

EMINENT DOMAIN AFTER *KELO*

University of Chicago, February 4, 2010

ILYA SOMIN*: I would like to thank the University of Chicago Federalist Society for organizing this event, and Dean Levmore and Dean Schill¹ for taking part. It's not often that a mere associate professor gets to be on a panel with not one but two University of Chicago Law School deans!

I'm going to start off by explaining what *Kelo v. City of New London* was about: namely economic development takings, and then describe why economic development takings generally cause more harm than good. I will go on to analyze some of the doctrinal and legal problems with the *Kelo* decision itself. Finally, I'll briefly talk about the massive political reaction that followed *Kelo*—in some ways a bigger backlash than has been generated by any Supreme Court decision in many decades if not even in the entire history of the Court.

What are economic development takings? Quite simply, they are situations where the government condemns property belonging to one private individual and transfers it to some other private entity solely on the justification that the new owner might produce more economic development than the old one. There is no claim that any kind of public facility will be built or that the area being condemned is blighted or otherwise harmful. Rather, the argument is that more development will be produced for the community. In several ways, these sorts of takings are more problematic and more dangerous than other condemnations.

The biggest danger has to do with something that Dean Levmore has written about in his scholarship,² the ability of politically influential interest groups to exploit this process at the expense, of the politically weak. There are several reasons why this kind of exploitation is especially likely with economic development takings.

First, there is the sheer breadth of interest groups that can take advantage of this rationale for condemnation. Almost any profit-making business can claim that if you condemn some land and transfer it to them, they might produce more development than existed previously. This really opens the floodgates for interest group "capture" of the condemnation process.

A second problem is that in none of the states which permit these sorts of condemnations are the new private owners legally required to produce the development that supposedly justified the taking in the first place. This of course gives people incentive to promise far more development than they will actually deliver. You give them the land they want, and years later it turns out that there's almost no development or much

less than was initially claimed. Indeed, in many instances, what actually happens is that you destroy more development by wiping out the existing use of the property than you produce by transferring it to new owners. That is exactly what occurred in the *Kelo* case itself. Some \$80 million in public funds were spent on that project. To date, nothing has actually been built on the site, and at least at the moment, there is no prospect that anything will be built in the near future.

Similar events have happened elsewhere. Prior to *Kelo*, the most famous economic development condemnation in American history was the *Poletown* case in Detroit in 1981.³ This was actually a much more egregious case than *Kelo*. Some 4,000 people were forced out of their homes in Detroit, in order to transfer the land to General Motors to build a new factory. At the time, it was promised by GM that there would be more than 6,000 jobs generated. In reality, there were never more than half that many. When you total up all the costs of the *Poletown* takings (as I did one of my articles),⁴ you find that even if you ignore the humanitarian harm inflicted on those displaced, the condemnations were a failure. It is very likely that much more development was destroyed than created in that condemnation.

In both of these cases and many others, politically influential groups were able to get land from the poor or politically weak. In *Poletown*, you had mostly working-class people going up against General Motors, which is a pretty powerful interest in the state of Michigan. In *Kelo*, we now know that the taking was instigated in large part as a result of lobbying by the Pfizer Corporation, which hoped to benefit from the condemnation because they were building a headquarters in New London. So there is a fairly consistent pattern.

In principle, the political process might be able to deal with this problem. If voters see that abusive takings are going on, they can punish the responsible officials at the ballot box during the next election. However, there are reasons why this rarely if ever happens. One is what scholars call the "rational ignorance" of voters. Most voters have very little incentive to learn about politics. Even if you do become knowledgeable, there is little or no payoff to having that information. The chance that any one will vote change the outcome of an election is infinitesimally small.

A great deal of survey evidence, including some that I have compiled in my forthcoming book on political ignorance,⁵ shows that most voters have very little knowledge of politics and public policy. In particular, they have difficulty assessing very complex issues. Economic development takings tend to be quite complex because it's hard for nonexperts to tell whether one of these condemnations really will generate more development. In most cases, voters simply don't have the knowledge to figure it out.

A second and related problem is that, even if voters are knowledgeable, often it's only years after the condemnation occurs that you can actually tell what has happened and whether any development has been generated. By that time, public

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attention has generally moved on to other issues. Many of the people who approved the initial condemnation may not even be in office any more.

I readily grant that some of these problems can occur even with ordinary, more traditional takings to build a road or bridge or other public facility. But they are at least somewhat less severe. With traditional takings, you at least have some sort of public facility that is built. Ordinary citizens can see it and get some sense of how valuable the road or bridge in question is to the community. For example, they might be able to tell whether a new road or bridge has reduced traffic congestion. It's not that these problems don't exist with other takings. But they tend to be more severe with economic development condemnations.

Although I am a critic of economic development takings, I admit that there is a nontrivial economic rationale for them, the so-called "holdout" problem. Let's say you have an assembly project that you need to do where, in order to build a new factory, you need to buy up land from a large number of existing owners. There is the danger that this valuable project will be held up by one or a few people saying: "I'm happy to sell my land to you but you have to pay me this vast sum of money, say, ninety percent of the expected profit from the project; otherwise, I won't sell." This is the classic holdout problem that advocates of economic development takings cite to justify the practice.

The argument has some merit, but it is greatly overblown. Markets have some very good mechanisms for dealing with holdouts that don't require the use of eminent domain. I'll just focus on one here: secret purchases. You can only become a holdout if you know that a big assembly project is going on. What developers often do is simply make people offers without actually telling them that this is part of a big assembly project. Therefore, potential sellers don't know that they have an opportunity to be holdouts. In that way, holdout problems are reduced. That's how Disney acquired the land to build Disney World, for example.⁶

Secret assembly has many advantages over eminent domain. A crucial one is that with eminent domain, there is no guarantee that the political process will restrict its use to those situations where holdout problems are actually likely. Indeed, in *Kelo*, there was no real holdout problem, as Richard Epstein of the University of Chicago explained in great detail in his amicus brief in the case.⁷ Yet, politically powerful interests nonetheless pushed for the use of condemnation. When you have economic development takings, there is no reason to believe the political process will confine their use to those situations where it is justified by the possibility of holdout problems. By contrast, secret assembly cannot be "captured" by interest groups in the same way.

I would like to turn next to the *Kelo* case itself.⁸ I'll start by noting a couple of positive aspects of the decision. Although it did uphold the use of condemnation for economic development, it actually constrained takings slightly more than the Court's previous public use decisions. Before *Kelo*, the Supreme Court had twice interpreted the Public Use Clause of the Fifth Amendment as essentially saying that a public use is whatever the government says it is.⁹ In *Kelo*, they stepped back from that very slightly. There is still very broad deference to government. But the Court said that maybe there won't

be quite as much if the taking is not part of a development plan.¹⁰ Moreover, the ruling was a close 5-4 decision. That itself might give some people pause because it shows that this is a controversial issue in the Court. The previous two big cases in this area had both been unanimous.

That said, there are several serious problems with the majority opinion which still interpreted public use as including virtually any kind of "public purpose" where the government could claim that there's some potential benefit to the public.¹¹ One flaw is that they almost completely ignored the 18th- and 19th-century history of public use. Although there were divergent views during that period, nonetheless the dominant position was that public use is not simply some potential benefit to the public. Rather, in most states it was interpreted to mean either actual ownership by the government of the condemned property or a situation where it was privately owned but there was a legal right of the general public to physically use it (as with a public utility). This is almost entirely ignored in the majority opinion.

Second, there is a fundamental logical problem in the majority's approach. They admit that the Public Use Clause creates an individual right that is supposed to constrain the government. But they interpret that right in a way that allows the government to define its scope. The government gets to decide what is or is not a public use, subject only to extremely minor limitations. This defeats the whole point of having a constitutional individual right in the first place, which is to constrain abuses by the government. It makes little sense to have a constitutional right whose scope is defined by the very organization that the right is supposed to constrain. Indeed, this is the only part of the Bill of Rights that the Court has interpreted in this way. It is like appointing a committee of wolves to guard your chicken coop. When you do that, the wolves will tend to gobble up the chickens. The same thing happens here.

A third problem is that the Court claimed that there was a hundred years of precedent backing up their position.¹² There is no question there was some precedent supporting them. But the 100 year claim is simply wrong. If you look at those cases from the late 19th and early 20th century which they claim support their position, in reality none of them actually has anything to do with the Public Use Clause of the Fifth Amendment. They are all cases where takings were challenged under the Due Process Clause of the 14th Amendment. Just read the text of those cases. None of them even so much as mentions the Takings Clause.¹³

Why were property owners bringing these cases under the Due Process Clause rather than under public use? The answer is that during that period the Supreme Court did not interpret the Bill of Rights as being incorporated against the states. So the only way you could challenge a state taking in federal court was by using the Due Process Clause of the 14th Amendment. In one of the very few cases where the Supreme Court did apply the Public Use Clause in this period (because it was a federal government taking)—the 1896 *Gettysburg* case—the Court specifically stated there that if it was a taking transferring property to a private individual, then heightened scrutiny would apply.¹⁴

Finally, the *Kelo* majority ignored the problems with the political process that I discussed in the first part of my presentation. It might be permissible to allow the government broad discretion if there was not a danger of capture of the process by interest groups. But, in fact, that danger is very great. The Court suggests the planning process might constrain it.¹⁵ But that is unlikely to work. Virtually all takings of this kind, including the one in *Kelo*, are part of a plan of some sort. It is not hard to come up with a plan to rationalize pretty much any condemnation that benefits a private business. This is especially true if, as the Court concluded in *Kelo*, courts are forbidden to “second-guess” the quality of the plan.¹⁶ A local government can easily come up with a plan that justifies transferring property to General Motors or Pfizer or any other private interest. And under *Kelo*, courts would probably have to approve the taking.

I could say much more about *Kelo* itself. But I want to use my last few minutes to talk about the massive political backlash that *Kelo* generated. After *Kelo* was decided, it was condemned—pun intended—by a wide range of people across the political spectrum, including Rush Limbaugh, Ralph Nader, Bill Clinton, the NAACP, and numerous political activists and talk show hosts on the left and right.¹⁷ In addition, polls showed that over eighty percent of the public opposed the decision.¹⁸

Because of this widespread political opposition, many people expected that the problem of economic development takings would be dealt with by the political process. And indeed, forty-three states and the federal government enacted legislation purporting to curb these types of condemnations. This is more legislation than has been enacted in response to any Supreme Court decision in all of American history.

But the majority of these new laws actually don’t constrain economic development takings in any meaningful way. In many cases, economic development condemnations are banned but “blight” condemnations are permitted. And “blight” is defined so broadly that virtually any area could be declared blighted and then condemned. For example, the Supreme Court of Nevada, ruled that that downtown Las Vegas is blighted, and therefore upheld a condemnation there that transferred property to politically influential casino interests.¹⁹ Nevada has since changed its blight law; but numerous other states still have blight statutes with the same or similar wording. There are other comparably extreme examples that I could cite if time permitted.

Why did this happen? Why was stronger legislation not passed? There are several factors involved. But a big one is the very kind of political ignorance that made it hard for voters to monitor economic development condemnations in the first place. Voters who don’t pay close attention to what’s going on quite understandably could not tell the difference between laws that effectively constrained takings and those were primarily for show. Indeed, it is no accident that ineffective reform laws were particularly common among those states that actually used this sort of condemnation power extensively beforehand.²⁰

Survey questions that I designed for the Saint Index poll showed that only thirteen percent of the public could both correctly answer a question about whether their state had passed a reform law and also knew whether it was likely to be effective

or not.²¹ And for various technical reasons, even that figure probably over estimates the true level of knowledge.²²

I have covered the shortcomings of economic development takings and the *Kelo* decision, and also briefly analyzed the political reaction to *Kelo*. Last but not least, I’ve set up some targets for Dean Levmore to shoot at, and I look forward to his response.

Thank you very much.

Saul Levmore*: Much of the backlash against *Kelo* has less to do with takings law and more to do with opposition to Big Government, and especially to aggressive local governments. I don’t like Big Government either. But there is something of a “baby with the bathwater” problem here. We can agree that ill-advised government activity is ruinous. Governments take the wrong properties; they buy the wrong properties; they probably cannot spell “blight” correctly. They undertake the wrong wars; they pass taxes they should not; they build bridges in the wrong locations; they overpay for toilet seats. In short, we must be careful to differentiate between bad government and too much government. I do not hear anyone saying that the government should not be allowed to build aircraft carriers or pay for land needed to expand a military base. When we observe unwise military spending, we do not jump to the conclusion that it is constitutionally impermissible spending or that it is the Supreme Court that ought to control this misguided government activity.

The real, or better, objection is that we are concerned about overachieving interest groups. That concern suggests an irony in *Kelo*. Imagine that *Kelo* had been decided by Justice Somin, that the *Poletown* case had gone the other way, and so forth, so that the government found itself unable to take property in all but the most obvious cases of public use. Would that not look a bit like military spending? Our government rarely makes a private corporation build a submarine. Rather, interest groups come and encourage the building of submarines. They try and accept \$2 billion for a submarine that might well be built for half that amount. When the government needs toilet seats, we can count on someone offering to develop specifications then build the seat for \$600.

In his written work, Professor Somin argues that government could accomplish its anti-blight aims with tax breaks and with the enforcement of building restrictions. But these tools involve the feeding of interest group frenzy at least as much as compensated takings. Why would we think that interest groups prefer takings to tax breaks? They seem to thrive in both domains.

I prefer to think that the problem with takings is that we are not very good—in courts or elsewhere—at figuring out the right level of compensation. When the government overpays, there is grave inefficiency. If it undercompensates, people scream on talk radio that they detest takings.

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If we take a broad view, it is likely that most people love to be “taken.” Many of these transactions are invisible because they are completed in the shadow of takings law. Think, for example, of the enormous amount of property taken for the interstate highway system, and think of wartime requisitions. We know why most sellers, many nominally voluntary, have been satisfied; the government likely overpaid. For most government agents, it is easier to overpay and get the turnpike done on time, or the war won, than it is to go to court on behalf of the citizens. Put slightly unfairly, when we go to war, businesses that are likely to supply goods to the government do not drop in value. A combination of overpayment and occasional condemnation—but always the threat of condemnation—creates windfalls rather than victims.

And each time the government overpays, new interest groups arise and discover that they want more and not less of this government activity. The losers are, of course, dispersed. Imagine, for example, that the federal government decides to build a bridge in your state. Does anyone say “This is going to be terrible for my state; the government will spend money here and condemn the wrong properties at unfair prices”? It is this harm from overpayment that must be compared to the harm done by eminent domain. If you constrain the government’s power to take, it will do more taxing and spending—which is to say more buying of \$600 toilets from eager sellers. Every government strategy involves insiders and interest groups.

If we look with fresh eyes at our iPhone app or pocket Constitutions (distributed by an interest group)—and I am a bit surprised that the Constitution has not yet been mentioned—we are reminded that the Bill of Rights is absorbed with wartime problems and with high crimes and misdemeanors. And then it turns to the problem and promise of government. The government—though I recognize that it is not a monolithic entity—defines crimes and then the Fifth Amendment, as well as other Amendments, offers some protections, including the double jeopardy clause. Similarly, the government defines property in many ways and then the Fifth Amendment offers protective rules. Professor Somin thinks of the government as the wolves we must fear, but I have already suggested that what we must fear is ourselves, or at least the interest groups we form. In any event, the Fifth Amendment says “nor shall [any person] be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.”

There are a few plausible plain meanings of these words but I do not think any of them justifies the anti-*Kelo* posture encouraged by Professor Somin. The idea that the government should refrain from taking private property for private use is hardly obvious; it is something of a modern construct. The words appear to communicate the notion that if the government wants to take your life, if the government wants to draft you into military service—which is one means of liberty deprivation—or if the government needs your property for something, it can not simply grab and go. It is required to have some legal regime, some due process, some legislation, or something related to its courts. It is less than clear what “due process” itself means. At times, the government might take private property for public use. Imagine the most extreme public use; the government

needs your factory for its war effort. In that case, it must pay you just compensation. The implication might be that if it were not for such a public purpose, then it would not be required to pay any compensation! Note that there is no rule about taking from one private interest for the benefit of another. Imagine, in this regard, that after the war in Granada it becomes clear that the government’s war-making was motivated by the pleas of twenty Americans studying in medical school down there. Similarly, imagine that an invasion in the Middle East is fueled by the needs of several oil companies. That these ventures might involve public spending, or takings, for private use, is not addressed in these clauses. I doubt that anyone thinks the government is forbidden from fighting such wars.

Indeed, our government engages in private-to-private transfers, or takings, with some regularity. It taxes some citizens and funds others. There are constant private-to-private transfers, and we learn to encourage them or defend against them through the political process. In comparison to our tax-and-transfer form of government, a hue and cry over an occasional and *compensable* “taking” of private real property for a purpose supported by other private interests seems almost like a fetish. The real action is elsewhere, and it is even more of a taking for private purposes because the losers are regularly uncompensated; not undercompensated, but uncompensated.

I digress for a moment on the word “public” in the Fifth Amendment. It has an interesting history. When that Amendment was drafted, corporations were regarded as “public.” Public meant being a public corporation; they had charters in the period of the framing and into the early 1800s. It is plausible that the Amendment communicated the following message: (1) There is an entity called Dartmouth College (for example); it has a public charter, it is a public corporation. (2) Imagine that the federal government were to establish a national university in the District of Columbia or in Philadelphia, or perhaps it were to purchase land and add to Dartmouth College’s holdings and work a deal in which Dartmouth College itself became the national university. (3) If so, which is to say if the government takes land to enhance a public corporation, it must pay just compensation. This seems like a perfectly sensible rule. It is in a context in which the colonies often allowed their governments to take without compensation. In some colonies, as remains true in various parts of the world, if the government constructed a road through your unimproved land it, did not need to pay. The idea behind this doctrine of resumption is that the landowner was often receiving more benefit than loss.

Finally, let us remember that without an eminent domain power at all, government would often be hobbled. Imagine a government at war, and a seller who knows that its fighter jets cannot be taken. Similarly, suppose that a government builds a highway (even to benefit “private parties” in the interior) but every landowner can hold out for a high price. The obvious holdout power of these owners of assets has caused every stable government in the world to equip itself with eminent domain power, but to instruct itself to pay fair value in order not to discourage private investment, and perhaps to encourage reasonably efficient takings. This is not an American creation. The argument against eminent domain is really a suggestion that the government operate in secrecy so as to prevent these

holdouts. This is a dangerous claim in a democracy. The disadvantages of secrecy carry over to many cases where private activity is at issue. It is unlikely that we really want a state government to woo private industry and to say: "Come invest in our state. But instead of discussing this openly in our state capital, carry out your investment, including the purchase of land, secretly, and we will secretly give you zoning rights, access roads, and so forth." We don't want such secrecy, but transparency often needs eminent domain as a partner.

In the modern world, unlike the Framers' world, there's more need for eminent domain, rather than less, because Disney World is not going to buy land, no one's going to Groton and building a big research park, without knowing in advance about what the tax rates will be, what the possibility of highways to ship the product will be, or what the investment in education will be. So private parties go to state governments and they say, "I have three or four locations where I can invest and open a factory, or I can invest abroad; I want to know what my political package is because once I go to you and open my plant, you might change the rules because now you'll have holdout power over me."

I find it hard to understand why someone skeptical of government would want a rule that encouraged nontransparent zoning and other regulation. It seems clear that as soon as we bring interest groups into the discussion—and stop thinking of eminent domain as a stand-alone topic with no dynamic impact on other law—we must be more suspicious of forcing the government to go outside of transparent takings law to more secret deals. Eminent domain has some costs, because our assessment of property values is imperfect, but in return for a little more eminent domain we get much less in the way of tax breaks, secrecy, and government overspending on property purchases and side projects.

Somin: I'm going to take just a few minutes to briefly talk about three topics in reverse order of Dean Levmore. First secrecy, then the Constitution, and then, lastly, alternatives to eminent domain such as tax policy.

Regarding secrecy, yes, absolutely, I prefer secrecy when it's private owners doing a private development project. If that's what they're doing and there's no government money or government power involved, then I think that's perfectly fine. The market can sort out development projects that are more valuable than existing uses of the land from those that are not.

Dean Levmore suggests that developers might secretly go to the government and ask for various concessions. But this is actually less likely if you cannot resort eminent domain. In that scenario, you have to operate in secrecy to acquire the property you need for a development project. If the developers go to government beforehand, governments tend to do this thing called "leaking." It might leak out that Disney is buying up lots of properties for an assembly project; if that happens, Disney will be faced with holdout problems. That prospect will diminish Disney's incentive and ability to negotiate in secret with the government in advance for special tax breaks and other concessions. I think that's a good thing. As a general

rule, government should try to treat all businesses equally. Firms should compete with each other for consumer dollars in the marketplace rather than competing for government favors in the political arena. I am grateful to Dean Levmore for pointing out this advantage of my position that I didn't think of myself. I fully intend to include it in my forthcoming book on *Kelo*.

Two points regarding the Constitution, which I think I did touch on a bit in my talk. First, as I discussed in my presentation, there is lots of evidence that the original meaning of "public use" was much more restrictive than the definition adopted in cases like *Kelo*. If you are a Federalist or an originalist of any kind, that should matter. Second, in regard to the text, there is a long and somewhat complicated history that boils down to this: the reason why the original Bill of Rights in 1791 says, "Nor shall private property be taken for public use without compensation," is that it was not imagined that the federal government at that time had the power to take property for private use at all. They thought that only "public use" takings needed to be constrained because private takings were not authorized by the Constitution to begin with.

But the relevant point for constraining state government takings is not 1791 but 1868, when the Bill of Rights was incorporated against the states. By that time, the most widely accepted definition of "public use," including public use clauses in state constitutions with the same wording as a Federal Constitution, was a relatively narrow one. Indeed, the leading treatise about these issues at the time, published in 1868 by Justice Thomas Cooley of the Michigan Supreme Court, defined it precisely that way.²³

Finally, I think Dean Levmore is absolutely right on one point: If government doesn't engage in these types of takings, they can do other bad things instead. He's also right that government is dangerous. I believe that some of that other government activity should also be under tighter constraints than it currently is.

But I would also say that these takings are particularly dangerous and particularly abusive relative to other policy tools for several reasons. One is, they are more opaque and difficult for voters to monitor. Second, there is something that Dean Levmore actually pointed out in one of his own fine articles in 1990: eminent domain enables specific targeting of politically weak people.²⁴ When you use taxation, by contrast, most of the time you have to tax relatively affluent people because they're the ones who have the money. But they also have considerable political power. So when you tax them too much, you often get anti-tax revolts and backlashes. That imposes some constraints.

I agree, of course, there can be other types of government favoritism toward private interests. But this is a particularly pernicious kind, one that we don't need to tolerate in order to achieve its ostensible purpose of economic development. We should be able to eliminate this type of dangerous favoritism without waiting for the day when we can get rid of every other abuse of government power.

Levmore: Government activity is necessarily "opaque." War is opaque in the sense that it is difficult for voters to know when

a war is a good or a bad one. Think also of increases in tax rates, of choices about what to tax, about relying on one tax rather than another. The point is that we ought not introduce opacity as an argument just where it is convenient in debate.

Second, one's own preference for a bridge, or other government project, provides little information as to whether the government performed well when it built a bridge at a given cost. The decision is a complicated one. I do not see the difference between deciding to build a bridge and deciding to battle blight in a particular manner.

Finally, a reminder about secrecy and regulation. In the modern era we will rarely find a business assembling land for large project without a great deal of pre-clearance regarding various government rules and tax laws. Investors want to know about property taxes, about zoning, about job training for employees, and so forth. These rules must be in place or the investor will go to another jurisdiction. It is that process that needs to be transparent. If we want transparency in these decisions, then it is unrealistic to imagine that we can have many secret assemblies of large properties, as we might have experienced in the past. And without such secrecy good investments will be stymied by holdouts unless eminent domain is available.

Endnotes

1 University of Chicago Dean Michael Schill was the moderator of the debate.

2 Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285 (1990).

3 Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), *overruled* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

4 Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005 (symposium on *County of Wayne v. Hathcock*).

5 ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE (forthcoming).

6 Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 206 (2007).

7 Kelo v. City of New London, 545 U.S. 469 (2005), amicus br. of Cato Institute 2004 WL 2802972, at 23-25 (authored by Richard Epstein).

8 Kelo v. City of New London, 545 U.S. 469 (2005).

9 See Haw. Housing Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (concluding that a public use was any objective "rationally related to a conceivable public purpose"); Berman v. Parker, 348 U.S. 26, 32 (1954) (ruling that the legislature has "well-nigh conclusive" discretion in determining what counts as a public use).

10 Kelo, 545 U.S. at 488.

11 *Id.* at 478-85.

12 See *id.* at 483 ("For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.").

13 See Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 240-44 (2007).

14 *Id.* at 242-43 (discussing *United States v. Gettysburg Elec. Ry. Co.* 160 U.S. 668 (1896)).

15 Kelo, 545 U.S. at 487-88.

16 *Id.* at 488.

17 Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2109-09 (2009).

18 *Id.* at 2109-14.

19 See *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1, 12-15 (Nev. 2003).

20 Somin, *The Limits of Backlash*, *supra* note 17, at 2117-19.

21 *Id.* at 2155-59.

22 *Id.* at 2156-57.

23 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION 530-38 (1868).

24 Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285 (1990).



THE SPURIOUS CONSTITUTIONAL DISTINCTION BETWEEN TAKINGS AND REGULATION

By Richard A. Epstein*

NOTE FROM THE EDITOR: The following article is an expanded version of a speech Professor Epstein gave during a debate on regulatory takings with Dean William M. Treanor at the Fordham University School of Law. We will carry Dean Treanor's remarks in a future edition of *Engage*. (He was recently named Dean at the Georgetown University Law Center.)

TOWARD A UNITARY THEORY OF TAKINGS

The major question that I shall address in this short talk concerns a fundamental fault line that is widely embraced in modern American constitutional law. My task is to figure out whether the American constitutional law of takings has a uniform architecture that applies with equal force to cases of government occupation in so-called "physical takings" cases and government regulation in so-called "regulatory takings" cases. For these purposes, I shall confine my attention to real property, and thereby ignore such critical issues as financial rate regulation of public utilities on the one hand or the regulation of intellectual property on the other. In the land context, the difference between these two scenarios is usually not that hard to observe in most settings. A physical taking is said to occur when the government occupies land that was once in the possession of some private party. Or, in the alternative, the government issues an order that allows some private party to enter the land under its authorization. The pivot point is found whenever an owner is allowed to remain in possession, but is forced to share that possession with either the government, or again, private parties who enter under government authorization.¹

On the other side of the line fall those cases of regulatory takings in which the government leaves an individual in undisturbed exclusive possession of his or her own property, but nonetheless imposes restrictions on land use or land disposition above and beyond those imposed under the common law. This last qualification about the common law has two functions. The first is to make clear that restrictions on nuisance-like behavior do not require compensation. The second is to insure that certain common law restraints on alienation like the rule against perpetuities are not swept into the analysis.

To challenge the present divide between occupation and regulation is to ask whether the rules of private law must be carried over into the constitutional analysis of the Takings Clause that makes explicit reference to it: "Nor shall private property be taken for public use, without just compensation." As a matter of private law, an owner of property can enter into two kinds of transactions. The first might be called "clean" deals in which there is an outright transfer of ownership from one person to another, such that at the end of the day the original owner stands in no better position against his transferee than does a total stranger. That is just the position that all people would be in if they tried to reenter a house that they have just

sold. On the other side are complex details in which voluntary transactions created divided interests in property. Private property can be divided at any given point in time by creating joint tenancies and tenancies in common. It can be divided spatially to include mineral rights, surface rights, and air rights. It can be divided on the plane of time, so that different persons hold a variety of present and future interests. Private property can be divided between an owner who keeps the equity of redemption and a lender that has a lien on property. Moving outward, private property can be divided between neighbors through the law of servitudes, which includes restrictive covenants on the one side and easements on the other. The great flexibility within this system allows any given owner or group of owners to enter into, simultaneously or sequentially, multiple types of transactions on the same underlying asset. Nothing is more common than joint owners taking out a mortgage on property over which a neighbor has a right of way.

The central analytical challenge is to determine the status of these divided interests under the Takings Clause. Does each component of the original property retain the full measure of protection, an equal dignity of right, with the original whole of which it was a part? Or does the fragmentation of property interests carry with it the implicit price that the holders of the separate pieces receive less protection from government action than the individual who retains possession of the entirety?

To give a concrete example, what happens when the government decides to impose a height restriction by public fiat? Should that regulation be analogized to the identical restrictive covenant that a group of neighbors want to impose upon the land? Privately, of course, the neighbors would be able to obtain that height restriction only voluntarily. Typically they would be required to pay for what they received. Normally these transactions are not made for cash. Rather, they are imposed as part of a common unit development by a common landlord, in which the reciprocal nature of the obligations coupled with appropriate adjustments in the sales price ensure that each person gets to share in the gains from the cooperative venture. The government of course does not act like the owner of a common development anxious to maximize his gain from sale. Rather, it enjoys the unique right to force the exchange on its own initiative over the active opposition of the party on whom the restriction is imposed.

The position that I've always defended is that any coherent account of the Takings Clause insists that the government can only force the exchange insofar as it is prepared to pay just compensation to the owner for the loss of the property interest in land. Partial interests in land can be taken in the same manner as the entire land itself. The government's unquestioned right to take a partial interest in land for public use does not

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excuse it from the duty to compensate, in cash or in kind, all the individuals whose property is taken. Where it engages in a scheme with reciprocal burdens and benefits, it can credit the benefit that it supplies to any owner in that transaction against the costs that it otherwise imposes. This use of implicit in-kind compensation meets the requirements of the Takings Clause.

THE PENN CENTRAL FIASCO: DOES COMPETITION EQUAL RESTRAINT?

Unfortunately, this effort to link public to private law has been decisively rebuffed by the Supreme Court in its 1978 decision in *Penn Central Transportation Co. v. City of New York*,² where Justice Brennan, at his ingenious worst, took a different approach. *Penn Central* asked whether New York City's landmark preservation commission could, pursuant to city ordinance, prevent the construction of a proposed new Marcel Breuer tower over Grand Central Station without paying compensation to Penn Central for its loss of air rights under New York law. The first point about this case is that it shows the fragile nature of the divide between the physical and the regulatory takings. It is, for example, easy to think of this as a physical taking in which New York City took the air rights from the Penn Central, by denying Penn Central all use of them, even though it made no use of them itself, except to keep them open. The government engages in a physical taking if it decides to leave vacant land that it takes from a private owner. Air rights are no different. On the other hand, in both cases someone could argue that so long as the government does not use the air rights to build it is a mere restriction on use, similar to other forms of restrictive covenants. The same could be said of land which the government does not enter, but from it forbids its former owner all rights of access or use. It seems odd that the question of whether or not compensation is owing should depend on any of these fine distinctions.

Within this framework it is easy to see what a legal rule that told a given owner of land or chattels that the government would not let him make any use of his property even though he could not use it himself would count as a taking, followed by a retirement of the land from active use. If the mere fact of ownership still had value, it would reduce the level of compensation owing by some miniscule amount, but the literalism that says all regulations are out from under the Takings Clause produces results that no one can credit as a proper use of the English language.

The same point applies to chattels. William Treanor has often used the example of a ball which belongs to his daughter. He tells her that he will not take the ball, but that she nonetheless cannot make any use of it for some definite period of this time. Does his disavowal of the taking carry any weight? I think that everyone would regard this set of regulations as tantamount to a taking. If there were some residual value to the child from the use of the ball, that could be an offset against the level of compensation otherwise owing, but no one in dealing with either land or chattels would ever think that a total restriction on land use by either private or state action does not amount to a taking of the subject property.

That same analysis applies to the air rights in the *Penn Central* case, even though the overall situation is complicated

further because of voluntary division of rights in the Penn Central parcel. Once the air rights were sold by the ground owner, its new holder of the air rights lost all value, for the case became a total taking of a divided interest. Yet if the air rights had been merged with the surface rights, the transaction would have only been a partial taking of the entire fee simple interest. Should the taking of all of a part be different from the taking of a part of the whole? Again this supposed fine line makes no sense. As a matter of basic theory, these subtle characterizations of the underlying rights should matter little for the overall analysis. It does not matter whether we think of this as a total or a partial taking. It does not matter whether we think of it as an occupation of the air rights or a restriction on their use. In all permutations, the loss in value to the owner is the measure of compensation that is required, no matter which description of the underlying facts is accepted. Rejecting all these fine lines puts the government in the proper position for asking whether the set of diffuse social benefits that it seeks to create through the landmark preservation law was greater or less than the concrete economic losses (and possible amenity losses from the construction of the new tower) that the regulation imposed on the owner of the air rights.

Unfortunately, Justice Brennan paid no attention to any of these doctrinal or functional issues. Instead he made the inexcusable intellectual blunder of analogizing the losses from these government restrictions on air rights to the economic loss that any property owner suffers from market competition. By way of example, on his view the loss of air rights is no different from the losses that Penn Central would have suffered if the shops inside its building suffered competitive losses when its former customers patronized a new shopping center that opened up across the street. In those cases, the owner of the existing establishment has no right to compensation for those losses. Brennan thought air rights should receive the same treatment.

This supposed analogy between competition and land use restriction is, however, deeply flawed. The differences between these two supposed equivalents becomes clear when the two different types transactions are analyzed within a single comprehensive conceptual framework. The question of what counts as an "actionable" harm—that is an economic loss that the legal system should recognize—cannot be resolved simply by looking at what private or government actions make someone better off and someone else worse off. That conception of an externality is too broad for legal work. All actions that help one person will hurt in this broad sense another person. The necessary task is to seal off those subclasses of externalities that should be regarded as actionable within the system, and dismiss all others.

The modern English expression for this distinction puts "pecuniary externalities" on one side of the line and "real externalities" on the other. But the terms have to ordinary understanding no verbal traction. Slightly better is the Roman law view that certain harms are *damnum absque iniuria*, harms without legal injury, but that definition also mainly points to the distinction without grounding it more rigorously. What is needed is a systematic approach that bolsters the intuitive awareness that competition and the use of force lie at opposite

ends of the spectrum. Looking at only the two parties to a particular dispute does not supply that answer. The dispute has to be put in a large social context, which operates as follows. Competition generates a *positive-sum* game when the impact on all persons, including potential customers and suppliers, are taken into account. When customers move from one store to the other, they get lower prices, a benefit which more than offsets any loss by the existing firm, which can of course lower its prices or improve its products to meet the competitive threat. In the end competition generates a set of transactions whose quantities and prices squeeze the most out of scarce resources. Any private right of action that is allowed to frustrate that movement of resources to more productive uses thus creates social inefficiencies. It is an ironic corollary to Justice Brennan's opinion that the worst of the New Deal legislative excesses were routinely justified on the ground that they were needed to protect established firms against "ruinous competition." In short order that inflammatory rhetoric led to the cartelization of the airline industry under the Civil Aeronautics Board, and of the agricultural sector under the Agricultural Adjustment Acts, both passed in 1938—a very bad year indeed.

THE POLITICAL DYNAMICS OF LAND USE REGULATION

Penn Central of course is not objecting to competitive harm when it wants to use its air rights. Rather, it opposes a very different kind of political dynamic in which government-inflicted losses on private property owners are devastating for the property owner, without promoting any general community well-being. Here is how the game plays out. Once everyone knows that government has the ability to restrict land use and land development without having to pay compensation, the demand for these restrictions from neighbors (who have a clear view of their own self interest) will rise steeply. That is what always happens when people are able to obtain valuable rights from others for free. Indeed, for a zero price they will insist on all sorts of elaborate protections for which they would never pay. We know this because in crowded urban areas few people are willing to pay for the right to keep the plot of land next door vacant. The combined value of two urban homes is greater than the value of one home with a fancy side yard owned by someone else who has no particular use of the barren land. To be sure, restrictive covenants may be used to impose some adjustments on light and air and the boundary line, but, as noted earlier, these will typically be reciprocal, and naturally constrained to the point where each party at the margin thinks that what it loses in land use it gains in increased light and air made possible by the less intensive use of neighboring land. But once the reciprocal element is gone, that natural restraint which operates market settings will disappear. Instead, overclaiming the virtues of public amenities becomes the order of the day, as private losses are ignored in the relentless pursuit of, well, other private interests.

These maneuvers to impose these restrictive covenants on land use necessarily impose real losses on owners, who would in a private transaction demand real dollars or in kind benefits to accept those covenants. But with politics it is always possible to bypass the market and to use political means to obtain what one wants at a lower price, namely, what it costs to assemble a

winning political coalition. The social cost calculations are thus clear. The political costs of acquiring the interests of others are low, but the externalities they inflict upon the users are great. Real resources are used to move land from a higher to a lower use so that the public loses both ways from these successful efforts at market circumvention. Resistance through politics is possible as well, and may prevail but only at a cost. What the eminent domain clause, with its just compensation requirement does, is prevent the circumvention of voluntary markets for private advantage. It eliminates the deadweight social losses that arise through political efforts to gain, or resist the coercive transfer of rights for no price, or indeed any price below their fair market value.

One corollary of this unfortunate dynamic is that market processes cannot survive when the law of regulatory takes allows any stubborn group of neighbors a veto right over anybody who wants to build on his own property. Just that tragic outcome happens in cities like New York all the time. It is quickly perceived that no total veto right is acceptable. So the compromise that emerges is an elaborate administrative process that creates a forum in which everybody may express his or her views about what Jones can do with his land. There is no unique decisionmaker, but a motley array of administrative boards that gets to decide who is in a position to build subject to what constraints. What are going to be the architectural specifications? What about the densities? The amount of affordable housing? Access for wheelchairs? At zero price every interest group will make its grand entrance into the political process.

The combined operation of these various restrictions will retard development of any use project by as much as three to five years (in many cases more), assuming they get approval in the first place. There are many private agendas that converge on the proposed project, each demanding its pound of flesh. There need be, of course, little coordination among the various parties seeking particular benefits. Once the separate exactions are combined, therefore, it could easily turn out that the deal no longer contains enough profit for the developer to want to move forward. Ironically, marginal projects are shelved. The attractive projects that remain are then denounced as proof of the greed of real estate developers in a classic Catch-22 situation.

In this fevered environment, community boards, some better than others, occupy a pivotal role. Sometimes they lead the opposition that dooms the project. Sometimes they take on the thankless task of capping aggregate demand for exactions so that the project can move hesitantly forward with its backing. Yet their job is made more complicated because every large project will spawn a rejectionist wing whose main agenda is to make sure that the cumulative exactions sink the project. The outcome is never certain, but in some real fraction of cases viable projects may be abandoned, after both public and private resources are squandered. Failure in the first generation makes the next generation of developers more gun-shy than predecessors. Over time, the tax base is reduced, and the neighbors who like the status quo are emboldened to use the same disruptive tactics time and time again. The developer and its supporters cannot respond with similar inflammatory tactics, because they have to continue to work in the community when and if the project

goes forward, and thus cannot afford to alienate the key players with whom they will have to cooperate on both this and other projects. The opponents of development thus have a strident freedom of action that developers cannot match.

From this political turmoil economic stagnation can follow, for the dilapidated warehouses sitting on the property remain in their faded squalor because nobody can agree on the ideal configuration of townhouses or condominiums. The result of these heavy costs is a chronic underproduction of housing for new arrivals who might do much to revitalize commerce or trade. Faced with these roadblocks, the major tactic to expand supply in a place like New York is to subdivide small apartments into still smaller units in order to lower the price to the point where ordinary people can afford to buy them. The 800-square-foot apartment that once had two tenants now has three. Perpetual gridlock in the new housing even hurts the incumbents in the long run even if they happen to benefit from the outcome of a particular dispute. They could well favor a project located a mile away, but are powerless to steer it through the local opposition, which gives pride of place to a powerful breed of NIMBYism. The new way of business is so entrenched that freedom to build in real estate markets is never thought of as a viable option. The permit culture becomes a way of life.

This system produces other inequities which magnify the advantage of initial entrant into a community. The common law rules on first possession gave a person exclusive rights of use and disposition of the land so possessed. But those rules never prevented neighbors who arrived later from exercising the same rights over their own land. The newer political economy gives the early arrivals who develop their property an unwholesome political advantage in the form of a near-veto right over later developers that was no part of the traditional bundle of common law property rights. But since rights are always scarce like other resources, that veto advantage in the first-to-build hurts the newcomers. The result is that local politics, say in the form of rent stabilization (which should also be attacked under the Takings Clause), creates a group of privileged incumbents who can raise the value of their own homes at the expense of others who are forced to find very marginal accommodations at extremely high rents. The idea that these peculiar distributional consequences from regulation are intrinsically desirable is a first-order intellectual mistake that drives Justice Brennan's faulty analogy between competition and legal restriction. The system of land-use restraint has worse distributional consequences than any open market for real estate that obeys the simple and sensible constraints on private real estate development. The dominant paradigm thus imposes major allocative losses in order to solidify perverse distributional outcomes.

A PATH FOR REFORM

The present situation is ripe for change. The key question is what would happen if New York City and other cities around the country were to reverse course, such that the loss of a right to build, which is a loss of a use right, is treated as a fully protected species of private property instead of a nondescript interest that the government can always toy with at its free will and pleasure? At this particular point, the entire dynamic of the political process will change and change for the better. In this

universe the opponents of new development will have only two legitimate options. The first is that they remain able to enjoin those activities that, if allowed to take place, would result in harms for which the new developer could rightly be required to compensate his aggrieved neighbors under the traditional law of nuisance. No property owner can construct a building that is likely to topple over only to smash on the pedestrians below. I dare say there's not a single builder anywhere in New York State or New York City that proposes to engage in construction that poses serious risk to life, limb, or property. Narrowly tailored building codes that addressed these external risks could withstand any constitutional challenge, without reintroducing the set of destructive veto gates under current law.

Second, local governments should have the power to coordinate new construction with existing and future infrastructure. The question of how much off-site parking is required for a large development, what kind of curb cuts are needed to secure vehicular access without endangering pedestrians calls for some measured degree of public regulation. Yet these issues in virtually all cases turn out to be low-level technical disputes that today rarely form the stumbling blocks for new development. It is typically possible to relocate a garage entry so that it does not open right next-door to an elementary school.

Apart from nuisance and infrastructure, the correct legal rule requires all local governments to buy for those extras that existing landowners demand for themselves. Ideally local governments should also have to pay for any extra delay from stringing out the administrative process to interminable lengths.

What changes in local government behavior should we expect under this new legal regime. There are some glimpses. Occasionally, some states like Oregon have flirted with legal regimes that say that any increase in regulation that reduces land values above a certain level must be paid for by the government that imposes it. Demand for these regulations typically disappears once the price tag is attached, which should come as no surprise. The basic dynamic in all these development settings is that the internal gain of the developer sets only the lower bound on the amount of social gain that a particular project will generate. Even if the developer is compensated for his loss, the government restrictions could still prove too severe. But the issue is usually academic. Even the prospect of partial payment for direct developer losses is enough to sink the political opposition.

Indeed, these observations reveal one common danger of speaking about the interests of the "community" in land-use disputes. This rhetorical trope consciously excludes the interests of those outsiders who would like to move into the community if only they could find a place to live. Those outsiders, of course, would profit from the deals they make with the developer. Any comprehensive social calculus has to include those gains, which can be quite large once modest local adaptations are made when the outsiders come in. The new apartment building that is ferociously fought one year becomes part of the fabric of the community the next year. Once these issues are put on the balance, blocking the project looks like a negative sum outcome, which turns hugely negative when the additional

costs of administration, error, delay, and uncertainty are factored into the equation. It is the modern tragedy of incurring heavy administrative costs in order to secure allocative losses.

Matters need not always remain that way. Once the price tag is added to the mix, the negatives and the positives are now brought into alignment. Given that the opponents of the project will have to pony up more money to stop the project than they could gain from it, they won't do it, even if the costs of coordinating their venture are zero. It never makes sense to expend \$100 to secure a \$50 gain. So understood, much of local opposition should be understood as a form of strategic "cheap talk." In case after case, once a compensation requirement is put into place, the opposition slinks away. Passionate indignation is in abundant supply. Dollars are not. The moral of this story should be clear. Neither in New York City or anywhere else should reflective citizens be prepared to tolerate a situation where endless delays take their toll in time, money, and uncertainty on those entrepreneurs who are trying to expand the homes, offices, and shops where ordinary people live and work, in order to let a few citizens objectors preserve their own short-term serenity, leaving everyone else to gather the scraps.

Unfortunately, the Supreme Court's flaccid approach to regulatory takings in *Penn Central* has created a huge void in which property rights have become indefinite. It is that indefiniteness of rights that in turn allows political intrigue to flourish. My alternative approach cuts down on opportunities for these illicit transactions without interfering with sensible state functions like controlling nuisances, ensuring safety, controlling infrastructure, and directing traffic. Yet, by the same token, this alternative approach does signal an end to all sorts of other exotic restrictions, which in effect can sap all the gain out of real estate projects that could be to the benefit of the community at large if only allowed to go forward.

ORIGINALISM, JUDICIAL RESTRAINT, AND TAKINGS LAW

One standard rebuttal to my position is that it may represent sound policy, but not sound constitutional law. The argument against constitutional protection of private property as an originalism matter never did extend to the area of regulatory takings. At this point, there is a familiar tension between the historical instances that are said to have sparked the inclusion of a particular guarantee into the Constitution and the scope of the guarantee that is included into the constitution. It could be said, for example, that the immediate instance of government practices that sparked the Takings Clause was a fear of outright seizure of land, or taking slaves from their owners without compensation. But the constitutional text, which speaks about private property in its widest signification, addresses a systematic protection of a bedrock social institution.

Here are some relevant comparisons. When those institutions are at issue in connection with speech under the First Amendment, no one thinks that the Amendment should be limited to government actions that shut down a newspaper, whether or not they leave the owners in possession of their plant. The legal rules quickly address permissible forms of taxation, permissible forms of regulation short of an outright prohibition on speech, and permissible rules of liability for defamation and

invasion of privacy. It is those same three dimensions that a comprehensive theory of takings has to move as well. Similarly, the Fourth Amendment protection against searches and seizures has not been interpreted to tolerate all sorts of surveillance that was not possible at the time of the finding. Once again the fear of circumvention by wrongful government action leads to the quick conclusion that eavesdropping is covered by the Amendment even if it does not involve a trespassory invasion of private property. The history does not impose shackles on any interpretation of the other guarantees in the Bill of Rights which is consistent with the text and the larger purposes—the constraint of government abuses against which it was directed.

The more difficult question is whether a rigorous analysis that only looks to the original public meaning of the written words of the text can be a faithful guide to constitutional interpretation. No workable originalism could reject fidelity to text. But by the same token no workable originalism can limit itself to parsing the words of the text. Indeed, no one who has ever steeped in classical interpretive methods ever defended the view that a key governing text had to be complete and entire unto itself. In all cases, the text was read and understood against the backdrop of a strong interpretive tradition that dates back to Roman times, and which was followed consistently throughout the following centuries.

I know of no better way to understand this issue than to refer to one of my favorite Roman texts—the Lex Aquilia of 287 BCE, which was written in stone, and thus not subject to easy amendment. It showed how to make a flexible interpretation of doctrine that avoids a rigid narrowness on the one hand and the free-form discourse of Justice Brennan on the other.

The key feature of this approach is to start with a single prohibition that in the case of the Lex Aquilia condemned the unlawful killing of a slave or herd animal. That was it for the written text. But the law of these killings went far beyond these words, as the basic qualification prohibition was systematically qualified in two ways to meet the challenges of the discerning skeptic. The first involves issues of strategic behavior. X knows that he cannot kill Y without being punished. So he decides to place poison in the milk which he places in front of Y. Y then drinks the milk and dies. X defends himself by saying that he did not kill Y who in ignorance of the risk chose to drink the milk and thus in effect killed himself. It never works. To be sure there was the act of Y that intervened between the act of X and the death of Y, but the counterresponse is that anyone who tries to circumvent a powerful norm will, in fact, be found liable if the tactic he uses is sufficiently similar to the forbidden tactic. Dutifully, the Romans developed the principle *causam mortis praestare*, meaning "to furnish the cause of death," which did not literally fall within the Lex Aquilia, but was subject to the same treatment (some procedural details aside) as the direct killing.³ The precise English analogy is the action on the case—placing a log on a road—which grew up to supplement the tort of trespass, which was confined to cases of the direct application of force by one party to another.

This principle of statutory interpretation was well-understood and accepted by the Framers. To treat it as though it is some foreign element that was to be expunged in the name

of originalism is to misunderstand the originalism. It is not that careful textual interpretation of the words in the text can be ignored. It is just that these words have to be read against an interpretive tradition which in this instance has a powerful social justification. Thus does anyone think that a decision by government officials to blow up a private home is not caught by the Takings Clause because the government does not enter the land or allows the owner to retain possession of the rubble? Just as private parties can be guilty of evasions of public law, so public officials can be guilty of evasion of their constitutional obligations.

The Lex Aquilia used a second nontextual move. Defenses to killing were allowed, to cover such matters as self-defense, assumption of risk and contributory negligence. Once again this move has its precise constitutional analogue, which covers the extensive development of the “police power” exception to the Takings Clause, and indeed to every other major constitutional protection of individual rights to cover regulations that deal with matters of health, safety, morals and the general welfare. Once again this critical element of the constitutional tradition has no textual warrant in the Constitution. Nor, ironically, was it seriously discussed during the founding period. But just as the anticircumvention rules expand the scope of the basic text, so the police power move limits its scope. The government can, for example, disarm somebody who’s about to kill a stranger. The owner of the property cannot treat that as an unlawful deprivation of the property. The control of common law nuisances is a classic instance of a proper police power initiative that allows for state restrictions on the private use of land, without just compensation.

The careful originalist position also must be aware of the overuse of physicalist images in determining the scope of constitutional protections. For example, current property law gives strong protection to patents, copyrights, and trademarks, none of which can be seized physically by the government. But essentially they are treated as seized, if somebody else is allowed to use them in addition to the owner. There’s nobody who thinks that that particular doctrine is not appropriate, notwithstanding the absence of some physical interest at stake. Various forms of electronic surveillance often are of dubious physicality, yet they do not fall outside the scope of the Fourth Amendment protections against searches and seizures.

Indeed, as I mentioned earlier, it is not clear *Penn Central* should be treated as a regulatory taking case at all when it is a confiscation of air rights under standard common law rules under which these rights were severable estates that were capable of being alienated, mortgaged, donated, or bequeathed. What happened in *Penn Central* was an intellectual travesty. Once the property owner complained that the government took its air rights, the Court replied “no, no, no; so long as you, Penn Central, retain the ground rights, the air rights don’t count as protectable property rights, even when they are held by some separate owner.” The line between the physical and the regulatory is vanishingly thin. *Penn Central* is probably incorrectly decided because it does not follow the central maxim of takings law which holds that state law determines the nature and scope of the property interests that the United States Constitution protects.

FAIRNESS AND EFFICIENCY—OPPONENTS OR ALLIES?

In responding to originalist arguments, the opponents of a broad reading of the Takings Clause make a different claim. The Takings Clause should not be read in a crabbed sense so that its sole objective is to protect some undefined notion of economic “efficiency.” The fairness element is a constant theme in the public discourse on this issue, and it too should be incorporated into the analysis so that due weight is also given to community interests. I believe that this position misunderstands the interrelationship between fairness and efficiency. Indeed, one reason why the clause is susceptible to a coherent and comprehensive interpretation is because of the close correlation between fairness and efficiency when both concepts are rightly understood.

First of all, on the efficiency side, the standard economic definitions of efficiency are necessarily implicated by the Takings Clause. The two standard definitions are closely related insofar as both seek to combine the subjective states of different individuals in order to create a composite measure of social welfare. The first of these two definitions in the Pareto standard which holds that a general kind of regulation will be Pareto efficient if when all is said and done each person is at least as well-off after the social program is implemented and at least one person is better-off. The reason that this formula implicates compensation is that various kinds of transfer programs can be used to offset any skewed distribution that regulation otherwise brings about. Thus suppose that a system of regulation moves one person from ten to twenty and another person from ten to eight. That system is not Pareto efficient because of the shortfall for the second person. But it can be made to be Pareto efficient if two units are paid over to the second party from the first to compensate the former for his loss. Indeed, it should be clear that in this simple example, in the absence of transaction costs, distribution of the ten units of surplus between the two parties is consistent with the definition of Pareto efficiency. From this example it is a very short stretch to note that if the state takes the role of the first party, it can take (or regulate) land so long as it meets the just compensation requirement by paying off two units to the individual owner whose property is taken. The Pareto test thus maps easily into the constitutional standard.

In contrast, the Kaldor-Hicks formula builds off the same basic insight that compensation between parties is one way to insure overall social efficiency. But it does not require that this compensation be paid with all the transaction costs that are thereby imposed. It only requires some demonstration that the winner from some government action be able to provide, *hypothetically*, compensation to the loser and still be better off himself. As a general intuition the higher the level of transaction costs, the greater the appeal of the Kaldor-Hicks formulation, which does not, however, meet the constitutional standard that calls for the provision of just compensation.

As a normative matter, however, it is equally clear that the higher level of perceived fairness comes with the Pareto test under which no person is required to make on net a sacrifice for the common good. Individual property may be taken against an owner’s will but the offset will be supplied in some other form. Indeed that is the precise logic that dictated the outcome

in the important 1960 case of *Armstrong v. United States*,⁴ which articulated the most common fairness justification of the Takings Clause when it wrote that “[t]he Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”

It is easy to see where the fairness reference comes from. In that case *Armstrong* had a materialman’s lien United States Navy vessel berthed in Maine waters. The United States decided to dissolve the lien by sailing the vessel into international waters. The construction of the boat was for the benefit of the public at large, not the materialman alone. So it is just not fair that he should pay the disproportionate cost of providing that indubitable public benefit. Since the lien cannot be restored, the government’s unilateral action did not let it go scot free. Rather it transformed the government into a unsecured debtor that had to pay the debt out of general tax revenues. To be sure, this fairness standard might not apply in all cases. Indeed, historically, asking when the Pareto standard should be abandoned poses one of the great challenges of constitutional theory. The correct answer usually is to do so only with widespread social changes which we are confident generate huge social gains, so that we can prevent the situation where a complex set of legal transformations cannot go forward because some uncompensable loss of ten units to one person blocks an ambitious initiative that generates hundreds of units of gains to everyone else. But short of those extreme cases the fairness concern tends to point to the Pareto test, which is why the two standards are operationally so closely linked together.

There is, moreover, one critical common feature that exerts an immense influence in thinking about the proper role for government coercion. Although the Pareto and Kaldor-Hicks tests differ in how they divide gains from government projects, both of them unequivocally condemn the government initiation of those projects that generate *net losses*, such that providing compensation, hypothetical or real, becomes a definitional impossibility. But the importance of this point is easy to overlook. The common way of thinking about the Takings Clause is to assume that it only regulates the distribution of benefits or losses from those projects that do take place. But in fact one of its most vital functions is to afford a general all-purpose screen that blocks in practice those government initiatives that should not be undertaken in the first place. The price system in ordinary economics has, by way of comparison, one desirable function of making sure that goods and services do not get provided to the wrong people. The price mechanism adopted under the takings clause has exactly the same effect. In general every time that we can identify some public projects that do not take place, we have good reason to praise that result so long as the compensation measures are accurately set.

In practice therefore the Takings Clause in its multiple guises prevents both inefficiencies and inequities at the same time. Why then should any court want to back off its logical structure and subject private ownership to the vagaries of the political process? The usual argument in that regard comes from the supposed belief that the principle of judicial restraint

demonstrates that it is not an appropriate function of courts to intervene in, for example, land-use disputes no matter how scandalous because courts do not have the expertise to so do. Fortunately, that logic has never dominated across the board, as many areas of law dealing with speech, religion, and searches and seizures show that it is possible to develop coherent rules under which judicial intervention is not an arbitrary expression of political will. That is surely the case with the Takings Clause once regulation and occupation are seen as part of a single continuum that are governed by a uniform set of rules.

The key question in many cases is how to work out the principles of compensation. In dealing with the occupation of a single parcel by the state, cash compensation is the norm, because there is no reason to think that the occupation in question supplies any in-kind compensation to the dispossessed landowner. The same is true of land-use regulation which is directed to a single parcel. That form of “spot zoning” subjects the landowner to immediate losses in uses for which there are no offsetting benefits. Yet the situation may change if the regulations in question cover a large number of parcels, each of which are benefitted and burdened in the same degree. As a matter of first principle, the burdens on each parcel count as the taking for which the benefits received from nearby parcels count as the return compensation. In some cases the entire scheme could leave each owner better off than before, at which point no further compensation is required. But in other cases, the compensation in question may amount to only a partial offset of the loss from the parallel restriction, at which point some cash compensation is needed to offset the difference.

In dealing with these cases, my rejection of the supposed principle of judicial restraint does not imply that courts should take over the world. There is, for example, no warrant for any court to decide whether or not the state should, or should not, condemn a particular parcel of land. That decision is a political function, subject to the limitations of the public use requirement. The proper role of the state is to be sure that the correct levels of compensation are supplied once the compensation of the property in question is determined. I do think, however, courts should decide that the compensation is needed. The rejection of the categorical distinction between occupation and regulation in no way undermines that distinction, nor does it offend any originalist position or force courts into any improper role. There is no need to fear the proper reading of the Takings Clause. There is much to fear in the current situations where its commands are systematically ignored.

Endnotes

1 *United States v. Kaiser Aetna*, 444 U.S. 164 (1979).

2 438 U.S. 104 (1978).

3 For discussion, see Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 BOST. U. L. REV. 699 (1992).

4 364 U.S. 40, 49 (1960).

CIVIL RIGHTS

WANT TO BE A DOCTOR? A SCIENTIST? AN ENGINEER? AN AFFIRMATIVE ACTION LEG UP MAY HURT YOUR CHANCES

By Gail Heriot*

The assumption behind the fierce competition for admission to elite colleges and universities is clear: The more elite the school one attends, the brighter one's future. That assumption, however, may well be flawed. The research examined recently by the U.S. Commission on Civil Rights provides strong reason to believe that attending the most competitive school is not always best—at least for students who aspire to a degree in science or engineering.¹

Majoring in science or engineering can be difficult. As one Yale University student told the *Wall Street Journal*, the science course he took “scared the hell out of me.” “In other classes, if you do the work, you’ll get an A,” he complained. “In science, it just doesn’t work that way.”²

Well . . . yes . . . the feeling that one is flailing about in science and engineering courses can be very disconcerting. Many students who start out with such a major switch to something easier. Others drop out or even flunk out. And it should surprise no one that those who wash out are disproportionately students whose entering academic credentials put them towards the bottom of their college class.³ Not all stereotypes about science and engineering students are accurate. But the basic notion that they tend to be highly-credentialed and hardworking is largely on target. They have to be.

What some do find surprising is this: *Part of the effect is relative.*⁴ An aspiring science or engineering major who attends a school where his entering academic credentials put him in the middle or the top of his class is more likely to succeed than an otherwise identical student attending a more elite school where *those same credentials* place him towards the bottom of the class. Put differently, an aspiring science or engineering major increases his chance of success not just if his entering credentials are high, but also if those credentials compare favorably with his classmates.⁵

The reasons for this comparative effect are doubtless complex. But they are based on a common everyday observation: A good student can get in over his head and end up learning little or nothing if he is placed in a classroom with students whose level of academic preparation is much higher than his own, even though he is fully capable of mastering the material when presented at a more moderate pace. Discouraged, he may even give up—even though he would have persevered had he been in a somewhat less competitive environment.⁶

Science and engineering are ruthlessly cumulative. A student who has difficulty with the first chapter in the calculus textbook is apt to have difficulty with the second, third, and fourth chapters. Indeed, the subsequent courses in the

mathematics curriculum may be a problem. By contrast, an English literature student who simply fails to read the Chaucer assignment is not necessarily at a serious disadvantage when it comes to reading and understanding George Eliot. Since quitting science and engineering is easy—ordinarily all one has to do is switch majors—the attrition rate is quite high. By senior year, there are significantly fewer science and engineering majors than there were freshmen initially interested in those majors.

Some call this comparative effect the “mismatch” effect.⁷ And although there is reason to believe that it applies to other kinds of learning, science and engineering examples are perhaps the easiest to imagine: I have every confidence that I can learn basic physics, despite the fact that I have never taken a course in it and my mathematics skills are a little rusty. If I ever lose my job as a law professor, I suspect that I am fully capable of re-tooling as a physics teacher if that is where the available jobs turn out to be. But if I were thrown into the Basic Physics course at Cal Tech, with many of the very best science students in the world, I would be lost and likely learn little if anything. I would be mismatched.⁸ On a good day I might make a few lame jokes about my unhappy situation; on a bad day I might even get a little testy about it. But I would be unlikely to come out of that class as competent in the basic principles of physics as I would have in a less high-powered setting.⁹

That doesn’t mean, however, that those who aspire to a career in science or engineering must graduate from high school already prepared for the rigorous science curriculum at the world’s most competitive science-oriented university. There are many careers in science and engineering. Many have been filled by latecomers to the field. It simply means that for those who are not already well-prepared when they begin to study science or engineering in earnest, the best strategy may be to avoid going immediately head-to-head with better prepared students.

The interest of the Commission on Civil Rights in mismatch centers mainly on its effect on members of under-represented racial minorities—primarily African Americans, Hispanics, and American Indians. Since admissions standards are frequently relaxed in order to admit a more diverse student body, minority students constitute a disproportionate share of the students with entering academic credentials towards the bottom of any particular class.¹⁰ Obviously, however, there are other categories of students, such as athletes, children of alumni, and other special admittees, who should also be mindful of the risk of mismatch that comes with preferred treatment in admissions.

All such students have a dilemma to face. Should they accept the supposed “leg up” they have been offered? Or should they reject it and attend a school where such an advantage would have been unnecessary? The answer is likely to vary from student to student and may be a question of priorities. Which is more

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important—that student’s desire to attend the most elite school or his or her desire to be a physician, engineer, or scientist?

The problem is that few students who receive a preference realize that their entering academic credentials are well below the institutional median. Fewer still realize that relatively low academic credentials are likely to handicap their ability to earn a degree in science or engineering at that institution and that their odds would be better elsewhere. Instead, they are recruited, indeed romanced, by colleges and universities who allow the scramble for a racially diverse campus (or a winning football team or happy alumni) to overcome their commitment to full and fair disclosure.

It is for this reason that the Commission on Civil Rights has recommended that schools inform the students they are attempting to recruit of the mismatch issue and its potential impact. Tuition for the 2010-11 academic year at the University of San Diego, for example, where I am on the faculty, will be \$36,950. That, of course, does not include room and board or various fees. Many students are willing to incur such debt because they envision their future career will be in a well-paying field like medicine or nuclear engineering. When they graduate four years later with a less marketable degree, they may be saddled with a large debt that they would have been unwilling to undertake had they understood that the odds were stacked against their success in science or engineering. But no one told them.

At minimum, this is an issue that students should be informed of so that they, with assistance from their parents, high school teachers, and guidance counselors and other advisors, can decide for themselves how to proceed. But let’s look at the evidence step by step.

A. Minority Students Are Indeed Under-Represented in Science and Engineering.

There is no segment of the labor force that proportionally reflects the nation’s demographic profile. Physicians are disproportionately Jewish. Jockeys are disproportionately Hispanic. The wine industry employs more than its share of Italian Americans. Even within professions, disproportionality is the rule, not the exception. Among lawyers, litigators are often Irish American. Among physicians, radiologists are disproportionately Subcontinent Indian American.

Lack of proportionality is not necessarily the result of systematic discrimination. There are many ways in which one’s family background, language, and cultural traditions directly or indirectly affect career choices. As a result, it would be hard to find a single profession or occupation that looks, as it is often put, “like America.” The world is always more complex than that.

But science and engineering are special. For one thing, they are not single fields. Instead, obtaining an initial degree in a field of science or engineering is the gateway to a large number of respected professions and occupations—from aviation inspector to zoologist. These fields represent a significant portion of the most lucrative and dynamic sectors of the world economy. If African Americans, Hispanics, and American Indians are facing significant impediments in entering these fields, that is a situation that calls for attention.¹¹

Using data from the National Survey of College Graduates conducted by the U.S. Census Bureau, UCLA law professor Richard Sander and senior statistician Roger Bolus have calculated the following racial gap in science among college graduates, including immigrants educated or partly educated abroad, age 35 and under:

*Table I: How Significant is the Racial Gap in Science?*¹²

Frequency Relative to Population	White	Black	Hispanic	Asian
Gen. Pop.	100	100	100	100
Bachelor’s Degree Science	100	36	41	454
PhD Science	100	15	26	703

As the chart indicates, blacks and Hispanics are only 36% and 41% respectively as likely as whites to have a bachelor’s degree in science or engineering. An Asian, by contrast, is more than four-and-a-half times more likely than a white to hold such a degree. Blacks are only 15% and Hispanics are only 26% as likely as whites to have a PhD in science. Asians, on the other hand, are more than seven times as likely as whites. The under-representation of blacks and Hispanics in science and engineering is real (although these figures are in part a reflection of the immigration of highly-qualified individuals from abroad).¹³

Of course, concern over under-representation in science and engineering is not new. On November 13, 1992, the popular magazine *Science* issued a special news report entitled “Minorities in Science.” In it, the editors lamented:

For 20 years, science has been wrestling with “the pipeline problem”: how to keep minorities from turning off the obstacle-strewn path to careers in science, mathematics, and engineering. Thousands of programs have been started since the late 1960s to bring diversity to the scientific work force. But their results have been dismal¹⁴

One thing, however, is clear. The problem has not been an unwillingness to spend money. By 1992, the National Science Foundation had already spent over \$1.5 billion on programs designed to increase the number of minorities in science or engineering. Officials at the National Institutes of Health estimated that they had pumped an additional \$675 million into the system. Uncounted state, local, foundation, and industry programs contributed millions more.¹⁵

But the consensus of opinion has been that much of the money had been spent unwisely. In their eagerness to qualify for the vast grants available to educate future minority scientists and engineers, many colleges and universities admitted minority students with little background in science or mathematics. In the early days of affirmative action, “colleges took any person of color who wanted to become an engineer, regardless of their background,” said Mary Perry Smith, a former Oakland schoolteacher and founder of California’s Mathematics, Engineering, Science Achievement (MESA) program, which promotes minority student participation in those fields. “They

tried to turn students who barely knew algebra into engineers and it was a total failure.”¹⁶

“The country cannot repeat the experiment of the last 20 years,” said Luther Williams in 1992, then the assistant director of education and human resources at the National Science Foundation. Williams, who later went on to become provost of Tuskegee University, a historically black university with a reputation for emphasizing a science and engineering curriculum, was blunt: Those vast expenditures were “an incredible waste of financial and human resources.”¹⁷

Perhaps Williams was being too harsh. Progress has been made, and it will continue—even though it is not as much progress as we would like. But if the problem is going to be solved, it will not be solved by more of the same thinking that has characterized the efforts of the last forty years. A re-examination of the assumptions behind those efforts is in order—even if it will step on a few well-entrenched toes.

B. There is No Problem with Lack of Interest in Science and Engineering Among Minority Students. It is Disproportionate Attrition that is the Cause for Concern.

The problem with minority under-representation in science and engineering is not the result of lack of interest among college-bound African Americans, Hispanics, and American Indians. Study after study has found just the opposite.¹⁸ Indeed, if anything, such students are slightly more interested in pursuing science and engineering degrees than white students. For example, Professors Alexander W. Astin and Helen S. Astin of UCLA’s Higher Education Research Institute examined a sample of 27,065 students enrolling as freshmen at 388 four-year colleges in 1985. They found that the rate of initial interest in majoring in a biological science, a physical science, or engineering was, in descending order, 52.6% for Asians, 35.7% for Chicanos, 34.5% for American Indians, 34.2% for African Americans, and 27.3% for whites.¹⁹ If there is a problem with lack of interest in science and engineering, it is with college-bound whites, not college-bound African Americans, Hispanics, and American Indians.

These findings were consistent with later efforts to study the issue. When Dartmouth College psychology professor Rogers Elliott and his co-investigators looked at a sample of 4687 students enrolling at four elite colleges and universities in 1988, they found that 55% of the Asians, 44.2% of the African Americans, 44% of the Hispanics, and 41.4% of the whites were initially interested in majoring in science.²⁰ Similarly, Richard Sander and Roger Bolus, in analyzing all students enrolling in the University of California between 2004 and 2006, found that 57.1% of Asians, 40.5% of African Americans/Hispanics, and 34.7% of whites declared an intention to major in science or engineering.²¹

To be sure, that doesn’t mean that there is no point encouraging even more under-represented minorities to aspire to careers in science and engineering. Programs that are proven to encourage such interest might be money well-spent. But if one wants to understand the root of the problem, one must look elsewhere.

And some researchers have. Their work has shown that the problem for minority college students comes a little further

down the pipeline. While African Americans, Hispanics, and probably American Indians have high rates of initial interest relative to whites, they are less likely to follow through with that interest. Somewhere in college, the aspiration to graduate with a degree in science or engineering dies. Astin and Astin report, for example, that while 68% of Asians and 61% of whites in their sample followed through on their intention to major in biological science, physical science, or engineering four years later, only 47% of African Americans and 37% of Hispanics did the same. The rest had apparently changed majors, dropped out, or flunked out.

Consequently, while one might expect, given their level of interest, that African American college students would be somewhat over-represented among science and engineering college graduates, they turn out to be under-represented instead. Hispanics are a special case. With them, English mastery is sometimes a problem. One would therefore expect very high perseverance in science and engineering, since transfer to a discipline that requires skill in English can be daunting. All other things being equal, over-representation in science and engineering should be expected for a language-based minority. But for Hispanics attrition rates in science and engineering were also unusually high.

Similar results were obtained by Rogers Elliott and his co-investigators. In their study, they found that 70% of Asians persisted in their ambition, while 61% of whites, 55% of Hispanics and 34% of blacks did.²² Others had similar findings.²³

C. Students with Low Entering Credentials in Science, Both in Absolute and in Comparative Terms, Are More Likely to Leave Science and Engineering.

It is tempting to ask the question “What accounts for disproportionate minority attrition?” first. But that temptation should be avoided. Instead, the first question should be “What accounts for student attrition in general?” Once that preliminary question is answered, the question about disproportionate minority attrition essentially answers itself.

It is no secret that entering science credentials—like Math SAT score and the number and grades received for high school courses in mathematics and science—are strongly correlated with persistence in science.²⁴ Since African American, Hispanic, and American Indian students tend as a group to have lower entering science credentials, they are almost certain to have a higher attrition rate.²⁵

It would be wonderful if the disparities among races, including the disparities between Asians and others, could be eliminated overnight by improving the performance of the lower-performing groups. For that matter, it would be nice if disparities between individuals could be eliminated and everyone could perform better in mathematics, science, and all subjects. And there is no doubt that improvements can be made.

But if there is one thing that we have learned during the many decades that this problem has been receiving attention, it is that few improvements can be made quickly. The mismatch problem, however, may be a partial exception. Matching students to the right college or university for their level of

developed academic ability could increase the number of science and engineering majors in fairly short order.

As three independent studies have now concluded, absolute credentials are not the only thing that matters in keeping students in science and engineering. Relative credentials are also important. A student whose entering credentials are at the bottom of the class at the school he attends is less likely to persevere in his quest for a degree in mathematics or engineering than a student with identical credentials who attends a school where those credentials place him higher in the class.

The first of these studies was that published by Rogers Elliott and his co-investigators in 1996.²⁶ The single most important culprit they found was the “*relatively* low preparation of black aspirants to science in these schools.”²⁷ The Elliott team was careful to put the emphasis on “*relatively*.” It wasn’t just entering credentials demonstrating high developed ability at science that mattered, but comparatively high credentials. A student who attended a school at which his Math SAT score was in the top third of his class was more likely to follow through with an ambition to earn a degree in science or engineering than was a student with the same score who attended a school at which his score was in the bottom third. The chart at the bottom of the page was presented.

According to the authors, the bottom line was this: A student with an SAT Math score of 580 “who wants to be in science will be three or four times more likely to persist at institutions J and K, where he or she is competitive, than at institutions A and B, where he or she is not.”²⁸

For some this is counter-intuitive. The more prestigious the school, they believe, the more adept it should be at graduating future physicians, scientists, and engineers, no matter what their entering credentials. But instructors everywhere must pitch the material they teach at a particular level. They can pitch to the top of the class, to the middle, or to the bottom, but they can’t do all three at the same time. At elite colleges and universities pitching to the bottom of the class is uncommon—especially in the science and engineering departments. The whole point

of these institutions is to teach to the top. That is the reason that students, who may have been positively mismatched in high school, are willing to travel thousands of miles and incur significant debt to attend them. If they were to abandon that practice and resolve to teach to the bottom of the class, they would no longer be elite institutions.²⁹

The extraordinary record of Historically Black Colleges and Universities was one source of evidence cited by the Elliott team in favor of their conclusion. With only 20% of total African American enrollment, these schools produce 40% of the African American students graduating with natural science degrees, according to the National Science Foundation. These students frequently go on to earn PhD’s from mainstream universities. The National Science Foundation reports, for example, that of the approximately 700 African Americans who earned a doctorate in science or engineering between 1986 and 1988, 29% earned their undergraduate degree from an HBCU. For biologists the figure was 42%, and for engineers it was 36%.³⁰ Even those who have mixed feelings about HBCUs (and I am such a person) must admit this is impressive.

Why have HBCUs been so successful? Unlike at mainstream institutions with their high levels of affirmative action, African American students at HBCUs are not grouped at the bottom of the class. Roughly half of African American students at HBCUs will be in the top half of the class. Many will be honor students. As a result, systematic mismatch is just not an issue.³¹

The problem is not that there are no minority students capable of doing honors work at mainstream college and universities. There are many. But there are not enough at the very top tier to satisfy the demand for diversity. And when elite universities like Cal Tech, MIT, or the Ivies lower their academic standards in order to admit a more racially diverse class, schools one or two tiers down feel they must do likewise, since the minority students who might have attended those schools based on their own academic record are instead attending the more elite schools. The problem thus cascades downward

Table II: Percentage of Earned Degrees in the Natural Sciences as a Function of Terciles of the SAT-M Distribution in Eleven Institutions³²

Institution	Tercile 1		Tercile 2		Tercile 3	
	% Degrees	SAT-M	% Degrees	SAT-M	% Degrees	SAT-M
Institution A	53.4	753	31.2	674	15.4	581
Institution B	57.3	729	29.8	656	12.9	546
Institution C	45.6	697	34.7	631	19.7	547
Institution D	53.6	697	31.4	626	15.0	534
Institution E	51.0	696	34.7	624	14.4	534
Institution F	57.3	688	24.0	601	18.8	494
Institution G	62.1	678	22.6	583	15.4	485
Institution H	49.0	663	32.4	573	18.6	492
Institution I	51.8	633	27.3	551	20.8	479
Institution J	54.9	591	33.9	514	11.2	431
Institution K	55.0	569	27.1	472	17.8	407
Medians	53.6		31.4		15.4	

to the fourth and fifth tiers, which respond similarly. As a result, a serious gap in academic credentials between minority and non-minority students is created at all competitive levels at mainstream universities—a gap that results in seriously disappointing grades for many minority students, especially in science and engineering classes where good grades are hard to come by.

At least one HBCU faculty member—Professor Walter Pattillo, Jr. of North Carolina Central University—intuitively grasped the mismatch problem even before the Elliott team was able to demonstrate its existence empirically. As then-chairman of the biology department, he vented his frustrations to *Science* in 1992: “The way we see it, the majority schools are wasting large numbers of good students. They have black students with admission statistics [that are] very high, tops. But these students wind up majoring in sociology or recreation or get wiped out altogether.”³³

Neither Professor Pattillo nor the Elliott study received attention from mainstream college or university administrators. Admissions policies at competitive schools continued to emphasize recruiting minority students even if their entering credentials would put them towards the bottom of the class. Instead, emboldened by their perception that the Supreme Court had given a constitutional green light to racially preferential admissions policies in *Grutter v. Bollinger* (2003),³⁴ selective schools ramped up those policies.³⁵ The supposed beneficiaries of these policies were not informed.

Around that time, however, the tide of opinion among social scientists studying the issue was beginning to turn, even as it remained frozen among college and university administrators.³⁶ One of the milestones was the publication of *Increasing Faculty Diversity: The Occupational Choices of High Achieving Minority Students* in 2003. The long-term project was funded by the Mellon Foundation, which had been and remains one of the nation’s most zealous institutional backers of race-based admissions policies. The authors’ mission was to determine why more minority students are not attracted to careers in academia. Their conclusions, reached after extensively questioning 7,612 high-achieving undergraduates at thirty-four colleges and universities, pointed to mismatch as a significant culprit:

The best-prepared African Americans, those with the highest SAT scores, are most likely to attend elite schools, especially at the Ivy League. Because of affirmative action, these African Americans (those with the highest scores on the SAT) are admitted to schools where, on average, white students’ scores are substantially higher, exceeding those of African Americans by about 200 points or more. Not surprisingly, in this kind of competitive situation, African Americans get relatively low grades. It is a fact that in virtually all selective schools (colleges, law schools, medical schools, etc.) where racial preferences in admission is practiced, the majority of African American students end up in the lower quarter of the class. . . .

African American students at the elite schools . . . get lower grades than [African American] students with similar levels of academic preparation (as measured by SAT scores) . . .

. . . at the nonelite schools. . . . *Lower grades lead to lower levels of academic self-confidence, which in turn influence the extent to which African American students will persist with a freshman interest in academia as a career. African American students at elite schools are significantly less likely to persist with an interest in academia than are their counterparts at nonelite schools.*³⁷

A year after Cole & Barber’s research became public, a second study on science and engineering mismatch was published. University of Virginia psychologists Frederick L. Smyth and John J. McArdle used a different methodology and database from those of Elliott and his co-authors. But they reported findings that “are consistent” with the earlier article’s conclusion that “race-sensitive admissions, while increasing access to elite colleges, was inadvertently causing disproportionate loss of talented under-represented minority students from science majors.”³⁸

Indeed, Smyth & McArdle went further. They developed a model that attempts to measure how many more minority students would have succeeded in their goal of a science or engineering degree if race neutral admissions criteria had been employed. They wrote:

According to our model . . . , if all the [Science-Mathematics-Engineering]-intending underrepresented minority students had enrolled in similarly functioning colleges where their high school grades and math test scores averaged at the institutional means among [Science-Mathematics-Engineering] intenders, 72 more of the women and 62 more of the men would be predicted to persist in [Science-Mathematics-Engineering] (45% and 35% increases, respectively).³⁹

Smyth & McArdle’s recommendation was clear: “Admission officials are advised to carefully consider the relative academic preparedness of science-interested students, and such students choosing among colleges are advised to compare their academic qualifications to those of successful science students at each institution.”

The latest contribution to the literature on science and engineering mismatch is *Do Credential Gaps in College Reduce the Number of Minority Science Graduates?*⁴⁰ Using a number of sophisticated methodologies, Sander & Bolus arrive at conclusions like those of Smyth & McArdle and the Elliott team.

Sander & Bolus studied data obtained from the multi-campus University of California. All UC campuses are quite selective. But some are more selective than others. The flagship campus at Berkeley is highly selective, as are the UCLA and UC-San Diego campuses. At the other end of the spectrum, the campuses at Riverside and Santa Cruz are easier to gain admittance to, but nonetheless hardly “easy.”

Employing what they call the “distance method,” Sander & Bolus measured the distance between each student’s entering academic index and the median academic index of all science and engineering-interested students at that campus. This allowed the authors to compare not just students with equal academic indices attending different UC campuses, but also make comparisons based on the magnitude of mismatch.⁴¹

They found that students who are “mismatched” at one UC campus are at a greater risk of failing to attain their initial goal of a science or engineering degree than otherwise identically-credentialed students attending a less selective campus of that same university at which they were not mismatched. And the greater the mismatch, the greater the problem.

Not satisfied with confining their analysis to the “distance method,” Sander & Bolus also employed what they dubbed the “first choice/second choice” method. This approach involves looking at pairs of students who were admitted to two different UC campuses, one more elite and the other less elite. In each pair, one student chose to attend the more elite school and the other the less elite. The results were the same: Mismatched students are at a disadvantage in science and engineering.⁴²

“Minority attrition in science is a very real problem, and the evidence in this paper suggests that ‘negative mismatch’ probably plays a role in it,” they wrote. The approaches they took yielded consistent results: “[S]tudents with credentials more than one standard deviation below their science peers at college are about half as likely to end up with science bachelor degrees, compared with similar students attending schools where their credentials are much closer to, or above, the mean credentials of their peers.”⁴³

D. Conclusion.

Decades ago, well-meaning administrators at selective college and universities resolved to “do the right thing” by extending preferential treatment to under-represented minorities in admissions. One of the consequences of that policy has been systematically low college grades for most of the supposed beneficiaries of that preferential treatment.⁴⁴

No serious supporter of affirmative action denies this. William G. Bowen and Derek Bok, authors of *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* and long-time advocates of race-based admissions policies, candidly admit that the credentials gap has serious consequences: “College grades [for affirmative action beneficiaries] present a . . . sobering picture,” they wrote. “The grades earned by African-American students at the [schools we studied] often reflect their struggles to succeed academically in highly competitive academic settings.”⁴⁵

The long-term social and educational consequences of decades of race-based admissions policies and the artificially low grades for minorities those policies produce are only now beginning to be studied. The evidence examined by the Commission on Civil Rights focuses only on the effects on science and engineering majors. It suggests that, as a result of race-based admissions policies, we now have fewer, not more, physicians, dentists, engineers, scientists and other science-oriented professionals than we would have had under a policy of color-blindness.

While there are still a few unanswered questions, it is time for students to be advised of the issue and allowed to make their own decision about their future. Indeed, it is long past time. If higher education were held to the same standards of consumer disclosure as other businesses—from securities brokerage houses to children’s toy manufacturers—this information would have been disclosed long ago.

Endnotes

1 Apart from the considerations discussed in this report, there may indeed be something special about the education available from America’s most academically competitive colleges and universities. It should be noted, however, that some of the most sophisticated research available suggests that when it comes to increasing one’s income, elite schools are not exactly the ticket. See Stacy Berg Dale & Alan B. Krueger, *Estimating the Payoff to a Highly Selective College*, 117 Q.J. ECON. 1491 (2002). Graduates of Ivy League institutions are indeed high earners. But, if this research is correct, this is simply a reflection of the fact that very talented students attend those schools. If the same students had attended less prestigious schools, they would have done on average just as well financially—or so this research suggests.

2 Dana Milbank, *Education: Shortage of Scientists Approaches a Crisis As More Students Drop Out of the Field*, WALL ST. J. (September 17, 1990).

3 See *infra* at Part C.

4 See *infra* at Part C.

5 As one early researcher on this topic put it, there is an academic advantage to being a “big frog” in the “frog pond.” James A. Davis, *The Campus as a Frog Pond: An Application of the Theory of Relative Deprivation to Career Decisions of College Men*, 72 AM. J. SOCIO. 17 (July 1966). This article was written well before the concept of mismatch came to be associated with the controversy over affirmative action and was not focused specifically on science and engineering. Davis found that college GPA is more strongly correlated with career choice than is quality of institution. In other words, while students take both their college grades and the academic quality of the school they are attending into account in evaluating their career choices, they tend to place more emphasis on college grades than is justified. A student at the bottom of his very elite class will tend to underestimate his abilities, while a student at the top of a class at a mediocre school will tend to over-estimate them. Davis concludes:

[T]hese ideas have some implications for educational policy. At the level of the individual, they challenge the notion that getting into the “best possible” school is the most efficient route to occupational mobility. Counselors and parents might well consider the drawbacks as well as the advantages of sending a boy to a “fine” college, if, when doing so, it is fairly certain he will end up in the bottom ranks of his graduating class.

Id. at 30-31.

6 While the observation that a student is more likely to learn in a classroom where his academic credentials are not at the bottom of the class is common sense, it is not necessarily true in all contexts. Take, for example, a school with 100 first graders. If one were to divide the class into thirds according to their achievement test scores, it is not necessarily the case that all three groups would learn more than if they were divided into three groups at random. Students with behavioral problems may tend to be over-represented in the group of students with the lowest scores for the simple reason that their behavior has interfered with their own learning. Concentrating them in one group may create havoc in the classroom that interferes with the ability of all students, not just those with behavioral problems, to learn.

7 See, e.g., THOMAS SOWELL, *INSIDE AMERICAN EDUCATION: THE DECLINE, THE DECEPTION, THE DOGMAS* (1993).

8 Mismatch may be positive or negative. If a typical Cal Tech freshman were to take a Basic Physics class designed for law professors like me, many of whom have never excelled at science, she would likely learn less than she would have in a class with her fellow Cal Tech students. Coasting through a “Basic Physics for Dilettantes” course, she would be the victim of positive mismatch, while I am negatively mismatched in the hypothetical.

9 The empirical studies discussed in Part C do not distinguish among the reasons that mismatched students might drop out of science and engineering more often than non-mismatched students with similar credentials. They simply record that they disproportionately do so. Is it just because they perceive that they aren’t doing well relative to other students and hence lack confidence in themselves? Or are they actually learning less than their similarly-credentialed counterparts who persevere in science or engineering at somewhat less elite institutions? Or both? There is, at present, no national examination for science and engineering achievement that would allow researchers to determine whether college students who were mismatched and dropped out of science or engineering actually learned less than their counterparts at less elite schools

who took similar courses. The intuitive answer is that they did and that their self-confidence was also shaken in the process. But it is unnecessary at this point to draw a distinction. The law school experience is clearer, since law students must pass a bar examination in order to practice law. There is empirical evidence that mismatched law students are less likely to pass the bar examination than their non-mismatched counterparts at less elite schools. Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 393 (2004).

10 While the Supreme Court case of *Gratz v. Bollinger*, 539 U.S. 244 (2003), was pending before the Supreme Court, much publicity was centered around the fact that the University of Michigan routinely added the equivalent of an entire letter grade to the admissions index of under-represented minority students. An African American student with a high school grade point average of 2.95 would thus be preferred to an Asian American student with a high school grade point average of 3.94 (just shy of straight As) all other things being equal. The *Gratz* case rejected such a formulaic approach, but it did not reject the size of the preference granted to minority students. And indeed, the evidence suggests that the size of the preference grew at the University of Michigan in the period following the *Gratz* decision. See *infra* at note 35.

The University of Michigan's policies were not more over-the-top than other universities. Lawsuits filed against the University of Georgia, the University of Texas, and the University of Washington prior to the Supreme Court's decision in *Gratz* brought to light similar practices. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996) (law school); *Smith v. University of Washington*, 233 F.3d 1188 (9th Cir. 2000) (law school); *Johnson v. Board of Regents*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000), *aff'd*, 263 F.3d 1234 (11th Cir. 2001) (undergraduate admissions). See also ROBERT LERNER & ALTHEA NAGAI, CTR. FOR EQUAL OPPORTUNITY, RACIAL AND ETHNIC PREFERENCES IN UNDERGRADUATE ADMISSIONS AT SIX NORTH CAROLINA PUBLIC UNIVERSITIES (May 28, 2007) (finding similar preferences at competitive North Carolina universities).

Some of the most discriminatory policies are at professional schools. At law schools, for example, the average black student has an academic index that is more than two standard deviations below that of his average white classmate. Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 393 (2004).

11 In addition, many have asserted that there is a shortage of Americans trained in science and engineering and that this shortage will likely get worse. If a particular segment of the population is under-represented in these fields, it is only prudent to look into what can be done to increase their participation. NAT'L SCI. FOUND., *FUTURE SCARCITIES OF SCIENTISTS AND ENGINEERS: PROBLEMS AND SOLUTIONS* (1992).

12 Richard Sander & Roger Bolus, *Do Credentials Gaps in College Reduce the Number of Minority Science Graduates?*, Working Paper 2 (Draft July 2009) (using data from 2003) [hereinafter "Sander & Bolus"].

13 Unlike African Americans, Hispanics in science and engineering do not appear to be under-represented relative to Hispanics in other college disciplines, such as the humanities. *Id.* Relative to their initial interest, however, they are under-represented. Ordinarily one would expect a language minority to be over-represented in science and engineering, since those disciplines do not require the same language skills as the humanities.

14 Elizabeth Culotta & Ann Gibbons, *Minorities in Science: Two Generations of Struggle: Special Report Overview*, 258 SCIENCE 1176 (November 13, 1992).

15 Calvin Sims, *What Went Wrong: Why Programs Failed*, 258 SCIENCE 1185, 1185 (November 13, 1992).

16 *Id.* at 1187.

17 *Id.*

18 Smyth & McArdle, *Ethnic and Gender Differences in Science Graduation at Selective Colleges with Implications for Admission Policy and College Choice*, 45 RES. HIGHER ED. 353, 357 (2004) (calling this finding "consistent" and citing a number of studies dating back to the late 1970s) [hereinafter "Smyth & McArdle"].

19 ALEXANDER W. ASTIN & HELEN S. ASTIN, *UNDERGRADUATE SCIENCE EDUCATION: THE IMPACT OF DIFFERENT COLLEGE ENVIRONMENTS ON THE EDUCATIONAL PIPELINE IN THE SCIENCES* 3-9, Table 3.5 (1993) [hereinafter "ASTIN & ASTIN"].

20 Rogers Elliott, A. Christopher Strenta, Russell Adair, Michael Matier & Jannah Scott, *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 RES. HIGHER ED. 681, 692-93 (1996) [hereinafter "Elliott"].

21 Sander & Bolus, *supra* note 12, at 3. Sander and Bolus also report that among the University of California students enrolling from 1992 to 2006, 52.6% of Asians declared an intention to major in science and engineering, as did 37.5% of Blacks/Hispanics and 34.7% of whites. *Id.*

22 Elliott, *supra* note 20, at 694. See also NAT'L SCI. FOUND., *FUTURE SCARCITIES OF SCIENTISTS AND ENGINEERS: PROBLEMS AND SOLUTIONS* (1990) (finding persistence rates of 43% for majority students and 21% for minority students); T.L. HILTON, J. HSIA, D.G. SOLORZANO & N.L. BENTON, *PERSISTENCE IN SCIENCE OF HIGH ABILITY MINORITY STUDENTS* (1989) (reporting that 54% of Asian, 44% of white, 36% of black, and 29% of Latino high school seniors who had intended to attend college and major in science or engineering were doing so two years later).

23 Smyth & McArdle, *supra* note 18, at 361-63.

24 ASTIN & ASTIN, *supra* note 19, at 3-9, Table 3.5; Elliott, *supra* note 20, at 694; Smyth & McArdle, *supra* note 18, at 357; Sander & Bolus, *supra* note 12.

25 See *id.* See also William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998).

26 Elliott, *supra* note 20.

27 *Id.* Among the credentials that mattered most were number of science courses taken, average grades in high school science courses and SAT-Math score.

28 *Id.* at 702. This estimate, of course, was based on the assumption that the student started out with a desire to major in science or engineering. Whether a student with no particular plans to major in science or engineering is more likely to graduate with a science or engineering degree if he attends a school at which he is properly matched is a more complex matter. As the Elliott team demonstrated, students with higher SAT Math scores are more likely to begin college with a desire to major in science. Consequently, institutions A-E likely have more students interested in pursuing science than Institutions F-K and thus would naturally be expected to award a higher proportion of science degrees, since that is what their students desire. And indeed they did. The Elliott team reported that Institution A-E were about twice as likely to award science degrees as Institutions F-K, with about 28% of the first group's bachelor's degrees being in science and about 15% of the second group's. Nevertheless, as they point out, "a 54% chance of getting one of the 15% of the degrees that are in science is nearly twice as good as a 15% chance of getting one of the 28% of degrees that are in science." *Id.* at 702.

29 In theory, intensive remedial instruction is supposed to bridge the gap between the top and the bottom. But not every theory works out in reality. The educational experience at elite institutions is meant to be a full-time job and then some. With only twenty-four hours in a day, something has to give. Every hour a minority student spends in a remedial classroom, sometimes struggling to stay on top of material other students are having less trouble with, is an hour other students can spend getting a deeper understanding of that material. The game of catch-up is thus never-ending.

30 Elizabeth Culotta, *Black Colleges Cultivate Scientists*, 258 SCIENCE 1216 (November 13, 1992) (hereinafter "Culotta").

31 The Elliott team members were particularly impressed that HBCUs are able to graduate large numbers of students in science and engineering despite entering credentials that were significantly lower than those ordinarily found at elite institutions. Students at Xavier University, for example, were reported to have SAT Math scores averaging around 400, yet half of the class was majoring in science. If elite schools could do the same with minority students (or with students in the bottom third of the class generally), it would be astonishing. In fact they do the opposite. They are able to award far fewer science or engineering degrees to African Americans than one would expect given the number of African American students in their classes. Elliott, *supra* note 20, at 700.

32 *Id.* at 701.

33 Culotta, *supra* note 30, at 1218.

34 539 U.S. 306 (2003).

35 ALTHEA K. NAGAI, CTR. FOR EQUAL OPPORTUNITY, RACIAL AND ETHNIC PREFERENCES IN UNDERGRADUATE ADMISSION AT THE UNIVERSITY OF MICHIGAN (October 17, 2006); *see also* Fisher v. University of Texas, 645 F. Supp. 2d 587 (W.D. Tex. 2009).

36 *See* Russell K. Nieli, *The Changing Shape of the River: Affirmative Action and Recent Social Science Research*, 17 ACAD. QUESTIONS 7 (2004).

37 STEPHEN COLE & ELINOR BARBER, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH ACHIEVING MINORITY STUDENTS 124, 212 (2003) (citations omitted) (emphasis supplied).

38 Smyth & McArdle, *supra* note 18, at 373.

39 *Id.*

40 Sander & Bolus, *supra* note 12.

41 *Id.* at 14-20.

42 *Id.* at 20-23.

43 *Id.* at 23-24.

44 The figures for law school grades are available and particularly instructive: In elite law schools, 51.6% of African-American law students have first-year GPAs in the bottom 10% of their class as opposed to only 5.6% of white students. Nearly identical gaps exist at law schools at all levels (with the exception of historically minority schools). At mid-range public schools, the median African-American student's first-year grades corresponded to the fifth percentile among white students. For mid-range private schools it was seventh. With disappointingly few exceptions, African-American students were grouped toward the bottom of their class. Moreover, contrary to popular belief, the gap in grades did not close as students continued through law school. Instead, by graduation, it had gotten wider. Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 427-36, Tables 5.1, 5.3 & 5.4 (2004). I am not aware of anyone who disputes these figures, and indeed some critics of Sander's work appear to have conceded their accuracy. *See* Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1807 (2005) ("Richard Sander's study of affirmative action at U.S. law schools highlights a real and serious problem: the average black law student's grades are startlingly low.").

45 WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 72 (1998).



THE OBAMA ADMINISTRATION: CHANGING THE RULES OF THE TITLE IX GAME?

By Alison Somin*

Making Title IX as strong as possible is a no-brainer,” Vice President Joe Biden told a cheering crowd at George Washington University this past April.¹ Biden appeared at GWU to announce that colleges could no longer demonstrate compliance with Title IX by using the Model Survey, an instrument designed by the Bush Department of Education’s Office of Civil Rights (“OCR”) to help universities assess relative male and female interest in participating in sports on their campuses.

In fact, whether to make Title IX as strong as possible is anything but a no-brainer. Indeed, virtually since the statute’s enactment in 1972, there has been vigorous debate over how to interpret and enforce this statute, especially with regard to equality in collegiate athletic offerings. While the Department of Education’s guidance documents interpreting Title IX purport to give schools choice over how to demonstrate compliance with the law, in practice they encourage schools to comply only by demonstrating substantial proportionality between men and women’s teams. The Model Survey was intended to solve the problem by giving colleges an easy way to demonstrate relative levels of male and female interest in sports. Because of the Model Survey’s rescission, it will now be harder for schools to demonstrate that they are complying with Title IX. Also, colleges that use substantial proportionality approaches may become embroiled in litigation over whether to count cheerleaders as athletes—an issue that pits women against women. If using an interest-based model were more viable, universities could avoid these battles altogether. Finally, and perhaps most significantly, the Model Survey’s rescission may also portend a wave of Title IX enforcement actions directed at science and engineering programs, both academic fields in which there are disproportionately few women relative to men—a troubling development for separate reasons.

Background on Title IX

Title IX of the Education Amendments of 1972 requires that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”² Although Title IX is perhaps best known for its impact on intercollegiate athletics, issues of equal opportunity in athletics barely made it into the legislative history. While Birch Bayh made a few offhand remarks about football and shared locker rooms before the Senate, members of the 92nd Congress were not focused on equality of athletic opportunity. On the other hand, the bill’s sponsors were clear that they did not intend Title IX to impose gender quotas on universities. Birch Bayh said on the floor of the Senate that gender quotas were “exactly what this amendment intends to prohibit,” and that the “thrust of the

amendment is to do away with every quota.”³ In the House, Rep. Albert Quie said that Title IX “would provide that there shall be no quotas in the sex anti-discrimination title.”⁴

Despite these strong anti-quota statements from Congress, the Department of Health, Education, and Welfare issued a 1979 guidance document that would transform Title IX into a statute requiring de facto quotas in university athletics. The 1979 guidance document stated that it would apply the following test to determine if an institution is providing non-discriminatory participation opportunities for individuals of both sexes:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, the interests and abilities of the members of the underrepresented sex have been fully and effectively accommodated by the present program.⁵

The three elements of this guidance are often referred to as “prongs,” and a school is in compliance with Title IX if it is in compliance with any prong. But while the three-part test appears to give schools choices regarding how to comply with Title IX, often universities can only feel comfortable about their legal obligations if they are in compliance with the first prong.⁶ For example, a university is theoretically in compliance under prong two if it can show “a history and continuing practice of program expansion.” But in a world in which resources are scarce, few if any universities can afford to continue expanding athletic programs indefinitely.⁷ Universities hoping to comply under prong two are thus left to wonder: how much continuous expansion is enough? In practice, the answer often becomes: when proportional representation is achieved under prong one.⁸

Achieving compliance under prong three—by demonstrating that the interests and abilities of the underrepresented sex have been fully and effectively accommodated—can be even more difficult. In theory, prong three is supposed to offer schools a safe harbor: even if athletic offerings are unequal, a school is in compliance so long as the unequal offerings were not produced by discrimination. The Department of Education issued a guidance document in 1996 that listed six different indicators that its Office of Civil Rights (“OCR”) might use to determine that discrimination did not produce any inequalities: The relevant excerpt from this guidance document reads in full:

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OCR will determine whether there is sufficient unmet interest among the institution's students who are members of the underrepresented sex to sustain an intercollegiate team. OCR will look for interest by the underrepresented sex as expressed through the following indicators, among others:

- requests by students and admitted students that a particular sport be added;
- requests that an existing club sport be elevated to intercollegiate team status;
- participation in particular club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- results of questionnaires of students and admitted students regarding interests in particular sports; and
- participation in particular interscholastic sports by admitted students.

In addition, OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students in order to ascertain likely interest and ability of its students and admitted students in particular sport(s).⁹

The document also did not explain how OCR might analyze a case in which some of the listed indicators show unmet interest and others do not, indicating that this list is too vague to give universities much useful guidance. In particular, the claim that OCR would look to "participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students" is problematic, as determining what is the relevant area from which an institution draws its students can be quite difficult.¹⁰ Some of the largest and most selective national universities, for example, commonly recruit from a national or even international pool of students.¹¹ Perhaps because of these problems, many institutions preferred to use prong one or two. Indeed, only rarely have schools faced with a Title IX complaint been able to demonstrate compliance with the law under this third prong.¹²

This emphasis on proportionality has sometimes led schools to slash men's teams. As noted above, adding new teams is expensive, and few if any universities have the resources to continue expanding athletic opportunities indefinitely. Jerome Kravitz, a consultant to the U.S. Department of Education and professor at Howard University, testified at a meeting of the federal Title IX commission that from 1982 to 2001, women gained 2,046 teams and 51,967 athletic opportunities.¹³ During the same period, men lost between 1,434 teams and 57,100 to 57,700 participation opportunities. Many witnesses also testified before the Commission that they believed the teams on which they participated were cut due to concerns about Title IX compliance.¹⁴

Critics sometimes claim that budgetary issues, rather than Title IX, actually drove these cuts to men's teams. In some

cases, these claims appear particularly dubious—at UCLA, the university athletic department claimed that it cut its men's gymnastics team for budgetary reasons—but then added a women's soccer team the same year.¹⁵ These critics also fail to recognize that these causes are not mutually exclusive. Title IX (as interpreted) makes men's sports very expensive. For every men's sports team, the university needs an equivalent number of female athletes—unless the school can prove that women do not want these opportunities. When universities face budget crunches, Title IX thus makes cutting a men's team more attractive than cutting a women's team.

The Model Survey

To help schools thus struggling with compliance under the third prong, OCR issued further guidance in 2005.¹⁶ This guidance also included a Model Survey, an instrument designed to measure student interest in participating in intercollegiate varsity athletics. When the Model Survey indicates insufficient student interest to field a team, OCR indicated that the result would create a presumption of compliance with Title IX.¹⁷ This presumption, however, could be rebutted with "direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team."¹⁸ Critics raised several different concerns about the limitations of the new Model Survey. For reasons I discuss below, however, those criticisms are not well-founded enough to justify the Obama Administration's decision to rescind the survey.

First, some critics objected to the survey's design on technical grounds. For example, Jocelyn Samuels, formerly of the National Women's Law Center and now of the Department of Justice, claimed that the Model Survey fails to depict student interest accurately because OCR permits schools to accept non-responses as evidence of lack of interest.¹⁹ Samuels has suggested that students may not respond to an e-mail survey for reasons wholly unrelated to interest in sports participation, such as the e-mail survey's being caught in a spam filter or a student's not having time to respond at the moment that she received the e-mail.²⁰ But the guidance document accompanying the survey answers Samuels's objection: it states clearly that schools must administer the survey "in a manner that is designed to generate high response rates."²¹ That is, if sending out a single mass e-mail generates few responses, then administration of the survey in this manner may not be sufficient to bring an institution into compliance with Title IX.²² The Additional Clarification document accompanying the Model Survey also suggested that schools distribute the survey by methods more certain than mass e-mail to generate large responses—for example, by incorporating the survey into the mandatory online class registration process.²³

Other objections have been more philosophical and indicate these critics' opposition to the use of any type of interest survey, regardless of how high response rates are. For example, some say that the survey would not measure women's interest in sports fairly because women capable of playing sports, but influenced by negative stereotypes that women shouldn't be athletes, might indicate on the surveys that they're uninterested in athletics.²⁴ According to these advocates, the purpose of Title IX is to effect a cultural transformation of gender roles. They

argue that it was designed to ensure that schools offer adequate opportunities to young women to play sports, an approach that commentator Jessica Gavora calls the “if you build it, they will come” approach to Title IX.²⁵ But it remains unclear whether this approach really works in practice. When Brown University was sued under Title IX in 1992, for example, the university had more than eighty unfilled slots on various female varsity teams—at the same time that Brown was demoting men’s water polo and golf teams from university-funded to donor-funded status due to budgetary constraints.²⁶

Similarly, Samuels has said that the Model Survey unfairly relies on women’s self-assessment of their ability to compete athletically at the college level. Again for cultural reasons, women may be disproportionately likely to assess their own athletic skills too harshly.²⁷ But female participation in sports rose considerably in the years immediately before Title IX’s passage and has continued to rise.²⁸ It’s therefore unclear to what extent—or if at all—such stereotypes still resonate with today’s college-age women. Also, the higher number of female students of non-traditional age—rather than stereotypes—might partially explain females’ lower levels of interest in sports. Two-thirds of undergraduates over thirty are female, as are 66.4% of undergraduates over forty.²⁹

Third, critics of the Model Survey charge that, because the Model Survey is necessarily administered only to students currently enrolled in a particular school, it fails to capture the athletic interests of students who would have attended that school had it offered particular sports. It’s unclear from this point alone that these surveys are inadequate to measure men and women’s relative interest. A simple hypothetical may best illustrate the point. Imagine a state, Ames, with two large universities—East Ames State and West Ames State. East Ames State does not offer the imaginary sport of women’s fraggle ball, whereas West Ames State does. There may be women who might have slightly preferred to attend East Ames over West Ames had both universities offered fraggle ball. But if there are enough slots at West Ames to give all the interested women of Ames an opportunity to play fraggle ball, it’s not clear why East Ames should also offer the sport. Indeed, in a world in which university budgets are often tight, such specialization may even be desirable.

Impact of the Model Survey’s Rescission

Although the Model Survey might have made demonstrating compliance easier for some institutions, almost no universities ever actually opted to use it.³⁰ Many universities may have made this decision because the NCAA passed a resolution discouraging their members from using the Model Survey.³¹ Myles Brand, president of the NCAA, told *The Washington Post* in 2005 that concerns about litigation from advocacy groups in part motivated the NCAA’s decision. “Whether that will be tested in court or some other way, we’re waiting to see what the Women’s Law Center and others might do. We’re supportive of their actions,” he said.³²

Because so few institutions ever actually adopted the Model Survey, its rescission will likely have little short term impact. But, had it not been rescinded, perhaps a plaintiff would have brought a lawsuit challenging it, just as Brand predicted. Had a court upheld the survey, some institutions might have chosen not

to create or maintain some women’s sports teams because of the decision. But such a decision would have lowered universities’ costs of compliance with Title IX and possibly freed up resources for other programs that benefit men and women.

This last point—that women appear to be more interested in many non-athletic extracurriculars than men, and that Title IX may divert resources from these programs—may be all-too-often overlooked during discussions about Title IX. For example, data presented during the *Cohen v. Brown University* litigation, one prominent Title IX case, showed that ninety-one percent of Brown applicants interested in dance were women, fifty-six percent of those interested in drama were female, and sixty-six percent of those interested in music were women. By contrast, sixty percent of Brown applicants who expressed an interest in competing in varsity athletics were male, and forty percent were female.³³ Statistics from the National Federation of High Schools also show that women are disproportionately interested in music and the performing arts.³⁴ Eighty percent of high school aged choir members are female, as are over sixty percent of high school orchestra members and fifty-five percent of high school marching bands. U.S. Department of Education data show that more men than women participate in academic clubs, hobby clubs, music programs, and vocational clubs.³⁵

Title IX and Cheerleading

Widespread use of the Model Survey might have also permitted universities to head off a possible wave of litigation regarding whether cheerleaders count as athletes under Title IX and some of the gender politics questions that will inevitably accompany this litigation. Recently, universities eager to get their numbers right for Title IX purposes have designated competitive cheer as a sport.³⁶ Competitive cheerleaders distinguish their competitions—events in which teams of cheerleaders compete against each other to perform elaborate routines, an activity that they claim is similar to the traditional sport gymnastics—from “sideline cheer,” the more traditional form of cheerleading that entails chanting cheers from the sidelines at another sports event.³⁷

The gender politics of whether cheer should count as a sport have proven complicated. Some Title IX advocates have said that counting cheerleaders as athletes only perpetuates stereotypes that women cannot succeed in more traditionally masculine athletic activities.³⁸ Take, for example, the comments of former Stanford basketball player and author Mariah Burton Nelson regarding cheerleading and athletics:

I respect that they [cheerleaders] are athletic. I realize it requires strength, stamina and balance. They tell you it’s not about looks, but what they’re really doing is showing off their bodies, showing off their underwear and shaking their breasts around. It’s quite embarrassing when I go to games with children and see how sexualized the routines have become.³⁹

But other young women have had experiences with cheerleading that feminists might well applaud. “I began cheerleading my freshman year of high school,” writes Syracuse University student Deanna Harvey in the *New York Daily News*, “and it immediately gave me a confidence that I’d never had before.

It also made me appreciate what it takes to succeed in a competitive, challenging and dangerous environment.”⁴⁰

To date, only one federal district court has weighed in on the issue and has concluded that competitive cheerleading at Quinnipiac University not a sport for Title IX purposes.⁴¹ Judge Stefan Underhill’s opinion bases its conclusion on the requirement of judicial reference to OCR letters, stating that OCR has presumed that cheerleading should not qualify as a sport. He noted that the same presumption applies to other extracurricular activities that have a significant athletic component but are not considered sports, such as drill teams.⁴² Underhill also looked at a test for what activities qualify as sports set forth in another OCR letter, which entails looking to: 1) the quality of team’s practice opportunities; 2) whether the regular season differs qualitatively or quantitatively from the regular seasons of other varsity sports; 3) whether the pre and post seasons are consistent with other varsity sports; and 4) whether the team is organized primarily for the purpose of engaging in athletic competition.⁴³ While cheerleading resembled other varsity sports along three of these axes, Underhill’s opinion concluded that the competitive cheerleading schedule differed significantly from those of other Quinnipiac varsity sports. Significantly, unlike other varsity athletes, Quinnipiac cheerleaders also competed against high-school-aged athletes and non-scholastically-affiliated “all star” teams of competitive cheerleaders.⁴⁴

To his credit, Judge Underhill’s opinion avoided the thorny questions of gender politics. He emphasized:

In deciding that competitive cheer is not presently a Title IX sport, I do not mean to minimize the experience shared by the Quinnipiac cheer team. . . . In reaching my conclusion, I also do not mean to belittle competitive cheer as an athletic endeavor. Competitive cheerleading is a difficult task that requires strength, agility, and grace.⁴⁵

Still, despite the restrained tone of Underhill’s opinion, news reports about the decision indicate that at least some reacted angrily to the Underhill decision because they thought it belittled cheerleading. Deanna Harvey, writing in the *New York Daily News* column cited above, wrote that “[m]y message to the judge who ruled that cheerleading is not a sport is to try one stunt, perform a backflip in the air, and wait for two petite girls to catch you. And then get back to me.”⁴⁶ Similarly, in the *Atlanta Journal-Constitution*, a former University of Georgia football player turned competitive cheer coach commented, “I think this is just a bunch of old men who don’t know the sport. This is a multi- million dollar year-round sport, not some girls wearing short skirts and smiling.”⁴⁷

It bears repeating that this question made it into the federal courts only because colleges want their numbers to come out right for substantial proportionality purposes. In a world in which substantial proportionality were less important—in one in which compliance under the accommodation prong was a more viable option for many universities—universities wouldn’t need to count cheerleaders’ heads toward their totals of female athletes. In that world, some young women might see competitive cheer as a feminist and empowering activity, while others would not. The federal courts would not need to wade into this particular controversy. But as the world is,

wade into it they must—even though their involvement makes this particular battle in the gender wars all that much more unnecessarily contentious.

Title IX and Science

The Obama Administration’s decision to rescind the Model Survey might also indicate an interest in “title nining” academic science. Obama himself seems to have latched onto the idea. While praising Title IX’s impact on increasing women’s participation in athletics, he said, “If pursued with the necessary attention and enforcement, Title IX has the potential to make similar, striking advances in the opportunities that girls have in the science, technology, engineering, and mathematics (“STEM”) disciplines.”⁴⁸ The nation’s university science, engineering, and mathematics departments may thus soon find themselves faced with the task of complying with a regulatory regime similar to the intercollegiate athletics three part test.

Such proposals to “title nine” academic science have been in the air for some time. Debra Rolison, Head of the Advanced Electrochemicals Section at the Naval Research Laboratory in Washington, made one proposal as early as 2000.⁴⁹ She has promoted Title IX as an “implacable hammer” in terms of getting faculty attention. Rolison noted the disparities between the numbers of women who receive Ph.Ds in chemistry and the numbers who receive tenure track positions in the sciences. She cited the rapid increase in the numbers of women who have started participating in sports since the passage of Title IX and claimed that application of a similar “creative legal strategy” could close gender gaps in the sciences.⁵⁰ There are at least two potential problems with Rolison’s proposed approach. First, where Rolison sees “creativity,” others might see “lawlessness”: as discussed earlier, neither the text of Title IX nor its legislative history indicates that Congress meant Title IX to require proportional representation of women in academic science. Second, it’s at best unclear whether it was Title IX or other factors that caused the vast increases in the number of women playing sports. For example, Jessica Gavora pointed to data in her book indicating that the fundamental shift in girls’ athletics participation actually occurred in the late 1960s or early 1970s, before Title IX was passed.⁵¹

Rolison’s essay also claims that the primary cause of the disparities is a “culture that is unappealing to women otherwise interested in math and science studies, including how scientific arrogance and other solipsistic behaviors are rewarded by the existing culture.”⁵² This culture, according to Rolison, is one in which “round-the-clock scholarship by men doing science was historically sustained by a sociological and emotional infrastructure first provided by monasteries and then by wives.”⁵³ She does not explain how this culture might differ from the culture of other academic disciplines that were also once sustained by a similar “sociological and emotional infrastructure.” Art historians, for example, also face intense pressure to publish and also benefit from having spouses to help with domestic tasks so that they may focus on academic work. Yet women significantly outnumber men in art history departments, and the picture is similar in other humanities departments.⁵⁴

Indeed, there remains a vigorous debate over what the most important causes of the current gender disparities in

science are. As Stephen Ceci and Wendy Williams state in their recent book *The Mathematics of Sex*, writers on this topic have commonly advanced three classes of explanations regarding gender disparities in science. One class of explanations resembles Rolison's—that bias and barriers prevent scientifically gifted women from maximizing their potential. The second concerns innate ability, or the claim that boys and men have greater inherent mathematical abilities.⁵⁵ A third class of explanation alleges that women are simply less interested in mathematics and science than men.⁵⁶

Ceci and Williams themselves concluded, after three years of reviewing the relevant studies, that the “major cause” of the disparities is “sex differences in occupational preferences.”⁵⁷ Mathematically talented women prefer to enter non-mathematical fields like medicine, veterinary medicine, law, and the biological sciences, whereas men with equal mathematical talent more often choose math-intensive fields like engineering and physics. Mathematically gifted women are also more likely than mathematically gifted men to be verbally gifted, meaning that many will choose careers making use of these other gifts. Ceci and Williams do agree somewhat with Rolison that gender bias and barriers may deter some women's pursuit of scientific careers. But they ultimately found that bias and barriers “have declined in importance in recent years and now seem fairly weak as an explanation for women's current under-representation.”⁵⁸ Ceci and Williams were careful to claim, however, that their results are not necessarily definitive and do call for additional research on these questions at the end of their book.⁵⁹ It is difficult to craft to a solution to a problem without understanding the causes of the problem. Yet regulators attempting to “title nine” academic science would find themselves in precisely this position.

Some might claim that these differences in interest—even if not caused by bias or the persistence of stereotypes—are still a problem worth remedying. At the same time, it is less than obvious why the government should expend potentially millions of tax dollars urging academically inclined women to teach college physics instead of Shakespeare, or to convince would-be pre-laws to switch to engineering instead. Perhaps most importantly, those who drafted the law never intended to impose such quotas on academic science. Consider also that extensive Title IX compliance reviews in academic science would come at tremendous opportunity cost. Cosmology professor Amber Miller, responding to a 2007 U.S. Department of Education review of her department at Columbia University, described the process as a “waste of time.” Miller was required to make an inventory of all of the equipment in her lab and indicate whether women were permitted to use various items. “I wanted to say, leave me alone, and let me get my work done,” she told *Science* magazine.⁶⁰ The work that scientists like Miller do is tremendously valuable in driving national prosperity and innovation. The government should be extremely careful about imposing on these scientists' highly valuable time.

Conclusion

The Obama administration should not have rescinded the Model Survey. If a court had upheld the Model Survey,

it would have become easier for universities that are in fact in compliance with Title IX's prohibition on gender discrimination to demonstrate that compliance under the third prong. Instead, the current numbers games to satisfy substantial proportionality requirements will continue. As a result of these games, budget-minded universities will be forced to divert resources away from programs for which there may be substantial demand (such as dance club, men's wrestling, or cheerleading) and toward some women's athletics team for which there is less demand. As in the Brown example, some teams may even have empty slots. Finally, Obama's stance on the Model Survey foretells that his administration may soon adopt an aggressive approach to enforcing Title IX in academic science. “Title nining” academic science is a bad idea for both legal and policy reasons. First, the law was never intended to mandate strict proportionality in academic science. Secondly, there is no clear consensus among researchers regarding the causes of current gender disparities in science. Until these issues are better understood, a federally imposed solution might well do more harm than good.

Endnotes

1 Katie Thomas, *Rule Change Takes Aim at Loophole in Title IX*, N.Y. TIMES, April 19, 2010.

2 20 U.S.C. 1681(a).

3 117 Cong. Rec. 30,409 (1971).

4 117 Cong. Rec. 39,261-2 (1971).

5 44 Fed. Reg. at 71418.

6 See, e.g., JESSICA GAVORA, *TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, SEX, AND TITLE IX*, 32-33 (2002).

7 Complicating the picture further, the typical college added many sports in the 1970s and early 1980s and has not added any in more recent years. See Jill K. Johnson, Note, *Title IX and Intercollegiate Athletics, Current Judicial Interpretation and Standards for Compliance*, 74 B.U. L. REV. 553, 583 (May 1994) (citing William E. Thro & Brian A. Snow, *Cohen v. Brown University and the Future of Intercollegiate and Interscholastic Athletics*, 84 EDUC. L. REP. (WEST) 611, 625 (1993)). A wave of news stories published after the 2008 financial crisis also indicates that budget cuts are becoming quite common. See, e.g., Editorial, *University Budget Cuts are a Reality Check*, ATHENS BANNER-HERALD, Mar. 4, 2010 (describing budget cuts at the University of Georgia), available at http://www.onlineathens.com/stories/030410/opi_570347902.shtml; Noa Naftali, *Budget Cuts, Fee Increases Draw Anger at University of California*, TUFTS DAILY, Mar. 2, 2010, available at <http://www.tuftsdaily.com/budget-cuts-fee-increases-draw-anger-of-university-of-california-students-1.2175778>; Rohan Mascarenhas, *Rutgers University Students Protest Higher Education Cuts from Governor Chris Christie's Budget*, NEWARK STAR-LEDGER, Apr. 13, 2010, available at http://www.nj.com/news/index.ssf/2010/04/rutgers_university_protest_hig.html.

8 See GAVORA, *supra* note 6, at 36.

9 U.S. DEP'T OF EDUC., *CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE PART TEST* (Jan. 16, 1996), available at <http://ed.gov/about/offices/list/ocr/docs/clarific.html#two> (last accessed June 3, 2010).

10 The guidance document accompanying the model survey made a similar point:

An alternative to surveying the entire student population is to survey a catchment population consisting of both the entire student population and potential applicants. However, the use of a catchment population is very problematic. The size of the catchment area is dependent on the student population served by a specific institution. The catchment area might be local for a rural community college, national for a small state

college, and international for large 4-year and doctoral institutions. Even if definable, such a large target population is almost surely unreachable in any meaningful way and thus is not recommended here.

Additional Clarification at 36.

11 Princeton University, for example, has students from fifty states and ninety-eight different countries. See PRINCETON VIEWBOOK 4, *available at* http://www.princeton.edu/admission/pdfs/Princeton_VB_0910.pdf (last accessed July 26, 2010). Haverford College has students from forty-five states and thirty-five different countries. See Haverford College at a Glance, *available at* <http://www.haverford.edu/abouthaverford/ata glance.php> (last accessed July 26, 2010). Lehigh University has undergraduates from forty-nine different states and forty-nine different foreign countries. See Lehigh at a Glance, *available at* <http://www4.lehigh.edu/admissions/undergrad/glance> (last accessed July 26, 2010).

12 Between 1992 and 2000, the Clinton DOE's Office of Civil Rights investigated forty-four Title IX complaints. In only three of these cases was the school found compliant under prong two. None of the schools investigated could successfully demonstrate compliance under prong three. GAVORA, *supra* note 6, at 37.

13 SPORTING EQUALITY: TITLE IX THIRTY YEARS LATER 13 (Rita J. Simon ed., Transaction Publishers 2006).

14 *Id.*

15 *Id.*

16 Under this guidance, an institution will be found in compliance with the third prong unless there exists a sport(s) for the underrepresented sex for which all three of the following conditions are met: 1) unmet interest sufficient to sustain a varsity team in the sport(s); 2) sufficient ability to sustain an intercollegiate team in the sport(s); and 3) reasonable expectation of intercollegiate competition for a team in the sport(s) within the school's normal competitive region. Thus, schools are not required to accommodate the interests and abilities of all their students or fulfill every request for the addition or elevation of particular sports, unless all three conditions are fulfilled. Additional Clarification at 4.

17 *Id.* at 4-5.

18 *Id.* at 5. The type of direct and persuasive evidence that would rebut the presumption might include, for example, "the recent elimination of a varsity team of the underrepresented sex or a recent, broad-based petition from an existing club team to varsity status."

19 U.S. COMM'N ON CIVIL RIGHTS, TITLE IX ATHLETICS: ACCOMMODATING INDIVIDUAL INTERESTS AND ABILITIES, Statement of Jocelyn Samuels, 53 (Feb. 2010), *available at* <http://www.usccr.gov> (last accessed August 14, 2010).

20 *Id.*

21 Additional Clarification at 6-7.

22 *Id.*

23 *Id.* at 7.

24 Sociology professor and feminist theorist Don Sabo, for example, has testified that women are less likely than men to express interest in sports because of the "historical, social, and political contextualization of women's role in society." Quoted in GAVORA, *supra* note 6, at 76; see also Note, *Cheering on Women and Girls, Using Title IX To Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1640 (1997) ("In effect, the 'substantially proportionate' approach recognizes that women's attitudes toward sports are socially constructed and have been limited by discrimination and gender stereotypes. Congress passed Title IX to combat such gender discrimination and stereotypes, thereby changing the environment in which girls and women develop, or do not develop, interests in sports.")

25 Gavora has called this approach the "Field of Dreams" approach to Title IX, referring to the often quoted line from that movie "If you build it, they will come." GAVORA, *supra* note 6, at 86.

26 Cohen v. Brown University, 101 F.3d 155, 162 (1st Cir. 1996). The eighty unfilled slots statistic appears in Allison Kasic and Kimberly Schuld's "Title IX and Athletics: A Primer," Position Paper No. 610, at 9, The Independent Women's Forum (Sept. 2008).

27 *Id.* at 48. Also on the theme of gender differences in self-assessment, see generally CATHERINE HILL ET AL., AM. ASS'N OF UNIV. WOMEN, WHY SO FEW? WOMEN IN SCIENCE, ENGINEERING, TECHNOLOGY AND MATHEMATICS 63 (2010), *available at* <http://www.aauw.org/learn/research/upload/whysofew.pdf> (last accessed May 25, 2010). According to the AAUW report, female students rated their mathematical abilities lower than did male students with equivalent levels of achievement. The effect is reversed, however, when students are asked to rate their own verbal abilities: there, men are more likely to underrate their abilities and women to overrate them. *Id.*

28 In 1971, the year before Title IX was passed, one in twenty-seven high-school-age women played sports. In 1972, the year that Title IX was passed, the number rose to one in nine. In 2002, the number was in one in three. GAVORA, *supra* note 6, at 32-33.

29 NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEPARTMENT OF EDUCATION PROFILE OF UNDERGRADUATES IN U.S. POST-SECONDARY EDUCATION INSTITUTIONS: 2003-2004, at 84, Table 3.1 (June 2006).

30 Jessica Gavora testified before the U.S. Commission on Civil Rights in 2007 that she knew of no schools that had used the Model Survey at that time. One news report states, however, that Western Illinois University administered the Model Survey to its students in 2009. See Posting of Eric McErlain to Saving Sports blog, WIU Completes Model Survey, <http://savingsports.blogspot.com/2009/05/wiu-completes-model-survey.html> (May 27, 2009, 12:05 ET).

31 Press Release, NCAA, In Honor of Title IX Anniversary NCAA Urges Department of Education to Rescind Additional Clarification of Federal Law, *available at* http://www.thencaa.biz/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/media+and+events/press+room/news+release+archive/2005/announcements/in+honor+of+title+ix+anniversary+ncaa+urges+department+of+education+to+rescind+additional+clarification+of+federal+law (last accessed June 3, 2010).

32 Michael Dobbs, *Title IX Web Surveys Criticized by NCAA*, WASH. POST, Mar. 24, 2005, *available at* <http://www.washingtonpost.com/wp-dyn/articles/A61507-2005Mar23.html> (last accessed August 13, 2010).

33 GAVORA, *supra* note 6, at 77-78.

34 *Id.* at 143.

35 Inst. of Educ. Scis., U.S. Dep't of Educ., Digest of Education Statistics, Table 147 (2007) ("Percentage of High School Sophomores Who Participate in Various School-sponsored Extracurricular Activities, by Selected Student Characteristics: 1990 and 2002"), *available at* http://nces.ed.gov/programs/digest/d07/tables/dt07_147.asp (last accessed Aug. 13, 2010).

36 The universities that have done so include the University of Maryland and Seton Hall University. See Posting of Marc Edelman to Above the Law, Sports and the Law: Can Schools 'Cheer' Their Way Into Title IX Compliance?, <http://abovethelaw.com/2009/02/sports-and-the-law-can-schools-cheer-their-way-into-title-ix-compliance/> (Feb. 4, 2009, 13:59 ET). So has Baylor University in Texas. See *Baylor: Competitive Cheer Compliant with Title IX*, WACO TRIBUNE-HERALD, *available at* <http://www.wacotrib.com/sports/baylor/99078104.html> (last accessed August 13, 2010).

37 See, e.g., *Biedinger v. Quinnipiac University*, No. 3:09cv21 (D. Conn. July 21, 2010).

38 See, e.g., Frank Deford, *Women's Sports, Title IX, and the Cheerleader Option*, National Public Radio, Nov. 25, 2009, *available at* <http://www.npr.org/templates/story/story.php?storyId=120766782> (last accessed July 26, 2010).

39 Quoted in Wayne Drehs, *Athletes Are Cheerleaders, Too*, ESPN.COM *available at* <http://sports.espn.go.com/espn/page2/story?page=drehs/040316> (last accessed August 5, 2010).

40 See, e.g., Deanna Harvey, *Federal Judge Who Rules Cheerleading Not a Sport Under Title IX Should Toss His Decision*, N.Y. DAILY NEWS, July 22, 2010.

41 *Biedinger v. Quinnipiac University*, No. 3:09cv21 (D. Conn. July 21, 2010).

42 *Id.* at 53.

43 *Id.*

44 *Id.* at 65.

CORPORATIONS, SECURITIES & ANTITRUST

THE CORPORATE GOVERNANCE PROVISIONS OF DODD-FRANK

*By Stephen Bainbridge**

In response to the financial crisis of 2007-2008, Congress passed The Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank" or "the Act").¹ Most of the Act deals with financial regulation. Six provisions of the Act, however, impose new corporate governance regulations not just on Wall Street banks but also on all Main Street public corporations. A seventh provides limited regulatory relief from § 404 of Sarbanes-Oxley² for the smallest public corporations.

1. Section 951 creates a so-called "say on pay" mandate, requiring periodic shareholder advisory votes on executive compensation.
2. Section 952 mandates that the compensation committees of reporting companies must be fully independent and that those committees be given certain specified oversight responsibilities.
3. Section 953 directs that the SEC require companies to provide additional disclosures with respect to executive compensation.
4. Section 954 expands Sarbanes-Oxley Act's rules regarding clawbacks of executive compensation.
5. Section 971 affirms that the SEC has authority to promulgate a so-called "shareholder access" rule pursuant to which shareholders would be allowed to use the company's proxy statement to nominate candidates to the board of directors.
6. Section 972 requires that companies disclose whether the same person holds both the CEO and Chairman of the Board positions and why they either do or do not do so.
7. Section 989G affords small issuers an exemption from the internal controls auditor attestation requirement of Section 404(b) of the Sarbanes-Oxley Act.

Compared to some of the proposals floated in Congress following the 2007-2008 financial crisis, Dodd-Frank's corporate governance provisions were relatively modest. Senators Maria Cantwell's and Charles Schumer's Shareholder Bill of Rights, for example, would have mandated the use of majority voting in the election of directors.³ It also would have banned the use of staggered boards of directors and required creation of board-level risk management committees.⁴ None of these provisions made it into the final Dodd-Frank Act. Other provisions of the Cantwell-Schumer bill made it into Dodd-Frank only in a much weakened form. Instead of instructing the SEC to adopt a proxy access rule, Dodd-Frank merely affirms that the SEC has authority to do so.⁵ Instead of requiring that companies separate the positions of CEO and Chairman

of the Board, with the latter being an independent director, Dodd-Frank merely requires companies to disclose their policy with respect to filling those positions.⁶ Even so, however, the remaining provisions impose important new duties and expand the federal regulatory role in corporate governance.

Say on Pay

Dodd-Frank § 951 creates a new § 14A of the Securities Exchange Act, pursuant to which reporting companies must conduct a shareholder advisory vote on specified executive compensation not less frequently than every three years.⁷ At least once every six years, shareholders must vote on how frequently to hold such an advisory vote (i.e., annually, biannually, or triennially).⁸ The compensation arrangements subject to the shareholder vote are those set out in Item 402 of Regulation S-K.⁹ In addition, a shareholder advisory vote is required with respect to golden parachutes.¹⁰

The vote must be tabulated and disclosed, but is not binding on the board of directors.¹¹ Indeed, the Act makes clear that the vote shall not be deemed either to effect or affect the fiduciary duties of directors.¹² Accelerated and large accelerated filers must describe in their compensation disclosure and analysis whether and how their compensation policies and decisions take into account the results of the say on pay vote.

A proposed SEC rule mandates that proxy statements must provide shareholders with the choice of selecting one, two, or three years, or to abstain. The company's board of directors may include a recommendation as to which frequency shareholders should choose.

Curiously, the Act does not specify whether the "say when on pay" vote on how frequently the shareholder say on pay vote must be taken will be binding on the board. A proposed SEC rule would require the company to disclose whether it will treat the frequency vote as non-binding. The company must disclose the results of the vote and its decision as to the frequency of say on pay votes in its next quarterly or annual report.

The Act gives the SEC power to create exemptions. The SEC is specifically directed to evaluate the impact of the say on pay rule on small issuers.¹³

The effectiveness of say on pay is highly contested. The Senate committee report argued that:

The UK has implemented "say on pay" policy. Professor John Coates in testimony for the Senate Banking Committee stated that the UK's experience has been positive; "different researchers have conducted several investigations of this kind . . . These findings suggest that say-on-pay legislation would have a positive impact on corporate governance in the U.S. While the two legal contexts are not identical, there is no evidence in the existing literature to suggest that the differences would turn what would be a good idea in the UK into a bad one in the U.S."¹⁴

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In contrast, Professor Jeffrey Gordon argues that the U.K. experience with say on pay makes a mandatory vote a “dubious choice.”¹⁵ First, because individualized review of compensation schemes at the 10,000-odd U.S. reporting companies will be prohibitively expensive, activist institutional investors will probably favor only a narrow range of compensation programs, that will tend to push companies toward a one-size-fits-all model.¹⁶ Second, because many institutional investors rely on proxy advisory firms, a very small number of gatekeepers will wield undue influence over compensation.¹⁷ This likely outcome seriously undercuts the case for say on pay. Although proponents of say on pay claim it will help make management more accountable, they ignore the probability that say on pay really will shift power from boards of directors not to shareholders but to advisory firms like RiskMetrics.¹⁸ There is good reason to think that boards are more accountable than those firms. “The most important proxy advisor, RiskMetrics, already faces conflict issues in its dual role of both advising and rating firms on corporate governance that will be greatly magnified when it begins to rate firms on their compensation plans.”¹⁹ Ironically, the only constraint on RiskMetrics’ conflict is the market—i.e., the possibility that they will lose credibility and therefore customers—the very force most shareholder power proponents claim doesn’t work when it comes to holding management accountable.²⁰

As for the U.K. experience, Gordon’s review of the empirical evidence finds that shareholders almost invariably approve the compensation packages put to a vote.²¹ He further finds that while there is some evidence that pay for performance sensitivity has increased in the U.K., executive compensation has continued to rise “significantly” there.²² Indeed, the growth rate for long-term incentive plans has been “higher” than in the U.S.²³

Gordon concludes “that ‘say on pay’ has some downsides even in the United Kingdom, downsides that would be exacerbated by a simple transplant into the United States.”²⁴ He recommended that any federal rule be limited to an opt-in regime or, if some form of mandatory regime was politically necessary, that it be limited to the very largest firms.²⁵ Gordon’s proposal finds support in a recent behavioral economics laboratory experiment finding that say on pay has a more positive impact on investors when it is voluntarily effected by companies than when it is mandated.²⁶ As we have seen, however, Congress went in a different direction.

Compensation Committees

Section 952 of Dodd-Frank contains a number of provisions relating to compensation committees, including:

- The SEC is to adopt rules prohibiting the stock exchanges and NASDAQ (collectively self-regulatory organizations) from listing any issuer that does not comply with specified requirements relating to the independence of compensation committee members.
- The SEC is to direct the self-regulatory organizations to adopt listing standards requiring that each member of an issuer’s compensation committee be independent.²⁷

- The SEC is to adopt rules requiring that the self-regulatory organizations consider certain factors in defining what constitutes independence in connection with compensation committee membership. These include the source of the director’s total compensation, including such items as consulting, advisory, or other fees, and whether the director is affiliated with the company, any of its subsidiaries, or any of its other affiliates. Beyond this, however, the self-regulatory organizations are allowed to develop their own definition of independence.
- The compensation committee must have authority to retain at company expense independent legal and other advisors, including compensation consultants.
- The committee is to be solely responsible for selecting, retaining, and determining the compensation of such advisors.
- If a compensation consultant is retained, the proxy statement must so disclose, as well as disclosing any conflicts of interest raised thereby.

Curiously, there is disagreement as to whether Section 952 mandates that SRO listing standards require all listed companies to have an independent compensation committee. The relevant section, parsed of exceptions, provides that:

The Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any equity security of an issuer . . . that does not comply with the requirements of this subsection.

Nothing in that provision nor anything else in Section 952 mandates expressly the use of compensation committees. Instead, it says that a compensation committee must be independent.

The key issue here relates to NASDAQ-listed companies. NASDAQ listing standard 5605(d) requires executive officer compensation decisions to be made by independent directors. Under the rule, this can be done either by a majority of the independent directors, or by a committee comprised solely of independent directors. If the company chooses to rely on a vote of a majority of the independent directors, the independent directors must meet alone in executive session to make these decisions. The plain text of § 952 does not appear to require a company making use of this option to create a compensation committee.

Commentators differ on the issue.²⁸ Dorsey & Whitney lawyers Thomas Martin and Kimberley Anderson, for example, opine that “Section 952 of the Act requires the SEC to adopt, on or before July 16, 2011, a rule that will prohibit the listing of issuers that do not have independent compensation committees.” In contrast, King & Spalding lawyers Kenneth Rasking and Laura Westfall opine that “Section 952 does not require companies to have compensation committees, but does require existing compensation committees to meet its ‘independence’ criteria.” A Paul Weiss client memo likewise states that “[w]hile the Act does not require companies to have compensation committees per se (meaning, for example,

that NASDAQ companies that do not have compensation committee structures may be able to continue that practice pending further rulemaking from the exchange), those companies that do must have fully independent committees.”

The Act authorizes self-regulatory organizations to adopt exemptions from the independence requirement. In addition, the Act itself excludes a number of categories of issuers, including controlled companies, limited partnerships, issuers in bankruptcy proceedings, open-end investment companies, and foreign private issuers that annually disclose why they do not have an independent compensation committee.

Proponents argued that Congress should “ensure that compensation committees are free of conflicts and receive unbiased advice.”²⁹ If the Act is read to require that all public corporations must have an independent compensation committee, however, it will do so without support in the empirical literature. Most empirical studies have rejected the hypothesis that compensation committee independence is positively correlated with firm performance or with improved CEO compensation practices.³⁰

Section 952 also requires the SEC to adopt rules requiring that compensation committees take into consideration specified factors in determining whether a compensation consultant is independent of management. These include other services provided to the issuer by the consultants, the percentage of the consultant firm’s income received from the company, adequacy of the consultant firm’s conflict of interest policies, whether the consultant owns stock in the company, and any relationship between the consultant and a member of the committee.

Pay Disclosures

Section 953 requires that each reporting company’s annual proxy statement must contain a clear exposition of the relationship between executive compensation and the issuer’s financial performance. The disclosure must give investors an easy way of comparing executive compensation and firm performance over time. The proxy statement also must disclose whether employees are allowed to hedge the value of company stock they own.

One aspect of § 953 likely to prove particularly problematic is the requirement that companies disclose “the median of the annual total compensation of all employees of the issuer” except the CEO, the CEO’s annual total compensation, and the ratio of the two amounts.³¹ This requirement is expected to be hugely burdensome:

[It] means that for every employee, the company would have to calculate his or her salary, bonus, stock awards, option awards, nonequity incentive plan compensation, change in pension value and nonqualified deferred compensation earnings, and all other compensation (e.g., perquisites). This information would undoubtedly be extremely time-consuming to collect and analyze, making it virtually impossible for a company with thousands of employees to comply with this section of the Act.³²

“The rules’ complexity means multinationals face a ‘logistical nightmare’ in calculating the ratio, which has to be based on the median annual total compensation for all employees,

warned Richard Susko, partner at law firm Cleary Gottlieb. ‘It’s just not do-able for a large company with tens of thousands of employees worldwide.’”³³

Compensation Clawbacks

Under Sarbanes-Oxley § 304, in the event a corporation is obliged to restate its financial statements due to “misconduct,” the CEO and CFO must return to the corporation any bonus, incentive, or equity-based compensation they received during the twelve months following the original issuance of the restated financials, along with any profits they realized from the sale of corporate stock during that period. Dodd-Frank significantly expands this provision.

Dodd-Frank § 954 adds a new § 10D to the Securities Exchange Act, pursuant to which the SEC is instructed to direct the self-regulatory organizations to require their listed companies to disclose company policies for clawing back incentive-based compensation paid to current or former executive officers in the event of a restatement of the company’s financials due to material non-compliance with any federal securities law financial reporting requirement.³⁴ Issuers failing to adopt such a policy must be delisted.³⁵ The requisite policy must provide for clawing back any “excess” compensation any such executive officer received during the three-year period prior to the date on which the issuer was obliged to issue the restatement.³⁶ Excess compensation is defined as the difference between what the executive was paid and what the executive would have received if the financials had been correct.³⁷

Critics identify a number of concerns raised by § 954. On the one hand, as a deterrent to financial reporting fraud and error, it is over-inclusive. It encompasses all executive officers, without regard to their responsibility or lack thereof for the financial statement in question. Some innocent executives therefore will have to forfeit significant amounts of pay. On the other hand, it is under-inclusive. Executive officers include an issuer’s “president, any vice president . . . in charge of a principal business unit, division or function . . . , any other officer who performs a policy making function or any other person who performs similar policy making functions. . . .”³⁸ As the Senate committee acknowledged, the policy therefore applies only to a “very limited number of employees. . . .”³⁹ The trouble with this limitation is that “decisions of individuals such as proprietary traders, who may well not be among” an issuer’s executive officers nevertheless “can adversely affect, indeed implode, a firm.”⁴⁰

Another concern is the high probability of unintended consequences. In response to Sarbanes-Oxley’s much narrower clawback provision, “companies increased non-forfeitable, fixed-salary compensation and decreased incentive compensation, thereby providing insurance to managers for increased risk.”⁴¹ Because current federal policy seeks to promote pay for performance, mandatory clawbacks undermine that goal.⁴² There is a significant risk, moreover, that other unintended consequences will develop in light of the “many ambiguities in the legislative language which will have to be clarified in implementing SEC regulations, e.g. is it retroactive, how to calculate recoverable amount, the dates during which the recovery must be sought.”⁴³

Proxy Access

Dodd-Frank § 971 affirms that the SEC has authority to adopt a proxy access rule.⁴⁴ At the same time, however, the legislative history makes clear that Congress intends that the SEC “should have wide latitude in setting the terms of such proxy access.”⁴⁵ In particular, § 971 expressly authorizes the SEC to exempt “an issuer or class of issuers” from any proxy access rule and specifically requires the SEC to “take into account, among other considerations, whether” proxy access “disproportionately burdens small issuers.”⁴⁶

Section 971 probably was unnecessary. An SEC rulemaking proceeding on proxy access was well advanced long before Dodd-Frank was adopted, so a shove from Congress was superfluous. Although the SEC lacks authority to regulate the substance of shareholder voting rights proxy access almost certainly fell within the disclosure and process sphere over which the SEC has unquestioned authority.⁴⁷ By adopting § 971, however, Congress did preempt an expected challenge to any forthcoming SEC regulation.

On August 25, 2010, just a few weeks after Dodd-Frank became law, the SEC adopted Rule 14a-11, which will require companies to include in their proxy materials, alongside the nominees of the incumbent board, the nominees of shareholders who own at least three percent of the company’s shares and have done so continuously for at least the prior three years.⁴⁸ A shareholder may not use the rule to take over the company. Instead, the shareholder is limited to putting forward a short slate consisting of at least one nominee or up to twenty-five percent of the company’s board of directors, whichever is greater.⁴⁹ Application of the rule to small companies will be deferred for three years, while the SEC studies its impact on them.⁵⁰

Proxy access has been highly controversial. As SEC Commissioner Troy Paredes pointed out in dissenting from adoption of new Rule 14a-11, proxy access marks a considerable displacement of state corporate law by federal securities regulation:

Rule 14a-11’s immutability conflicts with state law. Rule 14a-11 is not limited to facilitating the ability of shareholders to exercise their state law rights, but instead confers upon shareholders a new substantive federal right that in many respects runs counter to what state corporate law otherwise provides.⁵¹

Commissioner Paredes further pointed out that:

The mixed empirical results do not support the Commission’s decision to impose a one-size-fits-all minimum right of access. Some studies have shown that certain means of enhancing corporate accountability, such as de-staggering boards, may increase firm value, but these studies do not test the impact of proxy access specifically. Accordingly, what the Commission properly can infer from these data is limited and, in any event, other studies show competing results. Recent economic work examining proxy access specifically is of particular interest in that the findings suggest that the costs of proxy access may outweigh the potential benefits, although the

results are not uniform. The net effect of proxy access—be it for better or for worse—would seem to vary based on a company’s particular characteristics and circumstances.

To my mind, the adopting release’s treatment of the economic studies is not evenhanded. The release goes to some length in questioning studies that call the benefits of proxy access into doubt—critiquing the authors’ methodologies, noting that the studies’ results are open to interpretation, and cautioning against drawing “sharp inferences” from the data. By way of contrast, the release too readily embraces and extrapolates from the studies it characterizes as supporting the rulemaking, as if these studies were on point and above critique when in fact they are not.⁵²

SEC Commissioner Kathleen Casey pointed out in her dissent that the new rule favors activist investors who may seek to use the new access rights to engage in private rent seeking:

The paradigm of a power struggle between directors and shareholders is one that activist, largely institutional, investors assiduously promote, and this rule illustrates a troubling trend in our recent and ongoing rulemaking in favor of empowering these shareholders through, among other things, increasingly federalized corporate governance requirements. Yet, these shareholders do not necessarily represent the interests of all shareholders, and the Commission betrays its mission when it treats these investors as a proxy for all shareholders.⁵³

A legal challenge by the U.S. Chamber of Commerce to the administrative process by which the SEC adopted proxy access is currently pending and the SEC has stayed implementation of the rule until the 2012 proxy season to provide an adequate opportunity for the challenge to be resolved.

Board Structure Disclosure

Section 972 directs the SEC to adopt a new rule requiring reporting companies to disclose whether the same person or different persons holds the positions of CEO and Chairman of the Board.⁵⁴ In either case, the company must disclose its reasons for doing so.

“The legislation does not endorse or prohibit either method.”⁵⁵ Instead, Dodd-Frank opted for disclosure rather than a substantive mandate that the two positions be separated. It did so presumably because the evidence on the merits of separating the two positions is mixed, at best:

At least 34 separate studies of the differences in the performance of companies with split vs. unified chair/CEO positions have been conducted over the last 20 years, including two “meta-studies.” . . . The only clear lesson from these studies is that there has been no long-term trend or convergence on a split chair/CEO structure, and that variation in board leadership structure has persisted for decades, even in the UK, where a split chair/CEO structure is the norm.⁵⁶

Unfortunately, however, some activist investors hope that the provision will shame companies into separating the two positions:

Mr. Joseph Dear, Chief Investment Officer of the California Public Employees' Retirement System, on behalf of the Council of Institutional Investors, wrote in testimony for the Senate Banking Committee that "Boards of directors should be encouraged to separate the role of chair and CEO, or explain why they have adopted another method to assure independent leadership of the board."⁵⁷

Section 404 Relief

Sarbanes-Oxley § 404(a) ordered the SEC to adopt rules requiring reporting companies to include in their annual reports a statement of management's responsibility for "establishing and maintaining an adequate internal control structure and procedures for financial reporting" and "an assessment, as of the end of the most recent fiscal year of the issuer, of the effectiveness of the internal control structure and procedures of the issuer for financial reporting." Section 404(b) required that the company's independent auditors attest to and report on management's assessment.

A 2005 survey put the direct cost of complying with § 404 in its first year at \$7.3 million for large accelerated filers and \$1.5 million for accelerated filers.⁵⁸ "First-year implementation costs for larger companies were thus eighty times greater than the SEC had estimated, and sixteen times greater than estimated for smaller companies."⁵⁹ While some of these costs were one-time expenditures, other SOX compliance costs recur annually.

Section 404 compliance costs are disproportionately borne by smaller public firms. Director compensation at small firms increased from \$5.91 paid to non-employee directors on every \$1,000 in sales in the pre-SOX period to \$9.76 on every \$1000 in sales in the post-SOX period. In contrast, large firms incurred thirteen cents in director cash compensation per \$1,000 in sales in the pre-SOX period, which increased only to fifteen cents in the post-SOX period. Likewise, companies with annual sales less than \$250 million incurred \$1.56 million in external resource costs to comply with § 404. In contrast, firms with annual sales of \$1-2 billion incurred an average of \$2.4 million in such costs. Accordingly, while SOX compliance costs do scale, they do so only to a rather limited extent.

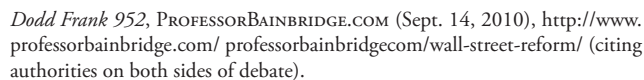
Dodd-Frank § 989H permanently exempted nonaccelerated filers from compliance with the auditor attestation requirement of Section 404(b). The Act further "directs the SEC to conduct a study within the next nine months to determine how the burden of compliance with Section 404(b) could be reduced for companies with market capitalizations between \$75 million and \$250 million."⁶⁰

Conclusion

Dodd-Frank marks an important expansion of the federal role in regulating corporate governance. The new provisions will have important consequences not only for the Wall Street firms that were at the heart of the recent financial crisis, but also for all publicly traded Main Street firms.

Endnotes

- 1 The Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter cited as "Dodd Frank"].
- 2 The Public Company Accounting Reform and Investor Protection Act, Pub. L. No. 107-204, 2002 U.S.C.C.A.N. (116 Stat.) 745 (codified in scattered sections of 15 and 18 U.S.C.).
- 3 Press Release, Sen. Charles E. Schumer, Schumer, Cantwell Announce 'Shareholder Bill of Rights' to Impose Greater Accountability on Corporate America (May 19, 2009) [hereinafter cited as "Press Release"], available at http://schumer.senate.gov/new_website/record.cfm?id=313468. Specifically, they proposed that nominees to the board of directors would have "board directors to receive at least 50% of the vote in uncontested elections in order remain on the board." *Id.*
- 4 *Id.* Dodd-Frank § 165 does mandate risk management committees, but only for non-bank financial services companies supervised by the Federal Reserve and bank holding companies.
- 5 Compare Dodd-Frank § 971 (affirming authority), with Press Release, *supra* note 3 (mandating adoption).
- 6 Compare Dodd-Frank § 972 (requiring disclosure), with Press Release, *supra* note 3 (mandating separation).
- 7 Dodd-Frank § 951.
- 8 *Id.*
- 9 See *id.* (requiring a vote "to approve the compensation of executives, as disclosed pursuant to section 229.402 of title 17, Code of Federal Regulations, or any successor thereto").
- 10 See *id.*
- 11 S. Rep. No. 111-176, at 133.
- 12 Dodd-Frank § 951, to be codified at 15 U.S.C. 78n-1.
- 13 *Id.*
- 14 S. Rep. No. 111-176, at 134.
- 15 Jeffrey N. Gordon, "Say on Pay": Cautionary Notes on the U.K. Experience and the Case for Shareholder Opt-in, 46 HARV. J. LEGIS. 323, 325 (2009).
- 16 *Id.*
- 17 *Id.* at 326.
- 18 See Stephen M. Bainbridge, *Will the Unaccountable Power of RiskMetrics Put Teeth in the Dodd Bill's Say on Pay Provision?*, PROFESSORBAINBRIDGE.COM (Apr. 22, 2010), <http://www.professorbainbridge.com/professorbainbridge.com/2010/04/will-the-unaccountable-power-of-risk-metrics-put-teeth-in-the-dodd-bills-say-on-pay-provision.html> (making this point).
- 19 Gordon, *supra* note 15, at 326.
- 20 See Bainbridge, *supra* note 18 (making this point).
- 21 See Gordon, *supra* note 15, at 341 (explaining that "shareholders invariably approve the Directors Remuneration Report, with perhaps eight turn downs across thousands of votes over a six-year experience"). The same is true of the limited U.S. experience with voluntary say on pay. See *id.* at 339 ("The number of proposals grew only moderately [in 2008], to seventy, and the level of shareholder support has remained at the same level, approximately forty-two percent.").
- 22 *Id.* at 341.
- 23 *Id.* at 344.
- 24 *Id.* at 367.
- 25 See *id.* (setting out recommendations).
- 26 KENDALL O. BOWLIN ET AL., SAY-ON-PAY AND THE DIFFERENTIAL EFFECTS OF VOLUNTARY VERSUS MANDATORY REGIMES ON INVESTOR PERCEPTIONS AND BEHAVIOR (Aug. 16, 2010), available at <http://ssrn.com/abstract=1659862>.
- 27 Dodd-Frank § 952(a).
- 28 See Stephen M. Bainbridge, *A Question re Compensation Committees Under*



ENVIRONMENTAL LAW & PROPERTY RIGHTS

THE SACRAMENTO-SAN JOAQUIN DELTA LITIGATION: A BRIEF SUMMARY

By *Brandon M. Middleton**

California's Sacramento-San Joaquin Delta serves as a dynamic ecosystem as well as a critical supply of water for millions of people in the Golden State. While these two purposes do not necessarily conflict with each other, recent periods of limited precipitation in Northern California have made it difficult to adequately provide for both environmental and socioeconomic needs.

When either environmental interests or agricultural and municipal water users receive less Delta water than they anticipate, litigation often follows. The latest litigation concerning the Delta and the intersection of human and environmental needs is currently taking place in Fresno before Judge Oliver W. Wanger of the Eastern District of California.

In *The Consolidated Delta Smelt Cases*, water users are challenging the United States Fish and Wildlife Service's ("FWS") conclusions regarding the effects state and federal water projects have on the delta smelt, a threatened species under the federal Endangered Species Act ("ESA").¹ In *The Consolidated Salmonid Cases*, water users have brought a similar challenge against the National Marine Fisheries Service's ("NMFS") conclusions on the effects the projects have on Chinook salmon, green sturgeon, and other federally-protected aquatic species.²

In each case, the federal government has issued a biological opinion under the ESA that restricts the amount of water that can be delivered to farmers in the San Joaquin Valley and urban water users in Southern California.³ According to the government, these restrictions are necessary to protect the endangered fish species from harm resulting from the operation of the state and federal projects' water pumps, which are located in the southern part of the Delta.

The farmers, urban water users, and their respective water districts contend as plaintiffs that the restrictions are illegal for several reasons, including that they violate the ESA's mandate that biological opinions be completed by using the best scientific and commercial data available, that the government failed to consider the economic and technological feasibility of the biological opinions' restrictions, and that the conclusions supporting the restrictions are internally inconsistent. They contend further that the government failed to adequately consider the effects that other factors besides the pumps have on the species. These factors include predation, invasive species, and pollution, among others.

Judge Wanger has recognized the significant impact the federal government's decision to restrict water deliveries has

had on communities in the San Joaquin Valley and Southern California: "The stakes are high, the harms to the affected human communities great, and the injuries unacceptable if they can be mitigated."⁴ In addition, on December 14, 2010, the court in *The Consolidated Delta Smelt Cases* granted the plaintiffs summary judgment on many of their ESA and Administrative Procedure Act claims, remanding the delta smelt biological opinion back to FWS.⁵

Even before this recent summary judgment ruling, however, the court had rendered conclusions of law with respect to several important issues that may have a significant impact on environmental litigation in the years to come. Three rulings stand out: the court's holding that the biological opinions were implemented in violation of the National Environmental Policy Act ("NEPA"),⁶ its decision to balance competing hardships in considering preliminary injunctive relief,⁷ and its conclusion that the delta smelt restrictions do not exceed the federal government's Commerce Clause authority.⁸ A brief summary of each ruling follows.

I. The Federal Government's Implementation of the Biological Opinions Violates NEPA

Several of the plaintiffs in *The Consolidated Delta Smelt Cases* and *The Consolidated Salmonid Cases* alleged that the biological opinions and the resulting water restrictions did not comply with NEPA. All parties agreed that no NEPA documentation was prepared by federal agencies in charge of issuing (FWS and NMFS) and implementing (United States Bureau of Reclamation) the biological opinions.

NEPA requires federal agencies to prepare an Environmental Impact Statement in order to assess the potential environmental consequences of proposed "major Federal actions significantly affecting the quality of the human environment."⁹ Although NEPA is a procedural statute and does not mandate a particular result for an agency action, the Supreme Court has noted that NEPA ensures that agencies "have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."¹⁰ A holding that the federal agencies in charge of issuing and implementing the biological opinions are bound by NEPA would thus provide a significant benefit to water users because it would ensure, in the words of a pertinent Ninth Circuit decision, "a democratic decisionmaking structure . . . that is 'almost certain to affect the agency's substantive decision.'"¹¹

The court in the Delta litigation first considered whether any federal agency conducted major federal action under NEPA, commenting that the issue of which agency is subject to NEPA "is not a shell game in which the agencies may leave the public to guess which agency has taken major federal action."¹² According

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to the court, Reclamation's implementation of each biological opinion was major federal action because it substantially altered the status quo of the water projects' delivery operations. As the court noted, water delivery operations must be materially changed to restrict project water flows to protect smelt, salmon, and other species analyzed in the biological opinions.¹³

The second issue for the plaintiffs' NEPA claim was whether Reclamation's implementation of the biological opinions resulted in significant environmental impacts. Throughout the litigation, the court has held in the affirmative, relying on the harm implementation of the biological opinions has brought to humans. The adverse human environmental impacts include destruction of permanent crops, fallowed lands, increased groundwater consumption, land subsidence, reduction of air quality, destruction of family and entity farming businesses, and social disruption and dislocation (such as increased property crime and intra-family crimes of violence, adverse effects on schools, and increased unemployment leading to hunger and homelessness).¹⁴

In light of these significant impacts and the lack of NEPA analyses for each biological opinion, the court concluded that the plaintiffs were entitled to summary judgment against Reclamation for the agency's failure to perform any NEPA review prior to provisionally adopting and implementing the biological opinions.¹⁵ The court later emphasized the importance of NEPA compliance when considering restriction of water deliveries for the purported benefit of endangered species: "Federal Defendants completely abdicated their responsibility to consider alternative remedies in formulating [a]ctions that would not only protect the species, but would also minimize the adverse impact on humans and the human environment."¹⁶ Judge Wanger expressed further concern that, although the government considered the effects water deliveries have on species, the burden of the other causes of the species' decline (including pollution and invasive species) "is allocated to the water supply, without the required analysis whether alternatives, less harmful to humans and the human environment, exist. Although this allocation of resources ultimately is the prerogative of the agency, NEPA nevertheless required a hard look."¹⁷

Reclamation's failure to comply with NEPA was one reason why the court later granted the plaintiffs preliminary injunctive relief over implementation of the biological opinions, as discussed below.

II. Judge Wanger Distinguishes *TVA v. Hill* and Grants the Plaintiffs Preliminary Injunctive Relief

In late 2009 and early 2010, implementation of the delta smelt and salmonid biological opinions prevented significant amounts of water from being delivered to the plaintiffs. With the final resolution of the Delta litigation still months away, the plaintiffs moved for preliminary injunctive relief.

Preliminary injunctive relief requires that the plaintiff demonstrate 1) a likelihood of success on the merits, 2) irreparable harm, 3) that the balance of hardships tips in the plaintiff's favor, and 4) that injunctive relief is in the public interest.¹⁸ The NEPA claim discussed above demonstrated success on the merits, and the court likewise held that plaintiffs

were likely to succeed on some of their ESA claims as well. Further, irreparable harm was clear in that plaintiffs were losing water that would have been delivered to them but for the implementation of the biological opinions.¹⁹

But the plaintiffs were also required to show that the balance of hardships tipped in their favor and that the public interest favored injunctive relief. Despite the benefit that an increased water supply would provide to the plaintiffs, these were difficult showings to make because the water restrictions were intended to protect endangered species. For example, in *TVA v. Hill*, the Supreme Court enjoined a federal dam project that would have eradicated the snail darter species, holding that Congress struck the balance in favor of affording species the highest of priorities.²⁰ In so doing, the Court declared that Congress' intent in enacting the ESA was to "halt and reverse the trend toward species extinction, whatever the cost."²¹

The plaintiffs faced a significant hurdle in that prior decisions involving the water projects in the Delta litigation found that *TVA* forecloses a court's traditional equitable discretion to consider economic hardship when balancing competing injuries.²² Ninth Circuit precedent on preliminary injunctive relief in cases involving endangered species was also not favorable.²³

Nonetheless, Judge Wanger found that a balance of hardships was appropriate in light of the significant harm to human welfare that was occurring under the implementation of the biological opinions.²⁴ The court reasoned that while *TVA* "concerned the competing economic interest in the operation of a hydro-electric project and prohibited federal courts from balancing the loss of funds spent on that project against the loss of an endangered species," no case addressed "whether the ESA precludes balancing of harms to humans and the human environment under the circumstances presented here."²⁵ According to the court, "Congress has not nor does *TVA v. Hill* elevate species protection over the health and safety of humans."²⁶ More precisely, the argument that *TVA v. Hill* "precludes equitable weighing of Plaintiffs' interests is not supported by that case, as evidence of harm to the human environment in the form of social dislocation, unemployment, and other threats to human welfare were not present in *Hill*. They are in this case."²⁷

The court determined further that preliminary injunctive relief was in the public interest due to the same human hardships discussed in its NEPA analysis, including the destruction of permanent crops, fallowed lands, reduced groundwater supplies, and destruction of family and entity farming businesses.²⁸ As Judge Wanger wrote in his preliminary injunction decision, "[n]o party has suggested that humans and their environment are less deserving of protection than the species. Until Defendant Agencies have complied with the law, some injunctive relief . . . may be appropriate, so long as it will not further jeopardize the species or their habitat."²⁹

After the issuance of the preliminary injunction decision, the parties in the Delta litigation entered into a temporary agreement that provided certain water flow levels for the state and federal projects while providing specific conditions under which those flows could be decreased in order to protect species as necessary.³⁰

III. Court Upholds Delta Smelt Restrictions Under Commerce Clause

The plaintiffs in *Stewart & Jasper Orchards v. Salazar*, one of the lawsuits in *The Consolidated Delta Smelt Cases*, have alleged that the Fish and Wildlife Service's delta smelt water restrictions exceed the scope of the federal government's commerce power.³¹ The Commerce Clause, of course, authorizes Congress to "regulate Commerce . . . among the several states."³² This authority includes the power to regulate activities that substantially affect interstate commerce.³³

Under the Supreme Court's decisions in *United States v. Lopez*³⁴ and *United States v. Morrison*,³⁵ courts must consider four factors in order to determine whether an activity substantially affects interstate commerce such that it is subject to federal regulation. The first factor is whether the activity is economic in nature. Second, courts look for a "jurisdictional element" in the authorizing statute that helps ensure on a case-by-case basis that the federal regulation is one of an activity that substantially affects interstate commerce. Third, courts examine the legislative history of the statute to locate any express congressional findings that demonstrate Congress' belief that the activity being regulated under the Commerce Clause substantially affects interstate commerce. The final factor is whether the connection between a regulated activity and the activity's effect upon interstate commerce is attenuated.³⁶ In addition, the Supreme Court held in *Gonzales v. Raich* that the regulation of a local, noncommercial activity satisfies the "substantial effects" test if it is done pursuant to "a statute the regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative interstate market."³⁷

According to the plaintiffs in *Stewart & Jasper*, the delta smelt's status as a noncommercial, intrastate fish—the smelt has no commercial value and is found only in California—demonstrates that smelt-based water restrictions are not a regulation of interstate commerce or of an activity that substantially affects interstate commerce.

No court has invalidated federal regulation of a noncommercial, intrastate species on Commerce Clause grounds. However, the five circuit courts that have considered this issue have offered different rationales for upholding federal authority over noncommercial, intrastate species.³⁸

For example, in *Rancho Viejo v. Norton*, the D.C. Circuit considered a Commerce Clause challenge to the application of the ESA to the arroyo toad and found a substantial effect on interstate commerce based on Rancho Viejo's "planned commercial development, not on the arroyo toad that it threatens."³⁹ Thus, under the D.C. Circuit's reading of the "substantial effects" test, whether an activity is economic in nature under the first *Lopez* and *Morrison* factor is determined by looking at the activity affected by a regulation (in *Rancho Viejo*, the ESA affected the construction of a housing development), not the activity regulated by the express terms of a statute (the ESA does not regulate commercial development generally but prohibits activities which result in the taking of endangered species like the arroyo toad).⁴⁰

The Fifth Circuit rejected this approach in *GDF Realty Inv. Ltd. v. Norton*, which concerned the ESA take provision's

constitutionality as applied to six species of subterranean invertebrates found only in two counties in Texas.⁴¹ In *GDF Realty*, the district court had held that the regulated activity in the "substantial effects" test was a commercial development, just as the D.C. Circuit had concluded in *Rancho Viejo*. But the Fifth Circuit rejected this rationale, noting that Congress, through the ESA, "is not directly regulating commercial development. To accept the district court's analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors."⁴² As the court explained, "[n]either the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that . . . Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in regulated activity will have some connection to interstate commerce."⁴³

Nonetheless, the Fifth Circuit offered a different approach for sustaining the regulation of Cave Species takes: "[The] ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other ESA takes."⁴⁴

The Eleventh Circuit issued a similar decision in *Alabama-Tombigbee Rivers Coal. v. Kempthorne*.⁴⁵ According to the court in *Tombigbee*, the ESA is a market regulatory scheme under *Raich* based on Congress' concern with the trade in endangered species as well as the potential commercial benefits that come with the preservation of biodiversity.⁴⁶ As the court saw it, "pharmaceuticals, agriculture, fishing, hunting, and wildlife tourism . . . fundamentally depend on a diverse stock of wildlife, and the Endangered Species Act is designed to safeguard that stock."⁴⁷

Judge Wanger relied heavily on *Tombigbee* in upholding the delta smelt restrictions against the *Stewart & Jasper* plaintiffs' Commerce Clause challenge, opining that "[t]he parallels between *Alabama-Tombigbee* and the [delta smelt] case are myriad, and the distinctions immaterial."⁴⁸ While Congress had multiple motivations for passing the ESA, including ethical and aesthetic considerations, the court held that the ESA is an economic regulatory scheme, given its "strong underpinnings in market regulation."⁴⁹ Echoing *ATRC*, the court left FWS's delta smelt restrictions in place: "Congress had a rational basis for believing that requiring federal agencies to evaluate the impacts of planned activities on all threatened or endangered species, regardless of their geographic range, was the most effective way to protect the commercial benefits of biodiversity."⁵⁰

The biodiversity rationale, however, is not without its flaws. As Judge Sentelle of the D.C. Circuit has explained, "[a] creative and imaginative court can certainly speculate on the possibility that any object cited in any locality no matter how intrastate or isolated might some day have a medical, scientific, or economic value which could then propel it into interstate commerce."⁵¹ But if such speculation could defeat a Commerce Clause challenge, "Congress could [not] be prohibited from regulating any action that might conceivably affect the number or continued existence of any item whatsoever," and congressional power would have "no stopping point."⁵²

In light of these criticisms, and with the circuit courts having "applied different, and, sometimes, clearly contradictory

rationales in order to justify federal regulation of endangered species,⁵³ the issue of whether the federal government may regulate noncommercial, intrastate species under the Commerce Clause is far from settled. The *Stewart & Jasper* plaintiffs have appealed Judge Wanger's Commerce Clause decision to the Ninth Circuit, asking the court to strike down the delta smelt regulations by holding that the ESA is not a market regulatory scheme.⁵⁴ Briefing in the Ninth Circuit appeal was completed this fall, with oral argument expected to occur in 2011.⁵⁵


Conclusion

The plaintiffs in the Delta litigation have obtained significant victories in their challenge to the federal government's Endangered Species Act biological opinions. The court's NEPA ruling and decision to apply traditional equitable standards in considering injunctive relief led to more water for users in the San Joaquin Valley and Southern California and gave the plaintiffs hope for further relief as the litigation progressed. Indeed, the plaintiffs ultimately prevailed on many of their claims in *The Delta Smelt Consolidated Cases*, as determined by the court's recent summary judgment decision. The court's summary judgment decision in *The Consolidated Salmonid Cases* is expected to occur in early 2011.

Endnotes

- 1 See *The Consolidated Delta Smelt Cases*, No. 1:09-cv-407 OWW DLB (E.D. Cal.).
- 2 See *The Consolidated Salmonid Cases*, No. 1:09-cv-1053 OWW DLB (E.D. Cal.).
- 3 While *The Consolidated Delta Smelt Cases* and *The Consolidated Salmonid Cases* are separate cases involving distinct biological opinions issued under the Endangered Species Act, the cases parallel each other with regard to certain legal issues. These issues include the federal government's obligations under the National Environmental Policy Act for the restriction of water deliveries under each biological opinion, as well as the standard for preliminary injunctive relief under the Endangered Species Act. Because the Eastern District of California's treatment of both of these issues is similar in each case, and as a courtesy to the reader, much of the summary below cites to the relevant parts of *The Consolidated Delta Smelt Cases* as a means to describe the Delta litigation generally, instead of discussing each case individually.
- 4 *The Consolidated Delta Smelt Cases*, No. 1:09-cv-407, 2010 U.S. Dist. LEXIS 62006, at *148 (E.D. Cal. May 27, 2010).
- 5 See *The Consolidated Delta Smelt Cases*, 2010 U.S. Dist. LEXIS 132819.
- 6 See *The Consolidated Delta Smelt Cases*, 686 F.Supp.2d 1026 (E.D. Cal. 2009); *The Consolidated Salmonid Cases*, 688 F.Supp.2d 1013 (E.D. Cal. 2010).
- 7 See *The Consolidated Delta Smelt Cases*, No. 1:09-cv-407, 2010 U.S. Dist. LEXIS 62006 (E.D. Cal. May 27, 2010); *The Consolidated Salmonid Cases*, No. 1:09-cv-1053, 2010 U.S. Dist. LEXIS 54937 (E.D. Cal. May 18, 2010).
- 8 See *The Consolidated Delta Smelt Cases*, 663 F.Supp.2d 922 (E.D. Cal. 2009).
- 9 42 U.S.C. § 4332(C).
- 10 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).
- 11 *Or. Natural Desert Ass'n. v. BLM*, 531 F.3d 1114, 1120 (9th Cir. 2008) (quoting *Methow Valley*, 490 U.S. at 350).
- 12 *The Consolidated Delta Smelt Cases*, 686 F.Supp.2d at 1044.

- 13 *Id.* at 1049.
- 14 *Id.* at 1044.
- 15 *The Consolidated Delta Smelt Cases*, 686 F.Supp.2d at 1051.
- 16 *The Consolidated Delta Smelt Cases*, 2010 U.S. Dist. LEXIS 62006 at *145.
- 17 *Id.*
- 18 See *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 374 (2008).
- 19 See *The Consolidated Delta Smelt Cases*, 2010 U.S. Dist. LEXIS 62006 at *95 ("Every acre-foot of pumping foregone during critical time periods is an acre-foot that does not reach the San Luis Reservoir where it can be stored for future delivery to users during times of peak demand in the water year.").
- 20 *TVA v. Hill*, 437 U.S. 153, 194 (1978).
- 21 *Id.* at 184.
- 22 Earlier in the Delta litigation, for example, Judge Wanger denied the plaintiffs' request for a temporary restraining order of the delta smelt biological opinion, holding that "*TVA v. Hill* and related Ninth Circuit authorities foreclose the district court's traditional discretion to balance equities under the ESA." *The Consolidated Delta Smelt Cases*, 693 F. Supp. 2d 1145, 1150 (E.D.Cal. 2010).
- 23 See, e.g., *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987) ("In Congress's view . . . the balance of hardships and the public interest tip heavily in favor of endangered species. We may not use equity's scales to strike a different balance.") (citing *TVA*, 437 U.S. at 187-88).
- 24 See *The Consolidated Delta Smelt Cases*, 2010 U.S. Dist. LEXIS 62006 at *141-43.
- 25 *Id.* at *142.
- 26 *Id.*
- 27 *Id.* at *146.
- 28 *Id.* at *144.
- 29 *Id.* at *148-49.
- 30 See Press Release, U.S. Department of the Interior, Interior, California, Water Users, and Environmental Groups Reach Agreement on CVP Operational Plan Protections for Imperiled Delta Smelt (June 23, 2010), available at <http://www.doi.gov/news/pressreleases/Interior-California-Water-Users-and-Environmental-Groups-Reach-Agreement-on-CVP-Operational-Plan-Protections-for-Imperiled-Delta-Smelt.cfm>.
- 31 See *The Consolidated Delta Smelt Cases*, 663 F.Supp.2d at 925.
- 32 U.S. CONST. art. I, § 8.
- 33 See, e.g., *United States v. Lopez*, 514 U.S. 549, 559 (1995).
- 34 514 U.S. 549 (1995).
- 35 529 U.S. 598 (2000).
- 36 See *Morrison*, 529 U.S. at 610-612.
- 37 *Gonzales v. Raich*, 545 U.S. 1, 26 (2005).
- 38 See *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Ala.-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007).
- 39 *Ranch Viejo*, 323 F.3d at 1072.
- 40 See 16 U.S.C. § 1538(a)(1)(B) ("It is unlawful for any person subject to the jurisdiction of the United States . . . to take any [endangered or threatened] species within the United States.").
- 41 See *GDF Realty*, 326 F.3d at 624.
- 42 *Id.* at 634.
- 43 *Id.*
- 44 *Id.* at 640.
- 45 477 F.3d 1250 (11th Cir. 2007).



47 *Id.*

48 The Delta Smelt Consolidated Cases, 663 F.Supp.2d at 945.

49 *Id.* at 947.

50 *Id.* at 948.

51 See *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1065 (D.C. Cir. 1997) (Sentelle, J., dissenting).

52 *Id.*

53 Bradford C. Mank, *After Gonzales v. Raich: Is the Endangered Species Act Constitutional Under the Commerce Clause?*, 78 U. COLO. L. REV. 375, 378 (2007).

54 The *Stewart & Jasper* plaintiffs' Ninth Circuit opening
brief may be downloaded at [http://plf.typepad.com/files/
july152010deltasmeltopeningbrief.pdf](http://plf.typepad.com/files/july152010deltasmeltopeningbrief.pdf).

55 The opening, answering, and reply briefs in the *Stewart & Jasper* plaintiffs' Commerce Clause appeal may be downloaded at: <http://community.pacificlegal.org/Page.aspx?pid=900>.



UNCHECKED DATA: A TOOL FOR POLITICAL CORRUPTION?

By Catherine Campbell Meshkin*

I. Global Warming

While the history of global warming dates back *ad infinitum*, for the purposes of this paper, we will begin the discussion in 2006. It was at this pivotal time that most Americans became interested in, and aware of, global warming. David Guggenheim directed the documentary “An Inconvenient Truth” about Al Gore’s campaign against carbon dioxide and its link to global warming. This movie, which won Guggenheim an Academy Award for Best Documentary Feature, has been credited for raising international awareness of climate change and reenergizing the environmental movement.¹ Throughout the world, schools have included the data in their science curriculum, and it is frequently referenced in political campaigns and debates.² In addition, Al Gore received further validation for his environmental work when he received the 2007 Nobel Peace Prize.³

For the American public, these concerns grew in 2005-06, when the Gulf Coast was hit by repeated record hurricanes such as Katrina, Gustav, Ike and others, while the West Coast experienced unprecedented wildfires. The nation began looking for answers.

Gore became a thought-leader on the subject. NASA climatologist James E. Hansen praised Gore, claiming that while some may attack his information, he will be remembered for providing the public with the information they need to distinguish long-term wellbeing from short-term special interests.⁴ Others, however, contended that the data underlying the film’s content was either unsound or went too far.⁵ Eric Steig, a scientific author, claimed, “[O]ne can neither see, nor detect . . . any evidence in Antarctica of the effects of the Clean Air Act.”⁶ MIT physicist Richard S. Lindzen wrote that Gore was using a biased presentation to exploit the fears of the public for his own political gain.⁷ Even film reviewers questioned the material, calling it “blatant intellectual fraud.”⁸

The White House is now implementing an unprecedented effort to regulate private industry and eliminate carbon emissions which, they assert, cause climate change. All of this is substantiated by their reliance on data from the EPA.⁹

However, the EPA’s evidence detailed health and safety concerns over greenhouse gasses and stirred a firestorm from Republicans.¹⁰ Republican Senators released a nine-page memorandum explaining that the EPA’s data was a compilation of opinions made by various federal agencies and departments.¹¹ When pressed, the White House Office of Management and Budget (OMB) said the cost critique came only from a single federal agency and did not reflect the Administration’s view.¹²

Under George W. Bush, comments from each agency regarding a proposal to use the Clean Air Act to regulate greenhouse gases were largely critical. The Bush White House ultimately decided against using the Clean Air Act, suggesting

that it would be an imperfect tool and would ultimately burden the economy.¹³ However, under the current Administration and Congress, the agency’s opinion has shifted. The Obama White House has called on Congress to pass comprehensive energy legislation that includes a market-based cap on carbon emissions that would transition the nation to a “clean energy economy” and assertedly create green jobs.¹⁴ However, Republicans contend that the EPA did not consider all relevant factors and question the reliability of the data, suggesting that “the EPA could have been more balanced in its analysis by also highlighting regions of the country that would benefit from global warming.”¹⁵

Some assert that the EPA stretched the precautionary principle to support regulation despite the “unprecedented uncertainty” linking emissions of greenhouse gases and warming. Senator John Barrasso, from Wyoming, who called the document a “smoking gun,” said the EPA’s decision was based more on political calculation than scientific ones and repeatedly questioned the lack of scientific data and support used for the proposed findings.¹⁶ EPA administrator Lisa Jackson responded by saying, “I have said over and over that we understand that there are costs of addressing global warming emissions and that the best way to address them is through a gradual move to a market-based program like cap and trade.”¹⁷

Outsiders not only question the data, but whether the EPA is the most appropriate group to disseminate the information. First, political appointees, often loyal to political ideology, oversee agencies. One example is President Obama’s appointment of Carol Browner, who previously served as Administrator of the EPA, and is now the Director of the White House Office of Energy and Climate Change Policy—an office created by President Obama to further the Administration’s environmental agenda.¹⁸ This new office and role in the Obama Administration does not receive, nor is required to receive, Senate confirmation.

Second, agencies often may not release information unfavorable to the Administration’s position. Dr. Alan Carlin, known for his expertise in global warming and climate research, and who has worked for the EPA since the Nixon Administration, wrote a ninety-eight-page report to a proposed EPA finding that challenged humanity’s role in climate change, and it was leaked to the press last year.¹⁹ An EPA official responded to a staff member’s email, which questioned the EPA data, in March 2009 by stating, “The administrator and administration have decided to move forward. . . . [Y]our comments do not help the legal or policy case for this decision.”²⁰ Carlin told CBS News that his boss was being pressured: “It was his view that he either lost his job or got me working on something else. . . . That was obviously coming from higher up.”²¹

The correspondence raises fundamental questions about political interference in what the law requires to be an independent review process inside a federal agency. According to the Associated Press, climate scientists at seven different

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governmental agencies have been subjected to political pressure aimed at downplaying the threat of global warming.²² The groups presented survey responses that showed that two in five of the 279 climate scientists complained that some of their scientific papers had been edited in a way that changed their meanings; and nearly half said that at some point they had been told to delete references from their reports.²³

A NEW YORK TIMES article claimed that climate scientist James E. Hansen, director of NASA's Goddard Institute for Space Studies, said that his superiors were trying to "censor" information that was disseminated to the public.²⁴ NASA denied this, asserting instead that they were enforcing long-standing governmental policies of protecting the information and their employees.²⁵ In 2008, a report by NASA's Office of the Inspector General concluded that NASA staff appointed by the White House had, in fact, censored and suppressed scientific data on global warming in order to protect the Bush Administration from controversy close to the presidential election.²⁶ These reports show that when data is disseminated by key agencies, like the EPA, to such influential bodies as Congress, the President, and the American people, there is a threat of wide-scale abuse.

The EPA formally announced "Phase-in" of the Clean Air Act in March 2010.²⁷ The EPA's final decision explained that no stationary sources will be required to obtain Clean Air Act permits that cover greenhouse gases before January 2011.²⁸ The announcement stated that the "EPA has pledged to take sensible steps to address the billions of tons of greenhouse gas pollution that threaten Americans' health and welfare, and is providing time for large industrial facilities and state governments to put in place cost-effective, innovative technologies to control and reduce carbon pollution."²⁹

Despite concerns about the EPA's data, some legislators are calling for far-reaching congressional action and regulation for environmental issues. If, somewhere down the line, a court or independent arbiter confirms that this data is faulty, serious financial loss for American taxpayers could result. While some might argue that the judiciary remains a check to the other branches when these branches are controlled by a single party, an inherent challenge to this argument arises when the judiciary either cannot or will not review issues of interest. When anyone objects to evidence behind a federal regulation, the absence of judicial review can limit the ability to address the grievance and may indirectly create circumstances where opinions are able to supercede facts.

II. The Three Branches of Government—An Inherent "Check" on Unbridled Discretion

The Constitution enumerates, with exacting detail, the three different branches and their respective powers. James Madison penned, "[P]ower is of an encroaching nature and it ought to be effectually restrained from passing the limits assigned to it."³⁰

Since America's founding, this has been a universal concern. Even the Anti-Federalists argued, "The legislative power should be in one body, the executive in another, and the judicial in one different from either—but still each should be accountable for their conduct."³¹ This division of government

into different but co-equal branches gave rise to the concept that the powers assigned to each branch are separate and serve as a check onto the other.³² "Each department should have a will of its own. . . . [T]he members of each should have as little agency as possible in the appointment of the members of others."³³ The separation of powers doctrine implicitly arises from the tripartite democratic form of government and recognizes that the executive, legislative, and judicial branches of government have their own unique powers and duties that are separate and apart from the others.³⁴

The Founders also acknowledged that two of these branches would be political branches—the executive and legislative—both accountable to the electorate. Since they recognized that power could corrupt even the best people,³⁵ the Founders tried to ensure that the third branch—the judiciary—would be more independent and thus able to thwart potential corruption. Legislators are chosen by the people and are accountable to them. As such, their conduct must comply with what the people want.³⁶ Judges, however, enjoy a different situation.

According to *The Federalist*, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution because it will be least in capacity to annoy or injure them.³⁷ The judiciary has neither force nor will, simply judgment. "Liberty can have nothing to fear from the judiciary alone but would have everything to fear from its union with either of the other departments. . . . [T]he complete independence of the courts of justice is essential to . . . [our] constitution."³⁸ Thus, the independent judgment of the judiciary was created to be an essential safe-guard against the effects of occasional "ill humours" of society, which stem from the "arts of designing men or the [corrupt] influence of particular conjunctures. . . ."³⁹ The judiciary's independence, extensive educational background, and rational judgment were to ensure that the corruption of politics and congressional action would be kept in check and limited, when necessary.⁴⁰

III. The Data Quality Act

Government information often forms the basis for congressional lawmaking, as well as regulation and resource allocation decisions by federal agencies. As such, it is vital that the information used be valid, as data derived from bad science or poor quality can lead to costly mistakes.⁴¹

In 1995, Congress passed the Paperwork Reduction Act (PRA), which was designed to improve the functioning of the federal government.⁴² This law contained government data quality provisions, which directed the White House Office of Management and Budget (OMB) to implement policies, principles, standards, and guidelines to ensure the quality of information used and disseminated by the federal government. However, little was done with data quality after its passage. Congress made another attempt to ensure that federal agencies use and disseminate accurate information by passing the Data Quality Act (DQA) (also referred to as the Information Quality Act).

The DQA was a two-sentence rider inserted in Section 515 of the 2000 Consolidated Appropriations Act. The DQA, which is not codified, amends the PRA. It took effect on

October 1, 2002, which also happened to be the deadline for federal agencies to issue their final information on quality guidelines.⁴³ Congress enacted the DQA primarily in response to increased use of the Internet, which gave agencies the ability to communicate information quickly and easily to large audiences.⁴⁴ Congress intended to prevent the harm that can occur when government websites, which are easily and often accessed by the public, disseminate inaccurate information.⁴⁵

Because the DQA was passed as a rider, without hearings or floor debate, there is limited guidance on how the DQA was supposed to promote the dissemination of reliable and accurate agency information or how it was to be balanced with the regulatory goals of agencies.⁴⁶ To address this, OMB—an extension of the executive and political branch—has offered its own interpretation of what Congress required.

The DQA requires OMB to establish “policy and procedural” guidelines to ensure that the information disseminated is of requisite quality, objectivity, and utility.⁴⁷ The DQA applies to all information disseminated by a federal agency. OMB has defined “disseminated” to include any “agency initiated or sponsored distribution of information to the public.”⁴⁸ Agencies initiate or sponsor information when they endorse it.⁴⁹ Thus, the information can originate from a non-governmental entity but, because it is used to address particular policy issues, it is subject to the scrutiny of the legislation.

OMB has a three-tiered requirement structure.⁵⁰ The requirements address the manner in which an agency presents information and the reliability of the information presented. At a minimum, the information must meet the criteria that OMB has established for routine information.⁵¹ Agencies must meet additional requirements if the information is “influential,” meaning it has a clear and substantial impact on important public policies or important private sector decisions.⁵² There is a final requirement concerning environmental, health, or safety risks.⁵³

Agencies are required to present information in a clear and unbiased manner, including the presentation of other contextual information necessary to ensure a lack of bias.⁵⁴ However, this requirement can be overridden by “compelling interests,” which are never fully explained by the OMB.⁵⁵ Agencies are also required to assure that their information is reliable.⁵⁶ OMB suggests that information is deemed reliable when it is subject to external, independent peer review.⁵⁷ OMB also states that if an agency disseminates influential scientific, financial, or statistical information, it must first determine that the analytical results were developed using sound methods.⁵⁸ However, OMB does not delineate what is meant by “sound methods” or “influential information.”

The DQA further requires that agencies establish guidelines for the same purpose as OMB and establish administrative mechanisms that allow “affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the [OMB] guidelines. . . .”⁵⁹ OMB asserts that these mechanisms shall be flexible, “appropriate to the nature and timeliness of the disseminated information, and incorporated into agency information resources management and administrative practices.”⁶⁰

While affected agencies have administrative appeal processes in place to review the agencies’ initial decisions and time limits to resolve any requests for reconsideration, it seems inappropriate for the offending office to have responsibility over both the initial response and the resolution of the disagreement. It also seems suspect for OMB to leave room for flexibility that is subjectively limited to the “appropriate nature and timeliness of disseminated information.”

IV. Judicial Review

Agencies become bound by OMB’s definitions and interpretation, unless and until a court determines that OMB has misstated Congress’ intent. However, this can be problematic. Sydney Shapiro, a panelist at the DQA teleconference and board member for the Center for Progressive Regulation, expressed the views of many environmentalists when he argued that OMB has attempted to model the regulatory process on the scientific process.⁶¹ The problem, Shapiro contends, is that the two processes often have different goals—science benefits when results are accurate, while regulations are made to protect people from harm and should always err on the side of safety.⁶² This inherent contradiction begs the question whether agency dissemination also properly allows for OMB rulemaking.

With no legislative history to reference, it is difficult to say how courts would rule in such a situation. Under the historic Supreme Court ruling in *Marbury v. Madison*, United States federal courts have the authority to judicially review statutes enacted by Congress and declare a statute invalid if it violates the Constitution.⁶³ However, the Constitution does not set any express limits on how much federal authority can be delegated to a government agency. These limits are set by statute. Thus, the courts’ interpretation of these statutes becomes an important oversight function in ensuring our government’s inherent system of checks and balances.

Thus, the question becomes how—or even if—the courts choose to interpret the statute. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the United States Supreme Court deferred to agency interpretation because Congress failed to precisely define the statutory language and, in order to fill the gap, the Court held that the EPA offered a reasonable and permissible interpretation.⁶⁴ Thus, courts may defer to the agency tasked with administering the statute, so long as their interpretation is “reasonable.” Of course, specifying “reasonability” offers even more room for judicial interpretation. However, even without *Chevron* deference, an agency’s interpretive rules may still be given deference according to their persuasiveness under *Skidmore v. Swift & Co.*⁶⁵ *Skidmore* established a four-factor test to determine whether or not deference should be given to an agency’s interpretation, including: (1) the thoroughness of the agency’s investigation; (2) the validity of its reasoning; (3) the consistency of its interpretation over time; and (4) other persuasive powers of the agency.⁶⁶

However, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, the U.S. Supreme Court addressed the geographic scope of the Clean Water Act (CWA) and declined to afford the U.S. Army Corps of

Engineers the customary deference granted to an agency.⁶⁷ The Court claimed that deference is not appropriate when an agency's interpretation of a statute "invokes the outer limits of Congress' power," a reference to the Court's milestone decisions in recent years involving the reach of the Commerce Clause. This concern is particularly strong, said the Court, where the agency interpretation permits encroachment on a traditional state power.⁶⁸

Thus, when a statute is unfairly deferential to the agency that penned it, not only may such an interpretation be unfair, it may also be unconstitutional. Despite necessary political constraints and limited ways to strike down unconstitutional measures, courts must still step in when there is an obvious imbalance. As Madison explained, the courts exist as an intermediate body between the people and the legislature, ensuring that enacted laws are both constitutional and fair.⁶⁹ Nowhere is this more distinctly summarized than in Federalist No. 78, where Madison stated, "If the will of the legislature stands in opposition to that of the people . . . [or] the Constitution, judges ought to be governed by the latter . . . [and] ought to regulate the decisions by the fundamental laws."⁷⁰ Thus, courts can ensure fairness without disrupting the realities of the current political landscape. One obvious way to do so would be to limit their "strike"—not necessarily eliminating the adjudicated issue altogether but instead limiting the scope of authority.⁷¹

While this seems to be the intended will of the Founders, courts do have another recourse—they may refuse to interpret the issue altogether. Even though *Marbury v. Madison* granted the courts judicial review, ensuring that it is "emphatically the province and duty of the judicial department to say what the law is,"⁷² there are limits, and most fall under justiciability.

It is unclear whether the Founders intended these safeguards, as neither the text of the Constitution nor the framers expressly mention any of these limitations. However, the Founders did intend for the Supreme Court to have enough influence over the actions of lower courts, to ensure no undue corruption of power or influence.

The justiciability doctrines are closely tied to the inherent concept of separation of powers, by defining when it is appropriate for the federal courts to review matters and when it is necessary to defer to other branches of government. It is often said that the justiciability doctrines are intended to improve judicial decision making by providing the federal courts with concrete controversies best suited for judicial resolution.⁷³ The Supreme Court has reasoned that the requirements limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.⁷⁴

Of course, even these limits are not absolute. The debate over justiciability also centers on an issue of methodology: Should the rules be clear and predictable or should doctrines remain flexible, permitting courts to have discretion to choose which cases they hear and which they decline?⁷⁵ Some contend that if courts are able to manipulate justiciability doctrines to avoid cases or make decisions about merits of disputes under the guise of rulings about justiciability, it equates to avoidance rather than justice.⁷⁶

This concept of avoidance is at the very heart of the current debate with the DQA. Some contend that the courts are right to avoid judicial review for a number of important reasons. First, nothing in the text of the DQA requires judicial review of denied requests for correction. Second, there may be inherent dangers in pushing for judicial review, including the reality that judges might be ill-equipped to make determinations on the reliability of hyper-technical scientific data. Third, agencies might anticipate court action and become timid, limiting information dissemination to Congress, industry, or the public at large. Fourth, enabling judicial review may provide a tool for industry or other groups to bias people against important governmental regulations, by slowing agency action or restricting public access to government information.⁷⁷ Not only would this be inappropriate, since the legislation has never been debated or reviewed by Congress, it would also potentially allow for corrupt governmental practices.

However, would-be plaintiffs suggest that without proper judicial review, oversight will cease to exist and agencies will maintain unbridled discretion.⁷⁸ At the very least, the omission of stated oversight requirements has certainly not helped these potential litigants.

The first lawsuit to allege compliance failure with the DQA was *Competitive Enterprise Institute v. Bush*. Filed in August 2003, it involved potentially inaccurate data used in the White House Office of Science and Technology Policy's report to the President and Congress on climate change.⁷⁹ However, the lawsuit was dismissed when the White House offered to issue a disclaimer stating that the national assessment had not been subject to a review under the data quality standards requirement.⁸⁰ Thus, the prospect of potential litigation seemed to "check" the agency's actions, encouraging them to "come clean" about their inability to review the disclosed information.

Since *Competitive Enterprise Institute*, United States district courts have rejected two subsequent attempts to seek judicial review in DQA decisions: *Salt Institute v. Thompson* and *re: Operation of the Missouri River System Litigation*. In both cases, the district courts concluded that the DQA was unreviewable because the Act does not subject the dissemination of data by an agency to court supervision.⁸¹ According to attorney Margaret Pak:

Congressional intent to preclude judicial review is implicit in the DQA's structure and objectives and in the nature of administrative action involved. In the absence of an express statement on judicial review and with almost no legislative history, these factors control the determination of congressional intent to preclude judicial review.⁸²

On the other hand, those seeking review could argue that the court could use the definitions established by the agency to effectuate the review, even if Congress failed to define the terms. In fact, their review may be required because of the gaps created by legislative inaction.

The U.S. Chamber of Commerce and the Salt Institute took their case to the U.S. Court of Appeals for the Fourth Circuit, arguing that the Health and Human Services Department refused to change its position, despite the copious

amounts of data they had presented which suggested inapposite views of those taken. The court upheld the rights of federal agencies to have the final word on the quality of their facts, figures, and research used in rulemaking and other decisions.⁸³ The court determined that the DQA does not create a legal right to information or information correctness and referred complaints back to the agency.⁸⁴ “By its terms, this statute creates no legal rights in any third parties—it orders the OMB to draft guidelines concerning information quality and specifies what those guidelines should contain.”⁸⁵

William Kovacs, the Chamber of Commerce’s Vice President for Environment, Technology and Regulatory Affairs, said the ruling obliterated the federal law: “[W]e’re left with the arrogance of the agency and have essentially been told that no one can challenge them.”⁸⁶ This bold statement may prove to be true, considering that there were eighty-five requests for correction in 2003 and 2004 alone, and only ten of those requests led to some sort of change by the agency.⁸⁷

V. The Administrative Procedure Act

One of the inherent difficulties for judicial review is that courts have previously refused to engage in review of agency dissemination of information on the ground that it is not final agency action—a prerequisite for judicial review under section 702 of the Federal Administrative Procedure Act (APA).⁸⁸ However, under section 701 of the APA, resolution of an information quality complaint is committed to agency discretion by law.⁸⁹ If courts reject this argument, the availability of judicial review might turn on whether a plaintiff has standing to seek judicial review of the information quality complaints, which reverts back to many of the issues addressed earlier under the justiciability doctrines.

Ultimately, this will turn on whether or not the litigant has an appropriate cause of action under the APA. As long as the injury suffered is “arguably within the zone of interests protected, the potential plaintiff satisfies the provisions of the section.”⁹⁰ However, despite this, courts have routinely refused to subject agency information activities to judicial review, claiming that section 704 of the APA limits judicial review to final agency action and dissemination of information does not fit as agency action.⁹¹

In *Industrial Safety Equipment Association v. EPA*, the court held that publication of a guide on respirators by the National Institute of Occupational Safety and Health was not final agency action despite the report’s impact of decertifying most respirators.⁹² The Fourth Circuit held that the APA statute barred the agency from imposing any regulation because the report produced by the EPA on second-hand smoke carried no legally binding effect.⁹³ This position discounts the harmful effect on businesses that suffer from these actions, limits their ability to dispute the findings before an impartial judicial body, and restricts their ability to present equally convincing scientific data.

The DQA does not seem to fall under either the finality requirement or the “not committed to agency discretion by law” requirement of the APA. Regarding finality, past Supreme Court rulings require that to be final, agency action must (1) mark the

consummation of the agency’s decision making process and (2) be one from which legal consequences flow or by which rights and obligations are determined.⁹⁴

Regarding the second requirement, *Salt Institute* opposed claims on the National Heart Lung and Blood Institute’s website and filed a DQA complaint requesting review of the data underlying the study.⁹⁵ The suit was rejected, though, on the grounds that “without a meaningful standard against which to judge the agency’s exercise of discretion . . . meaningful judicial review is impossible.”⁹⁶ Thus, the court found that DQA oversight is designated to agencies such as the OMB, not the judiciary. However, this logic may be faulty. Under sections 701 and 702 of the APA, if a person has cause and standing, judicial review should be allowed and the rejection of a complaint under the DQA is likely a final agency action since there is no other defined recourse for a litigant.⁹⁷

VI. If the Judiciary Refuses to Review, What Other Options Are There?

Returning to the issue of global warming, many claim that the EPA’s recent “endangerment finding” that greenhouse gas emissions threaten human health—a finding that is a precursor to potential regulation—violates the DQA.⁹⁸ Senator John Barrasso (Wyoming), Senator David Vitter (Louisiana), Representative Darrell Issa (California), and Representative James Sensenbrenner, Jr. (Wisconsin) made the allegation in a letter to EPA Administrator Lisa Jackson.⁹⁹ The lawmakers claim that the practices of prominent climate scientists have clouded a major report written by the United Nations’ Intergovernmental Panel on Climate Change that the EPA relied on when crafting the endangerment finding.¹⁰⁰ These lawmakers hold leadership positions on various related committees, including the House Oversight and Government Reform Committee and the Select Committee on Energy Independence and Global Warming as well as the Senate Environment and Public Works Committee. The lawmakers fear political corruption since the courts have been reluctant to review the issue and suggest that there may be alternatives. Senator Lisa Murkowski from Alaska has suggested involving the legislature in an effort to overturn the endangerment finding using the Congressional Review Act (CRA).¹⁰¹

VII. The Congressional Review Act

The CRA was signed into law as part of the Small Business Regulatory Enforcement Fairness Act of 1996. The CRA establishes special congressional procedures that allow Congress to enact a resolution of disapproval to overturn rules instituted by federal administrative agencies.¹⁰² Before the rule can take effect, the federal agency that promulgates the rule must submit it to Congress.¹⁰³

Additionally, a CRA resolution must pass both houses of Congress and be signed by the President or pass by a two-thirds majority in both houses in case of a presidential veto. If Congress passes a joint resolution disapproving the rule, and the resolution becomes law, the rule cannot take effect or continue in effect. The agency may not reissue that rule or a substantially similar one except under authority of a subsequently enacted law.¹⁰⁴

Since its passage in 1996, the Comptroller General has submitted reports to Congress on nearly 800 major rules. The Government Accountability Office has catalogued the submission of almost 50,000 non-major rules and to date, only forty-seven joint resolutions of disapproval have been introduced on thirty-five different rules.¹⁰⁵ And only one of these, the Department of Labor's ergonomics rule, has been disapproved by Congress using the CRA.¹⁰⁶ Two others were disapproved by the Senate but were never acted upon by the House. These include the Federal Communications Commission's (FCC) 2003 rule relating to broadcast media ownership and the Department of Agriculture's 2005 rule relating to the establishment of minimal risk zones for introduction of Mad Cow Disease.¹⁰⁷

Recently, Senator Murkowski introduced Senate Joint Resolution twenty-six under the CRA to disapprove the EPA's cap-and-trade regulations.¹⁰⁸ However, since the CRA requires a majority of votes in both houses and/or the signature of the President, the CRA is unlikely to help any challenge to data quality claims under the DQA.

VIII. Is This a Problem in Need of a Solution or Are There Other Options?

Maybe the real question is whether this is a problem in need of a solution. Should a minority party have recourse options when the same party controls both houses of Congress and the executive, and the federal judiciary refuses to intervene?

Perhaps no, since Congress has other alternatives for overseeing agency action, including the addition of provisions to agency appropriations bills that restrict federal rulemaking and/or regulatory activities.¹⁰⁹ However, no appropriation provisions are designed to reverse rules, as the CRA was originally intended to permit.¹¹⁰ But, the number and variety of the provisions discussed does illustrate that Congress' scope of control over agencies is potentially wider than CRA resolutions of disapproval.

In testimony before Congress, William Kovacs suggested that administrative law judges within agencies might be a better adjudicative body to hear DQA issues and settle disputes.¹¹¹ Kovacs also suggested that the OMB could establish an ombudsman¹¹² to act as a trusted intermediary between the organization and the internal or external constituency while representing the OMB's broad scope of interests.¹¹³ On the other hand, it would be hard to ensure that the selection of this person would be unbiased.

Perhaps one of the most obvious alternatives is to let the people decide. While this may be a slow answer and may not offer immediate solutions, it is certainly one way to ensure that the people have the final say. However, even if elections were an appropriate response to this situation, they would not eliminate the underlying problem for a myriad of reasons.

First, the DQA is a small, obscure piece of legislation of which most Americans are unaware. Therefore, it is unlikely that the potentially corrupt practices allowable by the DQA will ever hit most people's radar.

Second, the impact of elections on congressional accountability has been dramatically reduced over the years through the ascendancy of incumbents, gerrymandered

congressional districts, and special interest money, which targets those isolated few contested seats in any given election cycle.

Third, many Americans may not understand or differentiate between accurate, quality data and unreliable, inaccurate information in a political campaign. Judges, on the other hand, may be in a better position to sift through the information, and weigh its credibility.

When issues are hotly contested and highly combative, elections simply "flip" the party in charge. This does little, if anything, to curb the dilemmas posited in this paper.

IX. Conclusion

Despite these various options, and because of the reasons outlined, court involvement in policing data disputes is the inevitable and most reasonable recourse, despite their current inaction.¹¹⁴ In fact, many suggest that Congress intended the DQA to provoke a revolution about how decisions are made, and meant to provide a means to force agencies and departments into court at any stage of the rule-making process if an affected party believed that inaccurate or unreliable information had been considered.¹¹⁵ Representative Candice S. Miller, chairwoman of the House Government Reform subcommittee, with jurisdiction over the DQA, said, "The Act is an important, good government statute ensuring that government information be of the highest quality before it is disseminated. . . . [Despite the court rulings], Congress intended that agency decisions under this Act be reviewed by the courts."¹¹⁶ She even contended that other cases might bring different results and, if not, Congress might well need to make important legislative changes.¹¹⁷

The DQA represents a classic case of "slipping through the cracks." Congress passed legislation that it failed to define, held no hearings on it, and developed no legislative history for it, leaving the details and their implementation to the very agency tasked with overseeing it. However, when that agency can be seen as a "tool" of the executive, and in turn a "tool" of the majority party, the only reasonable alternative is for the interpretation of the legislation to be left in the hands of the courts. An agency cannot be held to police itself.

While the DQA has largely fallen by the wayside, it could be a source of legitimate government oversight if courts would agree to review it and, even potentially limit it, to avoid unnecessary impositions on information dissemination. As government regulation and oversight expand, and the use of evidence and statistics become proof sources to legitimize these actions, the ability to demonstrate and validate the accuracy and reliability of the evidence data is critical. Without objective review, the disseminated data by key governmental agencies could easily become subject to statistical manipulation, or even worse, those agencies could actively suppress efforts to improve the data utilized by regulators due to political pressures.

As the initial example of global warming suggested, once an executive agency disseminates data, the data can become the basis for documentaries, legislation, business practice, and public opinion. When an agency has a particular interest in the data being collected and is receiving substantial political pressure to ensure that the data looks and sounds a particular way, the data becomes subject to manipulation. When agencies

are tasked to serve those same political or ideological needs, it is highly unlikely that the *Chevron* deference to agency discretion is appropriate, regardless of whether or not the agency's interpretations are "reasonable." It is not difficult to see why the American people need an objective body to step in and ensure that the information being disclosed is both reliable and accurate. In the absence of objective third-party review and debate, the likelihood of political corruption and wide-scale abuse increases. Not only could this negatively affect costly legislation, but it will also affect the pocketbooks of all tax-paying Americans.

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EPA'S PROPOSED REGULATION OF COAL ASH

By Steven Burns and Mary Samuels*

On June 21, 2010, EPA published proposed regulations for the management of coal combustion byproducts ("CCBs").¹ CCBs (which EPA refers to as "coal combustion residuals" or "CCRs") are the materials that remain after coal is burned for electricity. CCBs include fly ash, fine particles that rise out of the top of the boiler; bottom ash, larger particles that drop to the bottom; and gypsum, the byproduct of flue gas desulfurization devices commonly known as "scrubbers." CCBs are typically placed in a water solution to facilitate transport via pipelines, and at many plants, they are deposited in surface impoundments commonly referred to as "ash ponds" or "gypsum ponds." At others, they are dried and "stacked" in landfills. Some CCBs can be essentially recycled as components in concrete, wallboard, and other products.

The Resource Conservation and Recovery Act ("RCRA") is the primary federal statute governing waste disposal.² Under RCRA, discarded material may be either "hazardous waste" and subject to special regulatory provisions under RCRA Subtitle C, or "solid waste" and acceptable for placement in ordinary municipal landfills under RCRA Subtitle D. The so-called "Bevill Amendment" to RCRA provides that EPA may not regulate CCBs and certain other substances as hazardous waste unless and until EPA studies the issue, reports to Congress, and makes a formal determination that hazardous waste regulation under Subtitle C is warranted.³ CCBs may include trace quantities of metals—potentially including arsenic, cadmium, chromium, lead, and others—which occur naturally in coal but which are also known to be harmful if ingested in sufficient quantities. EPA prepared the studies and reports required by the Bevill Amendment and issued formal determinations in 1993 and 2000. EPA concluded that regulation of CCBs and other Bevill wastes under RCRA Subtitle C was *not* warranted. Rather, EPA found that regulation under the solid waste program under Subtitle D would provide an appropriate level of regulatory protection with much less expense.

However, in December 2008, an ash pond failure at the Tennessee Valley Authority's ("TVA") Kingston facility resulted in a massive spill of water-borne ash into the Emory River and across hundreds of acres of nearby property. The issue was still a hot topic a short time later when Lisa Jackson appeared before Chairman Barbara Boxer of the Senate Environment and Public Works Committee at the hearing to consider Ms. Jackson's nomination to be the Administrator of EPA. Chairman Boxer demanded that Ms. Jackson take action, and in response, Ms. Jackson committed to inspect existing ash ponds and reevaluate EPA's position on the regulation of CCBs. That led to the proposed rules now under consideration.

EPA's Proposed Regulations

In a somewhat unusual move, EPA presented two different regulatory options in its proposed rule, and requested comments on both. Under one option, EPA would treat CCBs as a "special waste" regulated pursuant to EPA's hazardous waste authority under RCRA Subtitle C. The other option would rely on RCRA Subtitle D. Both proposals favor dry CCB management and aim to phase out ash ponds. Both would result in similar disposal facilities. However, the choice of whether to regulate under Subtitle C or Subtitle D of RCRA has important implications for EPA. Congress provided EPA direct enforcement authority under Subtitle C. EPA can approve a state program to regulate hazardous waste, but even in an EPA-approved state, EPA retains the power to bring enforcement actions. EPA's role is much more limited under Subtitle D. EPA lacks direct enforcement authority except as necessary to address "an imminent and substantial endangerment to health or the environment."⁴

The problem at TVA, which precipitated the intense interest in regulation of CCBs, was primarily the structural integrity of the ash pond at the Kingston plant. However, EPA's discussion of structural integrity issues is strikingly thin, and most of EPA's proposal has little to do with the factors that caused the Kingston facility to fail. Incidentally, EPA's inspections of scores of ash ponds around the country have yet to find another Kingston-type situation. Available information indicates the factors present at Kingston are not typical across the industry. The incident was an extremely unfortunate anomaly.

A listing of CCBs under Subtitle C would impose a host of regulatory requirements and restrictions on the management of CCBs from the point of generation, through any process of transportation, up to and including disposal at an approved facility. A hazardous waste regulatory program must include such measures as limits on worker exposure, manifests for transportation, and facility-wide corrective action requirements in the event of a release. The requirements peculiar to Subtitle C would result in a program that is substantially more expensive than a Subtitle D program.

Nevertheless, under either regulatory proposal, the single biggest expenditure is likely to be the construction of new disposal facilities to meet the proposed structural standards, land disposal restrictions, and other requirements. Further, as EPA has acknowledged, any new facilities to contain CCBs would be substantially the same, regardless of whether EPA proceeds under Subtitles C and D. The primary protection against any unintended leaching is a liner, and EPA would require a modern liner either way. The primary way to detect leaching is to monitor strategically placed groundwater wells; again, groundwater monitoring would be required under both proposals.

EPA also discussed but did not formally propose a third option, designated "D Prime." This option is substantially the

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same as the Subtitle D proposal, but it would allow existing ash ponds to remain in operation for their useful life. Accordingly, under EPA's proposal, a utility is not permitted to gather and present evidence that an existing facility is safe and adequate notwithstanding an original design and construction that does not meet EPA's new standards, regardless of how the facility is actually performing.

EPA proposes to maintain the Bevill exemption for CCBs that are beneficially reused. For example, any fly ash used to make concrete or gypsum used for wallboard would not be subject to regulation as a waste under either Subtitle C or D.

Issues of Concern

Here are some aspects of EPA's proposal that have raised concerns among electric utilities, businesses that use CCBs for their products and processes, and state agencies.

- Federal attitude toward state regulators.

In the preamble to the proposed regulations, EPA was remarkably candid in asserting as a primary concern the fact that states would assume primary administrative authority under Subtitle D. EPA essentially assumes that state regulatory authority under Subtitle D would automatically result in higher noncompliance, and EPA uses that assumption in support of the Subtitle C proposal. This is in spite of the fact—again, as EPA admits in the proposed rule—that new disposal facilities would be constructed in substantially the same manner under both proposals. In other words, to the extent EPA has a problem with Subtitle D, it is not about the technology associated with disposal facilities. Rather, it is the fact that state governments would be in charge of administering the program instead of EPA.

Past questions about whether to apply hazardous waste regulations have typically focused substantially on the intrinsic characteristics of the substance at issue, and most hazardous wastes clearly exhibit toxicity or another of the hazardous characteristics. By contrast, here, EPA is faced with substantial evidence that coal ash and other CCBs do not typically exhibit toxic characteristics (as discussed further below). To support its Subtitle C proposal, EPA challenges the states' competence to administer a regulatory program and uses that point to support a stronger federal presence at the expense of state authority.

- Stigma against use or recycling of CCBs under a Subtitle C program.

Under all proposals, EPA proposes to retain the Bevill exemption for CCBs that are used beneficially, and EPA claims to support continued beneficial reuse and recycling of CCBs. EPA's stated intent is to allow recycling to continue (although even that is opposed by many environmental citizen groups).

However, those familiar with the beneficial reuse of CCBs—including utilities, construction-related businesses, agricultural interests, state transportation agencies, and even other federal agencies such as the Department of Energy and the Department of Transportation—have advocated forcefully against listing CCBs under Subtitle C. A primary concern is that hazardous waste regulation will create a stigma to beneficial

uses and expand litigation risk. Even if EPA chooses to call CCBs a "special" waste rather than hazardous, regulation under RCRA Subtitle C would clearly communicate the message that CCBs are hazardous, according to the federal government's environmental regulators. That may provide an easy target for the plaintiffs' bar, which can supplement whatever claims it can muster with EPA's determination that a hazardous waste program for CCBs is warranted. The comments from market participants and regulators familiar with beneficial uses have been virtually unanimous on this point, but in the preamble, EPA flatly states that it questions this argument.

EPA has demanded additional evidence of how stigma deters and diminishes the beneficial uses of CCBs, beyond the predictions and opinions of those with the greatest experience in the marketplace. That is a difficult task, since there has not in the past been a Subtitle C listing for CCBs. CCB users are concerned that no amount of evidence supporting predictions of stigma will be good enough for EPA.

Further, EPA has indicated that only "encapsulated" uses would be acceptable, but EPA does not define that concept. For example, in its preamble, EPA indicates that it may regard the placement of ash in a road embankment as an unencapsulated use, even though roads can be designed such that the ash would be contained within layers of other materials and not exposed to water flows.

- EPA's own test procedure demonstrates that CCBs are not hazardous for purposes of RCRA.

Analysis of CCBs indicates that they are not "hazardous" as that term is commonly understood for purposes of RCRA. No one questions the fact that metals such as arsenic or mercury occur naturally in coal and, therefore, are also present as a minute percentage of coal ash. Further, no one questions the epidemiological evidence that those and other metals can be harmful when ingested in sufficient quantities. That is not the issue in this rulemaking. The mere presence of a constituent of concern in any proportion does not automatically transform a substance into hazardous waste. Rather, the issue is whether a substance has the potential to leach and enter an environmental "receptor" or pathway by which the constituent of concern may travel to an organism or some other sensitive resource. Application of the EPA-approved Toxic Characteristic Leaching Procedure ("TCLP") is the usual method to determine whether a substance is to be treated as hazardous under RCRA. CCBs consistently pass the TCLP. They are not toxic according to EPA's usual measure of toxicity.

- Unnecessary cost.

Many industry participants already implement some of the requirements that likely would be included in new regulations. For example, it has become common in the industry to include liners in new CCB facilities, and a number of state programs require groundwater monitoring under current law.

However, EPA has proposed unreasonably inflexible requirements that will drive up costs substantially, without a commensurate increase in environmental protection. A prime example is an apparent regulatory preference toward phasing

out all existing facilities that do not meet the standards, including especially older ash ponds that were not built with modern liners. Most of these ponds were built decades ago, according to best industry practices at the time, before the techniques and materials typically applied today were available. At some of those facilities, groundwater monitoring and other forms of investigation may well identify issues in need of repair or even facilities that must be closed. On the other hand, many facilities are likely to be perfectly safe due to site-specific factors such as a facility's particular ash management practices or local geology and hydrology. For example, an ash pond may be sited above a layer of clay or some other impervious geological feature. If that clay layer is sufficient to prevent the leaching of any constituents of concern into groundwater, the fact that it is naturally occurring rather than artificially engineered is irrelevant.

Even if action may be advisable at *some* existing facilities, that does not justify mandatory, across-the-board facility retrofits and closure of *all* existing facilities. Indeed, if all utilities are subjected to the same retrofit and closure requirements at the same time, that will increase costs even more by artificially boosting short-term demand for scarce resources such as qualified people and equipment such as drilling rigs. There is no reason to increase the cost and logistical difficulty of addressing facilities that may truly require repair or closure by forcing those facilities to compete for scarce resources with others that can be shown to be perfectly safe. A more reasonable approach would be to gather more information and then make judgments as to what may be necessary on what schedule, based on hard data that accounts for site-specific considerations.

Another example is the application of mandatory, one-size-fits-all standards such as siting restrictions and groundwater monitoring regimens. For example, EPA is poised to require testing of a laundry list of parameters in the groundwater. A relatively straightforward analysis, based on factors such as the known content of the ash at a particular location or past monitoring results, may lead to the conclusion that continued monitoring of certain parameters serves no purpose. As another example, the potential for flooding or seismic activity in a particular area should be taken into account in the design of the facility. Those considerations require site-specific analysis and engineering, but where there are engineering solutions, such factors should not preclude the siting of a new facility or implementations of improvements at an existing facility.

In one respect, the regulatory process has apparently resulted in some improvements to the regulations. A review of the rulemaking record indicates EPA originally intended to propose a single regulatory approach—to regulate CCBs as hazardous under RCRA Subtitle C. To its credit, during interagency review, the Office of Management and Budget raised questions about the cost of the Subtitle C approach compared to Subtitle D, in light of the similar degrees of environmental protection. The fact that EPA issued two co-proposals appears to be a direct result of cost-benefit concerns raised by OMB and other federal agencies in the interagency review process.

• Impact on small businesses.

The Regulatory Flexibility Act requires consideration of the impacts of proposed regulations on small businesses. EPA limited its consideration to electric utilities that are also small businesses. Because EPA refuses to seriously consider the possibility that a Subtitle C listing could constrain the supply of CCBs, EPA has failed to evaluate the small businesses that work in construction, road-building, and other industries that rely on the beneficial reuse of CCBs.

Next Steps

The comment period for EPA's proposed regulations closed on November 19, 2010. EPA could issue final regulations as soon as mid-2011.

Endnotes

- 1 See 75 Fed. Reg. 35127 (June 21, 2010).
- 2 See 42 U.S.C. §§ 6901 *et seq.*
- 3 See *id.* § 6921(b)(3)(A)(i).
- 4 42 U.S.C. § 6973.



FEDERALISM & SEPARATION OF POWERS

A FUNDAMENTAL MISCONCEPTION OF SEPARATION OF POWERS: *BOUMEDIENE V. BUSH*

By Heather P. Scribner*

Terrorists attacked the United States on September 11, 2001. Congress quickly authorized the President to respond with military force,¹ and the Bush Administration ordered the military detention of alien al Qaeda and Taliban fighters at Guantanamo Bay, Cuba.² When the Supreme Court signaled in June 2004 that it would not permit the military to hold these enemy combatants indefinitely,³ Congress responded with § 7 of the Military Commissions Act (MCA).⁴ The MCA deprived the Supreme Court of jurisdiction to hear claims, including habeas corpus petitions, from alien enemy combatants challenging their detention.⁵ In *Boumediene v. Bush*,⁶ the Supreme Court held that § 7 of the MCA unconstitutionally suspended the writ of habeas corpus and that the detainees thus had access to the federal courts through the writ.⁷

Undoubtedly, civil rights advocates will champion *Boumediene* as a triumph of the Constitution and the rule of law over political will.⁸ It is not. It is instead the apex of the Supreme Court's monopoly power over constitutional interpretation. In passing the MCA, Congress challenged the Court's claim to exclusive authority over constitutional meaning. Congress used one of the few tools available under the Constitution to check the Supreme Court's usurpation of political power. The Constitution gives Congress authority to make "Exceptions" and "Regulations" to the Court's appellate jurisdiction,⁹ and the MCA stripped the Supreme Court of jurisdiction over any and all cases involving the Guantanamo prisoners' detention.¹⁰ Thus, the Court lacked any colorable claim to jurisdiction over any case involving the Guantanamo Bay detainees, and the political branches' constitutional interpretations of the detainees' due process rights should have been final. Nonetheless, without articulating a statute or constitutional provision purportedly granting it jurisdiction, the Supreme Court granted certiorari in *Boumediene v. Bush* and decided the case on the merits.¹¹ For the first time in American history, the Court had overturned a congressional act limiting its jurisdiction.¹²

Boumediene raises vexing questions regarding the limits of judicial review and judicial power. *Boumediene* was a 5–4 decision, with two lengthy and scathing dissents.¹³ Yet every member of the Court seemed to agree on one crucial principle: Congress's constitutional check on Supreme Court power is not a plenary, unreviewable one. This Article's thesis is that the Court violated basic separation-of-powers principles when it refused to stay its hand in the face of jurisdiction-

stripping legislation.¹⁴ Although the Court has long exercised the power to "say what the law is," it consistently recognized, until *Boumediene*, that it *only* has that power when Congress grants the Court jurisdiction to "apply the rule to particular cases."¹⁵ Only then, "of necessity," can the Court "expound and interpret" the law.¹⁶

I. The Initial Detainee Habeas Cases

On the morning of September 11, 2001, terrorists hijacked four commercial airplanes and aimed them at crucial governmental and financial centers within the United States. Two planes destroyed the Twin Towers of New York's World Trade Center. Another crashed into the Pentagon near Washington, D.C. The fourth plane, which was apparently aimed for either the White House or the Capitol building,¹⁷ crashed in a field in Pennsylvania after civilian passengers attempted to overpower the terrorists. More than 3,000 people died, and thousands more were injured.¹⁸ The attacks were orchestrated by al Qaeda, an international terrorist organization implicated in a series of attacks on the United States and its interests beginning long before September 11, 2001.¹⁹ Those attacks include the World Trade Center bombing of 1993, the attack on U.S. military housing in Saudi Arabia in 1996, the bombing of American embassies in Kenya and Tanzania in 1998, and the bombing of the U.S.S. Cole in Yemen in 2000.²⁰ The Taliban militia, which is not a recognized arm of Afghanistan's government, but which nonetheless exercises military control over portions of that country, supported al Qaeda's training and activities.²¹

Congress swiftly authorized the President to use military force against "those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks."²² The Bush Administration ordered the military detention at Guantanamo Bay, Cuba, of alien al Qaeda and Taliban fighters.²³ As the Supreme Court later acknowledged, detaining enemy fighters for the duration of the conflict was a "fundamental and accepted" principle of the customary laws of war.²⁴ But the Supreme Court held that the President would have to prove, as a matter of juridical fact, that the detainees had been involved in armed conflict against the United States.²⁵

In 2001, Yaser Hamdi—an American citizen—was captured in a combat zone in Afghanistan by the Northern Alliance, a group fighting against the Taliban militia.²⁶ The U.S. military later detained him as an enemy combatant.²⁷ Hamdi challenged his military detention, but a majority of the Supreme Court held that enemy combatants could be detained for the duration of the armed conflict.²⁸ The plurality opinion in *Hamdi v. Rumsfeld*, written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, held that the AUMF authorized the President to hold persons fighting against the United States until the conflict ended.²⁹ Justice Thomas, who provided a fifth vote, opined that the

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AUMF was unnecessary; the President had inherent authority as Commander in Chief to detain persons, including American citizens, who were deemed enemy combatants.³⁰

The plurality asserted that Hamdi was entitled to some type of process to make a factual determination whether he was an enemy combatant.³¹ At a constitutional minimum, an American citizen challenging his status as an enemy combatant was entitled to “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker.”³² The plurality acknowledged that this decision maker need not necessarily be an Article III court but rather could be “an appropriately authorized and properly constituted military tribunal.”³³ Thereafter, the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to make factual determinations whether individuals detained at Guantanamo Bay were enemy combatants.³⁴

The Court also considered *Rasul v. Bush*, where a number of noncitizens detained as enemy combatants at Guantanamo Bay sought habeas relief.³⁵ The Government moved to dismiss the habeas petitions on the grounds that the federal courts lacked authority to hear habeas petitions by noncitizens held at Guantanamo.³⁶ The *Rasul* majority nevertheless read 28 U.S.C. § 2241,³⁷ the federal habeas corpus statute, to authorize the Court to exercise jurisdiction over detainees held by the U.S. military in Cuba.³⁸

Congress quickly corrected the Court's misinterpretation of 28 U.S.C. § 2241 in the Detainee Treatment Act of 2005 (DTA),³⁹ which forbade all federal courts from exercising habeas jurisdiction over any detainee of Guantanamo Bay military prison.⁴⁰ The DTA vested in the United States Court of Appeals for the D.C. Circuit exclusive jurisdiction to review a determination by a CSRT that an alien is "properly detained as an enemy combatant."⁴¹ The DTA authorized the D.C. Circuit to determine whether the CSRT's findings were "consistent with the standards and procedures specified by the Secretary of Defense" and whether those standards and procedures were "consistent with the Constitution and laws of the United States."⁴²

The Supreme Court was not willing to accept Congress's constriction of its role in reviewing the legality of the detainees' incarceration. Giving the statute a tortured reading, the Court held that the DTA's jurisdiction-stripping provisions applied prospectively only, so the Court would continue to entertain the hundreds of pending habeas petitions filed by Guantanamo detainees.⁴³ Congress responded with the Military Commissions Act of 2006 (MCA), which even more clearly stripped the federal courts of jurisdiction over pending habeas petitions.⁴⁴ The MCA reconfirmed the D.C. Circuit's jurisdiction to review the CSRTs' determinations regarding enemy combatant status.⁴⁵

In passing the MCA and stripping the Court of jurisdiction over the detainee's cases, Congress and the President stood firm in their conviction that the Supreme Court had no constitutional claim to judicial review over military detentions in connection with the War on Terror. Then, in *Boumediene v. Bush*, the Court held that § 7 of the Military Commissions Act violated the Suspension Clause⁴⁶ by denying the federal courts

jurisdiction to adjudicate habeas corpus petitions from military detainees at Guantanamo Bay.⁴⁷ For the first time in history, the Court refused to stand aside when Congress exercised its Exceptions and Regulations power to check the Court's overreaching its legitimate sphere of authority.

II. The Boumediene Decision

A. The Majority Opinion

Justice Kennedy, writing for the majority of the Court, began by candidly acknowledging that “the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us.”⁴⁸ Without pausing to articulate a statutory or constitutional provision that purportedly provided the jurisdiction to do so, the majority opinion then proceeded to analyze whether noncitizens detained outside the territory of the United States have a constitutional right to habeas corpus.⁴⁹ The *Boumediene* majority apparently assumed that the Suspension Clause created self-executing habeas jurisdiction in the Supreme Court in any case where the writ would have run in 1789—*apparently* because the Court did not expressly so state, and *assumed* because the Court did not address this proposition’s obvious tension with foundational cases.⁵⁰

In the majority's view, if the writ of habeas corpus ran to aliens in foreign nations during the pre-constitutional period, then Article I, Section Nine would prevent Congress from making exceptions and regulations to its habeas jurisdiction over the Guantanamo detainees; therefore, the majority opinion focused heavily on the extraterritorial reach of the writ of habeas corpus in the British empire before 1789.⁵¹ Justice Kennedy found historical inconsistencies regarding whether the writ was available to foreign nationals or available in foreign lands.⁵² The writ was unavailable to persons in Scotland, which lay within the King's territories, but the writ was available in Ireland, despite its status as an independent sovereign.⁵³ After a ten-page historical narrative, Justice Kennedy could draw "no certain conclusions" about whether a pre-1789 common law court would have granted a writ of habeas corpus brought by an enemy combatant detained outside the United States or would have refused to grant the writ for lack of jurisdiction.⁵⁴ For Justice Kennedy, the historical record did prove, however, that *de jure* sovereignty had not been the "touchstone" for habeas corpus jurisdiction.⁵⁵

The Kennedy opinion's exploration of the pre-constitutional history of habeas corpus contrasts sharply with the scant attention given the political question doctrine.⁵⁶ The only potential political question, in the Court's view, was whether Cuba or the United States held sovereign power at Guantanamo Bay.⁵⁷ The Court did not quibble with the obvious fact that Guantanamo Bay lies within Cuba's sovereign territory.⁵⁸ However, the Court said the political question doctrine did not forbid the Court from determining whether the United States held what Justice Kennedy called "*de facto* sovereignty"—that is, practical control—over Guantanamo.⁵⁹ "Were we to hold that the present cases turn on the political question doctrine, we would be required first to accept the Government's premise that *de jure* sovereignty is the touchstone of habeas corpus jurisdiction."⁶⁰ In three paragraphs, the majority opinion had rejected the notion that the political

branches might be vested with unreviewable constitutional authority to determine whether the writ was available to the Guantanamo detainees.⁶¹ For Justice Kennedy, the premise that the political branches, and not the Court, could determine whether to allow habeas jurisdiction would be “contrary to fundamental separation-of-powers principles.”⁶² Congress had the power to make laws, but it was the Court’s province “to say what the law is.”⁶³

Kennedy’s opinion then reviewed a series of cases addressing, in his view, the geographic reach of the Constitution.⁶⁴ It focused on three decisions: *The Insular Cases*,⁶⁵ *Reid v. Covert*,⁶⁶ and *Johnson v. Eisentrager*.⁶⁷ In each case, Justice Kennedy wrote, the extent to which the petitioners were afforded constitutional rights did not turn solely on whether the geographic territory was formally part of the United States.⁶⁸ Instead, extraterritorial effect depended upon the “particular circumstances, the practical necessities, and the possible alternatives which Congress had before it” and, in particular, whether judicial enforcement of the provision would be “impractical and anomalous.”⁶⁹

The *Insular Cases*, decided following the Spanish-American War, addressed whether the Constitution applied of its own force in the newly acquired Philippine Islands or whether the Constitution would apply only if Congress passed enabling legislation.⁷⁰ Although the Court held that the Constitution automatically applied in new territories, it noted that practical difficulties would result from full-scale importation of all constitutional requirements.⁷¹ It would disrupt the existing, well-functioning legal culture, one that should be kept intact since the U.S. intended that the Philippine Islands would return to independence.⁷² Thus, only “fundamental” constitutional protections would apply there.⁷³

Justice Kennedy saw the same case-by-case, totality-of-the-circumstances analysis at work in *Reid*.⁷⁴ Civilian wives of military personnel had been tried by court martial for murders committed in England and Japan.⁷⁵ The Court held, however, that these American civilians were constitutionally entitled to trial by jury.⁷⁶ While Justice Kennedy conceded that their American citizenship was a “key factor” in the *Reid* Court’s conclusion that they were entitled to jury trials, practical considerations also played a part.⁷⁷

Finally, Justice Kennedy addressed *Johnson v. Eisentrager*.⁷⁸ The *Eisentrager* Court had refused to grant a writ of habeas corpus and had noted that the prisoners, who were German nationals held in occupied Germany to serve sentences in an American military prison, “at no relevant time were within any territory over which the United States is sovereign.”⁷⁹ Justice Kennedy wrote that “because the United States lacked both *de jure* sovereignty and plenary control over Landsberg Prison, it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility.”⁸⁰ Instead, Justice Kennedy contended, the *Eisentrager* opinion also focused on the practical difficulties involved in transporting prisoners and “damag[ing] the prestige of military commanders at a sensitive time.”⁸¹

The Kennedy opinion interpreted the writ’s history and the Court’s precedents in light of “fundamental separation-of-powers principles,”⁸² which, in the majority’s view, demanded

that the Guantanamo Bay detainees have access to habeas corpus review.⁸³ If the Court’s habeas power depended upon formal state sovereignty, then “it would be possible for the political branches to govern without legal constraint” in foreign territory.⁸⁴ In the Court’s view, permitting the political branches to operate without the possibility of habeas review in federal court would mean that “the political branches have the power to switch the Constitution on or off at will.”⁸⁵

The majority listed three factors that would determine whether the Suspension Clause vests the Court with power to issue habeas writs to an alien held outside U.S. borders: “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.”⁸⁶ Applying the first factor, the Court pointed to *Eisentrager*’s trial by military commission as the ideal level of process for determining whether the Guantanamo detainees were in fact enemy combatants.⁸⁷ The prisoners in *Eisentrager* had received a full trial by military commission for war crimes, with a bill of particulars and detailed factual allegations against them.⁸⁸ They were afforded legal counsel and the right to cross-examine witnesses.⁸⁹ In comparison, CSRT hearings provided the detainee with a “Personal Representative,” rather than legal counsel.⁹⁰ The Government’s evidence was presumptively valid, and the detainee was permitted to present only “reasonably available” evidence.⁹¹ The CSRT process, Justice Kennedy wrote, fell “well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.”⁹² Regarding the second factor, the Court opined that the military held a higher level of control over the Guantanamo military base than over Landsberg prison in Germany following World War II.⁹³

As for the third factor, the “practical obstacles,” the majority was “sensitive” to the fact that affording habeas petitions to detainees in federal court costs money and “may divert the attention of military personnel from other pressing tasks.”⁹⁴ The majority did not, however, find these facts “dispositive.”⁹⁵ The Executive Branch, in their view, presented “no credible arguments that the military mission at Guantanamo would be compromised” by the federal courts’ exercise of habeas corpus jurisdiction.⁹⁶

In the end, the majority held that its habeas jurisdiction could not be constricted through the MCA’s jurisdiction-stripping provision.⁹⁷ Congress could limit the Court’s jurisdiction only through a “formal” suspension of the writ.⁹⁸ The Court neither cited authority for the proposition that a suspension of habeas must be “formal” nor did it explain what a “formal” suspension might entail.⁹⁹

B. The Dissenting Opinions

Chief Justice Roberts and Justices Scalia, Thomas, and Alito signed onto two separate dissents.¹⁰⁰ Both dissents were highly critical of the majority’s decision, which upended the CSRT review process and provided the detainees with constitutional rights to habeas corpus review of the CSRT decisions in federal court. But the dissenters did not dispute certain fundamental assumptions underlying the majority

opinion. In the Justices' unanimous view, the Supreme Court's role in the constitutional enterprise was to declare the true meaning of the Constitution;¹⁰¹ it was for the Court, not the political branches, to give an authoritative interpretation of the Suspension Clause's cryptic language and the writ's uncertain history.¹⁰² Moreover, Congress was apparently powerless to strip the Court of jurisdiction to make those determinations, despite Congress's unqualified constitutional authority to limit the Court's jurisdiction.¹⁰³ Every Justice on the *Boumediene* Court held the opinion that Congress's enumerated power to make exceptions to the Court's jurisdiction was limited, not plenary. As Justice Scalia's dissent phrased it, "[a]s a court of law operating under a written Constitution, our role is to determine whether there is a conflict between [the Suspension] Clause and the Military Commissions Act."¹⁰⁴ The dissenters, like the majority, did not explain where the Court acquired jurisdiction to entertain that question even after the MCA stripped its jurisdiction to hear any case involving the detainees. Did the Court believe that the Suspension Clause provided self-executing habeas corpus jurisdiction to the federal courts? Perhaps the Court believed that the Suspension Clause restricted Congress from ever diminishing the courts' habeas jurisdiction once Congress granted that jurisdiction in the first instance. The dissenting opinions did not explore these questions, and they did not dispute the majority's implicit conclusion that these were not political questions.

The thrust of Justice Roberts's dissent was that the DTA's statutory processes for making enemy combatant determinations satisfied due process.¹⁰⁵ Congress had modeled the combatant-status-determination upon Army Regulation 190-8, which the *Hamdi* plurality presented as a model of the level of procedural protections an enemy combatant would receive from a habeas court.¹⁰⁶ Under the DTA, the Combatant Status Review Tribunals reviewed initial battlefield determinations of combatant status.¹⁰⁷ CSRTs "operate much as habeas courts . . . [t]hey gather evidence, call witnesses, take testimony, and render a decision on the legality of the Government's detention."¹⁰⁸ The *Hamdi* plurality had opined that this first level of review would satisfy constitutional due process standards for American citizens challenging their enemy combatant status.¹⁰⁹ However, Congress went much further than the constitutional minimum and extended the CSRT review process to all detainees, American and alien alike.¹¹⁰ Congress also provided for an additional layer of review by an Article III court.¹¹¹ The DTA authorized the D.C. Circuit to determine not only whether the CSRT's finding in a particular detainee's case "was consistent with the standards and procedures specified by the Secretary of Defense" but also "whether the use of such standards and procedures to make the determination [was] consistent with the Constitution and laws of the United States."¹¹² The *Boumediene* petitioners had never made use of these statutory remedies.¹¹³

Justice Scalia wrote separately to emphasize a point he considered "more fundamental still," which was that the writ of habeas corpus had never been available to noncitizens in foreign lands.¹¹⁴ The Suspension Clause thus did not provide the detainees with habeas rights.¹¹⁵ Justice Scalia began from

the proposition that the Court owes deference to Congress's judgments.¹¹⁶ Its statutes are entitled to a presumption of constitutionality, and this is especially true in foreign and military affairs.¹¹⁷ Indeed, Justice Kennedy's majority opinion admitted that, despite his careful examination of pre-constitutional history, he could not come to a certain conclusion regarding whether the writ would have run to aliens outside our borders.¹¹⁸ For Justice Scalia, this meant that the Court had no basis for striking down the MCA.¹¹⁹ The Court must defer to Congress's judgment.¹²⁰ Justice Scalia nonetheless contended that the majority had incorrectly judged the historical evidence regarding the geographical reach of the writ of habeas corpus.¹²¹ In his view, pre-constitutional and early post-1789 precedents plainly demonstrated that the writ was not available to noncitizens abroad.¹²²

III. Separation of Powers After *Boumediene*

Both the majority and dissenting opinions in *Boumediene* gave remarkably short shrift to two critical issues. The first was the political question doctrine. The second was Congress's power under Article III, Section Two to make exceptions to the Court's appellate jurisdiction.¹²³ The issues stand in close relationship to one another, since both allocate final constitutional decision-making authority away from the Judicial Branch and place that power within the political branches. Jurisdiction stripping is one of Congress's expressly granted constitutional means for checking the Judicial Branch from abusing sovereign power.¹²⁴ The political question doctrine, on the other hand, is a sort of check on the Judicial Branch imposed by the Court itself. It is a judicially crafted doctrine meant to ensure that the Judicial Branch does not usurp legislative or executive power.¹²⁵

The early Court did not view jurisdiction regulation or the political question doctrine as conflicting with the judicial role because the early Court did not view itself as the sole interpreter of the Constitution. That is no longer the case. The modern Court views the political branches' constitutional interpretations as only second-best guesses of "true" constitutional meaning, which the Court may fine-tune or reject as it sees fit. Neither the political question doctrine nor jurisdiction stripping can coexist with the Court's new conception of itself as supreme interpreter of the Constitution.

A. The Political Question Doctrine in *Boumediene*

The *Boumediene* decision, which spans seventy-seven pages in the Supreme Court Reporter, devotes three paragraphs to the political question doctrine.¹²⁶ The only potential political question any member of the Court could identify was an inconsequential one: the Court did "not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay."¹²⁷ The majority opinion did not pause for even a moment to consider whether the political branches possessed all constitutional authority to interpret their own and the others' war powers.

Boumediene marks a clear break with precedent. Until September 11, 2001, the Court had consistently taken the position that any constitutional questions arising from the

military detention or prosecution of enemy combatants were political questions to be answered by the political branches alone. The classic political question doctrine posits that the Constitution itself, by virtue of vesting an extraordinary level of discretionary power in one of the political branches, leaves all constitutional questions regarding the limits of that power in that single branch.¹²⁸ This doctrine finds its roots in *Marbury v. Madison*, the case that declared the power of judicial review itself, and the two doctrines are inextricably intertwined. Both judicial review and the political question doctrine are judicially crafted instruments for protecting the people's interests by ensuring that sovereign power remains dispersed in accordance with the constitutional plan. In *Marbury*, Chief Justice Marshall made the claim, radical at the time, that the Judicial Branch could issue writs of mandamus to high-order Executive Branch officials.¹²⁹ However, the Chief Justice also said that the Court could only order the Executive Branch to perform ministerial duties—those unambiguous legal obligations which left no room for discretion.¹³⁰ Where the Executive was vested with discretionary decision-making authority, even deferential judicial review would go too far.¹³¹ It would trespass on a core constitutional function solely dedicated to a coordinate branch, violating separation-of-powers precepts.¹³²

The political branches' powers to wage war have historically been viewed as the paradigmatic political question.¹³³ War powers are the Constitution's clearest "textually demonstrable constitutional commitment" of authority to the political branches.¹³⁴ The constitutional text is far more detailed in describing Congress's range of authority over the military than other congressional powers. The sheer number of provisions is striking: Congress has the power to "provide for the common Defence and general Welfare of the United States;"¹³⁵ "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;"¹³⁶ "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;"¹³⁷ "raise and support Armies;"¹³⁸ "provide and maintain a Navy;"¹³⁹ "make Rules for the Government and Regulation of the land and naval Forces;"¹⁴⁰ "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;"¹⁴¹ and "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."¹⁴²

The Constitution also vests significant war power in the Executive Branch by declaring the President to be the "Commander in Chief of the Army and Navy of the United States."¹⁴³ The Constitution makes no attempt to specify how the President shall go about performing this function. It is instead a matter left to the President's discretion, so the Judicial Branch has no "judicially discoverable standards" upon which to judge whether the President exercised that discretion within constitutional bounds.¹⁴⁴ All powers over war were granted to the political branches, without specifying a precise dividing line between them. The Framers blended and overlapped military powers in two separate branches to create an "intentional gray area, or zone of shared powers, requiring the legislative and executive branches to work out the allocation of power and responsibility."¹⁴⁵ This blending

of powers created a strong system of checks and balances.¹⁴⁶ Congress and the President might cooperate or might conflict over military policy, but neither had exclusive control over standing armies.¹⁴⁷ Each political branch would stand ready to check any unconstitutional action by the other.¹⁴⁸

Soon after the September 11th terrorist attacks and consistent with the customary laws of war, the Bush Administration took the position that the military could detain enemy combatants until the cessation of hostilities, and that no formal juridical process was necessary to determine who was an enemy combatant.¹⁴⁹ But the War on Terror was like no other war before it. Its temporal boundaries were uncertain, with the potential to last for decades or beyond. The battlefield had no geographic boundaries. The enemy wore no uniform. Combatants might live in Afghanistan or in Brooklyn. Under these conditions, the potential for erroneously detaining a non-enemy civilian was exponentially higher than in previous wars where military personnel could generally separate civilians from combatants with relative ease.¹⁵⁰

Given these facts, the Supreme Court broke with the established tradition of non-involvement in military matters and entertained *Hamdi v. Rumsfeld* on a writ of habeas corpus. *Hamdi* acknowledged that the customary laws of war allow the detainment of combatants captured in the course of battle until the conflict ceases.¹⁵¹ But the plurality was concerned about the possibility that humanitarian aid workers and journalists could be captured, mistaken for enemy combatants, and incarcerated in a war on terror that could last two generations.¹⁵² At the same time, the *Hamdi* plurality recognized the "weighty and sensitive governmental interests" in detaining enemies who have fought against the United States.¹⁵³ Further, *Hamdi* acknowledged that the political branches, not the Court, were responsible for wartime decision making: "Without doubt, our Constitution recognizes that core strategic matters of war making belong in the hands of those who are best positioned and most politically accountable for making them."¹⁵⁴ Weighing these competing concerns, *Hamdi* held that an American citizen detained as an enemy combatant had a constitutional right to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."¹⁵⁵

Hamdi might thus be viewed as opening a dialogue with the political branches regarding the proper interpretation of constitutional norms.¹⁵⁶ The plurality's tone was diplomatic and collaborative. Although it held that some level of process was owed to the detainees before they could be indefinitely detained, *Hamdi* did not attempt to dictate precisely what that process must entail. The military could choose a process that permitted hearsay and gave a rebuttable presumption in favor of the Government's evidence.¹⁵⁷ *Hamdi* conceded that Article III courts might have no role to play in the detainees' cases.¹⁵⁸

The Court's tone quickly changed when Congress revoked its jurisdiction to consider additional habeas cases from alien enemy combatants. *Boumediene* apparently considered the MCA's jurisdiction-stripping provisions to be an affront to the Court's place in the constitutional chain of command. The Court proclaimed that the CSRT procedures did not comply with due process, without identifying any particular

shortcomings.¹⁵⁹ *Boumediene* then delegated to the district courts the task of devising new procedures that would meet the detainees' constitutional rights of due process.¹⁶⁰ In response to the Government's concern that vital classified information presented in those habeas proceedings would find its way into enemy hands, *Boumediene* refused to "attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise" in the district courts.¹⁶¹ Those were questions "within the expertise and competence of the District Court to address in the first instance."¹⁶²

The *Boumediene* Court had lost sight of the limits of the judiciary's institutional capacity. The legitimacy of a judicial decision depends upon an even-handed application of the law. The Court must determine whether the law protects one party's security against his opponent's actions or whether the law instead leaves the opponent at liberty to continue those actions. In an ordinary case, statutory or common law will usually provide a relatively straightforward answer to that legal question. The open-textured language of the Constitution, on the other hand, protects *both* of these values—liberty and security—which often stand in direct opposition to one another. The Constitution secures individual liberties and provides for the common defense and domestic tranquility.¹⁶³ The early Court largely left balancing between the two values to the political branches through the complementary principles of deferential judicial review and the political question doctrine. From the 1930s to the 1990s, the Court took an active role in defining and enforcing individual liberties but continued to defer to the political branches' constitutional interpretations in foreign-policy matters in general and wartime policy decisions in particular. Each arrangement was a more acceptable balancing of sovereign power among the coordinate branches. These tacit settlement agreements each achieved a chief aim of the Constitution: to disperse governmental power so as to protect the people's own sovereignty and influence over their government.¹⁶⁴

However, the modern Court has abandoned the Framers' vision of separation of powers. *Boumediene* exemplifies a new vision of "fundamental separation-of-powers principles,"¹⁶⁵ different not just in degree but in kind from historical understandings of that phrase. The Court is the keeper of the Constitution; the political branches are to concern themselves only with politics—in the most derogatory sense of the term. The Court distrusts the political branches and the political process. Where the early Court considered it beyond the capacity of the judiciary to balance constitutional rights that implicate larger issues of policy vitally affecting the nation, the modern Court views itself as not only capable of balancing competing constitutional rights but also as the *only* branch capable of doing so.

B. The End of Congress's Power to Control the Court's Jurisdiction?

Boumediene began with the Court's acknowledgement that "the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us."¹⁶⁶ The opinion should have ended with that admission. Article III provides that Congress may make "Exceptions" from and "Regulations" to the

Court's jurisdiction.¹⁶⁷ The Constitution places no limitations on Congress's discretion.¹⁶⁸ With the exception of a small class of cases within its original jurisdiction,¹⁶⁹ the Supreme Court may adjudicate a case only where Congress has, by statute, granted it jurisdiction to do so.¹⁷⁰ Congress did not grant the federal courts jurisdiction to hear habeas petitions from the Guantanamo detainees but, to the contrary, enacted a series of statutes stripping the Court of habeas jurisdiction in no uncertain terms.¹⁷¹

Neither the *Boumediene* majority nor the dissenters mentioned the landmark cases that acknowledged Congress's plenary power and unreviewable discretion to prevent the Court from exercising habeas jurisdiction. In *Ex parte Bollman*, Chief Justice Marshall explained that if Congress chose not to provide the Court with statutory jurisdiction to issue writs of habeas corpus, then "the privilege [of the writ] itself would be lost."¹⁷² *Bollman* thus belied any suggestion that the Suspension Clause vests self-executing habeas jurisdiction in the federal Judiciary.¹⁷³ *Boumediene* also failed to acknowledge *Ex parte McCordle*, where Congress stripped the Court of jurisdiction to consider a then-pending habeas petition.¹⁷⁴ "The first question necessarily is that of jurisdiction," said *McCordle*, and once it was determined that Congress had revoked the Court's jurisdiction, it was "useless, if not improper, to enter into any discussion of other questions."¹⁷⁵ The *McCordle* Court was undoubtedly perturbed that Congress had prevented it from exercising influence over the course of Reconstruction, and yet, even a year later in *Ex parte Yerger*, the Court acknowledged that the Constitution had squarely committed to Congress the unreviewable discretion to determine whether the Court should exercise habeas jurisdiction in any case, including cases alleging constitutional violations and deprivations of liberty.¹⁷⁶

McCordle and *Bollman* were a consequence of the early Court's conception of the Constitution's separation-of-powers structure and the political theory that drove the Framers to settle upon that structure. The Framers divided power among three branches because they knew to a moral certainty that power corrupts. No one branch could be trusted with absolute dominion over constitutional interpretation, or else the Constitution would cease to perform its chief function, which was to protect the people from overweening governmental power. The Constitution delegated various enumerated powers to each branch, but the Constitution did not expressly grant the power of constitutional review to any single institution. The power and duty of constitutional review was instead an implied power, shared by all the coordinate branches. It derived from the Supremacy Clause, which declares the Constitution the supreme law of the land,¹⁷⁷ and from the Constitution's requirement that each branch swear a solemn oath to uphold the Constitution.¹⁷⁸

Judicial supremacy is directly contrary to the Founding Fathers' intention that "each department should have a will of its own."¹⁷⁹ To prevent "a gradual concentration of the several powers in the same department," the Constitution gave "each department the necessary constitutional means and personal motives to resist encroachments of the others."¹⁸⁰ In *Bollman* and *McCordle*, the Court acknowledged one of the key

constitutional checks on encroachments by the Judicial Branch: the power of Congress given by Article III, Section Two to make exceptions and regulations to the Court's jurisdiction.¹⁸¹

These foundational premises—that the Judicial and political branches possess equal authority to interpret the Constitution and that Congress may check the Court's violations of separation-of-powers principles—are no longer acceptable to the modern Court. *Boumediene* seemed to find it intolerable that Congress could remove the Court from the enemy combatant review process. The Court believed itself the only arm of government constituted to act on principle and imagined that Congress and the President were willing to sacrifice the deepest values embodied in the Constitution. The Court believed that rights to due process are something that it respects but that the other political branches violate to satisfy the base preferences of their constituents. In the Court's view, Congress and the President would subjugate the Constitution were it not for strict judicial oversight.

With these as its underlying assumptions, the *Boumediene* Court treated constitutional review as if it were an enumerated and delegated power expressly given to the Judicial Branch and to the Judicial Branch alone. The Court acted as if it viewed itself as the ultimate referee of constitutional-boundary disputes, even where its *own* errors in constitutional interpretation and abuses of constitutional power were at issue. In Congress's independent judgment, the Court had seriously misinterpreted its own constitutional power in declaring its intention to hear habeas claims filed by Guantanamo detainees. Congress used its constitutional Exceptions and Regulations check on the Court to enforce a contrary interpretation.¹⁸² But *Boumediene* deemed Congress and the President unqualified to judge whether the Court had overreached its legitimate sphere of constitutional authority. It would be a "striking anomaly," Justice Kennedy wrote, if "Congress and the President, not this Court, [could] say 'what the law is.'"¹⁸³

Boumediene treated Congress's Exceptions and Regulations power as a narrow and limited one, which could not prevent the Court from exercising its paramount power of judicial review. The writ of habeas corpus was "an indispensable mechanism for monitoring the separation of powers," Justice Kennedy wrote, and the Suspension Clause "must not be subject to manipulation by those whose power it is designed to restrain."¹⁸⁴ Justice Scalia's dissent soundly criticized Justice Kennedy's argument on the grounds that the Court, not Congress, had manipulated the writ's historical reach.¹⁸⁵ But even the dissenters, like the majority, still believed that only the Court could give an authoritative interpretation of the Suspension Clause and further believed that Congress could not prevent the Court from adjudicating that issue. Congress's constitutional Exceptions and Regulations check on the Court is no check at all if the Court has the power to decide whether Congress can use it.¹⁸⁶

Those who support judicial supremacy do not necessarily contend that the Court is more competent at interpreting the Constitution than the political branches, but instead desire a single interpretation that binds every branch.¹⁸⁷ These commentators feel uncomfortable with the open-endedness of a plurality of voices interpreting the Constitution; they want an authoritative voice.¹⁸⁸ In their article, Larry Alexander

and Frederick Schauer argue in favor of judicial supremacy on the grounds that the function of law in general—and the Constitution in particular—is to stabilize society and declare the rights and duties of societal actors consistently and across time.¹⁸⁹ But judicial supremacy would not realize these goals. Even if the Supreme Court were the final authority on constitutional meaning, the Court has altered that meaning time and again by overruling or distinguishing clearly applicable constitutional decisions.¹⁹⁰ Thus, the Court has proved that precedent and stare decisis are insufficient restraints on judicial activism to realize these commentators' desired level of stability.

What is more, there is no reason to believe that the Judicial Branch's constitutional interpretations would likely provide greater stability in the law than the political branches' interpretations. The political branches' readings of constitutional norms have, if anything, remained more consistent over time. Again, military law provides an excellent example, not only because it is directly at issue in *Boumediene* but also because military matters have historically been cordoned off from judicial oversight. The Uniform Code of Military Justice and the Geneva and Hague conventions have provided stable and predictable rules governing armed conflict.¹⁹¹ They have not lead to the "interpretive anarchy" that Alexander and Schauer fear.¹⁹²

This Article does not advocate putting an end to judicial review.¹⁹³ Quite the contrary, judicial review plays an important role in protecting constitutional norms. But the judicial power, like any other power, can be abused. The Constitution was designed to provide other branches the means to resist judicial manipulations of authority. The most flexible and effective constitutional check on the Judiciary is Congress's Article III power to regulate and make exceptions to the jurisdiction of the federal courts.¹⁹⁴ The constitutional system of checks and balances, designed to protect the people from governmental abuse of power, is more essential to the people's liberty interests than is federal habeas jurisdiction. Where Congress is convinced that the Court has attempted to alter the Constitution under the guise of interpreting it, Congress has an oath-sworn duty to uphold the Constitution and resist the abuse. The Constitution gave Congress the means by which to resist the Court's overreaching, by stripping it of jurisdiction.¹⁹⁵ In *Boumediene*, however, the Court refused to defer to Congress's check on its power. The Judicial Branch has claimed total dominion over constitutional interpretation, which is contrary to the Framers' best efforts to divide that awesome power among all the branches.

CONCLUSION

Justice Kennedy ended his *Boumediene* opinion with this thought: "Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law."¹⁹⁶ His statement was correct. The individual's liberty and the community's security are precious constitutional values, each deeply worthy of protection, and where those values come into conflict, they must be reconciled within the constitutional framework. But Justice Kennedy's statement begs the real

question: *Who* must reconcile them? For the *Boumediene* Court, it was the Court and the Court alone—the Court must “say what the law is”¹⁹⁷—and Congress’s attempt to deprive the Court of jurisdiction to do so was a violation of “fundamental separation-of-powers principles.”¹⁹⁸

Boumediene’s understanding of the Court’s role is sharply at odds with the Framers’ vision—and the early Court’s vision—of how the coordinate branches would operate within the constitutional system. The Framers designed the constitutional structure to ensure that no single branch would accumulate too much power. Thus, the Constitution created three perfectly coordinate branches of national government and delegated power, in widely varying amounts, to each. The Constitution did not grant any branch of government the final or exclusive right to declare constitutional meaning. It was instead an implied power, divided and shared among all branches. Because each enjoyed equal stature and rank, no branch could “pretend to an exclusive or superior right of settling the boundaries between their respective powers.”¹⁹⁹

Habeas corpus was indeed an important part of that constitutional framework, as Justice Kennedy said. It does not, however, give the Court license to overturn well-reasoned constitutional interpretations and policy decisions of the coordinate branches. When it became clear that the Court intended to issue habeas writs not to enforce but rather to radically alter settled constitutional understandings, Congress used its delegated and enumerated constitutional check on what it perceived to be the Court’s abuses.

The Court’s jurisdiction is not self-executing. Congress may grant it, and Congress may take it away. That power is Congress’s most effective and flexible check to prevent the Court from overreaching its rightful sphere of influence, and in the MCA, Congress unambiguously stripped the Court’s jurisdiction to entertain any claims, including petitions for habeas relief, from the Guantanamo detainees. The Court refused to be deterred. The Court claimed the power to review the constitutionality of Congress’s check on the Court’s *own* departures from constitutional norms and usurpations of coordinate branches’ constitutional powers. The Court claimed irreducible jurisdiction, through the mechanism of habeas corpus review, to proclaim final answers to constitutional questions. The Founding Fathers would find it troubling that *Boumediene* did so in the name of separation of powers.

Endnotes

- 1 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).
- 2 Military Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 9 C.F.R. 918 (2002), *reprinted in* 8 U.S.C. § 801 (2006).
- 3 See *Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004) (opining that being detained for over two years in territory controlled by the United States without counsel and without being charged with a crime amounted to unlawful detention).
- 4 Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (codified at 28 U.S.C.A. § 2241(e) (Supp. 2009)).
- 5 *Id.* § 7(a).

6 128 S. Ct. 2229 (2008).

7 *Id.* at 2275–76.

8 Many already have. See, e.g., Ronald Dworkin, *Why It Was a Great Victory*, N.Y. REV. BOOKS, Aug. 14, 2008, at 18 (praising *Boumediene* as a successful attempt by the Court to prevent the President from escaping his constitutional responsibilities); Jack M. Balkin, *Two Takes: With ‘Boumediene,’ the Court Reaffirmed a Basic Principle*, U.S. NEWS & WORLD REP., June 19, 2008, <http://www.usnews.com/articles/opinion/2008/06/19/two-takes-with-boumediene-the-court-reaffirmed-a-basic-principle.html> (arguing that the *Boumediene* Court saw through the Bush “[A]dministration’s ruse”).

9 U.S. CONST. art. III, § 2, cl. 2.

10 Military Commissions Act of 2006 § 7(a).

11 *Boumediene v. Bush*, 128 S. Ct. 2229, 2274–75 (2008).

12 *Id.* at 2275.

13 *Id.* at 2279–93 (Roberts, C.J., dissenting); *id.* at 2293–307 (Scalia, J., dissenting).

14 Others have sharply disagreed. See Gerald L. Neuman, *The Extraterritorial Constitution after Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 260–61 (2009) (arguing that the Supreme Court took a “functional approach” in *Boumediene* that balanced practical, historical, and political considerations with the Constitution).

15 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

16 *Id.*

17 THE 9/11 COMMISSION REPORT 326 (2004), *available at* <http://www.9-11commission.gov/report/911Report.pdf> (last visited Dec. 20, 2009).

18 *Rasul v. Bush*, 542 U.S. 466, 470 (2004).

19 See THE 9/11 COMMISSION REPORT, *supra* note 17, at 50–63, 231–41 (discussing, among other things, a series of fatwas and other calls to engage Americans in war made by Usama bin Laden and other senior members of al Qaeda and the role of that organization in the 9/11 attacks).

20 *Id.* at 50–73.

21 *Id.* at 63–70.

22 Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

23 See Military Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 9 C.F.R. 918 (2002), *reprinted in* 8 U.S.C. § 801 (2006) (granting authority to the Secretary of Defense to detain and try—subject to certain restrictions—international terrorists and other noncitizens).

24 *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

25 *Id.* at 533.

26 *Id.* at 513.

27 *Id.* at 518.

28 *Id.* at 515. On the same day the Court entertained Mr. Hamdi’s habeas petition, it also considered the petition of Jose Padilla. Robert H. Freilich, Ryan M. Manies, & Corey J. Mertes, *The Freilich Report 2003–04: The Supreme Court in an Age of Secrecy and Fear*, 36 URB. LAW. 583, 591 (2004). Mr. Padilla was an American citizen captured within the United States who allegedly planned to detonate a radioactive bomb here. *Padilla v. Rumsfeld*, 352 F.3d 695, 701 (2d Cir. 2003). He was detained as an enemy combatant and held for a time in New York before being transferred to South Carolina. *Rumsfeld v. Padilla*, 542 U.S. 426, 441 (2004). The issue decided by the Supreme Court in *Rumsfeld v. Padilla* was a narrow one: whether the federal court in New York had jurisdiction over Padilla’s habeas petition after his transfer to South Carolina. *Id.* at 443, 447. Five members of the Court held the view that Padilla did have a right to habeas relief, even though New York was not the proper locale in which to press that right. *Id.* at 451.

29 *Id.* at 533.

30 *Id.* at 589–90 (Thomas, J., dissenting).

31 *Id.* at 533 (plurality opinion).

32 *Id.*

33 *Id.* at 538.

34 Memorandum from Paul Wolfowitz, Deputy Sec’y, U.S. Dep’t of Def., to the Sec’y of the Navy (Jul. 7, 2004), <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

35 *Rasul v. Bush*, 542 U.S. 466, 470 (2004).

36 *Id.* at 484.

37 28 U.S.C. § 2241 (2006).

38 *Rasul*, 542 U.S. at 484.

39 Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, 119 Stat. 2739 (codified as amended in scattered sections of 1, 5, 10, 15, 16, 28, 37, 41, 42, and 50 U.S.C.).

40 *Id.* at § 1005(e)(1). The DTA amended 28 U.S.C. § 2241 to provide that “no court, justice, or judge shall have jurisdiction to . . . consider . . . an application for . . . habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo.” 28 U.S.C. § 2241(e)(1) (2006).

41 DTA § 1005(e)(2)(B).

42 *Id.* at § 1005(e)(2)(C).

43 *Hamdan v. Rumsfeld*, 548 U.S. 557, 577 (2006).

44 Military Commissions Act of 2006 § 7(a), 28 U.S.C.A. § 2241(e)(1) (Supp. 2009):

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or *is awaiting such determination*.

(emphasis added).

45 *Id.*

46 U.S. CONST. art. I, § 9, cl. 2.

47 *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008).

48 *Id.* at 2244.

49 *Id.*

50 See the discussion of *Ex parte* McCordle, 74 U.S. (7 Wall.) 506 (1868), and *Ex parte* Bollman, 8 U.S. (4 Cranch.) 75, 95 (1807), in section III.B.

51 *Id.* at 2244–54.

52 *Id.*

53 *Id.* at 2246–52.

54 *Id.* at 2248.

55 *Id.* at 2253.

56 *Id.* at 2252–53.

57 *Id.*

58 *Id.*

59 *Id.* at 2253.

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.* at 2259 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

64 *Id.* at 2254–60.

65 The *Insular Cases* were a series of cases. *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182

U.S. 243 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *De Lima v. Bidwell* 182 U.S. 1 (1901). See generally Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283, 300–12 (discussing generally the facts of and the decisions in the *Insular Cases*).

66 354 U.S. 1 (1957).

67 339 U.S. 763 (1950).

68 *Boumediene v. Bush*, 128 S. Ct. 2229, 2254–56(2008).

69 *Id.* at 2255–56 (quoting *Reid*, 354 U.S. at 74–75 (Harlan, J., concurring)).

70 *Id.* at 2254.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.* at 2255–56.

75 *Id.* at 2255.

76 *Id.*

77 *Id.* at 2256.

78 *Id.* at 2257.

79 *Id.* at 2257 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950)).

80 *Id.* at 2257 (citation omitted).

81 *Id.* at 2257 (citing *Eisentrager*, 339 U.S. at 779).

82 *Id.* at 2253.

83 *Id.* at 2262.

84 *Id.* at 2258–59.

85 *Id.* at 2258.

86 *Id.* at 2259.

87 *Id.*

88 *Id.* at 2260.

89 *Id.* at 2260.

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.* at 2261.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.* at 2262.

98 *Id.*

99 The *Boumediene* majority enigmatically opined that “[n]othing in [*Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)] can be construed as an invitation for Congress to suspend the writ.” *Id.* at 2242.

100 *Id.* at 2279–93 (Roberts, C.J., dissenting); *id.* at 2293–307 (Scalia, J., dissenting).

101 *Id.* at 2304 (Scalia, J., dissenting).

102 *Id.*

103 See U.S. CONST. art. III, § 2, cl. 2; *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 329 (1938) (“There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.”); *Sheldon v. Sill*, 49 U.S. (8 How.) 411, 448–49 (1850) (concluding that “Congress, having the power to establish the [inferior] courts, must define their respective jurisdictions”); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 314–15 (1816) (emphasizing that Congress has an option, not

- an obligation, to create inferior courts).
- 104 *Boumediene*, 128 S. Ct. at 2296 (Scalia, J., dissenting).
- 105 *Id.* at 2279 (Roberts, C.J., dissenting).
- 106 *Id.* at 2284 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004)).
- 107 *Id.*
- 108 *Id.*
- 109 *Id.*
- 110 *Id.*
- 111 *Id.*
- 112 *Id.*
- 113 *Id.*
- 114 *Id.* at 2294 (Scalia, J., dissenting).
- 115 *Id.*
- 116 *Id.* at 2296.
- 117 *Id.* at 2296–97.
- 118 *Id.* at 2251 (majority opinion).
- 119 *Id.* at 2297 (Scalia, J., dissenting).
- 120 *Id.*
- 121 *Id.* at 2298–302.
- 122 *Id.*
- 123 U.S. CONST. art. III, § 2, cl. 2.
- 124 *Id.*
- 125 Rachel Barkow has carefully distinguished between the classical and prudential strands of the political question doctrine. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002). The classical strand of the political question doctrine is premised upon the idea that the Constitution itself forbids the Judiciary from entertaining certain policy questions. *Id.* at 246–53. The prudential strand of the political question doctrine, on the other hand, is more closely related to abstention doctrines. *Id.* at 253–64. In these situations, the Constitution does not forbid judicial review and Congress has granted statutory jurisdiction over the issues presented, but the Court nonetheless declines to adjudicate the case out of deference to the policy-making decisions of the political branches. *Id.* at 263–73. Barkow’s article traces how the Court’s failure to articulate clearly whether it was relying upon the classical or prudential strand led to a jurisprudential mess, and as a result, too-heavy reliance on the prudential strand has almost killed the constitutionally based classical strand. *Id.* Barkow advocates a return to the classical strand, in which the Judiciary only refrains from hearing cases where the subject matter presents a textually demonstrable commitment of constitutional decision-making authority to a coordinate branch. *Id.* at 319–35. This article focuses on military power, which is the clearest example of the classical political question doctrine, with a plethora of clear textually demonstrable commitments of authority outside the Judicial Branch. Thus, it is largely unnecessary to distinguish here between the classical and prudential strands of the doctrine.
- 126 *Boumediene*, 128 S. Ct. at 2253.
- 127 *Id.* at 2252.
- 128 *See supra* note 125.
- 129 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 149–50 (1803).
- 130 *Id.* at 149–50.
- 131 *Id.* at 166.
- 132 *Id.* at 166.
- 133 *Boudemiene* presented a second set of political questions that should have been resolved in Congress alone: questions involving Article III, Section Two, which vests in Congress the unconditional power to control the federal courts’ jurisdiction, and the Suspension Clause, which vests in Congress the power to suspend habeas corpus jurisdiction “when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. III, § 2, cl. 2; *id.* art. I, § 9, cl. 2. These constitutional provisions vest in Congress two checks on the Court’s power. If the Court holds the power of judicial review over another branch’s constitutional check on the Court’s own abuses, then that check is no check at all.
- 134 *Baker v. Carr*, 369 U.S. 186, 217 (1962).
- 135 U.S. CONST. art. I, § 8, cl. 1.
- 136 *Id.* cl. 10.
- 137 *Id.* cl. 11.
- 138 *Id.* cl. 12.
- 139 *Id.* cl. 13.
- 140 *Id.* cl. 14.
- 141 *Id.* cl. 15.
- 142 *Id.* cl. 16.
- 143 *Id.* art. II, § 2, cl. 1.
- 144 *Baker v. Carr*, 369 U.S. 186, 217 (1962).
- 145 Geoffrey Corn & Eric T. Jensen, *The Political Balance of Power Over the Military: Rethinking the Relationship Between the Armed Forces, The President, and Congress*, 44 HOUS. L. REV. 553, 563 (2007).
- 146 *Id.*
- 147 *Id.* at 564.
- 148 *Id.* at 565.
- 149 Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, to Daniel J. Bryant, Assistant Attorney Gen., Office of Legis. Affairs, U.S. Dep’t of Justice (June 27, 2002), <http://www.justice.gov/olc/docs/memodetentionuscitizens06272002.pdf>.
- 150 *See generally* Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675 (2004) (discussing one’s status under the Geneva Convention as hinging on questions of form and not on one’s substantive actions).
- 151 *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).
- 152 *Id.* at 530–31.
- 153 *Id.* at 531.
- 154 *Id.*
- 155 *Id.* at 533.
- 156 *See* Robert C. Post & Reva B. Siegel, *Protecting the Constitution From the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 3 (2003) (arguing constitutional structure of separated coequal branches was intended to encourage compromise and dialogue among governmental branches).
- 157 *Hamdi*, 542 U.S. at 533–34.
- 158 *See id.* at 538 (“There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.”).
- 159 *Boumediene v. Bush*, 128 S. Ct. 2229, 2258–61 (2008).
- 160 *Id.* at 2276.
- 161 *Id.*
- 162 *Id.*
- 163 U.S. CONST. amends. I–VIII; *id.* pmbl.
- 164 *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1435–36 (1987); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive power to Say What the Law Is*, 83 GEO. L.J. 217, 245–52 (1994) (arguing that no branch can be the constitutional judge of its own power).
- 165 *Boumediene*, 128 S. Ct. at 2253.
- 166 *Id.* at 2244.
- 167 U.S. CONST. art. III, § 1, cl. 2.
- 168 *See* *Palmore v. United States*, 411 U.S. 389, 400–01 (1973) (holding

that, per its constitutional power to legislate for the District of Columbia, Congress may establish laws to try local criminal cases before judges who are not accorded life tenure or an indiminishable salary).

169 U.S. CONST. art. III, § 2, cl. 2.

170 *Id.*

171 Military Commissions Act of 2006 § 7(a), 28 U.S.C.A. § 2241(e)(1) (Supp. 2009)); Detainee Treatment Act of 2005 § 1005(e)(1), 28 U.S.C. § 2241(e)(1) (2006).

172 *Ex parte Bollman*, 8 U.S. (4 Cranch.) 75, 95 (1807).

173 No party in *Bollman* actually made such a suggestion. Neither prisoner's attorney argued that Article I, Section Nine gave the Supreme Court self-executing habeas jurisdiction. This is consistent with William Duker's leading text on the subject, which explains that the Suspension Clause did not create an individual right to habeas corpus in any person. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 133–36 (1980). It instead protected *state courts'* habeas jurisdiction from congressional interference because the Framers intended that the state courts would issue writs of habeas corpus to ensure the legality of federal detention. *Id.* The language of Article I, Section Nine, which forbids Congress from *suspending* habeas, presupposes the existence of habeas relief. At the time that language was drafted, state courts had jurisdiction (in varying degrees) to issue writs of habeas corpus. *Id.* at 111–15, 129–30. But there was no federal habeas relief because there were no federal courts. The Articles of Confederation made no provision for federal courts, and the Constitution had not yet been ratified. *Id.* at 131. Even after ratification created the Supreme Court, the Constitution left to Congress the decision whether to create lower federal courts and whether to grant jurisdiction to any federal court. *Id.* at 133–36.

174 *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 512 (1868).

175 *Id.*

176 *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 103–06 (1869).

177 U.S. CONST. art. VI, cl. 2.

178 *Id.* cl. 3.

179 THE FEDERALIST No. 51, at 319 (James Madison) (Isaac Kramnick ed., 1987).

180 *Id.*

181 *Ex parte McCordle*, 74 U.S. (7 Wall.) 505, 512–14 (1868); 8 U.S. (4 Cranch) 75, 116 (1807).

182 See Military Commissions Act of 2006 § 7(a), 28 U.S.C.A. § 2241(e)(1) (Supp. 2009):

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

183 *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

184 *Id.*

185 *Id.* at 2296–98 (Scalia, J., dissenting).

186 What remedy is left if Congress got serious about separation of powers, other than impeachment of Justices? If Congress took that step, would the Court claim the ultimate constitutional power to interpret Article III's provision that federal judges shall "hold their Offices during good Behaviour"? U.S. CONST. art. III, § 1.

187 See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377 (1997) ("The reasons for having laws and a constitution that is treated as law are accordingly also reasons for establishing one interpreter's interpretation as authoritative.").

188 *Id.*

189 *Id.* at 1371–77.

190 Compare *Johnson v. Eisentrager*, 339 U.S. 763, 790 (1950). (refusing to

extend jurisdiction to German nationals convicted of carrying out military activities in China against the United States) and *Ex Parte McCordle*, 74 U.S. (7 Wall) 505, 515 (1868) (relying on Article III, Section Two to uphold congressional withdrawal of the Court's jurisdiction) with *Boumediene v. Bush*, 128 S. Ct. 2229, 2251–62 (2008) (extending habeas jurisdiction to detainees at Guantanamo Bay, Cuba). Compare *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (upholding congressional power to regulate access to the polls under the Fourteenth Amendment) with *City of Boerne v. Flores*, 521 U.S. 531–36 (1997). (striking down the Religious Freedom Restoration Act as an unconstitutional use of congressional power).

191 See generally Corn and Jensen, *supra* note 148, at 569 (discussing the constraints that the Uniform Code of Military Justice and the Geneva and Hague Conventions have placed on the government).

192 Alexander and Schauer, *supra* note 196, at 1379.

193 But others have. Mark Tushnet and Robert Bork, who stand at opposite ends of the political spectrum, both advocate that judicial review should end. Professor Tushnet has suggested this constitutional amendment: "The provisions of this Constitution shall not be cognizable by any court." MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 175 (1999). Robert Bork suggests something less extreme. He would permit judicial review and the Court's constitutional interpretation would bind the particular parties who appeared before the Court, but Congress could by majority vote overturn the Court's interpretation of the particular constitutional provision. ROBERT H. BORK, SLOUCHING TOWARD GOMORRAH 117 (1996). This author remains committed to the premise that the people are best protected where all three branches contribute their various perspectives and institutional strengths to constitutional interpretation. But how to retain judicial review while eliminating judicial supremacy? That is a problem outside the scope of this article.

194 U.S. CONST. art. III., § 2, cl. 2.

195 *Id.*

196 *Boumediene v. Bush*, 128 S. Ct. 2229, 2274–75 (2008).

197 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

198 *Boumediene*, 128 S. Ct. at 2253.

199 THE FEDERALIST No. 49 (James Madison), *supra* note 188, at 313.



FINANCIAL SERVICES & E-COMMERCE

THE DODD-FRANK WALL STREET REFORM & CONSUMER PROTECTION ACT OF 2010: IS IT CONSTITUTIONAL?

By C. Boyden Gray and John Shu¹

Letter from the Editor . . .

There has been a great deal of discussion about the Dodd-Frank Wall Street Reform and Consumer Protection Act. By publishing this paper, which challenges the Act on several grounds, mostly constitutional, The Federalist Society seeks to foster further discussion and debate about this Act. To this end, we have included links to relevant materials that take different legal and policy positions on the Act. We do not link to other constitutional positions because this discussion is in too early a stage; as the conversation progresses we will link to those constitutional arguments. As always, The Federalist Society welcomes your responses to these materials. To join the debate, you can e-mail us at info@fed-soc.org.

The Federalist Society

Related Links:

Text of Dodd-Frank Wall Street Reform and Consumer Protection Act: http://docs.house.gov/rules/finserv/111_hr4173_fin-srvcr.pdf

Testimony of Michael Calhoun, Center for Responsible Lending, Before the House Committee on Financial Services, Sept. 30, 2009: http://financialservices.house.gov/media/file/hearings/111/calhoun_testimony.pdf

Testimony of Ben S. Bernanke, Chairman, Board of Governors of the Federal Reserve System, Before the House Committee on Financial Services, Oct. 1, 2009: http://financialservices.house.gov/media/file/hearings/111/testimony_of_chairman_bernanke.pdf

Testimony of Timothy F. Geithner, Secretary, U.S. Department of the Treasury, Before the House Committee on Financial Services, Oct. 29, 2009: http://financialservices.house.gov/media/file/hearings/111/geithner_treasury.pdf

Testimony of Sheila C. Blair, Chairman, Federal Deposit Insurance Corporation, Before the House Committee on Financial Services, Oct. 29, 2009: <http://financialservices.house.gov/media/file/hearings/111/bair.pdf>

Testimony of Peter J. Wallison, American Enterprise Institute, Before the House Committee on Financial Services, Oct. 29, 2009: http://www.house.gov/apps/list/hearing/financialsvcs_dem/wallison_aei.pdf

Statement of Senator Chris Dodd, Opening Senate Banking Committee Markup of Financial Reform Legislation, Nov. 19, 2009: <http://dodd.senate.gov/?q=node/5335>

Testimony of Prof. Todd J. Zywicki, George Mason University School of Law, Before the House Committee on Financial Services, Feb. 26, 2010: http://www.house.gov/apps/list/hearing/financialsvcs_dem/zywicki.pdf

C. Boyden Gray, Op-Ed, *No Checks, No Balance in Reform Law*, WASH. TIMES, Sept. 14, 2010: <http://www.washingtontimes.com/news/2010/sep/14/gray-no-checks-no-balance-in-reform-law/>

President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank” or “the Act”) into law on July 21, 2010.^{2,3} The massive and complex Act is reportedly the result of many compromises.⁴ Dodd-Frank’s intent, according to its title page, is “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail,’ to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.”

Dodd-Frank is extraordinarily complex, appearing to require almost a dozen different federal agencies to complete anywhere between 240 to 540 new sets of rules, along with approximately 145 studies that will very likely affect rulemaking.⁵ This count does not include situations where different agencies create different rules that govern the same activity. This new, expansive regulatory regime prompted former Fed Chairman Alan Greenspan to argue that Dodd-Frank’s “unprecedented complexity” and its “inevitable uncertainty” will negatively impact economic growth, inhibit financial innovation, and

render the rules that will govern a future financial marketplace disturbingly conjectural.”⁶

There has been much debate over whether Dodd-Frank will accomplish its stated intent, but there is also a growing exchange about whether the law is constitutionally infirm, primarily due to separation of powers, vagueness, and due process.⁷ Central to this discussion is the fact that Dodd-Frank grants bureaucracies broad and unchallengeable discretionary authority; we query whether the Act provides effective oversight by *any* branch of government—the President, Congress, or the Judiciary.

This paper focuses on the constitutional issues which three of the law’s most central grants of regulatory power raise: the Financial Stability Oversight Council (“FSOC”) and its powers in Title I, the Federal Deposit Insurance Corporation’s (“FDIC’s”) related liquidation authority in Title II, and the Bureau of Consumer Financial Protection (“CFPB”) in Title X. But first, to provide background and context, we set forth a brief “primer” on some of the constitutional doctrines that the Act’s critics are beginning to invoke.

THE STRUCTURAL CONSTITUTION: A PRIMER

The U.S. Constitution significantly constrains national government authority by enumerating particular powers, dividing or dispersing decision rights or control among three different branches, and establishing a system of checks and balances through which, in effect, one government branch’s ambitions counteract the ambitions of the others.

The Framers most feared the lawmaking power, vested in the Legislative Branch alone, although decades of wars and foreign threats helped make the Executive Branch an able competitor for power. The U.S. Supreme Court observed in 1892 “[t]hat Congress cannot delegate power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”⁸ Even Justice Scalia, who is skeptical of the non-delegation doctrine (*see infra*), noted that

“[s]trictly speaking, there is *no* acceptable delegation of legislative power. As John Locke put it almost 300 years ago . . . ‘the *legislative* can have no power to transfer their authority of making laws, and place it in other hands.’”⁹

The Supreme Court, in the last few decades, has been reluctant to strike down broad grants of authority to the Executive. The Court instead preferred to interpret troublesome grants as narrowly as possible in order to avoid constitutional issues. Dodd-Frank, however, so restricts the Judiciary’s ability to interpret the Act that the courts may have no choice but to invoke separation of powers.¹⁰

Dodd-Frank’s limits on oversight do not stop with the Judiciary; the Act also limits the President’s oversight. For example, the Act makes the Director of the Bureau of Consumer Financial Protection (“CFPB”) independent of the Federal Reserve Board, which funds and houses it, and the President. Furthermore, the Act dramatically curtails Congress’ oversight of the CFPB because it provides the CFPB’s funds out of the Fed’s seignorage and prevents both the House and Senate Appropriations Committees from reviewing the

CFPB’s funding. When one incorporates the Act’s requiring the Judiciary to defer to however the CFPB Director chooses to rewrite the U.S. consumer laws, it is difficult to discern any lines clearly separating the Branches. As Madison quoted Montesquieu’s admonition in Federalist No. 47, “[w]ere the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for THE JUDGE would then be THE LEGISLATOR.”¹¹

The Constitution is designed to avoid placing all of the government’s functions in one entity. Dodd-Frank, however, may have accomplished exactly what the Constitution intends to avoid unless the courts correct the Act. Eliminating the lines of government demarcation also effectively eliminates the lines between government and the private sector. The consequence is the likelihood of “agency capture” by Wall Street elements on the one hand, and, on the other hand, implicit recognition of “Too Big To Fail” along with all of the implicit subsidies which go with a bailout promise. Thus, for any financial entity not in the charmed circle and credit consumers (small, medium, or large), the end result is a major loss of both their ability to compete and their basic freedoms from rent-seeking regulation and competitor-instigated “takings.” Dodd-Frank’s power aggregation reflected in this article is not what the Framers intended.¹²

TITLE I: FINANCIAL STABILITY OVERSIGHT COUNCIL

The Secretary of the Treasury chairs the FSOC.¹³ Other members include the heads of the Securities & Exchange Commission (“SEC”), Commodities Futures Trading Commission (“CFTC”), Federal Housing Finance Agency (“FHFA”), Office of the Comptroller of Currency (“OCC”), Federal Deposit Insurance Corporation (“FDIC”), the CFPB, the Federal Reserve Board, the National Credit Union Administration Board (“NCIU”), and another member with insurance expertise, whom the President appoints by and with the Senate’s advice and consent for a fixed term of six years.¹⁴ The FSOC’s three main goals are to (1) act as a “systemic regulator,” (2) prevent “Too Big To Fail,” and (3) prevent future “bank bailouts.”¹⁵

The FSOC’s power cannot be overstated. For example, with the vote of two-thirds of its voting members and the Treasury Secretary’s affirmative vote,¹⁶ the FSOC can force the Federal Reserve Board to begin supervising U.S. non-bank financial companies pursuant to heightened, but undefined, principles without any guidance from Congress, other than the Act’s giving the FSOC the power to self-determine that either the company is in “material financial distress” or that the company’s “nature, scope, size, scale concentration, interconnectedness, or mix of the activities” “could pose a threat to the financial stability of the United States.”¹⁷ The Volker provisions of section 619 of the Act also subject such non-bank financial companies to the Volcker Rule, even though they have never been criticized for trading activities nor had any government support such as deposit insurance or access to the Federal Reserve Discount Window as bank holding companies did.

While the Act lists ten specific factors for the FSOC to consider in making this determination, such as the company’s

leverage status and off-balance-sheet exposures, it also lists as a factor “any other risk-related factors that the [FSOC] deems appropriate,” which serves as a “catch-all” item to effectively negate the specificity of the preceding ten factors and give the FSOC seemingly unlimited reach.¹⁸ The same applies for the FSOC to require the Federal Reserve Board to begin supervising foreign non-bank financial companies.¹⁹ In essence, Dodd-Frank authorizes the Federal Reserve to seize companies which did not request federal help and do not enjoy Federal subsidies.

The Act also has an “anti-evasion” provision which subjects the financial activities of any U.S. or foreign company to Federal Reserve Board supervision if the FSOC, on the vote of two-thirds of its voting members and the Treasury Secretary’s affirmative vote, determines that (1) the company or its financial activities pose sufficient danger to the financial stability of the United States, and (2) the company is organized or operates in such a manner as to evade Dodd-Frank’s application.²⁰ Again, the FSOC has unlimited power to define and determine the relevant terms, factors, and facts.

Only the FSOC may re-evaluate and/or rescind its determinations.²¹ It cannot rescind its determinations unless the Treasury Secretary votes in the affirmative, even if two-thirds of the voting members determine otherwise, again giving disproportionate power to the Treasury Secretary.²² While the Act lays out a procedure for notice and opportunity for a hearing, the non-bank financial company only has thirty days to request a hearing, and then the FSOC “shall fix a time . . . and place” where the company may submit written materials “or, at the sole discretion of the [FSOC], [give] oral testimony and oral argument.”²³ Furthermore, the FSOC, upon two-thirds vote of its voting members *and* the affirmative vote of the Treasury Secretary, may “waive or modify” the notice and hearing procedures if it determines that “such waiver or modification is necessary or appropriate to prevent or mitigate threats posed by the nonbank financial company to the financial stability of the United States,” which means that the FSOC has the discretion to ignore the notice and hearing procedures.²⁴

The affected non-bank financial company may petition a U.S. district court to rescind the FSOC’s final determination, but (1) it must do so within thirty days of receiving notice of the final determination, and (2) the court may only review whether the final determination was arbitrary and capricious; it may not hear any statutory or constitutional challenges.²⁵ Because the Act’s language is so vague and broad, and because it leaves so much power to the FSOC, it is difficult to see how a court could ever find a FSOC action to be arbitrary and capricious under the Act’s *prima facie* language.

The FSOC has the power to make recommendations to the Federal Reserve Board of Governors “concerning the establishment and refinement of prudential standards and reporting and disclosure requirements. . . .”²⁶ The FSOC, in making these recommendations, may take into consideration capital structure, riskiness, complexity, financial activities (including the financial activities of subsidiaries), size, and *any other risk-related factors that the FSOC deems appropriate*.²⁷ It may also differentiate among companies at its discretion.²⁸

Again, the FSOC has vague or undefined “catch-all” term to give it unchecked authority.

The FSOC may also “provide for more stringent regulation of a financial activity by issuing recommendations to the primary financial regulatory agencies to apply new or heightened standards . . . for a financial activity or practice conducted by bank holding companies or nonbank financial companies” if the FSOC determines that the activity or practice “could create or increase the risk of significant liquidity, credit, or other problems spreading among bank holding companies and nonbank financial companies, financial markets of the United States, or low-income, minority, or underserved communities.”²⁹ The phrases “could” and “or other problems” again serve as vague or undefined catch-all phrases which negate any specificity of previously delineated risk elements, thereby giving the FSOC unfettered discretion.

If the Federal Reserve Board determines that either a bank holding company with total consolidated assets of at least \$50 billion or a non-bank financial company under Federal Reserve Board supervision poses a “grave threat to the financial stability of the United States,” then the FSOC, under the rationale of mitigating risks to financial stability, and upon a two-thirds vote (this time not requiring the Treasury Secretary’s affirmative vote), can force the Federal Reserve Board to (1) limit the company’s ability to merge, acquire, or consolidate, or otherwise become affiliated with another company; (2) restrict the company’s ability to offer financial products; (3) require the company to terminate its activities; (4) impose conditions on the company’s business conduct; and (5) require the company to sell or otherwise transfer assets or off-balance-sheet items to unaffiliated entities.³⁰ The FSOC, in other words, has broad discretion to prohibit a company’s normal business activities or force it to take actions against its own financial interests. The Act provides an affected company with abbreviated notice and hearing procedures, with the Federal Reserve Board, in consultation with the FSOC, deciding whether to take oral testimony and oral argument. The Act does not clearly state whether the affected company has any avenue for judicial relief, and if so, under what circumstances and standard.³¹

Title I is likely to prompt disputes over several issues, such as the amount and scope of legislative power which the Act delegates to others. Ever since *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the courts have used the constitutional avoidance doctrine to construe statutes—where it is reasonable to do so—in such a way as to avoid invoking non-delegation directly.³² While the courts might be able to follow the same approach with respect to Dodd-Frank, it is not obvious which provisions the courts could narrow because of the delegation’s open-ended nature and the severe limits on the scope of judicial review. The Act’s few vague standards are likely unenforceable because the Act limits the courts to arbitrary and capricious review, thus precluding the judiciary from fully reviewing those standards and/or the legal authority. The FSOC is therefore left to its own devices to simultaneously exercise legislative, executive, and judicial powers.

Moreover, the Act’s curtailing judicial review very likely violates Article III’s protection of judicial independence and

thus raises separation of powers issues. The Supreme Court has never approved eliminating all judicial review of statutory and constitutional issues raised by government rules.³³ The potential impact of the Act's judicial review limitations has not yet generated wide discussion, and it should.

TITLE II: "ORDERLY LIQUIDATION AUTHORITY"

Under Title II, the FDIC and the Federal Reserve Board, upon two-thirds vote of each respective board, "shall consider whether to make a written recommendation" as to whether the Secretary of the Treasury should appoint the FDIC as receiver for a financial company.³⁴ The FDIC and Federal Reserve Board may do so *sua sponte* or at the Treasury Secretary's request,³⁵ and if the Treasury Secretary determines certain factors such as (1) whether the financial company is "in default or in danger of default," (2) that the financial company's failure and resolution under bankruptcy or other resolution authority "would have serious adverse effects on financial stability in the United States,"³⁶ and (3) whether any effect of the government's actions on the claims of creditors, counterparties, company shareholders, and other market participants are "appropriate," which is yet another vague term subject both to self-definition and discretionary change.³⁷

Dodd-Frank permits a U.S. district court to review whether Treasury's determinations are "arbitrary and capricious"—without regard to whether the determination violated the statute or the Constitution—on a "strictly confidential basis" and "without any prior public disclosure," which presumably means in secret and out of public view and scrutiny.³⁸ In fact, the Treasury Department must file its petition under seal if a company does not acquiesce or consent to the FDIC serving as its receiver.³⁹ Anyone who "recklessly discloses" information about either Treasury's determination or petition or the "pendency of court proceedings" faces felony criminal penalties of a fine up to \$250,000, five years in prison, or both.⁴⁰

The court must "make a determination within 24 hours of receipt of the petition," or else (1) the petition shall be granted by operation of law; (2) the Treasury Secretary shall appoint the FDIC as the receiver, and (3) liquidation automatically starts and the FDIC may immediately take all actions authorized under Title II.⁴¹ Twenty-four hours is a very short amount of time for a district court to do anything in an area so complex.⁴² The Act strips a party's ability to request a stay or injunction pending appeal⁴³ and restricts the appeals process, especially regarding the scope of review, which is limited to whether the Treasury Department was arbitrary and capricious when it determined that the covered financial company was in default or danger of default and satisfied § 201(a)(11)'s definition of a "financial company."⁴⁴ The Act does not permit the district or circuit courts to review Treasury's determination of whether default would cause "serious adverse effects" on financial stability "in" the United States.

With respect to the "orderly liquidation of covered brokers and dealers," Dodd-Frank specifically prohibits courts from taking "any action, including any action pursuant to the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa *et seq.*) or the Bankruptcy Code, to restrain or affect the [receiver's] exercise of powers or functions. . . ."⁴⁵ The Act also limits any

claim against the FDIC as receiver to money damages, and the FDIC has the power to allow, disallow and determine claims.⁴⁶ A claimant may sue in U.S. district court within sixty days, but if the claimant misses the deadline, "the claim shall be deemed to be disallowed . . . such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim."⁴⁷

Title II also states that "no court shall have jurisdiction over" (1) any claim or action for payment from, or any action seeking a determination of rights with respect to the assets of the seized entity or any claim relating to any act or omission of the seized entity or the FDIC.⁴⁸ Thus, the shareholders and creditors of the seized company appear to have no rights to contest the proceedings.

These various restrictions on judicial review—suspensions, in effect—go to the heart of the constitutional separation of powers infirmities of all three of the central authorities reviewed in this paper. The basic direction of the Supreme Court's case law is quite clear, even if details are less precise than in other areas of constitutional jurisprudence. The building block cases—*Crowell v. Benson*, 285 U.S. 22 (1932), *Northern Pipeline Construction Company v. Marathon Pipe Line Company*, 458 U.S. 50 (1982), and their progeny, such as *Thomas v. Union Carbide Agricultural Products*, 473 U.S. 568 (1985) and *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986)—all make clear that the restrictions on Article III jurisdiction and review in Dodd-Frank generally and Title II specifically run afoul of the separation of powers protection for the Judiciary's independence, as well as the Due Process requirements of the Fifth and Fourteenth Amendments.

The key principle is that Article III is likely to require the judiciary's close attention if the statute in question addresses rights which have been traditionally viewed as common-law commercial rights, but not require the same level of attention if the statute in question addresses regulatory issues which the federal statute created. Even in the latter context, however, there must still be some Article III oversight and review.

The issue in *Crowell* turned on whether the delegation of adjudicative functions to an administrative agency for determining injury awards to claimants under the Longshoremen's and Harbor Workers' Compensation Act violated the Article III responsibilities of the admiralty courts.⁴⁹ The Court found the delegation permissible because Article III courts retained broad oversight authority to review factual findings and legal determinations.⁵⁰ The case previewed much of the structure of the administrative state later established under the Administrative Procedure Act, including the provision for judicial review of an agency's factual and legal determinations.

Fifty years later, when the appellants in *Northern Pipeline* argued that Congress may, pursuant to its Article I powers, create (bankruptcy) courts free of Article III requirements, the majority observed that "[t]he flaw in appellants' analysis is that it provides no limiting principle. It thus threatens to supplant completely our system of adjudication in independent Art. III tribunals and replace it with a system of 'specialized' legislative courts."⁵¹ In striking down the bankruptcy regime, the Court contrasted the agency's statutorily limited fact-finding functions

in *Crowell* with the fact that the “bankruptcy courts exercise ‘all of the jurisdiction’ conferred by the Act on the district courts.”⁵² The Court noted, for example, that while the agency’s order in *Crowell* would be set aside “if ‘not supported by the evidence,’ the judgments of the bankruptcy courts are apparently subject to review only under the more deferential ‘clearly erroneous’ standard.”⁵³ The Court noted also that the *Crowell* agency had to go to the district courts for enforcement, while the bankruptcy courts “issue final judgments, which are binding and enforceable even in the absence of an appeal.”⁵⁴

Dodd-Frank’s resolution authority provisions cannot pass muster under the Court’s precedent for preserving the central requirements of Article III oversight. Title II of Dodd-Frank strips Article III courts of the right to review whether Treasury’s designation of receivership for FDIC resolution is consistent with Dodd-Frank or the Constitution.⁵⁵ This effectively gives the FDIC virtually exclusive authority to resolve issues that were previously the province of the Article III courts. Dodd-Frank limits the district court to arbitrary and capricious review, and further requires the district court to conduct that review in secret and complete it within 24 hours, which is an impossible task given the usual complexity of resolution cases.⁵⁶ Furthermore, the Act strips the district court of its usual authority to grant a stay pending appeal.⁵⁷ The Act also prevents the courts from reviewing Treasury’s factual determination whether a financial company’s default would have any impact on the financial stability of the United States as a condition of seizing the bank at the outset.⁵⁸

The Act’s broker-dealer review limitations go further and give the FDIC what appears to be exclusive authority to allow, disallow, and determine claims, permit claimants only 60 days to sue, and strip shareholders and creditors of the seized broker-dealer of any right to contest the FDIC rulings under the Bankruptcy Code or otherwise.

Dodd-Frank’s judicial review provisions starkly contrast with the judicial provisions in the *Thomas* case, where the issue was “whether Article III of the constitution prohibits Congress from selecting binding arbitration with only limited judicial review as the mechanism for resolving disputes among participants in FIFRA’s [Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.*] pesticide registration scheme.”⁵⁹

The Court made clear that, under FIFRA, a party’s submitting at the outset to arbitration was voluntary, stating that “the only potential object of judicial enforcement power is the . . . [pesticide] registrant who explicitly consents to have his rights determined by arbitration.”⁶⁰

Even so, the court noted that FIFRA “limits but does not preclude review of the arbitration proceeding by an Article III court,” preserved judicial review of constitutional error, and, *at a minimum*, protected “against arbitrators who abuse or exceed their powers or willfully misconstrue their mandate under the governing law.”⁶¹ Justice Brennan’s concurring opinion (which Justices Marshall and Blackmun joined) likened the arbitrator’s exercise of authority in this regulatory context to “the characteristics of a standard agency adjudication.”⁶² In Justice Brennan’s view, FIFRA satisfied Article III’s mandates because Article III courts had “the authority to invalidate an

arbitrator’s decision when that decision exceeds the arbitrator’s authority or exhibits a manifest disregard for the governing law,” thus preserving “the judicial authority over questions of law.”⁶³

In Dodd-Frank, however, Article III courts have no ability to review compliance with either the Act or the Constitution in the context of adjudicating rights historically considered more “private” or commercial in nature than FIFRA’s federally created obligations. If one also considers the Act’s standardless and vague grant of authority to the FSOC, FDIC, and Treasury, together with the delegated judicial power, the result resembles “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands,” which Madison declared was the “very definition of tyranny.”⁶⁴

Dodd-Frank’s challenge to the Judiciary’s independence complicates questions about the scope of the delegation of legislative power to the Executive. As noted *supra*, courts generally seek to construe statutes narrowly in order to avoid non-delegation and other constitutional issues. In *Whitman v. American Trucking Associations, Inc.*, the Supreme Court narrowly construed the Clean Air Act to avoid a potential delegation problem at the Environmental Protection Agency.⁶⁵ The Court also rejected the “idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power,” describing it as “internally contradictory” and further stating that the “very choice of which portion to exercise . . . would *itself* be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency’s voluntary self-denial has no bearing upon the answer.”⁶⁶ Dodd-Frank, however, virtually guarantees the exercise of that forbidden authority because it removes the courts’ ability to render statutory interpretations that are the sole province of the courts.⁶⁷

The Supreme Court’s jurisprudence indicates that observing Article III powers is most important when “private” as opposed to regulatory rights are at stake, such as the commercial bankruptcy issues in Dodd-Frank’s Title II. The Act is potentially infirm under a *Northern Pipeline* analysis because the Act essentially overrides the bankruptcy code and its judicial review options, thus inappropriately authorizing agency bureaucrats and political appointees instead of the impartial judiciary to determine basic contract rights. As a result, Dodd-Frank potentially undermines the very basis of capital markets altogether.

TITLE X: BUREAU OF CONSUMER FINANCIAL PROTECTION

The Bureau of Consumer Financial Protection (“CFPB”) is an executive agency whose mandate is to “regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws.”⁶⁸ Essentially, it has the authority to implement and enforce all consumer-related laws involving finance and credit, and thus will dictate credit allocation in the U.S. economy.⁶⁹ The CFPB has the power to administer, enforce and implement federal consumer financial law with exclusive rulemaking authority, which means that it has the unconstitutional power to define and determine, for

example, what is or is not a financial product, halt certain conduct, and enforce its own regulations.⁷⁰ The courts must defer to the CFPB regarding the meaning or interpretation of any provision of federal consumer financial law.⁷¹ Only the FSOC may set aside a CFPB final regulation, and only if the FSOC decides upon a two-thirds vote that the regulation in question endangers the U.S. banking or financial system.⁷² The CFPB may exempt any entity, product, or service so long as it determines that it is “necessary or appropriate” to do so.⁷³ Because only the CFPB determines what is “necessary or appropriate,” both of which are vague, undefined terms, this is susceptible to challenge either as a violation of due process or an impermissible encroachment on Article III. The relevant analytical approach here is under *Northern Pipeline*, where the Court criticized the statutorily-required deference review standard as too limited.⁷⁴

One of the CFPB’s stated objectives is to protect consumers “from unfair, deceptive, or abusive acts and practices and from discrimination.”⁷⁵ The CFPB may halt a company or service provider from “committing or engaging in an unfair, deceptive, or abusive act or practice” with respect to offering or transacting in a consumer financial product or service.⁷⁶ In fact, Dodd-Frank makes it unlawful for consumer financial product companies or service providers to “engage in any unfair, deceptive, or abusive act or practice.”⁷⁷ The Act extends this liability to any entity that “knowingly or recklessly provide[d] substantial assistance” to the offender.⁷⁸

One immediate litigation “red flag” is that the Act does not clearly define vague terms such as “unfair,” “deceptive,” “abusive,” and “discrimination.” CFPB is vested with the sole discretion to decide what those terms mean and how they are applied to consumer financial products and services and the consumer financial industry.⁷⁹ For example, Dodd-Frank defines an act or practice as “abusive” if it “materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service,” or if it takes “unreasonable advantage” of a consumer’s “lack of understanding” of the “material risks, costs, or conditions of the product or service” or a consumer’s “inability” to protect his own interests “in selecting or using a consumer financial product or service.”⁸⁰ Given that each and every consumer has different abilities to understand a term, condition, material risk, and cost; and each and every consumer has varying levels of ability—or desire—to protect his own interests, the Act’s standard can readily be caricatured as “we know it when we see it.” Moreover, the Act does not seem to include the concepts of deception or fraud with respect to the term “abusive,” which would mean that the CFPB could still declare illegal products and services whose terms, conditions, risks and costs are fully disclosed, so long as the CFPB labels them “abusive.” Moreover, the CFPB’s charter is so vast that its power could be characterized as including the practical authority to re-write consumer financial protection laws if it chooses to do so. Accordingly, it is reasonable to argue that Congress must do the re-writing, not an agency that escapes meaningful oversight.

Those challenging Dodd-Frank will maintain that Congress structured the CFPB in such a way that it unconstitutionally

escapes both Article I and Article II oversight. The key is that the Act houses the CFPB within the Federal Reserve, thereby placing one protected entity (the CFPB) within another (the Fed).⁸¹

Congress does not have the power of the purse over the CFPB because the CFPB director determines his own budget, which the Federal Reserve Board “shall transfer to the [CFPB] from the combined earnings of the Federal Reserve System.”⁸² The maximum budget amount is 12% of the Federal Reserve System’s operating expenses.⁸³ The CFPB’s funds from the Federal Reserve System “shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.”⁸⁴ The CFPB director also has wide discretion over the management, use, and disbursement of several separate funds, such as the “Consumer Financial Protection Fund.”⁸⁵ If the CFPB needs more money than what the Federal Reserve System provides, Dodd-Frank authorizes Congress to appropriate \$200 million to the CFPB for five fiscal years (FY 2010 – FY 2014), for a total of \$1 billion.⁸⁶ Presumably Congress would have oversight authority for that \$200 million per year appropriation, although the Act is unclear on that issue and pre-authorized the money.⁸⁷

The Federal Reserve Board may delegate to the CFPB the power to examine entities subject to the Federal Reserve Board’s jurisdiction for compliance with the federal consumer financial laws.⁸⁸ The Federal Reserve Board, however, has no oversight or purse powers over the CFPB. For example, the Federal Reserve Board may not (1) intervene in *any* CFPB matter or proceeding, (2) appoint, direct, or remove any CFPB officer or employee, nor (3) merge or consolidate the CFPB or its functions and/or responsibilities with any part of the Federal Reserve Board or the Federal Reserve banks.⁸⁹ Furthermore, the Federal Reserve Board may not delay, prevent, or review any CFPB rule or order.⁹⁰

Some litigants will characterize the CFPB as escaping Article II oversight as well, and litigants will therefore likely invoke the Appointments Clause. The President appoints the CFPB’s director, with and by Senate advice and consent.⁹¹ The director may appoint, direct, and determine the number of all CFPB employees.⁹² The director has a five-year fixed term.⁹³ The President may remove the director only for cause.⁹⁴ The CFPB director is thus protected under *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), and its progeny.⁹⁵

The U.S. Supreme Court recently spoke on an Appointments Clause issue in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (Jun. 28, 2010). There, the Court ruled SOX’s PCAOB structure unconstitutional because the SEC, not the President, appointed the PCAOB members; therefore, there were two tiers of protection: the SEC could not remove PCAOB members without cause, and the President could not remove SEC members without cause.⁹⁶ The Court’s remedy was to sever the second layer of “good cause” protection such that the SEC could remove PCAOB members without cause.⁹⁷ Such a remedy would not work with the CFPB, however, because Dodd-Frank forbids the Federal Reserve Board from appointing, directing, or removing any CFPB officer or employee.⁹⁸ It is worth noting

that the SEC and PCAOB, unlike the CFPB, are subject to congressional appropriations and review authority, as well as normal judicial review.

The CFPB's internal structure is also potentially constitutionally suspect. The CFPB director is to create a Consumer Advisory Board and appoint its members, although the Act is not clear as to how many members comprise the Consumer Advisory Board.⁹⁹ The Act mandates, however, that "not fewer than 6 members shall be appointed upon the recommendation of the regional Federal Reserve Bank Presidents, on a rotating basis."¹⁰⁰ Therefore, it appears that the CFPB director may not appoint whomever he or she believes is most qualified. Also, the CFPB, with its sole director, is different from agencies such as the SEC, the FTC, the Federal Communications Commission, the Federal Election Commission, *et al.* Those agencies are structured as collegial bodies, *id est* a group of members, often bipartisan, who make the agency's ultimate decisions. Thus, the CFPB director does not have an internal structural check, and escapes both presidential and congressional oversight.

OTHER ISSUES

Dodd-Frank eliminates, or at least weakens, subsidiary pre-emption.¹⁰¹ Courts likely will have to consider whether this conflicts with *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007), where the Court held that OCC regulations, promulgated under the National Bank Act, 12 U.S.C. § 1, *et seq.*, pre-empted the State of Michigan's mortgage lending laws, and thus Michigan could not regulate a national bank's wholly-owned subsidiary.¹⁰²

Dodd-Frank might even trigger some equal protection challenges. For example, the Act amends § 22(a) of the Commodities Exchange Act (7 U.S.C. § 25(a)) and, by fixing the terms of long-term swaps, provides legal certainty for them.¹⁰³ However, the Act does not contain a parallel provision for security-based swaps, even though these swaps are similarly situated.¹⁰⁴ Additionally, the Act's derivative exceptions grant certain counterparties greater rights than ordinary creditors, and the FDIC may disburse more money to some creditors over other creditors which are similarly situated.¹⁰⁵ The FDIC may also make additional payments to certain creditors at its discretion during liquidation, even if that amount is more than those selected creditors are owed.¹⁰⁶ Similarly-situated creditors are therefore not treated similarly.

Recently TCF Financial Corp. ("TCF"), a large regional bank based in Wayzata, Minnesota, sued the Federal Reserve and Fed Chairman Ben Bernanke to block the Fed's expected interchange or "swipe" fee restrictions under Dodd-Frank § 1075, often referred to as the "Durbin Amendment."^{107, 108} § 1075 excepts banks with assets of less than \$10 billion. TCF primarily alleges that § 1075 violates the Takings and Equal Protection clauses because it unfairly targets large financial institutions, unfairly prevents large banks from recouping fees and investments from their checking account and debit card businesses, and forces large banks to provide certain services below cost.¹⁰⁹

SUMMARY

The Dodd-Frank debate began as a policy dispute over its effectiveness in resolving the financial crisis or preventing a future one, but it will likely soon turn into disputes over constitutional infirmity. For example, does the law present such vagueness and uncertainty that it is a source of irreparable harm? Is the law an unprecedented breach of an array of structural constitutional protections that constrain government power and prevent an undue concentration of authority in any one part of government? Do the courts have the authority to oversee legal issues constitutionally committed to the independent judiciary? And even if the authority is there, does the legislation contain inappropriate limiting principles for the courts to apply? A Dodd-Frank challenge is sure to present these and other fundamental questions.

Endnotes

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2 See, e.g., Ronald D. Orol, *Obama Signs Sweeping Bank-Reform Bill Into Law*, MARKETWATCH, Jul. 21, 2010, available at <http://www.marketwatch.com/story/story/print?guid=2B007AF9-98C4-46BD-B7B6-09545EF8ADEF>.

3 The law is named after Senator Chris Dodd and Congressman Barney Frank.

4 See, e.g., Binyamin Appelbaum, *Lawmakers At Impasse On Trading*, THE NEW YORK TIMES, June 23, 2010, available at <http://www.nytimes.com/2010/06/24/business/24regulate.html>; and Jim Puzzanghera, *Congressional Negotiators Wrap Up Work On Financial Reform Legislation*, THE LOS ANGELES TIMES, June 26, 2010, available at <http://articles.latimes.com/2010/jun/26/business/la-fi-financial-reform-20100626>.

5 As a comparison, the Sarbanes-Oxley Act of 2002 ("SOX") required only 16 new rules.

6 Alan Greenspan, *Fear Undermines America's Recovery*, THE FINANCIAL TIMES, Oct. 6, 2010 (emphasis added), available at www.ft.com/cms/s/0/4524339a-d17a-11dF-96d1-00144feabdc0.html.

7 One key reason why Dodd-Frank will unlikely accomplish its intent is because Wall Street's compensation incentives have not changed, and thus Wall Street's senior executives have little economic incentive to closely monitor the risks their companies take and to make sure that those risks are prudent. This year Wall Street is preparing a record high \$144 billion for compensation and almost \$.50 of every dollar earned goes towards compensation. Regardless of whether Wall Street's compensation incentives are correct as a matter of policy, the Act does not effectively address the fact that the United States remains in the position of privatizing Wall Street's profits while socializing Wall Street's risks. Dodd-Frank also does not sufficiently account for the key roles that federal housing policy and government-sponsored entities such as the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) played in causing the financial crisis which spawned the Act.

8 *Field v. Clark*, 143 U.S. 649, 692 (1892).

9 *Mistretta v. United States*, 488 US 361, 419-20 (1989) (Scalia, J., dissenting) (citing J. Locke, 2nd Treatise of Gov't 87 (R. Cox ed. 1982) (emphasis in original)).

10 See *infra*.

11 THE FEDERALIST NO. 47 (James Madison).

12 Nelson D. Schwartz, *Financial Leaders Expect Shift of Power After Elections*, THE NEW YORK TIMES, Nov. 1, 2010, available at <http://nyti.ms/9oUz0z>.

13 Dodd-Frank, § 111(b)(1)(A).

14 Dodd-Frank, § 111(b)(1) and § 111(c)(1).

15 Dodd-Frank, § 112(a)(1).

16 Thus giving the Treasury Secretary disproportionate power over the FSOC.

17 Dodd-Frank, § 113(a)(1).

18 Dodd-Frank, § 113(a)(2).

19 Dodd-Frank, § 113(b).

20 Dodd-Frank, § 113(c).

21 Dodd-Frank, § 113(d).

22 Dodd-Frank, § 113(d)(2).

23 Dodd-Frank, § 113(e).

24 Dodd-Frank, § 113(f).

25 Dodd-Frank, § 113(h).

26 Dodd-Frank, § 115(a)(1).

27 Dodd-Frank, § 115(a)(2)(A) (emphasis added).

28 Dodd-Frank, § 115(a)(2)(A).

29 Dodd-Frank, § 120(a) (emphasis added).

30 Dodd-Frank, § 121(a).

31 Courts generally review an administrative agency's decision on an arbitrary and capricious standard, *id est* whether the agency's action is reasonable and based on a proper consideration of the circumstances, and generally give that agency what is known as *Chevron* deference. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The classic *Chevron* two-step test is where a reviewing court determines (1) whether Congress spoke directly to the precise question at issue (Congress' unambiguously expressed intent controls); and (2) if the statute is silent or *ambiguous* (emphasis added) with respect to the specific question, the court must review whether the agency's answer is based on a permissible construction of the statute. Here, the Act is so ambiguous in so many different places that courts will have a tough time reviewing an agency's actions, and the Act's vagueness and lack of parameters cause the "arbitrary and capricious" standard to become virtually meaningless in this context. See also *Natural Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency*, 966 F.2d 1292, 1297 (9th Cir. 1992).

32 See also *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001); see generally Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407 (Oct. 2008).

33 See *infra*, and *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 594 (1985).

34 Dodd-Frank, § 203(a)(1).

35 *Id.*

36 Interestingly, Dodd-Frank § 203(b) does not speak to the financial stability of the United States, but rather to the financial stability *in* the United States. Other sections refer to the financial stability *of* the United States. See, e.g., Dodd-Frank § 204(a).

37 Dodd-Frank, § 203(b).

38 Dodd-Frank, § 202(a)(1)(A)(iii).

39 Dodd-Frank, § 202(a)(1)(A)(ii).

40 Dodd-Frank, § 202(a)(1)(C).

41 Dodd-Frank, § 202(a)(1)(A)(v).

42 See, e.g., Andrew Clevenger, *Holder: Federal Judicial System "Stressed To The Breaking Point,"* THE CHARLESTON GAZETTE, Sept. 28, 2010, available at <http://blogs.wvgazette.com/watchdog/2010/09/28/holder-federal-judicial>

system-stressed-to-the-breaking-point; Dahlia Lithwick & Carl Tobias, *Vacant Stares: Why Don't Americans Worry About How An Understaffed Federal Bench Is Hazardous To Their Health?*, SLATE, Sept. 27, 2010, available at <http://www.slate.com/id/2268466>; and Jonathan Cole, *Citizens Lose When Judicial Vacancies Are Left In Limbo*, THE TENNESSEAN, Oct. 10, 2010, available at <http://www.tennessean.com/article/20101010/OPINION01/10100376/1008/Citizens+lose+when+judicial+vacancies+are+left+in+limbo>.

43 Dodd-Frank, § 202(a)(1)(B).

44 Dodd-Frank, § 202(a)(2).

45 Dodd-Frank, § 205(c).

46 Dodd-Frank, §§ 205(e), 210(a)(1), 210(a)(2).

47 Dodd-Frank, § 210(a)(4).

48 Dodd-Frank, § 202(a)(9)(D).

49 *Crowell v. Benson*, 285 U.S. 22, 36-37 (1932).

50 *Id.* at 60-61.

51 *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73 (1982).

52 *Id.* at 85 (emphasis in original) (citations omitted).

53 *Id.* (citation omitted).

54 *Id.* at 86 (citations omitted).

55 See *supra*.

56 See *supra*.

57 Dodd-Frank, § 202(a)(1)(B).

58 See *supra*.

59 *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 571 (1985).

60 *Id.* at 592.

61 *Id.*

62 *Id.* at 600-01 (citations omitted) (Brennan, J., dissenting).

63 *Id.* at 601-02 (citations omitted).

64 THE FEDERALIST NO. 47 (James Madison).

65 *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 473 (2001).

66 *Id.* at 472-73 (citations omitted) (emphasis in original).

67 *But cf. Reg'l Rail Reorg. Act Cases*, 419 U.S. 102 (1974) (due process takings claims, in some circumstances, can be satisfied collaterally in the Court of Claims).

68 Dodd-Frank, § 1011(a).

69 There are certain exceptions, such as § 1029 (auto dealers, which was one of the compromises needed for the law's passage), and § 1075 (interchange fees, *a.k.a.* the Durbin Amendment). See *infra*.

70 Dodd-Frank, §§ 1022(a), (b)(1), (b)(2), (b)(4). See *supra* re: the FDIC's exclusive resolution authority.

71 Dodd-Frank, § 1022(b)(4).

72 Dodd-Frank, § 1023.

73 Dodd-Frank, § 1022(b)(3)(A) (emphasis added).

74 *N. Pipeline*, 458 U.S. at 85-7.

75 Dodd-Frank, § 1021(b)(2).

76 Dodd-Frank, § 1031.

77 Dodd-Frank, § 1036(a)(1)(B).

78 Dodd-Frank, § 1036(a)(3).

79 See, e.g., Dodd-Frank, §§ 1022(a), (b)(1), (b)(2), (b)(4).

80 Dodd-Frank, § 1031(d).

81 Dodd-Frank, § 1011(a).

82 Dodd-Frank, § 1017(a)(1).

83 Dodd-Frank, § 1017(a)(2). The percentage is 10% for fiscal year 2011 (more than \$600 million), 11% for FY 2012, and 12% for FY 2013 and beyond, plus the percent increase in the employment cost index.

84 Dodd-Frank, § 1017(a)(2)(C).

85 See, e.g., Dodd-Frank, §§ 1017(b), (c).

86 Dodd-Frank, § 1017(e)(2).

87 Oddly, the Act requires that the CFPB director prepare reports and appear before Congress regarding, *inter alia*, “a justification of the budget request of the previous year.” See, e.g., Dodd-Frank, § 1016(c)(2).

88 Dodd-Frank, § 1012(c)(1).

89 Dodd-Frank, § 1012(c)(2).

90 Dodd-Frank, § 1012(c)(3).

91 Dodd-Frank, § 1011(b)(2).

92 Dodd-Frank, § 1013(a)(1)(A).

93 Dodd-Frank, § 1011(c)(1).

94 Dodd-Frank, § 1011(c)(3), which states that “[t]he President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.”

95 Furthermore, agencies whose heads have fixed terms, such as the Director of the Federal Bureau of Investigation (10-year term), are usually housed within an Executive Branch cabinet department which is accountable to the cabinet secretary and the President (*e.g.* the FBI is housed within the Department of Justice).

96 *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151-55 (Jun. 28, 2010).

97 *Id.* at 3161.

98 Dodd-Frank, § 1012(c)(2).

99 Dodd-Frank, § 1014(a).

100 Dodd-Frank, § 1014(b).

101 Dodd-Frank, § 1044.

102 *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007).

103 Dodd-Frank's § 739.

104 Oddly, the Act specifically mentions security-based swaps elsewhere. *See, e.g.*, Dodd-Frank § 803(7)(B)(vii).

105 See generally, Dodd-Frank, Title VII.

106 See generally, Dodd-Frank, Title II.

107 Named after Senator Dick Durbin (D-IL), who managed to get his provision through without any hearings or debate.

108 The case is *TCF Nat'l Bank v. Bernanke*, 10-CV-04149 (Dist. S.D. Oct. 12, 2010).

109 According to TCF's most recent annual balance sheet, it has total assets of nearly \$18 billion. See, TCF's Dec. 31., 2009 annual balance sheet, *available at* <http://ir.tcfexpress.com/phoenix.zhtml?c=95289&p=irol-fundBalanceA>.



FREE SPEECH & ELECTION LAW

HOLDING THE SERVICE'S FEET TO THE FIRE: APPLYING *CITIZENS UNITED* AND THE FIRST AMENDMENT TO THE IRC § 501(c)(3) POLITICAL PROHIBITION

By James Bopp, Jr.* and Zachary S. Kester**

The Supreme Court's recent decision in *Citizens United v. FEC*¹ will have a lasting and profound impact on the future of campaign finance regulation.² *Citizens United* will impact several other areas of law as well,³ not the least of which is federal tax law.⁴ This article explains how *Citizens United*—and the First Amendment—apply to the law of tax exempt organizations generally, and Internal Revenue Code Section 501(c)(3) specifically.

Currently, organizations exempt from federal income tax under IRC § 501(c)(3), often called charities,⁵ may not engage in more than an insubstantial amount of lobbying or violate what is known as the political prohibition, the campaign intervention prohibition, or simply, the prohibition.⁶ The prohibition requires that a charity “not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”⁷ The Internal Revenue Service (Service) investigates all relevant facts and circumstances in determining whether a charity has engaged in impermissible lobbying or campaign activities.⁸ As a result, no clear standards exist for a charity to determine whether it has run afoul of the political prohibition. Most charities therefore refrain from engaging in any speech that the Service *might* consider a violation of the political prohibition.

Citizens United is but one of many cases dealing with challenges to laws regulating core political speech,⁹ including “issue advocacy.”¹⁰ In *Citizens United*, the Supreme Court powerfully reaffirmed that strong protection for, and necessity of, core political speech as “an essential mechanism of democracy.”¹¹ The Court stressed the need to avoid chilling political speech by giving it “breathing space” and by not prescribing complex rules regulating it.¹² The Court further explained that government efforts to chill speech by adopting a multi-factor balancing test must be viewed with skepticism,

not deference, and subjected to strict scrutiny.¹³ Finally, it held that permitting a corporation to engage in campaign-related speech through its political action committee (PAC) does not allow a corporation itself to speak, concluding that the ban on corporate political speech was, in fact, a ban on corporate political speech.¹⁴

Citizens United and other cases dealing with core speech affect the tax exempt sector in at least three ways. First, IRC § 501(c)(3) and the Service's enforcement thereof must comport with the procedural due process requirement that a law provides fair notice of the conduct it prohibits.¹⁵ Second, the political prohibition is unconstitutionally vague on its face and as applied to charities engaging in political issue education and advocacy.¹⁶ Third, *Citizens United* casts serious doubt on the veracity of the “alternate channel doctrine” (ACD), which allows speech-related prohibitions on an entity so long as there exists an alternative route or channel by which an entity may engage in those activities.¹⁷ This article will address each of these in turn, but greatly emphasizes the latter.

I. Procedural Due Process Demands Fair Notice of Prohibited Conduct

The Due Process Clause of the Fifth Amendment provides that “No person . . . shall be . . . deprived of life, liberty, or property, without due process of law.” This clause¹⁸ requires that a law provide fair notice of conduct it prohibits—that a law not be vague.¹⁹ A law violates due process when it fails to provide fair notice²⁰ of prohibited conduct; when it may authorize and even encourage arbitrary, discriminatory, and selective enforcement;²¹ or when the government in its enforcement makes “value laden conclusion[s]” that an organization is “too doctrinaire.”²²

There are two contexts in which vagueness claims frequently arise: criminal prohibitions and laws regulating free speech. Generally, if a claim of unconstitutionality involves free speech, the claim is made strictly on free speech grounds. And if a claim involves criminal prohibitions, the claim is brought on due process grounds. Together this explains why due process fair notice cases deal either with criminal law or free speech, but not both.

The leading opinion applying the due process requirement that laws not be vague to the tax exempt organization context, *Big Mama Rag v. United States*, serves as an example of a case that would likely have had the same result regardless of whether the claim was brought under the Due Process Clause or the First Amendment.

In *Big Mama Rag*, the United States Court of Appeals for the District of Columbia Circuit held that “regulations authorizing tax exemptions may not be so unclear as to afford latitude for subjective application by IRS officials.”²³ *Big Mama Rag* (BMR) was an educational, feminist organization

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whose purpose was “to create a channel of communication for women that would educate and inform them on general issues of concern to them.”²⁴ After the Service denied tax exemption under IRC § 501(c)(3), BMR challenged the definition of the word “educational” within the meaning of IRC § 501(c)(3) and as implemented by regulations and Revenue Rulings.²⁵ The court explained at length:

Vague laws are not tolerated for a number of reasons, and the Supreme Court has fashioned the constitutional standards of specificity with these policies in mind. First, the vagueness doctrine incorporates the idea of notice—informing those subject to the law of its meaning. *Smith v. Goguen*, 415 U.S. [566, 572 (1974)]; *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A law must therefore be struck down if “men of common intelligence must necessarily guess at its meaning.” *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). See also *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964).

Second, the doctrine is concerned with providing officials with explicit guidelines in order to avoid arbitrary and discriminatory enforcement. *Hynes*, 425 U.S. at 622; *Goguen*, 415 U.S. at 572–73; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972). To that end, laws are invalidated if they are “wholly lacking in ‘terms susceptible of objective measurement.’” *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967) (quoting *Cramp v. Board of Public Instruction*, 368 U.S. 278, 286 (1961)). See also *NAACP v. Button*, 371 U.S. 415, 466 (1963) (Harlan, J., dissenting) (“Laws that have failed to meet this [. . .] standard are, almost without exception, those which turn on language calling for the exercise of subjective judgment, unaided by objective norms.”).

Importantly, the court applied the heightened standards applicable to regulations touching on speech even though it was construing the regulatory definition of “educational.”²⁶ Why? Because BMR advocated a position on “the reaction of local feminists” to a plea bargain of a female bank robber in Philadelphia—namely “that we, as women, are inextricably bound up with each other in the struggle.”²⁷ BMR was not discussing political issues around an election, but it was advocating for women’s rights in its newsletter with a position that the district court thought improperly “doctrinaire” to be educational.²⁸ But speech was at issue, so First Amendment standards applied.

The regulations defined educational as requiring a “full and fair exposition” of the “pertinent facts” surrounding an issue in order for a communication to be considered educational, but only if the Service determined an organization “advocate[d] a particular position or viewpoint.”²⁹ The court explained that the test to determine whether a charity met the “position of viewpoint” test was for the agent to determine whether a position was “controversial.”³⁰ And the record showed that only rarely did the Service ever make such a determination.³¹ Because the test was only applied after the Service made a standardless determination as to the controversy of a

position, the court struck the position or viewpoint test as unconstitutional.

The court then reached the “full and fair exposition” standard, which the Service attempted to apply by asking whether a communication was supported by fact or opinion.³² In analyzing the statement by BMR that “we, as women, are inextricably bound up with each other in the struggle,” the court asked “is the author’s description of the terms of the guilty plea sufficient to inform readers of the basis underlying her opinion? Or is further proof of the existence of ‘the struggle’ necessary? If so, would the article satisfy the ‘full and fair exposition’ test without that final statement?”³³ Because the answers to these questions under the Service’s test were unclear, the court struck down the test as unconstitutional. The court further explained that the “futility of attempting to draw lines between fact and unsupported opinion is further illustrated by the district court’s application of that test.”³⁴ BMR had, according to the district court, “adopted a stance so doctrinaire that it cannot satisfy this standard.”³⁵ This, the circuit court held, was simply too much. The definition of educational was deemed unconstitutional because it was unconstitutionally vague and required a subjective determination on the part of the government.

The concerns with vagueness apply equally to the prohibition. IRC § 501(c)(3) requires that a charity not “participate in, or intervene in” a campaign “on behalf of (or in opposition to)” a candidate. The definition of “participate” is “to take part or to share in something.”³⁶ The definition of “intervene” is “to come in or between by way of hindrance or modification or to interfere with the outcome.”³⁷ Thus, a reasonable person could understand the phrase “participate in” a campaign to mean to take part or share in the activities surrounding a campaign. Where, as often occurs, issues become central to campaigns, merely speaking about issues becomes potentially prohibited activity. The phrase “intervene in” a campaign likewise comes to mean affecting or interfering with the outcome of an election. Because candidates often ally themselves with positions on issues, discussion of issues then affects or interferes with the outcome of the election. Thus, a natural reading of the phrase “participate in, or intervene in” includes any discussion of issues important to Americans, simply because they might also be important to the candidates.

Similarly, the phrase “on behalf of (or in opposition to)” any candidate for public office suffers the same constitutional defect.³⁸ The definition of “on behalf of” is “in the interest of or as a representative of.”³⁹ Thus, the natural reading of the phrase would lead a charity to believe that it may not discuss issues in the interest of, as an agent of, or directly representing a candidate. This would seem to be a reasonable interpretation, especially since a parenthetical modifying phrase “(or in opposition to)” strongly correlates therewith. It would seem, then, reading the phrases together, that a wide array of campaign-related activity is permissible, such as comparing the charity’s position with those of candidates or praising and criticizing the merits of the positions taken by various candidates. But a charity would soon discover that the

Service thought these activities to be political intervention, for the Service understands “on behalf of” to mean showing any bias (as distinct from partisanship) in light of the statement’s timing and myriad other factors.⁴⁰

In nonprecedential guidance the Service makes it clear that “[i]n situations where there is no explicit endorsement or partisan activity, there is no bright-line test for determining if the IRC 501(c)(3) organization participated or intervened in a political campaign.”⁴¹ Further, the Service has rejected the need for clear lines and voiced its “concern . . . that an IRC 501(c)(3) organization may support or oppose a particular candidate in a political campaign without specifically naming the candidate by using code words to substitute for the candidate’s name in its messages.”⁴² “Code words,” the Service explains, “are used with the intent of conjuring favorable or unfavorable images—they have pejorative or commendatory connotations. . . . [O]rganizations would not use up air time or newspaper space with a code word if the word was not intended to communicate to the viewer, listener, or reader a specific elective choice.”⁴³ If the Service interprets a communication differently than the speaker or other hearers, then the fears of the Supreme Court ring true. The charity becomes “wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.”⁴⁴

On one hand, the statute initially appears to proscribe all speech on all policy issues. But on the other, a later clause modifies that proscription to speech in the interest of, as an agent of, or directly representing a candidate. Which is it? If the proscription falls in-between these understandings, how is a charity to know? The lack of a clear test means a charity has not received fair notice of prohibited conduct, and it allows the government to make subjective, value-laden determinations, both in violation of due process. A clear test must be established.

II. The First Amendment Proscribes Vague Laws that Chill Speech

Government cannot regulate speech and speech-related activities with laws that chill permissible speech. Congress has limited what has been called the “subsidy” of tax exemption under IRC § 501(c)(3), and the related ability to receive tax-deductible donations under IRC § 170,⁴⁵ to organizations that do not “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”⁴⁶ However, Congress and the Service have avoided delineating the bounds of what is permissible. Certainly, “[t]he First Amendment is often inconvenient. But that is beside the point. Inconvenience does not absolve the government from its obligation to tolerate speech.”⁴⁷

In *Citizens United*, the Supreme Court unequivocally stated that “First Amendment standards must eschew the open-ended rough-and-tumble of factors, which invites complex argument in a trial court and a virtually inevitable appeal.”⁴⁸ The First Amendment is “[p]remised on mistrust of government power,” especially where government’s “business is to censor.”⁴⁹ Thus, government efforts to chill speech—e.g.,

by fashioning “a two-part, 11-factor balancing test,”⁵⁰ or by steadfastly refusing to craft clear speech-protective tests and looking, as the Service does, for “code words”⁵¹ in speech—must be viewed with skepticism, not deference, and subjected to strict scrutiny.⁵²

Complex laws regulating speech are in effect prior restraints.⁵³ The *Citizens United* Court recognized regulation of speech and behavior—even speech and behavior that may not be protected by the First Amendment—with complex laws will result in situations where “[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.”⁵⁴ The “First Amendment does not permit laws that force speakers to retain a [specialist] attorney . . . or seek declaratory rulings before discussing . . . issues.”⁵⁵ The Court continued, “[p]roliferous laws chill speech for the same reason that vague laws chill speech: People ‘of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.’”⁵⁶ And few laws are as complex as federal tax-exempt law.

The Service’s reticence to provide precedential guidance and its policy to avoid litigation on these matters makes this First Amendment infringement grave indeed. The Service has made it its business to seek out “code words” and to fashion complex and unknowable “facts and circumstances” tests of the sort rejected in *Citizens United*. The unfortunate reality is that many charities “will choose simply to abstain from protected speech.”⁵⁷ That is, charities are chilled from engaging in otherwise protected core political speech.

With respect to the prohibition on political intervention in IRC § 501(c)(3), there is the added constraint that organizations are unable to vindicate their rights through case-by-case litigation because the Service rarely enforces its “I-know-it-when-I-see-it” standards,⁵⁸ and even then, only selectively.⁵⁹ Enforcement poses grave administrative costs, including significant time and expense for discovery, as well as practical concerns regarding the comparative cost of litigation against the cost of paying excise taxes. Accordingly, organizations avoid any speech the Service *might* consider problematic. This is the very evil the First Amendment sought to avoid. The only solution to the vagueness problem is a clear, bright-line, speech-protective test such as the express advocacy test.⁶⁰

III. *Citizens United* Effectively Invalidates the Alternate Channel Doctrine vis-à-vis Tax Exempt Organizations

Citizens United significantly undercuts the single most important rationale the Supreme Court has used in upholding restrictions on charities’ speech—what has become known as the alternate channel doctrine (ACD).⁶¹ “Scholars have argued that the [political prohibition] is unconstitutional, or at least ‘constitutionally suspect,’ for decades.”⁶² Perhaps the strongest of these arguments is that to the degree the political prohibition “imposes more than a restriction on using tax-deductible funds for campaign intervention . . . it violates the Constitution.”⁶³ The ACD is one method to prevent charities

from spending tax deductible monies for political campaign activity.

The ACD holds that the government need not subsidize constitutionally protected speech, but that an entity receiving government funds (whether in the form of tax exemption, or the ability to utilize tax deductible donations, which the Court views as subsidies, or in the form of a direct grant) must have an alternative channel through which it may engage in core political speech. The doctrine began with *Regan v. Taxation with Representation of Wash.*⁶⁴ Taxation with Representation challenged the clause of IRC § 501(c)(3) that prohibits a charity from engaging in more than an insubstantial amount of lobbying as unconstitutionally conditioning its tax exemption on surrendering its ability to engage in core political speech.⁶⁵ The Court noted that the tax benefits a charity receives—being exempt from paying federal income tax and the ability to receive tax deductible donations—are akin to subsidies.⁶⁶ Critical to its decision was the Court’s differentiation between a statutory scheme prohibiting subsidization of certain *activities*, on the one hand, and a scheme preventing subsidization of an *organization* that engages in certain activities on the other.⁶⁷ That is, government need not subsidize constitutionally protected activity but neither may it ban that activity, either directly or indirectly.⁶⁸ Finally, the Court explained how TWR could establish a related organization under IRC § 501(c)(4), as an alternate channel, to engage in an unlimited amount of lobbying activity.⁶⁹

Though *TWR* was a unanimous opinion, Justice Blackmun wrote a concurring opinion, joined by two other Justices, underscoring the importance of having an alternate channel through which the organization could speak. Justice Blackmun made clear that TWR had a right to lobby under the First Amendment, but that channeling this speech through a 501(c)(4) affiliate was permissible so long as TWR could *control* the 501(c)(4) organization, and the 501(c)(4) organization could *speak for* the 501(c)(3).⁷⁰

While Justice Blackmun’s position does not seem controlling, subsequent decisions have made clear this was the proper rationale. In *FCC v. League of Women Voters (LOWV)*,⁷¹ the majority opinion explicitly relied upon Blackmun’s reasoning in striking down the federal prohibition on “editorializing” for public broadcasting stations that received federal funding.⁷² Importantly, the ban applied to all station “editorializing” speech, not just speech paid for by the federal funds.⁷³ Because no alternate channels of speaking existed, the law was unconstitutional.⁷⁴

Additionally, in *Rust v. Sullivan*, the Court relied upon the availability of an alternate channel in upholding conditions on Title X family planning funding that prohibited all discussions of and referrals for abortions between medical providers and their patients in programs funded by Title X monies.⁷⁵ Importantly, the Title X recipients have access to alternate methods of spreading their message and so were free to educate about, refer for, and perform abortions in any non-Title X program.⁷⁶ The *Rust* Court relied upon the part of the majority opinion in *TWR* that Justice Blackmun expounded in his concurrence for the alternate channel proposition, thereby

showing that alternate channel availability was central to that opinion as well as Justice Blackmun’s concurrence.^{77,78}

One notable feature of the alternate channel cases is that *TWR* is the only case in which the acceptable alternate channel is actually a different legal person. In *LWV*, the government could not constitutionally prohibit the League’s editorializing, except to the extent the speech was funded with government monies. In *Rust*, the medical providers (whether hospitals, doctors, or nurses) were permitted to educate about, advocate for, and perform abortions, just not inside the context of the Title X-funded program. *TWR* was actually required to create a separate legal entity through which it could speak, but only if the 501(c)(3) organization could both *control and have its message disseminated by* the 501(c)(4).

A final aspect of *TWR* worth mentioning is that the Court, and Justice Blackmun, in what has become the controlling analysis, chose to allow the alternate channel to be a different legal person notwithstanding the existence of other options available to fix its subsidization concern. Generally, the only benefit that 501(c)(3) organizations receive that 501(c)(4) and 527 organizations do not is the ability to receive tax-deductible donations.⁷⁹ None of these organizations pay federal income tax on any activities that further their respective exempt purposes.

Though not argued in the *TWR* briefing, the Court had a different option to alleviate its subsidization concern. This option would operate in a similar way to the unrelated business income taxation system. A charity could speak and yet ensure deductible donations are not used if it implemented a record-keeping and reporting system parallel to the unrelated business income taxation system. Unrelated business income (UBI) is taxable income derived from a charity’s business activities that are unrelated to its charitable purpose.⁸⁰ UBI is permissible so long as the unrelated business is not the primary or more than an “insubstantial” purpose of the charity.⁸¹ Political intervention can be tailored to further the educational, religious, or other charitable purpose of an organization and yet not detract from its charitable mission.⁸² Requiring that deductible donations be kept separate effectively satisfies the only recognized governmental concern—subsidization of political speech.⁸³ Such a system would ensure that non-deductible monies are used for political intervention but the remaining functions are accept[ably] “charitable.” Such a system would only work if bright, clear, speech-protective lines exist to identify exactly what constitutes political campaign activity.⁸⁴

Citizens United casts grave doubts on the viability of the ACD, and therefore the constitutionality of the political prohibition. *Citizens United* involved a challenge to the provision of the Bipartisan Campaign Reform Act (BCRA) that banned corporations from making electioneering communications.⁸⁵ The *Citizens United* Court explained at length that requiring a corporation to speak through another person, in that case through a PAC, meant the corporation was not the speaker.⁸⁶ The ban on corporate electioneering communications was a “ban on corporate speech notwithstanding the fact that a PAC created by the

corporation can still speak.”⁸⁷ The PAC is a legally distinct person from the corporation.⁸⁸ So allowing a corporation to speak with its connected PAC is, in fact, not allowing the corporation to speak at all.

But “[e]ven if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems” with requiring a PAC speak for a corporation.⁸⁹ The Court then explained the burdens imposed on PACs, stating that “they are expensive to administer and subject to extensive regulations.”⁹⁰ Some of the applicable regulations require that a PAC appoint a treasurer who must then be forwarded all donations, the PAC must keep detailed records regarding contributors and maintain them for numerous years, and they must file new registration statements to report any changes within ten days.⁹¹ “And that is just the beginning, PACs must file” detailed monthly and last-minute reports of all cash on hand, itemized receipts of any type of income of any kind (including loans), aggregate and itemized expenditures, among other obligations.⁹² “PACs . . . must exist before they can speak,” and a “corporation may not be able to establish a PAC in time to make its views known.”⁹³ Thus, requiring a corporation to speak through a different organization is a ban on the corporation’s speech, and does not comport with the First Amendment.

It follows, then, that the rationale in *Citizens United* supports the idea that, requiring a charity to speak through not one but two different organizations is a ban on the charity’s speech. Once a charity decides to intervene in a campaign, it must first organize an affiliate, such as an IRC § 501(c)(4) social welfare organization, which may only engage in an “insubstantial” amount of political campaign intervention.⁹⁴ Such an organization must run its own gauntlet of compliance. It must formally organize, a process which generally includes filing articles of incorporation or association. Then there must be specialized language in the organizational documents relating to distribution of assets and inurement that only a specialist would be familiar with, necessitating the hiring of a tax exempt attorney. Finally, the secretary of state will issue a certificate. In the meantime, the organization must: draft bylaws, which requires additional specialized language regarding conflicts of interest and board operation, among other topics; hold an organizational meeting; appoint a board; obtain a tax identification number; and open a bank account. Depending on the state in which the entity is organized, the order of the above work may be different.

This affiliate must then file a Form 1024, Application for Recognition of Exemption with the Service. This six-page form contains an additional eleven schedules to be completed depending on the nature of its activities. Like PAC reports, the organization must include itemized detail of all finances, operations, and governance. It must also provide a detailed narrative of its past and planned activities that includes: a separate listing in the order of importance based on the relative time and other resources devoted to the activity; an explanation of how each activity furthers the organization’s exempt purpose; and where and when the activity was or will be held. Of course, like any other organization exempt from federal income tax, it must file an annual return, Form

990, which is a behemoth of a return, requiring an extensive amount of information. And this is only the compliance for the first of two entities the charity must create in order to spread its message. This is exactly the type of burden held unconstitutional in *Citizens United*.

Once the 501(c)(4) organization is operational, it must organize some other entity exempt from income tax under IRC § 527, such as a state PAC, which reports to the state’s reporting authority,⁹⁵ or a so-called “527,” which reports to the Service.⁹⁶ In all relevant respects, an entity reporting to a state or to the Service experiences the same PAC burdens as itemized above and by the Supreme Court in *Citizens United*.⁹⁷ Further, the treasurer (and sometimes the custodian of records or chairman) of a PAC is personally liable for fines levied on the PAC,⁹⁸ a reality not experienced by leadership of charities or social welfare organizations. In short, in order for a charity to intervene in a campaign it must organize not one but two different legal entities *before* it can speak. And each entity comes with a mountain of additional compliance, a mountain of compliance that effectively renders the ACD unconstitutional in *Citizens United*.

Title X funding recipients may themselves speak, just not within the bounds of the Title X funded program. Public broadcasting stations may also speak, just not with federal funds. Charities, however, need only pass through the “Rube Goldberg” device of creating an affiliated 501(c)(4) organization, which must then create a PAC in order to engage in campaign-related speech.⁹⁹ Of course, each entity involved is subject to three very different aspects of tax exempt law (IRC §§ 501(c)(3), 501(c)(4) and 527) and an organization must take great pains to comply with each in order to engage in political campaign speech. And, 501(c)(3) organizations may not make any decision of the PAC,¹⁰⁰ even if the decision is filtered through an affiliate organization.

No longer can the alternative channel doctrine be considered viable to the extent that, as in *TWR*, it requires speech to be directed through a different legal entity. In what has become the controlling analysis, Justice Blackmun made clear that what the limitation of lobbying in *TWR* saved was the ability to speak through a different person that the 501(c)(3) could *control*.¹⁰¹ Justice Blackmun further explained, any “attempt to prevent § 501(c)(4) organizations from lobbying *explicitly on behalf of their § 501(c)(3) affiliates would perpetuate § 501(c)(3) organizations’ inability to make known their views on legislation without incurring the unconstitutional penalty.*”¹⁰² The problem is only made worse when the 501(c)(4) must serve as an intermediary between the affiliated 501(c)(3) and PAC.

A charity is unable to control a PAC—a requirement central to the ACD. If a charity were to control the message of the PAC, it would be by controlling each entity in the decision-making and governance stages. However, a charity may not set the electoral goals of a social welfare organization or a PAC because to do so would be to spend 501(c)(3) dollars on impermissible political intervention. Further, a PAC cannot spread a political message of its related charity, such as an endorsement of a candidate, because a charity is not permitted to endorse candidates. Without the ability to speak

itself, or to control the affiliated political entity or its message, a charity is unable to speak. The controlling analysis of *TWR* is thus undermined, and the ACD is no more, at least to the extent that it requires speech to occur through a different legal person.

Thus, even prior to *Citizens United*, a 501(c)(3) organization must have been able to prompt an affiliate that it controls to engage in speech on its behalf,¹⁰³ including statutorily proscribed speech, to avoid imposing an unconstitutional condition on the receipt of tax exemption.¹⁰⁴ *Citizens United* establishes that an entity itself must be able to speak. A charity cannot be forced to speak through an affiliate—and in the case of the political prohibition through *two* affiliates.

Conclusion

Citizens United poses grave challenges to the prohibition against a charity participating or intervening in a political campaign. The ACD prohibits a charity itself from speaking under the guise of allowing its “affiliated organizations” to speak. But this is a fallacy to the extent that the charity is unable to control the messenger and the message. The only workable solution is to allow a charity to engage in speech that would currently violate the political prohibition, but to do so with non-tax-deductible dollars. If this solution is to work, a bright, clear line must be adopted to delineate the bounds of what speech is “political” and what speech is “charitable.”

Endnotes

1 130 S. Ct. 876 (2010).

2 See James Bopp, Jr. & Richard E. Coleson, *Citizens United v. Federal Election Commission: “Precisely What WRTL Sought to Avoid”*, 2009-2010 CATO SUP. CT. REV. 29; Lloyd H. Mayer, *Breaching a Leaking Dam?: Corporate Money and Elections*, CHARLESTON L. REV. (Supreme Court Preview edition), Vol. 4 (2009); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, APSA 2010 Annual Meeting Paper (June 4, 2010); Justin Levitt, *Confronting the Impact of Citizens United*, YALE L. & POL’Y REV., Vol. 29 (Sept. 13, 2010) (forthcoming); David Axelman, *Citizens United: How the New Campaign Finance Jurisprudence Has Been Shaped by Previous Dissents*, U. MIAMI L. REV. (Feb. 8, 2010) (forthcoming).

Several cases have already extended the core holdings of *Citizens United*. See *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010); *Thalheimer v. City of San Diego*, No. 09-CV-2862-IEG, 2010 WL 596397, at *6-9 (S.D. Cal. Feb. 16, 2010) (preliminary injunction opinion).

3 See Wendy Seltzer, *Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, Berkman Ctr. Research Publication No. 2010-3 (Mar. 2010); Reuven S. Avi-Yonah, *To Be or Not to Be? Citizens United and the Corporate Form*, Univ. of Mich. Law & Econ. Empirical Legal Studies Ctr. Paper No. 10-005 (Feb. 1, 2010); Paul M. Secunda, *Addressing Political Captive Audience Workplace Meetings in the Post-Citizens United Environment*, YALE L.J. ONLINE, Vol. 120 (Apr. 27, 2010); Jonathan A. Marcantel, *The Corporation as a ‘Real’ Constitutional Person* (June 5, 2010); James A. Gardner, *Anti-Regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope*, CORNELL J.L. & PUB. POL’Y, Vol. 20 (Aug. 22, 2010); David Kairys, *The Contradictory Messages of Speech Law: Eloquence and Annoyance* (July 18, 2010); Elizabeth R. Sheyn, *The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of Citizens United*, U. MIAMI L. REV., Vol. 65, No. 1 (Feb. 8, 2010); Anne Tucker Nees, *Politicizing Corporations: A Corporate Law Analysis of Corporate Personhood and First Amendment Rights after Citizens United*; Darrell A. H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights* (July

6, 2010).

4 See Miriam Galston, *When Statutory Regimes Collide: Will Wisconsin Right to Life and Citizens United Invalidate Federal Tax Regulation of Campaign Activity?* (March 2010) [hereinafter “Statutory Regimes”]; Jonathan A. Marcantel, *The Corporation as a ‘Real’ Constitutional Person* (June 5, 2010).

5 Not all organizations exempt under IRC § 501(c)(3) are “charities,” properly understood. But for the purposes of this article “charity” is a sufficient short hand for “organization exempt from federal income taxation under IRC § 501(c)(3).”

6 26 C.F.R. (Reg.) § 1.501(c)(3)-1(c)(3)(i) & (ii); see also IRC § 501(c)(3).

7 IRC § 501(c)(3).

8 Reg. § 1.501(c)(3)-1(c)(3)(iv); Revenue Ruling (Rev. Rul.) 78-248.

9 A government that takes away the core of what the First Amendment protects leaves what at most is at the periphery: Wearing profane jackets, *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 466 (2001) (Thomas, J., dissenting) (collecting authorities), burning crosses, pornography, *McConnell v. FEC*, 540 U.S. 93, 265 (2003) (Thomas, J., dissenting) (collecting authorities), “making false defamatory statements, filing lawsuits, dancing nude, exhibiting drive-in movies with nudity, burning flags, and wearing military uniforms[, plus] begging, shouting obscenities, erecting tables on a sidewalk, and refusing to wear a necktie.” *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 412 (2000) (Thomas, J., dissenting) (collecting authorities). See also *McConnell*, 540 U.S. at 248 (Scalia, J., dissenting) (collecting authorities).

10 That is, speech other than “express advocacy” as defined in *Buckley v. Valeo*, 424 U.S. 1, 43-44 & n.52 (1976). See James Bopp Jr. & Richard E. Coleson, *The First Amendment Is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 UWLA L. REV. 1, 9, 11-15 (1997) (explaining the long-standing express advocacy test).

11 130 S. Ct. at 898.

12 *Id.* at 892 (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (controlling opinion by Roberts, C.J., joined by Alito, J.) [hereinafter *WRTL II*]), 889.

13 *Id.* at 895 & 898.

14 *Id.* at 897-98. Many charities choose to incorporate as not-for-profit corporations, a decision that is permissible under IRC § 501(c)(3). Banning charities from engaging in certain types of speech is a ban on speech.

15 See *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

16 The Service recognizes that there is at least some core political speech that would constitute political issue education that does not violate the political prohibition. See Rev. Rul 2007-41; 2002 Continuing Professional Education (CPE) Text at 344-45.

17 See *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983) (“*TWR*”). The concurring opinion turned on the existence of an alternate channel. Subsequent Supreme Court decisions have adopted the view of the concurrence. See *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984); *Rust v. Sullivan*, 500 U.S. 173, 196 (1991).

18 The Due Process Clauses of the Fifth and Fourteenth Amendments are substantially similar and are to be interpreted as protecting the same interests: “To suppose that ‘due process of law’ mean[s] one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.” *Eldridge v. Williams*, 424 U.S. 319, 335 (1976). See also *Hurtado v. California*, 110 U.S. 516 (1884) (“[W]hen the same phrase was employed . . . it was used in the same sense with no greater extent.”).

19 See *Morales*, 527 U.S. at 56; *Smith v. Goguen*, 415 U.S. 566, 572 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Buckley*, 424 U.S. at 77.

20 The term “notice” has two meanings in the due process context. The first, as mentioned above, is that a law must provide fair notice of conduct it prohibits, that a law not be vague. See *supra* note 19. The second meaning is that a person “be given notice of case against him and opportunity to meet it.” *Matthews v. Eldridge*, 424 U.S. 319, 348 (1976) (internal citation omitted). It is the former meaning at issue here.

67 461 U.S. at 545.

68 *Id.*

69 *Id.* at 543.

70 *Id.* at 551-53 (Blackmun, J., concurring). Justice Blackmun made clear, however, that the 501(c)(3) organization could not transfer its funds to the 501(c)(4), but that the 501(c)(4) organization could be controlled by the 501(c)(3). *Id.* at 553.

71 468 U.S. 364 (1984).

72 *Id.* at 399-00.

73 *Id.* at 400.

74 *Id.* at 400-01.

75 500 U.S. 173, 198-99 (1991).

76 *Id.* at 193.

77 *Id.* at 197-98.

78 In the context of tax exempt entities, the alternate channel doctrine was extended by the United States Court of Appeals for the District of Columbia Circuit. *Branch Ministries*, 211 F.3d at 143. Relying upon Blackmun's concurrence in TWR and upon LWV, the D.C. Circuit held that the plaintiff church could utilize an affiliate 501(c)(4) organization to establish a PAC, through which its campaign speech could be undertaken. *Id.* Notably, the Branch Ministries Court never addressed the free speech concerns addressed in this article; instead it addressed the free exercise of religion claims brought by Branch Ministries. *Id.*

79 See IRC § 170. There are some additional tax benefits charities receive, many of which are tied to specific quasi-governmental functions some perform. For an exhaustive listing, see John Simon et al., *The Federal Tax Treatment of Charitable Organizations*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 267, 268-72 (Walter W. Powell & Richard Steinberg eds., 2006).

80 See IRC §§ 511-13; Reg. § 1.501(c)(3)-1(e). While the UBIT rules are complex, they are clear.

81 IRC § 513(a).

82 See Rev. Proc. 86-43.

83 See *supra* note 59, regarding the numerous possible bright line tests.

84 Congress has already decided to subsidize political speech in the form of tax exemption in exempting so-called 527 organizations from federal income tax. See IRC § 527.

85 2 U.S.C. 441b. Electioneering communications are any broadcast, cable, or satellite communication that (a) refers to a clearly identified candidate for federal office; (b) is made within (i) sixty days before a general, special, or runoff election; or (ii) thirty days before a primary election or a convention or caucus of a political party; and (c) is targeted to the relevant electorate. 2 U.S.C. § 434(f)(3)(A)(i).

86 130 S. Ct. at 897-98.

87 *Id.* at 897.

88 *Id.* A corporation that establishes a PAC may completely control that PAC, but only through appointing the officers of the PAC.

89 *Id.* at 897.

90 *Id.*

91 *Id.*

92 *Id.* (citing *McConnell*, 540 U.S. at 331-32).

93 *Id.* at 898.

94 See IRC § 501(c)(4). The metes and bounds of "substantiality" have not been identified with any clarity. On the one hand, the IRS has defined the term substantial in relation to the legislative activities of exempt organization to be five percent or greater. Reg. § 1.501(c)(3)-1(b)(3)(i). On the other hand, the IRS did not revoke an organization's tax exemption even though seventy-five percent of its income was derived from unrelated business sources. Rev. Rul. 57-313, 1957-1 C.B. 316. Further, authorities conflict on what activities

to measure in determining what activities count. Do volunteer hours count? How about expenditures? What counts more, expenditures of volunteer hours? There is no clear guidance.

95 For a complete listing of where to find each state's campaign finance law, see Database of Campaign Finance Legislation, National Conference of State Legislatures, *available at* www.ncsl.org (click on "Legislatures & Elections" then "Elections & Campaigns" and then "Database Campaign Finance Legislation").

96 The Service outlines the filing requirements for organizations tax-exempt under IRC § 527 at <http://www.irs.gov/charities/political/article/0,,id=96355,00.html>.

97 130 S. Ct. at 897-98.

98 See 11 C.F.R. 104.14(d).

99 Miriam Galston, *Statutory Regimes*, *supra* note 4, at 27.

100 2002 CPE Text at 365-67.

101 461 U.S. 552-54.

102 *Id.* at 553 (emphasis added).

103 It may be that the charity itself is not actually controlling the affiliate, but that the people who sit on the respective boards are making the decisions. This then means that if the boards do not overlap to a significant degree at each level, an affiliated PAC may experience "mission drift" and the charity and PAC may ultimately move in different directions.

104 On this view, even before *Citizens United*, explicit endorsement of a candidate by a 501(c)(3) through its 501(c)(4) affiliate was and remains permissible.



INTELLECTUAL PROPERTY

IN RE BILSKI: BUSINESS METHOD PATENTS RESOLVED? NOT LIKELY

By David L. Applegate*

The day before Halloween 2008, the Court of Appeals for the Federal Circuit released a much-anticipated *en banc* decision in the case of *In re Bernard L. Bilski and Rand Warsaw*, but it was difficult to tell whether it was a trick or a treat.¹ In that appeal from a final decision of the Board of Patent Appeals and Interferences, the Federal Circuit held that a claimed invention of a method for hedging the “consumption risks” associated with a commodity sold at a fixed price—in short, a method for hedging commodities—was not patent-eligible subject matter under 35 U.S.C. § 101 (“Section 101”).² The Federal Circuit therefore sustained the examiner’s rejection of all eleven claims of Bilski’s and Warsaw’s U.S. Patent Application, Serial No. 08/833,892, without ever determining whether the claimed invention was novel, useful, or nonobvious under 35 U.S.C. §§ 102 and 103 (“Sections 102 and 103”).³

On the last day of its 2010 term, the United States Supreme Court issued its long-awaited ruling in the same case, and observers are wondering once again if they have been tricked or treated.⁴ Perhaps naively anticipating a ruling that would definitively guide future conduct, practitioners, academics, and commentators alike have expressed reactions ranging from non-plussed to consternation to derision—and all of this from a result that was unanimous: that Bilski’s claimed invention did not represent patentable subject matter under Section 101. (Like the Federal Circuit, the Supreme Court had no reason to decide whether the claimed invention complied with Sections 102 and 103.)

In a decision that is difficult to characterize numerically (i.e., 5-4, 6-3), the Supreme Court issued three opinions: a sixteen-page opinion by Justice Kennedy, in twelve pages of which Justices Thomas, Alito, Roberts, and Scalia joined;⁵ a forty-seven page concurrence in the judgment by now-retired Justice John Paul Stevens, in which Justices Ginsburg, Breyer, and Sotomayor joined;⁶ and a four-page concurrence by Justice Breyer in which Justice Scalia joined.⁷

As this lineup suggests, the Supreme Court’s last-day-of-Term ruling didn’t really clarify *Bilski* all that much. Although smacking down the Federal Circuit’s efforts to formulate a bright-line test for patent-eligible subject matter, the Supreme Court also did not resolve any questions that the Federal Circuit had left open.

Whatever patentable subject matter means, it is more complicated than whether the claimed invention results in a change from one state to another or is tied to a machine. Beyond that, the Supreme Court did not definitively say. But before examining the Supreme Court’s opinions in detail, some background on *Bilski* in the court of appeals is in order.

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I. Federal Circuit Opinion

The Federal Circuit itself had issued a fractured decision that ran 132 pages and included three dissents and one concurrence.⁸ It raised and purported to answer five inter-related questions that the court had invited amici to address:

- (1) whether a claim addressed to a method practiced by a commodity provider for hedging the “consumption risks” associated with a commodity sold at a fixed price is patent-eligible subject matter under Section 101 (No);
- (2) whether the standard for determining whether a process is patent-eligible subject matter under Section 101 is whether it results in a transformation of an article or is tied to a machine (Yes);
- (3) whether Bilski’s claimed subject matter was ineligible for patent protection because it constituted an abstract idea or mental process (Yes);
- (4) whether a method or process must result in a transformation of an article or be tied to a machine to be patent-eligible under Section 101 (Yes);
- (5) whether it was appropriate to reconsider *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*⁹ and *AT&T Corp. v. Excel Communications, Inc.*¹⁰, and, if so, whether those cases should be overruled in any respect (sort of).¹¹

The Federal Circuit’s lengthy opinions left practitioners and commentators disagreeing over *Bilski*’s precise holding and puzzling over *Bilski*’s likely practical effect, including in these pages: exactly what kind of transformation from one state to another (physical? chemical? electrical?) was required, and would *Bilski* make so-called “business method” patents harder or easier to get-and therefore more (or less) valuable in the future?¹²

A. Bilski’s Background

Technically at issue in *Bilski* were two questions: (1) whether the examiner of the original USPTO application had erroneously rejected the claims as not directed to patent-eligible subject matter under 35 U.S.C. § 101, and (2) whether the Board of Patent Appeals and Interferences had erred in upholding that rejection.¹³ More broadly speaking, the issue of concern to most of the intellectual property community was the continued vitality of so-called “business method” patents such as Amazon.com’s “one-click” Internet shopping patent and others even more abstract.¹⁴

1. Historical Background

In keeping with Article One, Section 8, Clause 8 of the Constitution,¹⁵ Congress has authorized patent rights for new inventions and discoveries almost from the nation’s

start, beginning with the first Patent Act in 1790. Under the current Patent Act in 1952, as from time to time amended,¹⁶ patents are available for inventions or discoveries that are new (“novel”), “non-obvious” to others of “ordinary skill” in the “art,” and “useful” (although the standard of utility is low).¹⁷

Subject to specified conditions and requirements, the current U. S. Patent Code explicitly limits patent-eligible subject matter to five categories: processes, machines, manufactures, compositions of matter, and new and useful “improvements thereof, but it does not define these terms.”¹⁸ Of particular debate and confusion are what constitute “processes” and “machines.”

In the 18th and 19th century mechanical age, the answer seemed fairly clear: although logarithms (abstract ideas) were not potentially patentable, for example, the slide rule (a machine) clearly was. Even at the dawn of the 20th century’s electrical age, the line of patentability was typically not difficult to draw: Faraday’s Law was not potentially patentable, but the microwave oven was. Ever since the dawn of the microprocessor, however, inventors and their lawyers, patent examiners, and the courts have had a tougher time drawing the line. A primary source of recent consternation has been the field of “business method” patents.

2. Business Methods

The U.S. has long granted patents on processes and even financial-related inventions, but patents on methods of doing business have become both more widespread and more controversial in the age of the Internet. At the end of the last decade, the Federal Circuit decided in *State Street Bank* and *AT&T Corp.* that the courts and the U.S. Patent and Trademark Office need no longer distinguish between “technology-based” and “business-based” patents. To the dismay of many, *State Street Bank* prompted a rash of applications for such things as methods of online shopping and methods of raising funds in financial markets.

A threshold difficulty in determining whether such business methods constitute patentable “processes” is that Congress has in part defined the term “process” tautologically:

The term “process” means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material.¹⁹

In other words, in part, “process” includes a “process” or a new use of a “process,” which is not particularly illuminating.²⁰

B. The Issue in *Bilski*

Against this background the central issue before the Federal Circuit in *Bilski* was akin to whether the applicants had discovered logarithms on the one hand or had invented the slide rule on the other—or, some would say, having already seen the slide rule attempted to patent logarithms. Starting with the observation that the applicants’ claim was for a method of hedging risk in the field of commodities trading and the proposition that abstract ideas are not patentable, a majority of nine judges agreed that, to be patent-eligible

under 35 U.S.C. § 101, a method or process must (a) result in a transformation of an article or (b) be tied to a machine, as set forth in a sequential trilogy of U.S. Supreme Court cases: *Gottschalk v. Benson*,²¹ *Parker v. Flook*,²² and *Diamond v. Diehr*.²³

The *Bilski* majority nonetheless regarded this revelation as merely a “clarification” of existing law—not an overturning of either *State Street Bank* or *AT&T*. The court nonetheless also cautioned in a footnote that “[a]s a result, those portions of our opinions in *State Street* and *AT&T* relying solely on a ‘useful, concrete and tangible result’ analysis” should no longer be relied upon.²⁴ But because this merely “clarified” existing law in light of Supreme Court precedent, the majority said, “we decline to adopt a broad exclusion over software or any other such category of subject matter beyond the exclusion of claims drawn to fundamental principles set forth by the Supreme Court.”²⁵

At the Federal Circuit level, then, *Bilski* “clarified” the state of patentability law as follows: Abstract ideas, mental processes, fundamental truths, and general knowledge remained unpatentable, but inventions or discoveries that are new, nonobvious, useful, and meet the remaining statutory requirements are patentable—so long as they are tied to a machine or result in a transformation of matter. Thus, it would seem, a “business method” would need to employ a machine or transform matter in some fashion in order to be potentially patentable.

II. Supreme Court Opinions

Bilski reached the Supreme Court for oral argument in November 2009 and was the last case to be decided from among those argued that month.²⁶ Ultimately all nine Justices agreed with the Federal Circuit that *Bilski*’s claimed invention is unpatentable as an abstract idea. All nine Justices also rejected the Federal Circuit’s “machine or transformation” test as too narrow for purposes of determining patentable subject matter under Section 101.²⁷ But apart from these two points the Justices were far from unanimous, and the Supreme Court’s decision may raise as many questions as it answers.

A. Justice Kennedy’s Opinion

Writing for the Court except as to two parts in which Justice Scalia would not join,²⁸ Justice Kennedy found that (1) Section 101 specifies four independent patent-eligible categories of inventions or discoveries: “process[es],” “machin[es],” “manufactur[es],” and “composition[s] of matter”; (2) the machine-or-transformation test is therefore not the sole test for § 101 patent eligibility; (3) “process” does not categorically exclude business methods; (4) *Bilski*’s claimed invention was not categorically outside of Section 101 but did not constitute a “process” under § 101; and (e) because *Bilski*’s application could be rejected solely as for a patent on an abstract idea, the Court need not further define what constitutes a patentable “process.”²⁹ Justice Kennedy grounded this practical and judicially cautious opinion on both the Constitution and the Court’s prior decisions; that is, *stare decisis*.

1. Patent-Eligible Categories

In choosing such “expansive terms” as processes, machine, manufacture, and composition of matter, Justice Kennedy wrote, “Congress plainly contemplated that the patent laws would be given wide scope.”³⁰ Consistent with patent law’s requirement that a patentable process be “new and useful” and now embedded in the law as a matter of *stare decisis*, he found, Supreme Court precedent provides only three specific exceptions: “laws of nature, physical phenomena, and abstract ideas.”³¹

Even if a claimed invention meets one of the four § 101 categories, Justice Kennedy reminds us, it must also be novel (§ 102), nonobvious (§ 103), and contain a full and particular description (§ 112).³² Thus, he reminds us, § 101 is not the be-all and end-all of patentability.

2. The Machine-or-Transformation Test

Justice Kennedy next determined that the Federal Circuit’s “machine-or-transformation” test may be “a useful and important clue or investigative tool” but that it is not “the sole test for deciding whether an invention is a patent-eligible ‘process.’”³³ In holding otherwise, in his view, the Federal Circuit violated two principles of statutory interpretation: (1) that Courts should not read into the patent laws limitations and conditions that Congress has not expressed and that (2) unless otherwise defined, words should be taken at “their ordinary, contemporary, common meaning.”³⁴

Unaware of any ordinary, contemporary, common meaning of “process” requiring that it be tied to a machine or the transformation of an article, Justice Kennedy observed that §100(b) already defines “process” to include “process,” which must mean something in addition to a machine or transformation.³⁵ Finally, citing *Parker v. Flook*,³⁶ Justice Kennedy noted that the Supreme Court has never endorsed the machine-or-transformation test as the exhaustive or exclusive test, so that it is not bound to do so now.³⁷ (In and of itself, of course, that would not have prevented the Supreme Court from doing so in *Bilski*.)

3. Textual Analysis

As a textual matter, Justice Kennedy also found that the inclusion of “method” within § 100(b)’s definition of “process” may include some methods of doing business, and stated that he is unaware of any “ordinary, contemporary, common meaning” of “method” that excludes business methods.³⁸ Nor is it clear to Justice Kennedy that even a business method exception would provide an easy-to-apply “bright line” test would exclude technologies for conducting business more efficiently.³⁹

Further undermining such a categorical exclusion, Justice Kennedy said, is § 273(b)(1)’s explicit recognition of a defense of prior use to an infringement claim based on “a method in [a] patent.”⁴⁰ A contrary conclusion, says Justice Kennedy, would therefore violate the canon against interpreting statutory provisions in a manner to render another provision superfluous.⁴¹

Thus, based on constitutional history, legislative language, and the Court’s prior decisions, Justice Kennedy and

his majority saw no reason categorically to exclude methods of doing business from potential U.S. patent protection.

4. Not a Process

Although §273 leaves open the possibility of some business method patents, says Justice Kennedy, it does not suggest their broad patentability.⁴² Under *Benson*, *Flook*, and *Diehr*, therefore, Justice Kennedy found that *Bilski*’s concept of hedging risk and the application of that concept to energy markets are not patentable processes but merely attempts to patent abstract ideas.⁴³ In particular, *Bilski*’s reduction of the basic concept of hedging to a mathematical formula in Claims 1 and 4 (like the algorithms at issue in *Benson* and *Flook*) is an unpatentable abstract idea.⁴⁴ *Bilski*’s remaining claims, Justice Kennedy found, merely provide broad examples of how to use hedging in commodities and energy markets using well-known random analysis techniques to help establish inputs into the equation.⁴⁵ Accordingly, Justice Kennedy found that those claims add even less to the underlying abstract principle than the invention held patent ineligible in *Flook*.⁴⁶ Thus, concluded Justice Kennedy, *Bilski*’s and *Warsaw*’s claimed “invention” is unpatentable under Section 101.⁴⁷

5. Patentable Process Undefined

Because *Bilski*’s and *Warsaw*’s application could be rejected as an unpatentable abstract idea, Justice Kennedy did not further define a patentable “process” beyond that provided in §100(b). Most significantly, relying on *State Street*,⁴⁸ Justice Kennedy declared for (a majority of) the Court that “[n]othing in today’s opinion should be read as endorsing the Federal Circuit’s past interpretations of §101.”⁴⁹ In disapproving the Federal Circuit’s exclusive machine-or-transformation test, however, Justice Kennedy said that the Supreme Court does not mean to preclude the Federal Circuit from developing other “limiting criteria that further the Patent Act’s purposes and are not inconsistent with its text.”⁵⁰

Up until his last two points, Justice Kennedy’s opinion could easily have simply adopted Judge Rader’s sentence from the Federal Circuit below: “Because *Bilski* claims merely an abstract idea, this court affirms the Board’s rejection.”⁵¹ That would have left the state of the law exactly where it was before *Bilski* in the Federal Circuit: business methods are patent-eligible but *Bilski*’s claimed invention was not because it was an abstract idea, not an invention. Instead, while affirming the result below, Justice Kennedy repudiated the Federal Circuit’s “machine or transformation” test but in effect invited it to keep trying. Joining Justice Kennedy’s opinion in full were Justices Roberts, Thomas, and Alito; Justice Scalia joined except for Parts II-B-2 and II-C2.

B. Justice Stevens’ Opinion

In a much lengthier opinion than Justice Kennedy’s, now-retired Justice Stevens concurred in the judgment, joined by Justices Ginsburg, Breyer, and Sotomayor.⁵² Had this four-Justice opinion prevailed, the new patent law of the land would be that a claim that merely describes a method of doing business would not qualify as a “process” under § 101. Questions of utility, novelty, and obviousness need never be reached.

Justice Stevens began by observing that in the area of patents, it is especially important that the law remain stable and clear. The only question *Bilski* presented is whether the “machine-or-transformation” test should be the exclusive Section 101 test of a patentable “process,” Justice Stevens said.⁵³ One could answer that question, he continued, simply by holding that although the machine-or-transformation test is in most cases reliable, it is not the *exclusive* test.⁵⁴

But to eliminate further uncertainty currently pervading the patent field, Justice Stevens would have provided further guidance: Rather than broadly trying to define “process” or “tinkering with the bounds of” unpatentable abstract ideas, Justice Stevens would have restored patent law to what he understands as its historical and constitutional moorings by recognizing that a series of steps for conducting business is, in itself, simply not patentable.⁵⁵

In the view of Justice Stevens, courts considered this principle well-established until the late 1990’s when the Federal Circuit’s *State Street Bank* decision called it into question.⁵⁶ Congress then responded with a simple stopgap measure, the “First Inventors Defense Act of 1999,”⁵⁷ which provided a limited defense to claims of patent infringement for “method(s) of doing or conducting business.”⁵⁸ The majority should therefore not have put much stock into § 273(3)(b)(1)’s defense based on prior use of a “method,” Justice Stevens suggested, because § 273’s reference to “method” patents was an attempt to weaken them, not to recognize their existence or importance.⁵⁹

Following “several more years of confusion,” Justice Stevens wrote, the Federal Circuit then changed course, overruled several of its recent decisions, and held in *Bilski* that a series of steps may constitute a patentable process only if it is tied to a machine or transforms an article into a different state or thing.⁶⁰ In his view, however, the Federal Circuit’s “machine-or-transformation test” excluded not only general methods of doing business but also potentially a variety of other processes, some of which are potentially patentable.⁶¹

Although in his view the majority correctly held that the sole test of patentability is not the machine-or-transformation test,⁶² Justice Stevens therefore also thought the majority wrong to suggest that any series of steps that is not itself an abstract idea or law of nature may ever constitute a “process” within the meaning of §101.⁶³ In his view, the language in the Court’s opinion to this effect “can only cause mischief.”⁶⁴ The wiser course would therefore have been to hold that *Bilski*’s method is not a “process” because it describes only a general method of engaging in business transactions and business methods simply are not patentable.⁶⁵

C. Justice Breyer’s Opinion

Like Justice Stevens, Justice Breyer concurred in the judgment. He did so in two parts. Justice Scalia joined him in Part II, which explained the areas in which Justices Breyer and Scalia viewed the entire Court as in agreement.

1. Part I

In Part I, Justice Breyer agreed with Justice Stevens that a “general method of engaging in business transactions” is not

a patentable “process” within the meaning of §101.⁶⁶ Justice Breyer based this opinion on his view that the Supreme Court has never before held that so-called “business methods” are patentable, and on his view of the text, history, and purposes of the Patent Act.⁶⁷ He therefore claimed to join the Stevens opinion in full, but wrote separately to highlight what he saw as the substantial agreement among the Court’s Justices, in “light of the need for clarity and settled law in this highly technical area.”⁶⁸

2. Part II

In Part II, Justice Breyer explained the four points on which he and Justice Scalia believed that the entire Court agreed, as follows:

a. First point of agreement

First, said Justice Breyer, the Court agrees that although the text of §101 is broad it nonetheless remains limited. This is because “the underlying policy of the patent system [is] that ‘the things which are worth to the public the embarrassment of an exclusive patent,’ . . . must outweigh the restrictive effect of the limited patent monopoly.”⁶⁹ In particular, Justice Breyer emphasized that the Court has long held that “[p]henomena of nature, though just discovered, mental processes, and abstract intellectual concepts are not patentable” under §101, because allowing individuals to patent these fundamental principles would “wholly pre-empt” the public’s access to the “basic tools of scientific and technological work.”⁷⁰

b. Second point of agreement

Second, Justice Breyer said, the Court has for over a century stated that “[t]ransformation and reduction of an article to a different state or thing is *the clue* to the patentability of a process claim that does not include particular machines.”⁷¹ Application of this so-called “machine-or-transformation test” has thus repeatedly helped the Court to determine, said Justice Breyer, what is “a patentable ‘process.’”⁷²

c. Third point of agreement

Third, the machine-or-transformation test has never been the “sole test” for determining patentability.⁷³ Rather, Justice Breyer said, a process claim meets the requirements of §101 when, “considered as a whole,” it “is performing a function which the patent laws were designed to protect (*e.g.*, transforming or reducing an article to a different state or thing).”⁷⁴ In Justice Breyer’s view, therefore, the Federal Circuit erred in *Bilski* by treating the machine-or-transformation test as the exclusive test of patentable subject matter.

d. Fourth point of agreement

Rejecting the machine-or-transformation test as the only test for patentability does not mean, however, that anything that produces a “useful, concrete, and tangible result” is patentable.⁷⁵ According to Justice Breyer, “this Court has never made such a statement and, if taken literally, the statement would cover instances where this Court has held the contrary.”⁷⁶ Indeed, in Justice Breyer’s view, the Federal Circuit’s introduction of the “useful, concrete, and tangible result” approach to patentability in *State Street Bank*

precipitated the grant of patents ranging from “the somewhat ridiculous to the truly absurd.”⁷⁷ To the extent that the Federal Circuit rejected that approach in *Bilski*, therefore, nothing in the majority’s decision should be taken as disapproving that determination.⁷⁸

e. Summary

In sum, in reemphasizing that the “machine-or-transformation” test is not necessarily the *sole* test of patentability, Justices Breyer and Scalia believe that the Court intended neither to deemphasize the test’s usefulness nor to suggest that very many patentable processes lie beyond its reach.

D. Some Notes on the Decision’s Dynamics

Perhaps coincidentally for a decision in a field of law in which the traditional liberal-conservative political divide would seem less relevant than in, say, the fields of civil rights or religious freedom, the Court’s opinions broke down along familiar lines: the “conservative” Justices (Thomas, Alito, Roberts, and—for the most part—Scalia) on one side, the “liberal” Justices (Stevens, Ginsburg, Breyer, and Sotomayor) on the other, with Justice Kennedy forming a majority in the middle, for the portions for which the Court actually issued a majority opinion.⁷⁹

Equally interesting, however, is how close the Court might actually have come to issuing a different majority decision: namely the Justice Stevens opinion that “business methods” should not be patentable subject matter at all. A few days before the decision came out, for example, patent blogger Dennis Crouch argued persuasively—if ultimately incorrectly—that Justice Stevens would write *Bilski*’s majority opinion because “[i]n the months since the oral argument in *Bilski*, every Justice save Justice Stevens has delivered an opinion from the set of cases argued in the November sitting” and “*Bilski* remains the only case not decided from that sitting.”⁸⁰

Indeed, the lengthy, weighty, and history-searching Stevens opinion—three times the length of the majority’s—reads in many ways as if Justice Stevens had begun it expecting to speak for the majority. Justice Kennedy’s opinion, in contrast, reads more as if it were stitched together to gain a majority but did not quite completely get there. This suggests that it may be the product of some intense negotiating and a fair amount of compromise in order to gain a fifth “vote” for a majority opinion.

If Crouch’s conjecture is correct, then what could have swung a fifth Justice away from the Stevens point of view, and who likely was that Justice? One speculation is that it may have been Justice Scalia—who after all did not join Justice Kennedy in all parts of the decision—and whose own respect for statutory language (as opposed to legislative history) may have given him pause about ignoring the language of § 273(b). On the other hand, perhaps it was Justice Breyer, who found many areas of agreement but simply could not agree with Justice Stevens that no business method should ever be patentable.

III. Where We Go From Here

In many respects, patent holders and patent practitioners are left where they were before: the machine-or-transformation test “clarified” in *Bilski* remains the key to patentable subject matter under Section 101, but business methods as a category still include potentially patentable subject matter. No one can say exactly where the courts (or the Congress) will ultimately draw the line. In the meantime, innovators should continue to feel free to apply for patents on business methods (beyond abstract ideas) that are new, non-obvious, and useful, and patent litigators should expect their business to continue apace.

Beyond that, *Bilski* will require further dissection and application as each additional case is litigated. Regrettably, though, the end result may be “business as usual,” particularly at the Patent Office, whence the *Bilski* appeal arose.

Business method patents, it turns out, may have been one Justice away from going the way of buggy whips. It is easy, in any event, for practitioners and business people to imagine a more satisfactory and bright-line resolution of *Bilski*, but hard to imagine how the decision could have come down much more closely at the Supreme Court level.

Endnotes

1 545 F.3d 943 (Fed. Cir. 2008).

2 *Id.* at 966

3 *Id.*

4 *Bilski v. Kappos*, 130 S. Ct. 3218 (2010).

5 *Id.* at 3223.

6 *Id.* at 3231.

7 *Id.* at 3257.

8 *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008).

9 149 F.3d 1368; 47 USPQ 2d 1596 (Fed. Cir. 1998).

10 172 F.3d 1352 (Fed. Cir. 1999).

11 In *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998), the Federal Circuit held that a method of transforming data representing discrete dollar amounts into a final share price was patentable where the claims recited computer processor means, storage means, and other means corresponding to an arithmetic logic unit. In *AT&T Corp. v. Excel Communications, Inc.*, 172 F.3d 1352 (Fed. Cir. 1999), the Court found the following year that claims directed to a method of generating a message record and including in the message record an indicator of a “primary interchange carrier” for use in a telecommunications system were patent-eligible subject matter.

12 See, e.g., The Prior Art, In re *Bilski* and the Future of Business Method Patents, http://thepriorart.typepad.com_the_prior_art/200811Olin-re-bilski-decided.html (Oct. 31, 2008, 05:45).

13 See *Ex parte Bilski*, No. 2002-2257, 2006 WL 5738364 (BPAI, Sept. 26, 2006); *In re Bilski*, No. 2007-1130, 2008 WL 417680 (Fed. Cir. Feb. 15, 2008).

14 See U.S. Patent No. 5,960,411, issued Sept. 28, 1999.

15 In Article I, Section One, Clause Eight, the Constitution empowers Congress in part to “promote the progress of . . . the useful Arts” by “securing for limited Times to . . . Inventors the exclusive right to their respective . . . Discoveries.” U.S. CONST., Art. I, § 1, cl. 8. By authorizing limited monopolies,

this clause recognizes that disseminating the knowledge of how to make or use something new and useful is essential to promoting the advance of the “useful arts,” and has therefore long provided that inventions or discoveries are potentially patentable, but abstract ideas or fundamental principles are not. Although easy enough to state, the rule is often difficult to apply.

16 A Patent Reform Act has been pending in Congress since at least 2007, with repeated predictions that it would pass in the coming year too parlous to repeat here. *See, e.g.,* David Applegate, *A Billion Here and a Billion There: Talking Real Money in the Patent Damages Case*, PAT. LITIG. 2007, at 1376-77 (PLI 2007); David Applegate & Lewis M. Koppel, *A Mark, A Yen, A Buck, or A Pound: Damages Make the World Go Round*, PAT. LITIG. 2008, Vol. 2, at 485-486 (PLI 2008).

17 U.S. CONST., art. I, § 1, cl. 8.

18 35 U.S.C. § 100 (b) (emphasis added); *see In re Bilski*, 545 F.3d 943, 951 (Fed. Cir. 2008) (“Congress provided a definition of ‘process’ in 35 U.S.C. § 100(b): However, this provision is unhelpful given that the definition itself uses the term ‘process.’”). Up until 1952, U.S. patent statutes dating back to the 1793 Act had used “art” instead of “process,” but this too is not particularly helpful. Substituting “art” for “process” as the defined term in Section 100(b) would likewise produce the following tautological definition: The term “art” means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material. Thus the Supreme Court has long held that the change from “art” to “process” did not alter the scope of eligibility for patent protection because “[i]n the language of the patent law, [a process] is an art.” *Diamond v. Diehr*, 450 U.S. 175, 182-84 (1981) (quoting *Cochrane v. Deener*, 94 U.S. 780, 787-88 (1877)); *see also In re Comiskey*, 499 F.3d 1365, 1375 (Fed. Cir. 2007); *Bilski*, 130 S. Ct. 3218 (2010). Whatever the answer may be, it is clear that it is not apparent from the face of the statute.

19 35 U.S.C. § 100 (b).

20 In lay usage, as several *Bilski* amici argued in *Bilski*, the word “process” generally has a broad meaning. “A procedure. . . . A series of actions, motions, or operations definitely conducting to an end, whether voluntary or involuntary.” *In re Bilski*, 545 F.3d at 951-52, forecloses a purely literal reading of § 101.”). *See* Gottschalk v. Benson, 409 U.S. 63, 67 (1972). Still, as *Bilski* itself observed, the Supreme Court has held that “process” as used in §101 has a narrower meaning. *See* Parker v. Flook, 437 U.S. 584, 588-89 (1978). In common parlance, therefore laying out a series of scales of logarithms of numbers end-to-end to achieve the results of multiplication would be a “process,” but for §101 purposes the discovery would not be a “patentable process” until an inventor had achieved the slide rule.

21 409 U.S. 63 (1972).

22 437 U.S. 584 (1978).

23 450 U.S. 175 (1981). In *Benson* and *Flook*, the *Bilski* majority found, the Supreme Court had expressly left open the possibility that a process outside the confines of the machine-or-transformation test could be patentable, but in *Diamond v. Diehr*, the Supreme Court foreclosed it by failing to mention it. Although academics have criticized this as insufficient foundation for embracing the “machine-or-transformation test” as the exclusive determinant of potential patent eligibility, the *Bilski* majority nonetheless found this reasoning dispositive. *Bilski*, 130 S.Ct. at 3230; *see, e.g.,* Posting of Randy Picker to The University of Chicago Law School Faculty Blog, *In re Bilski: The Fed Circuit Tells Inventors to Stuff It*, <http://uchicagolaw.typepad.com/faculty/2008/10/in-re-bilski-th.html> (Oct. 30, 2008, 05:03 PM). Thus, the majority found, the § 101 standard that governs is the “machine-or-transformation” test, and the hedging process at issue before it in *Bilski* was therefore not patent-eligible subject matter.

24 After this followed thirty-two pages of majority opinion by Chief Judge Michel (joined by Judges Lourie, Schall, Bryson, Gajarsa, Linn, Dyk, Prost, and Moore); seventy-six pages of dissents (forty-one by Judge Newman, twenty-five by Judge Mayer, and ten by Judge Rader); and a twenty-page concurrence by Judges Dyk and Linn that responded to the dissents’ assertion that the majority had “usurp[ed] the legislative role.” *Bilski*, Dyk and Linn dissent at 1.

25 In dissent, Judge Newman accused the majority of imposing, “contrary to statute, . . . precedent, and the constitutional mandate,” a “new and far-reaching restriction” on the scope of patentability more suited to the Industrial Age than “today’s Information Age of electronic and photonic technologies,

as well as other processes that handle data and information in novel ways.” *Bilski*, 130 S. Ct. at 3242 n.23; *In re Bilski*, 545 F.3d at 976 (Newman, J., dissenting). Judge Mayer agreed with the majority that “[t]he patent system has run amok,” *In re Bilski*, 545 F.3d at 1010, but preferred to “repudiate *State Street* and to recalibrate the standards for patent eligibility, thereby ensuring that the patent system can fulfill its constitutional mandate to protect and promote truly useful innovations in science and technology.” *Id.* Speaking last in dissent, Judge Rader noted simply that “[t]his court labors for page after page, paragraph after paragraph, explanation after explanation to say what could have been said in a single sentence: ‘Because *Bilski* claims merely an abstract idea, this court affirms the Board’s rejection.’” *Id.* at 1011 (Rader, J., dissenting).

26 *See* Dennis Crouch’s Patently-O, noreply+feedproxy@google.com; on behalf of; Patent Law Blog (Patently-O) [patent@gmail.com] (June 26, 2010, 05:29 AM).

27 *Bilski*, 130 S. Ct. at 3221.

28 Justice Scalia declined to join in Sections II-B-2 and II-C-2 of the opinion.

29 *Bilski*, 130 S. Ct. at 3221-31.

30 *Id.* at 3225 (citing *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980)).

31 *Id.* (citing *Le Roy v. Tatham*, 55 U.S. 156, 174 (1852)).

32 *Id.*

33 *Id.* at 3227.

34 *Id.* at 3226 (citing *Diamond v. Diehr*, 450 U.S. 175, 182 (1981)).

35 *Id.* (citing *Burgess v. United States*, 553 U.S. 124, 130 (2008)).

36 437 U.S. 584, 588 (1978).

37 *Bilski*, 130 S. Ct. at 3231.

38 *Id.* at 3228 (citing *Diehr*, 450 U.S. at 182).

39 *Id.*

40 *Id.*

41 *Id.* at 3228-29 (citing *Corley v. United States*, 129 S. Ct. 1558 (2009)).

42 *Id.* at 3228-29.

43 *Id.* at 3229.

44 *Id.* at 3231.

45 *Id.*

46 *Id.*

47 *Id.*

48 149 F.3d 1368, 1373 (Fed. Cir. 1998).

49 *Bilski*, 130 S.Ct. at 3231.

50 *Id.*

51 *In re Bilski*, 545 F.3d at 1011 (Rader, J., dissenting).

52 *Id.*

53 *Id.*

54 *Id.* at 3232.

55 *Id.*

56 *Id.*

57 113 Stat. 1501A-555, codified at 35 U.S.C. §273.

58 *Bilski*, 130 S. Ct. at 3232 (citing 35 U.S.C. §273(a)(3)); *see* 35 U.S.C. § 273(b).

59 *Id.*

60 *Id.*

61 *Id.*

62 “Rather,” said Justice Stevens, “it is a critical clue, even if the machine-or-transformation test may not define the scope of a patentable process, it would be a grave mistake to assume that anything with a ‘useful, concrete and tangible result,’ may be patented. *Id.* (quoting *State Street Bank & Trust v.*

Signature Fin. Group, Inc., 149 F.3d 1368, 1373 (Fed. Cir. 1998)).

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.* at 3257.

67 *Id.* at 3258.

68 If Breyer joined a four-justice plurality in full, why did that not make a five-justice majority?

69 *Bilski*, 130 S. Ct. at 3258 (citing *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 10-11 (1966) (quoting Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 6 Writings of Thomas Jefferson 181 (H. Washington ed.))).

70 *Id.* (citing *Gottschalk v. Benson*, 409 U.S. 63, 67, 72 (1972)); *see also*, e.g., *Diamond v. Diehr*, 450 U.S. 175, 185 (1981); *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980).

71 *Id.* (citing *Diehr*, 450 U.S. at 184 (emphasis added; internal quotation marks omitted)); *see also*, e.g., *Benson*, 409 U.S. at 70; *Parker v. Flook*, 437 U.S. 584, 588 n.9 (1978); *Cochrane v. Deener*, 94 U.S. 780, 788 (1877).

72 *Id.* (citing *Flook*, 437 U.S. 584).

73 *Id.* (citing ante, at 8; *see also* ante, at 1 (Stevens, J., concurring in judgment); *Benson*, 409 U.S. at 71 (rejecting the argument that “no process patent could ever qualify” for protection under §101 “if it did not meet the [machine-or-transformation] requirements”).

74 *Id.* at 3258-59 (citing *Diehr*, 450 U.S. at 192).

75 *Id.* at 3259 (quoting *State Street Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368, 1373 (Fed. Cir. 1998)).

76 *Id.* (citing *Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 548 U.S. 124, 136 (2006) (Breyer, J., dissenting from dismissal of certiorari as improvidently granted)); *see also*, e.g., *O'Reilly v. Morse*, 56 U.S. 62, 117 (1853); *Flook*, 437 U.S. at 590.

77 *Bilski*, 130 S. Ct. at 3259 (quoting *In re Bilski*, 545 F.3d 943, 1004 (Fed. Cir. 2008) (Mayer, J., dissenting) (citing patents on, *inter alia*, a “method of training janitors to dust and vacuum using video displays,” a “system for toilet reservations,” and a “method of using color-coded bracelets to designate dating status in order to limit ‘the embarrassment of rejection.’”); *see also* Brief for Respondent 40-41, and n.20 (listing dubious patents).

78 *Id.* (citing ante, at 16; ante, at 2, n.1 (Stevens, J., concurring in judgment)).

79 With respect to two sections of what otherwise would have been a complete majority opinion, Justice Scalia opted out and instead joined hands across the aisle with Justice Breyer, who concurred separately in an effort to emphasize the points on which all Justices agreed: (1) that the broad text of § 101 is “not without limit” (Breyer at 2); (2) “[t]ransformation and reduction of an article to a different state or thing [“the so-called ‘machine-or-transformation test’”] is the clue to the patentability of a process claim that does not include particular machines” (*id.* (citing *Diehr*, 450 U.S. at 184) (emphasis added); *Gottschalk v. Benson*, 409 U.S. 63, 70 (1972); *Flook*, 437 U.S. at 588 n.9); *Cochran v. Deener*, 94 U.S. 780, 788 (1877)); (3) the machine-or-transformation test has never been the sole test for patentability (Breyer at 3); but (4) this “by no means indicates that anything which produces a ‘useful, concrete, and tangible result’ [citing *State Street Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368, 1373 (Fed. Cir. 1998)] is patentable.”

80 Crouch, *supra* note 26. In the same source, Crouch also pointed out that the time required to write his lengthy dissent in *Citizens United v. FEC*, 558 U.S. 50 (2010), would help explain the tardiness of the Court’s *Bilski* decision if in fact Justice Stevens had been assigned to draft the majority opinion. *Id.*



HOW THE “NEW GM” CAN STEAL FROM TOYOTA

By Adam Mossoff*

“What is good for General Motors is good for the nation.”¹ This iconic statement by Charles (“Engine Charlie”) Wilson, the then-U.S. Secretary of Defense and former CEO of GM has long been condemned as an exemplar of corporate hubris. But last summer it achieved something even more important: It became true. When GM moved out of bankruptcy in July 2009, the federal government took a 60.8% ownership stake in this classic American automobile manufacturing company.²

Uncle Sam is now in the business of making cars. With this in mind, someone somewhere in the federal government might even now be preparing a very special memorandum for the GM board of directors. That memorandum is the subject of this essay, and the subject of the memorandum is how GM can cut its costs by lawfully stealing what it needs to build better cars.

This essay proceeds in three parts, with the first two parts roughly paralleling the form and content of that special memorandum. First, it discusses the 2006 decision by the U.S. Court of Appeals for the Federal Circuit in *Zoltek Corp. v. United States*,³ which held that “patent rights are a creature of federal law” and thus what the government giveth, the government can taketh away.⁴ The practical effect of *Zoltek* was that a military contractor was given a free hand to profit from the unauthorized use in a foreign jurisdiction of a U.S. patent. Second, the essay explains how GM may now exploit *Zoltek* to advance its own cost-cutting goals, which will certainly make its majority shareholder—the federal government—very happy. In a hypothetical case developed below, GM may use a patented process owned by Toyota without having to pay either license fees or patent infringement damages. Such a windfall for GM can certainly help it make more fuel-efficient automobiles at lower cost as it uses Toyota’s intellectual property to its own advantage. Last, but certainly not least, the essay concludes by explaining how this situation highlights the unintended consequences of denying to patentees their constitutional rights in their intellectual property.

Building the F-22 Fighter Jet

In order to understand how GM may be able to benefit from a patented process owned by Toyota, we first must understand the 2006 decision in *Zoltek* that makes doing so possible.

First, the facts. The federal government contracted with Lockheed Martin Corp. to develop and build the Air Force’s new F-22 Raptor fighter jet.⁵ (The lawsuit was originally filed with respect to the development and construction of the B-2 Stealth Bomber, but by the time the trial court was ruling on summary judgment motions, the case involved only the F-22 Raptor.) Lockheed, in turn, subcontracted with two

Japanese companies to manufacture the composite fiber sheets used in the F-22 Raptor. The subcontractors produced the sheets in Japan, using a manufacturing process claimed in Zoltek Corp.’s reissued U.S. Patent No. 34,162 (’162 patent). Lockheed imported the fiber sheets into the U.S., where it used them to build the F-22 Raptor, which is now flying the unfriendly skies.

Second, the law. (This part is a bit longer and more convoluted thanks to Congress’s machinations in enacting different statutes at different times under different titles of the U.S. Code.) Normally, if Lockheed had done what it did with regard to the ’162 patent, it would have been liable for patent infringement. It’s important to recognize, though, that Lockheed’s use of the composite fiber sheets was not the problem. Zoltek’s patent did not cover composite fiber sheets, but rather only the *process* for making these products. Thus, Lockheed would not have been liable for importing or using the fiber sheets in the U.S. under 35 U.S.C. § 271(a), the primary liability provision in the Patent Act.⁶ Nor would the Japanese subcontractors have been liable for using Zoltek’s patented process in Japan, because U.S. patent law does not have extraterritorial force.⁷

Nevertheless, Lockheed still would have been liable to Zoltek for patent infringement under § 271(g), which Congress added to the patent statutes in 1988. This provision prohibits anyone from importing into the United States a product made abroad with a process patented under U.S. law.⁸ The purpose of § 271(g) was to close an inadvertent infringement loophole in the 1952 Patent Act, which penalized the importation of an unauthorized patented product but permitted the importation of a product from an unauthorized use of a patented process.⁹ After 1988, owners of patented products and patented processes received equal protection for their intellectual property under U.S. law.

The catch in *Zoltek* was that Lockheed was not acting for private purposes in importing the composite fiber sheets manufactured abroad with Zoltek’s patented process. Lockheed was a government contractor. Under the Tucker Act,¹⁰ the use of a patented invention by a government contractor or subcontractor “shall be construed as use or manufacture for the United States,”¹¹ which meant that Zoltek’s legal claim had to be brought against the U.S. government. Thus, Zoltek could not sue Lockheed under § 271(g) of the Patent Act, but rather had to pursue its legal remedy against the U.S. under § 1498 of the Tucker Act.¹²

Here’s where things got tricky for Zoltek, because § 1498(c) provides a safe harbor for government liability against “any claim arising in a foreign country.” As the Court of Federal Claims recognized in granting the government’s motion to dismiss, “As the patent statute has been expanded to provide additional protection to patent owners from infringing parties, Congress has failed to update section 1498 to make these additional protections applicable against the Federal Government.”¹³ Thus, the trial court found that a “legislative

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gap exists” in § 1498, because the government would have been liable under § 1498(a) but for the safe harbor provided under § 1498(c).¹⁴ The court subsequently ruled that, given the absence of a statutory remedy under § 1498(c), Zoltek could pursue a constitutional claim for “just compensation” under the Takings Clause of the Fifth Amendment.¹⁵

On appeal to the Federal Circuit, the government prevailed in its argument that neither § 1498 nor the Fifth Amendment applied to Lockheed’s importation of the composite fiber sheets manufactured with Zoltek’s patented process. But the Federal Circuit expanded the scope of the government’s immunity, concluding that there was no need to reach the safe harbor in § 1498(c) because the government was not liable under the primary liability provision in § 1498(a). The court reasoned that the express terms of § 1498(a) impose liability on the federal government only when a patented invention “is used by . . . or for the United States,” and thus does not provide a remedy when a government contractor imports products produced by a patented process in a foreign jurisdiction.¹⁶

Since it held that § 1498(a) did not even apply to the facts of the case, the *Zoltek* court concluded that the “trial court’s remaining conjectures on takings jurisprudence do not require consideration.”¹⁷ Of course, the same “legislative gap” under § 1498 originally identified by the trial court exists regardless of whether one finds the government immune from liability under the express terms of either § 1498(a) or § 1498(c). The Federal Circuit thus rejected Zoltek’s takings claim by implication, stating that “patent rights are a creature of federal law,” and as such the only legal route for it to obtain compensation is for “Congress [to] provide[] a specific sovereign immunity waiver for a patentee to recover for infringement by the government.”¹⁸ Lacking both a constitutional remedy under the Takings Clause and a statutory remedy under § 1498(a), there was no basis for Zoltek to obtain compensation from the government.

Through this somewhat tangled web of statutory construction ranging between two separate but intertwined pieces of legislation—the Patent Act and the Tucker Act—the Federal Circuit confirmed that an owner of a patented process could not sue the government for importing a product that resulted from the unauthorized use of that process abroad. The constitutional issue was no less important. In two separate concurrences, one joining the court’s per curiam opinion and another joining the order denying Zoltek’s petition for rehearing en banc, Judge Timothy Dyk made explicit *Zoltek*’s implication that patents do not fall within the ambit of the Takings Clause.¹⁹ The cert petition to the United States Supreme Court was denied as well.²⁰

BUILDING NEW GM CARS

The government’s victory in *Zoltek* is now government-owned GM’s opportunity four years later. After watching its sales evaporate over the years, the “new GM” (as it now calls itself²¹) must claw its way back to profitability.²² For obvious reasons, it is under “intense pressure” to do so by those who have chosen to invest in this company with monies from the public fisc.²³ What is GM to do? *Zoltek* points the way

to one source of financial relief for the beleaguered auto manufacturer: GM can now have automobiles built abroad using patented processes and then import and sell the cars in the U.S. market—and it can reap the windfall of not having to pay either license fees or patent infringement damages for its use of these patents.

For this to happen, the fact pattern need only vary by a slight degree from that of *Zoltek*. Suppose that some enterprising Toyota engineers have invented a new process for manufacturing composite fibers that represents a major advance in technology beyond even the valuable process covered by Zoltek’s ’162 patent. This isn’t a wild leap of the imagination, as automobile manufacturers have begun using composite fiber materials to reduce the weight of cars, which improves fuel efficiency and reduces emissions.²⁴ In this scenario, Toyota will use this new process to manufacture more efficiently the materials used in its popular cars, like the Prius. To ensure that Toyota retains its competitive advantage against its rivals in one of its largest car markets, the engineers obtain a U.S. patent for this new manufacturing process and they assign it to their employer.

Sometime later, GM contracts with a Chinese firm to construct composite-fiber panels for use in its remaining automobile lines. In fulfilling its contract with GM, the Chinese firm uses the manufacturing process claimed in Toyota’s patent and it decides to avoid the hassle and expense of paying Toyota a licensing fee. GM doesn’t mind, because it’s obtaining its parts at cheaper prices. Thus, GM imports the composite-fiber parts, assembles its new cars and trucks, and sells them in the U.S., touting their improved fuel efficiencies and environmental benefits at lower costs to consumers.

Here, Toyota falls within the exact same legislative and constitutional gap imposed on Zoltek by the Federal Circuit in 2006. If Toyota sought relief for the unauthorized use of its patented manufacturing process, it would be forced to sue government-owned GM under the Tucker Act for the same reason that Zoltek was forced to sue the U.S. given Lockheed’s unauthorized use of its patent. If Toyota sues for compensation under § 1498(a), GM would successfully file a motion to dismiss the complaint given *Zoltek*’s holding that § 1498(a) does not permit suits against the government based on the importation of products made from unlicensed patented processes used abroad. Alternatively, even if § 1498(a) was deemed to apply, then the foreign-jurisdiction safe harbor in § 1498(c) would still exempt GM from liability. If Toyota then claimed a constitutional taking of its property—the patented manufacturing process—a court would still dismiss the complaint on the basis of Zoltek’s second holding that patentees have no constitutional protection under the Takings Clause.

There is admittedly one important difference between GM’s manufacture of its new lightweight cars and the situation in *Zoltek* in which Lockheed manufactured the F-22 Raptor. In *Zoltek*, Lockheed was a contractor of the federal government, which explains why Zoltek argued for the application of § 1498(a)’s language that “use or manufacture of an invention . . . by a contractor [or] subcontractor . . . shall be construed as use or manufacture for the United States.”²⁵ In the hypothetical

scenario of GM's manufacture of cars and trucks built with patented manufacturing technology used abroad, the Chinese firm is a contractor of GM, not the federal government.

A court would likely find, however, that this is a distinction without a difference. Beyond its specification of immunity for contractors and subcontractors, § 1498(a) also provides that "any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States." The Federal Circuit has thus recognized that § 1498 provides broad immunity against infringement claims under § 271 of the Patent Act, even in the absence of an express agency relationship.²⁶

Moreover, the federal government is exercising control over GM and other firms in which it has assumed ownership stakes.²⁷ As the majority shareholder of GM—indeed, GM was operating under the oversight of the Obama Administration months before the federal government assumed formal ownership of the corporation²⁸—there is at least a colorable argument under long-established corporate and securities law precedents that GM is a functionary of the federal government.²⁹ The "Government Motors"³⁰ epithet makes sense to so many people today precisely because GM is no longer a privately-owned firm acting for solely private purposes.³¹

Of course, a judge might balk at the uncertain policy implications of granting GM sovereign immunity, such as whether this implies that GM acquires constitutional obligations along with its newly acquired constitutional immunities. Would the Due Process Clause or the Equal Protection Clause also now apply to GM? A judge might find such concerns to be sufficient enough to justify coming up with a new test for determining the sovereign immunity in a government-owned corporation; a test that GM might fail. But the plain language of § 1498 seems to apply to GM, as there is evidence in both law and fact that GM is now acting as a "corporation for the Government and with the authorization or consent of the Government."³²

A four-year-old court decision that appeared at the time to benefit only a limited set of government military contractors now points the way for government-owned GM to return to profitability by cutting its operating costs. Following the statutory and constitutional holdings in *Zoltek*, GM may now benefit from patented processes without having to pay royalties and without worrying about infringement liability. GM will likely not want to miss the opportunity to exploit this loophole to the benefit of its majority shareholder—the American people.

THE END, OR THE BEGINNING?

This essay reveals the unforeseen consequences of the statutory and constitutional loophole created by the 2006 decision in *Zoltek*. I have explained elsewhere how the *Zoltek* decision conflicts with longstanding patent-takings decisions by the Supreme Court and lower courts reaching back to the nineteenth century, as well as with the original meaning of § 1498.³³ When combined with the equally unprecedented actions taken by the federal government in the past two years in

pursuit of its economic policies, there is now a gap in the legal protection of patents through which the government could drive the proverbial Mack truck (or perhaps a GM truck). *Zoltek* now points the way for a government-owned GM, and other firms in which the government has a controlling stake, to engage in piracy of intellectual property rights. This piracy is limited only by the number of process patents that GM finds useful in propping up its bottom line.

Ironically, at the time *Zoltek* was decided, the federal government argued to the Supreme Court that "it is unlikely that the court of appeals' decision will prove to have exceptional importance."³⁴ This did not seem to be an outlandish claim; the government rightly pointed out that this "appears to be the first case" of its kind arising from a statute that had "been in effect for decades."³⁵ The statutory loophole in § 1498—the federal government's retaining sovereign immunity against liability arising from importing products of unauthorized patented processes employed in foreign jurisdictions—and the concomitant denial of constitutional protection for patents under the Takings Clause seemed insignificant in 2007. Although it is arguable that denying constitutional protection to patents is unexceptional, the events in the ensuing years suggest that the federal government may have spoken too soon.

Endnotes

1 TOM LEWIS, DIVIDED HIGHWAYS: BUILDING THE INTERSTATE HIGHWAYS, TRANSFORMING AMERICAN LIFE 106-07 (1999) (quoting Wilson's 1953 statement to Congress).

2 Peter Whoriskey, *With Bankruptcy Behind It, GM Focuses on a Culture Change*, WASH. POST, at A10 (July 10, 2009).

3 442 F.3d 1345 (Fed. Cir. 2006).

4 *Id.* at 1352.

5 The factual background is summarized here from the trial court's two decisions, *see Zoltek Corp. v. United States*, 51 Fed. Cl. 829, 831-34 (Fed. Cl. 2002); *Zoltek Corp. v. United States*, 58 Fed. Cl. 688, 689-90 (2003).

6 35 U.S.C. § 271(a) (stating that patent infringement arises for "whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention"). The patented invention in this case is the manufacturing process, not the products (fiber sheets) that are the result of the manufacturing process. Since Lockheed neither used nor imported the process into the United States, it is not liable for patent infringement under § 271(a).

7 *See AT&T v. Microsoft Corp.*, 550 U.S. 437, 441 (2007).

8 *See* 35 U.S.C. § 271(g) (providing that "[w]hoever without authority imports into the United States or offers to sell, sells, or uses within the United States a product which is made by a process patented in the United States shall be liable as an infringer . . .").

9 *See* H.R. Rep. No. 60, 100th Cong., 1st Sess. 3 (1987) (stating that § 271(g) will provide "meaningful protection to owners of patented processes" because there was to date "no remedy against parties who use or sell the product, regardless where it is made").

10 28 U.S.C. § 1491 et. seq.

11 28 U.S.C. § 1498(a).

12 *See id.* ("Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United

States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture.”).

13 Zoltek Corp. v. United States, 51 Fed. Cl. 829, 838 (Fed. Cl. 2002). The predecessor statute to § 1498 was first enacted in 1910. See Act of June 26, 1910, ch. 423, 36 Stat. 851, 851-52 (1910) (codified as amended at 28 U.S.C. § 1498).

14 Zoltek, 51 Fed. Cl. at 837-83.

15 See Zoltek Corp. v. United States, 58 Fed. Cl. 688 (Fed. Cl. 2003), *rev'd*, Zoltek v. United States, 442 F.3d 1345 (Fed. Cir. 2006).

16 See Zoltek Corp. v. United States, 442 F.3d 1345, 1349-50 (Fed. Cir. 2006).

17 *Id.* at 1352.

18 *Id.*

19 *Id.* at 1345 (Dyk, J., concurring) (“Patent rights are creatures of federal statute. . . . There is thus no basis for a Fifth Amendment takings claim in this case. . . .”); Zoltek Corp. v. United States, 464 F.3d 1335, 1339 (Fed. Cir. 2006) (Dyk, J., concurring in denial of rehearing en banc) (“The panel decision here, in rejecting the constitutional claim and in finding no infringement, is faithful to section 1498, to the decisions of the Supreme Court, and to the decisions of this court.”).

20 See Zoltek Corp. v. United States, 127 S. Ct. 2936 (2007).

21 GM Press Release on ‘New GM’ (June 1, 2009), available at blogs.wsj.com/autoshow/2009/06/01/gm-press-release-on-new-gm/ (vis. July 17, 2010).

22 See Peter Whoriskey, *GM loses \$4.3 billion, gains faith in profitability*, WASH. POST, at A14 (Apr. 8, 2010) (reporting that “GM has not earned an annual profit since 2004 and lost \$88 billion between 2005 and its bankruptcy filing in June 2009”).

23 Sharon Terlep, *GM Behind on Some Goals, CEO Says*, WALL ST. J., at B2 (Oct. 8, 2009) (“Mr. Henderson [GM’s Chief Executive] faces intense pressure from GM’s new chairman and the U.S. Government—the company’s new majority owner—to stem the sales slide and improve GM’s financial performance.”).

24 See Sebastian Blanco, *Megacity will be BMW’s first to use carbon fiber “on a large scale,”* AutoBlogGreen (Oct. 29, 2009), available at green.autoblog.com/2009/10/29/megacity-will-be-bmws-first-to-use-carbon-fiber-on-a-large-scale/ (vis. July 17, 2010) (quoting BMW’s press release that “carbon fibre technology is becoming increasingly important . . . [and] will help to reduce CO2 emissions and save our natural resources”); Sam Abuelsamid, *Lotus creates lightweight structures division*, AutoBlogGreen (May 18, 2008), available at green.autoblog.com/2008/05/18/lotus-creates-lightweight-structures-division/ (vis. July 17, 2010) (quoting Lotus’s press release that “Weight reduction is one of the most attainable ways to lowering CO2 emissions in vehicles today, as well as improving fuel economy and performance”).

25 28 U.S.C. § 1498(a).

26 See Adv. Software Design Corp. v. Fed. Res. B. of St. Louis, 583 F.3d 1371, 1379 (Fed. Cir. 2008) (recognizing that “an agency relationship need not exist in order for § 1498(a) to apply” in immunizing a private entity from a patent infringement lawsuit).

27 See J.W. Verret, *Treasury, Inc.: How the Bailout Reshapes Corporate Theory and Practice*, 27 YALE J. REG. 283 (2010) (discussing numerous ways in which the federal government is exerting control over Citibank and other firms).

28 See Jacob Sollum, *Illegal: The Auto Bailout Makes a Mockery of the Rule of Law*, REASON 24 (Aug/Sep 2009) (reporting how GM’s receipt of TARP funds was invoked by House Majority Leader Steny Hoyer as a justification for, among other things, President Obama firing GM’s CEO, Rick Wagoner, on March 29, 2009).

29 See generally Verret, *supra* note 27.

30 See Shika Dalmia, *Still Government Motors*, FORBES.COM, Apr. 23, 2010, www.forbes.com/2010/04/23/general-motors-economy-bailout-opinions-columnists-shikha-dalmia.html (vis. July 17, 2010).

31 See, e.g., Neil King, Jr., *Politicians Butt In at Bailed-Out GM*, WALL ST. J., at A12 (Oct. 30, 2009) (quoting Representative Denny Rehberg

that “The simple fact is, when GM took federal dollars, they lost some of their autonomy.”); *A Leak in the Transmission; Congress Tries to Thwart Automakers’ Efforts to Economize on Distribution*, WASH. POST, at A26 (Dec. 13, 2009) (criticizing congressional intervention to stop GM’s decision to close dealerships as “a sop to a lobby with influence in practically every congressional district”).

32 28 U.S.C. § 1498(a); see also King, *supra* note 31 (“Companies in hock to Washington now have the equivalent of 535 new board members—100 U.S. senators and 435 House members” and that “no company has been more on the receiving end of congressional attention than GM.”).

33 See Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents under the Takings Clause*, 87 B.U. L. REV. 689 (2007).

34 See Brief for the United States in Opposition to Petition for Writ of Certiorari, Zoltek Corp. v. United States, No. 06-1155 (May 11, 2007), at 20.

35 *Id.*

INTERNATIONAL & NATIONAL SECURITY LAW

ARIZONA'S ATTEMPT TO ENFORCE FEDERAL IMMIGRATION LAW: "FORCE MULTIPLIER," OR "BALL AND CHAIN"?

By Margaret D. Stock*

NOTE FROM THE EDITOR: As part of a point-counterpoint on the topic of Arizona's Senate Bill 1070, The Federalist Society intends to publish an alternate view of the legislation from Kris Kobach, professor at University of Missouri-Kansas City School of Law and Secretary of State-elect of Kansas, in the next issue of *Engage*.

In recent years, as immigration has become a seemingly intractable political issue in the United States Congress, state and local legislatures have shown increasing interest in passing immigration legislation of their own.¹ State and local enforcement of American immigration laws is thought to be helpful to federal authorities that lack the resources to enforce U.S. immigration laws fully by themselves; one scholar who has authored many state and local immigration-related laws has argued that state and local regulation of immigration can be a "force multiplier" for the federal government.² And indeed, the federal government has traditionally sought assistance from states in enforcing immigration laws where states do so voluntarily and subject to federal direction and control. In 2010, however, Arizona's Senate Bill 1070 went well beyond the traditional boundaries of federal and state immigration cooperation to become the most widely publicized attempt by a state to expand its involvement in enforcement of federal immigration laws. SB 1070 makes certain civil and criminal violations of federal law into Arizona state crimes as well, thereby allowing unauthorized immigrants who enter Arizona to be charged criminally and prosecuted by the State of Arizona while they also potentially face civil and criminal prosecution by the federal government. Arizona's law goes well beyond previous attempts by the states to regulate immigration. At the urging of the U.S. Department of Justice, a United States district court judge partially enjoined enforcement of SB 1070 in July 2010, and the preliminary injunction remains in place at this writing, pending the resolution of an appeal to the U.S. Court of Appeals for the Ninth Circuit. Whether Arizona's law will stand or fail is likely to turn on whether the law is deemed to enhance or impede federal efforts to carry out immigration enforcement objectives.

Background

On April 23, 2010, Arizona Governor Jan Brewer signed into law the Support Our Law Enforcement and Safe Neighborhoods Act, which had been introduced originally as Arizona Senate Bill 1070.³ SB 1070 was a very broad measure that, *inter alia*, made it an Arizona state misdemeanor for a foreigner to be present in Arizona in violation of federal alien registration laws.⁴ The law was scheduled to go into effect on July 29, 2010, but the United States sued to enjoin enforcement

of parts of the law.⁵ A day before the law was to take effect, the U.S. district court in Arizona partially enjoined the law's enforcement by issuing a preliminary injunction against the most controversial provisions in the law.⁶

The federal lawsuit highlights one of the more interesting aspects of today's highly charged immigration enforcement debate: While the states and the federal government often work together cooperatively to enforce U.S. immigration laws, such efforts have only earned federal approval if they are directed and managed by the federal government so as to complement federal policies and priorities. In 1996, for example, Congress created a formal federal program for voluntary state immigration enforcement by enacting Section 287(g) of the Immigration & Nationality Act;⁷ under Section 287(g) programs, states may enter into agreements with the federal government to allow state and local law enforcement officials to enforce federal immigration laws. But the federal government—through the Department of Homeland Security—sets priorities for 287(g) immigration enforcement and has overall control of the program. Similarly, through the federally-managed "Secure Communities" program, states and localities can transmit the fingerprints of foreign-born prisoners to the federal government, but it is up to the federal government whether to press civil or criminal immigration charges against these persons.⁸

Arizona's law goes beyond the regulatory framework created by Congress in INA §287(g) and by DHS in the Secure Communities program. Rather than following the lead of the federal government by focusing on particular federal immigration enforcement priorities, Arizona's law mandates enforcement of federal immigration laws against all people who are stopped, arrested, or detained by Arizona law enforcement officials, if there is "reasonable suspicion . . . that the person is an alien and is unlawfully present in the United States."⁹ Through this broad enforcement effort aimed equally at all immigration violators, Arizona seeks to implement a doctrine called "attrition through enforcement,"¹⁰ whereby, through strict state enforcement of federal immigration laws, Arizona hopes to cause unauthorized immigrants to leave Arizona and go elsewhere, thereby causing "attrition" in the state's population of an estimated half million unauthorized immigrants. "Attrition by enforcement," however, is not the policy of the federal government, which prefers to pursue a policy of targeting immigration offenders based on the danger to the community and the seriousness of their immigration offenses.¹¹

Because Hispanics are thought to comprise the majority of unauthorized immigrants in Arizona,¹² opponents of the Arizona law have argued that the law will encourage racial profiling of

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Hispanics. Opponents also argue that the complexity of federal immigration law will cause state and local officials to make mistakes and harm U.S. citizens and legal residents.¹³ Finally, some question the assumption that increased efforts by the state to target unauthorized immigrants will reduce the overall crime rate in Arizona.¹⁴ In the debate over the law, some Arizona law enforcement officials had differing views on whether the law would reduce crime, with some fearing that some crime victims in the community would stop reporting crimes to police for fear that such a report would trigger an investigation into their immigration status.¹⁵

Supporters of the law say that the law does not target anyone solely on the basis of race; that the law will cause unauthorized immigrants to leave Arizona and go elsewhere; that the law will reduce crime in Arizona; and that the law is necessary to protect Arizonans, because the federal government has failed to provide sufficient security along Arizona's border with Mexico.¹⁶

While Arizona faces many lawsuits as a result of enacting SB 1070, the most significant is the suit filed by the U.S. government. In defending itself against the federal lawsuit, Arizona has argued that its law is a permissible attempt by Arizona to engage in concurrent enforcement of federal law because the Arizona law only criminalizes behavior that is already unlawful under federal law.¹⁷ Also, as a result of modifications made to the law after its passage, Arizona's law does not allow race to be used as a sole criterion for checking someone's immigration status, but only as a criterion "when permitted by the United States or Arizona Constitution."¹⁸ Arizona has argued that past laws regarding state regulation of immigration have been upheld by the federal courts, and its new law is in keeping with this tradition of allowing state regulation of some aspects of immigration.¹⁹ Finally, Arizona has cited the failure of the United States to secure the Arizona border and the proliferation of "sanctuary" policies within Arizona as reasons why Arizona must take steps—such as SB 1070—to mitigate the "ever-escalating social, economic, and environmental costs caused by illegal immigration . . ."²⁰

In seeking a preliminary injunction against the law, the federal government argued that Congress has enacted a comprehensive regulatory framework over immigration matters, and the "Constitution and federal law do not permit the development of a patchwork of state and local immigration policies throughout the country."²¹ The government has indicated that through its law, Arizona seeks to divert precious federal immigration enforcement resources to Arizona and away from other states. The government has said that the federal government, not Arizona, must be able to decide its enforcement priorities. The government has also argued that immigration law is extremely complex, and by failing to recognize that complexity, Arizona's law will inevitably harm U.S. citizens and foreigners who are lawfully present in the U.S. according to federal law. The federal government noted, for example, that Arizona's law requiring immigrants to carry documents fails to recognize that not all lawfully present immigrants are given documentary proof of their status by federal authorities, so that it is impossible for many legally present immigrants to satisfy Arizona's registration requirements. Overall, say DOJ lawyers,

Arizona's law is clearly preempted by Congress's enactment of a complex and pervasive scheme of immigration laws, some of which conflict with Arizona's new mandates.

The U.S. district court mostly sided with the federal government and granted a preliminary injunction against enforcement of the most controversial provisions of the Arizona law. The court left untouched the "purpose statement," and several sections of the law that had gone unchallenged by the federal government. Enjoined are the sections of the law that (1) require Arizona law enforcement officials to check the immigration status of persons whom they stop, detain, or arrest; (2) make it a crime to fail to apply for or carry alien registration papers; (3) make it a crime for an unauthorized alien to apply for or perform work; and (4) authorize warrantless arrests of persons who have committed crimes that make them "removable"²² from the United States. The court's opinion provides a straightforward, preemption-based rationale for issuing a preliminary injunction, finding that if the Arizona law were to go into effect, the United States would suffer "irreparable harm" to its ability to enforce its overall immigration policies and achieve its immigration enforcement objectives.

Preemption Issues

For more than a hundred years, the U.S. Supreme Court has affirmed that the federal government has broad and exclusive power to regulate immigration. The power to regulate immigration is not expressly enumerated in the U.S. Constitution, but the Supreme Court has described the immigration power as a plenary power inherent in the sovereignty of the United States.²³ State and local laws that attempt to regulate immigration may violate the Supremacy Clause of the U.S. Constitution and, if so, are preempted by federal law.

Congress has not specifically barred the states from making it a state crime to violate federal immigration law, but preemption doctrine does not require that Congress always expressly act to prohibit the states from legislating in an area of traditional federal expertise; it can also include "conflict preemption" and "field preemption."²⁴ Arizona's law does conflict with federal law and the overall federal immigration strategy, and there is also a very strong argument that Congress has so comprehensively regulated in the field of immigration enforcement—including in its legislation of the exact role that states may play in such enforcement—that Congress has left no room for states to exceed the specific role identified for them in federal statutes.

It is likely that Arizona's law will fail under both the "field" and "conflict" preemption doctrines. SB 1070 attempts to criminalize unauthorized workers who seek employment, but this provision is likely preempted under "field preemption" doctrine; the test there is whether Congress intended to oust the states completely from legislating in an area. The Supreme Court previously allowed state regulation of the employment of unauthorized workers, but only in a case that arose before Congress legislated in this area.²⁵ Under the Immigration Reform and Control Act of 1986 (IRCA), Congress amended the Immigration and Nationality Act to include a complex employer sanctions scheme, civil rights protections, and

preemption language. In fact, 8 U.S.C. 1324a(h)(2) expressly preempts any state or local law from imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or refer or recruit for a fee for employment, unauthorized aliens. Congress apparently chose not to criminalize the act of the workers in seeking employment, which Arizona now seeks to do.

The rest of the enjoined provisions likely fail under the “conflict preemption” doctrine. The rule to be applied there was explained by the United States in the leading case of *Hines v. Davidowicz*, in which the Court struck down a state system of alien registration because the state system was an “obstacle to accomplishment” of the goals of the federal system.²⁶ In deciding whether a state scheme to enforce immigration law will stand, the Court will inquire whether “under the circumstances of [the] particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²⁷ As explained by Justice Hugo L. Black, federal power over this area of law is supreme:

That the supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution, was pointed out by the authors of The Federalist in 1787, and has since been given continuous recognition by this Court. When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute, for Article 6 of the Constitution provides that “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. “For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”²⁸

Congress has not criminalized all violations of U.S. immigration law, and has even authorized immigration benefits for certain unlawfully present immigrants.²⁹ Most immigration law violators are not prosecuted criminally by federal authorities; instead, Congress has created an extensive administrative law system through the Executive Office for Immigration Review and its immigration judges. Presumably, Congress’s decision to process most immigration violators through the civil administrative immigration system reflects congressional recognition that criminalizing immigration violations would overburden the Article III federal courts and the criminal defense and prosecution resources of the federal government. Criminal defendants, after all, are entitled to the

full array of due process protections, while civil immigration “respondents” get much less due process—including, *inter alia*, “in absentia” deportation orders, a limited right to counsel, lesser evidentiary protections, and a much lower prosecutorial burden of proof.³⁰

Under SB 1070, Arizona has chosen to criminalize all immigration violations, including those that are civil violations under federal immigration law. For example, Arizona’s law criminalizes the act of being present in Arizona without being authorized under federal immigration law to be present in the United States, but being present without authorization is only a civil violation under federal law. Normally, someone who is present without authorization—such as a person who overstays his permission to be in the U.S.—would not be charged with a crime by federal authorities, but would merely be ordered to appear before an administrative law judge. If such a person is present in Arizona when SB 1070 goes into effect, however, that person will be charged under Arizona state law with a crime; he or she will be booked into the Arizona state jail system and provided with a defense attorney if he or she cannot afford one; that attorney must also—under the recent U.S. Supreme Court case in *Padilla v. Kentucky*³¹—provide the person with expert advice as to the immigration consequences of the Arizona criminal conviction. An Arizona state prosecutor must prosecute the case, which may involve determining whether the person is “removable” under federal immigration law; the prosecutor must also prove beyond a reasonable doubt that the person has violated federal immigration law, a matter that will require Arizona prosecutors and defense lawyers to become immigration and citizenship law experts. Once provided with defense counsel, the person may also find out that he is really a United States citizen³² or otherwise entitled to apply for immigration benefits,³³ thus mooted the state prosecution (and potentially giving the person a cause of action for damages for wrongful prosecution).

Kris Kobach, the author of the Arizona immigration law, has expressed the view that Arizona’s law is required because Immigration and Customs Enforcement (ICE), the DHS agency charged with immigration enforcement inside the United States, does not conduct interior “patrols” to find unauthorized immigrants.³⁴ Because of the lack of ICE patrols, argues Mr. Kobach, Arizona state law enforcement should be given the power to charge criminally any unauthorized immigrants that they encounter. But the lack of ICE patrols is merely confirmation that Arizona’s SB 1070 strategy is in conflict with the overall federal strategy; ICE agents do not conduct interior community patrols because—in addition to offending Americans who would be constantly stopped and asked about their citizenship status—such patrols would be an ineffectual means of prioritizing ICE resources, which are presently directed against the worst immigration violators. The worst immigration violators are most likely to be found in state and federal correctional facilities, where ICE maintains a constant presence. If SB 1070 goes into effect, then Arizona will flood its state correctional system with thousands of immigration violators who have committed federal civil immigration violations; ICE resources in Arizona will be overwhelmed, ICE may be forced to ignore Arizona enforcement efforts, and DHS

will be unable to achieve its goal of efficiently identifying the worst violators. And if all of the minor immigration violators arrested by Arizona police are processed for deportation, federal immigration courts in Arizona—and ultimately the Ninth Circuit Court of Appeals, which handles immigration court appeals involving Arizona—will face a “surge” in cases unlike anything ever seen before.³⁵

Congress has also specifically explicated a role for state and local law enforcement in its carefully crafted scheme under Immigration & Nationality Act §287(g).³⁶ Arizona is free to assist federal immigration enforcement efforts through INA 287(g) program participation—but SB 1070 goes well beyond the careful parameters of the federal 287(g) program, which has specific training and certification requirements, and which allows designated state and local officers to perform immigration law enforcement functions, as long as they are trained and they function under the supervision of ICE officers. Arizona’s SB 1070 operates independently of the 287(g) program as devised by Congress. Accordingly, SB 1070 is likely preempted for that reason as well.

Conclusion

Key provisions of Arizona’s law have now been enjoined as a preliminary matter, but Arizona continues to face opposition to the enjoined law, not only from the federal government, but also in the form of boycotts, other lawsuits, and international condemnation. Hispanics—both legal and unauthorized—had been leaving the state for years, but this trend has accelerated.³⁷ Proponents of the law have urged other states to enact similar legislation, but after the federal government filed suit against Arizona and obtained a preliminary injunction, other states that had considered similar legislation appeared to be awaiting the ultimate outcome of the suit before taking further action. As of the date of this writing, no other state has followed Arizona’s example, although some plan to do so in the future and some proposed legislation is pending. Arizona has appealed the district court’s decision to the Ninth Circuit Court of Appeals, which is expected to rule later this year.

Congress has created a complex system of civil and criminal immigration laws that are legendary for their variety and complexity.³⁸ The Department of Homeland Security, the federal agency primarily charged with enforcing this complex code, has generally lacked the full resources necessary to enforce federal law to the letter, and has accordingly adopted a strategy of prioritizing its efforts so as to concentrate on the worst immigration offenders. DHS uses a variety of civil and criminal tools to implement that strategy. To supplement its efforts, the Department has long sought assistance from state and local authorities—but only when the federal government has been able to direct and control those efforts. By creating mandatory state criminal sanctions for even the most minor civil immigration violations, Arizona’s foray into immigration enforcement is likely to disrupt federal immigration enforcement efforts substantially, creating a surge of immigration cases in the civil immigration and federal criminal court systems. If other states copy Arizona’s law, the resulting tidal wave of cases could completely overwhelm federal resources. Given these practical realities, it is understandable that the United States has chosen

to seek an injunction against the Arizona law. Rather than being a “force multiplier,” Arizona’s law forces an even greater burden on the already overwhelmed federal immigration system, threatening to become a “ball and chain” that undermines overall federal immigration enforcement efforts.

Endnotes

1 These attempts have included efforts to assist immigrants, as well as efforts to enforce federal immigration laws against unauthorized immigrants. For a general overview of such laws as well as up-to-date information on the current status of state and local immigration-related legislation, see THE NAT’L COUNCIL OF STATE LEGISLATURES, IMMIGRANT POLICY PROJECT, at <http://www.ncsl.org/default.aspx?TabId=20881>.

2 Kris W. Kobach, The Quintessential Force Multiplier: The Inherent Authority Of Local Police To Make Immigration Arrests,” 69 ALBANY L.REV. 179 (2006).

3 After passage, SB 1070 was almost immediately modified by Arizona House Bill 2162 after critics raised objections to some of the language in the original SB 1070 bill. For ease of reading, this article will refer to the final bill as “SB 1070,” although the final, enacted law consists of SB 1070 as well as the changes made by HB 2162.

4 SB 1070 also added state penalties for harboring and transporting illegal immigrants, employing illegal immigrants, and smuggling humans, among other things.

5 In its complaint, the United States sought to enjoin Sections 1 through 6 of the Arizona law, leaving untouched the later Sections. See United States v. Arizona, Complaint, Case No. 10-CV-01413, at 24.

6 Order, United States v. Arizona, Case No. 10-CV-01413-SRB, July 28, 2010 (granting preliminary injunction against SB 1070).

7 Section 287(g) was enacted as part of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996, P. L. 104-208, §133.

8 See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES PROGRAM, available at <http://www.ice.gov/about/offices/enforcement-removal-operations/secure-communities/index.htm> (“ICE determines if immigration enforcement action is required, considering the immigration status of the alien, the severity of the crime and the alien’s criminal history. Secure Communities also helps ICE maximize and prioritize its resources to ensure that the right people, processes and infrastructure are in place to accommodate the increased number of criminal aliens being identified and removed . . . [allowing ICE to prioritize] resources toward the greatest threats.”).

9 See Arizona SB 1070 as amended by Arizona HB 2162, §2, available at <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>.

10 See Arizona SB 1070 as amended by Arizona HB 2162, §1, Intent (“[T]he intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona.”), available at <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>.

11 See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, UPDATED FACTS ON ICE’S 287(G) PROGRAM (Apr. 12, 2010), available at http://www.ice.gov/pi/news/factsheets/section287_g-reform.htm.

12 PEW HISPANIC CTR., HISPANICS AND ARIZONA’S NEW IMMIGRATION LAW (Apr. 29, 2010), available at <http://pewresearch.org/pubs/1579/arizona-immigration-law-fact-sheet-hispanic-population-opinion-discrimination>.

13 Mistaken deportations of U.S. citizens have risen in recent years with the increasingly strict enforcement of U.S. immigration laws by federal authorities. See, e.g., Alex Perez & B.J. Lutz, American Citizen Faced Deportation: Despite ID and Birth Certificate, *Chicago Man Detained for Three Days*, NBC CHIC., May 24, 2010, available at <http://www.nbcchicago.com/news/local-beat/eduardo-caraballo-puerto-rico-deportation-94795779.html>; Marisa Taylor, *US Citizen’s Near-Deportation Not A Rarity*, MCCLATCHY NEWS SERV., Jan. 26, 2008, available at <http://www.startribune.com/nation/14456137.html>.

14 See, e.g., Spencer S. Hsu, *U.S. Police Chiefs Say Arizona Immigration Law Will Increase Crime*, WASH. POST, May 27, 2010 (“Arizona’s law will

intimidate crime victims and witnesses who are illegal immigrants and divert police from investigating more serious crimes.”); AMERICA’S VOICE, ARIZONA IMMIGRATION LAW COULD LEAD TO SURGE IN VIOLENT CRIME, *available at* http://amvoice.3cdn.net/166b34220b0f52c7fc_zpm6bo6lu.pdf.

15 Randal C. Archibold, *Arizona’s Effort to Bolster Local Immigration Authority Divides Law Enforcement*, N.Y. TIMES, Apr. 21, 2010, *available at* <http://www.nytimes.com/2010/04/22/us/22immig.html>.

16 For the purpose statement in the law, see Arizona SB 1070 as amended by Arizona HB 2162, §1, *available at* <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>; *see also* ARIZ. GOVERNORS’ OFFICE, COMMON MYTHS AND FACTS ABOUT SENATE BILL 1070, *available at* <http://azgovernor.gov/documents/BorderSecurity/SB1070MythsandFacts.pdf>.

17 *See* http://www.azgovernor.gov/dms/upload/PR_072010_USvAZDefendantsResponsePlaintiffMotionPI.pdf.

18 *See* SB 1070 as amended by HB 2162, §2 (amending Title 11, chapter 7, Arizona Revised Statutes, to add an Article 8), *available at* <http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF>.

19 *See, e.g.*, *Gonzales v. City of Peoria (AZ)*, 722 F.2d 468 (9th Cir. 1983) (“[N]othing in federal law precluded . . . police from enforcing the criminal provisions of the Immigration and Naturalization Act.”).

20 Defendants’ Response to Plaintiff’s Motion for Preliminary Injunction, *United States v. Arizona*, No. 10-CV-01413-PHX-SRB, July 20, 2010, at 8.

21 Plaintiff’s Motion for Preliminary Injunction and Memorandum of Law In Support Thereof, *United States v. Arizona*, No. 10-CV-01413-NVW, July 6, 2010, at 1.

22 Whether someone is “removable” is a very complex determination that is normally made by federal immigration judges in the context of a removal proceeding in federal immigration court; it is thus unclear how Arizona law enforcement officials will make this determination when a person has not yet completed immigration court removal proceedings.

23 *See, e.g.*, *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Fong Yue Ting v. U.S.*, 149 U.S. 698, 711 (1893).

24 *See DeCanas v. Bica*, 424 U.S. 351, 355–56 (1976) (describing the three types of preemption, and also stating that the “[p]ower to regulate immigration is unquestionably exclusively a federal power”); *see also Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Fiallo v. Bell*, 430 U.S. 787 (1977); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

25 *See DeCanas v. Bica*, 424 U.S. 351 (1976).

26 312 U.S. 52 (1941).

27 *Id.* at 67.

28 *Id.* at 62 [internal footnotes and citations omitted].

29 *See, e.g.*, 8 U.S.C. §1101(a)(15)(T) (2010) (authorizing immigration benefits for unlawfully present non-citizens who are victims of human trafficking).

30 Congress has also failed repeatedly to fund DHS enforcement efforts at a level that would allow the deportation of all unlawfully present non-citizens. *See* Darryl Fears, *\$41 Billion Cost Projected to Remove Illegal Entrants*, WASH. POST, July 26, 2005 (estimating “the cost of forcibly removing most of the nation’s estimated 10 million illegal immigrants at \$41 billion a year, a sum that exceeds the annual budget of the Department of Homeland Security”), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/25/AR2005072501605.html>.

31 130 S. Ct. 1473 (2010) (holding that criminal defense attorneys have an obligation to inform their clients if a guilty plea carries a risk of deportation).

32 Each year, many persons whom government officials thought were “removable aliens” turn out to be United States citizens. *See, e.g.*, Jill Serjeant, *Lawsuit Filed Over Man Deported and Lost in Mexico*, REUTERS, Feb. 27, 2008, *available at* <http://www.reuters.com/article/idUSN2747919120080227>.

33 For example, many “unauthorized” immigrants turn out—when an immigrant expert reviews the facts of their cases—to be eligible for Temporary Protected Status, adjustment of status, or “T” and “U” visas because they have been human trafficking or crime victims. *See, e.g.*, Chelsea Phua, *U Visas*

Can Help Illegal Immigrant Crime Victims, SACRAMENTO BEE, July 5, 2010 (describing how undocumented immigrants victimized by crime can obtain lawful status by cooperating with police), *available at* <http://www.sacbee.com/2010/07/05/2869340/u-visas-can-help-illegal-immigrant.html>.

34 Kris W. Kobach, Remarks at The Federalist Society National Lawyers Convention, Washington, D.C., Nov. 18, 2010. Mr. Kobach discussed only a lack of Immigration & Customs Enforcement (ICE) patrols; a separate DHS agency, Customs and Border Protection (CBP), does conduct patrols to find unauthorized immigrants within extremely large border patrol sectors that reach well into the interior of the United States. For a map of border patrol sectors in the U.S., *see* http://www.cbp.gov/linkhandler/cgov/careers/customs_careers/border_careers/bp_agent/sectors_map.ctt/Sectors_Map.pdf. *See also* Nina Bernstein, *Border Sweeps in North Reach Miles into U.S.*, N.Y. TIMES, Aug. 29, 2010, *available at* http://www.nytimes.com/2010/08/30/nyregion/30border.html?_r=1.

35 Federal courts along the border are already overwhelmed with cases. *See* Amanda Lee Myers, *Overwhelmed Courts Need \$40 Million for Border Plan*, ASSOCIATED PRESS, June 29, 2010 (“The current workload in our Southwest border courts is staggering.”), *available at* <http://www.azcentral.com/news/articles/2010/06/29/20100629arizona-immigration-federal-court-costs.html>.

36 IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEET, DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION & NATIONALITY ACT, *available at* <http://www.ice.gov/news/library/factsheets/287g.htm>.

37 Randal C. Archibold, *Arizona Seeing Signs of Flight By Immigrants*, N.Y. TIMES, Feb. 12, 2008; Alan Gomez, *Hispanics Flee Arizona Ahead of Immigration Law*, USA TODAY, June 9, 2010, *available at* http://www.usatoday.com/news/nation/2010-06-08-immigration_N.htm.

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LITIGATION

THE AMENDMENTS TO THE AMERICANS WITH DISABILITIES ACT: BAD FOR BUSINESS, BOON FOR THE DISABLED?

By Karen R. Harned and Katelynn K. McBride*

The ADA was designed with a noble mission in mind: “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹ In order to accomplish this mandate, the ADA prohibited discrimination against the disabled in job application procedures, hiring, and other conditions of employment.²

As part of the prohibition, employers were required to provide reasonable accommodations to the disabled by taking actions such as giving the disabled time off to seek treatment, making physical changes to the workplace like building a ramp, physically altering the workspace to accommodate the employee, or supplying materials in accessible formats such as Braille.³ Disability was defined as “a physical or mental impairment that substantially limits a major life activity, a record of impairment, or being regarded as having an impairment.”⁴ The consequences for violating the act included significant damages such as back pay, compensatory damages for injuries such as emotional distress, front pay for anticipated future losses, and injunctive relief such as reinstatement into his or her former position.⁵

Reaction to the ADA

Not long after the ADA went into effect, courts began limiting its reach. The Supreme Court narrowed the scope of the act and the definition of “disability” in particular. The court emphasized that the standard for disability is a demanding one. In *Sutton v. United States*, the Supreme Court held that when inquiring about whether an impairment constitutes a major life activity, mitigating measures must be considered.⁶ For example, bipolarism controlled by medication would not be considered a disability because mitigating measures are taken to control the condition. The Supreme Court similarly narrowed the scope of the ADA in *Toyota v. Williams*, where it held that in order to be considered “substantially limited” in the “major life activity” of performing manual tasks, the individual’s limitations must prevent or severely restrict her from performing activities that are “central to most people’s lives.”⁷

In the early stages of ADA litigation, therefore, employers sought to significantly limit the scope of what could be considered a disability under the law, and they succeeded. Proving that one’s disability was covered under the ADA became a central focus of litigation as federal courts continued to rein

in the definition of disability. Impairments such as diabetes, epilepsy, muscular dystrophy, post-traumatic stress disorder, clinical depression, arthritis, and multiple sclerosis were all held to be disabilities not covered by the ADA.⁸

As employers succeeded in limiting the scope of the act, disability rights groups fought back, crying out that the original intent of the ADA had been abandoned. *Sutton* and *Toyota*, in particular, prompted groups such as the Epilepsy Foundation, the American Diabetes Association, and the National Multiple Sclerosis Society to lobby Congress to overturn those Supreme Court decisions.⁹ The National Council on Disability also took action, launching an investigation into the outcome of Supreme Court decisions in ADA cases.¹⁰

A 2004 report on the NCD investigation was entitled “Righting the ADA,” and it discussed ways in which the Supreme Court and lower federal courts had misconstrued the original intent of the ADA.¹¹ These efforts worked; the NCD report sparked congressional interest, leading to the introduction of the “ADA Restoration Act” in both houses of Congress in 2006 and 2007.¹² By enacting the ADAAA, Congress did exactly what the disability rights groups had asked them to do; they brought back the original intent of the ADA.¹³

The Birth of the ADAAA

The ADA Amendments Act (ADAAA) went into effect on January 1, 2009,¹⁴ effectively overturning the *Sutton* and *Toyota* decisions.¹⁵ Emphasis was placed on the act’s broad coverage, while the demanding standard for “disability” was deemphasized. The ADAAA shifted the focus from whether the plaintiff’s impairment constitutes a disability to whether the employer has discriminated.¹⁶

Under the ADAAA, employers are no longer permitted to inquire as to whether mitigating measures are being taken to control the disability.¹⁷ As a result, the bipolar individual who takes medication to control her condition is considered disabled. The exception to this rule is the employee who uses eyeglasses or takes other action to mitigate impaired vision.¹⁸

The ADAAA also expands the definition of “disability” to include individuals with a perceived disability without considering whether it limits a major life activity.¹⁹ The ADAAA softens the definition of “substantially limits” by stating that defining the term as “severely restricts” is too high a standard.²⁰ The ADAAA also eliminates the “central importance to daily life” requirement of “major life activity.”²¹

The act states that a condition in remission still constitutes a disability if it would “substantially limit a major life activity” while the condition is in its active state.²² Under the ADAAA, a condition only need substantially limit one major life activity in order for the condition to be considered a disability rather than requiring wholesale impairment of all activities that are central to a person’s life as the ADA previously required.²³ The

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law also alters the definition of “major life activity” to include virtually all activities, including “performing manual tasks,” “thinking,” “lifting,” “communicating,” and “major bodily functions.”²⁴ Activities not included under the revised definition of “major life activity” include sexual relations, driving, and using a computer. It is likely that these activities will continue to be litigated.

Courts Review the ADAAA

Because the ADAAA did not go into effect until January 1, 2009, case law is still developing. To date, the majority of case law considers whether the act is retroactive. Most courts have held that the act is not retroactive.²⁵ This means that acts occurring before the passage of the ADAAA are evaluated under *Toyota* and *Sutton* and not under the new ADAAA regime.

The Fifth Circuit explained:

The effective date of the ADAAA was January 1, 2009. This case was filed, tried, and decided before then. Therefore, in order for us to depart from the Supreme Court’s settled interpretation, we would need to find that Congress intended the ADAAA to apply retroactively. We have already declined to do that.²⁶

Other courts agree with this conclusion.²⁷

In *Jenkins v. National Board of Medical Examiners*, the Sixth Circuit departed from other courts and held in an unpublished opinion that because the case involved prospective relief and was pending when the amendments became effective, the ADAAA and not the ADA must be applied.²⁸ The lynchpin to the decision was the fact that the plaintiff did not seek damages for the past but accommodation for the future. This case is an outlier in holding that the ADAAA is retroactive.

Cases engaging the substance of the ADAAA include *Horgan v. Simmons*, where the Northern District of Illinois held that under the ADAAA, HIV positive status is a disability because it impairs the immune system.²⁹ In *O’Neill v. Hernandez*, the Southern District of New York stated in a footnote that the court’s conclusion, that the defendant was not discriminated against due to disabling depression, would be the same under both the ADA and ADAAA.³⁰

The case delving most deeply into the substance of the ADAAA is *Menchaca v. Maricopa Community College*, where the court refused to dismiss the claim of a former college professor who had been diagnosed with post-traumatic stress disorder.³¹ Menchaca suffered a traumatic brain injury from a car accident.³² Her doctor recommended that she only teach a certain number of hours, only teach courses she had taught before, have reduced administrative responsibilities, and be provided with a job coach.³³

The school accommodated nearly all of these requests.³⁴ Despite these accommodations, Menchaca’s employment was terminated after complaints that she shouted at students in class, had a great deal of anxiety in meetings, and was found by a doctor to lack empathy.³⁵ She filed a complaint alleging that the school had failed to reasonably accommodate her.³⁶

She was allowed to go to trial based on her inability to “interact with life.”³⁷ She was unable to regulate her emotional

responses in stressful situations, limiting her ability to care for herself and to interact with others.³⁸ This, the court held, was a disability under the ADAAA.³⁹

The court referenced the following ADAAA language: “the definition of disability shall be construed in favor of broad coverage of individuals under the ADA.”⁴⁰ The inability to “interact with life” was not considered a disability under the ADA, particularly because this inability was a condition composed of symptoms that were episodic in nature. Under the ADAAA, however, this inability does qualify as a disability. When the court stated that Menchaca had a disability, they referenced the fact that the ADAAA, unlike the ADA, affords protection to episodic conditions.⁴¹

Although a young statute, it is clear that the ADAAA shifts the focus away from whether a particular condition constitutes a disability. Under the ADA, whether a condition constituted a disability was the central question in litigation. Under the ADAAA, more often than not, a condition will be considered a disability, and consideration shifts to whether an accommodation was made and whether the accommodation adequately responded to the disability.

The ADAAA’s Impact on Employers and Business

Employers will have to alter their behavior and conform their practices to meet the demands of the ADAAA. Because the definition of “disability” has been so widely expanded, employers will be obligated to provide accommodations to nearly every employee claiming a disability. The cost to employers of investigating whether a particular condition constitutes a disability is wasted because the definition is so broad; instead, employers should investigate at the start whether the employee was accommodated.

Because disabled employees can sue for being discriminated against due to their disability, and because the definition of “disability” is so encompassing, firing a disabled employee can lead to costly litigation. The ADAAA will inevitably increase litigation. Under the ADA, most lawsuits were dismissed at the summary judgment stage because the employee was unable to prove the existence of a disability.⁴² Whether or not a disability exists will no longer be the focus of litigation. Employers will have to devote more resources to litigation since lawsuits will take longer to conclude and more employees will have a cause of action.

The ADAAA’s wide definition of “disability” creates a regime that looks much less like at-will employment and much more like the system in foreign countries where employees are afforded a great deal of protections. In countries where more protections are afforded to employees, the trend is that employers are less willing to hire, and job growth is halted.⁴³ The ADAAA will mean increased costs to employers, and, like employers in these other countries, U.S. employers will hesitate to hire new employees when the employment will no longer be purely at-will.⁴⁴

Small business will be disproportionately affected because larger firms have legal counsel and disability consultants in place to help them adapt to new laws. In order to accommodate one employee, small businesses must bring in outside experts such as

lawyers and ADA consultants to assist them in complying with the law. The law thus places small businesses at a competitive disadvantage to larger firms.

Larger business will still feel the impact of the ADAAA, however, and maintaining a consistent accommodation process is key. If, for example, an employee injured her knee and the business fulfilled her request for accommodation by giving her a new office on the first floor, the business ought to provide the same accommodation to any future employees with similar injuries. Providing lesser accommodations to similarly situated employees is a recipe for a lawsuit.

While the overall impact of the ADAAA on business is negative, there are some positive aspects to the new law. The ADAAA contains no provision for reverse discrimination claims, meaning that an employee without a disability may not sue under the theory that he received less favorable treatment than disabled employees because of his lack of a disability.⁴⁵ Also, employers are not required to provide reasonable accommodation to employees who are “regarded as” disabled; they are only required to avoid discriminating against those employees.⁴⁶ Multiple exclusions, such as exclusions for illegal drug use, sex-based conditions such as transvestitism, and psychological criminal conditions like kleptomania, remain under the law.⁴⁷

The ADAAA's Impact on the Disabled

Another important consideration is the effect that the ADA has had on the disabled. Studies show that more disabled individuals were unemployed after the ADA was passed than before it.⁴⁸ Employers are far more likely to face liability for terminating someone than for failing to hire them, so employers simply decline to hire the disabled in the first place and thus avoid having to provide expensive accommodations.⁴⁹ The two most common ADA violations alleged with the EEOC are discharge, layoff, or suspension claims and failure to provide reasonable accommodation. Failure to hire is therefore not as much of a concern.

Julie Hofius, an attorney who uses a wheelchair, wrote an article entitled “How the ADA Handicaps Me,” where she discussed her difficulty getting a job offer.⁵⁰ Hofius was thrilled that the ADA provided her with ramps and elevators to get around yet concluded, “The physical obstacles have been removed, but they have been replaced with a more daunting obstacle: the employer’s fear of lawsuits.”⁵¹ Hofius says the reason for her troubles is that employers are legally prohibited from asking the disabled about their limitations, and so they just decline to hire people like her in order to prevent entanglement in the mess of accommodations.⁵²

Solutions for Employers and Business

The most important step that employers can take to become compliant under the ADAAA is to recognize that nearly every condition now constitutes a disability. The definition of “disability” has been expanded threefold. The ADAAA softens the definition of “substantially limits,” eliminates the “central importance to daily life” requirement of “major life activity,” and alters the definition of “major life activity” to include everything from “major bodily functions” to “thinking.” As we mentioned above, when an employee tells an employer about

a disability and asks for an accommodation, the employer should not question whether the condition complained of is a disability but should immediately consider accommodations for the employee. This shift in thinking will help employers avoid litigation as much as possible and determine whether the individual can perform the essential functions of the job without accommodation.

Whereas before employers could deny accommodations to individuals taking medication to control their condition, employers will have to train managers to ignore mitigating measures and provide accommodations anyway. Prior to the passage of the ADAAA, the Supreme Court developed the “work with what you know” standard, allowing employers to focus on the current limitations of employees rather than speculating about future possibilities.⁵³ This standard was easy for employers to apply.⁵⁴ Now, employers must consider how the condition operates when mitigating measures are not being utilized. As a result, employers almost have to develop or pay for some base of medical knowledge.

Employers should understand the expanded definition of “major life activity.” The Supreme Court had interpreted the term to mean activities that are of “central importance to most people’s daily lives.” That definition no longer stands. The ADAAA made clear that an impairment that substantially limits one major life activity need not limit any other major life activity in order for that impairment to be considered a disability.

An awareness that episodic conditions and conditions in remission are now protected is crucial. An employee who has had only one seizure yet has been diagnosed with epilepsy is disabled under the ADAAA.⁵⁵ The ADAAA does not define episodic or remission and does not give examples of conditions falling under these categories that would count as disabilities.⁵⁶

Episodic Conditions

The ADAAA does not place a timeline on impairments, nor does it require an employee to experience more than one impairing episode to be considered disabled.⁵⁷ Employees should not deny a reasonable accommodation to an employee because he has experienced only one episode of an impairment. Employers ought to work with employees to address the impairment and assess its severity and frequency based on a physician’s assessment as well as any other impairments the physician believes the employee might develop as a result of the recurring condition.⁵⁸

After providing a reasonable accommodation, the employer should follow up to ensure that the reasonable accommodation meets the employee’s needs and that the employee feels comfortable talking to the employer about future needed reasonable accommodations, and if a second episode occurs, the employer should confirm the employee’s safety.⁵⁹ If the employee has had more than one episode, the employer should treat them the same as someone who has had only one, making sure to document each separate episode. The employer should try to tailor the reasonable accommodation to the individual employee by considering the information the employee has learned from his episodes, such as triggering factors and coping mechanisms.⁶⁰

Conditions in Remission

The ADAAA states that conditions in remission constitute disabilities as well.⁶¹ The two forms of remission are complete remission, which means “complete disappearance of the clinical and subjective characteristics of a chronic or malignant disease,” and partial remission, which means that a disease is much improved but “residual traces of the disease are still present.”⁶² The ADAAA makes clear that conditions in partial remission are disabilities if they substantially limit a major life activity while active. Employers must also continue to accommodate conditions in complete remission because remission is different from a cure. Those who have had cancer, for instance, can experience symptoms of the disease prior to its return.

Possibly the most important action that employers can take is to require the employee to provide reasonable updates to the medical certification for his need of a continuing accommodation. Because episodic conditions and conditions in remission constitute disabilities, without requiring the medical certification of need, employees could continue to ask for accommodations indefinitely.⁶³

Consistency is Critical

Consistent provision of reasonable accommodations throughout the organization is paramount. Large businesses will receive more accommodation requests, creating a greater potential for inconsistency. To combat inconsistency, larger businesses should create structures within their central human resources departments to track how each individual accommodation is handled. With each subsequent request for an accommodation, the business should refer back to how previous requests have been handled to avoid providing different levels of accommodation for the same disability.

Smaller businesses will likely not face the same problems as larger businesses. Smaller businesses have fewer employees, which means fewer requests for accommodations and a lower chance of inconsistent provision of accommodations. Moreover, businesses are not required to provide an accommodation if it would create an undue hardship. Still, small businesses face problems in ADAAA compliance about which larger businesses do not have to worry. Each small business owner must act as his own compliance officer, making judgments about accommodations on his own. Lacking a central human resources department and lacking in-house ADA consultants, small businesses must exercise caution when providing accommodations.

Conclusion

The ADAAA likely will increase compliance costs for business and encourage more litigation. However, by prioritizing the documentation of employee medical issues and the provision of reasonable accommodations, businesses will be able to manage the new law. The key for businesses concerned with successful navigation of the ADAAA is to change their own attitudes toward reasonable accommodation. Rather than debating whether to provide the accommodation and questioning whether the condition is a disability, employers should engage in the interactive process to ascertain whether there is a reasonable accommodation available that would

enable the employee to perform his or her job. To avoid abuse, employers should require frequent updated documentation of employee medical issues.

Unfortunately, even by adopting the best attitudes, the ADAAA will prove burdensome for business by increasing costs and making businesses hesitant to hire new employees. This impact on business will result in harm to the disabled. While creating safe and comfortable work places for the disabled is an important objective, the ADAAA will likely make obtaining jobs more difficult. Concerned about litigation costs and aware that litigation rarely arises from the failure to hire, employers might hesitate to hire disabled individuals.

Endnotes

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- 2 42 U.S.C.A. § 12112(a) (1990).
- 3 42 U.S.C.A. § 12111(9) (1990).
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- 7 *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 187 (2002).
- 8 *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002) (diabetes); *Todd v. Academy Corp.*, 57 F. Supp. 2d 448 (S.D. Tex. 1999) (epilepsy); *McClure v. General Motors Corp.*, 75 Fed. Appx. 983, 2003 WL 21766539 (5th Cir. 2003) (muscular dystrophy); *Schriner v. Sysco Food Serv.*, No. Civ. 1CV032122, 2005 WL 1498497 (M.D. Pa. June 23, 2005) (post traumatic stress disorder); *McMullin v. Ashcroft*, 337 F. Supp. 2d 1281 (D. Wyo. 2004) (clinical depression); *Sutton v. N.M. Dept. of Children, Youth and Families*, 922 F. Supp. 516 (D.N.M. 1996) (arthritis); *Sorensen v. Univ. of Utah Hosp.*, 194 F.3d 1084, 1085 (10th Cir. 1999) (multiple sclerosis).
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- 10 *Id.* at 188, 194.
- 11 *Id.* at 194.
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- 13 ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat. 3553, 3554 (codified as amended at 42 U.S.C. § 12101) (The ADAAA statute states that one of the purposes of the statute is to bring back the original intent of the ADA.).
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- 17 42 U.S.C.A. § 12102(4)(E)(i) (2009); Gina M. Cook, *When the Duty to Provide a Reasonable Accommodation Seems Unreasonable: Accommodating and Managing Employees with Episodic Impairments or Impairments in Remission Under the ADA Amendments Act of 2008*, 32 N.C. CENT. L. REV. 1, 14-15 (2009).
- 18 42 U.S.C.A. § 12102 (4)(E)(ii)(2009).
- 19 42 U.S.C.A. § 12102 (3)(A)(2009).
- 20 42 U.S.C.A. § 12102 (4)(B)(2009).
- 21 42 U.S.C.A. § 12102 (2)(2009).
- 22 42 U.S.C.A. § 12102 (4)(D)(2009).

23 42 U.S.C.A. § 12102 (1)(A)(2009).

24 42 U.S.C.A. § 12102 (4)(A)(B)(2009).

25 See *Carmona v. Sw. Airlines*, 604 F.3d 848, 857 (5th Cir. 2010); *Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562, 565 (6th Cir. 2009); *EEOC v. Agro Distribution LLC* 555 F.3d 462, 473 n.8 (5th Cir. 2009).

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52 *Id.*

53 See, e.g., *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002).

54 See, e.g., *Zirpel v. Toshiba Am. Info. Sys., Inc.*, 111 F.3d 80, 81 (8th Cir. 1997) (finding that employee was not disabled because panic disorder did not usually limit her activities and did not substantially limit her ability to work).

55 See *Cook*, *supra* note 17.

56 *Contra* H.R. Rep. No. 110-730, pt. 2, at 19 (2008), available at <http://www.law.georgetown.edu/archiveada/documents/HRRep110-730Part2.pdf> (providing examples of episodic impairments or impairments in remission, i.e. epilepsy, multiple sclerosis, and cancer).

57 See *Cook*, *supra* note 17.

58 *Id.*

59 *Id.*

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62 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *EEOC ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA)*, EEOC Notice No. 915.002 (July 27, 2000), available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> #6.

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PROFESSIONAL RESPONSIBILITY & LEGAL EDUCATION

DOJ's EX-DETAINEE LAWYERS: THE ETHICS ISSUE

By Edwin D. Williamson and Richard W. Painter*

One neglected issue in the controversy over the revelation that there are at least nine (or ten, if you count Attorney General Eric Holder) Justice Department lawyers who represented, or filed briefs in support of, Guantanamo detainees is whether those lawyers are complying with applicable ethics rules—and whether those rules are being applied evenly.

The two basic ethics rules are (a) the “inward” revolving door ban found in President Obama’s executive order imposing ethics obligations on his administration’s appointees and (b) the conflict of interest rules found in codes of professional conduct defining lawyers’ duties to clients.

President Obama’s Ethics Order. This bans an appointee from participating for two years in any “specific party particular matter” (includes litigation, investigations and rulemaking) in which the appointee’s former client or former firm is a party or represents a party. The Justice Department, in a letter to Republican senators on the Judiciary Committee, takes the position that the ban does not apply to the DOJ lawyers as long as the appointee is not dealing with the same detainee that he represented or his former employer represents.

If this is a correct reading of the “inward” revolving door restriction, then it is substantially less strict than the “outward” revolving door ban found in the federal government’s and the Bar’s ethics rules. They would ban a former government official who had, while in government service, participated in the disposition of Guantanamo Detainee A from turning around and in private practice representing Guantanamo Detainee B where the facts overlapped. On the other hand, according to DOJ’s interpretation, a political appointee who represented Detainee A when in the private sector could participate in the disposition of Detainee B, even if they were alleged co-conspirators.

We believe that the interpretations of “specific party particular matter” by the government’s Office of Government Ethics and the D.C. Court of Appeals of their respective “outward” revolving door rules (some of which we happen to disagree with) compel the conclusion that the implementation of President Obama’s January 2009 executive order (entitled “Review and Disposition of Individuals Detained at Guantanamo Bay Naval Base and Closure of Detention Facilities”) involves the same specific party particular matter as the representation of any of the Guantanamo detainees.

Thus, any Obama appointee who represented, or whose former employer represents, a detainee (including in an amicus capacity) would be banned from being involved in the review or disposition of any Guantanamo detainee.

This conclusion would be consistent with the purpose of President Obama’s ethics order—to keep appointees from acting in a way that benefits their former clients. After all, one would be horrified to find a lawyer who had represented Exxon in a DOJ antitrust conspiracy investigation joining the antitrust division and formulating policies or litigation strategy concerning another colluding oil company.

The Bar’s Client Loyalty Rules. These ban a lawyer who has represented a client in a matter from representing another person in the same or a substantially related matter in which that person’s interests are materially adverse to the former client’s interests, unless the former client gives an “informed consent.” Where a lawyer’s former firm represents or represented a client in a matter and the lawyer acquired material confidential information, the lawyer cannot represent another person with adverse interests in the same or a substantially related matter without the former client’s “informed consent.”

Again, we believe that a government lawyer who had represented a Guantanamo detainee or who had acquired material confidential information about his former firm’s detainee client would have serious problems in participating in the implementation of the Obama executive order mandating the review and disposition of the Guantanamo detainees.

The purpose of the Bar rules is to protect a former client from the use by a former lawyer of privileged or protected information in a manner that would adversely affect the former client. Given the clamor raised by the human rights lobby over the treatment of the Guantanamo detainees, we are stuck by the total absence of any expressions of concern whether the rules designed to protect the detainees are being followed.

Consistent Application of Ethics Rules. When Reagan-Bush State Department legal adviser Abraham Sofaer took on the representation of the Libyan Government in 1993 in an effort to settle the PanAm 103 bombing case, a high profile debate erupted over whether he was violating the “outward” revolving door rules. Senator Carl Levin asked the Office of Government Ethics for its opinion as to whether Sofaer was in violation of the federal revolving door ban. In response to an op-ed by *Washington Post* columnist Jim Hoagland suggesting that Sofaer would have undue influence on the Clinton administration’s handling of the PanAm 103 bombing (!), the D.C. Bar Counsel initiated an action against Sofaer alleging violation of its revolving door ban.

Although he withdrew immediately from his Libyan representation, Sofaer eventually was issued an informal admonition by the D.C. Bar Counsel, the lightest form of ethics punishment, but it did constitute a finding that he had violated the ethics rules. The D.C. Court of Appeals, in upholding

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Sofer's sanction, essentially adopted a safe harbor rule, in effect requiring a lawyer facing a close or difficult ethics issue to obtain the view of her employer's or her Bar's ethics expert.

The questions we are addressing are complicated, and the determination of whether these rules are being complied with depends very much on the facts of individual cases. At a minimum, therefore, we believe that the Justice Department should release their internal opinions as to why they believe that the president's ethics rules and the Bar rules have been complied with. Senate Judiciary Committee members should ask for the views of the director of the Office Government Ethics and the D.C. Bar Counsel or the D.C. Bar Ethics Committee.

Under existing federal ethics rules, the standard for deciding whether an executive branch official may participate in a particular matter is whether "a reasonable person with knowledge of the relevant facts would question his impartiality in the matter." Given the ferocity with which the detainees' lawyers criticized the government's detention policies, it is a fair question whether those who are now government officials meet this impartiality standard.

President Obama claims to have established high ethical standards for his appointees. His words should be implemented into action. The placing of former detainee lawyers in detainee-sensitive positions raises separate serious questions as to the attorney general's judgment.

Epilogue

We have not done any additional research since the original publication of this article. We do note, however, the nearly disastrous outcome of DOJ's decision to try detainee Ahmed Khalfan Ghailani in a civilian court and wonder if the poor judgment reflected in that decision and the conduct of his trial reflects the influence of the ex-detainee lawyers. If it does, it adds more heat to the controversy as to whether those lawyers should have been banned from participating in the disposition of the Guantanamo detainees.



JUDICIAL DISQUALIFICATION WHEN A SOLICITOR GENERAL MOVES TO THE BENCH

By Ronald D. Rotunda*

Introduction

It has been over forty years since a Solicitor General has moved to the High Court. Now that Elena Kagan has followed in Thurgood Marshall's footsteps—when she moved from standing in front of the bench to sitting behind it—she has to navigate a strict judicial disqualification statute that did not exist in 1967, when Thurgood Marshall (the grandson of a slave) left his position as Solicitor General to become Supreme Court Justice.

When Elena Kagan was first nominated, she said that she would disqualify herself only in cases in which she was listed as one of the authors of the Solicitor General's brief filed before the court.¹ However, a federal statute specifically governs this situation, and, as my testimony before the Judiciary Committee explained, it imposes a far stricter obligation on federal government employees. It requires disqualification in *every case* where a government employee has *participated* as a lawyer or as an *adviser* or *expressed an opinion* concerning the merits of the particular case in controversy.²

In response to that statute, Justice Kagan has now disqualified herself in about fifty percent of the cases (twenty-five of the fifty-one cases so far this Term).³ We should not be surprised if that percentage does not drop substantially for the next year or so. For example, she may have to disqualify herself in cases testing the constitutionality of the new medical care overhaul, popularly called Obamacare, if she earlier expressed an opinion about cases now in litigation.

The Federal Recusal Statute

The basic federal disqualification statute is found at 28 U.S.C.A. § 455. The relevant subsection is § (b)(3), along with §§ (d)(1), (e). The statute provides:

§ 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding *in which his impartiality might reasonably be questioned*.

(b) He shall also disqualify himself in the following circumstances:

...

(3) Where he has served in governmental employment and in such capacity participated as counsel, *adviser* or material witness concerning the proceeding or *expressed an opinion concerning the merits of the particular case* in controversy;

...

.....

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(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation . . .

(e) *No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b).* Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) [Omitted].⁴

In interpreting §455(d)(1), we must take into account that it appears to be augmented by 28 U.S.C.A. § 455(a), which requires that any federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." And, to emphasize that Congress considered this new disqualification to be significant, Congress added a kicker: § 455(e) provides that the parties cannot waive the disqualification that § 455(b)(3) imposes.

Congress enacted § 455(b)(3) in response the 1972 decision of *Laird v. Tatum*.⁵ Respondents in *Laird* moved to disqualify Justice Rehnquist because "of his appearance as an expert witness for the Justice Department and Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allegations, and because of his public statements about the lack of merit in respondents' claims."⁶ At the time, Rehnquist was in the Office of Legal Counsel. He was not responsible for preparing for litigation, arguing cases, or writing briefs.

Justice Rehnquist acknowledged that the parties seeking to disqualify him were—

substantially correct in characterizing my appearance before the Ervin Subcommittee as an "expert witness for the Justice Department" on the subject of statutory and constitutional law dealing with the authority of the Executive Branch to gather information. They are also correct in stating that during the course of my testimony at that hearing, and on other occasions, I expressed an understanding of the law, as established by decided cases of this Court and of other courts, which was contrary to the contentions of respondents in this case.⁷

Justice Rehnquist also conceded that he had referred to *Laird v. Tatum*, by name, "in my prepared statement to the Subcommittee, and one reference to it in my subsequent appearance during a colloquy with Senator Ervin."⁸ Nonetheless, he refused to disqualify himself.⁹

At the time of this case, the relevant statutory language in title 28 was much less expansive. It read:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest,

has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.¹⁰

Applying this language of the statute, Justice Rehnquist refused to disqualify himself. The relevant clause of the statute required that he have been counsel in the litigation, and he certainly was not that.

While Rehnquist's view of the statute was certainly a very reasonable interpretation, many people thought that Rehnquist should have recused himself and that Congress should revise the statute to make that clear. Indeed, that is what Congress did. It amended the language¹¹ and changed the statutory test so that it now covered any federal judge who had "participated as counsel, *adviser* or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." The statute no longer requires that the judge have appeared as "of counsel." There is no requirement that the government lawyer (now judge or justice) have appeared on the brief.

Clearly, Rehnquist would have had to disqualify himself in *Laird v. Tatum*, pursuant to the test of this amended statute. The scope of that statute as applied to Solicitor General Kagan is the focus of this essay.

First, it is clear that §455 applies to all federal judges, including those on the Supreme Court. It refers, after all, to any "*justice, judge, or magistrate judge of the United States.*" In addition, the disqualification that §455(b)(3) imposes is so important that the parties cannot waive it.¹² Not all disqualification provisions govern the Justices,¹³ but this clause certainly does.

Under this standard, Solicitor General Kagan obviously must recuse herself in all cases in which she is counsel of record. However, her obligation to disqualify herself does not stop there. She also must recuse herself in all situations where she was an *adviser* "concerning the proceeding" or where she "*expressed an opinion concerning the merits of the particular case in controversy.*"

The statute defines "proceeding" broadly, to include "pretrial, trial, appellate review, or other stages of litigation."¹⁴ "Proceeding" is not limited to trial because it includes all stages of litigation. The question is whether it includes steps preparatory to litigation, even if those steps occur before a case is actually filed. We know that other federal judicial rules governing disqualification refer to "proceeding" and acknowledge that a proceeding can be "pending" or "impending."¹⁵

In addition, the United States Courts webpage advises that:

Judges may not hear cases in which they have either personal knowledge of the disputed facts, a personal bias concerning a party to the case, *earlier involvement in the case as a lawyer*, or a financial interest in any party or subject matter of the case.¹⁶

The lawyer may have been involved in advising how the litigation should be structured, in which case she would have had "earlier involvement in the case as a lawyer."

It is not unusual for a lawyer to be involved in preparation before the client files a particular case. Preparing for expected litigation to be filed by or against the client is what good litigators do. That advice is not part of "pretrial" in the sense that there is no motion or discovery in connection with pretrial matters. However, it is part of "pretrial" in the sense that it occurs prior to expected litigation; one of the "stages of litigation" occurs when the lawyer is preparing for particular litigation that one expects to file or to defend. Either pre-litigation strategy or pre-litigation investigation is one of the things that lawyers do.

For example, *United States v. Arnpriester*¹⁷ held that §455(b)(3) applies and requires a judge to disqualify himself in a criminal case because he was the U.S. Attorney at the time of an "investigation *preceding* the indictment"¹⁸ that eventually led to indictment. The court emphasized: "there can be no prosecution unless it is preceded by investigation."¹⁹ The court relied on both §§ 455(a) [impartiality might reasonably have been questioned] & 455(b)(3) [he had served in government employment as counsel in connection with indictment] in reaching its result. The trial judge was not personally involved in the investigation. It simply occurred under his watch.

Hence, if General Kagan was offering advice in connection with particular litigation that the United States would file, or the United States expected that particular litigation would be brought against it, it is likely that §455(b)(3)—as augmented by §455(a)—would apply.

We do not know in how many cases Justice Kagan must disqualify herself now that she has been confirmed, but this statute assuredly requires disqualification in many instances where she is not counsel of record. The statute does not limit disqualification to cases where General Kagan's name is on the brief, nor does the statute require that she express her opinion "in writing."

For example, the news reports that General Kagan "played a key role in authorizing a brief" challenging a 2007 Arizona law requiring all Arizona employers to use the federal government's E-Verify program to check the legal status of new employees. She informed the Judiciary Committee that on April 12, 2010, she recommended that the federal government take the position that the federal law preempts Arizona law.²⁰ It does not matter that her name was not on the brief or that she was no longer Solicitor General at the time the government filed the brief. Congress drafted section 455(b)(3) to mandate disqualification without regard to who is counsel of record.

Several years ago, the Solicitor General's office²¹ handled or offered advice on many of the detainee cases, even in the lower courts, and gave advice on many legal issues related to those cases. I do not know if the Solicitor General's office is still involved in that issue. If it is, General Kagan should disqualify herself in those cases because she was involved as an "adviser" or "*expressed an opinion concerning the merits of the particular case in controversy.*"²² The advice, given the language of the statute, would relate to the "merits of the particular case" and not simply observations about law in general or law involving another case, as opposed to law in the particular case that is now before her as a Supreme Court Justice. It is not necessary

that she be listed as “of counsel” on the brief or be counsel of record. The fact that she gave advice about the proceeding is all that is necessary to require her to disqualify herself. The Solicitor General will have to search her records and make sure that she disqualifies herself in such circumstances.²³

Similarly, if the Administration has asked her advice (and she has given it) on the constitutionality of proposed legislation in connection with contemplated litigation so that it can be said that she has expressed an opinion concerning the merits of a particular case in controversy, she should disqualify herself if that case ever comes to the Supreme Court.

There are only a few cases that interpret this section.²⁴ None involve the Solicitor General, but that is not surprising because it has been over forty years since a Solicitor General has moved to the High Court.²⁵ Yet, the same basic principles discussed above still apply. We do not know if the Department of Justice (e.g., the Office of Legal Counsel) or the White House asked her advice on how to structure health care legislation in order to prepare for particular litigation, or if she has “expressed an opinion concerning the merits” of the litigation that various states have recently filed. If she has, she must disqualify herself if that case goes to the Supreme Court.

In short, Solicitor General Kagan should disqualify herself in all instances where participated as counsel, “*adviser* or material witness concerning the proceeding *or* expressed an opinion *concerning the merits of the particular case* in controversy.” Her disqualification does not limit itself to cases where she is counsel of record. Under 28 U.S.C.A. § 455(b)(3), General Kagan must recuse herself from:

- Cases in which she approved appeals and/or amicus filings, whether or not she was “counsel of record”;
- Cases where she gave advice about or “*expressed an opinion concerning the merits of the particular case*” in the lower courts, or approved of lower court briefs in a case, although she is not listed a counsel on the brief;
- Cases in which she sat in on meetings with counsel and thereby “*participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case* in controversy,” even though Deputy Solicitor General Neal K. Katyal is now listed as the counsel of record;²⁶
- Cases in which the Supreme Court asked the Solicitor General whether it should hear the case;
- Cases before the time she was officially confirmed as Solicitor General if she gave advice or *expressed an opinion concerning the merits of the particular case* with government lawyers who would soon become subordinate to her once she was officially confirmed;
- Cases in litigation where the Department of Justice or other government lawyers (e.g., lawyers in the office of Counsel to the President) may have asked for her views on questions of constitutional significance or where she offered other legal advice; and,

- Cases in the lower courts in which the Department of Justice solicited her views.

> In all of these circumstances, it does not matter if her advice was oral or written, because the statute does not draw that distinction.

> And, if she recuses herself, her disqualification is not subject to waiver by the parties, pursuant to 28 U.S.C.A. § 455(e), which provides that no Justice “*shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b).*”

Senator Leahy’s Proposed Recusal Statute: Using Retired Justices

With the problem of disqualification in mind, Senator Patrick Leahy has introduced legislation that would authorize retired Supreme Court Justices to return to the Court to decide cases when one or more of the Court’s members are recused.²⁷ There are only three retired Justices now (Stevens, Souter, or O’Connor). Justice Stevens, in fact, suggested the idea that he or another retired Justice could become the deciding vote if there is a four to four tie.²⁸

This proposal carries with it a very important policy defect: it will make the law unstable. If the pinch-hitter is on the bench pursuant to the Leahy proposal, we will know—at the very moment that the Court renders its decision—that the deciding factor is a person who will leave the bench the moment after the decision. If we have a four to four tie, the decision is not precedent. The Court can decide the issue at some later time, when the disqualifying factor is gone. But, under the Leahy proposed law, we do not know if lower courts must treat the decision as binding precedent, or if the Supreme Court treats this opinion as binding itself when the full Court (the “real Court”) decides the issue.

In addition, the Leahy proposal is unconstitutional, for reasons that Chief Justice Hughes presented nearly seventy-five years ago. There is nothing new under the sun. In 1937, Franklin Delano Roosevelt tried to expand the number of Justices who could sit on the Court. Most people do not realize that only a statute (and not the Constitution) limits the number of Justices to nine. FDR’s plan would have given him six new Justices to appoint.

Senator Leahy’s proposal does not increase the number of Justices, but his proposal suffers from a basic constitutional flaw—one that also existed in part of FDR’s ill-fated Court-packing plan. Because FDR would have new appointees, the number of Justices would increase to fifteen. That is a large number, so part of the plan proposed that the Court could sit in special divisions or panels that would not include all the Justices.

Chief Justice Hughes, in response to an inquiry from Senator Wheeler, wrote that it would not only be inadvisable for the Court to sit in panels, but would appear to violate the constitutional requirement that there shall be “one Supreme Court.” A contemporary observer reported that Hughes’ letter was the “most powerful weapon” for those who opposed packing the Court.²⁹

Senator Leahy's proposed law shares the same constitutional flaw that Hughes identified. There is not "one" Supreme Court if one group of Justices decides one case while a Supreme Court with different membership decides another case.

After Justice William Douglas retired from the Court, he kept his office there. There came a time when he wanted to write an opinion and publish it with the other opinions. Douglas thought that even though he was retired he still was part of the Court and could cast a vote. No member of the Court agreed with him, and he never filed his opinion. The modern Court, like the Court of 1937, knows that there cannot be one Supreme Court if the membership changes from case to case.

Endnotes

1 Senate Committee on the Judiciary, Committee Hearing on the Nomination of Elena Kagan, July 1, 2010, 2010 WL 2637747 (F.D.C.H.).

2 28 U.S.C.A. § 455(d)(1), (e).

3 Ronald D. Rotunda, *The Point of No Return: Kagan's Recusals Are No Excuse for Retiree Curtain Calls*, WASH. TIMES, Oct. 11, 2010, at B3.

4 Emphasis added.

5 409 U.S. 824 (1972).

6 409 U.S. 824, 825 (Memorandum of Rehnquist, J.).

7 409 U.S. 824, 825-26 (Memorandum of Rehnquist, J.).

8 409 U.S. 824, 826-27 (Memorandum of Rehnquist, J.).

9 He elaborated on his views in William Rehnquist, *Sense and Nonsense about Judicial Ethics*, 28 RECORD OF ASSOC. OF THE BAR OF THE CITY OF N.Y. 694, 708-713 (1973).

10 409 U.S. 824, 825 (Memorandum of Rehnquist, J.).

11 1974 U.S. Code, CONGRESSIONAL & ADMINISTRATIVE NEWS 6351, 6355-6356 (1974), H.R. REP. 93-1453, H.R. Rep. No. 1453, 93th CONG., 2nd Sess. 1974, 1974 U.S.C.C.A.N. 6351, 1974 WL 11635 (Leg. Hist.) refers specifically to the result in *Laird v. Tatum*:

Subsection (b)(3) of the amended statute is an addition to the language of the ABA canon on disqualification. It is intended to cover the situations which can occur during the first two or three years of judicial service of a lawyer who is appointed to the bench from service as a government lawyer. This situation occurs more frequently in the federal judicial system than it does in state judicial systems and for this reason the committee believes that the federal statute should be more explicit than are the minimum standards adopted by the ABA for application in all the states. Subsection (b)(3) carries forward from subsection (b)(2) a required disqualification where the judge, as a government lawyer, had acted as counsel, adviser or material witness concerning the proceeding. In addition, the judge must disqualify himself where, as a government lawyer, he had expressed an opinion concerning the merits of the particular case in controversy. Thus, subsection (b)(3) is a statutory solution to the problems which have confronted many of our federal judges who came to the bench from prior service as a District Attorney, from the Department of Justice or from a federal agency. For example, Mr. Justice Byron White felt compelled to ask for a legal memorandum to guide his decision whether to remain in cases which were in the Department of Justice during his service there. A variation of this problem arose in *Laird v. Tatum*, 408 U.S. 1, wherein Mr. Justice William Rehnquist found it necessary to explain in a separate memorandum (409 U.S. 824) his decision not to disqualify himself because of prior testimony before a congressional committee.

12 28 U.S.C.A. § 455(e).

13 See discussion in RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS—THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY §10.0-2(c), & n. 7 (Thomson-West; ABA Center for Professional Responsibility 2010-2011 ed.) (The federal judicial code excludes covering Supreme Court Justices.).

14 28 U.S.C.A. §455(d)(1).

15 *E.g.*, Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144, at 35 & n.155 (Fed. Judicial Center 2002) (discussing *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001)), [http://www.fjc.gov/public/pdf.nsf/lookup/recusal.pdf/\\$file/recusal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/recusal.pdf/$file/recusal.pdf); see also Ronald D. Rotunda, *Judicial Comments on Pending Cases: the Ethical Restrictions and the Sanctions—A Case Study of the Microsoft Litigation*, 2001 U. ILL. L. REV. 611 (2001).

16 <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct.aspx> (emphasis added); see also, *e.g.*, GUIDE TO JUDICIARY POLICY, *Ethics and Judicial Conduct*, volume 2, at 55-1 (June 2009), <http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/Vol02B-Ch02-OGC-Post2USCOURTS-PublAdvisoryOps.pdf> ("To start, a 'judge should not make public comment on the merits of a matter pending or impending in any court.'" (emphasis added)).

17 37 F.3d 466 (9th Cir. 1994).

18 37 F.3d at 466 (emphasis added).

19 37 F.3d at 467.

20 Letter from Lamar Smith et al. to the Hon. Senator Jeff Sessions, June 24, 2010.

21 *United States v. Arnpriester*, 37 F.3d 466 (9th Cir. 1994) disqualified a judge (and former U.S. Attorney) because of actions that an assistant U.S. Attorney took while the judge was the U.S. Attorney. The U.S. Attorney was not personally involved in the investigation. Nonetheless, the court disqualified the judge: "This analysis imputes to the United States Attorney the knowledge and acts of his assistants." 37 F.3d at 467.

22 Carter G. Phillips, a former assistant to the Solicitor General, has said that she should interpret the statute broadly, and she should therefore disqualify herself from any case in which she participated in "conversations—regardless of whether she ultimately signed the office's filing." See Seth Stern, *Kagan's Criteria for Recusals Not Wide Enough*, *Say Legal Scholars*, CQ TODAY, 2010 WLNR 10665560 (May 18, 2010).

23 For example, if she gave advice or was involved in lower court litigation in California involving the Defense of Marriage Act, she would have to disqualify herself on that litigation. It does not matter if her involvement was in support of DOMA or against it. If she was involved in that case, she cannot sit on it if it comes before the U.S. Supreme Court. See, *e.g.*, Posting of Ed Whelan to National Review Online Bench Memos, <http://www.nationalreview.com/bench-memos/49585/sg-kagan-breaks-her-vows/ed-whelan> (Aug. 18, 2009) ("Consistent with convention, SG Kagan's name does not appear on the district-court brief. But two former senior DOJ officials have confirmed that, under usual practices, she surely must have been aware of, and approved, the positions taken in it.")

I do not know if General Kagan was involved with this California case, but she can tell us. If she gave any advice regarding the Government's brief, she would have to disqualify herself in that litigation.

24 See 34 A.L.R. Fed. 2d 589 (Originally published in 2009).

25 *E.g.*, *United States v. Arnpriester*, 37 F.3d 466 (9th Cir. 1994) (discussed above); see also *Mixon v. United States*, 620 F.2d 486 (5th Cir. 1980) (per curiam) (holding that a magistrate judge was automatically disqualified to hear a motion for reduction of the sentence because the magistrate judge was the Assistant United States attorney who had represented the government in earlier proceedings on the defendant's motion for reduction of sentence).

26 The court in *United States v. Arnpriester*, 37 F.3d 466 (9th Cir. 1994), disqualified a judge because actions were taken by an Assistant U.S. Attorney when the judge was U.S. Attorney. The U.S. Attorney was not personally involved in the investigation. Nonetheless, the court disqualified the judge and former U.S. Attorney: "This analysis imputes to the United States Attorney the knowledge and acts of his assistants." 37 F.3d at 467.

27 David Ingram, *Should Retired Justices Be Called Back to Supreme Court?*, NAT'L L.J., June 17, 2010, <http://www.law.com/jsp/article.jsp?id=12024627>

Should_Retired_Justices_Be_Called_Back_to_Supreme_Court.

28 Ronald D. Rotunda, *The Point of No Return: Kagan's Recusals Are No Excuse for Retiree Curtain Calls*, WASH. TIMES, Oct. 11, 2010, at B3.

29 Paul Freund, *Charles Evans Hughes as Chief Justice*, 81 HARV. L. REV. 4, 14 (1967); see also JEFFREY SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2009).



RELIGIOUS LIBERTIES

AN ABORTION EXCEPTION TO THE FIRST AMENDMENT?

EVALUATING RECENT EFFORTS TO REGULATE SPEECH ABOUT PREGNANCY OPTIONS

By Mark L. Rienzi*

Abortion is a highly-charged and intensely-debated issue. Partisans on both sides believe abortion implicates fundamental human rights, with abortion supporters comparing abortion prohibitions to slavery, and abortion opponents comparing a permissive abortion regime to the holocaust. Some people believe so strongly that abortion should be available that they endure protests, threats, and physical violence to provide a service they deem critically important.¹ Others refuse to refer or provide for abortions under any circumstances.

This intense debate extends to virtually every aspect of the abortion controversy. For example, the two sides strongly dispute the history of abortion, and particularly whether it was a crime at common law.² They disagree about the scientific facts concerning abortion, such as at what stage a fetus suffers pain during an abortion,³ or whether abortion can result in adverse health consequences such as breast cancer, future difficulty having children, and psychological trauma.⁴ They cannot even agree on issues of language related to abortion.⁵

Not surprisingly, speakers on both sides of this intense abortion debate frequently cite to the information that supports their view. The Court in *Roe*, for example, cited to the work of historians working for NARAL in order to claim that abortion may not have been recognized as a common law crime.⁶ *Roe*'s critics, of course, tell a very different story.⁷ Those seeking to persuade women to have abortions cite the studies that say it does not cause breast cancer and minimize those that suggest that it does.⁸ Those seeking to dissuade women from having abortions emphasize those studies that do show an increased risk of health problems, including breast cancer.⁹

What does the Constitution say about this state of affairs? That is, in the midst of this controversial and highly-charged dispute, are speakers on both sides free to believe—and to refer to—the scientific evidence they choose? Or does the Constitution permit the government to decide which set of competing evidence is “true” and to proscribe or regulate the other arguments as “false”? Can the government subject people who refuse to refer or provide for abortions to special speech restrictions? Or must it treat all speakers equally?

These issues have come into sharp relief during a recent wave of legislation focusing on pregnancy-related speech. In three jurisdictions—Baltimore, Maryland; Montgomery County Maryland; and Austin, Texas—local legislatures have enacted laws that they admit are targeted at specific speakers with whom the legislatures disagree over facts about abortion. In states from Oregon to Michigan to New York City, legislatures have considered but not yet enacted such laws.

In Baltimore and Austin, individuals who wish to talk about pregnancy but refuse to refer for abortions must post prominent signs announcing their opposition to abortion. No similar requirement applies to abortion clinics, requiring them to disclose that they do not offer adoption services, or requiring them, for example, to disclose that they earn money if a woman chooses abortion, but not if she makes a different choice. In Montgomery County, speakers are required to post signs announcing that they are not licensed healthcare providers, and informing women that the County Health Director thinks they should go discuss their pregnancy with someone who is.¹⁰ No similar requirement is imposed on unlicensed counselors at abortion clinics.

Generally speaking, these laws are defended by their proponents as necessary to protect women from what they view to be “false and misleading” speech about abortion. Proponents argue that false speech is beyond the protection of the First Amendment, that pregnancy-related speech restrictions are judged under a special standard announced in *Planned Parenthood v. Casey*, and that pregnancy-related speech is commercial speech.

In my view, each of these arguments fails. The government has no power to decide that one side of the abortion debate is “true” and the other side is “false,” particularly in the face of competing scientific evidence. Nor did *Casey* establish an abortion exception to the First Amendment, giving governments greater power to regulate speech about abortion than other topics. And the vast majority of speech targeted by these laws is not commercial at all, but is provided as a free service, usually by people with strong religious, moral, ethical, and/or political reasons for speaking.

Ultimately, the pregnancy-related speech restrictions enacted to date are invalid for a variety of reasons. First and foremost, they are invalid on free speech grounds, because they deliberately target protected speech of a particular content (namely, speech about pregnancy), with a particular viewpoint (opposition to abortion), by particular speakers (namely “crisis pregnancy centers” or “pregnancy resource centers”), requiring the announcement of government-mandated messages, and do so because the government disagrees with the speakers about the health risks of abortion. In addition, in certain instances, they are invalid on conscience grounds, because they treat a refusal to refer for abortion as an element of a crime—in direct contradiction of state conscience laws.¹¹

I. The Government Cannot Broadly Regulate Pregnancy Speech by Claiming to Find Some of It False.

Proponents of pregnancy speech regulations argue that the laws are necessary and justified as a response to the “false and misleading” past speech of pregnancy centers. This argument fails for several reasons.

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First, peer-reviewed articles in prestigious medical journals provide scientific support for the three chief alleged “lies” told by the pregnancy centers—that there is a link between abortion and breast cancer, that abortion can cause subsequent fertility problems, and that abortion is linked to subsequent mental health problems.¹² What proponents of pregnancy speech restrictions frequently call “lies” are ultimately different conclusions drawn from conflicting medical evidence. For example, a 1997 study of 1.5 million Danish women that appeared in the *New England Journal of Medicine* concluded that abortion did not lead to an increase in breast cancer when judged across the entire population, but the same study showed an increase in breast cancer rates of thirty-eight percent when looking at women who had abortions in the second trimester.¹³ Indeed, the American Cancer Society acknowledges that “study findings vary” on this issue.¹⁴ Likewise, recent studies in other journals have continued suggesting a link between abortion and breast cancer,¹⁵ and several states actually affirmatively require that women be informed of the breast cancer and other health risks in order to provide informed consent.¹⁶ Thus, because the information provided has scientific support, and therefore cannot be inherently false and misleading, the laws cannot be justified as responses to allegedly “false and misleading” speech.¹⁷

In any case, speech about a different interpretation of conflicting evidence is not proscribable, because “[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”¹⁸ Thus it is no surprise that even while purporting to regulate the centers *because of this speech*, Montgomery County specifically acknowledged that the centers “can cite alternate studies to their clients.”¹⁹

Third, it is well-established that the government cannot regulate present and future speech based on past legal speech.²⁰ Thus, just as the government cannot outlaw discussion of conflicting study results, it is also barred from regulating pregnancy counselors’ speech based on their past discussions of this information.

II. *Casey* Did Not Establish an Abortion Exception to the First Amendment.

Proponents of pregnancy-speech regulations sometimes argue that the government has wide latitude to regulate speech about abortion because the Supreme Court’s decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*²¹ permitted state regulation of physician speech related to informed consent. For example, Maryland’s Attorney General asserted that proposed restrictions were permissible under *Casey* and *Planned Parenthood v. Rounds*,²² a recent appellate decision applying *Casey*.²³

These cases, however, concerned state law requirements enacted as part of the state’s regulation of the medical profession and as part of the requirement that physicians obtain informed consent before providing medical services.²⁴ In *Casey*, the Supreme Court held that “a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion” implicates a physician’s First Amendment right not to speak, “but only as part of the practice of medicine,

subject to reasonable licensing and regulation by the State.”²⁵ Likewise, in *Rounds*, the Eighth Circuit addressed a South Dakota requirement that physicians provide certain information to patients as part of obtaining informed consent. Among other things, the law required doctors to inform patients that “the abortion will terminate the life of a whole, separate, unique, living human being.”²⁶ Relying on *Casey*, the court found that “while the State cannot compel an individual simply to speak the State’s ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient’s decision to have an abortion.”²⁷ The Eighth Circuit found that the required statement was permissible, noting that it was largely consistent with statements by Planned Parenthood’s own experts.²⁸

Any attempt to rely on *Casey* and *Rounds* to insulate the pregnancy counseling regulations fails for two reasons. First, unlike the doctors in *Casey* and *Rounds*, people talking about pregnancy are not engaged in the regulated practice of medicine. They do not seek to perform medical procedures or practice medicine—for which they would need a license from the state—but rather to *talk about* pregnancy and medical issues, for which the government cannot and does not require a license. Second, unlike the doctors in *Casey* and *Rounds*, pregnancy counselors generally are not seeking to perform surgery or any other procedure that requires them to obtain informed consent. Doctors performing medical procedures need to obtain informed consent because, absent such consent, the procedure would constitute a battery and would expose them to liability. Thus while it is entirely consistent with historical practice for state courts and legislatures to dictate the terms on which informed consent must be obtained by a doctor, these courts and legislatures have no similar role in requiring informed consent before merely *talking about* medical issues, much less as a required step before merely offering support and assistance to help someone through a pregnancy.²⁹ As such, their discussions of abortion are simply beyond the state regulatory powers that supported the regulations in *Casey* and *Rounds*.³⁰

Most importantly, nothing in *Casey* or *Rounds* themselves suggests that those courts intended to permit governments to broadly regulate speakers whenever they discuss abortion. *Casey* does not stand for the idea that Pennsylvania could have required *everyone* talking about abortion to have the same conversation required for a doctor performing one, and *Rounds* does not mean that South Dakota can make *all speakers* refer to a human fetus as “a whole, separate, unique, living human being.” These cases do not create an abortion exception to the First Amendment.

III. The Restrictions Do Not Target Commercial Speech.

Nor can these pregnancy speech regulations be defended by attempting to classify speech about pregnancy as “commercial speech.” Although regulations to ensure the accuracy of commercial speech can be permissible in certain circumstances,³¹ those circumstances do not apply here. As explained by the Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the ability to regulate commercial speech extends only to “expression solely related to the economic interests of the speaker and its audience.”³² Here, the regulated pregnancy centers have no economic interests at all—they are non-profit

centers that do not charge for their services. Moreover, the primary argument against these centers is that they have a political, social, and/or religious agenda to dissuade women from seeking abortion—in other words, the exact opposite of the “solely economic” speech to which the commercial speech analysis applies.³³

The recently proposed New York City law attempts to sidestep this inquiry by defining the regulated speakers as those who will not refer for abortion and who provide “commercially valuable pregnancy-related services.”³⁴ But Supreme Court case law is clear—the test is not whether the speaker ever provides information or services that are “commercially valuable”—a standard that would certainly apply to much of the information in the *New York Times* and the *Wall Street Journal*—but whether the regulated speech is speech “that *proposes* a commercial transaction, which is what defines commercial speech.”³⁵ Thus the New York law, if enacted, must also be treated as regulating non-commercial speech.

IV. Pregnancy-Related Speech Restrictions Fail First Amendment Analysis.

A. The First Amendment Generally Prohibits Government-Required Speech.

The Baltimore, Montgomery, and Austin regulations all require certain speakers discussing pregnancy to engage in government-dictated speech about their services and/or about the government’s view about whether women should go talk to someone else. Generally speaking, however, the First Amendment forbids the government from requiring private citizens to engage in government-dictated speech. As the Supreme Court has explained, “the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.”³⁶

This analysis does not change merely because the required speech is purportedly factual. Rather, the Supreme Court has held that the general prohibition on forced speech applies to the exact sorts of mandatory factual statements implicated by the pregnancy speech restrictions, explaining that compelled statements of fact “burden[] protected speech” as much as compelled statements of opinion.³⁷ For these reasons, the Court has explained that there is no constitutionally significant difference between the standards applied to government-required factual disclaimers and those applied to government prohibitions on speech.³⁸

B. The Laws Are Content-Based.

As the Supreme Court has explained, “[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”³⁹ Thus while content-neutral speech restrictions can be permissible in certain circumstances, the Supreme Court has repeatedly stated that *content-based* restrictions of speech are presumptively unconstitutional.⁴⁰

The Baltimore, Montgomery, and Austin pregnancy speech regulations are content-based because they single out speech about one and only one subject—pregnancy—for special restrictions and financial penalties. Indeed, the *only*

way to determine whether a particular speaker or entity needs to post a sign is to inquire whether they wish to discuss pregnancy. If the speaker wants to discuss any other subject—including any crucially important *medical* subject, such as drug abuse, heart disease, obesity, or vaccinations—the laws would not apply. Thus the laws are content-based, and therefore unconstitutional, because their application is entirely governed by whether or not speakers discuss a single regulated topic—pregnancy. This is the essence of content-based regulation, and it is precisely what the First Amendment forbids.⁴¹

C. The Laws Are Viewpoint-Based.

Viewpoint discrimination is a particularly pernicious form of content discrimination. For this reason, laws that discriminate based on viewpoint are presumptively unconstitutional and essentially forbidden. As the Supreme Court has explained:

When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.⁴²

Here, the text, history, operation, and public justification for the pregnancy speech regulations confirm that they target speakers with a particular viewpoint. The laws are therefore invalid viewpoint-based speech restrictions.

First, the text of the Baltimore law is expressly viewpoint-discriminatory. The law does not apply to all discussions relating to pregnancy, nor does it apply to all discussions of pregnancy by speakers without medical licenses. Rather, it applies only to those discussions of pregnancy by a particular group of speakers who are, thus, regulated solely because they refuse to “refer or provide for abortion.” By using a speaker’s position on abortion to determine whether or not to regulate speech, the law is impermissibly viewpoint-based.⁴³

Furthermore, pregnancy speech regulations generally have been publicly justified based on the legislature’s disagreement with the substance of past speech about pregnancy. It is axiomatic that the government may not enact a restriction on speech “because of disagreement with the message it conveys.”⁴⁴ Yet legislatures enacting such laws have openly admitted that the laws were designed to target particular speech by abortion opponents with which the government disagreed.⁴⁵ While these legislatures are of course free to draw their own conclusions about, for example, whether there is any link between abortion and breast cancer, they are not permitted to regulate the speech of private speakers who take a different view of the evidence.

D. The Laws Discriminate Among Speakers.

As set forth above, the history and text of the pregnancy speech restrictions confirm that they are aimed only at specified speakers. Thus, for example, even unlicensed counselors at abortion clinics remain entirely unregulated in their discussions of pregnancy, while counselors at pregnancy centers opposed to abortion are regulated. This leads pregnancy center speech regulations to another First Amendment problem: the

government is not free to decide to regulate the speech only on one side of a contentious public debate.⁴⁶

The Supreme Court's recent decision in *Citizens United v. Federal Election Commission*, confirms that this type of speaker regulation is impermissible under the First Amendment.⁴⁷ In *Citizens United*, the Court addressed regulations on campaign-related speech by certain corporations. When explaining general principles of First Amendment law (i.e., those that apply outside the campaign finance context) the Court explained that the First Amendment does not permit the government to make such speaker distinctions:

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. *Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others.* As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. . . . *We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.*⁴⁸

Here, the proposed speech regulations apply only to certain speakers who wish to talk about abortion—the most contentious political and social issue of our time. In this manner, the government would be “impos[ing] restrictions on certain disfavored speakers” in precisely the way forbidden by the Court.⁴⁹ *Citizens United* makes clear that the Constitution does not permit the government to create different rules for different speakers.

V. Conclusion

For these reasons, the type of pregnancy center speech restrictions being enacted and considered by various legislatures are impermissible under the First Amendment. Yet this does not leave the government without tools to advance its legitimate interests. If a government wishes to counter pregnancy center speech about the health effects of abortion, they remain free to do so, but they must do so by speaking with their own voices, and not by forcing others to speak their message. Likewise, to the extent these governments have legitimate concerns about false advertising, actual fraud, impersonation of doctors, or the unlicensed practice of medicine, they of course retain the power to enforce their advertising, tort, and licensing laws.

Ultimately, governments may find it more difficult to target the actual wrongdoing with these laws than to simply regulate all speech by a particular group abortion opponents. Yet as the Supreme Court explained in *Riley*, the government cannot enact broad speech regulations to avoid the difficulty of finding and prosecuting the actual fraud. “If this is not the

most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency.”

Endnotes

1 See David Barstow, *An Abortion Battle, Fought to the Death*, N.Y. TIMES, July 26, 2009, at A1 (discussing the life and death of abortion provider George Tiller). Dr. Tiller devoted his entire career to performing abortions, focusing particularly on late-term abortions that few other doctors will provide, and enduring bombings, death threats and multiple attempts on his life. Dr. Tiller was murdered by an abortion opponent on May 31, 2009. *Id.*

2 Compare, e.g., *Roe v. Wade*, 410 U.S. 113, 135-136, n.26 (1973) (expressing doubt that abortion “was ever firmly established as a common law crime”) with Lynn Wardle, “Time Enough”: *Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 FLA. L. REV. 881, 985 (1989) (noting that *Roe*’s suggestion that abortion was not established as a common law crime “has been thoroughly discredited”), and Jeffrey D. Jackson, *Blackstone’s Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*, 62 OKLA. L. REV. 167, 218 (2010) (“Although Justice Blackmun’s majority opinion in *Roe* attempted to infuse some doubt into the status of the common law crime of abortion, stating at one point that research ‘makes it now appear doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus,’ his opinion was based on faulty history and was quickly debunked by scholars.”).

3 See, e.g., *The Science, Law, and Politics of Fetal Pain Legislation*, 115 HARV. L. REV. 2010 (2002).

4 See, e.g., Dolle, Daling, White, Brinton, Doody, et al., *Risk Factors for Triple-Negative Breast Cancer in Women Under the Age of 45 Years*, CANCER EPIDEMIOLOGY, BIOMARKERS & PREVENTION, Vol. 18(4), April 2009, at 1157 (listing abortion among “known and suspected risk factors” and showing a forty percent increased risk for “triple negative” breast cancer).

5 For example, partisans on the two sides often dispute whether to use the term “fetus,” “baby,” or “products of conception,” and whether to call the different sides “pro-life,” “anti-abortion,” “pro-choice,” or “pro-abortion.”

6 See *Roe*, 410 U.S. at 132-135 (relying on histories by Cyril Means); see also JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 14 (2004) (noting Means’ employment as NARAL’s General Counsel).

7 See Wardle, *supra* note 2; Jackson, *supra* note 2.

8 See, e.g., <http://www.plannedparenthood.org/resources/research-papers/anti-choice-claims-about-abortion-breast-cancer-5095.htm> (finding that studies showing a cancer link are “difficult to interpret” and “unreliable” while those rejecting a link are “rigorous”).

9 See, e.g., <http://www.nrlc.org/news/2000/NRL03/brind.html> (citing the “large and growing body of studies has demonstrated a link between a woman’s decision to undergo an induced abortion and a subsequent increased risk of contracting breast cancer”).

10 See Montgomery County, Md., Resolution No. 16-1251, Board of Health Regulation Requiring a Disclaimer for Certain Pregnancy Resource Centers, at 2 (Nov. 10, 2009), available at http://www.montgomerycountymd.gov/content/council/pdf/res/2010/20100202_16-1252.pdf.

11 For example, because refusal to refer for abortions is an element of the offense under Baltimore’s law, the ordinance is a clear violation of Maryland’s state conscience statute, which provides that a person’s refusal to refer or provide for abortion “may not be a basis for . . . disciplinary or other recriminatory action.” Md. Code Ann., Health-Gen. § 20-214.

12 Mads Melbye, M.D. et al., *Induced Abortion and the Risk of Breast Cancer*, NEW ENG. J. MED. 81, 83 (1997); AM. CANCER SOC’Y, CANCER REFERENCE INFORMATION: IS ABORTION LINKED TO BREAST CANCER?, <http://www.cancer.org/Cancer/BreastCancer/MoreInformation/is-abortion-linked-to-breast-cancer> (last visited Nov. 23, 2010) (acknowledging that “study findings vary” and that some studies show “a slight increase” in abortion risk); Peng Xing et al., *A Case-Control Study of Reproductive Factors Associated with Subtypes*

of Breast Cancer in Northeast China, 26 MED. ONCOLOGY 37 (2009), available at <http://www.springerlink.com/content/60h727v546373185/>.

13 See Melbye, *supra* note 12.

14 See AM. CANCER SOC'Y, *supra* note 12 (acknowledging that "study findings vary" and that some studies show "a slight increase" in abortion risk). Wooley v. Maynard, 430 U.S. 705 (1977), prohibits the government from requiring forced speech to support the alleged majority view of conflicting evidence.

The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.

Wooley, 430 U.S. at 705.

15 See Peng Xing et al., *supra* note 12.

16 MINN. STAT. § 145.4242 (2009) (prohibiting abortions without informed consent and providing that such consent is only effective if the women is informed of "the particular medical risks associated with the particular abortion procedure to be employed including, when medically accurate, the risks of infection, hemorrhage, breast cancer, danger to subsequent pregnancies, and infertility"); see also TEX. HEALTH & SAFETY CODE § 171.012 (2009) (consent only valid if woman is told of "the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer").

17 Similar scientific evidence exists to support the centers' claims about the physical and mental health risks of abortion, or at the very least demonstrate the existence of a legitimate medical dispute over which the government should not pass laws to penalize speakers with one view or another. See David M. Ferguson et al., *Abortion and Mental Health Disorders: Evidence from a 30-Year Longitudinal Study*, 193 BRIT. J. PSYCHIATRY 444, 449 (2008) (finding that "women who had had abortions had rates of mental disorder that were about 30% higher than other women"). "The specific issue of whether or not induced abortion has harmful effects on women's mental health remains to be fully resolved. The current research evidence base is inconclusive—some studies indicate no evidence of harm, whilst other studies identify a range of mental disorders following abortion." The Royal College of Psychiatrists, Position Statement on Women's Mental Health in Relation to Induced Abortion, Mar. 14, 2009, available at <http://www.rcpsych.ac.uk/member/currentissues/mentalhealthandabortion.aspx>. See also P.S. Shah, Knowledge Synthesis Group of Determinants of Preterm/LBW Births, *Induced Termination of Pregnancy and Low Birthweight and Preterm Birth: A Systematic Review and Meta-Analysis*, 116 BRIT. J. OBSTETRICS & GYNAECOLOGY 1425 (2009) (finding that abortion increased risks of preterm delivery and low birth weight in future pregnancies), available at <http://www3.interscience.wiley.com/cgi-bin/fulltext/122591273/PDFSTART>.

18 Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-341 (1974).

19 Montgomery County Council, Worksession Memorandum, Jan. 21, 2010, at 2.

20 See, e.g., Vance v. Universal Amusement Co., 445 U.S. 308, 310-11 (1980); Ackerley Commc'ns of Mass., Inc. v. City of Somerville, 878 F.2d 513, 520-21 (1st Cir. 1989); Eller Media Co. v. Montgomery County, 795 A.2d 728, 751 (Md. App. 2002) (deeming "well-founded" the claim that the First Amendment prohibits regulation of future speech based on past lawful speech).

21 505 U.S. 833, 884 (1992).

22 530 F.3d 724, 733-34 (8th Cir. 2008).

23 Letter from Attorney General's Office to Delegate Roger P. Manno, Mar. 14, 2008, at 2-3 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) and Planned Parenthood of Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 733-34 (8th Cir. 2008)).

24 *Id.*

25 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992).

26 Planned Parenthood of Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 735 (8th Cir. 2008)

27 *Id.*

28 *Id.* at 736.

29 For example, while Michelle Obama spends much of her time talking about medical issues related to proper diet and exercise, she is not engaged in the practice of medicine, nor could any state or local government regulate her speech by forcing her to give disclaimers about her lack of training, any biases she has related to food, and/or any stock holdings she has in food companies. Rather, the First Amendment leaves Mrs. Obama free to speak about this and any other medical issue of her choice.

30 In fact, proponents of the regulations have been exceedingly clear in explaining that the pregnancy centers are generally *not* engaged in the practice of medicine, and therefore *not* subject to the state's regulatory authority over the medical profession. See, e.g., Montgomery County Council, Worksession Memorandum, Jan. 21, 2010, at 4 ("Although they discuss issues related to medical conditions (i.e., pregnancy)[, the centers] remain unregulated unless they have a licensed medical professional on staff or they perform laboratory services."); Letter from Attorney General's Office to Delegate Roger P. Manno, Mar. 14, 2008 at 2 (Pregnancy centers "are subject to no state licensing or permit requirement, and there is no agency oversight of their activities.").

31 See, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

32 *Id.* at 561; see also Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 482 (1989) (noting that even speech engaged in for a profit is not commercial speech if it does not "consist of speech that *proposes* a commercial transaction, which is what defines commercial speech.").

33 Nor can the government deem the centers' speech commercial simply because it is speech about a commercial enterprise, namely abortions provided for money. The Supreme Court expressly rejected this argument. See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761-62 (1976) ("[T]he speech whose content deprives it of protection cannot simply be speech on a commercial subject. No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical process should be regulated or their advertisement forbidden."). Thus, for example, while the sale of cigarettes is undoubtedly a commercial enterprise and can be regulated as such, an anti-smoking campaign would not be. *Id.*

34 See New York City Council, Int. No. 371, §20-815(e) (proposed).

35 See Fox, 492 U.S. at 482.

36 Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988). The Court's opinion in Wooley v. Maynard, 430 U.S. 705 (1977), also is instructive. In Wooley, the Court considered whether New Hampshire could require citizens to use license plates with the state's motto "Live Free or Die" on them. The plaintiffs alleged that the inclusion of the motto on the required license plate forced them to engage in speech with which they disagreed. The Court began its analysis "with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." Wooley, 430 U.S. at 714 (citing Bd. of Educ. v. Barnette, 319 U.S. 624, 633-634 (1943)). The Court then explained that "a system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." Wooley, 430 U.S. at 714.

37 Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797-798 (1988) (Prior cases "cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.").

38 *Id.* at 796-97 (noting that difference between compelled silence and compelled speech is "without constitutional significance").

39 *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995) (citing *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 96 (1972)).

40 *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”).

41 *See Rosenberger*, 515 U.S. at 828-29; *R.A.V.*, 505 U.S. at 382.

42 *Rosenberger*, 515 U.S. at 828-29.

43 Indeed, *The Washington Post* editorialized that this type of regulation “is suspect because it singles out pregnancy centers while absolving abortion clinics of any disclosure requirements regarding adoption or parenting options.” Editorial, *Pregnant and In Need of Help*, WASH. POST, Nov. 23, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/22/AR2009112201605.html>. Likewise, the Montgomery County Council staff concluded that the Baltimore approach “could violate the First Amendment’s prohibition against viewpoint discrimination because it singles out for regulation only those [centers] that have a particular view of abortion.” Montgomery County Council, Worksession Memorandum, Jan. 21, 2010, at 2.

44 *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

45 *See, e.g.,* Montgomery County Council, Worksession Memorandum, Agenda Item #13, Feb. 2, 2010, available at http://www.montgomerycountymd.gov/content/council/pdf/agenda/col/2010/100202/20100202_13.pdf (noting that the “the issue the proposed regulation is designed to address” was what the Montgomery County Council viewed as “misinformation/incomplete information” about the health effects of abortion).

46 *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (Government may not “license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (“[A]n exemption from an otherwise permissible regulation of speech may represent a governmental ‘attempt to give one side of a debatable public question an advantage in expressing its views to the people.’”) (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978)).

47 *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

48 *Id.* at 24-25 (emphasis added).

49 *Id.*



BOOK REVIEWS

Constitutional Illusions and Anchoring Truths: The Touchstone of the Natural Law

BY HADLEY ARKES

Reviewed by Diarmuid F. O'Scannlain*

It was her last day of testimony before the Senate Judiciary Committee, and the question seemed to surprise Elena Kagan, the President's nominee for the Supreme Court. "Do you believe it is a fundamental, pre-existing right to have an arm to defend yourself?", asked Senator Tom Coburn of Oklahoma.¹ When Kagan began to answer by stating that she "accept[ed]"² the Supreme Court's decision in *District of Columbia v. Heller*,³ which held that the Second Amendment guarantees an individual right to keep and bear arms, Coburn interrupted. He was not asking whether she believed the right to be protected by the Constitution, but rather whether she considered it to be a "natural right."⁴ "Senator Coburn," replied Kagan, "to be honest with you, I—I don't have a view of what are natural rights independent of the Constitution."⁵

Such agnosticism on the existence of natural rights is hardly uncommon among Americans today—which is why Professor Hadley Arkes's latest book, *Constitutional Illusions and Anchoring Truths*, is so timely. Too many of us, Arkes rightly laments, have succumbed to the fallacy that our rights arise "merely from the law that [is] 'posited' or written down."⁶ Few take seriously the notion of natural rights, *i.e.*, of rights grounded in nature, held by all humans as a matter of moral principle. Thus, Arkes notes, when we refer to the freedoms of speech and of religion, we speak of "those rights we have *through* the First Amendment," as if their existence depended on the positive law.⁷ Or, like Kagan at her confirmation hearing, we speak of our right to keep and bear arms *under* the Second Amendment, as if the right was created by the Constitution.

Fortunately, Professor Arkes has made it his project once again to guide us back to the understanding of natural rights shared by our nation's Founders. Throughout *Constitutional Illusions*, Arkes makes the point—forcefully and persuasively—that the founding generation was deeply attuned to the moral grounds of our rights. As Arkes observes, the Founders possessed "the remarkable capacity . . . to trace [their] judgments back to first principles."⁸ Their writings are replete with references to a higher, unwritten law, accessible to human reason. The Declaration of Independence, which famously invokes the

"Laws of Nature and of Nature's God," is but one example.⁹ Others include the *Federalist Papers*, several of which rely on "nature" and "reason" to justify general principles of law.¹⁰

It should come as no surprise, then, that the Founders' understanding of natural rights informed the framing of the Constitution itself. Arkes gives, as one example, the Constitution's prohibition on *ex post facto* laws—on laws that impose retroactive punishment.¹¹ "For the Founders," Arkes explains, "the principle on 'ex post facto' laws was one of those deep principles of lawfulness that had a claim to be respected in all places, or incorporated in the basic law of any country that would claim to be a civilized country under the rule of law."¹² Indeed, Arkes recounts, the principle was so obvious and fundamental that some questioned the need to make it explicit in the Constitution.¹³ James Wilson, for one, feared that doing so would "proclaim that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so."¹⁴

Arkes cites, as another example of a constitutional provision grounded in the natural law, the First Amendment.¹⁵ Here, Arkes's work dovetails nicely with that of another eminent constitutional scholar, Philip Hamburger. In an article entitled *Natural Rights, Natural Law, and American Constitutions*, Hamburger demonstrates that the Founders regarded the freedoms of speech and of the press as natural rights—rights individuals had even in the absence of government.¹⁶ Writing in 1789, for instance, Roger Sherman declared "the rights . . . of Speaking, writing and publishing their Sentiments with decency and freedom" as among the "natural rights which are retained by [the people] when they enter into society."¹⁷ Patrick Henry similarly invoked "the freedom of the press" as one of "the rights of human nature."¹⁸ Given such statements, it can hardly be doubted that the First Amendment reflects the Founders' understandings of the natural law.

For Arkes, however, the main significance of the Constitution's natural-law origins is jurisprudential rather than historical. Echoing themes from his earlier works,¹⁹ Arkes argues that if judges are "to apply the Constitution sensibly," they must "appeal beyond the text of the Constitution" to "those deeper principles that informed and guided the judgment of the Founders as they went about the task of framing the Constitution."²⁰ In Arkes's view, the line separating law and morals is a thin one, and judges must sometimes engage in moral reasoning and give effect to "the first principles of . . . moral judgment," when interpreting the Constitution.²¹

Arkes readily acknowledges that the "philosophic" reading of the Constitution he advocates will be difficult for many judicial conservatives to accept,²² and I must admit that I myself harbor reservations about his proposed method of interpretation. It is not that I question the existence of natural law or natural rights; I embrace the Declaration of Independence and the "self-evident" truths expressed therein.²³ Nor is it that I question the influence of natural-law philosophy on

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* Hadley Arkes's *Constitutional Illusions and Anchoring Truths: The Touchstone of the Natural Law* is published by Cambridge University Press.

the framing of the Constitution. Abraham Lincoln, himself a devoted student of the Founding, perhaps said it best: “The Declaration is the apple of gold; the Constitution is the frame of silver. The Constitutional frame is made to fit the apple, not the other way around.”²⁴

Be that as it may, it does not follow, in my view, that judges have the authority to enforce principles of natural law beyond the text of the Constitution. As Robert P. George has explained, the proper scope of judicial authority is itself a question of the positive law of the Constitution.²⁵ And I believe the “judicial Power” conferred by Article III is limited in constitutional cases to enforcing the constitutional text, as understood at the time of its enactment.²⁶ This is not to say that the natural law is altogether irrelevant to the task of constitutional interpretation. It is of course relevant where a constitutional provision incorporates a principle of natural law. But even there, the judicial inquiry is a historical one, not a philosophical one; the question is how the relevant principle was understood at the time the provision was enacted—not how the principle ought to be understood as matter of abstract moral philosophy.²⁷

Consider, in this respect, the recent controversy over the meaning of the Second Amendment. The question presented in *Heller* was “whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment.”²⁸ The majority (in an opinion by Justice Scalia) engaged in a historical inquiry into the natural right to bear arms which the Second Amendment was designed to protect.²⁹ It asked not whether the right to keep and to bear arms was *in fact* grounded in nature, but rather whether the founding generation *believed* it to be. As to that question, the majority held the answer is yes: At the time the Second Amendment was enacted, the right to keep and bear arms was understood to be part and parcel of what Blackstone called “the natural right of resistance and self-preservation.”³⁰ As such, it was not (as the dissent argued) a collective right, connected only with militia service;³¹ rather, it was an individual right, extending to possession of weapons in the home for self-defense.³² On that historical understanding of the right—rather than a philosophical understanding of natural law—the Court declared the D.C. handgun ban unconstitutional.³³

Like Arkes, I am a believer in natural law, and I recognize its influence on the framing of the Constitution. But as *Heller* illustrates, the relevance of natural law to the task of constitutional interpretation is limited. Where, as in the case of the Second Amendment, a constitutional provision embodies a particular conception of a natural right, judges must uphold that conception, as understood at the time the provision was enacted. Judges have no authority, in my view, to go beyond that original understanding. It is not our role to enforce judgments of natural law, however correct they may be as a matter of moral philosophy, that have not been incorporated into the positive law of the Constitution.³⁴

After stating at her confirmation hearing that she did not “have a view of what are natural rights independent of the Constitution,” now-Justice Kagan stressed that her “job as a justice will be to enforce and defend the Constitution and other laws of the United States”; in that office, she would not “act in

any way” on the basis of her personal beliefs about natural law.³⁵ Arkes’s latest book is a timely reminder that none of us should be agnostic on the existence of natural rights. But with respect to the role of a federal judge under the Constitution, I believe Justice Kagan got it right. To interpret the Constitution faithfully, one need not believe personally in natural law. One need only respect the judgments of natural law enacted by the people throughout our nation’s history into the Constitution itself.

Endnotes

1 Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nomination, WASH. POST, June 30, 2010, available at <http://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY3.pdf>.

2 *Id.*

3 128 S. Ct. 2783 (2008).

4 Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nomination, *supra* note 1.

5 *Id.*

6 HADLEY ARKES, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS: THE TOUCHSTONE OF THE NATURAL LAW 7 (2010).

7 *Id.* (internal quotation marks omitted).

8 *Id.* at 8.

9 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

10 THE FEDERALIST NO. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 81, *supra*, at 545 (Alexander Hamilton); see ARKES, *supra* note 6, at 25.

11 U.S. CONST. art. I, §§ 9, 10; see *Smith v. Doe*, 538 U.S. 84, 92 (2003).

12 ARKES, *supra* note 6, at 28.

13 *Id.* at 26–27.

14 Quoted in *id.* at 27.

15 See *id.* at 261.

16 Philip Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 919 (1993).

17 Quoted in *id.* at 948.

18 Quoted in *id.* at 919 n.39.

19 See, e.g., HADLEY ARKES, BEYOND THE CONSTITUTION (1990).

20 ARKES, *supra* note 6, at 6–7.

21 *Id.* at 12.

22 *Id.* at 7.

23 THE DECLARATION OF INDEPENDENCE, *supra* note 9, para. 2.

24 Abraham Lincoln, *Fragment on the Constitution and the Union*, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 169 (Roy Basler ed., 1953).

25 ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS 180 (2001).

26 U.S. CONST. art. III, § 1.

27 See GEORGE, *supra* note 25, at 181–82, 196.

28 *District of Columbia v. Heller*, 128 S. Ct. 2783, 2787–88 (2008).

29 *Id.* at 2788–2804.

30 *Id.* at 2798 (internal quotation marks omitted).

31 *Id.* at 2831 (Stevens, J., dissenting).

32 *Id.* at 2817–18 (majority opinion).

33 *Id.* at 2821–22.

34 See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 66 (1990); GEORGE, *supra* note 25, at 181–82, 196.

35 *Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nomination*, *supra* note 1.

Institutionalizing Counterterrorism: A Review of *Legislating the War on Terror: An Agenda for Reform*

EDITED BY BENJAMIN WITTES

By Adam R. Pearlman*

Late last year, Benjamin Wittes compiled a series of ten essays that offer a range of suggestions for congressional action with respect to U.S. counterterrorism policies. He means for the text not to be taken as a fluid whole, but rather as a series of independent observations and examinations of the broad, complex swath of legal and policy issues encompassing the once-called War on Terror.

The authors of the various pieces range greatly in both their backgrounds and political persuasions. Contributors include noted scholars as well as practitioners, including former officials from both Democratic and Republican administrations, but, Wittes tells us, the common thread among them is “the belief in the value of legislative action to help shape the contours of the continuing U.S. confrontation with terrorism.” In this period of institutionalizing counterterrorism legal authorities in such a way as to recognize evolving strategies and constantly changing tactics, this text overwhelmingly favors statutory lawmaking to establish what can be done, rather than relying on jurisprudential fiat to decree what cannot.

What follows will read more like a “book report” than a book review, but, with a modicum of commentary interspersed throughout, it offers an outline of the key points of each chapter, with the goal of piquing the reader’s interest in this interesting compilation.

I. Mark H. Gitenstein: Nine Democracies and the Problems of Detention, Surveillance, and Interrogation.

Mark Gitenstein offers an informative review of the United States’ and eight other democratic countries’ practices with respect to the detention, interrogation, and surveillance, of suspected terrorists. Gitenstein begins with brief descriptions of Australia, France, Germany, India, Israel, Spain, South Africa, and the United Kingdom’s respective experiences with terrorism, discussing major attacks each country has faced and from what groups they face threats. He notes the uniqueness of the United States in terms of our governing structures (including the bifurcation of criminal investigation and intelligence functions), robust civil liberties, and the fact that those who would do us harm generally reside, train, and plan far from our borders. The post-9/11 treatment of terrorism as a largely military operation, Gitenstein says, is therefore partly a result of the fact that the American criminal justice process “is quite restrictive and because the enemy, in any event, tends to reside in areas where application of U.S. law is difficult.”

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Regarding the power to detain, Gitenstein notes that the U.S. has not had “a stable statutory policy” governing the detention of suspected terrorists, and instead has relied on a series of executive actions mostly rooted in either a broadly-construed power to detain material witnesses, or detention under the laws of war. With the exception of Israel, Gitenstein asserts that none of the other countries he examines have employed the latter basis. Still, nearly every other country had broader domestic, non-military detention authorities than does the U.S., albeit with statutory procedural protections including judicial review.

Whereas each government’s detention regime has distinct characteristics, authorities, and limitations, “the world’s democracies have shown a remarkable convergence concerning appropriate legal restraints on interrogation.” Gitenstein bases much of his discussion on interrogation practices on interpretations of the Convention against Torture, its definition of what constitutes ‘torture,’ and generalizations about four countries’ legal limits on physical interrogation, although he suggests that some such limits, while constituting national policy, nevertheless are not hard-and-fast rules without exceptions.

Finally, Gitenstein reviews how all eight other democracies’ powers to engage in electronic surveillance of terror suspects are far broader than those of the United States government. Such relatively permissive laws governing monitoring practices, for example, “generally do not require advance judicial authorization for intelligence-gathering wiretaps.” Gitenstein briefly examines legal authorities in each of the countries, and under what circumstances information obtained pursuant to a national security investigation can be shared with law enforcement authorities for criminal prosecution. South Africa’s laws, which in every instance are influenced by the country’s desire to promote privacy and civil liberties in the post-apartheid era, come the closest to resembling American restrictions on surveillance and uses of so-procured information. Although Gitenstein asserts that none of the other countries allows its executive to bypass the statutory framework of its surveillance capabilities (an apparent jab at President Bush’s authorization of the National Security Agency’s Terrorist Surveillance Program, which operated outside the restrictions of the Foreign Intelligence Surveillance Act (FISA)), he also “cautions against too rigid an insistence on the precise lines that FISA draws.”

Gitenstein concludes with two parting notes: first, that the United States has the potential to deploy far broader domestic (rather than military) detention and surveillance policies without running afoul of “the mean” of other democratic countries, and second, that the most unique feature of the U.S. battle against terrorism is the “virtually unlimited executive authority” exercised with the above-examined three features of counterterrorism policy. Regarding the former, Gitenstein notably uses language such as “consensus” and “norms” when speaking of common threads between the countries he examines: the word “custom” is noticeably absent from his discussion.

* Legislating the War on Terror: An Agenda for Reform is published by Brookings Institution Press.

As for the latter, although he acknowledges the fundamental differences in governmental structure between the United States and the other nations, he seems to give somewhat short-shrift to the fundamental differences between the dynamics of legislative and executive power in parliamentary systems versus our own. To be fair, however, such differences are ancillary at best to his main premise, as the first chapter lays important groundwork for much of the rest of the book: giving perspective to the options U.S. policymakers have as they move forward with developing our own institutions to fight terror.

II. Matthew C. Waxman: Administrative Detention: Integrating Strategy and Institutional Design

Professor Waxman’s essay is adapted from a longer piece published last year in the Journal of National Security Law and Policy: “Administrative Detention of Terrorists: *Why* Detain and Detain *Whom*?” In this chapter, Waxman does not offer substantive answers to those two questions as much as a road-map or suggested approach by which policymakers can shape a sound detention policy. He begins with the most basic question, asking Congress to start a policy from scratch: what is the strategic purpose of detaining terrorists? The answer to that question, Waxman asserts, is essential to determining who should be detained, which will inform the resulting institutional design of the detention system. That ultimate discussion of design, the question of “*how* to detain,” Waxman says, too often comes before the foundational questions of “*why*” and “*whom*” are answered.

Waxman briefly explains the rationales behind criminal detention (prosecution and punishment for past wrongs) and detention under the law of armed conflict (removing hostile forces from the battlefield), and asserts that the United States “needs to think through how to define the set of cases that fall between the two existing systems” and determine the proper role for a prevention-based administrative detention system. He identifies four possible strategic rationales around which such a system can be designed: incapacitation, deterrence, disruption, and intelligence gathering. While several features of these rationales work in tandem, Waxman says, there are also “tensions and trade-offs” between them, as he demonstrates by discussing who the potential targets of detention would be under each strategy. Targeting individuals determined to be the greatest threat of carrying out a specific attack, for example, is somewhat distinct from targeting those who plan or coordinate attacks, or who have the most information about a given organization’s structure and operating bases.

Based on an assertion that overbroad administrative detention powers risk both liberty (in terms of potential for governmental abuse) and security (by alienating and radicalizing groups of people who perceive themselves to be victimized by detention), Waxman concludes that two potential strategies, those that prioritize deterrence or information gathering, should be discarded as primary bases for detention. Instead, Waxman says that either incapacitation of individuals or disruption of plots serve as the most sound strategies upon which to design a detention system.

But the distinctions between these two strategies can result in very different systems. The goal of incapacitation

will tend to result in long-term detention of individuals likely targeted either because of their immediate dangerousness or perhaps because of certain prior violent acts or membership in a particular group. Detaining individuals so as to disrupt particular terrorist plots, however, begets shorter periods of detention, and also will likely require far more restrictions on a detainee's access to counsel and the transparency of any proceedings pursuant to the detention so as not to tip-off the detainee's co-conspirators. Waxman emphasizes that legislators and agency decision makers must think through these problems from their strategic underpinnings so that any system eventually developed is one that coincides with sound policy priorities and fits the purpose(s) for which it is designed.

III. Jack Goldsmith: Long-term Terrorist Detention and a U.S. National Security Court

Professor Goldsmith's chapter seeks to simplify the issues surrounding the potential of setting up an Article III national security court. He begins with a very clear-cut proposition: the debate about whether there should be one "is largely a canard," as there already *is* a de facto national security court set-up in the federal courts of the District of Columbia. Although long-term military detention is lawfully possible during the present armed conflict against terrorists, Goldsmith says, three characteristics of the conflict make reliance on military detention problematic. First, the nature of the un-uniformed enemy increases the risk of erroneous detentions; second, "this war, unlike any other in U.S. history, seems likely to continue indefinitely"; and third, the possibility of such indefinite detention "strikes many as an excessive remedy" for mere membership in a terrorist group (referring to the fact that classic military detention models are status- rather than conduct-based).

Still, Goldsmith is not advocating for the elimination of traditional military detention in favor of holding all captured terrorists in some sort of Article III treatment. Several detainees legitimately qualify for noncriminal military detention, and, as a policy matter, it would be untenable if such individuals were found not guilty by a jury (a distinct possibility, given the recent verdict in *Ghailani*), or given a light sentence by a judge. Furthermore, Goldsmith says, subjecting terrorists to traditional, unqualified criminal processes in Article III courts risks precedents that erode the rights of other criminal defendants (Goldsmith uses the examples of the Moussaoui trial's watered-down confrontation procedures, and the Padilla prosecution's "unprecedentedly broad conception of conspiracy law").

According to Goldsmith, although the D.C. federal courts have amassed some of the virtues of his ideal national security court (i.e. a centralized body with limited members who have developed an expertise in national security matters), it is nevertheless largely an ad hoc system that grew up out of the courts themselves, rather than as part of a comprehensive legislative effort to vest jurisdiction in a body with a prescribed set of rules and procedures. He raises and makes suggestions regarding four overarching issues. First, he suggests that national security court jurisdiction and procedures be applied to U.S. citizens and non-citizens alike, to ensure fairness in the system. Second, he discusses at length the problem of defining the class

of persons subject to detention reviewable by a national security court, arguing for a conduct-based criterion for detention measured by a detainee's direct participation in hostilities (likely similar to the functional test the D.C. courts have adopted in the Guantanamo habeas cases). As the reader might intuit, such "participation" will have both substantive and temporal elements, although Goldsmith leaves it to the political branches to decide how to determine and measure such elements, almost implying that a "reasonableness" metric might be relied upon.

Third, Goldsmith raises a few of the plethora of procedural issues that will have to be addressed for a functioning national security court. Evidentiary issues such as hearsay and the handling of classified information tops his list, but he also argues for "maximum public disclosure" of proceedings, judicial review of the grounds of detention at regular intervals, and for detainees to be able to access counsel via a "standing pool of government-paid defense lawyers." Finally, Goldsmith skims some of the issues relating to the institutionalization of the court. Here, his most assertive statement is that, if the national security court is to be a stand-alone institution, Congress should *not* merely expand the FISA court, which handles matters that require maximum secrecy. Professor Goldsmith concludes by recommending that Congress build a sunset provision into any legislation creating and empowering a national security court, so that it is forced to revisit the issue in the coming years, and determine which aspects of the court work well, and which do not.

IV. Robert M. Chesney: Optimizing Criminal Prosecution as a Counterterrorism Tool

Acknowledging there is no single "correct" response to terrorism, Professor Chesney posits that whether the United States should ensure that we have a criminal justice system capable of trying terrorists is beyond debate. And, especially in light of President Obama's preference to try terrorists in federal court when possible, Chesney echoes the common prediction that Article III courts will continue to be pressured by increasing terrorism-related caseloads, and demands not commonly imposed upon them in regular criminal trials. Still, he says that what are perhaps the most common objections to criminal process—that it is neither a tool of prevention, nor is it readily flexible enough to handle the demands of terrorism proceedings—are over-stated.

Chesney describes several federal criminal statutes already on the books to support his proposition, and fills-in many potential jurisdictional gaps using examples of prosecuting defendants linked to terrorism with other, ancillary crimes, as well (i.e. the "Al Capone strategy"). These include material support and conspiracy statutes, which to an extent serve as de facto prohibitions on membership and association with terrorist groups, thereby attaching criminal liability to terrorist associates before any attacks are carried out. Chesney explains, however, that prosecutions under such statutes are limited to individuals associating with formally designated terror groups, at a time after the defendant's group of choice has been duly designated. Still, Professor Chesney points out that the prosecution of Jose Padilla in federal court resulted in a conviction based on his "informal 'membership' in the jihad movement itself,

irrespective of whether [he could] be linked to any particular organization or plot.” Although Chesney warns that the *Padilla* charging strategy may not be generalizable, as it is likely that some juries will not convict on that theory, the case shows the potential breadth of conspiracy liability as applied to defendants with links to terrorism.

Chesney notes that federal criminal laws do have some distinct limitations: *ex post facto* considerations are paramount, and criminal laws tend not to cover overseas acts by noncitizens against noncitizens, nor do they reach members and supporters of groups not federally designated as terrorist organizations. Chesney nevertheless argues that federal criminal legal authorities compare reasonably well to the government’s asserted military detention authority and authority to prosecute a subset of those detained for war crimes via military commissions. The three distinct grounds upon which terrorists are subject to military detention—fighting with or on behalf of, membership in, and supporting terrorist organizations—are closely mirrored in criminal law. And the crimes that military commissions may charge are similar to the jurisdiction of federal prosecutors.

Procedural safeguards are also discussed in some detail. Chesney cites a Human Rights First report that suggests *Miranda* concerns are overstated because of the doctrine’s public safety exception, and explains that the same report highlights problems concerning a criminal defendant’s access to classified information, the fact that much intelligence information will not be able to be used in a criminal prosecution, and the requirement of proving guilt beyond a reasonable doubt, which are all significant concerns that create a gap between criminal proceedings and other options. Overriding constitutional concerns, including Confrontation Clause and Due Process implications, necessarily limit to some extent the flexibility the judiciary has to resolve some of these issues.

Ultimately, Professor Chesney suggests seven specific reforms to improve criminal processes with respect to terrorism trials: expand prohibitions on receiving “military-style training”; expand the War Crimes Act to cover attacks by non-citizens on civilians; revisit the *mens rea* requirement for material support charges; limit possible spill-over effects that material support prosecutions could have in other areas of law; examine the proper scope of conspiracy liability; define the scope of the government’s duty to search for and disclose potentially exculpatory but classified information; and amend the Classified Information Procedures Act (CIPA, discussed further below) to address the possibility of a *pro se* terrorist defendant.

V. Robert S. Litt and Wells C. Bennett: Better Rules for Terrorism Trials

Current General Counsel for the Office of the Director of National Intelligence, Robert Litt, along with Wells Bennett, propose that the debate over whether to try terrorists via military commissions, regular Article III criminal proceedings, or in national security courts, is really a dispute about what procedural and evidentiary rules to apply to terrorism trials. Based on their analysis of publicly available information, they conclude that dramatic departure from existing federal court rules is not necessary to resolve potential unfairness to defendants and burdens upon prosecutors, and believe that federal criminal

trials are generally a preferable method for prosecuting terrorists. But, they argue, Congress should create a national security bar of cleared lawyers to represent suspected terrorists, and should amend rules for handling classified evidence.

Noting the oft-cited concerns about trying terrorists in federal court—i.e. the potential release of classified information, the burdens on the federal court system, and issues surrounding the adaptability of procedural and evidentiary rules such as chain of custody, *Miranda* warnings, and the use of hearsay evidence—Litt and Bennett argue that many of these caveats to criminal trials are overstated. Establishing a complete chain of custody, they note, is not a hard-and-fast rule to authenticating evidence, as evidenced by the military commissions’ rule, which is effectively the same as that found in the Federal Rules of Evidence. The authors also assert the possibility that a defendant can use the public forum of a criminal trial to communicate, undetected, with at-large co-conspirators is remote. And, they note, the Fourth Amendment’s search and seizure restrictions do not apply to overseas searches of alien terrorist suspects.

Instead, the biggest problem with respect to terror trials is the use of classified information to secure a criminal conviction. The authors believe the structure that the Classified Information Procedures Act (CIPA) provides in espionage and other cases may also be useful in the terrorism context, though it is not the perfect solution. To take full advantage of a CIPA-like structure, however, requires the creation of a national security bar of defense attorneys whose security clearances are current, and who would develop expertise in handling classified information in the course of litigation. Litt and Bennett propose that CIPA should be amended such that no discoverable information can be withheld from a defense counsel who is a member of the national security bar, that it would be up to the defendant whether to accept counsel who is a member of that bar, and that information not provided to the defendant himself could not be used against him. As no classified information would be allowed to be presented to the defendant personally, it seems that the thrust of the argument for a national security bar is to ensure defendants charged with terrorism-related crimes have adequate representation in-chambers when prosecutors present their proposed unclassified summaries of classified information to a judge to review for adequacy.

The authors suggest that similar principles should apply to depositions of witnesses whose identities must be kept confidential. The authors believe adequately cleared counsel should be allowed to take the depositions of such witnesses, rather than merely have summaries provided to them. The authors note that defendants who wish to represent themselves will not be able to avail themselves of these benefits.

Finally, Litt and Bennett acknowledge that questions surrounding *Miranda*, coercive interrogation, and hearsay pose issues that would have to be resolved for successful trials to occur. Hearsay, they suggest, may be the easiest of the three, as prohibitions on hearsay evidence are based on federal rules with built-in exceptions, rather than constitutional requirements. Still, they believe that there are ways to address each of these concerns while balancing values with risks, and feel that trials that closely resemble criminal proceedings are the best way to prosecute suspected terrorists.

VI. David A. Martin: Refining Immigration Law's Role in Counterterrorism

Noting disadvantages of how immigration laws were used in the aftermath of the 9/11 attacks, David Martin suggests five specific changes to the use of immigration law as a counterterrorism tool. First, Martin suggests a "risk-based approach" to extensive screening of visitors. The current system employs "a double layer of screening" whereby an admissions applicant faces demanding scrutiny by an overseas consular officer and an immigration inspector at a U.S. port of entry. Martin believes such blanket procedures create "white noise" that makes it more difficult to identify true threats. Instead, giving immigration officers greater access to law enforcement and intelligence information will allow them to make better screening decisions.

Second, he notes the value of biometric information, and suggests strengthening authorities to include relevant criminal information in the Automated Biometric Identification System (IDENT) database, while rescinding the mandate to fingerprint all departing noncitizens at land borders. The IDENT database serves as the basis for the Department of Homeland Security's U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) screening system, and although the DHS system has some access to FBI fingerprint records, at the time of Martin's writing, the arrangements for full interoperability of those two systems had not been completed.

Third, Martin suggests that future uses of alien registration laws should be mindful of the effect such laws had in the wake of the 9/11 attacks, and their use should be constrained with respect to resident populations. Relatedly, fourth, Martin says that Congress should either narrow terrorism-based grounds of inadmissibility and deportability, or develop waiver procedures to admit certain individuals who may have ties to terrorist organizations. This latter proposal is one which could serve to roll-back the radioactivity of associating with terrorist organizations, but what links it to his previous point is Martin's suggestion that Congress made a mistake by applying the same stringent standards regarding terrorism links to deportability as it did to admission decisions. In short, he says that the stakes of deportation for the individual being deported can be quite high, especially for someone who has established a livelihood and potentially a family while living in the United States. Martin argues that the bar for deportability should therefore be higher than the superficial connections to terrorism that might make an individual inadmissible. Specifically, he advocates that "in the deportation setting the law should demand more of the government to prove the individual's knowledge and intent in connection with any assistance or support later shown to have gone to terrorist activity or organizations." He further believes that it is possible to distinguish between terrorist organizations that harbor interests inimical to the United States, versus those engaging in "just war[s]."

Fifth, Martin argues that immigration-based detention should be subject to safeguards and review, and that immigration authorities should not be used "as a de facto preventive detention power." Martin notes that, after 9/11, more than 700 "special interest" individuals were detained on

immigrations charges, some for as long as a year. He advocates employing the *Zadvydas v. Davis* standards for immigration detention, which would require the government to deport as quickly as possible an individual subject to a removal order, or allow for supervised release. Pre-hearing immigration detention should be confined to individuals who pose a flight risk or danger to society; purely preventative detention, according to Martin, should occur under a separate legislative scheme, and not as part of immigration proceedings.

Finally, Martin echoes a common theme in other chapters that Congress should reexamine how classified information is used in immigration cases. He unequivocally asserts that the government should be permitted to use classified information in immigration proceedings. Consular officers, he explains, have always been allowed to use classified information to consider whether to admit or exclude a person seeking entry into the United States. Due process concerns exist, however, regarding the use of classified information in the course of deportation proceedings. For those purposes, Congress in 1996 created the special Alien Terrorist Removal Court, consisting of sitting federal judges appointed by the Chief Justice, which has never been used.

VII. David S. Kris: Modernizing FISA: Progress to Date and Work Still to Come

Current Assistant Attorney General for the National Security Division of the Justice Department, David Kris, provides a brief but thorough summary of the history of the Foreign Intelligence Surveillance Act (FISA) and the 2008 FISA Amendments Act (FAA). Noting that the 2005 disclosure of the NSA's Terrorist Surveillance Program was the "opening gambit" in the effort to modernize FISA, Kris argues that the FAA was likely not the end to updating federal surveillance authorities, and that much legislative work may yet need to be done. He opines that Congress may yet "want to overhaul the U.S. national security collection statutes *and* criminal investigative statutes." (Emphasis added.)

Traditional FISA warrants are subject to three key substantive requirements: probable cause that the target is a foreign power or an agent of a foreign power, probable cause that the target is "using or about to use the facility at which the surveillance will be directed," and specific minimization procedures to protect privacy interests. FISA does not apply to foreign intelligence collection outside of the United States, but changes in the nature of our national security interests, specifically the rise of stateless actors, have challenged the traditional notion of what it is to be a foreign power or agent thereof, and, more importantly, changes in technology, particularly email, have rendered the geographic notion of a "facility" less important.

Kris notes that FISA originally was designed to accommodate some warrantless wiretapping. He summarizes the three versions of the statute originally proposed prior to its enactment in 1978, and concludes that the final version of the bill contained specific exceptions "designed to accommodate the NSA. . . . FISA left the government free to monitor a great deal of international communications, including communications to or from Americans, without seeking warrants," but only

communications using certain technologies, at facilities located outside the United States. Now, under the FAA, “targeting is not limited to any particular facility or place,” but is still limited in other ways, including who is targeted, who may approve the surveillance, and the minimization procedures to be employed.

The FAA, Kris says, both expands and contracts FISA’s coverage (what expands FISA coverage decreases the government’s warrantless surveillance authority; what contracts FISA generally expands that authority to operate outside the confines of the statute). For example, Kris explains that a statutory requirement of probable cause to initiate surveillance of a wire or radio communication now applies even when all parties to that communication are located abroad, if one of those individuals is a U.S. person. However, a warrant is not required to inspect the foreign-to-foreign email exchanges, even if those messages are stored on a U.S. based server. A warrant is now required for surveillance of U.S. persons located abroad, but not required for non-U.S. persons located abroad even if the monitoring occurs from within the United States.

Kris believes that the FAA does not represent the end-game for amendments to foreign intelligence surveillance authorities. He reasons that it is a complicated statute that “continues to rely on location as a trigger for legal requirements,” and it may represent an incomplete regime with respect to the government’s retention and dissemination of collected information. Instead, he suggests that it is possible in the long run “to imagine” a framework of only two major national security-oriented collection statutes: one to replace the varying laws governing national security letters, FISA pen registers and trap-and-trace devices, mail cover regulations, and Patriot Act business records acquisition authorities; and one governing the “acquisition of information for which a warrant would be required if undertaken for law enforcement purposes in the United States,” which would treat physical and electronic searches similarly.

VIII. Justin Florence and Matthew Gerke: National Security Issues in Civil Litigation: A Blueprint for Reform

Justin Florence and Matthew Gerke argue that federal courts have increasingly conflated the two doctrines in civil cases that implicate U.S. national security: the jurisdictional or justiciability rule, and evidentiary privilege. They believe Congress should provide courts with legislative guidance to prevent judges from bringing those separate principles under the single heading of the “state secrets privilege” that prompts the dismissal of cases when it is invoked. Instead, the privilege should be deemed to be a rule of evidence, rather than justiciability, and should serve, when properly invoked, merely to exclude specific evidence from a case, not necessarily dismiss the action without further analysis. The authors also advocate for the adoption of certain procedural rules to help determine when dismissal is warranted. And they suggest that “Congress should put rules in place so that, even if secret evidence prevents the civil litigation system from dispensing justice in certain cases, other government institutions can fill in for the courts by providing redress to wronged parties and ensuring that the government is held accountable.”

The authors briefly trace the history of state secrets doctrine from English royal prerogative to post-9/11 uses to block litigation pertaining to suits against telecommunications companies accused of being complicit in warrantless surveillance programs, and suits against the government into alleged torture and rendition of detained suspected terrorists. They say that reform of the privilege should be “guided by three overarching goals: protecting the national security of the United States, providing access to justice, and ensuring that government actions are legal and politically accountable.” Although they assert that there should be “a strong state secrets privilege,” Florence and Gerke argue that it should simultaneously “provide the maximum level of openness and adversariality possible,” to allow individual cases to proceed as close to complete resolution as practicable, while at the same time preventing executive abuse of the privilege.

In sum, Florence and Gerke believe that Congress should clarify that the privilege should be invoked to protect disclosure of classified evidence, but not serve to block a pending lawsuit altogether, without further analysis of the classified evidence at issue. They also argue there should be greater judicial review of the evidence the government asserts is subject to the privilege, including bringing-in cleared national security experts to review the information and add “some modicum of adversariality” into the court’s ultimate determination. Further, Congress should provide “a clear standard for determining what evidence is privileged” beyond merely noting the fact that a piece of information is classified, and outline the consequences of a finding of privilege, which could include the possibilities of developing a CIPA-like unclassified substitute for the privileged evidence, victory for the plaintiff, absolute privilege of the evidence, qualified privilege subject to balancing, judicial consideration of the merits without disclosure to the non-governmental party, or judicial consideration for the limited purpose of whether the finding of privilege requires dismissal, and therefore victory for the government.

According to the authors, the Department of Justice should be required to report to Congress’ judiciary and intelligence committees about its invocation of the privilege, and Congress, in turn, should also allow judges to refer any concerns they have about how the privilege is used to Justice Department investigators. Finally, they say, treating state secrets as a justiciability doctrine requiring dismissal of a case that may invoke classified information, rather than an evidentiary privilege calling for analysis of the information the government seeks to protect, is erroneous as a default position. Instead, claims should be adjudicated to the extent possible, while still exercising measures to protect national security.

IX. Stuart Taylor Jr. and Benjamin Wittes: Looking Forward, not Backward: Refining U.S. Interrogation Law

Stuart Taylor and Benjamin Wittes engage in a fairly even-handed look at interrogation policy, and how to proceed in codifying laws that provide both sufficient guidance to those “in the room,” and the flexibility decision-makers will need to respond effectively to the wide range of information-gathering scenarios likely to lay ahead. Although they describe the Bush administration’s treatment of the issue to be characterized “with

Taylor and Wittes preface their proposals by defining the terms that are so central to understanding the legal bounds of detainee treatment (e.g. “torture,” “cruel, inhuman, or degrading,” “highly coercive,” and “mildly coercive”), and with a brief synopsis of post-9/11 interrogations and the situations that gave rise to prisoner abuse in some cases. They contrast the CIA’s highly regulated interrogation program with the arguably disjointed and uncoordinated response of in-theater military questioning, what they call a “culture of confusion about what the rules were.” The chapter continues by reviewing the reforms to interrogation policy that occurred during President Bush’s second term, which included both internal executive branch initiatives (such as a DOD working group, revisions to the Army Field Manual banning all coercion and threats, and the withdrawal of certain OLC memos), and legislative action (specifically the McCain Amendment to the Detainee Treatment Act, and certain provisions of the Military Commissions Act). They also discuss President Obama’s actions in this regard as of the date of their writing, specifically his Executive Order that the CIA comply with the Army Field Manual, a provision with which they strongly disagree.

X. Kenneth Anderson: Targeted Killing in U.S. Counterterrorism Strategy and Law

According to Anderson, even cabining the practice within the confines of the laws of war (international humanitarian law), and certainly by appealing to the operational authorities granted by Congress' Authorization for Use of Military Force, unnecessarily cedes ground to the United States' sweeping

Anderson notes that a “full response” to terrorism generally, not merely in anti-al Qaeda operations, requires the United States to leverage its capabilities across all three operational paradigms covering counterterrorism measures: criminal law, the law of armed conflict, and intelligence-based uses of force. His view on this point of course echoes the 9/11 Commission’s recommendations to “[r]oot out [terrorist] sanctuaries . . . using every element of national power.” But in application, he notes that transnational terrorists are “more efficiently targeted through narrow[] means,” and further points out the great political costs of capturing and holding detainees for whom the public demands trials, as opposed to eliminating enemy forces in the field. Yet Professor Anderson nevertheless makes a powerful argument for the “strategic and moral logic of targeted killing,” that includes the humanitarian benefits of discriminating targeting coupled with technological advancements that allow U.S. forces, from a stand-off position, to minimize collateral civilian damage.

Claiming that tailoring legal justifications narrowly to presently sufficient authorities (like the post-9/11 AUMF) may risk America's future ability to exercise targeting prerogatives under a self-defense doctrine, because of the developing international "soft law" against the practice, Anderson calls on Congress "to *preserve* a [legislative] category that is likely to be put under pressure in the future and, indeed, is already seen by many as a legal nonstarter under international law." He expresses that it is in the United States' interest to do "that exceedingly rare thing in international law and diplomacy: getting the United States out in front of the issue by making the U.S. position plain . . ." To that end,

The single most important role for Congress to play in addressing targeted killing . . . is to assert openly, unapologetically, and plainly that the U.S. understanding of international law on this issue of self defense is legitimate . . . and to put the weight of the legislative branch behind the official statements of the executive branch as the *opinio juris* of the United States.

Anderson suggests several specific legislative measures by which Congress may accomplish that goal, ultimately advising both Congress and the President that they must “use or lose” the ability to justify legitimately targeted killings as a measure of self-defense under international law.

Concluding Thoughts

Perhaps surprisingly, none of the essays in this book actually seeks to *define* terrorism, nor recommend that there be a single accepted definition throughout the United States Code. The term is presently defined several different ways in federal statutes and regulations, some of which include, for example, political motivation, and some which do not. Waxman and Chesney probably come the closest. Waxman implores policymakers to think through the strategy and goals of detaining terrorists before formulating the appropriate rules and systems to suit those purposes. Focusing on the goals of detention, i.e. *why* we detain certain people, as he explains, certainly will help to determine *who* we detain. But without a clear definition of what behavior might make one detainable, there will remain a significant gap in the law. Chesney’s chapter includes an entire section on “substantive grounds for prosecution in terrorism-related scenarios,” describing, as relayed above, various authorities in federal criminal law to subject terrorists to the jurisdiction of Article III courts, but several of the statutes upon which that section relies have differing definitions of what “terrorism” really is. However, his writing suggests that Chesney sees as integral the element of 18 U.S.C. § 2332(d), that an act of terrorism be intended to “coerce, intimidate, or retaliate against a government or civilian population.” Indeed, Jack Goldsmith, in his chapter, suggests that the “definition of the enemy” is “the hardest question in detention policy,” but his discussion, too, speaks of the complexities of detaining “terrorists,” while omitting what “terrorism” actually is.

Although the conspicuous absence of a proffered single definition of terrorism may simply indicate a common acceptance that we are in a fight with enemies incapable of a one-size-fits-all legislative definition, its absence leaves open the possibility of uneven, indeed perhaps even arbitrary, applications of the term. Common colloquial usage does not sound policy make. Rather, its greatest potential is to feed the divisive fervor of political rhetoric used by those in office to justify extraordinary uses of power by themselves, and leads to charges of fear-mongering by those who are not. Several authors in this book point out that dictators often begin their tyranny by labeling dissenters as “terrorists,” and argue that the distinction between liberty and security is a false one. And in recalling the lessons of our own history, perhaps best highlighted by the disdain with which we associate McCarthy-era blacklists, we

are reminded of the effect that labeling peoples and behaviors can have on national political and policy priorities, and how they impact our well-being as a nation under the rule of law. Should a man who flies his single-engine propeller plane into an IRS building staffed entirely by civilians, to protest government policies, beget the same label as members of a foreign organization who fly a jet into the headquarters of our military departments? This question, and others like it, are both difficult to ask and disquieting to consider. But if we as a citizenry are to expect Congress to attempt to tackle many of the extraordinarily tough issues presented in this fine book, they are questions we must ponder with all deliberateness and nuance that both accounts for the requirements of law and the operational necessities of maintaining our security.

Policy Paralysis and Homeland Security: A Review of *Skating on Stilts: Why We Aren’t Stopping Tomorrow’s Terrorism*

BY STEWART BAKER

Review By Gregory S. McNeal*

The Department of Homeland Security is paralyzed by civil-libertarian privacy advocates, business interests, and bureaucratic turf battles. The result of this paralysis is a bias toward the status quo that is preventing the United States from protecting the homeland. According to Stewart Baker, in his must read book *Skating on Stilts: Why We Aren’t Stopping Tomorrow’s Terrorism* (Hoover, 2010), this policy dynamic, combined with exponential advances in technology are key threats to U.S. national security.

As this review was going to print, the news was filled with the story of a video that went viral; in the video a passenger was subjected to an intrusive TSA pat down after he refused to pass through a full-body scanner. Privacy groups seized on the controversy, as the ACLU declared “Homeland Security wants to see you naked” and that “the jury is still out on the effectiveness of these machines or whether they justify the invasion of privacy involved.”¹ One cannot fault the ACLU for questioning whether these systems are effective—in fact the GAO raised similar questions, inquiring as to whether the full-body scanners would have prevented the Christmas Day bombing attempt.² What one can fault them for, though, is what Baker describes as advocating for “suffocating controls” on the information the U.S. gathers about suspected terrorists and how it is used (p.27). Consider this telling example recounted by Baker:

I started to believe that some of the privacy groups just objected in principle to any use of technology that might help catch criminals or terrorists. The example I remember best was when the police at Logan Airport got handheld computers. The computers were connected to public databases so they could check addresses and other

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information when they stopped someone. It was pretty much what any businessman could do already with a Blackberry or iPhone. The American Civil Liberties Union went nuts. The executive director of the Massachusetts chapter called the handhelds “mass scrutiny of the lives and activities of innocent people,” and “a violation of the core democratic principles that the government should not be permitted to violate a person’s privacy, unless it has a reason to believe that he or she is involved in wrongdoing.” (p.27)

These were computers tied to public databases that any citizen could search, and still privacy groups fought tooth and nail to prevent their use. Stories and anecdotes like this one appear throughout *Skating on Stilts* as Baker recounts his tenure in the Department of Homeland Security as Assistant Secretary for Policy. Such stories reveal just how entrenched interest group politics are, and illustrate how resistance to change in the name of privacy has unintended consequences like the pat downs we are now witnessing at the airport. Stewart’s personal quips and observations also liven up the policy discussion, which is accessible even for the non-national security law and policy specialist. For example, when recounting the handheld computer flap above, Stewart writes, “If the ACLU considered that a civil liberties disaster . . . we’d better not tell them that we also have access to the White Pages” (p.28).

Of course, it’s not just the ACLU who is opposed to innovation in security policy. The profits of businesses depend on the status quo (p.26) and the international community simply doesn’t like it when the United States changes policies (p.28). The result is a homeland security system that is nearly paralyzed, especially when powerful interest groups challenge innovation in the media and on Capitol Hill.

Baker explains how policy paralysis is the product of a left-right privacy machine. For example, the U.S. has good information on four hundred thousand terrorism suspects, “of whom less than twenty thousand are on lists that TSA uses to screen air travelers. That means that 95 percent of the identified terrorist suspects get on a plane bound for the United States without receiving any more scrutiny than a grandmother from Dubuque” (p.191). Why? According to Baker, it’s “[b]ecause that’s the way the privacy campaigners want it. It’s the intended result of their remarkably successful effort first to stall and then to roll back the security reforms undertaken after 9/11” (p.191). Privacy advocates turned travel reservation information such as name, address, gender, travel history, and phone number—the same things that are tracked as part of your frequent flier mileage program—into the policy equivalent of a toxic waste site (p.194). If privacy advocates want to blame someone for “touching their junk,”³ they need only look in the mirror.

The book covers issues outside the traditional homeland security policy stovepipes, with four chapters dedicated to technology and tomorrow’s threats. These issues, ranging from intrusions of classified networks to cyberattacks span the homeland security, national security, and defense policy divide.

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* Stewart Baker’s *Skating on Stilts: Why We Aren’t Stopping Tomorrow’s Terrorism* is published by Hoover Institution Press.

Baker’s reasoning for including these chapters is to illustrate how the exponential growth in information technology capabilities has benefited the Pentagon and the nation’s economy, but eventually these advances in technology will become a national weakness. This chapter may strike the reader as an outlier, but it is emblematic of Baker’s larger point—technology is a force multiplier for the nation *and* for the nation’s enemies. For example, advances in biotechnology—which are occurring at an exponential rate on par with that in information technology mean that “[w]ithin ten years, any competent biologist with a good lab and up-to-date DNA synthesis skills will be able to recreate the smallpox virus from scratch. Millions of people will have it in their power to waft this cruel death into the air, where it can feed on a world that has given up its immunity” (p.277).

Readers looking for optimism in Baker’s work should probably look elsewhere. In particular, conservatives and libertarians who fear big government and the tyranny of bureaucracy will find ample evidence to rail against the Homeland Security bureaucracy. For example, even when a controversial policy like the handing over of U.S. ports to a Dubai based company placed the regulation of a key security issue squarely within the public’s mind, “the nations and companies that opposed any regulation had successfully advocated for a law and executive order that undermined the security agencies, at least somewhat. That they accomplished their mission in the teeth of noisy public demands for tougher security standards is a testament to their formidable clout” (p.273). In another instance recounted by Baker, he explained how at the National Security Council, Homeland Security was consistently opposed by the State Department, who was more concerned with maintaining U.S.-Europe relations (which had soured after the Iraq invasion) than they were with protecting national security (p.116). Moreover, for those optimists who believe that September 11th heralded a new age of information-sharing between law enforcement and intelligence agencies all acting in the nation’s, rather than their bureaucracies’, best interest, Baker offers this story about the FBI’s opposition to sharing European airline reservation data with other U.S. agencies:

[A]fter long discussions, we figured out what the problem was. The FBI apparently had many agreements with foreign agencies that required it to keep the data to itself and not share it with other U.S. agencies. . . . If the United States declared that [the law] required reconsideration of such restrictions, we realized, the FBI and Justice might have to reconsider their own restrictions on sharing data with other agencies. And Justice did not want to do that. These were the same prosecutors who had fought like tigers to tear down the wall that restricted their access to intelligence agencies’ information; but now, with the shoe on the other foot, they were fighting almost as hard to keep other agencies from seeing the data they were getting from foreign partners. . . . DHS was fighting tooth and nail to win the right to share terrorism data with Justice, to break down the wall; and Justice was fighting just as hard to keep us from succeeding—for fear that it might then have to share more data with us.

Or consider the smallpox example from earlier. If a biological attack were to occur, what kind of government response can the nation expect? Surely nine years after September 11th these issues have been worked out. For example, one response that might resonate with conservatives is to trust people to treat themselves by allowing them to store antibiotics in their homes (p.286). As Baker tells it, this idea ran into the big government buzzsaw. First, the bureaucrats in the Health and Human Services slow-rolled the idea. Next, “to prove that you and I can’t be trusted, and to wait out their bosses, they insisted on a large-scale test” to see whether citizens might improperly open and use their antibiotic kits (p.286). That test proved that government doesn’t know best, in fact only one person opened her kit improperly. Of course, the bureaucrats in HHS were undeterred and ordered more tests and further studies. The result? In December 2009 the White House unveiled the “Roles and Responsibilities” of citizens in the face of a biological threat. The list “says individuals are supposed to ‘follow guidance’ about keeping food and other materials at home . . . and you’re only to keep materials ‘as recommended by authorities’” (p.287). How will the Obama administration get antibiotics to you in an emergency? According to Baker, “[t]he Obama administration decided to make a big bet on the postal service’s nimbleness, sense of urgency and dedication to duty” (p.287). In short, you must bet your life on the postal service. In perhaps one of the most telling anecdotes in the book, Baker asks the reader to consider how much they trust government:

Stop for a moment to imagine the scene. Postal workers will be asked to drive into contaminated neighborhoods even though they can’t be sure their countermeasures will work against whatever strain has spread there. The neighborhoods will be full of people desperate to get antibiotics, so for protection, the postal workers will first have to meet up with guys with guns whom they’ve never seen before. They also have to collect antibiotics from pickup points that they may or may not have seen before. They’ll meet the guys with guns there, or someplace else that may have to be made up at the last minute. Then they’ll start out on routes that almost certainly will be new to them. As they go, they will be expected to seamlessly and fairly make decisions about whether to deliver the antibiotics to homes where no one is present, to rural mailboxes that may or may not be easily rifled, to people on the street who claim to live down the way, to the guys with guns who are riding with them and have friends or family at risk, and to men in big cars who offer cash for anything that falls off the truck. . . . And this will put antibiotics in the hands of every single exposed person within forty-eight hours, from a no-notice standing start? (p.288)

Not holding back, Baker declares “no one but an idiot would bet his life or his children’s lives on flawless execution from a public agency doing something it’s never done before” (p.288). He then goes on to recommend you stockpile your own antibiotics in violation of federal law (p.289). It’s a funny, but also deadly serious passage.

Having recounted all of these problems (and more), what does Baker offer in the form of solutions? Most are

integrated throughout the book, and most were rejected by the bureaucracy or one of the powerful alliances of special interests. Followers of public policy won’t be surprised by this stasis; the status quo bias is a well-established principle in the public policy literature. Nonetheless, most readers will be disheartened by Baker’s account, and close watchers of national security policy will remember the prophetic words of one FBI agent investigating al Qaeda who, on August 29, 2001, sent an email to FBI headquarters, writing “Whatever has happened to this—someday someone will die . . . and the public will not understand why we were not more effective and throwing every resource we had at certain ‘problems.’”⁴ Sadly, someday we may say the same thing about the missed opportunities identified in *Skating on Stilts*. This book is a must-read.

Endnotes

- 1 <http://www.aclu.org/blog/technology-and-liberty/homeland-security-wants-see-you-naked>.
- 2 <http://www.npr.org/templates/story/story.php?storyId=124838054>.
- 3 http://technolog.msnbc.msn.com/_news/2010/11/22/5510440-tell-the-tsa-dont-touch-my-junk-heres-how.
- 4 The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States, at 271.

