey Weiss
Judiciary: TBD
Legislative Branch: Brian Callanan
Administrative Judiciary: Hon. Julian Mann

Liaisons

ABA Board of Governors: Peter A. Winograd
Young Lawyers Division: Allison Bonnenburg
Law Student Division: Brigitte Collier

ADMINISTRATIVE PROCESS COMMITTEES

Adjudication

Co-Chair: Phyllis Bernard

Collaborative Governance (formerly Dispute Resolution)

Chair: Orly Lobel

Constitutional Law and Separation of Powers

Co-Chairs: Anne Joseph O'Connell
Kevin M. Stack

Corporate Counsel

Co-Chairs: Richard DeSanti
Karyn Schmidt

E-Government (formerly E-Rulemaking)

Co-Chairs: Cary Coglianese
Josiah Heidt

Government Information and Right to Privacy

Co-Chairs: Bernard W. Bell
Mark S. Zaid

Intergovernmental Relations

Chair: Jeffrey B. Litwak

Judicial Review

Co-Chairs: Richard W. Murphy
Kathryn A. Watts

Legislation

Chair: Paul Noe

Regulatory Policy

Co-Chairs: Jonathan G. Cedarbaum
Jennifer A. Smith
Lisa Bressman

Rulemaking

Chair: Jeffrey A. Rosen

State Administrative Law

Co-Chairs: Errol H. Powell
Edward J. Schoenbaum

GOVERNMENT FUNCTIONS COMMITTEES

Agriculture

Co-Chair: Ryan K. Miltner

Amicus

Chair: David Frederick

Antitrust and Trade Regulation

Co-Chair: Peter de la Cruz

Banking and Financial Services

Co-Chairs: John F. Cooney
Christine C. Franklin

Benefits

Co-Chairs: Jodi B. Levine
Tom Sutton
Billy Coplin

Beverage Alcohol Practice

Co-Chairs: Tracy Genesen
Charles Smarr

Communications

Co-Chairs: Scott D. Delacourt
Donna C. Gregg

Consumer Products Regulation

Co-Chairs: David H. Baker
Eric Rubel

Criminal Process

Chair: Nancy Eyl

Education

Chair: Caroline Newcombe

Elections

Chair: Elizabeth Howard

Ethics and Professional Responsibility

Chair: TBD

Energy

Chair: Kenneth G. Hurwitz

Environmental and Natural Resources Regulation

Co-Chairs: Richard Parker
Richard Stoll

Federal Clean Energy Finance

Chair: Warren Belmar

Food and Drug

Co-Chairs: James T. O'Reilly
Katherine Van Tassel

Government Personnel

Co-Chairs: Joel P. Bennett
Andrew Perlmutter

Government Relations and Legislative Process

Co-Chairs: Michael Stern
Jack Hughes

Health and Human Service

Chair: Timothy Aspinwall

Homeland Security and National Defense

Co-Chairs: Chad Boudreaux
Elizabeth Branch
Joe D. Whitley
Evan Wolff

Housing and Urban Development

Chair: Otto J. Hetzel

Immigration and Naturalization

Chair: Jennifer Hermansky
Kate Kalmykov

Insurance

Co-Chairs: Janet Belkin
David Childers

Intellectual Property

Co-Chairs: Arti K. Rai
John Duffy

International Law

Co-Chairs: Neysun Mahboubi
David Zaring

International Trade & Customs

Chair: Leslie Alan Glick

Labor and Employment

Co-Chairs: Marc A. Antonetti
Robert J. Hickey

Ombuds

Chair: Karen Finnegan

Postal Matters

Chair: Ian David Volner

Securities, Commodities and Exchanges

Co-Chairs: James Gerkis
Fiona Phillip

Transportation

Chair: Jason Schlosberg

Veterans Affairs

Co-Chairs: Michael Viterna
Michael Allen

SECTION ACTIVITIES COMMITTEES

Annual Awards

Committee on Outstanding Government Service

Co-Chairs: Elaine S. Reiss
John Cooney
Paul Afonso

Committee on Scholarship

Chair: Russell L. Weaver

Budget

Chair: Ronald L. Smith

Fellows

Chair: Jack Young

Fundraising

Chair: Joe D. Whitley

Membership and Communications

Chair: Jonathan J. Rusch

Nominations

Chair: Jonathan J. Rusch

Pro Bono

Chair: Michael E. Herz

Publications

Chair: William S. Jordan III

Administrative and Regulatory

Law News

Editor: William S. Morrow, Jr.

Administrative Law Review

Faculty Advisor: Andrew Popper
Editor-in-Chief: Melissa Lim
Managing Editor: Virginia Knapp

Developments in Administrative Law & Regulatory Practice

Editor: Jeffrey S. Lubbers

Seasonal Meetings

Fall Conference: Neil Eisner
Richard Murphy
Carol Ann Siciliano
Spring Meeting: James W. Conrad, Jr.
Annual Meeting: James W. Conrad, Jr.

Annual Administrative

Law & Regulatory
Practice Institute: Anna W. Shavers
Homeland Security
Law Institute: Joe D. Whitley

AD-HOC COMMITTEES

Review of Recruitment of ALJ's by OPM

Chair: John Vittone

Federal Preemption

Chair: William Funk

Homeland Security Coordinating Committee

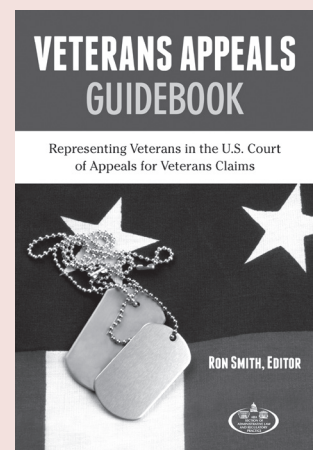
Chair: Joe D. Whitley

New Book Release From the ABA Veterans Appeals Guidebook: Representing Veterans in the U.S. Court of Appeals for Veterans Claims

Edited by Ronald Smith

Ronald Smith and four attorneys from the law firm of Finnegan, Henderson, Farabow, Garrett, & Dunner, LLP in Washington, DC, wrote this essential book to assist lawyers representing veterans and other claimants before the U.S. Court of Appeals for Veterans Claims (CAVC). The book addresses the basics of appeals to the CAVC, explores the jurisdiction of the court, and outlines the CAVC appellate process. Not only does this guide provide information on practicing before the CAVC, how to start the process, the pre-briefing, briefing, and post-briefing processes, but it also includes sample forms and memoranda, as well as a convenient acronym and abbreviation appendix. Whether you are new to handling appeals to CAVC or a seasoned practitioner, you will not want to be without this invaluable guidebook that can help you facilitate appeals to the court and may increase the chances for appellate success.

To order or for more information, visit www.ShopABA.org
or call the ABA Service Center at 1.800.285.2221.



\$69.95 – general public
\$54.95 – Ad Law Section
member price

2013 126 pages
6X9 PC: 5010075