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Letter from the Editor

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We hope that readers enjoy the articles and come away with new information and fresh insights. Articles are usually chosen by our Practice Group chairmen, but we strongly encourage readers to send us any suggestions and responses at info@fedsoc.org.

Sincerely,

Katie McClendon

Administrative Law & Regulation

REINING in the Agencies: Oversight of Executive Branch Rulemaking in the 21st Century

*By Alec D. Rogers**

Note from the Editor:

This article critiques current procedures for agency rulemaking and proposes an alternative. The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Ian Millhiser, *The Little-Noticed Conservative Plan To Permanently Lock Democrats Out Of Policymaking*, Think Progress (Nov. 16, 2015), *available at* http://thinkprogress.org/justice/2015/11/16/3722395/the-little-noticed-conservative-plan-to-permanently-lock-democrats-out-of-policymaking/.

• Press Release, *Science Leaders Decry Congressional Attacks on Science-Based Policy*, Union of Concerned Scientists (May 29, 2015), *available at* http://www.ucsusa.org/news/press_release/Congressional-attacks-on-science-0498#.Vk44Q_mrSM8.

• Elliot Negin, *Industry-Funded Lawmakers Target Public Health and Environmental Protections*, Huffington Post Blog (June 11, 2015), *available at* http://www.huffingtonpost.com/elliott-negin/industry-funded-lawmakers_b_7556454.html.

• Executive Office of the President, Office of Management and Budget, *Statement of Administration Policy: H.R. 367—Regulations From the Executive in Need of Scrutiny Act of 2013* (July 31, 2013), *available at* https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr367r_20130731.pdf.

• Clyde Wayne Crews Jr., *The Problem With The White House Threat To Veto The REINS Act*, Forbes (July 28, 2015), *available at* http://www.forbes.com/sites/waynecrews/2015/07/28/the-problem-with-the-white-house-threat-to-veto-the-reins-act/.

I. Introduction

The lack of Congressional oversight of the regulatory process is a problem of long standing. Agency-crafted regulations have increasingly pushed aside congressionally authored statutes in scope and importance, much as statutes once pushed aside the common law.[1] This development is problematic in a country that claims democratic governance, as regulators are unelected and unaccountable to the people except insofar as their representatives are able and willing to exercise effective oversight.[2] In addition to the problem of democratic legitimacy, the separation of regulatory authority from democratic responsibility can lead to bad rulemaking.[3]

As regulations have played an increasingly important role in the lives of Americans, conventions for overseeing them and checking excesses have fallen by the wayside. In 1983, a key device for congressional oversight, the so-called legislative veto, was struck down by the Supreme Court in the landmark separation of powers ruling *INS v. Chadha*.[4] This method whereby delegations by Congress of rulemaking authority to the executive were accompanied by mechanisms allowing for one or both houses of Congress to reverse particular exercises of such authority was held to violate the Constitution's clauses regarding bicameralism and presentment.[5]

The removal of the legislative veto left Congress in a bind. It could stop delegating its significant rulemaking power, thus preserving its authority over the rules that govern the American people. Or it could continue to delegate this authority, thus preserving the federal government's large and growing role in American society, even in matters of increasing complexity. Other less precise devices to control the agencies remained, such as the power of oversight and the power of the purse. And, of course, Congress could always change laws to override bad regulations, or even cut off funding for their enforcement. But they lacked the veto's precision and efficiency.

In recent years, some in Congress have sought new controls over the regulatory process. One fairly common state practice is to empower a joint legislative committee to exercise regulatory oversight and approval authority over regulations. A few state constitutions provide for the committee to exercise a veto over rules.[6] While such a body at the federal level would likely run afoul of *Chadha,* some have proposed arguably constitutional methods by which Congress could exercise similar authority, such as by requiring further legislation to give significant regulations legal effect.[7] In the mid-1990s, several members of Congress proposed legislation along these lines.[8] The underlying concept—that significant regulations could be denied legal effect until Congress enacts legislation explicitly allowing it—has resurfaced in recent years and is currently back on Congress's agenda.

This article will discuss the failure of past judicial and congressional doctrines and devices to provide oversight of the executive's rulemaking, the current proposals, and the arguments that have been put forth on both sides. It will close with

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a modest suggestion for how Congress might move forward in trying to restore meaningful oversight.

II. Judicial Oversight

Although 21st century Americans take executive rulemaking authority for granted, it was not always clear that it was constitutional. The Constitution, on behalf of "We the People," vests "all legislative powers" in Congress.[9] That Congress can delegate its legislative authority to executive departments is not explicit in the Constitution's text, but it has been done since the beginning of the Republic. While the "non-delegation doctrine" places theoretical limits on Congress's ability to devolve its legislative authority to administrative agencies, the evolution of the doctrine indicates that the Supreme Court has largely given up trying to place practical limits on delegation.

In 1825, the Supreme Court was presented with the question of whether state or federal law should govern procedures regarding the writ of executions on judgments emanating from federal courts.[10] Counsel for defendants against whom the writs had been executed had argued that congressionally enacted statutes providing for the federal courts to regulate the issuance of such writs constituted a constitutionally impermissible delegation of legislative power to the courts. Congress, not the federal courts, would need to create these rules. In the absence of its exercise of such authority, there was no federal law on point, and therefore state law should trump federal law.

Chief Justice John Marshall, speaking for a unanimous court, found that Congress "may certainly delegate to others, powers which the legislature may rightfully execute itself," even though it could not delegate "strictly and exclusively legislative powers".[11] Perhaps some powers were not delegable, he reasoned, but merely possessing the constitutional authority to make rules (such as it had done for courts) did not preclude the possibility of delegating rulemaking authority. They needed to draw a line "which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details."[12]

Marshall understood that differentiating between "important subjects" and "general provisions, to fill up the details" could pose a difficult task, and cautioned that the Court would take a limited role in policing Congress's delegation of authority:

> The difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter into unnecessarily.[13]

Subsequent courts would heed Marshall's advice. In the 1928 case of *J.W. Hampton, Jr. & Co v. U.S.*, the Supreme Court upheld a statute allowing the president to adjust tariff rates within certain bounds as he saw fit to "equalize the... differences in costs of production in the United States and the principal competing country."[14] Chief Justice William Howard Taft's opinion laid down the "intelligible principle" doctrine. So long as there was "an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[15] Taft's formulation is still black letter law.[16]

Seven years later, the Supreme Court struck down two New Deal programs under the "intelligible principle" standard. In *Panama Refining Co. v. Ryan*, the Court struck down a key portion of the National Industrial Recovery Act (NIRA) that permitted the president to establish trade quotas, but did not establish guidance on this grant of authority.[17] In the same term, *A.L.A. Schechter Poultry v. U.S.* invalidated another key provision of the NIRA that provided for the president to adopt privately drafted "codes of conduct" in certain industries and give them the force of law.[18] These were not the decisions of a bitterly divided Court. Only Justice Benjamin Cardozo dissented in *Panama Refining*, but even he viewed the scheme in *Schechter* as "delegation run riot" and joined with his brethren.[19]

The non-delegation doctrine had found a little life, but it would not last. The last time the Supreme Court held a statute unconstitutional on non-delegation grounds was in 1935. Since then, the Court has heard several challenges to statutes on non-delegation grounds, but it has upheld them even with only vague standards guiding the use of power.[20] By 2001, the Court had so retreated from the vigorous application of the non-delegation doctrine that it found the delegation of clean air rules "requisite to protect the public health" with "an adequate margin of safety" had a satisfactorily intelligible principle in *Whitman v. American Trucking*.[21]

As the Supreme Court has reduced the importance of the non-delegation doctrine as a judicial check on executive rulemaking, the Administrative Procedure Act (APA) has arisen in its place, with a focus on due process in administrative rule making. Enacted in 1946, this statutory accord between the executive and legislative branches has changed the role of the courts from determining whether regulations are substantively constitutional to ensuring that their promulgation satisfies procedural requirements. The APA requires, among other things, adequate notice of rulemaking to the public with an opportunity for public comment, publication of the rulemaking record to ensure that comments are considered, and a judicially administrable system to oversee the process.[22] The APA does not limit the promulgation of rules themselves.

III. Congressional Oversight

A. The Legislative Veto

Congress has sought to counter the deleterious effects of delegation through a wide variety of means. From the 1930s to the 1980s, it enacted numerous provisions that allowed it to overturn an executive branch action via legislative action without presidential consent. Over 300 statutes provided for some form of these "legislative vetoes."[23]

As noted above, however, the use of legislative vetoes ended after the *Chadha* case in 1983. Examining a legislative veto that allowed one house of Congress to block a decision by the Attorney General not to deport an alien, the Supreme Court held that all legislative vetoes—not just one-house ones—were unconstitutional.[24] Writing for the Court, Chief Justice Warren Burger noted that the Constitution's provisions on bicameral-

ism and presentment[25] required that laws pass both houses of Congress and be signed by the president.[26] Blocking the decision to suspend the deportation of Chadha would have the "purpose and effect of altering the legal rights, duties, and relations of persons," which Congress could not do except through the constitutionally prescribed mechanism of lawmaking.

The disappearance of a binding legislative veto created concerns for a Congress wary of delegating broad authority to the executive branch without some sort of guarantee that its intent would be honored in the execution of that authority. One solution was to draft conference reports accompanying legislation indicating where agencies had agreed to honor committee votes as a matter of accord, even though not legally bound.[27] As constitutional scholar Lou Fisher put it, such arrangements "are not legal in effect. They are, however, in effect legal."[28] So long as comity between the branches held, such an informal substitute could help alleviate concerns.

B. The Congressional Review Act

These "gentleman's agreements" of the post-*Chadha* era, however, have not satisfied partisans of a later era. Thirteen years after *Chadha*, Congress enacted the Congressional Review Act (CRA).[29] The CRA provides a mechanism for Congress to block significant regulations from taking effect in a manner consistent with the presentment clause. To do so, each house must pass a resolution of disapproval and the president must sign it (thereby blocking his or her own administration's regulation) or Congress must override his veto. The onus is on Congress to initiate the process.

Since its 1996 enactment, the CRA has seen little use. It has successfully stopped only one regulation that was promulgated at the end of the Clinton presidency but that, due to the CRA's provisions delaying the effective date of major regulations, would not take effect until the early days of President George W. Bush's presidency. The change in executive allowed the Republican Congress to block the regulation from taking effect, which saved the Bush administration the trouble of repealing it. The single success of the CRA in such an odd factual setting illustrates its limited usefulness in stopping regulations. But Congress should arguably make wider use of the CRA to flag onerous regulations, facilitate debate over them, and rally opposition to them within Congress.[30]

IV. The REINS Act

The most recent attempt by Congress to deal with the growth in administrative government is known as the "Regulations from the Executive in Need of Scrutiny Act" or REINS.[31] Premised on the notion that "[o]ver time, Congress has excessively delegated its constitutional charge while failing to conduct appropriate oversight and retain accountability for the content of the laws it passes," REINS seeks to restore accountability and transparency by subjecting regulations to a vote of congressional approval before they take effect.[32]

REINS begins by requiring agencies to submit all rules to Congress, along with an analysis and conclusion as to whether and why the rule constitutes a "major rule." Interestingly, a "list of other related regulatory actions intended to implement the same statutory provision or regulatory objective" must be included as well; presumably, this would include any guidance, interpretations, and similar supplements.[33] Non-major rules would take effect upon submission, but major rules would not take effect until a joint resolution of approval was enacted into law. If Congress does not act on a major rule within 70 days, it would be deemed "not approved" and would not take effect. There is an exception where the president makes a determination that failure to enact the rule would imperil health, safety, or national security or would undermine the enforcement of a criminal law or violate a trade treaty (in which case the regulation would take effect for a 90-day non-renewable period).

Congress would consider resolutions of approval in accordance with "fast track" procedures—including brief time tables and prohibitions on amendment—forcing Congress to take a quick "up or down" vote on approving the regulation. Therefore, consideration of such rules would not be subject to a filibuster or the numerous devices available for delaying consideration, nor could the proposed rules be altered. The committee process would not be skipped entirely, but the roles of committees with appropriate jurisdiction would be significantly curtailed.

In the case of non-major rules, the presumption would be reversed. Congress could use fast track procedures to vote a resolution of disapproval blocking it from taking effect. Failing to do so, however, the non-major rule would take effect within 60 days of its being reported to each house of Congress.

For major and non-major rules alike, the device being used is the joint resolution. Not to be confused with the concurrent resolution, a joint resolution must, like a bill, pass each house of Congress in identical form and be signed by the president to take effect. In short, the president would be part of the process in either case. He or she would, of course, almost assuredly sign joint resolutions approving major rules.

Judicial review has only a limited role under REINS. It would amend 5 U.S.C. § 805 to read: "No determination, funding, action or omission under this chapter shall be subject to judicial review."[34] However, a court would be allowed to determine "whether a federal agency has completed the necessary requirements under this chapter for a rule to take effect."[35] It is not clear whether an agency's failure to properly classify a rule as major, probably the most important failure it could make in this scheme, would fall under this exception.

A. Arguments in Favor of the REINS Act

Supporters of the REINS Act point out the increasing role that regulations play in governing our lives and imposing hidden costs.[36] Even granting that these regulations have benefits as well as costs, and perhaps even more benefits than costs, Congress still needs to ensure that regulations accurately reflect its intent. Courts help ensure that the processes laid out by Congress are followed when regulations are created. Yet "judicial review does not delve into the policy choices agencies make—nor should it. Whether a given agency is following the best course is ultimately a decision for the political branches."[37] Courts will defer to an agency's interpretation of a statute so long as it is reasonable.[38]

Supporters argue that current processes are failing to achieve constitutionally adequate Congressional oversight. While the CRA can highlight regulations run amok, it can

only stop the regulation where there is a two-thirds majority in both houses of Congress. The legislative veto option has been foreclosed by the Supreme Court.

The increasingly broken appropriations process provides another impetus for REINS. Under normal appropriations procedures, Congress enacts twelve bills to fund the activities of U.S. government agencies. These bills sometimes contain provisions barring funding for enforcing regulations Congress believes are unlawful. In recent years, however, the congressional appropriations process has broken down to the point where all of the agencies will often be funded by a single bill. This provides fewer opportunities for amendments, and any controversial amendments that might provoke a veto will shut down the entire U.S. government. It appears unreasonable, then, to attach amendments pertaining to individual regulations.

In sum, given the increasing role of regulations and the weakening of tools for Congress to oversee their promulgation, Congress needs to approve important regulations before they take effect.

B. Arguments Against the REINS Act

Opponents of the REINS Act raise concerns regarding its impact on the administrative state as well as its constitutional viability. They condemn it as poorly tailored to the problems it is attempting to solve and warn that it will not only harm the "economy and society at large" but "fundamentally chang[e] the constitutional structure of our government."[39] In their view, proponents cite an overly broad estimate of the costs of regulations, while failing to account for their benefits.[40] At the same time, critics contend, many regulations are non-controversial despite their status as "major regulations."

Critics further charge that supporters ignore the many checks built into the regulatory process, such as the parameters of the authorizing statute, the Administrative Procedure Act, and other statutes that put in place procedural hurdles for agencies.[41] Finally, Executive Order 12866 imposes internal criteria for regulatory development within the executive branch. At the end of the process stands the judiciary ready to thwart regulations that fail to meet the many pre-existing legal requirements for rule makers. These many safeguards render the REINS Act unnecessary, they say. Meanwhile, many rules that are actually eagerly awaited by program participants or vital to the public's health and safety may be needlessly delayed by a Congress where floor time is a precious commodity and the pace is ponderous.

Critics contend that it is the REINS Act itself that would "constitute a dramatic alteration of our constitutional order."[42] Constitutional concerns include the Constitution's general structure, which assigns the regulatory task to the executive as a means of enforcing congressionally enacted statutes. Where Congress chooses to "prescribe regulatory obligations very specifically," the executive is bound. When it writes more open ended programmatic statutes, it is the job of the executive to fill in the details in a "reasoned fashion."[43] Further, the Supreme Court's ruling in *Chadha* that an executive decision could not be vetoed by an act of one house of Congress poses more constitutional problems for REINS. The REINS Act would, in effect, subject the executive's regulatory function to the same sort of one-house veto. REINS represents old wine is new bottles in this regard, and the same concerns that drove the Court to invalidate the one-house veto in *Chadha* will not be overcome by REINS' "superficially different format."[44]

At the end of the day, the REINS Act could change thousands of long standing regulatory regimes that have been in place for decades, empowering one branch of government over another, an indicia of suspicion noted by Chief Justice Rehnquist in *Morrison v. Olson.*[45] Another criteria identified in *Morrison*, the ability of the executive to exercise his constitutionally appointed function (i.e. taking care that the laws be faithfully executed), would also be undermined by REINS. Congress's ability to approve regulations is therefore suspect just as a law requiring that Congress approve a prosecution would be.

V. Conclusions and a Proposal

The REINS Act has no chance of enactment in the current political environment. Perhaps no president would support legislation that would reduce his or her leverage over the lawmaking process. It is good to see Members of Congress taking seriously the impact that regulations can have both for good and ill and asserting their responsibility to ensure that executive branch rulemaking is consistent with congressional intent.

The constitutional arguments against the REINS Act do not hold up under scrutiny. Critics concede that Congress could legislate to the nth degree of granularity,[46] but they nevertheless maintain that the constitutional order is somehow disturbed if rulemaking power is conditioned upon subsequent congressional action because this puts form over substance in evading *Chadha*. Yet it elevates form over substance to suggest that Congress has plenary authority to legislate, but only if it places the details in the U.S. Code before, rather than after, rulemaking takes place.

Until there is an administration open to the enactment of such a "fast track" regime for approval of regulations, Congress should institute reforms at its own end of Pennsylvania Avenue. This would include drafting more detailed bills that leave less policymaking discretion in the hands of the executive branch. Congress could also place a REINS-like provision in a single bill granting rulemaking authority exercised pursuant to it subject to congressional review. Limited to one law, this would be more difficult to veto, and perhaps less tempting given its narrow scope. It would also allow us to see whether Congress could handle the responsibilities that a REINS regime would entail.

To again quote Lou Fisher: "Congress will remain a power in shared administration… We should not be too surprised or disconcerted if after the Court has closed the door to the legislative veto, we hear a number of windows being raised."[47] REINS constitutes a highly transparent window through which Congress can reengage with the executive to ensure that the laws are faithfully implemented in accord with its intentions. But Congress will need to demonstrate that it has the capacity and good faith as well. Enacting a REINS-like procedure particular to the rulemaking authority in a statute could serve to rebuild trust and confidence in both branches of government in a polarized time.

Endnotes

1 *See generally* Guido Calabresi, A Common Law for the Age of Statutes

(1982). Regulatory activity as measured by the pages in the Federal Register has increased from just under 11,000 pages per year in the 1950s to just over 73,000 pages per year in the first decade of the 21st century. Written testimony of Jonathan H. Adler before the House Subcommittee on Courts, Commercial and Administrative Law, at 2 (January 24, 2011), *available at* http://judiciary.house.gov/_files/hearings/pdf/Adler01242011.pdf.

2 One estimate pegs the compliance costs of regulations at over $1 trillion annually, greater than the amount paid in individual income tax. Adler testimony, *supra* note 1 at 2.

3 For example, Congress would not dream of delegating authority to significantly alter individual tax liability to the Internal Revenue Service, but it often delegates authority over regulatory compliance costs. One possible reason for this is that people are acutely aware of how much they pay in income taxes, while they are largely oblivious to costs imposed by regulation. This points to the need for even greater protection of when it comes to regulatory burdens.

4 462 U.S. 919 (1983).

5 Chadha, 419 U.S. at 959.

6 For example, Washington State provides at RCS § 34.05.610 et. seq. for a legislative committee that has the power to recommend that rules not in accord with legislative intent or in compliance with applicable procedures be suspended, but the governor retains ultimate authority. Many states have similar bodies with some degree of power to force reconsideration of rules. In a few states, the committee can even halt them all together. *See* Kenneth D. Dean, *Legislative Veto of Administrative Rules in Missouri: A Constitutional Virus,* 57 Mo. L. Rev. 1157 *et. seq*. (1992).

7 *See, e.g.*, Stephen Breyer, *The Legislative Veto After Chadha*, 72 Geo. L.J. 785 (1984).

8 *See, e.g.*, H.R. 2727, H.R. 2990.

9 U.S. Const. art. 1, § 1.

10 Wayman v. Southard, 23 U.S. 1 (1825).

11 *Id.* at 43.

12 *Id.*

13 *Id.* at 46.

14 J.W. Hampton, Jr. & Co. v. U.S., 276 U.S. 394, 401 (1928).

15 Hampton, 276 U.S. at 409.

16 Douglas Ginsberg, *Legislative Powers: Not Yours to Give Away*, Heritage Foundation Report (Jan. 6, 2011), *available at* http://www.heritage.org/research/reports/2011/01/legislative-powers-not-yours-to-give-away. By that time even such vague phrases such as "in the public interest" or "for the public convenience" had been upheld. Lou Fisher, Constitutional Conflicts Between Congress and the President 91 (1997).

17 Panama Refining v. Ryan, 293 U.S. 388 (1935).

18 Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

19 *Id.* at 553.

20 *See, e.g*., Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980); Mistretta v. U.S, 448 U.S. 361 (1989).

21 427 U.S. 426 (2001).

22 5 U.S.C. § 551 *et. seq.*

23 Adler testimony, *supra* note 1 at 5.

24 Chadha, 462 U.S. at 974 (White, J., dissenting).

25 U.S. Const. art 1, § 7.

26 Chadha, 468 U.S. at 958.

27 Fisher, *supra* note 16 at 157.

28 *Id.* at 158.

29 5 U.S.C. § 801, *et seq*.

30 Kevin Kosar, *Three Steps in Reasserting Congress in Regulatory Policy*, R Street Policy Study at 6.

31 The REINS Act has been introduced in various iterations in both chambers since 2010. The current version introduced in the House during the 114th Congress by Representative Todd Young (R-Indiana), H.R. 427, will be used for purposes of this article. Previous iterations include H.R. 10 in the 112th Congress, which passed the House but was never considered in the Senate. In the 113th Congress, it was H.R. 367 and also passed in the House. As of publication, H.R. 427 has been reported out of the House Judiciary Committee and awaits consideration in the House. A Senate companion, S. 226, introduced by Senator Rand Paul (R-Kentucky), remains in the Senate Committee on Homeland Security and Governmental Affairs to which it was referred upon introduction.

32 H.R. 427 § 2.

33 H.R. 427 § 3.

34 H.R. 227 § 3.

35 *Id.*

36 Adler testimony, *supra* note 1 at 2-3.

37 *Id.* at 3.

38 Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

39 Written testimony of Sally Katzen before the House Subcommittee on Regulatory Reform, Commercial and Administrative Law (January 24, 2011), *available at* http://judiciary.house.gov/_files/hearings/pdf/Katzen01242011.pdf.

40 *Id.* at 3.

41 For example, see the Congressional Review Act, the Unfunded Mandates Reform Act, the Regulatory Flexibility Act, and the Small Business Regulatory Fairness Act.

42 Written testimony of Ronald Levin before the House Subcommittee on Regulatory Reform, Commercial and Administrative Law, at 2 (March 5, 2013), *available at* http://judiciary.house.gov/_files/hearings/113th/03052013_3/Levin%2003052013.pdf.

43 *Id.*

44 *Id.* at 8.

45 487 U.S. 654 (1988).

46 Levin testimony, *supra* note 42 at 2.

47 Fisher, *supra* note 16 at 159.

Perez v. Mortgage Bankers Association: Portending a Return to Judicial Engagement

*By Stephen A. Vaden**

In a Term full of blockbuster cases considering the fate of Obamacare and establishing gay marriage as a constitutional right, it was easy to miss another case that may portend a larger and potentially more consequential turn in jurisprudence yet to come.[1] *Perez v. Mortgage Bankers Association* appears, at first glance, to be an esoteric administrative law case addressing a quirk in the D.C. Circuit's standard of review for agency regulations.[2] However, buried within the series of concurring opinions in this case lie signs that a majority of the Court might be willing to reclaim for the judiciary the preeminent role in interpreting the vast sea of federal regulations that govern Americans' everyday lives. The main question is how far the Court will go in defining deference down.

I. The Case

Executive and administrative employees have long been exempt from the forty-hour workweek rule under the Fair Labor Standards Act, but the Secretary of Labor determines who is an "administrative" employee. In 2004, through notice-and-comment rulemaking, the Labor Secretary promulgated regulations that exempted "[e]mployees in the financial services industry" who "generally meet the duties requirements for the administrative exception."[3] The regulations further specified that "an employee whose primary duty is selling financial products does not qualify" for the exemption.[4] Following the new regulations' promulgation, the Labor Secretary interpreted them to exempt mortgage-loan officers from the minimum-wage and maximum-hour requirements. Because the Labor Secretary's ruling constituted an "interpretation" of her prior-issued regulations, the Administrative Procedure Act (APA) did not require the Labor Department to engage in further notice-and-comment rulemaking.[5]

This interpretation governed until the Bush Administration gave way to the Obama Administration. In 2010, the Labor Department reexamined its interpretation of the administrative exemption and this time ruled that mortgage-loan officers were *not* exempt from the wage-and-hour limitations. Despite the about-face, the Department did not undergo the notice-and-comment process; it just issued a new administrative "interpretation" of its 2004 regulations. The Mortgage Bankers Association sued, and the D.C. Circuit invalidated the 2010 interpretation.[6]

Applying its nearly twenty-year-old *Paralyzed Veterans* doctrine, the D.C. Circuit found that the Labor Department could not change its interpretation of the 2004 regulations without first going through the notice-and-comment process. *Paralyzed Veterans* allowed agencies to issue a "definitive" interpretation of their existing regulations; but once the agency issued an initial definitive interpretation, it could not change that interpretation without going through the notice-and-comment process. The D.C. Circuit reasoned that allowing an agency to revise a prior interpretation without notice-and-comment would effectively allow it to amend the rule it purports to interpret.[7] Because the APA requires that amendments to regulations go through the notice-and-comment process, the D.C. Circuit held that changes to definitive interpretations of regulations must follow the same procedural path.[8] The Mortgage Bankers Association's case was a simple application of the *Paralyzed Veterans* rule. The Labor Department issued its "definitive" interpretation exempting mortgage-loan officers from the wage-and-hour requirements in 2006. In 2010, it reversed this interpretation without notice and comment. Thus, under *Paralyzed Veterans*, the Labor Department's 2010 interpretation was invalid.[9]

The case was equally simple for the Supreme Court—except in the government's favor. The APA establishes the maximum procedural requirements for agency rulemaking; courts lack the authority to add additional hurdles.[10] The challenged Labor Department rule was an interpretive rule, and the Mortgage Bankers Association had waived its opportunity to argue otherwise.[11] The APA states that notice-and-comment procedures do "not apply . . . to interpretive rules."[12] The *Paralyzed Veterans* doctrine thus violates the plain text of the APA by imposing a procedural requirement the statue expressly disclaims. A rule that can be promulgated without notice-and-comment may be amended the same way.[13]

II. The Concurrences

If that is all *Perez* said, it would not warrant more than a passing mention. It is what three Justices went on to say in their concurrences that gives *Perez* its true import. While the D.C. Circuit may have chosen the wrong remedy, it did identify a very real problem: the ability of the administrative state to insulate its ever-expanding regulatory reach from meaningful judicial review. Current Supreme Court precedent requires federal courts to defer to agencies' interpretations of their own regulations. Known as *Seminole Rock* or *Auer* deference—after the cases that established and reaffirmed the rule, respectively—it requires judicial deference to almost any interpretation an agency elects to give its regulations.[14] Those who are subject to these interpretive rules see it as rulemaking without checks or balances. Justices Alito, Scalia, and Thomas view this problem as one of the Supreme Court's own creation and therefore a problem that only the Supreme Court can remedy. Their three separate concurrences, taken together, suggest that the era of administrative deference may have passed its peak and that a majority may be forming to reassert the judiciary's role to say what the law is.

Justice Alito's short concurrence simply stated a willingness to reconsider the Supreme Court's longstanding *Seminole Rock* doctrine granting deference to an agency's interpretation

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of its own regulations.[15] Justices Scalia and Thomas, however, delved more deeply into what they see as the problem at hand. Justice Scalia's opinion identified three key legal and practical results of the Court's decision in *Seminole Rock*. First, by giving deference to an agency's interpretation of its own regulations, the Court has upset the balance between the executive and judicial branches established by the text of the APA. While the APA provides agencies with the power to issue rules interpreting their own regulations and exempts those rules from notice-and-comment procedures, it also provides that the federal courts "shall . . . interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of an agency action."[16] Thus, as Justice Scalia sees it, Congress gave agencies the power to "advise the public" about their preferred interpretation of their own regulations through interpretive rules, but it gave the judiciary the final say over what agency regulations mean.[17] By mandating that federal courts defer to the interpretations agencies give their own regulations, the Supreme Court has compelled "reviewing court[s] to 'decide' that the text means what the agency says."[18] The courts have thus neutered their own statutory power to "interpret . . . and determine the meaning or applicability of . . . agency actions."[19]

Second, this judicial deference destroys the practical difference between what the APA calls substantive rules—which are meant to have the binding effect of law and must go through the notice-and-comment process—and interpretive rules—which do not. If a court must defer to an agency's interpretive rule, the distinction between substantive and interpretive rules is meaningless to the regulated party. It must follow both because the courts will defer to the agency and enforce both.[20] Interpretive rules therefore "*do* have the force of law."[21] As a necessary corollary, *Seminole Rock* and its progeny allow agencies to control the scope of their discretion. By writing broad and vague substantive rules, an agency can leave gaps to fill later through interpretive rules that are unhindered by notice-and-comment procedures and the additional judicial scrutiny those procedures afford.[22] Courts cannot force agencies to respond to cogent criticism submitted through public comments when no comments are required.[23]

Third, Justice Scalia's concurrence attacks the foundation of modern administrative jurisprudence while also casting an unstated accusatory finger back at the Justice himself. Taken in its strongest form, his concern about the judiciary's abdication of its responsibility "to decide whether the law means what the agency says it means" calls into question not just *Seminole Rock*[24] but also *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[25] which requires courts to show deference to agency interpretations that resolve ambiguities in congressional statutes, *i.e.*, to defer to an agency's substantive rules.[26] The APA's provision granting courts the authority to "determine the meaning of . . . agency action" applies to all agency actions, not just the review of interpretive rules.[27] *Chevron*, therefore, seems to be vulnerable. But courts might tolerate abridgment of their right to have the final say on the meaning of substantive, but not interpretive, rules for a non-textual reason: the traditional role of executive authority.[28] The executive branch traditionally has received leeway when resolving ambiguities in congressionally-authored statutes but not when resolving ambiguities the executive branch creates itself. Whether such a "tradition" should override a statutory command is a question Justice Scalia here leaves unaddressed.

Also left unstated is the role Justice Scalia played in creating the conundrum in which the concurring Justices find themselves. He wrote the Court's opinion in *Auer*, which also involved interpretive rules under the Fair Labor Standards Act, and which not only reaffirmed *Seminole Rock* but also declared that the contrary position he now supports "would make little sense."[29] And only two Terms ago in *City of Arlington v. FCC*, Justice Scalia discounted the concerns expressed by Justices Roberts, Kennedy, and Alito about judicial deference to an agency's interpretation of its own jurisdiction[30] by declaring that "[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency."[31] Any other result would call into question "*Chevron* itself."[32] Two Terms later, it is Justice Scalia raising the very questions he once dismissed.

Justice Thomas joined in this questioning at a more theoretical level and without a concern for the continuing validity of *Chevron* or other Supreme Court precedents. His only stated concerns are that (1) the Court defend judicial independence, which would mean that (2) the only interpretation of a law or rule that can govern is the one that a court independently determines is the best based on the text of the provision.[33] Starting, as is his practice, with the history of the Court's jurisprudence, Justice Thomas notes that the language from *Seminole Rock* that is causing such constitutional consternation is dicta.[34] The *Seminole Rock* Court found that the text of the regulation "clearly" determined the question at issue.[35] There was no need to defer because there was no ambiguity to interpret. Nonetheless, *Seminole Rock*'s dicta spread throughout federal jurisprudence and now governs an astounding number of administrative actions covering topics as varied as forestry policy to criminal law.[36]

Seminole Rock's "holding," in Justice Thomas's view, has caused the judiciary to relinquish its power to definitively interpret the law to the agencies of the executive branch. Only through deference could a regulation whose text has not changed be given two diametrically opposite meanings in four years. Thus, Thomas fears, the Court's abdication of its role is leading the federal government to become a government of men and not of laws. The meaning of a text will vary not with its words but with the composition of the administration enforcing it.[37] Justice Thomas finds the origins of this transfer of power in the "belief that bureaucrats might more effectively govern the country than the American people"—a belief that originated in the writings of President Woodrow Wilson and his fellow "progressives."[38] Given the gravity of these constitutional concerns, Justice Thomas calls for reconsideration of "the entire line of precedent beginning with *Seminole Rock*."[39]

III. Conclusion

Perez therefore announces that at least three Justices are willing to reconsider *Seminole Rock*, *Auer*, and their progeny. Looking past *Perez*, however, a majority of the Court in recent Terms has expressed unease with the amount of deference agencies receive from the judiciary. In *City of Arlington*, Justices

Kennedy and Alito signed onto Chief Justice Roberts's dissent, which called on the Court to stop assuming that Congress has delegated to agencies the power to interpret every ambiguity in a statute. Instead, the Chief Justice argued that courts should determine independently whether Congress has delegated the power to interpret the specific ambiguity at issue.[40] Chief Justice Roberts and Justice Kennedy put this principle into practice in the second Obamacare case, *King v. Burwell*.[41] There, Chief Justice Roberts declined to defer to the IRS's interpretation of the phrase "an Exchange established by the State."[42] The Court rather held that Congress had not delegated to the IRS the authority to interpret a statutory provision involving the price of health insurance—an area wholly outside the IRS's expertise. The Court instead interpreted the language on its own without showing deference to the agency.[43] A redefinition of the Court's role in interpreting administrative statutes and regulations, therefore, already may be underway.

The Justices may differ on how far such a reexamination of the Court's administrative law jurisprudence should go. A reconsideration of *Chevron* may or may not be on the table.[44] It does appear that the days of federal courts deferring to agencies' interpretations of their own regulations are numbered.[45] Whether or not the Court chooses to go beyond *Seminole Rock* and its progeny and reexamine deference more broadly will determine how far the Court goes in reclaiming from the executive branch the judiciary's power to say what the law is.

Endnotes

1 *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (finding that substantive due process mandates a right to gay marriage); King v. Burwell, 135 S. Ct. 2480 (2015) (rejecting a statutory challenge to tax credits under Obamacare meant to allow for recipients to purchase health insurance on state marketplaces).

2 135 S. Ct. 1199 (2015).

3 29 C.F.R. § 541.203(b).

4 *Id.*

5 *See* 5 U.S.C. § 553(b)(A) (providing that the notice-and-comment requirement "does not apply . . . to interpretative rules").

6 Mortgage Bankers Ass'n v. Harris, 720 F.3d 966, 967 (D.C. Cir. 2013).

7 Paralyzed Veterans of Am. v. D.C. Arena, L.P., 117 F.3d 579, 586 (D.C. Cir. 1997); *see also* 5 U.S.C. § 551(5) (defining "rule making" to include "amending or repealing a rule").

8 Paralyzed Veterans, 117 F.3d at 586; *see* 5 U.S.C. § 553 (requiring notice-and-comment procedures for rule making).

9 Mortgage Bankers Ass'n, 720 F.3d at 968.

10 Perez, 135 S. Ct. at 1207.

11 *Id.* at 1210 (finding waiver).

12 5 U.S.C. § 553(b)(A).

13 Perez, 135 S. Ct. 1206.

14 *See* Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

15 Perez, 135 S. Ct. at 1210-11 (Alito, J., concurring in the judgment); *see also* Seminole Rock, 325 U.S. at 414.

16 5 U.S.C. § 706.

17 Perez, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment) (emphasis removed).

18 *Id.* at 1212.

19 5 U.S.C. § 706.

20 Perez, 135 S. Ct. at 1211-12.

21 *Id.* at 1212.

22 *Id.*

23 *Cf.* Lilliputian Sys., Inc. v. Pipeline & Hazardous Materials Safety Admin., 741 F.3d 1309, 1313-14 (2014) (remanding rule to agency because it failed to respond to comment noting its proposed rule would treat similar products differently).

24 Perez, 135 S. Ct. at 1211.

25 467 U.S. 837, 842-43 (1984).

26 Perez, 135 S. Ct. at 1211.

27 *See* 5 U.S.C. §§ 701(a), 706.

28 Perez, 135 S. Ct. at 1212.

29 *See* Auer, 519 U.S. at 463.

30 *Compare* City of Arlington v. FCC, 133 S. Ct. 1863, 1877-78 (2013) (Roberts, C.J., dissenting) (raising concerns that Justice Scalia's opinion risks putting legislative, executive, and judicial power all in the agencies' hands, "the very definition of tyranny"), *with* Perez, 135 S. Ct. at 1211 (Scalia, J., concurring in the judgment) (arguing that the APA requires that "courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations").

31 City of Arlington, 133 S. Ct. 1863, 1868 (Scalia, J.)

32 *Id.* at 1873.

33 Perez, 135 S. Ct. at 1217-21 (Thomas, J., concurring in the judgment).

34 *Id.* at 1214.

35 Seminole Rock, 325 U.S. at 415.

36 *See* Perez, 135 S. Ct. at 1214 (string citation listing the "broad spectrum of subjects" to which *Seminole Rock* has been applied).

37 *Id.* at 1222 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)).

38 *Id.* at 1223 n.6.

39 *Id.* at 1225.

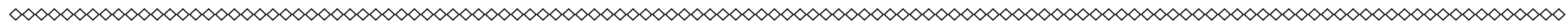
40 City of Arlington, 133 S. Ct. 1883 (Roberts, C.J., dissenting).

41 135 S. Ct. 2480 (2015).

42 *Id.* at 2488 (quoting 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(i)).

43 *Id.* at 2488-89.

44 *Compare* City of Arlington, 133 S. Ct. at 1885-86 (Roberts, C.J., dissenting) (disclaiming Justice Scalia's charge that the dissent takes aim at *Chevron*),



with Perez, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment) (acknowledging that the concerns raised may affect *Chevron*), *and* Perez, 135 S. Ct. at 1225 (Thomas, J., concurring in the judgment) (calling on the Court to examine "the entire line of precedent requiring deference, beginning with *Seminole Rock*," in light of the Constitution's delineation of the separation of powers).

45 *Se*e Decker v. Nw. Envt'l Def. Ctr., 133 S. Ct. 1326, 1339, 1342 (2013) (Scalia J., concurring in part and dissenting in part) (repudiating *Auer* as a doctrine with "no principled basis" and urging that "it is time" to "reconsider *Auer*"); *see also id.* at 1338 (Roberts, C.J., and Alito, J., concurring) ("It may be appropriate to reconsider [*Auer*] in an appropriate case.").

Civil Rights

California's SCA 5 and Racial Preferences in Education

*By Anthony T. Caso**

Note from the Editor:

This article is about racial preferences in education, specifically in the battle over SCA 5. The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• *California's SCA 5: Dealing with the Wide Democratic Tent*, Daily Kos (March 18, 2014), *available at* http://www.dailykos.com/story/2014/3/18/1285555/-California-s-SCA-5-Dealing-with-the-wide-Democratic-tent.

• Ben Christopher, *Finally, A Way to Diversify Cal Universities? Or "The Most Racist Bill" in State History?*, California Magazine (March 10, 2014), *available at* http://alumni.berkeley.edu/california-magazine/just-in/2014-03-19/finally-way-diversify-cal-universities-or-most-racist-bill.

• Josie Huang, *Complicated relationship: Asian-Americans and affirmative action*, KPCC (March 13, 2014), *available at* http://www.scpr.org/blogs/multiamerican/2014/03/13/16074/sca-5-asian-americans-affirmative-action/.

• Bernadette Lim, *Being Asian-American in the Affirmative Action Debate*, Huffington Post (May 19, 2015), *available at* http://www.huffingtonpost.com/bernadette-lim/being-asianamerican-in-th_b_7295246.html.

On May 15, 2015, a coalition of 60 organizations filed a complaint with the United States Department of Education's Office of Civil Rights (OCR) alleging that Harvard and other Ivy League schools discriminated against Asian American applicants in the college admissions process.[1] According to the complaint, students that colleges identify as Asian American must score 140 points higher on the SAT than similarly qualified white applicants in order to win admission to these elite schools.[2] While Harvard and other similar schools proudly boast of their use of affirmative action to maintain a diverse student body,[3] the OCR complaint alleges that there is a cap on Asian American students at these schools. The complaint alleges that the Ivy League schools are intent on limiting the population of Asian American students in the same manner that they limited the population of Jewish students nearly 100 years ago.[4]

California's flagship university was not named in the complaint. But how did UC Berkeley—the jewel in the crown of the California university system—avoid being named? Although the University of California earnestly wishes for the legal authority to use racial preferences in their admissions,[5] the California Constitution as amended by Proposition 209 limits its authority to do so.

The constitutional amendment instituted by Proposition 209 has been in effect since 1997, but it recently barely survived an attempt to overturn its restrictions on racial preferences in state university admissions. Asian American groups, not otherwise known for their political activism in California, used radio and social media to generate a firestorm of protest over the proposal to change Proposition 209. These groups succeeded in forcing the California legislature to drop a proposal to put a measure on the ballot for voters to determine whether to allow race-based admissions to resume in California.

I. California Proposition 209

Proposition 209, approved by California voters in 1996, added Article I, section 31 to the California Constitution. The measure implemented the broadest nondiscrimination principle into California law providing: "The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." The measure further defined "state" to include every public entity (state and local) and expressly included the University of California, the California State University, California community colleges, and all public schools in California.[6]

Proposition 209 did not have an immediate effect on the University of California system. The Regents of the University had already banned the consideration of race in admissions. Ward Connerly, an African-American businessman appointed to the Regents in 1993 by then-Governor Pete Wilson, spearheaded the effort to end race preferences in UC admissions. The 1995 decision to ban race in UC admissions made him "one of the most vilified and controversial figures in higher education," according to the San Francisco Chronicle.[7] From that narrow victory with the UC Regents, Connerly decided to broaden this principle of nondiscrimination to nearly all governmental practices in California. Proposition 209 was the result of those efforts. Despite an active campaign opposing the measure, California voters approved Proposition 209 by a margin of 54 to 45 percent.[8]

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II. The Legal Challenges to Proposition 209

Proponents of race preferences immediately challenged the measure as a violation of the Equal Protection Clause of the Fourteenth Amendment. United States District Court Judge Thelton Henderson enjoined the measure, but the Ninth Circuit Court of Appeals vacated the judgement and upheld the state constitutional amendment.[9] The court ruled that, "[a]s a matter of 'conventional' equal protection analysis, there is simply no doubt that Proposition 209 is constitutional."[10] The court also rejected the political structure argument—that by placing the ban on race preferences in the state constitution, the measure violates the political rights of minorities to seek preference laws in the future. The court noted that "[t]he alleged 'equal protection' burden that Proposition 209 imposes on those who would seek race and gender preferences is a burden that the Constitution itself imposes."[11] The court concluded: "The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits."[12]

That was not the end of the legal challenges, however. In 2010, San Francisco urged the California state courts to void Proposition 209 using the same political structure argument rejected by the Ninth Circuit. The California Supreme Court ultimately rejected the argument.[13] Affirmative action advocates made another attempt to overturn Proposition 209 in the Ninth Circuit, this time joined by the president of the University of California system. Again, however, the court rejected the challenge.[14] The United States Supreme Court finally, after eighteen years of legal battles, rejected application of the political structure argument to laws outlawing preferences and discrimination.[15]

Opponents of Proposition 209 also sought to undo it legislatively. The state legislature attempted to override it with a statute asserting that the measure did not define "discrimination" and adopting the International Convention on the Elimination of All Forms of Racial Discrimination as the controlling definition. That international convention excepts preferences from the definition of "discrimination" if they are meant to ensure "adequate advancement of certain racial or ethnic groups or individuals requiring such protection." A California appellate court rejected this definition as an attempt to amend the state constitution by statute.[16]

III. Race Preferences at the University of California

Before Ward Connerly initiated his campaign to ban discrimination and preferences in UC admissions and before Proposition 209, the university system considered the race of applicants for admission.[17] To preserve its elite status, the University of California adopted a plan in the late 1950s to admit only the top 12.5 percent of California high school graduates. The UC Berkeley campus sought to counter the impact of this restriction on minority groups by instituting an Education Opportunity Program in 1964. Under that program, Berkeley could select up to two percent of the incoming freshman class from a pool of candidates that did not otherwise meet the entrance qualifications. When the university began requiring all applicants to take the SAT in 1967, the negative impact on admission of black and Hispanic students grew. Conversely, the number of Asian American students grew. Berkeley compensated for this negative impact on blacks and Hispanics by selecting up to four percent of the incoming class from applicants that did not meet the same qualifications as other students.[18]

In the 1980s, the percentage of Asian American students who met the academic qualifications for UC Berkeley grew, but the number admitted dropped sharply. However, after Proposition 209 was in effect for a decade, the percentage of Asian American students at UC Berkeley increased from 32 percent to more than 42 percent.[19] Thus, when the California Senate proposed a ballot measure to amend Proposition 209 in order to allow race-based admissions to begin again in California, the Asian American community was understandably nervous.

IV. SCA 5–the Proposal to Amend Proposition 209

State Constitutional Amendment 5 (SCA 5) was proposed to amend Article I, Section 31 of the California Constitution by removing "public education" from the list of areas where racial discrimination and preferences were prohibited and by removing state universities, colleges, and public schools from the definition of "state" actors who were prohibited from using race-based preferences. The measure would have removed all state law barriers to race-based admissions at the University of California, and other race-based programs in the California State University system and at all public primary and secondary schools.

SCA 5 was introduced in the California State Senate by Senator Ed Hernandez, with Senate co-authors Block, De Leon, Lara, Leno, and Steinberg.[20] The measure had Assemblyman Bradford as a principal co-author, and Assemblyman Garcia as a co-author—all Democrats at a time when Democrats held a super-majority in both chambers of California Legislature.[21] With this backing, the measure easily passed the Senate. Although the authors believed they had an easy road to passage in the Assembly as well, they encountered an unexpected roadblock.

V. The Rise of the Asian American Community as a Political Force against Race Preferences

As noted above, when Asian American groups heard about the proposed change to Proposition 209, they were concerned, and for good reason. A recent study of admission practices by highly selective private universities established that "Asian applicants have 67% lower odds of admission than white applicants with comparable test scores."[22] While the concern of the Asian American community was not surprising, its input into the political process in California was—and it proved decisive. In California, the Asian American community "has traditionally leaned liberal Democratic."[23] That is true at least as far as voting goes. According to Cathy and Alan Zhang who host "Engage America," a radio show in the San Francisco Bay Area aimed at Chinese Americans in the area, "Chinese people care about education, but do not do politics."[24] This interest in education overcame the reluctance to engage in politics, and the Chinese American community in particular suddenly learned how to organize.

There were Asian American interest groups involved in the fight against SCA 5. These included the Joint Chinese University Alumni Association, Chinese Alliance for Equality, and the

Vietnamese Cambodia and Laos Association of America.[25] The 80-20 National Asian American PAC also actively campaigned against the measure.[26] A change.org petition generated more than 112,000 signatures opposing SCA 5. In a telephone interview I conducted, Cathy and Alan Zhang explained that their radio show also helped spur the Chinese American community to action. They explained that immigrants from mainland China avoided political participation in the past. Their experience in China made them believe that such participation was dangerous. This issue, however, struck a nerve with a community concerned with the education of their children. An example of that intense interest in education are the after school programs targeted at Chinese American students in particular, with students spending as much as 15 hours per week in these extra classes.[27] The Zhangs interviewed Senator Leland Yee about the proposed constitutional amendment and organized a forum to discuss the measure. The San Jose Mercury News covered the forum and other reporters started asking questions about how the amendment might impact college admissions of Asian Americans at the University of California.[28]

The most successful organizing efforts seem to have happened on social media. SCA 5 became a topic of conversation on various Facebook pages. People in the community began learning about the measure when mitbbs.com, a Chinese Language BBS forum, discussed the proposed amendment. WeChat, a phone-based group-messaging platform was one tool that advocates used to spread the word about SCA 5. Weibo, a Chinese language social network similar to Twitter was also instrumental in organizing the community.[29] As the Los Angeles Times reported, "the coalition that shot down SCA 5 was not a traditional political movement… Some were simply mothers with children preparing for college."[30]

VI. Conclusion

As the push to pass SCA 5 fell apart, Senate leader Darrell Steinberg called for a discussion of affirmative action, arguing that "affirmative action is not quotas."[31] However, admission to a selective university, like the University of California (and especially UC Berkeley), is a zero-sum game. Admission of one student requires exclusion of another. The Asian American communities that came together in opposition to SCA 5 understood that concept, and they understood that they would be the likely losers if the University of California were to use racial preferences for university admissions. There are still allegations that the University of California continues to use race preferences in some of its admissions decisions. UCLA Professor Tim Groseclose argues that race is a factor in the second round of admissions, with African American students more than twice as likely as Asian American students to advance from the "maybe" pile of applications to admission.[32] Still, there is a difference between the hidden use of race and the explicit use of race that imposes a ceiling on the number of Asian American students permitted to attend the most selective schools.

The legal action filed against elite universities argues that these selective universities use race in their admissions decisions to disadvantage Asian American students. Comments by the Harvard General Counsel, who stated, "We will vigorously defend the right of Harvard… to continue to seek the educational benefits that come from a class that is diverse on multiple dimensions,"[33] appear to support that argument. To the students applying for admission with near perfect test scores and superlative grade point averages, that can sound like the universities are using race in admissions decisions to ensure that there are not "too many" of some groups on campus. That fear motivated the Asian American community in California to come to the defense of Proposition 209. "Mothers with children preparing for college" can be a force in California politics.

Endnotes

1 Complaint Against Harvard University and the President and Fellows of Harvard College for Discriminating Against Asian-American Applicants in the College Admissions Process, Submitted to the Office for Civil Rights, U.S. Department of Education and the Civil Rights Division, U.S. Department of Justice, May 15, 2015 (Complaint). The Department of Justice quickly dismissed the complaint, purportedly because of ongoing litigation raising the same issues. Brief for the California Association of Scholars as Amicus Curiae, p. 29-30 *Fisher v. University of Texas at Austin*, Supreme Court No. 14-981.

2 Complaint at 13; *see also* Priceonomics, *Do Elite Colleges Discriminate Against Asians*, August 24, 2013, *available at* http://priceonomics.com/post/48794283011/do-elite-colleges-discriminate-against-asians.

3 *See* California Association of Scholars Brief at 27, n.19.

4 *Id.* at 27.

5 See footnote 14, *infra.*

6 Cal. Const. Art. I, § 31(f).

7 Tanya Schevitz, *Connerly Retiring as UC Regent—Leaves Controversial Legacy*, San Francisco Chronicle, Jan. 19, 2005, *available at* http://www.sfgate.com/education/article/Connerly-retiring-as-UC-regent-leaves-2704643.php.

8 California Secretary of State, *Statement of the Vote*, November 5, 1996, at p. 36, *available at* http://elections.cdn.sos.ca.gov/sov/1996-general/sov-complete.pdf.

9 *Coalition for Economic Equity v. Wilson*, 122 F. 3d 692, 710 (9th Cir. 1997).

10 *Id.* at 701.

11 *Id.* at 709.

12 *Id.* at 708.

13 *Coral Construction, Inc. v. City and County of San Francisco*, 50 Cal. 4th 315, 332 (2010).

14 *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1132 (9th Cir. 2012). UC President Mark Yudof was named by the plaintiffs as a defendant in the action. Both he and Governor Brown argued that Proposition 209's ban on race preferences in university admissions violated the Equal Protection Clause. Governor Brown's Answering Brief, 2011 WL 2822871.

15 *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1638 (2014) (plurality).

16 *C&C Construction v. Sacramento Municipal Utilities Dist.*, 122 Cal. App. 4th 284, 302 (2004).

17 *See Regents of the University of California v. Bakke*, 438 U.S. 265, 269 (1978).

18 PBS Frontline, *History of Admissions at UC Berkeley*, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/sats/etc/ucb.html.

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21 Sharokina Shams, *Democrats lose supermajority control in CA Legislature*, KCRA.com, November 5, 2014, *available at* http://www.kcra.com/politics/democrats-lost-supermajority-control-in-ca-legislature/29570378.

22 Priceonomics, *Do Elite Colleges Discriminate Against Asians*, *supra* note 2.

23 Frank Shyong, *Affirmative action amendment divides state's Asian Americans*, Los Angeles Times, May 18, 2014, *available at* http://www.latimes.com/local/la-me-asian-divisions-20140519-story.html.

24 Interview with Cathy and Alan Zhang, September 30, 2014.

25 Zen Vuong, *'Affirmative action' amendment SCA 5 withdrawn for revision*, Pasadena Star News, October 9, 2014, *available at* http://www.pasadenastarnews.com/social-affairs/20140317/affirmative-action-amendment-sca-5-withdrawn-for-revision.

26 Laurel Rosenhall, California lawmakers shelve effort to bring back affirmative action, Sacramento Bee, March 17, 2014, *available at* http://www.sacbee.com/2014/03/17/6245623/california-lawmakers-shelve-effort.html#storylink=cpy.

27 Zen Vuong, 'Affirmative action' amendment SCA 5 withdrawn for revision, Pasadena Star News, October 9, 2014 (http://www.pasadenastarnews.com/social-affairs/20140317/affirmative-action-amendment-sca-5-withdrawn-for-revision).

28 Interview, *supra* note 24.

29 Shyong, *Affirmative action amendment divides state's Asian Americans*, *supra* note 23.

30 *Id*.

31 Laurel Rosenhall, *California Lawmakers Shelve Effort to Bring Back Affirmative Action*, Sacramento Bee, March 17, 2014, *available at* http://www.sacbee.com/2014/03/17/6245623/california-lawmakers-shelve-effort.html#storylink=cpy.

32 Maxim Lott, *UCLA prof says stats prove school's admissions illegally favor blacks*, Fox News, May 13, 2014, *available at* http://www.foxnews.com/us/2014/05/13/ucla-prof-says-stats-prove-school-admissions-illegally-favor-blacks/.

33 *Asian groups file federal complaint against Harvard over admission practices*, Fox News, May 17, 2015, *available at* http://www.foxnews.com/us/2015/05/17/asian-groups-filed-federal-complaint-against-harvard-over-admission-practices/.

Behind the Scenes: A Closer Look at OCR's Enforcement Authority

*By Kent Talbert**

Note from the Editor:

This article is about the Department of Education's Office of Civil Rights' enforcement authority under Title IX. The Federalist Society takes no position on particular legal or public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• United States Department of Justice, Civil Rights Division, *Title IX Legal Manual*, http://www.justice.gov/crt/title-ix (see especially Section VII, Federal Funding Agency Methods to Enforce Compliance).

• Know Your IX, *Title IX: The Basics*, http://knowyourix.org/title-ix/title-ix-the-basics/.

• Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

I. Introduction

By the latest count, 129 institutions of higher education are under investigation by the Office for Civil Rights (OCR) of the U.S. Department of Education (Department) for their handling of sexual violence reports[1] under Title IX of the Education Amendments of 1972 (Title IX).[2] In 2014, six institutions of higher education executed Title IX resolution agreements concluding pending complaints or compliance reviews of sexual violence, sexual harassment, or both.[3] These resolution agreements are long and complex, and they bind colleges and universities to dozens of obligations that impact many areas of campus life. While no one questions the binding nature of these agreements, there is much debate about the origin and scope of OCR's authority to bind colleges and universities through such agreements. This article briefly analyzes the statutory and regulatory framework underlying OCR's enforcement authority, as well as the application of the framework to Title IX resolution agreements.

II. Title IX Statutory and Regulatory Framework

A. Statute

The key words of Title IX are short and simple: "No 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."[4] The Department "is authorized and directed to *effectuate* the provisions of section 1681 [Title IX's prohibition against sex discrimination] . . . by issuing *rules, regulations, or orders of general applicability.*"[5] Title IX does not grant OCR any authority to "effectuate" the prohibition against sex discrimination through sub-regulatory guidance.[6] "[R]ules, regulations . . . [and] orders of general applicability" are the sole means of effectuating or carrying out the prohibition of § 1681.[7] All three terms have meanings distinct from "guidance."[8]

The administrative component of Title IX, 20 U.S.C. § 1682, specifically authorizes two means of effecting "[c]ompliance with any requirement [rule, regulation or order of general applicability] adopted pursuant to this section [§ 1682]." The first is "by the termination of or refusal to grant or to continue assistance . . . to any recipient to whom there has been an express finding on the record, after an opportunity for hearing, of a failure to comply with such requirement."[9] Section 1682 provides a recipient with a formal enforcement process consisting of "an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement."[10]

The second means of effecting compliance is "by any other means authorized by law."[11] The obvious questions that arise are "What are these 'other means'?" and "What is the scope of this legal authority?" Section 100.8(a) defines "any other means authorized by law" to include a referral to the U. S. Department of Justice, or an applicable proceeding under state or local law.[12] This author is unaware of the Department of Education ever invoking state or local law proceedings to enforce Title IX.[13]

Further, no compliance or enforcement action may be taken by the Department of Education against a federal funding recipient[14] until the recipient has been "advised . . . [by the Department of Education] of the failure to comply with the requirement and [the Department of Education] has determined that compliance cannot be secured by *voluntary means*."[15] By referring to "compliance . . . by *voluntary means*[,]" Congress understood that a separate voluntary effort of some kind between the Department and a recipient could potentially resolve an issue—apart from "an express finding on the record, after [an] opportunity for [a] hearing."[16] The precise contours of "voluntary means" are unclear; however, the "voluntary means" used by the Department must have a basis in law.[17] The word "law" occurs once in 20 U.S.C. § 1682. The context suggests

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Further discussion by the author of Title IX sexual assault and sexual harassment resolution agreements reached with OCR in 2014 can be found at www.educationlawreview.com.

"law" means "statute." By contrast, where Congress intended a non-statutory reference in § 1682, such as "rules, regulations, or orders," it so designated.[18] When recently presented with a similar interpretive question involving the Homeland Security Act, the Supreme Court found "Congress's choice to say 'specifically prohibited by law' rather than 'specifically prohibited by law, rule, or regulation' suggests that Congress meant to exclude rules and regulations."[19] There, Congress used the word "law" standing alone, and did not use the phrase "law, rule, or regulation."[20]

The negotiations that occur over a Title IX resolution agreement appear to be the "voluntary means" used by OCR to achieve compliance. However, the larger question of authority for specific remedial actions must be traceable to the Title IX statute or other non-Title IX statutory text as discussed further below.

B. Procedural Regulations

1. "Voluntary" and "Informal" Means

In its procedural regulations, the Department includes a reference to "informal means," which can be found at 34 C.F.R. § 100.7(d)(1) (Resolution of Matters). Section 100.7(d)(1) provides:

> If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved *by informal means whenever possible*. If it has been determined that the matter cannot be resolved by *informal means*, action will be taken as provided for in § 100.8 [procedures for effecting compliance].[21]

The question arises whether the statute's "voluntary means" and the regulation's "informal means" are intended to communicate the same message. Neither Title IX, nor its implementing regulations, define the term "informal means." Do, therefore, "voluntary" and "informal" means encompass the authority of a government agency to demand an infinite range of remedial actions of a recipient to achieve compliance with Title IX? Based upon OCR's pattern and practice, OCR appears to construe "informal" and "voluntary" expansively (i.e. to encompass any remedial action to which a recipient will agree in a resolution agreement without regard to any independent statutory basis for the remedy). Under such a construction, nothing constrains OCR. What remains clear is that OCR has not communicated to institutions of higher education its specific views of the statutory and regulatory limits placed upon its authority to demand specific remedial actions.

2. "Remedial Action"

With respect to remedies, one further regulation warrants close attention, 34 C.F.R. § 106.3(a). Section 106.3(a) reads:

> (a) *Remedial action*. If the Assistant Secretary [for Civil Rights] finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take *such remedial action as the Assistant Secretary deems necessary* to overcome the effects of such discrimination.[22]

The regulation's expansive reach—"such remedial action as the Assistant Secretary deems necessary"—finds no authority in the law's enforcement scheme as laid out in 20 U.S.C. § 1682. While § 1682 does authorize the Department to promulgate regulations to effectuate or carry out Title IX, any regulation written under the authority of § 1682, and more specifically any "remedial action," must derive its authority from the text of a law. No part of Title IX nor any other law grants such infinite remedial authority to the Assistant Secretary as encompassed in 34 C.F.R. § 106.3(a). Congress did, however, specifically authorize one form of remedial action—the "termination of or refusal to grant or to continue assistance . . . to any recipient."[23]

To be sure, § 1682 also states compliance may "be effected . . . by any other means authorized by law."[24] However, there are no "other means" in the statute granting authority to the Assistant Secretary for Civil Rights to take "remedial action." The Department of Education Organization Act does not authorize the Assistant Secretary to take remedial actions, levy fines, or impose penalties.[25] In those instances where the Department is permitted to take remedial actions against recipients, it is pursuant to express authority.[26]

As referenced earlier, under 34 C.F.R. § 100.8(a) "[s]uch other means may include, but are not limited to" referral of a matter to the U.S. Department of Justice (DOJ) "with a recommendation that appropriate proceedings be brought to enforce any rights of the United States" or "with a recommendation that appropriate proceedings be brought to enforce . . . any assurance or other contractual undertaking [of the recipient]."[27] "Other means" may also include "any applicable proceeding under State or local law" or some other process not specified in the regulation, though the "means" must be "authorized by law."[28] Absent from both § 100.8(a) and Title IX is any affirmative authority of the Assistant Secretary, for example, to compel a recipient to pay individual monetary remedies, conduct climate surveys, or prohibit students from serving on sexual violence hearing panels.

III. Negotiating the Terms of a Resolution Agreement

The scope of OCR's enforcement authority becomes an important consideration when negotiating a resolution agreement. OCR relies upon statements found in its sub-regulatory guidance of April 4, 2011 and April 29, 2014[29] in negotiating agreements and in its correspondence with schools.[30] Yet, the administrative enforcement provision of Title IX, 20 U.S.C. § 1682, only authorizes rules, regulations, and orders of general applicability as the means to effectuate Title IX's prohibition on sex discrimination.

Second, OCR makes no reference to its independent basis, if any, for certain remedial actions it requires of institutions of higher education in resolution agreements. To this author's knowledge, OCR has never cited any specific authority or independent statutory basis for requiring a recipient to pay individual monetary remedies (e.g. medical and counseling expenses) to a Title IX complainant. Such

remedies were a part of four of the six resolution agreements reached in 2014.[31] During the negotiations of at least one agreement, OCR expressly required a school to provide individual monetary remedies as a condition for reaching an agreement.[32] The same is true for climate surveys. Climate surveys were either mandated or reaffirmed in all six agreements reached with institutions in 2014.[33] In like manner, schools have been pressed to prohibit students from serving on sexual violence hearing panels. While there is no legal authority for OCR's position (first articulated in April 29, 2014 sub-regulatory guidance),[34] such prohibitions were alluded to in one agreement and two resolution letters in 2014.[35]

By contrast, OCR's legal authority to require (as a part of a resolution agreement), the designation of a Title IX Coordinator (with appropriate contact information),[36] the adoption and publication of grievance procedures providing for the prompt and equitable resolution of complaints,[37] and the publication of a Notice of Nondiscrimination with the requisite specificity,[38] are all authorized remedial actions.

IV. Conclusion

Though the origin and scope of OCR's enforcement authority has received little attention in recent years, a careful review of the Title IX statute, its implementing regulations, and applicable procedural regulations[39] reveals fundamental questions about the outer limits of OCR's authority to leverage certain remedial terms for which an independent basis in law may be lacking.

Endnotes

1 Matt Fossen, *Feds Slow and Struggling to Keep up with Growing List of College Sexual Assault Investigations*, FoxNews.com (August 11, 2015), http://www.foxnews.com/politics/2015/08/11/feds-slow-and-struggling-to-keep-up-with-growing-list-college-sexual-assault/. A review of the U.S. Department of Education's web site finds an initial list of 55 schools as of May 1, 2014 labeled "Archived Information," *available at* http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations (last visited October 28, 2015). No further updated list of the Department could be located.

2 20 U.S.C. §§ 1681-1688.

3 The six institutions are Tufts University ("Tufts"), Virginia Military Institute ("VMI"), Ohio State University ("OSU" or "Ohio State"), Princeton University ("Princeton"), Southern Methodist University ("SMU"), and Harvard Law School ("Harvard"). While space limitations do not permit a discussion of the Title IX sexual harassment or sexual violence-related agreements reached in 2013 (State University of New York and University of Montana) or 2012 (Xavier University and Yale University), the reader may wish also to review those agreements prior to entering any negotiations with OCR. For purposes of this article, the term "sexual violence" encompasses all forms of sexual violence including "sexual misconduct" and "sexual assault," unless otherwise indicated.

4 20 U.S.C. § 1681(a).

5 20 U.S.C. § 1682 (emphasis added).

6 20 U.S.C. § 1682.

7 *Id.*

8 A "rule" "means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4) (Administrative Procedures Act). A "regulation" refers to the "act of regulating; a rule or order prescribed for management or government; a regulating principle; a precept." *Black's Law Dictionary* 1156 (5th ed. 1979). Regulations are issued by various government departments to carry out the intent of the law. *Id.* An "order" is "[a] mandate; precept; command or direction authoritatively given; rule or regulation." *Id.*

"Guidance," on the other hand, is most commonly characterized as "an agency statement of general applicability and future effect, other than a regulatory action . . . that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue." *Final Bulletin for Agency Good Guidance Practices*, Office of Management and Budget, Executive Office of the President, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2007). One could argue "guidance" is equivalent to an "order of general applicability." However, nowhere in the Dear Colleague Letter on Sexual Violence of April 4, 2011 or the Questions and Answers on Title IX and Sexual Violence of April 29, 2014 does the Department characterize either document as an "order of general applicability," or "rule" or "regulation." To the contrary, OCR characterizes both documents as "policy guidance" and states the "guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations." Dear Colleague Letter on Sexual Violence, Office for Civil Rights, U.S. Department of Education, 1 n.1 (April 4, 2011); *accord*, Questions and Answers on Title IX and Sexual Violence, Office for Civil Rights, U.S. Department of Education, 1 n.1 (April 29, 2014).

9 20 U.S.C. § 1682.

10 *Id.*

11 *Id.*

12 34 C.F.R. § 100.8(a). Further, 34 C.F.R. § 100.8(d) prohibits any action to effect compliance until the Department has taken certain steps as a precondition. The reader should be aware that procedures under Title VI of the Civil Rights Act of 1964 at 34 C.F.R. §§ 100.6-100.11 and 34 C.F.R. Part 101 apply to Title IX and are incorporated by reference in 34 C.F.R. § 106.71.

13 Two regulatory provisions, 34 C.F.R. §§ 100.8(a) and (d), shed some additional light on these questions and are discussed under "Remedial Action" below.

14 Substantially all institutions of higher education are federal funding recipients.

15 20 U.S.C. § 1682 (emphasis added).

16 *Id.*

17 *See* 20 U.S.C. § 1682 ("Each Federal department and agency . . . is authorized and directed to effectuate the provisions of section 1681 . . . by issuing rules, regulations, or orders . . . ." and "No such rule, regulation or order shall become effective unless and until approved by the President.")

18 *See id.*

19 *Department of Homeland Security v. MacLean*, ___ U.S. ___, 135 S. Ct. 913, 919, 190 L. Ed. 2d 771, 781, 2015 U.S. LEXIS 755, ***14 (2015).

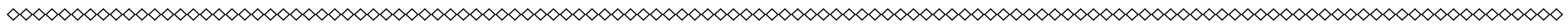
20 *Id.* at 919.

21 34 C.F.R. § 100.7(d)(1) (emphasis added).

22 34 C.F.R. § 106.3(a) (emphasis added).

23 20 U.S.C. § 1682.

24 *Id.*



25 *See* 20 U.S.C. § 3413.

26 *See* 20 U.S.C. §§ 1094(c)(3)(B)(II), 1015(c)(5), 1022d(A)(3), 1082(g), 1228c(c)(2).

27 34 C.F.R. § 100.8(a).

28 *Id.*

29 *See* Dear Colleague Letter on Sexual Violence, Office for Civil Rights, U.S. Department of Education (April 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (last visited October 28, 2015), and Questions and Answers on Title IX and Sexual Violence, Office for Civil Rights, U.S. Department of Education (April 29, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (last visited October 28, 2015).

30 See OCR Letter of Findings to Southern Methodist University at 2, Case Nos. 06-11-2126, 06-13-2081, 06-13-2088 (Dec. 11, 2014), http://www2.ed.gov/documents/press-releases/southern-methodist-university-letter.pdf.

31 *See* Tufts University Resolution Agreement ("Tufts Resolution Agreement"), Complaint No. 01-10-2089, 13 (April 17, 2014); Ohio State University Resolution Agreement ("OSU Resolution Agreement"), OCR Docket No. 15-10-6002, 15 (Sept. 8, 2014); Princeton University Resolution Agreement ("Princeton Resolution Agreement"), Case No. 02-11-2015, 12-13 (Oct. 12, 2014); and Southern Methodist University Resolution Agreement ("SMU Resolution Agreement"), Case Nos. 06-11-2126, 06-13-2081, 06-13-2088, 15 (Nov. 16, 2014).

32 SMU Resolution Agreement.

33 Tufts Resolution Agreement at 1, 3; Virginia Military Institute Resolution Agreement ("VMI Resolution Agreement"), Complaint No. 11-08-2079, 6-7 (April 30, 2014); OSU Resolution Agreement at 4, 11-12; Princeton Resolution Agreement at 9-11; SMU Resolution Agreement at 13-14; and Harvard Law School Resolution Agreement ("Harvard Resolution Agreement"), Complaint No. 01-11-2002, 8 (Dec. 23, 2014).

34 *See* note 27, Questions and Answers on Title IX and Sexual Violence, 30, n. 30.

35 *See* Princeton Resolution Agreement at 3 and OCR Letter to Virginia Military Institute ("OCR Letter to VMI"), Complaint No. 11-08-2079, 13 (May 9, 2014). Though no prohibition was included in the final SMU Resolution Agreement, OCR's Letter to SMU discusses OCR's policy position. OCR Letter to Southern Methodist University ("OCR Letter to SMU"), Case Nos. 06-11-2126, 06-13-2081, 06-13-2088, 22 n.12 (Dec. 11.2014).

36 34 C.F.R. § 106.8(a).

37 34 C.F.R. § 106.8(b).

38 34 C.F.R. § 106.9.

39 *See supra* note 13.

Corporations, Securities & Antitrust

Kellogg Brown & Root—What Happens to a Case Deferred?[1]

*By Christopher Bowen**

This article details the Fourth Circuit's and the Supreme Court's recent decisions in *United States ex rel. Carter v. Kellogg Brown & Root Services, Inc.*[2] The Supreme Court correctly held that the Wartime Statues of Limitations Act ("WSLA")[3] should only be applied in criminal cases, but then incorrectly held that the "first-to-file" jurisdictional bar is lifted whenever a prior lawsuit based on the same allegations is dismissed. In emphasizing the word "pending" over the rest of the text of the statute and the subsection, the Supreme Court has not only defeated a major purpose of the statute, it has given contractors facing False Claims Act lawsuits the perverse incentive to delay seeking a resolution.

The article further argues that the Supreme Court erred in failing to take the opportunity to reverse the Fourth Circuit on the definition of when the United States is "at war," because that Circuit adopted such an expansive definition that it essentially rendered superfluous later WSLA amendments and the False Claims Act's own statute of limitations. Because of this failure to address the Fourth Circuit's "at war" holding, not only do contractors face uncertainty regarding when the statute of limitations actually expires, but courts will be forced to decide when the United States is "at war," a task courts are ill-suited to perform.

I. Introduction[4]

The False Claims Act, 31 U.S.C. § 3729 *et seq.*, permits the United States to recover amounts that contractors obtained through false "claims." The lawsuit may be brought either directly by the United States, represented by the Department of Justice, or by a "relator," an individual who files a complaint under seal containing allegations of the false claim that have not been previously publicly disclosed.[5] Once a False Claims Act complaint has been filed, a subsequent relator may not maintain a False Claims Act lawsuit "based on the facts underlying the pending action."[6] After a relator files the lawsuit, the Attorney General has 60 days (routinely extended by motions one or more years)[7] to investigate the claim and decide whether or not to intervene. If the United States declines to intervene, the complaint is unsealed and the relator pursues the lawsuit on his or her own on behalf of the United States.[8]

To prove a violation of the False Claims Act, the plaintiff must demonstrate that the defendant:

(1) Made a false statement or engaged in a fraudulent course of conduct;

(2) With the requisite scienter (knowledge, willful blindness, or reckless disregard of the truth);[9]

(3) That was material to the Government's decision to pay; and

(4) That resulted in a claim to the Government.[10]

A "claim" is "any request or demand . . . for money or property . . . that is presented to an officer, employee, or agent of the United States."[11] The classic examples of "false claims" are invoices that request payment for a certain quantity or quality of goods or services, when in fact goods or services of lesser quantity or quality were delivered.[12] Liability also attaches to the creation of false records or statements that are material to a false or fraudulent claim, along with other acts not relevant here.[13]

The False Claims Act's statute of limitations is:

i. Six years from the date of the claim; or

ii. Three years from the date on which the relevant facts were known or should have been known "by the official of the United States charged with responsibility to act in the circumstances, but in no even more than 10 years after the date on which the violation occurs"; but

iii. In no event more than ten years after the date on which the violation is committed.[14]

The Government and relators have argued that the civil False Claims Act's statute of limitations may be suspended, however, by the Wartime Statute of Limitations Act ("WSLA").[15] Passed during World War II and currently found in the criminal code, the WSLA suspends the statute of limitations for claims of fraud against the United States for five years after the termination of hostilities. It currently reads:

> *When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces*, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)), *the running of any statute of limitations applicable to any offense* (1) involving fraud or attempted fraud against the United States . . . *shall be suspended until 5 years after the termination of hostilities* as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress. For purposes of applying such definitions in this section, the term "war" includes a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)).[16]

Prior to 2008, the statute had only suspended the statute of limitations for three years and had only been applied to situations where the United States was "at war" but not where "Congress has enacted a specific authorization for the use of the Armed Forces":

> When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States . . . shall be suspended until three years after the termina-

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tion of hostilities as proclaimed by the President or by a concurrent resolution of Congress.[17]

The WSLA was passed because of concerns about the difficulty with detecting fraud during wartime when the Government's attention may be diverted.[18] Despite being placed within Title 18 of the United States Code, some courts have held that the WSLA applies to both criminal and civil actions.[19] The WSLA defines neither when the United States is "at war" nor when the suspension is lifted in the absence of a Presidential proclamation or concurrent resolution of Congress.

Finally, the False Claims Act permits only the United States to intervene in a relator's case or to file a related cased "based on the facts underlying the pending action."[20]

II. Mr. Carter's Long and Winding Road & How It Always Led to His Case Being Dismissed[21]

In *United States ex rel. Carter v. Kellogg Brown & Root Services*, the relator, former Kellogg Brown & Root Services ("KBR") employee Benjamin Carter, alleged that KBR had sought payment between January and April 2005 for water purification services that had not actually been performed, and that KBR had ordered its employees to bill 12 hours a day, every day, to the project, even though the employees were not working on the project.[22] Despite at one point being only a month away from trial, Mr. Carter had various iterations of his complaint dismissed four times by the district court, with only the first dismissal being on the grounds of deficiencies within the complaint itself. The Fourth Circuit set forth the procedural posture in its 2013 opinion:

- February 2006 – The relator files his first complaint in the Central District of California, well within the six-year statute of limitations.
- February 2006 to Winter 2008 – The Government investigates the claims for two years, and then opts not to intervene.
- January 2009 – After the case is unsealed and transferred to the Eastern District of Virginia, the district court dismisses the complaint without prejudice for failure to plead fraud with particularity. That same month the relator files an amended complaint.
- January 2009 to March 2010 – After the district court denies-in-part a renewed motion to dismiss, the case proceeds through the close of discovery.
- March 2010 – A month before scheduled trial, the Department of Justice informs the court that the relator's case is similar to another pending False Claims Act case (*Thorpe*) in the Central District of California also based upon allegations of improper time-charging. KBR moves to dismiss the complaint based on the existence of a related action.
- May 2010 – Eastern District of Virginia dismisses the amended complaint, and relator timely appeals in July.
- July 2010 – Central District of California dismisses *Thorpe*.
- August 2010 – Relator re-files his amended complaint and seeks to dismiss his pending appeal.
- February 2011 – Fourth Circuit grants relator's motion to dismiss the appeal.
- May 2011 – Eastern District of Virginia dismisses relator's 2010 complaint, because relator had filed it while his appeal of the dismissal of his 2009 complaint was still pending, creating a first-to-file problem under 31 U.S.C. § 3730(b)(5).
- June 2011 – Relator re-files his amended complaint. KBR moves to dismiss on grounds of the statute of limitations and two other pending actions filed in 2007 regarding time-charging, one in Texas and one in Maryland.
- October 2011 – Maryland False Claims Act case is dismissed.
- November 2011 – Eastern District of Virginia dismisses relator's 2011 complaint, because it was related to the other cases and because it occurred more than 6 years after the events in question. Relator timely appeals.
- March 2012 – Texas False Claims Act case is dismissed.[23]

A review of the above timeline demonstrates that all but the final complaint was filed within the six-year statute of limitations and that many of the delays could be attributed to the on-again-off-again nature of other litigation related to KBR's time-charging practices.[24] Mr. Carter, therefore, presented the Fourth Circuit with a sympathetic case for finding that the statute of limitations did not bar his complaint.

III. The Fourth Circuit Did Not Leave Mr. Carter Waiting at the Courthouse Steps

The Fourth Circuit reversed the District Court on the statute of limitations issue, as well as the first-to-file issue. To resolve the statute of limitations issue, the Fourth Circuit needed to decide three questions:

(1) Was the United States "at war" for purposes of the WSLA between January and April 2005?

(2) Did the WSLA apply to civil fraud claims or only to criminal claims?

(3) Did the WSLA apply only to actions brought by the United States or also to actions maintained by relators on behalf of the United States?

Writing the opinion for a split panel, Judge Floyd began the analysis by noting that "[c]ourts are in disagreement as to which version of the WSLA applies to offenses that occurred before the amendments of 2008," but decided that it was unnecessary to reach that issue because, between January and April 2005, the United States was "at war."[25] The Court held that to be "at war" for WSLA purposes did not require a formal declaration of war, because:

- Congress opted not to write "declared war" despite having done so in other statutes;
- Requiring a declaration of war would be "unduly formalistic" given the nature of conflicts in the second half of the twentieth century;

- The Supreme Court has held that the laws of war apply even during an undeclared war; and
- The WSLA's purpose "to combat fraud at times when the United States may not be able to act as quickly because it is engaged in 'war' [] would be thwarted" if a formal declaration were required.[26]

Using these principles, the Fourth Circuit held that the Authorization for the Use of Military Force ("AUMF") that Congress passed in October 2002 was sufficient to put the United States "at war" in Iraq.[27] In contrast with its views on the informality with which the country could find itself "at war," the court then noted that the Iraq war was not over, because the formal cessation requirements ("termination . . . as proclaimed by the President . . .") had not been met.[28] The United States, therefore, was "at war" in Iraq between January and April 2005 (the dates relevant to Mr. Carter's allegations) because Congress had passed an Authorization for the Use of Military Force, but the president had never issued a formal proclamation regarding termination.

The Fourth Circuit then held that the language "any offense" did not limit the WSLA to criminal cases, but included civil offenses as well. In reaching this conclusion, the court focused on Congress' deletion of the words "now indictable" from the original wording in 1944 as well as the prior holdings from three district and circuit courts.[29] The court also rejected KBR's argument that the WSLA only applied when the United States, acting through the Department of Justice, was pursuing the case, as opposed to a private relator acting on behalf of the United States. The Fourth Circuit acknowledged that in 2008 it had decided *United States ex rel. Sanders*,[30] in which a panel had held that the statute of limitations extension within Section 3731(b)(2) (three years from time the cognizant Government agent or employee knew or should have known) only applied when the United States was represented by the Department of Justice.[31] The opinion, however, distinguished the extension within Section 3731(b)(2) with the WLSA, by holding that "whether the suit is brought by the United States or a relator is irrelevant to this case because the suspension of limitations in the WSLA depends upon whether the country is at war and not who brings the case."[32]

The Fourth Circuit then turned to the question of whether, assuming Mr. Carter's 2011 complaint was timely, it was nonetheless barred by the intervening filing of other False Claims Act lawsuits "based on the facts underlying the pending action,"[33] i.e., alleging similar time-charging misdeeds during the same time period. Applying the "material elements test," the Fourth Circuit determined that Mr. Carter's 2011 complaint regarding time-charging was "based on the facts underlying" the complaints filed in Texas and Maryland in 2007.[34] The district court had therefore correctly dismissed the 2011 complaint, because the other two lawsuits were pending in June 2011 when Mr. Carter filed his amended complaint.

The Fourth Circuit, however, held that the district court had erred in dismissing the 2011 complaint *with prejudice*.[35] The Fourth Circuit held that the prohibition on filing a False Claims Act lawsuit "based on the facts underlying" another pending action only existed so long as the other lawsuits were pending.[36] Because the other lawsuits had been dismissed, the court held that Mr. Carter should now be free to re-file his complaint.[37]

In a partial dissent, Judge Agee argued both that the WSLA did not apply in civil cases and that it could not be invoked when the lawsuit was not being prosecuted by the United States.[38] Regarding the applicability of the WSLA to civil cases, Judge Agee noted that all of the cases cited in the majority opinion had dealt with the civil applicability of the WSLA only in dicta, and that in none had the applicability of the WSLA been dispositive.[39]

In a concurring opinion, Judge Wynn joined with the entirety of the majority opinion, but wrote separately to address Judge Agee's dissent. Notably, Judge Wynn explicitly acknowledged the obvious implications of Judge Floyd's opinion—that the majority opinion could result in a statute of limitations that could continue indefinitely if Congress or the President never officially declared a war to be over:

> Moreover even if the informal nature of modern military conflicts renders the limitations period established by the Wartime Suspension of Limitations Act somewhat less definite, it is within Congress's purview to determine that certain conduct is sufficiently egregious—such as defrauding the government during a time of war—that an extended or indefinite limitations period is warranted.[40]

Per Judge Wynn, therefore, a contractor could continue to face litigation regarding claims not only submitted in 2003 during the Second Gulf War, but also for claims submitted during the First Gulf War, which, as the Fifth Circuit noted in *United States v. Pfluger*, had never officially ended.[41]

IV. The Supreme Court Leaves Mr. Carter With A Token of A Claim

KBR and the other defendants appealed the Fourth Circuit's decision to the Supreme Court, and oral argument was held on January 13, 2015. KBR's primary arguments were that:

- The WSLA did not apply to civil offenses,[42] and
- The first-to-file jurisdictional bar applied even if the previously filed lawsuits were dismissed.[43]

The Supreme Court reversed the Fourth Circuit, holding that the WSLA did not apply to civil actions, but only applied to criminal actions.[44] The unanimous opinion by Justice Alito held that the word "offense" in the phrase "any offense (1) involving fraud" only applied to crimes, principally because:

- The word "offense" is "most commonly used to refer to crimes," not civil infractions;[45]
- The WSLA is located in Title 18 of the United States Code;[46]
- The history of the WSLA does not indicate that Congress intended the removal of the words "now indictable" to expand the WSLA to cover civil offenses.[47]

The justices did, however, leave Mr. Carter with a small portion of the lawsuit that was within the statute of limitations, despite the fact that other relators had filed complaints with similar allegations prior to Mr. Carter's present complaint.[48] The Supreme Court held that the so called first-to-file bar only barred relators from bringing False Claims Act lawsuits if the

prior lawsuits were still pending, but was not a bar if the lawsuits had been dismissed, because:

- Congress chose to use the word "pending," which means "remaining undecided; awaiting decision";[49]
- "Pending" could not be a shorthand for "first-filed" because if Congress had wanted to use the word "first-filed" or "prior," it would have done so;[50]
- Using "pending" to mean "first-filed" would mean that the relators would be barred from recovery if a prior relator had brought a lawsuit and then subsequently dismissed it.[51]

The opinion characterized its holding as "an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed."[52] The Court rejected the Fourth Circuit's "first-to-file" characterization of the "pending action" bar because, "[u]nder this interpretation, *Marbury v. Madison*, 1 Cranch 137 (1803), is still 'pending.' So is the trial of Socrates."[53] Further, the Court asked, "[w]hy would Congress want the abandonment of an earlier suit to bar a later potentially successful suit that might result in a large recovery for the Government?" The Court conceded that contractors may be reluctant to settle with relators without the bar, but concluded that "[t]he False Claims Act's qui tam provisions present many interpretive challenges, and it is beyond our ability in this case to make them operate together smoothly like a finely tuned machine."[54]

Mr. Carter, therefore, is free to pursue his claims that accrued after June 2011, despite those claims being substantially related to claims already dismissed in Texas, Maryland, and California.

V. The Supreme Court's "Pending Action" Analysis Errs By Ignoring the Government's Role in Cases Brought by Relators

The Supreme Court's analysis of the "pending action" bar focused on why Congress would risk forgoing the potential rewards of False Claims Act lawsuits just because the first relator-filed lawsuit was dismissed because of, for example, failure to prosecute.[55] "Under petitioners' interpretation," the Court said "a first-filed suit would bar all subsequent related suits even if that earlier suit was dismissed for a reason having nothing to do with the merits."[56]

This concern, however, ignores the Government's involvement in False Claims Act lawsuits, even where the lawsuits are being pursued by a relator instead of the Department of Justice. If a relator's lawsuit is dismissed because the relator chooses not to prosecute it, this means that the Department of Justice:

- Has already had an opportunity to review the allegations,[57] but
- Has decided that the allegations are not worth much and therefore decided not to intervene[58] and
- Has not subsequently sought to intervene despite the lack of progress in the case.[59]

If a relator's complaint is at the stage of being dismissed for failure to prosecute, therefore, it is because both the relator *and* the Department of Justice have decided that the case is not worth pursuing.

Nor is there a danger that contractors could buy off relators with a quick settlement to foreclose larger claims. An "action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."[60] Additionally, if a relator's initial complaint contained defects, such as a failure to plead fraud with particularity, the Department of Justice could stop dismissal by filing an amended complaint.[61] Interpreting "pending action" to mean actions that were filed but then subsequently dismissed, therefore, would not result in a loss of opportunity for the United States to pursue what it thought to be a meritorious claim.

Not only does the Supreme Court's reasoning rely on nonexistent concerns, but its decision also is not required by the text. The "pending action" or "first-to-file" bar states "[w] hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action."[62] The Supreme Court focused on the word "pending" in holding that a case is no longer pending if it has been dismissed, and that such dismissal lifts the jurisdictional bar.[63] This analysis, however, ignores the rest of the text, the section's placement within the statute, and the absurd result that the interpretation engenders.

Both the text and the statutory placement demonstrate that the section is meant to provide only the first relator and the Department of Justice the opportunity to litigate the claims. The trigger barring "a person other than the Government" from intervening or bringing a related action is "when [another] person brings an action . . ."[64] Congress created a trigger for the bar on other relators, but did not create an event that would eliminate the bar.[65] The opinion has therefore stretched the word "pending" into an entirely new clause requiring the release of the prohibition, contrary to normal rules of statutory interpretation.[66] The word "pending," therefore, is simply the adjective Congress chose to describe the existing lawsuit, and nothing within the statute indicates that Congress intended to create a situation where multiple relators could bring lawsuits based upon facts of which the Government was already aware.[67]

Furthermore, the "pending action" restriction is within Subsection (b) of 31 U.S.C. § 3730, which pertains to the Government's right to take control of the claim, including the requirements that the complaint be filed under seal and served on the Government, and the deadlines for the Government to make a decision.[68] The subsequent sections delineate what control the Government may exercise over the lawsuit, both when it has chosen to intervene and when it declines to intervene, along with what share of the recovery the relator may claim.[69] The "pending action" restriction, therefore, must be seen in light of the Act's overall context of permitting a relator to maintain a lawsuit, but ensuring that the Department of Justice monitors and retains final over any dismissal or lawsuit.[70] Reading the word "pending" as permitting multiple relators to bring seriatim lawsuits, frustrates the overall purpose of Section 3730, because:

- The purpose of the seal is nullified, because the defendant presumably is aware of the allegations;[71]
- The Department of Justice has already decided once

not to intervene and not to oppose dismissal, and yet is being required to do another round of investigation;[72]

- Any settlement that results in a dismissal of the lawsuit will have already allocated proceeds between the portion received by a relator and the portion that goes to the Government.[73]

The Court's interpretation of "pending" makes the rest of Subsections 3730(b) through (d) pointless, is not required by the text, and creates the possibility that a contractor could end up paying multiple relators, even though the relators are alleging the same harm.

Finally, the Court's interpretation violates the Supreme Court's rule that "absurd results" should be avoided.[74] The absurd result that the opinion acknowledged is that, after this decision, defendants facing relator's lawsuits may be reluctant to settle the case in exchange for a dismissal, knowing that another relator can then just file another complaint.[75] The Court's response to this problem was a judicial shrug: "The False Claims Act's qui tam provisions present many interpretive challenges, and it is beyond our ability in this case to make them operate together smoothly like a finely tuned machine."[76] Additionally, although the United States and the relator argued that res judicata could prevent follow-on lawsuits, KBR noted in its reply brief that satisfying the identity-of-parties requirement could be a challenge when the Government opts not to intervene.[77] The Supreme Court, therefore, has created an incentive for contractors facing False Claims Act lawsuits to delay any settlement offer, perhaps in hopes that the relator and the relator's counsel will continue to litigate the claim until any other potential relators are barred by the statute of limitations. The Government, therefore, will face delays in receiving any settlement proceeds.

The Supreme Court's interpretation of the "pending action" bar will delay settlements and ignores that the False Claims Act already provides the Government with ample opportunity to protect its own interest. The result creates a conflict with the operation of the surrounding text. To clear up the confusion, Congress should amend the False Claims Act by replacing the word "pending" with the word "first."

VI. The Supreme Court Missed an Opportunity to Clarify When the United States is "At War"

Two major topics were left unaddressed by the Supreme Court's opinion:

(1) Whether the Fourth Circuit correctly held that conflicts without a formal declaration of war met the definition of "at war" under the WSLA; and

(2) Whether the Fourth Circuit correctly held that only a formal presidential proclamation or Congressional resolution could terminate the period during which the United States was "at war" under the WSLA.

Whether the Fourth Circuit had correctly applied the definition of "at war" was not among the issues on which the Supreme Court granted certiorari,[78] but both sides nevertheless addressed it. In its primary brief, KBR argued that the Fourth Circuit's interpretation of the phrase "at war" would impermissibly involve courts in matters of foreign policy decisions best left to the political branches.[79] If some engagements on foreign soil could make the United States "at war" even in the absence of a formal declaration, then courts would become involved in:

> the difficult and politically charged task of deciding when an undeclared conflict begins and ends. . . . Disregarding the ordinary meaning of "at war" will inevitably require extensive post-hoc factual determinations' on a range of issues, e.g., (1) the extent of Congress's authorization for the President to act; (2) whether the conflict is a "war" under other definitions and international law; (3) the conflict's scope; and (4) the diversion of resources away from investigating frauds.[80]

Neither Carter nor the United States directly addressed KBR's argument about the expansiveness of the Fourth Circuit's "at war" definition. Instead, both argued that the Supreme Court did not need to reach the definition of "at war" because the post-2008 WSLA, rather than the pre-2008 WSLA, applied. As a result, because the current WSLA permitted tolling of the statute of limitations not only when the United States was "at war" but also when "Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)), the 2002 AUMF was sufficient to trigger the WSLA.[81]

KBR replied by arguing that regardless of whether the current or prior version of the WSLA applied, the Supreme Court needed to address the Fourth Circuit's interpretation of "at war."[82] KBR pointed out that, if left unaddressed, the "at war" definition would render meaningless the 2008 addition of Congressional authorizations under the War Powers Act, because any conflicts authorized under the War Powers Act would be subsumed within the Fourth Circuit's definition of "at war."[83]

In addition, the Supreme Court did not address whether any event other than a presidential proclamation could demonstrate the cessation of hostilities to stop the tolling of the statute of limitations. This issue was examined by the Fifth Circuit in *United States v. Pfluger*, in which that court held that neither the toppling of Saddam Hussein's government in the spring of 2003 (in the case of Iraq) nor the recognition of a substitute government (in the case of Afghanistan) counted as a cessation of hostilities.[84] The Fifth Circuit held that it was bound by the Supreme Court's decision in *United States v. Grainger*,[85] which had held that World War II had not ceased for WSLA purposes until December 31, 1946, the date of President Truman's declaration regarding the cessation of hostilities, rather than, for example, September 3, 1945, the date of Japan's surrender.[86] The Fifth Circuit was not swayed by the argument that such a literal ruling would lead to absurd results, such as defendants still being liable for frauds committed during the first Gulf War, because it said that such a case was not before it.[87]

The Supreme Court opted not to address the issue of when the United States is "at war" or whether a formal presidential declaration is required for the United States to no longer be "at war." Although the WSLA now only applies to criminal offenses, the prior interpretations of the term "at war" by the Fourth and Fifth Circuits create confusion over when, if ever, the Government is time-barred from pursuing a criminal action for fraud. If a military operation that was conducted pursuant

to an authorization for the use of military force (as with the conflict in Iraq) meets the definition of "at war,"[88] then the 2008 amendment adding "or Congress has enacted a specific authorization for the use of the Armed Forces" was superfluous.[89] Additionally, given the frequent use of U.S. military forces abroad, the Fourth Circuit's interpretation makes it possible that False Claims Act actions may never be subject to a statute of limitations bar, as there has been no six year gap between the military actions abroad involving U.S. military forces since the end of World War II.[90] In the absence of correction by the Supreme Court or by Congress, therefore, contractors face the possibility of being subject to criminal fraud actions for decades beyond their contract's completion. Such a result would eviscerate the ten year limitation contained within the False Claims Act itself.[91]

This result is compounded by the formal requirement for ending a conflict only at "the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress."[92] After World War II, the Supreme Court held this requirement to mean that the statute of limitations was tolled until December 31, 1946 (the date of President Truman's formal declaration), even though the last enemy country had unconditionally surrendered on September 3, 1945, more than 16 months earlier.[93] The Fifth Circuit explicitly rejected formal recognitions of new governments after the deposing of the enemy governments, and has left open the possibility that the First Gulf War has never been ended for WSLA purposes.[94] At least one district court, however, has used May 1, 2003 as an end date for the Iraq War, when President George W. Bush proclaimed that "major combat operations have ended . . . . And now our coalition is engaged in securing and reconstructing that country."[95] The Fourth Circuit's "at war" definition, along with the Fifth Circuit's formalistic requirements for showing a termination of war, put contractors in the position of anticipating that litigation regarding their services could come decades after they have performed them.

Finally, as KBR and the other defendants pointed out in their brief, if the Supreme Court leaves the Fourth Circuit's "at war" definition untouched, courts will be placed in the position of deciding when the United States is and is not "at war."[96] The Supreme Court has previously noted, "[w]e are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons."[97] The Court has also held that "analysis reveals isolable reasons for the presence of political questions, underlying this Court's refusal to review the political departments' determination of when or whether a war has ended. Dominant is the need for finality in the political determination, for emergency's nature demands '[a] prompt and unhesitating obedience.'"[98] Drawing the courts into the defining when an informal conflict amounts to a war, therefore, is contrary to established precedent and common sense.

VII. Conclusion

The Supreme Court has correctly limited the scope of the WSLA to criminal lawsuits, but it has now put contractors on notice that they may be subject to False Claims Act lawsuits brought by serial relators. This creates perverse incentives for contractors to delay settlements with relators, thus delaying payments to the federal government and needlessly burdening the judicial system with extended cases. Congress should correct the Supreme Court's mistake by simply deleting the word "pending" and replacing it with "first-filed," "earlier," or "prior."[99] Additionally, Congress or the Supreme Court should correct the circuit courts' erroneous statements that the United States can be "at war" despite the lack of a formal declaration as well as establish standards for determining when the United States ceases to be at war. Failing to do so not only renders the 2008 amendments superfluous, it creates a potentially never-ending criminal statute of limitations for government contractors, and puts courts in a position to decide issues historically left to the political branches.

Endnotes

1 Adapted from Langston Hughes, *Harlem*, courtesy of the Poetry Foundation website, *available at* http://www.poetryfoundation.org/poem/175884 (last accessed Feb 24, 2015) ("What happens to a dream deferred? Does it dry up / like a raisin in the sun? / . . . / Maybe it just sags / like a heavy load. / Or does it explode?").

2 — U.S. —, 135 S. Ct. 1970 (2015); 710 F.3d 171 (4th Cir. 2013).

3 18 U.S.C. § 3287 (2011).

4 The author assumes that any reader of this publication will be familiar with the history and general contours of the False Claims Act. Therefore, this Introduction does not seek to provide an exhaustive overview of the statute or its processes and provides a substantially simplified summary.

5 31 U.S.C. § 3730(b), (e). The court will still have jurisdiction to adjudicate the complaint even if the allegations were previously publicly disclosed, so long as the relator was the "original source" of the information. 31 U.S.C. § 3730(e)(4). A discussion of the "public disclosure" jurisdictional bar and the "original source" exception to the "public disclosure" jurisdictional bar is beyond the scope of this article.

6 31 U.S.C. § 3730(b)(5).

7 Oral Argument Transcript, *Kellogg Brown & Root et al. v. United States ex rel. Carter*, U.S. Supreme Court No. 12-1497 (argued Jan. 13, 2015) *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1497_bpm1.pdf (citing Chamber of Commerce Letter finding an average of 13 months between filing of sealed complaint and Government decision on intervention).

8 31 U.S.C. § 3730(b).

9 The False Claims Act explicitly does NOT require a "specific intent to defraud". 31 U.S.C. § 3729(b)(1)(B).

10 *United States ex rel. Badr v. Triple Canopy, Inc.*, 775 F.3d 628, 634 (4th Cir. 2014) (citing *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 913 (4th Cir. 2003)).

11 31 U.S.C. § 3729(b)(2)(i). The term "claim" also includes statements made by suppliers or subcontractors to Federal contractors or grantees. 31 U.S.C. § 3729(b)(2)(ii)(I)-(II).

12 31 U.S.C. § 3729(a)(1)(A); *see* John T. Boese, *Civil False Claims and Qui Tam Actions*, § 1.06[A], p.1-46 (4th Ed. 2006) (updated through 2014) ("The mischarge case is the most common False Claims Act case, as well as well as the most straightforward.").

13 31 U.S.C. § 3729(a)(1)(B) (creation of false record or statement material to a claim); § 3729(a)(1)(C)-(G) (including conspiracy to violate the False Claims

Act, failing to return all money due to the United States, creating a false record to conceal or avoid repaying money to the United States; returning a receipt showing receipt of property used without knowing whether the receipt was true; or taking United States property as a pledge for loan from an officer or employee of the United States not authorized to sell or pledge the property).

14 31 U.S.C. § 3731(b)(1)-(2). Procedurally, attorneys with the United States investigating these allegations will seek a tolling agreement from the contractor, using the implied or explicit threat to file the False Claims Act lawsuit immediately if the contractor does not agree to the tolling. *See, e.g.*, Kellogg Brown & Root, 710 F.3d at 175 (delay of 2 years between initial filing of lawsuit and subsequent decision not to intervene); Oral Argument Transcript, *supra* note 7, at 5.

15 18 U.S.C. § 3287.

16 18 U.S.C.A. § 3287 (West 2011) (emphasis added).

17 18 U.S.C.A. § 3287 (West 2006).

18 *United States v. Temple*, 147 F. Supp. 118, 120 (N.D. Ill. 1956) ("The Wartime Suspension of Limitations Act was concerned in turn with the ease with which fraud could be concealed, and sought to grant the government in time of war a correspondingly longer time to discover it.").

19 *Id*. ("Surely Congress may be assumed to have been as anxious, or even more anxious, to preserve to the government its civil remedy as its criminal retribution.").

20 31 U.S.C. § 3730(b)(5).

21 Adapted from Sir Paul McCartney, *Long and Winding Road*, courtesy of the lyrics found at Google Play, *available at* play.google.com (last accessed Feb 25, 2015).

22 710 F.3d at 174-75.

23 *Id.* at 175-76.

24 In yet another and perhaps final indignity, on November 12, 2015 (after this article was substantially complete), the Eastern District of Virginia *again* dismissed Mr. Carter's remaining claims, holding that, because the Texas case was pending at the time of the filing of the current complaint, Mr. Carter's complaint was still barred by the first-to-file prohibition, and Mr. Carter therefore needed to file yet another complaint. *United States ex rel. Carter v. Kellogg Brown & Root*, E.D. Va. No. 1:11-cv-602, 2015 U.S. Dist. Lexis 153541 (E.D. Va. Nov. 12, 2015). The amount remaining in dispute is $673.56. *Id*. at *35.

25 *Id*. at 178.

26 *Id*. at 178-79.

27 *Id*. at 179.

28 *Id*.

29 *Id*. at 180.

30 546 F.3d 288 (4th Cir. 2008).

31 *Kellogg Brown & Root Services*, 710 F.3d at 180 (citing *United States ex rel. Sanders v. North American Bus Industries, Inc.*, 546 F.3d 288 (4th Cir. 2008)).

32 *Id.* at 180.

33 31 U.S.C. § 3730(b)(5) ("When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.").

34 *Kellogg Brown & Root Services*, 710 F.3d at 182.

35 *Id*.

36 *Id*. at 183.

37 *Id*.

38 *Id*. at 189-92 (Agee, J., dissenting).

39 *Id*. at 189-90.

40 *Id*. at 187 (Wynn, J., concurring).

41 *Pfluger*, 685 F.3d at 485 (citing Barbara Salazar Torreon, Congressional Research Serv., U.S. Periods of War and Dates of Current Conflicts (2011), *available at* http://www. fas.org/sgp/crs/natsec/RS21405.pdf).

42 Oral Argument Transcript, *supra* note 7, at 3-12.

43 *Id*. at 12-28.

44 *Kellogg Brown & Root, Inc.*, 135 S. Ct. 1970.

45 *Id*. at 1976-77.

46 *Id*. at 1977.

47 *Id*. at 1978.

48 *Id*.

49 *Id*.

50 *Id*.

51 *Id*. at 1979.

52 *Id*. at 1978.

53 *Id*. at 1979.

54 *Id*.

55 *Id*.

56 *Id*.

57 31 U.S.C. § 3730(b)(2)-(4) (Government has the right to review allegations and conduct investigation for 60 days, often extended to more than a year, before deciding whether to intervene).

58 31 U.S.C. § 3730(b)(4)(B) (Government has the right to decline to intervene).

59 31 U.S.C. § 3730(c)(3) (even if the Government opts not to intervene, the Government has the right to be served with all pleadings and may intervene at a later time "upon a showing of good cause").

60 31 U.S.C. § 3730(b)(1).

61 *See* 31 U.S.C. § 3730(c)(1). In practice, if the United States intervenes, it will always file its own complaint, often adding new grounds for recovery not previously contained in the relator's complaint.

62 31 U.S.C. § 3730(b)(5).

63 *Kellogg Brown & Root*, 135 S. Ct. at 1979.

64 31 U.S.C. § 3730(b)(5).

65 *Id*.

66 *See, e.g.*, *Marchetti v. United States*, 390 U.S. 39, 60 n. 18 (declining to adopt statutory interpretation that would require the court "to insert words that are not now in the statute"); *United States v. Reese*, 92 U.S. 214, 219 (1875)

("The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there."); *see also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("We have 'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'").

67 *Id.*

68 31 U.S.C. §§ 3730(b)(1)-(4).

69 31 U.S.C. § 3730(c)-(d).

70 31 U.S.C. § 3730(b)(1) ("The action may be dismissed only if the court and the Attorney General give written consent . . ."); § 3730(c)(2)(A) ("The Government may dismiss the action notwithstanding the objections of the person initiating the action . . . ."); § 3730(c)(2)(B) ("The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action . . ."); § 3730(c)(2)(C) ("Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation . . ."); § 3730(c)(3) (requiring the relator to provide the Government with copies of all pleadings and deposition transcripts as well as permitting the court to allow the Government to intervene even after declining to intervene initially).

71 31 U.S.C. § 3730(b)(2)

72 31 U.S.C. § 3730(b)(4)

73 31 U.S.C. § 3730(d)(1).

74 *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 332–333 (1938) ("To construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law.").

75 *Kellogg Brown & Root Services*, — U.S. —, 135 S. Ct. at 1979. Note that this scenario assumes that subsequent relators are not barred by any of the jurisdictional bars within 31 U.S.C. § 3730(e). This subsection deprives the court of jurisdiction to entertain relators' lawsuits where, relevant here, the allegations are already the subject of a civil lawsuit or an administrative civil money penalty hearing (31 U.S.C. § 3730(e)(3)) or the allegations were already publicly disclosed in a criminal, civil, or administrative hearing where the Government is a party, in a Government report, audit, or investigation, or in the news media, unless the relator is an "original source of the information". 31 U.S.C. § 3730(e)(4).

76 *Id.*

77 Reply Brief of Petitioners, *Kellogg Brown & Root Services Inc. et al. v. United States ex rel. Carter*, U.S. Supreme Court No. 12-1497 at pp. 20-21 (Nov. 13, 2014) (available at 2014 WL 5906565).

78 Brief of the Petitioners, *Kellogg Brown & Root Services Inc. et al. v. United States ex rel. Carter*, U.S. Supreme Court No. 12-1497 at I (Aug. 29, 2014) (available at 2014 WL 7717720).

79 *Id.* at 38-41.

80 *Id.* at 40-41 (quoting *United States v. Prosperi*, 573 F. Supp. 2d 436, 449 (D. Mass. 2008)).

81 18 U.S.C. § 3287. *See* Brief of the Respondents, *Kellogg Brown & Root Services Inc. et al. v. United States ex rel. Carter*, U.S. Supreme Court No. 12-1497 at pp. 43-44 (Oct. 14, 2014) available at 2014 WL 5299413; Brief of Amicus Curaie United States, *Kellogg Brown & Root Services Inc. et al. v. United States ex rel. Carter*, U.S. Supreme Court No. 12-1497 at pp. 15-16 (Oct. 21, 2014) (available at 2014 WL 5395798).

82 Reply Brief of Petitioners, *Kellogg Brown & Root Services Inc. et al. v. United States ex rel. Carter*, U.S. Supreme Court No. 12-1497 at pp. 13-14 (Nov. 13, 2014) (available at 2014 WL 5906565).

83 *Id.* at 14.

84 685 F.3d at 485.

85 346 U.S. 235 (1953).

86 *Pfluger*, 685 F.3d at 485 (citing *Grainger*, 346 U.S. at 246).

87 *Id.* at 485.

88 *See Kellogg Brown & Root Services*, 710 F.3d at 179-80.

89 *Compare* 18 U.S.C. § 3287 (2011) *with* 18 U.S.C. § 3287 (West 2006).

90 *See* http://www.pbs.org/wgbh/americanexperience/features/timeline/warletters/ (listing military involvement of U.S. forces.

91 *See* 31 U.S.C. § 3731(b)(10) ("A civil action under section 3730 may not be brought . . . more than 10 years after the date on which the violation is committed . . .").

92 31 U.S.C. § 3287 (2011).

93 *Grainger*, 346 U.S. at 246.

94 *Pfluger*, 685 F.3d at 485.

95 *United States v. Prosperi*, 573 F. Supp. 2d 436, 455 (D. Mass. 2008) (quoting speech of President George W. Bush on May 1, 2003 aboard U.S.S. Abraham Lincoln).

96 Reply Brief of Petitioners, *Kellogg Brown & Root Services Inc. et al. v. United States ex rel. Carter*, U.S. Supreme Court No. 12-1497 at pp. 13-14 (Nov. 13, 2014) (available at 2014 WL 5906565).

97 *Martin v. Mott*, 25 U.S. 19, 30 (1827).

98 *Baker v. Carr*, 369 U.S. 186, 213 (1962) (quoting *Martin v. Mott*, 12 Wheat. 19, 30 (1827)).

99 *Kellogg Brown & Root*, 135 S. Ct. at 1979 (suggesting such terms as substitutes for "pending").

Power Failures: Prosecution, Power, and Problems

*By Ronald A. Cass**

I. Introduction: Prosecution, Power, and Problems

Prosecutors wield an awesome power. They make the first (and sometimes the last) critical decisions on whether to deploy the ultimate power of the state—the power to punish—against particular targets. The degree to which and the ways in which prosecutorial power is checked largely define a society's conformance to the rule of law.

Over the past three decades, the world has embraced the concept of the rule of law to an unprecedented extent. The phrase has become the touchstone of good government for people all over the world, from Harare to Hanoi, Kabul to Kinshasa, Lhasa to Lima, Tegucigulpa to Tashkent.

At the same time, however, the rule of law has been undermined in America in ways that have not been fully appreciated. Changes in the locus and dispersion of prosecutorial authority, increasingly numerous, complex, and malleable legal rules, and failing procedural checks on prosecutorial decisions have allowed prosecutors (along with other officials exercising prosecutorial authority) to impose drastic punishments on selected targets without constraints traditionally associated with the rule of law.

Recognizing prosecutors' ability to bring the power of the state to bear against individuals in ways that especially threaten freedom, the legal system in the United States is designed to restrict prosecutorial power in numerous ways, including through constitutional constraints on the ways in which criminal law can be made and deployed. Beyond legal checks, practical considerations also influence (and to some extent constrain) prosecutors' judgments. Budget strictures, public relations considerations, personnel regulations and hierarchies, and ultimately judicial controls all limit prosecutorial discretion.

But older notions of how prosecutorial power might be misused—and older controls put in place to prevent that misuse—have been outstripped by more recent developments. And the practical restraints that do exist still leave room for very significant—and very troubling—amounts of discretionary prosecutorial power. That power can be exercised to pursue the innocent, to impose punishment without trial or conviction, and to pressure targets to compromise or capitulate rather than bear the risks and costs of asserting their rights or their innocence.

The power of the government as prosecutor is not only abused in ordinary criminal cases where the poor and the powerless are subjected to the weight of the criminal law system. Prosecutorial power is also abused in high-profile cases against the powerful, sometimes to serve personal or political ends. It is abused as well in selecting and pursuing targets in the world of business, where prosecution substitutes for ordinary regulatory processes or overrides salutary competitive forces.

Finally, the divisions between federal and state authorities often are not observed in prosecutorial decisions. Federal officials intrude on areas of state competence, and state authorities bring charges that effectively turn an individual state prosecutor into the national decision-maker on issues of regulatory importance. This results in duplication of effort on the part of government agents (prosecutorial and regulatory) and extra burden on those targeted for prosecution (or for analogous civil penalties). More concerning, it also brings opportunities for gamesmanship that advances prosecutorial interests at the expense of clear, cogent legal rules. All of these aspects of the misuse of prosecutorial power threaten the proper functioning of our constitutional system and undermine the rule of law.

An earlier article evaluated problems associated with overcriminalization, especially problems flowing from the expansion of regulatory crimes.[1] This paper explores other problems in the operation of prosecutions in America, in part through specific examples of misuse of prosecutorial power. It particularly focuses on the risks associated with prosecutorial discretion, including risks to government structure, personal liberty, and ordinary market competition.

II. Bad Cases, Bad Actors: The Joe Salvati Story[2]

On March 12, 1965, Edward "Teddy" Deegan was shot and killed in Chelsea, Massachusetts (just outside Boston), a victim of fights among New England organized crime families. The murder was committed by five men connected to the Patriarca crime organization: Vincent "Jimmy" Flemmi, Joe "the Animal" Barboza, Ronnie Cassesso, Roy French, and Romeo Martin. The five were seen together in a bar the evening of the Deegan murder, left shortly before the murder, and returned not long after it; a car belonging to Martin was seen by a police officer near the scene. Within a day, a Boston-based agent of the Federal Bureau of Investigation, Special Agent H. Paul Rico, had information identifying all five killers. He relayed that information to his superiors.

In the world we all imagine, the rest of the story should have been the swift arrest, trial, and conviction of the five killers. That is not what happened, for reasons rooted in a long-running project by the FBI and Department of Justice to develop evidence against leading members of organized criminal enterprises. That project, begun several years before the Deegan murder, included cultivating informants who could provide information and testimony that could be used to convict high-level organized crime targets. Jimmy Flemmi was recruited as a cooperating informant—and assigned to Special Agent Rico and his partner, Dennis Condon—on the same day Teddy Deegan was killed. Jimmy Flemmi's brother, Stephen "the

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Rifleman" Flemmi, became a highly prized cooperating figure in this program about six months later. Barboza, with serious new criminal charges hanging over him, became an informant two years later.

Barboza provided the key evidence in the Deegan murder case, which had languished because, despite what was known to the FBI, local law enforcement officials had not been able to put together a solid case. In addition to the testimony of informants at the time of the killing, the FBI had ample evidence from secret wiretaps on Raymond Patriarca that corroborated its information about the murder. With the evidence that was available to the Chelsea police, the Boston police, state troopers, and Suffolk County law enforcement officials, there would have been more than enough to prosecute the killers. Barboza, however, did not want to face capital charges and did not want to put Jimmy Flemmi, his best friend, in jeopardy. He constructed a story, which changed repeatedly and significantly over the next year, that correctly identified French, Cassesso, and Martin as participants in the killing, and also added four others to the event who had no connection to it. These included two high-ranking members of the Patriarca family: Peter Limone, who had warned Deegan that Barboza and Flemmi intended to kill him, and Henry Tameleo, who had no evident connection to the matter at all. The other two men named by Barboza were Louis Greco, who had intervened in a confrontation between Barboza and another man, and Joe Salvati, who owed Barboza money and refused to pay back the full amount (as calculated by Barboza).

The FBI officials who had followed the case knew that Barboza's testimony was false. (Rico would turn out to be more closely aligned with criminal associates than with law enforcement colleagues, and was later indicted for murder in an unrelated case; he apparently helped suppress evidence or craft false testimony in a number of cases.) In this case, Barboza's testimony conflicted with all nine contemporaneous reports prepared by federal and state officials based on evidence they had collected prior to Barboza becoming a state's witness. It changed in ways that were hardly credible but were necessary to fit the police reports. For instance, when Barboza found out that a police report had placed someone who looked just like Jimmy Flemmi in a car near the murder, Barboza claimed that the person was Joe Salvati—even though the police described someone with a pronounced bald spot and Salvati had a full head of hair. According to Barboza, Salvati (who was not an associate of the crowd that committed the murder) wore a bald wig, even though none of the other suspects was wearing a disguise. The state officials may not have known, as federal officials did, that Barboza was lying, but they did little to assure that his testimony fit all the evidence they had. In the end, a deal was struck for a reduced set of charges against Barboza. More serious charges were filed against the other men, with prosecutors seeking the death penalty for each; four were sentenced to death and Salvati to life imprisonment.

None of the men convicted in the case was executed—Massachusetts abolished the death penalty while appeals were pending—but two of them died in jail. Joe Salvati served 29 years before his sentence was commuted; Peter Limone served more than 30 years.

The ultimate release of Salvati and Limone and the public recognition that they were falsely convicted is not so much an affirmation that the American legal system works as tribute to Good Samaritan serendipity. After Joe Salvati's appeals were exhausted, his wife, Marie Salvati, asked Medford attorney Victor Garo to see if anything could be done for her husband, a man she protested was convicted of a crime he did not commit. A skeptical Garo took a retainer from Mrs. Salvati, looked into the case, returned the retainer, and worked for nearly 35 years without pay to secure Joe's release, to have his conviction reversed, and to secure compensation for a life turned inside out. Garo's efforts met resistance from state and federal authorities at every turn. Decade after decade, at every level, government officials who knew what had happened did everything they could to hide the facts, while those who were not complicit in framing Salvati and his co-defendants did not want to look into Garo's claims.

After more than 15 years of losing every legal challenge, having every door slammed, and failing to make any progress through judicial and administrative channels, Garo took his case to the public with the help of respected Boston newsman Dan Rea. A series of special investigative reports on local and then national television raised the profile of Salvati's case. Although the initial response from federal and state prosecutors was hostile, even to the point of bringing pressure on Rea's employer to curtail these reports, the heightened public attention led to federal investigations into corruption and abuse in the Boston FBI office and congressional inquiries. Eventually, these, along with court proceedings based on newly acquired evidence corroborating Salvati's and Limone's contentions, secured vacation of their convictions and state decisions not to retry.

Victor Garo's commitment to justice and to his client is extraordinary. Without that, Joe Salvati and Peter Limone might have died in jail, as Henry Tameleo and Louis Greco did. But Garo's fight on his client's behalf did not only require righting the initial wrongs. Prosecutors and investigators, their superiors and their successors—including many who were in no way complicit in framing the four men—continued to the very end to resist efforts aimed at discovering what had happened and righting the injustice. Focusing on the FBI's role, U.S. District Judge Nancy Gertner described both the initial wrong and the continuing wrong in this case:

> The plaintiffs were convicted of Deegan's murder based on the perjured testimony of Joseph . . . Barboza. . . . The FBI agents "handling" Barboza . . . and their superiors—all the way up to the FBI Director—knew that Barboza would perjure himself. They knew this because Barboza, a killer many times over, had told them so—directly and indirectly. Barboza's testimony about the plaintiffs contradicted every shred of evidence in the FBI's possession at the time—and the FBI had extraordinary information. . . .
>
> Nor did the FBI's misconduct stop after the plaintiffs were convicted. The plaintiffs appealed, filed motions for a new trial, . . . sought commutations, appeared before parole boards, seeking clemency from the governor . . . On each occasion, when asked about the plaintiffs, on each occasion when the FBI could have disclosed the truth—the perfidy of Barboza and their complicity in it—they did not. This was so even as more and more evidence surfaced casting more and more doubt on these convictions. In the 1970s, for example, Barboza tried to recant his testimony, not in all cases in which he had participated, but only as to the plaintiffs in this case—the very men the FBI knew

to be innocent. In the 1980s, Agent Rico was found by a court to have suborned the perjury of another witness under similar circumstances. Yet, there was still no FBI investigation, no searching inquiry to see if an injustice had been done in this case.[3]

This case is testament to the power wielded by officials who oversee and support prosecution, and to the risk that those who see themselves as society's bulwark against wrongdoing will come to view the law as an impediment to just outcomes. When people with power believe that they and their judgments of right and wrong are above the law, there is always a danger they will use their power recklessly or malevolently. The long-delayed course of justice reveals the power of natural human instincts allied with institutional design: inertia, reluctance to admit mistakes, and unwillingness to expose one's own corner of the bureaucracy to ridicule or liability.

The Salvati story is shocking and extraordinary because it exposes the extreme lengths to which the particular government officials who "handled" Barboza and the Flemmi brothers went: sanctioning perjury, blatantly corrupting the legal process, even overlooking murder, with utter disregard for the effects their actions had on the lives of others. This story is shocking because we know that the people who suffered punishment were actually innocent—and plenty of people in positions of authority knew or should have known that.

But if the overall picture is extreme, basic threads in the fabric of this tale are not unusual. Law enforcement officials often see their role as partisans in a fight against bad people, and that can lead them to stretch legal limits to secure and preserve convictions. This good guys against bad guys view of the process can be exacerbated when law enforcement officers are rewarded for turning informants, generating arrests and prosecutions, and winning cases. That reward structure can push less well-grounded officials to take things a bit too far, to cut corners, to worry too little about the real world impact of their decisions. And officials who are not complicit in the problem too often lack incentives to ask hard questions about their colleagues, as thirty years of denials, resistance, and disregard by otherwise innocent officials in the Salvati case make clear. Frequent unsubstantiated complaints against law enforcers may inure them to complaints from those truly wronged, which may not be so easily distinguished from baseless complaints. Law enforcement officials do need a degree of independence, but there must be mechanisms in place that provide safety valves to guard against abuses and better ways to identify instances in which the system is failing.

Those concerned with the rule of law should see in this story not simply the immoral behavior of a small coterie of government officers. Instead, we should see the natural risks that attend large concentrations of discretionary power. While our government structures largely constrain grants of discretionary power, they leave huge amounts of it in the hands of prosecutors. Some degree of discretion is doubtless necessary to protect society against dangerous individuals, but vigilance is needed to make sure that power is not abused. Without checks, protectors too easily can become tyrants. James Madison made that understanding a centerpiece of his vision for our government;[4] it should remain central to our government today.

III. Hide and Seek: The Stevens Prosecution[5]

The Salvati case lies at one extreme on the spectrum of prosecution misbehavior, with the government's entire case resting on testimony known to be false at the time. A more common type of problem involves prosecutions that rest not on wholly fabricated evidence but on distorted evidence—evidence that is undercut by information not produced in court. Imagine that a child is accused of cheating on an exam; her exam answers are identical to those of another student. But the teacher who is supposed to decide the fate of the accused is not told that the other student not only has significantly lower grades overall, but has also been suspended twice in the past two years for copying from classmates' exam papers. That missing information does not prove that the accused student was not cheating, but it certainly casts the matter in a different light.

In criminal cases, prosecutors have a special obligation to disclose information that could help persuade jurors that the accused is innocent. A line of court decisions tracing back to the 1963 case of *Brady v. Maryland*,[6] spells out the sorts of information that might reasonably be thought to be exculpatory, either directly or indirectly. In *Brady* itself, the defendant admitted his involvement in the crime, but claimed that his companion had actually done the killing. The prosecution did not reveal that the companion in fact had confessed to exactly that set of facts. In addition to requiring that such direct evidence be turned over to the defense, the *Brady* line of cases mandates that prosecutors inform defense counsel, on request, of other information in the government's hands that would make witness testimony less credible, such as prior inconsistent statements (earlier statements by a witness that are inconsistent with her trial testimony). Prosecutors must also reveal agreements with witnesses that might cast doubt on the truth of their testimony, such as an agreement to give a witness a reduced sentence if his testimony leads to conviction of other defendants.

The *Brady* rules are built around the idea that criminal cases should not be seen as games, but as honest efforts to establish the truth. That should be the goal for all government officers.

That is a fitting aspirational statement, but it hardly describes the reality of criminal prosecutions. Just as defense lawyers see their job as providing the best defense for their clients and letting the judge or jury sort out the findings to assess guilt or innocence, prosecutors often see their task as making the case for conviction and punishment. Each side measures success by wins and losses. Prosecutors are motivated by winning, not by making sure that defendants have the fairest chance to escape punishment. Good lawyers all want results to be just, but they see their individual roles as making the system work by doing their own partisan job with intelligence, skill, and zeal. With able counsel on both sides, the system tends to work, but not because prosecutors are indifferent about outcomes. *Brady* rules do not change the basic nature of the game; they simply change some of its parameters. And the players still recognize that, for them, it *is* a game.

One relatively high-profile example is the federal government's prosecution of Alaska Senator Ted Stevens. Stevens was accused of violating ethics laws by accepting and failing to report gifts, principally in the form of thousands of dollars of improvements to his Alaska home. The home improvements were arranged and paid for by a company owned by Stevens' longtime friend Bill Allen, whose company had benefited from federal largesse brought back to Alaska by Stevens, whose position on the Appropriations Committee and forty years of Senate service made him a formidable source of Alaskan

pork. Allen's company was by no means unique in its receipt of federal money.

A critical aspect of the case was Stevens' contention that he had asked Allen to bill him for the costs associated with the work on his house. The defense relied not only on Stevens' own testimony, but on a letter he had sent to Allen. After thanking him for, among other things, the work on his home, Stevens said:

> You owe me a bill—remember Toricelli, my friend. Friendship is one thing—compliance with the ethics rules entirely different. I asked Bob [Person] to talk to you about this, so don't get PO'd at him—it's [sic] just has to be done right.[7]

The reference to New Jersey Senator Bob Torricelli is a caution to Allen. Shortly before Stevens wrote the note to Allen in October 2002, Torricelli gave up his own reelection effort, largely because of the fallout from his being admonished by the Senate Ethics Committee for failing to report gifts from businessman David Chang. (The reference should have been even more of a caution to Allen than to Stevens, as Chang served an 18-month prison term for illegal campaign contributions while the criminal investigation of Torricelli was dropped.)

At Stevens' trial, Allen testified that the letter was a sham, intended to provide an appearance of conforming to the rules but understood by both men to be insincere. According to Allen, no bill was expected and had it been forthcoming, Stevens would not have paid. Not only did this contradict the Senator's testimony; it also contradicted statements that Allen had given previously, including two statements he had made to the FBI. The prosecution, despite repeated demands by the defense lawyers for all *Brady* evidence (and orders from the trial judge to comply), did not reveal Allen's inconsistent statements to the defense and even removed the contradictory statements from an FBI report that was eventually turned over to defense lawyers. When pressed, the government lawyers sent a letter to the defense lawyers explaining that in prior statements Allen had said he did not think that Stevens would have paid a bill for the amount of the renovations; though the letter contained some slightly modifying language as well, it conveyed the impression that the prior statements had been consistent with what Allen would testify to in court. The actual conflicting statements were finally turned over to the defense team at 11:00 p.m. the night before it was to begin its cross-examination.

The government also failed to disclose a mountain of other information potentially helpful to the defense.[8] A witness referred to early on by the government, but whose testimony (as the government lawyers found out during their preparation sessions with him) turned out not to be helpful to the government was sent back to Alaska without informing the defense or the judge. Another witness, Dave Anderson, was called to the stand at the last minute to establish the extent of the work done on Stevens' home (after fabricated records on that issue, introduced by the government, were excluded from consideration). Prosecutors did not reveal the immunity deal they had struck with Anderson, which Anderson denied on the witness stand. They also did not reveal that one of the FBI agents working with the prosecution team on the case was involved in an intimate personal relationship with Bill Allen during the preparation for and trial of the case.

The Stevens defense team was led by Brendan Sullivan, one of the nation's premier defense lawyers who gained broad national fame as counsel for Lieutenant Colonel Oliver North during the congressional Iran-Contra hearings in the 1980s. Sullivan, both meticulous and intelligent, left no stone unturned in his own preparation. The government, which can often point to lapses in defense demands for information, had no such excuse in the Stevens case. In fact, Sullivan pressed relentlessly for exculpatory information, believing Stevens was innocent and aware that Stevens' political career hung in the balance. The government had filed its charges against Stevens with a senatorial reelection contest just over the horizon. That led to a defense decision to embark on the equivalent of a forced march, with a goal of acquittal before voters went to the polls.

As it happened, the jury convicted Stevens a week before the election. Although he had led in polls prior to the verdict, Stevens narrowly lost the election; voters not wanting to send a convicted senator to Washington probably made the difference between victory and defeat. The defense asked the Justice Department to open an investigation into the prosecution's conduct and filed a motion for a new trial. The extent of the government misconduct, while suspected by Sullivan, only came to light after the trial when an FBI agent who was disturbed by the way the case unfolded filed a whistleblower complaint within the Justice Department. After the change in administration, the new Attorney General, Eric Holder, stepped in to halt the proceedings, ordering the prosecution to dismiss the matter—a Democrat ordering his department to stop prosecuting a Republican on charges brought during a Republican presidency. The judge who had overseen the case was not mollified, ordering an independent inquiry of the prosecution's behavior.[9]

The legacy of the Stevens case in part was a change in the composition of the Senate. Without the misconduct, Stevens almost certainly would not have been convicted; without the conviction, he would have been reelected; with a Republican in that seat, the Democrats would have had just 59 senators in their caucus for the first session of the 111th Congress, one shy of the number needed to move legislation forward. With many sweeping legislative initiatives moving haltingly through the Congress when they moved at all and Republicans solidly opposed to most of them emanating from the other end of Pennsylvania Avenue, this chain of events—starting with prosecution misbehavior—may have altered history in ways no one could have foreseen.

Commentary following the Stevens case has concentrated on what special factors might have led to egregious misbehavior from the Public Integrity Section of Justice, which had charge of the case.[10] Some have pointed to problems with the "culture" of the Justice Department encouraging its lawyers, especially those associated with keeping other public officials in line, to see themselves as too pure to be questioned. Whatever truth there may be to that accusation, the Stevens case is doubtless the tip of a much larger iceberg. What it uncovers extends far beyond the confines of the Public Integrity Section or the Justice Department as a whole.

Prosecutors become invested in the cases they bring. They are not neutral toward the evidence that comes before them. Information that outside observers would label exculpatory in an instant might be seen by prosecutors as equivocal. That is not necessarily the result of a conscious effort to subvert *Brady*—though in cases like the Stevens prosecution it comes awfully close. The difference is one of perspective. After living with a case, putting their time and energy and effort into it, even

identifying their own career success with victory in a high-stakes case, prosecutors tend to become so convinced of the justice of their cause that they lose the ability to make unbiased assessments of issues related to their case. That is precisely why due process requires an impartial decision-maker. The same happens on the other side of the courtroom, but the defense rarely has the evidence and tools at its disposal to put the prosecution at a disadvantage.

The result of living with and becoming personally committed to a case is much like what happens in a late-night game of Scrabble. If you look at the letters long enough, and want a really good word to put down badly enough, you begin to see words that aren't there, that aren't real words, that in any other context you would know in an instant aren't real; but when you're ready to put down the triple word score worth 66 points, you would swear they are legitimate words. That is why there are dictionaries and third parties to referee disagreements in Scrabble, and judges to settle disputes in court.

IV. Regulatory Crime: No Accounting for Prosecutorial Judgment[11]

Perhaps the most common and costly problems of prosecutorial judgment involve exercises of prosecutorial discretion in the context of regulatory crimes. The field of regulatory crimes has exploded over the past few decades, with estimates of the number of criminal provisions and criminally-enforceable regulations reaching into the hundreds of thousands. That is a far cry from the Ten Commandments or the small set of common law crimes that were presumed to be known by all citizens. Virtually all commentators, including those who support the current rules on prosecution of regulatory crimes, recognize that the range of regulations is so vast and the regulations themselves are so difficult to know that the prosecution of these crimes (either in the criminal courts or through pursuit of civil fines) is inevitably a highly selective matter.

In this context, the most critical judgments often will be determinations of which potential targets to prosecute, what charges to bring, and what level of investment to make in the particular case. These decisions—which are treated as exercises of prosecutorial discretion, outside the purview of judicial review or other effective control—hold the prospect of being final decisions on matters of individual businesses' life or death.

One of the most noted examples of this phenomenon is the federal government's 2005 prosecution of Arthur Andersen LLP (Andersen), one of the nation's leading accounting firms founded almost a century before, and one of the surviving "Big Five" firms at the time of the prosecution.[9] The events that led to Andersen's prosecution started with the downfall of the energy and services conglomerate Enron. Enron was formed from the merger of natural gas pipeline firms in the 1980s, quickly changing its name and location. It aggressively expanded, branched out into other ventures, and grew to be a firm that reportedly was generating revenues in excess of $100 billion, making it one of the top ten firms among the Fortune 500. As it turned out, the firm's profitability was due in part to overstating asset values and moving liabilities off-balance-sheet to a series of limited liability "special purpose entities," owned in part by Enron employees. Andersen was Enron's auditing firm.

When rumors of problems at Enron began to edge into public speculation on its financial issues, an account manager at Andersen (and her supervising partner) reminded others at the firm who had worked on Enron matters that it would be good to comply with Andersen's long-established (but rarely implemented) document retention policy. That policy called for retention only of a single, centrally filed copy of information relevant to client service, not necessarily including drafts and notes, but also cautioned that documents should not be destroyed if the firm is "advised of litigation or subpoenas regarding a particular engagement."[12] While the invitation to implement the firm's policy resulted in the destruction of thousands of documents (doubtless in the expectation that the documents otherwise would become subject to discovery in litigation or regulatory investigations relating to Enron), the shredding was stopped—on the direction of the same individuals at Andersen who had reminded employees of the firm's document retention and destruction policy—the day after Andersen was notified formally of an investigation by the SEC and served with a subpoena for records.

There is no doubt that the reminder about the company's policy respecting documents was intended to prevent anyone outside the firm—including regulatory and investigatory authorities as well as potential private litigants, reporters, and anyone outside the accounting firm interested in its relationship with Enron—from discovering what Andersen employees were thinking about, worrying about, and talking about in the privacy of the firm. That, of course, is the entire purpose of having policies about document retention: to preserve what is important and necessary for future uses while reducing the risk that disclosures of background discussions among members of a team working on a problem will inhibit free discussion of all aspects of the issues being addressed. As the Supreme Court said, that is the same reason given for protecting communications between lawyers and clients and similar legal privileges.

The applicable law in the Andersen prosecution—a statute dealing with witness tampering—did not make any document destruction a crime; in relevant part, it punished only the knowing use of physical force, threats, or corrupt persuasion of another with an intent to cause the person to withhold or alter documents in order to impede an official proceeding. The Supreme Court unanimously read the instruction as applying to a very limited class of cases, in which the intention to undermine a proceeding for corrupt purposes was plain, something that fit with the other parts of the provision punishing threats and physical force directed at intimidating potential witnesses and undermining official proceedings. It earlier had held that advising a client to withhold information that a lawyer thought was protected from disclosure to the Internal Revenue Service did not violate the law.[13] The Court had no trouble seeing that encouraging fellow firm members to dispose of documents that were not public records and were not (at the time) the objects of subpoenas served to the firm, especially within the contours of a document handling policy, is far closer to the case of advice to a client on what is protected from disclosure than to threatening witnesses with harm if they testify honestly or produce documents they are under a legal duty to provide.

The prosecutors had pushed for a very different reading of the statute, one that would have criminalized any action that made any possible investigation or prosecution of anyone more difficult. Even if it is understandable that prosecutors would want to have the ability to deploy a flexible and powerful tool to make it easier to enforce rules that they believe are beneficial, the decision to bring criminal charges against Andersen and the mindset respecting the law that supported this prosecution are hard to defend from a broader perspective. A criminal law as

flexible as the prosecution sought would threaten a huge range of decisions that are consistent with ordinary, prudent business behavior. It would make the prosecutor the ultimate authority over business regulation.[14] Any individual federal prosecutor could credibly threaten almost any firm with criminal liability, which in turn would bring enormous pressure to capitulate to whatever penalties and restrictions the prosecutor might demand. Even then, the prosecutor would be free to accept or reject the corporate surrender, deciding in the fashion of spectators in the Roman Coliseum who got thumbs up and who did not.

Andersen's treatment is a cautionary tale. Like any accounting firm, it had value as an enterprise that could certify whether the businesses it audited complied with established rules; it was not an investigative enterprise, just one that was supposed to make sure that the books it audited met accounting criteria and produced the results announced so far as could be determined from the information provided. The firm can be faulted for failing to ask more probing questions of Enron and of other companies it audited. Prosecutors evidently believed that this failure reflected business concerns that more probing inquiries might jeopardize the contribution Enron and other clients made to Andersen's bottom line. But treating the firm as a partner in a criminal enterprise—especially under a law designed to address serious efforts to intimidate and corrupt judicial proceedings—does something quite different from seeking to channel business decisions in a more publicly beneficial direction. It stigmatizes questionable business judgments as indefensible assaults on public good.

In the end, the government's decision to prosecute Andersen deprived the company of the public-trust-signaling value on which its accounting business depended. Clients fled even before any neutral authority had a chance to consider the charges. In short order, it lost almost its entire revenue base along with more than 96 percent of its employees (down from 85,000 employees in 2001 to less than 3,000 by the end of 2002) and was effectively finished as a going enterprise. Further, the prosecution came after Andersen's management made clear it was prepared to accede to pretty much any terms the prosecutors wanted, including removal of the partner in charge of the Enron account and termination of the two individuals who had recommended implementation of the document retention policy.

The decision to prosecute was especially striking given that, as Richard Epstein observed, "There was no evidence that any of the actions taken [by the Andersen employees] were done to shield Andersen or its partners from criminal liability . . . [as opposed to] protecting Andersen's reputation as an auditor."[15] Perhaps the prosecutors had a sense that, in the wake of a series of high-profile stock-market shocks traced to corporate accounting fraud, the public would be well-served—and faith in the stock market would be restored—by prosecuting a well-known accounting firm. Whatever signal was received by the public, another message was communicated to the business world. Rather than a step in the direction of assuring greater fidelity to accounting standards, Andersen's prosecution instructed the business community that federal law enforcement officials could and would issue a corporate death sentence if they chose.

The Arthur Andersen case is a cautionary tale in another sense. Not only does it show the power that individual prosecutors can wield in exercising discretion to bring charges, to publicize them, and to pursue proceedings even after securing every possible concession; it also shows how prosecutors can wield power that seems much more logically reposed in the SEC, a regulatory agency with a mandate that encompasses the sort of oversight associated with assuring appropriate standards for assessment of public companies, including the Enrons of the world. In fact, the SEC did pursue cases against both Enron and Arthur Andersen, and eventually revoked Andersen's license to provide services essential under the securities laws.

Regulatory proceedings and administratively-initiated court cases that can result in civil penalties are in many ways quite similar to prosecutions.[16] They operate under different rules of procedure and are subject to distinctive practical and political constraints and inducements. Competitors can entreat agencies to deploy these alternative forms of corporate sanction for reasons that are not aligned with broader public interests; the threat of severe sanctions can have similar *in terrorem* effect on enforcement targets; and the discretion to pick and choose among potential targets can produce similar issues respecting the scope of official discretion. The use of administrative processes, which have fewer protections for enforcement targets than criminal proceedings, can raise special problems, especially when related criminal charges can still be pursued. Civil liability can generate high costs to firms that limit their willingness to engage in some beneficial behaviors, and it may not deter the corporate misbehavior that imposes widespread costs on others. In short, whether one is concerned with overdeterrence or underdeterrence of corporate misconduct, administrative regulation and civil liability both have serious flaws.

The use of civil sanctions, however, does differ in at least one important respect from the use of criminal penalties: civil litigation does not generally carry the same signal of serious misconduct as criminal prosecution, a signal that threatens severe reputational harm regardless of the ultimate outcome of the case. That is the essential lesson of the Andersen prosecution.

V. States as Nations: Tales of Eliot Spitzer[17]

While many of the most talked-about prosecutions of the past several decades have been the work of federal prosecutors, state prosecutors handle the vast majority of criminal cases and account for a number of visible abuses of power as well.

Criticism of and concern with state prosecutions should not be taken as a total indictment of the criminal justice system, which is both relatively predictable and generally fair. An enormous number of state court cases—more than 50 million each year—are routine traffic cases, and another 30 million or so are relatively routine criminal cases.[18] More than 90 percent of these are disposed of by plea agreements, the bulk of these reached between overwhelmed and underpaid prosecutors and public defenders, court-appointed counsel, and lawyers trying to make a living in the sort of practices that seldom make news.

Yet, there are some state prosecutors—particularly a few famous or infamous state attorneys general—who have made careers of pursuing targets that are both powerful and unpopular. Sometimes these targets are officials or well-established citizens whose behavior quite clearly constituted what anyone would understand to be crimes: theft, bribery, murder, extortion. The "crusading prosecutor" is a tried and true story-line for novels, TV shows, and movies, drawn in some measure from real life; it is a type that depends on bravery, commitment, and dedication to legal ideals. But other times, the prosecutor targets individuals and enterprises that are engaged in what looks very much like ordinary business behavior, often in highly regulated industries

such as financial services, health care, and insurance.

The fact that these targets are already subject to extensive regulation, very often at the federal level, makes them at once questionable subjects for state prosecutors' attention and inviting targets. These are apt to be politically popular prosecutions because the regulations signal public concern about the industries, public skepticism that they can be trusted to operate free from government supervision, and public understanding of their importance. Moreover, where primary regulatory authority is in federal hands, a state official can play the role of outsider shining a light on the awful job other government officials have done. It is no surprise that crusading attorneys general frequently have high public approval ratings—and frequently move on to the governor's mansion after highly visible crusades.

The "poster child" for the crusading state attorney general is Eliot Spitzer, former New York Attorney General and then Governor of New York before his dramatic political fall from grace. As Attorney General, Mr. Spitzer's office brought cases against leading firms in investment banking, mutual funds, insurance, and other industries. The prosecutions were almost always predicated, at least in part, on a combination of charges under New York's Martin Act.[19] This 1920s-vintage law gives prosecutors who choose to use it extraordinary power, as it punishes a broad and largely unspecified range of activities in connection with (among other things) advice, advertisement, purchase, or sale of securities, without any requirement of intent to defraud. This includes anything that is deemed "contrary to the plain rules of common honesty" and anything "tending to deceive or mislead the public."[20]

With this broad charter to police almost any activity in the financial arena that he deemed questionable, Spitzer was able to select among an extraordinarily broad array of possible targets. No matter how earnestly a company's management tried to stay within the bounds of legal strictures and generally-accepted business practices, firms were unable to defend against charges under the Martin Act. While particular companies no doubt act questionably or even commit outright fraud, businesses generally counted on prosecutors' ability to distinguish the few truly bad actors from the general run of folks trying to succeed in making profits and providing useful services—those who occupy the vast expanse between Mother Teresa and Carlo Ponzi.

Spitzer's prosecutions, however, pushed the line of what is acceptable beyond ordinary business practice to something more like an aspirational goal—almost to the point of requiring firms to recommend and design only investments that would turn out to be good. Businesses facing Spitzer's charges and their lawyers—along with many neutral observers—were almost always skeptical of the Attorney General's concept of legally permissible acts—especially because his office purported to distinguish criminal conduct from ordinary business behavior.

Objections to Spitzer's view of the law were seldom tested, because rather than simply arguing his positions to judges, trying to persuade them that he had the law's interpretation and application right in the cases he brought, Spitzer deployed heavier artillery to overcome his targets' objections and effectively to coerce settlement without trial. As Daniel Gross explained:

> Spitzer viewed his targets not as criminals who needed to be jailed but as professionals (and firms) with assets, careers, and reputations to protect. So he didn't simply indict. He issued press releases. . . . When Spitzer [targeting Merrill Lynch] published a press release detailing "a shocking betrayal of trust by one of Wall Street's most trusted names," Merrill Lynch lost $5 billion in market value in a few days and quickly settled. Getting the rest of the investment banking world to go along was then a relatively easy matter.[21]

The result ultimately was a "global settlement" of charges against ten leading investment banking firms, with the firms agreeing to pay substantial fines (more than $1 billion), make structural changes to their research and investment operations, and change some practices respecting initial public offerings of securities.

The problems with the use of high-pressure tactics to secure, in Gross's words, "punishment, remedy, *and* structural change" all in one tidy package are two-fold. First, that use of prosecutorial pressure bypasses neutral review from judges who are responsible for reading the law and assuring that it applies, that it is used in a predictable manner, and that it is not twisted to fit a given official's own interests. The essence of the rule of law is that sort of principled predictability, and the structures of government that support and reinforce predictable, neutral, general application of law are prized precisely because they promote the rule of law.[22] Prosecutors who are sure they are doing the right thing are no substitute for the limited powers and well-defined processes that prevent tyranny.

The second problem with this kind of prosecution is that it upends federalism. Spitzer took it upon himself to regulate industries that have important components located in New York but that operate nationally and affect national finance and commerce. Spitzer and his associates used the threat of criminal and civil liability to force changes in business practices and structures without the sort of hearings, input, consideration, and expertise that are typically required for construction of far-reaching regulation of business practices.[23] But more than that, construction of such regulation by a single set of state officials—even if they adopted better suited processes to construct the regulations—risks letting parochial visions control national enterprises.

The Constitution assigns responsibility for matters that primarily affect a single state to that state's officials, while giving federal officers power over matters that have broad spillover effects across state lines. Spitzer's targets overwhelmingly fell into the category of entities and behaviors better regulated at the national than the state level. Yet his office's solutions to perceived problems routinely imposed conditions on targets that had national impact. In fact, making global changes was the essence of all of the office's major initiatives.

There are certainly some matters of national scope that state prosecutors can play a role in, especially on a collaborative basis with one another or with federal authorities where each prosecutor is protecting the interests of his or her own state's citizens. And there are matters where one state's citizens might have a specific interest that could be protected in litigation by its state attorney general, as with environmental harms that are concentrated in specific locations. But those types of litigation are radically different from the one-prosecutor structural reform cases brought by Spitzer, using the location of firms to leverage changes wide nationwide effects.

VI. From Traditions to Solutions

Traditionally, prosecutors have enjoyed broad, unreviewable discretion to decide whom to bring into court, to select the charges, to determine what resources to invest in each case,

and to choose when and how to settle. This level of discretion been defended as necessary to protect enforcement officials against constant engagement over the choice of enforcement priorities and resources. It has also been defended as benign: in theory, "type 1" errors (decisions to prosecute someone who is not guilty) will be corrected by not guilty verdicts, and "type 2" errors (failure to prosecute those who are guilty) are simply an inevitable result of limited law enforcement resources. Moreover, not all crimes deserve prosecution, and prosecutors should be able to consider excuses or justifications in deciding whether to bring charges. Changes in the set of government officials who exercise prosecutorial authority, expansion in the number of criminal offenses, declines in the clarity and predictability of criminal offenses, however, have undermined justifications for prosecutorial discretion.

These changes have greatly amplified prosecutors' power. Their range of targets, of possible charges, and of prosecution tactics is vastly larger while the proportion of potential targets that have meaningful criminal intent or are engaged in obviously criminal conduct has become smaller. Beyond that, in a world of instant and constant communication, where news travels immediately around the globe and markets react instantaneously to the information available, prosecutorial misbehavior can have dramatic consequences for which ex post correctives are inadequate. Those who think that prosecutors' mistakes or misuse of their office is benign should consider what happened to Joe Salvati, Ted Stevens, Arthur Andersen, and Eliot Spitzer's targets.

A number of steps could be taken to make matters better from a rule of law standpoint. The most important—but also the least likely—corrective would be a dramatic reduction in the number of crimes on the books, a step that would lessen target-and-charge selection options and reduce prosecutorial leverage. This would also realign the balance of legislative versus prosecutorial control over law. A second possible corrective would be to restore requirements for intentionality or a degree of knowledge of criminality or at least a reason to expect someone ignorant of the law to have had knowledge of its requirements. This too is unlikely to happen.

A third possible change would be to create or increase impediments to misuse of prosecutorial powers, whether through greater penalties for the sort of misbehavior observed in the Ted Stevens prosecution or through checking the prosecution via press release that characterized much of Eliot Spitzer's work as New York Attorney General.

Finally, judges might be more skeptical of rules that broadly vouchsafe prosecutors' discretion, whether in facilitating inquiries before irreparable damage is done or in assuring more searching scrutiny of the legal assertions on which prosecutions—frequently in connection with regulatory crimes—are based.

Over the past few decades, the contours of our legal system have diverged sharply from conditions that made broad prosecutorial discretion defensible. Personal liberty and economic rationality, touchstones of our heritage and of our future, depend on preventing the sort of prosecution abuses that easily occur but cannot easily be corrected. Prosecutors can be generally respected, even applauded; crusaders can be admired, even lionized. But freedom to live, work, and play under predictable, neutral rules deserves a higher place in our pantheon of values. It deserves not just our respect but our protection. That would preserve what our founding generation gave us, what our "greatest generation" fought for, and what future generations should inherit.

Endnotes

1 Ronald A. Cass, *Overcriminalization: Administrative Regulation, Prosecutorial Discretion, and the Rule of Law*, 15 Engage (No. 2) 14 (July 2014).

2 The facts set forth in this section come primarily from Judge Nancy Gertner's account in Limone v. United States, 497 F.Supp.2d 143 (D. Mass. 2007), aff'd, 579 F.3d 79 (1st Cir. 2009), supplemented by information from contemporaneous news reports.

3 *See* Limone, 497 F.Supp.2d at 152-53.

4 *See, e.g.*, Federalist Nos. 47 (Madison), 51 (Madison).

5 The facts set forth in this section are primarily based on U.S. Department of Justice, Office of Professional Responsibility, Report On Investigation of Allegations of Prosecutorial Misconduct in United States v. Theodore F. Stevens, Crim. No. 08-231 (D.D.C. 2009) (EGS) (Aug. 15, 2011), *available at* http://www.leahy.senate.gov/imo/media/doc/052412-081511Report.pdf (Stevens Report), and are well-documented in contemporaneous news reports.

6 373 U.S. 83 (1963).

7 *See* Anna Stolley Persky, *A Cautionary Tale: The Ted Stevens Prosecution*, 24 The Washington Lawyer 18, 22 (No. 2, Oct. 2009).

8 *See* Stevens Report, *supra* note 5.

9 The result was the almost 700-page Stevens Report, *supra* note 5. The report summarized misconduct that supported suspension of two prosecutors. A subsequent decision of the Merit Systems Protection Board, without contradicting the findings of the report, concluded that the Department had violated required procedures in issuing the suspensions.

10 *See, e.g.*, Persky, *supra*; Jeffrey Toobin, *Casualties of Justice*, The New Yorker, Jan. 3, 2011, *available at* http://www.newyorker.com/magazine/2011/01/03/casualties-of-justice ("the Stevens case . . . was a profoundly unjust use of government power against an individual—a case flawed in both conception and execution"). *See also* Rob Cary, *Recalling the Injustice Done to Sen. Ted Stevens*, Roll Call, Oct. 28, 2014, *available at* http://www.rollcall.com/news/recalling_the_injustice_done_to_sen_ted_stevens_commentary-237407-1.html (Mr. Cary, one of the lawyers representing Sen. Stevens, is not an impartial commentator, but his observations pointedly capture the sense of dismay with the prosecutors' performance also expressed by others).

11 The salient facts of the case are recounted, among other places, in the Supreme Court decision reversing the firm's conviction, Arthur Andersen, LLP v. United States, 544 U.S. 696 (2005).

12 Andersen Policy Statement No. 780—Notification of Litigation, excerpted in Arthur Andersen, LLP v. United States, *supra*, 544 U.S. at n. 4.

13 *See* Upjohn Co. v. United States, 449 U.S. 383 (1981).

14 For a similar prosecution based on an excessively broad construction of a law (in this case, a law that actually was addressed to financial regulation, though applied in a very different and wholly unpredictable context), and a similar rejection from the Supreme Court, *see, e.g.*, Yates v. United States, No. 13-7451, --- U.S. --- (Feb. 25, 2015).

15 Richard A. Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions,* in Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct 38, 47 (New York University Press, Anthony S. Barkow & Rachel E. Barkow eds. 2011) (Barkow & Barkow).

16 For discussion of the similarities and differences between corporate criminal liability and regulatory or civil proceedings, *see, e.g.*, Samuel Buell, *Potentially*

Perverse Effects of Corporate Criminal Liability, in Barkow & Barkow, *supra*, at 87-107.

17 Most of the facts in this section, are readily available in public news reports, and can also be found in Peter Elkind, Rough Justice: The Rise and Fall of Eliot Spitzer (Penguin Books 2010).

18 This figure is roughly 300 times the 90,000-100,000 criminal cases each year in federal courts. *See*, *e.g.*, Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics: 2013*, available at http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2013; U.S. Department of Justice, Bureau of Justice Statistics, *State Court Caseload Statistics, available at* http://www.bjs.gov/index.cfm?ty=tp&tid=30 (*State Court Statistics*).

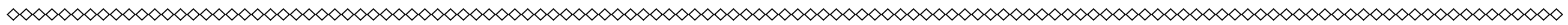
19 N.Y. Gen. Bus. Law. Art. 23-A, §352 et seq.

20 *See*, *e.g.*, People v. Sala, 258 A.D.2d 182, 193 (3d Dept. 1999), aff'd 95 N.Y.2d 254 (N.Y. Ct. App. 2000); People v. Federated Radio Corp., 244 N.Y. 33, 38-39 (N.Y. Ct. App. 1926).

21 *See* Daniel Gross, *Eliot Spitzer: How New York's Attorney General Became the Most Powerful Man on Wall Street*, Slate (Oct. 21, 2004), *available at* http://www.slate.com/articles/news_and_politics/assessment/2004/10/eliot_spitzer.single.html.

22 *See*, *e.g.*, Federalist Nos. 47 (Madison) (noting that, while the accumulation of powers "in the same hands . . . may justly be pronounced the very essence of tyranny," the structures of the Constitution is consciously designed to prevent that result), 51 (Madison) (elaborating on the reasons that the Constitution provides incentives and opportunities for different officials and institutions to check tendencies of others to aggrandizement); Ronald A. Cass, The Rule of Law in America 4-19, 28-29 (Johns Hopkins University Press 2001).

23 The argument against Lone Ranger lawmaking without process is *not* an endorsement of administrative regulation in its present form. The litany of problems associated with the regulatory state is long, well-analyzed, and raises serious concerns. Still, defects in one process do not make an alternative preferable.



Updating the Computer Fraud and Abuse Act

*By Jonathan S. Keim **

Introduction

In recent years, American institutions have suffered from a seemingly endless series of high-profile computer intrusions: Ashley Madison, the Office of Personnel Management, Sony Pictures, and health insurer Anthem.[1] Computer hackers connected with international organized crime groups apparently violate American law with impunity. Defensive technology designed to detect and prevent intrusions has been deployed widely, but attackers always seem to be one step ahead. In response, Congress has been considering a broad range of measures intended to address cybercrime's growing economic impact.

This paper provides some background principles to guide one aspect of that reform: revising the federal criminal statute that governs computer intrusions known as the Computer Fraud and Abuse Act (CFAA).[2] As Part I will show, the need for a strong CFAA has never been greater than it is today. But Part II will explain some of the problems with the current CFAA, which has become too broad. Its sweeping jurisdictional claims and wholesale incorporation of state criminal and tort laws put it into an uncomfortable position in the Constitution's allocation of federal and state powers. Meanwhile, the courts have interpreted the CFAA so broadly that Congress must step in to clarify its limits. The reforms proposed below are designed to fix these problems while ensuring that the CFAA is able to address contemporary threats adequately.

I. How We Got Here: A Brief Overview of Information Security

A. Computer Security from Mainframes to "The Cloud"

In the early days of computers, information security required little more than sturdy doors. Early room- or closet-sized mainframe computers usually required users to physically access the computers or their terminals, which meant that potential intruders necessarily exposed themselves to apprehension. In addition, attacks on centralized computing targeted the entities that could afford to invest vast resources in computing technology such as defense, research, and banking institutions, not consumers.

The expanding popularity of the personal computer in the 1980s decentralized computing power by putting devices into homes and small businesses and, in the process, opened new doors for electronic threats to consumers. This new computing paradigm eventually gave rise to a new type of threat: viruses. Few computers were connected by networks, so malicious software moved slowly from computer to computer through shared floppy disks. Virus writers rarely hoped for pecuniary gain, so viruses tended to be either harmless pranks or malicious data destroyers. Computers attached to networks were still vulnerable to outside attack, but the number of networked computers was so small that attackers could often be identified.

Electronic security threats to consumers and businesses accelerated in the mid-1990s as personal computers began connecting to the internet in large numbers. As more computers connected to the internet, the rise of cheap and fast network connectivity in the first decade of the 21st century began the rapid re-centralization of both data and computing resources in data centers.

On the one hand, technology re-centralization has enabled the growth of new business models based on reliable, fast, inexpensive network connectivity, a model sometimes called "cloud computing."[3] Consumers and businesses entrust "cloud" providers with vast amounts of information that they can access over the internet, but they often have no idea where in the world (literally) their data is being stored.[4]

Such connectivity comes with security risks. A company that handles customer data may be unwilling or unable to repel attacks from outsiders, or it may be populated by untrustworthy employees. In addition, computers attached to home and business networks can be vulnerable to infection by malicious software, known as "malware," which can use the computers to carry out sophisticated fraud transactions and other nefarious activity without the owner's knowledge.

At the same time, a cottage industry in defensive technology has risen to meet these challenges. Antivirus and other technology companies regularly hire ex-military cyber-operations personnel to ensure that their customers have products designed with the most up-to-date knowledge and skills. Penetration testers study computer software and hardware to find flaws. Several companies (and probably many more independent researchers) sell software that exploits these flaws to governments, defense contractors, and others who use them both offensively and defensively.[5]

B. Contemporary Threats

Computer intrusions and attacks generally fall into two general categories: insider and outsider.[6] An insider is typically an employee or other trusted person who has (or had) some level of authorization to access the victim's computer systems, but abuses that knowledge for an illegal purpose. The insider might be a disgruntled ex-employee, a friend, an employee engaging in corporate espionage, or perhaps a systems administrator who likes the thrill of damaging systems.[7]

An outsider, by contrast, has no authorization to use the targeted system. Because outsider attacks do not begin from a privileged position within a targeted organization, outsiders are likely to use hacking tools or techniques. Outsiders can be organized or disorganized, and their motives can include things like curiosity, anger, ideology, financial gain, nation-state intelligence-gathering, or even obtaining an advantage in competitive video games.[8] Once an attacker has obtained

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control over an attacked system, he can use the computer to eavesdrop, copy, modify or delete data, impersonate computer users, collect passwords and other identity information, or generally wreak havoc.[9]

Early cybercriminals tended to be computer science experts who knew the intricacies of the systems they compromised. Now, however, intrusion expertise has become decentralized and democratized along with computing technology. The last decade has seen the rise of international organized crime syndicates that use sophisticated attack mechanisms in connection with fraud schemes to steal hundreds of millions of dollars from banks, businesses, and individuals.[10] Anonymity technologies designed to help dissidents evade totalitarian regimes have enabled pedophiles to exchange child pornography using what is sometimes called the "Dark Web."[11] In addition, foreign nation-states and others have reportedly sought to obtain access to critical infrastructure and financial institutions.[12]

Just as the legitimate software industry has now created technology enabling kindergarteners to use smartphones, the cybercrime underworld has created consumer-grade tools that enable anyone with a little money and motivation to become a cybercriminal. Underworld merchants have borrowed lessons from business, creating products that make it possible for relatively unsophisticated criminals to perform basic hacking tasks. Sites on the Dark Web sell "off-the-shelf" hacking tools designed with easy-to-use controls, as well as access to pre-hacked computers and accounts for impatient criminals who can't be bothered to hack their own.[13] These computers can then be used to commit other crimes, send mass unsolicited email (or spam), or hide the source of other attacks.

C. How the CFAA Protects Legal Interests in Property

Computer intrusions affect legal interests in property that will be familiar to any student of tort law.[14] Criminal laws that forbid intrusions, such as the CFAA, generally protect a computer owner's legal interests in exclusive possession and control by prohibiting unauthorized access to the computer;[15] these legal interests are also protected by the common law tort of trespass to chattels.[16] Criminal laws forbidding unauthorized interference with the operation of computers[17] likewise protect the same interests as the torts of conversion and private nuisance because such activities interfere with the rightful control, use, or value of property.[18]

An intrusion that only nominally infringes on the rights of possession, control, or use is not sufficient to constitute a crime under the CFAA, however. It must result in some alteration in the use of the computer,[19] furtherance of a fraud,[20] damage or loss,[21] or a breach of confidentiality (defined as "obtain[ing] information").[22]

The legal interests protected by the statute can have fuzzy boundaries.[23] For instance: The CFAA forbids unauthorized "access" that "affects" a computer that is sometimes used by the government.[24] What degree of interaction is required before an "access" "affects" the operation of a computer? Also, a feared and very common attack called a distributed denial of service (or "DDoS") involves sending a flood of junk network traffic to a target website to crowd out other users' access, but it fits only uncomfortably within the CFAA's prohibitions of a "transmission of a program, information, code, or command" that intentionally causes damage.[25] Does crowding out other users' traffic count as "damage" to a target?

The CFAA's standard for whether a computer user actually trespasses is particularly malleable. Violations of the CFAA can occur if access is either "without authorization" or "exceeding authorization," but the latter has a circular statutory definition. Access that "exceeds [the owner's] authorization" is defined as access "with authorization" that the actor then uses "to obtain or alter information that the individual is not entitled to obtain or alter."[26] Although the drafters of the statute were trying to distinguish between permission to access the computer itself and the level of permission to obtain or alter information on the computer, courts have understandably been confused by the distinction.[27] Among other problems (such as those discussed in Part II.B), the fuzzy statutory boundaries protecting these legal interests ultimately raise questions about whether the CFAA provides adequate clarity to potential defendants about what conduct is prohibited.

Despite these problems, the CFAA remains the primary federal authority protecting computing technology from intrusions. With consumers and businesses facing security threats from every direction, the need for robust computer crime laws and enforcement has never been greater. At the same time, the CFAA must not create more problems through overbreadth than it solves. The next Part will explore several ways that Congress can ensure that the CFAA continues to serve its intended purpose without abandoning other values central to the rule of law.

II. Improving the Computer Fraud and Abuse Act: Problems and Solutions

As the preceding Part shows, protecting property threatened by computer intrusions requires enforcement of computer crime laws. Yet despite the relatively simple nature of the legal interests protected by the CFAA, several new circumstances complicate enforcement. In addition, the CFAA's scope—it claims to protect nearly every computer in the world—raises concerns about whether it occupies the appropriate constitutional role for a federal statute. A definitive answer for how to resolve the tension between effective enforcement of computer crime laws and a limited federal role is outside the scope of this paper, but this Part will identify several ways that would move the CFAA in the right direction.

To begin with, an internationalized and democratized computer security world means that much computer crime takes place across domestic and international boundaries. Congress can make better use of the powers entrusted to it by focusing federal law enforcement resources on inter-jurisdictional and international threats. In addition, fiscal restraint generally makes expensive and risky international investigations hard to justify. Congress should pursue policy federalism, allowing state law enforcement agencies to take increasing responsibility for purely domestic computer crimes that do not implicate a significant federal interest. This would make federal resources available for more ambitious international investigations that clearly implicate the powers of the federal government.

The CFAA also presents an overcriminalization problem. The courts have (until recently) progressively expanded

the scope of potential CFAA liability to include malfeasance that is not obviously trespass or hacking. Congress can fix this problem by scaling back the scope of the CFAA's criminal liability and leaving such matters for civil liability. Along the same lines, the CFAA can have unwanted chilling effects on innovative and socially-useful security research. Clarifying portions of the CFAA could eliminate these chilling effects, thus removing unnecessary legal impediments to development of advanced defensive security technologies. And at the same time, Congress should weigh in on the debate about whether victims of intrusions should be allowed to engage in "hacking back," a controversial practice that directly implicates the CFAA's core protections of property.

A. Prioritize Federal Resources Toward National and International Threats

With the most serious cybercrime threats now coming from international organized crime, Congress should encourage federal law enforcement agencies to prioritize investigative efforts against those threats. Although enforcement prioritization is typically an executive function, Congress has some tools to ensure that law enforcement resources are directed towards the most serious threats.

One drastic step in this direction would be to reduce the number of privately-owned computers that are subject to federal jurisdiction. The CFAA currently protects federal-interest computers (those used by financial institutions or the federal government) and all private computers "used in or affecting interstate or foreign commerce or communication."[28] By its terms, the CFAA effectively covers every computer in the world.[29] Congress could scale back the extent to which the CFAA reaches beyond federal-interest computers to include only private computers that have a *substantial* effect on interstate or international commerce, are used primarily for such commerce, or for which there is reason to suspect a connection to a conspiracy. This would ensure that government agents focus their investigative efforts on solving serious crimes instead of relatively minor computer intrusions for which the relationship with interstate commerce or other federal interests is only incidental.

More cautious steps would include directing federal investigators to prioritize the most significant threats to American consumers and businesses, such as fraud, malicious damage, and international organized crime. And since so much computer crime is committed by criminals located in other countries, this would practically mean reallocating enforcement resources toward international investigations and directing the executive branch to improve mutual legal assistance relationships with foreign governments.

Congress could also use federalism principles to divide responsibility for computer intrusions more evenly between the states and the federal government. Of course, federal law enforcement agencies have a central role investigating computer intrusions because the internet is an interstate telecommunications medium. The centralized federal role works for several simple reasons: federal agencies can easily operate across state lines, agents are unhampered by the daily emergency law enforcement responsibilities that typically apply to state law enforcement agencies, and federal agencies have greater resources and expertise than many state and local agencies. But the rapid development of new and sophisticated online threats is now putting significant pressure on those resources, which are increasingly scarce. As before, Congress could take drastic steps relinquishing federal responsibility to states.[30]

Similarly, Congress should consider reducing the extent to which the CFAA appropriates state law. The CFAA currently incorporates by reference state criminal and tort law—all of it—by turning any intrusion that furthers a state criminal or tortious act into a 5-year felony.[31] But this discourages states from investigating or prosecuting intrusions. After all, why should a state bother to investigate or prosecute a computer intrusion if the federal government will do it instead?

Encouraging states to pursue their own enforcement priorities would have some potential drawbacks such as reduced efficiency, cross-jurisdictional investigative cooperation problems, non-uniform policy, and so forth. In addition, few states currently have resources or expertise comparable to those of the federal agencies that currently investigate most cybercrimes.

On the other hand, there is little reason to impose a single, uniform national approach to computer intrusions for crimes that have no substantial federal interest or cross-jurisdictional connection. De-federalization of enforcement responsibilities would encourage states to experiment with policies uniquely addressed to particular state needs. California, whose economy depends heavily on its electronic infrastructure, could impose more significant penalties on intrusions than New Hampshire. Rebalancing responsibility among the actors in the federal system would reduce the burdens on federal law enforcement while also empowering states to pursue more locally-desirable solutions.

B. Decriminalize Activity That Can Be Adequately Addressed Through Civil Liability

Decriminalizing conduct that can be adequately addressed through non-criminal forms of legal liability would allow law enforcement to focus on investigating and prosecuting the most serious crimes. This proposal would principally affect the CFAA provisions prohibiting access that "exceeds authorization" and thereby obtains or alters information that the individual "is not entitled" to.[32] This form of liability is designed to enable prosecution of (for example) employees who are given access to a computer, then abuse that access and obtain information that they are not supposed to access. But it has also turned into a tool for punishing employees who violate use restrictions on data they are otherwise entitled to access.

The current language creates two particularly important problems. First, as law professor Orin Kerr has observed, its breadth approaches constitutional limits regarding notice to potential defendants about what conduct violates the statute. [33] The CFAA does not explain how a defendant can know which information she might be "entitled" to. Recent government proposals to amend the CFAA do nothing to address the notice problem, and actually would specifically authorize prosecutions for "exceeds authorization" violations that involve the misuse of data (defined as use for a purpose that the computer owner opposes).[34] By refocusing the CFAA's authorization language on the defendant's wrongful intent, i.e., her intention to violate the

owner's right to exclude her from the property, Congress could eliminate the notice problems and avoid the worst overbreadth.

Second, the CFAA's "exceeds authorization" liability criminalizes disputes that more properly fit within civil processes. Many of the cases concluding that a defendant "exceeds authorization," for instance, seek criminal sanctions for company employees who are entitled to access data but misuse it or misappropriate it in violation of an employment agreement or fiduciary duty.[35] In these cases there is usually been little question about the identity of the responsible defendants and no physical damage or violence (even if there is fraud). In such cases, the intrusive methods and punitive goals of the criminal law seem disproportionate to the wrong. Civil damages or equitable relief, by contrast, could provide victims with a complete remedy without requiring incarceration. Congress should not de-criminalize all forms of "exceeds authorization" liability, however. Deliberate attempts to inflict damage or pecuniary loss would be appropriate bases for criminal liability. But mere breaches of trust or contract should only be subject to civil remedies.[36]

If decriminalization of all "exceeds authorization" cases seems excessive, Congress could take a more modest step of elevating the mens rea to require at least an intentional violation of the owner's property interests. Because intrusion liability has generally been predicated on a trespass of some sort, Congress could refine "exceeds authorization" liability to include only willful violations of express limitations on access. Elevating proof requirements in this way would ensure that the CFAA, much like criminal trespass statutes, punishes the willful violation of an owner's right to exclude others from property, not the mere misuse of information.[37]

C. Clarify the Legal Boundaries for Computer Security Research

In recent years, the CFAA has begun to cast a shadow over the development of technology that is the first line of defense against intrusions for most businesses and consumers. Such technologies are often the result of intense study and experimentation, but research can easily drift into activities of dubious legality, particularly if the activities strongly resemble the activities of a potential intruder. In some cases, researchers have faced criminal prosecution because they pursued their research several steps too far.[38] For the purposes of this Section, though, the main concern is the potential chilling effect on research from excessively broad or ambiguous provisions of the CFAA. Researchers who must choose between potential jail time and not performing important research are likely to avoid innovative forms of research. Here as elsewhere, good fences make good neighbors, and the CFAA is badly in need of some fence-mending in four areas.

The first relates to the definition of "access" under the CFAA. Private security researchers often find it useful to access computers attached to the internet to collect data through automated scanning.[39] But some courts have concluded that the Terms of Service posted on a website can be legally binding and that visitors can be held liable for violations of those terms under the CFAA.[40] This puts researchers who use automated tools to a Hobson's choice: How would a potential defendant ever know what potentially liability-creating restrictions an owner has placed on access to the computer without first accessing the computer? Defining "access" would help clarify the scope of such prohibitions.

The second relates to aggressive techniques used by some security researchers. Teams of volunteers perform research on malware and help shut down networks of infected computers (called "botnets") under the control of a criminal (the "botmaster") that can be used for a variety of nefarious purposes, such as banking fraud or DDoS attacks. But under existing law, these public-spirited researchers could someday find themselves the targets of prosecution, since shutting down a computer without the owner's express permission seems to fit within the CFAA's prohibited conduct.[41] Some researchers forge ahead with research despite the possibility of prosecution.[42] Congress should find a way to encourage such socially beneficial activities without authorizing outright vigilantism.

Third, the Department of Justice and private sector actors have performed a valuable service in recent years to shut down botnets down by cobbling together civil and criminal legal remedies.[43] But the ad hoc approach and lack of congressionally-authorized standards for such operations raises concerns about accountability for mistakes, disruptions, and potential misconduct. This is particularly concerning because of the significant possibility of collateral damage from such operations.[44] Whatever the best policy in this area, minimizing the legal gray areas around research and mitigation efforts, as well as articulating standards for judicial review, would protect computer owners from unwarranted interference while also permitting remediation efforts to continue.

The fourth area concerns the disclosure of security vulnerabilities. "White hat" researchers sometimes infiltrate "black hat" circles or make purchases on the black market to publicize cutting-edge techniques and vulnerabilities of commercial products. Security experts who discover vulnerabilities in software or other technologies publish vulnerability information to the public as a way of shaming manufacturers who are slow to rectify the problems with their products.[45] Although the ethical boundaries around such practices are still being debated,[46] Congress should clarify the legal boundaries.

As in other areas of law, clarification of the actors' legal rights promotes Coasian bargaining about the scope of permissible access. Clarity encourages companies and researchers to contract around potential disputes, as Google and many other others have done, by establishing "bug bounty" programs that reward researchers for finding security problems before criminals find and exploit them.[47] Researchers who obtain consent from consumers before engaging in more aggressive forms of research or testing would facilitate research while also eliminating the risk of CFAA liability. This approach allows the parties to work out a desirable outcome without tying the hands of the industry that creates advanced technologies far more nimbly than Congress or any administrative agency could act.

D. Clarify the Legal Boundaries for Self-Help

For more than a decade, academic and policy experts have debated the desirability of permitting self-help as a countermeasure to computer intrusions.[48] With defensive technology lagging a step or two behind offensive technologies, some have

proposed that the CFAA should allow intrusion victims to "hack back."[49] The Department of Justice has steadfastly maintained that the CFAA prohibits hacking back, but some commentators claim that it is justified as a form of limited self-defense.[50] Either way, Congress should weigh in to provide certainty about legal consequences for victims of computer intrusions who are tempted to return fire.

III. Conclusion

New threats from international and organized crime are changing the way that Americans use the internet. Legislation alone will not solve the problem of computer intrusions. Improved computer security will require efforts by law enforcement, yes, but also by the private sector, the computer security industry, and consumers. To that end, Congress should ensure that the CFAA provides law enforcement agencies the clearest possible authority for prosecuting serious threats while allowing security researchers to develop the tools that will make possible tomorrow's defense.

Endnotes

1 Mark Seal, *An Exclusive Look at Sony's Hacking Saga*, Vanity Fair, Mar. 2015, http://www.vanityfair.com/hollywood/2015/02/sony-hacking-seth-rogen-evan-goldberg (last accessed Oct. 8, 2015); Dan Goodin, *Ashley Madison hack is not only real, it's worse than we thought*, Ars Technica, Aug. 19, 2015, http://arstechnica.com/security/2015/08/ashley-madison-hack-is-not-only-real-its-worse-than-we-thought/ (last accessed Oct. 8, 2015); Andrea Peterson, *OPM says 5.6 million fingerprints stolen in cyberattack, five times as many as previously thought*, The Switch, The Washington Post, Oct. 8, 2015, https://www.washingtonpost.com/news/the-switch/wp/2015/09/23/opm-now-says-more-than-five-million-fingerprints-compromised-in-breaches/ (last accessed Sept. 25, 2015); Ellen Nakashima, *Security firm finds link between China and Anthem hack*, The Switch, The Washington Post, Feb. 27, 2015, https://www.washingtonpost.com/news/the-switch/wp/2015/02/27/security-firm-finds-link-between-china-and-anthem-hack/ (last accessed Oct. 8, 2015).

2 18 U.S.C. § 1030.

3 Paradoxically, re-centralization has not affected the physical decentralization that the internet enabled. Instead, cheap and fast network connectivity has allowed businesses to integrate computers that are physically located around the world into a single organizational whole.

4 Sanjay Ghemawat, Howard Gobioff, & Shun-Tak Leung, *The Google File System*, 37 Operating Systems Review 29 (Dec. 2003), *available at* http://research.google.com/archive/gfs.html (last accessed Oct. 8, 2015).

5 An Italian company called Hacking Team apparently sold their offensive technologies to American law enforcement agencies in addition to many foreign governments. *See* Andrea Peterson, *A company that sells hacking tools to governments just got hacked*, The Switch, The Washington Post, July 6, 2015, https://www.washingtonpost.com/news/the-switch/wp/2015/07/06/a-company-that-sells-hacking-tools-to-governments-just-got-hacked/ (last accessed Oct. 8, 2015).

6 Somewhat confusingly, the academic literature applies the "insider" label to former employees. This is because a former employee has an enormous informational advantage compared to an attacker who is a total stranger. See Chris Strohm & Jordan Robertson, *Companies' Worst Hacking Threat May Be Their Own Workers*, Bloomberg Business, Sept. 26, 2014, http://www.bloomberg.com/news/2014-09-26/companies-worst-hacking-threat-may-be-their-own-workers.html (last accessed Oct. 8, 2015).

7 National Cybersecurity and Communications Integration Center, *Combating the Insider Threat*, May 2, 2014, https://www.us-cert.gov/sites/default/files/publications/Combating%20the%20Insider%20Threat_0.pdf (last accessed Oct. 8, 2015).

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14 Computer intrusion law is thus far from a specialized form of "cyberlaw" that Frank Easterbrook famously derided as "the Law of the Horse." Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal F. 207 (1996).

15 18 U.S.C. § 1030(a)(1)-(4).

16 *See* Restatement (Second) Torts, §§ 217, 218 (1977).

17 18 U.S.C. § 1030(a)(7).

18 *See* Restatement (Second) Torts, §§ 222A, 821D, cmts. b-d (1977); *but see* Intel Corp. v. Hamidi,71 P.3d 296 (Cal. 2003) (rejecting trespass to chattels theory in the absence of injury).

19 18 U.S.C. § 1030(a)(3).

20 18 U.S.C. § 1030(a)(4).

21 18 U.S.C. § 1030(a)(5). Other CFAA provisions define intrusion crimes related to interstate computer threats or extortion. 18 U.S.C. § 1030(a)(7).

22 The CFAA's confidentiality protections reach well beyond the common law tort of breach of privacy, requiring a showing merely that an attacker "obtained information" from the targeted computer. 18 U.S.C. § 1030(a)(1), (2); *see also* Restatement (Second) Torts, § 652A *et seq.* (1977) (discussing common law right of privacy). This has happened several times recently. *Ashley Madison Hackers Release Info of Man Who Paid to Erase His Profile*, Vice News, July 24, 2015, https://news.vice.com/article/ashley-madison-hackers-release-info-of-man-who-paid-to-erase-his-profile (last accessed Oct. 8, 2015); Seal, *Sony's Hacking Saga*, http://www.vanityfair.com/hollywood/2015/02/sony-hacking-seth-rogen-evan-goldberg.

23 Other federal statutes protect related interests. One taxonomy of these goods distills information security interests into four elements of information security assurance: confidentiality, integrity, availability, and accountability. Gary Stoneburner, *Underlying Technical Models for Information Technology Security*, NIST Spec. Pub. 800-33, Dec. 2001, *available at* http://csrc.nist.gov/publications/nistpubs/800-33/sp800-33.pdf (last accessed Oct. 8, 2015). An attacker can violate confidentiality interests by eavesdropping, by obtaining and releasing confidential information (subject to the First Amendment), or by transferring intellectual property without consent. *See generally* Department of Justice, Office of Legal Education, *Prosecuting Computer Crimes* (2013), *available at* http://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ccmanual.pdf (last accessed Oct. 8, 2015). Information itself may be protected from interference or misuse by several other statutes, which prohibit eavesdropping and trafficking in eavesdropping devices, identity theft, spam, wire fraud, and various forms of communication interference. Several of these criminal statutes, including the CFAA, have an accompanying civil cause of action. *See*, *e.g.*, 18 U.S.C. § 1030(g). According to statistics from the Federal Judicial Center, the CFAA was the major offense in between 93 and 120 criminal prosecutions per year (with no comparable statistics available for the civil cause of action). Federal Judicial Center, *Federal Judicial Caseload Statistics*, Table D-2 at 2 (2014), *available at* http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/D02DMar14.pdf (last accessed Oct. 8, 2015).

24 *See* 18 U.S.C. § 1030(a)(3) (forbidding "access" that "affects" the use of a government computer).

25 18 U.S.C. § 1030(a)(5).

26 18 U.S.C. §§ 1030(a), (e)(6).

27 *See* Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U.L. Rev. 1596, 1598-99 (2003).

28 18 U.S.C. § 1030(e)(2).

29 Orin S. Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 Minn. L. Rev. 1561, 1568 (2010) ("Because every computer connected to the Internet is used in interstate commerce or communication, it seems that every computer connected to the Internet is 'protected computer' covered by 18 U.S.C. § 1030.").

30 Congress need not be involved, of course. The Department of Justice could consider reprioritizing federal resources toward greater threats.

31 18 U.S.C. § 1030(c)(2)(B)(ii). The CFAA's reliance on state law undermines uniformity by making federal enforcement vary from state to state and creating the possibility of notice or vagueness problems. In addition, incorporating tort law into the substance of a criminal statute distorts the cost-benefit tradeoffs of tort law by creating a substantial risk of overpunishment. Whereas remedies for tortious conduct tend to be mostly compensatory, criminal statutes like the CFAA also provide for penalties as retribution and deterrence.

32 18 U.S.C. §§ 1030(a), (e)(6).

33 Kerr, *supra* note 29, at 1571-87.

34 Updated Administration Proposal: Law Enforcement Provisions, http://www.whitehouse.gov/sites/default/files/omb/legislative/letters/updated-law-enforcement-tools.pdf (last accessed Oct. 8, 2015).

35 *See* United States v. Rodriguez, 628 F.3d 1258 (11th Cir. 2010) (misuse of Social Security Administration computers); United States v. John, 597 F.3d 263 (5th Cir. 2010) (exceeding authorization in furtherance of a fraud crime); Int'l Airport Ctrs., LLC v. Citrin, 440 F.3d 418 (7th Cir. 2006) (Posner, J.) (breach of duty of loyalty and violation of employment agreement); *but see* WEC Carolina Energy Solutions LLC v. Miller, 687 F.3d 199, 203-04 (4th Cir. 2012) (violation of company policy); United States v. Nosal, 676 F.3d 854, 862-63 (9th Cir. 2012) (en banc) (Kozinski, J.) (limiting "exceeds authorized access" violations under CFAA to access violations, not use violations).

36 Not all misappropriations would become purely civil matters, however, since federal law also prohibits theft of trade secrets. 18 U.S.C. § 1832.

37 Interestingly, the common law pleading rules forbade the use of an "exceeds authorized access" theory for trespass to chattels in which the defendant remained in contact with a chattel if the original contact was made with the possessor's consent. Restatement (2d) Torts, § 217, cmt. g (1977). Because the distinction between the two was one of pleading, however, the Second Restatement made no such distinction.

38 In one case, an expert exploited a security vulnerability for the purpose of notifying consumers about the existence of the vulnerability. Kevin Poulsen, *Prosecutors admit error in whistleblower conviction*, SecurityFocus, Oct. 14, 2003, http://www.securityfocus.com/news/7202 (last accessed Oct. 8, 2015). Although the researchers was eventually cleared, he no doubt would have preferred to avoid an erroneous prosecution in the first place.

39 *See*, *e.g.*, *Of Privacy, Security, and the Art of Scanning*, Shadowserver Foundation, June 23, 2015, http://blog.shadowserver.org/2015/06/23/of-privacy-security-and-the-art-of-scanning/ (last accessed Oct. 8, 2015); Dan Kaminsky, *RDP and the Critical Server Attack Surface*, Dan Kaminsky's Blog, Mar. 18, 2012, http://dankaminsky.com/2012/03/18/rdp/ (last accessed Oct. 8, 2015).

40 *See* United States v. Drew, 259 F.R.D. 449, 458-62 (C.D. Cal. 2009) (creating profile on MySpace containing false age, picture, and pretending to be a juvenile violated CFAA); *see also* EF Cultural Travel BV v. Zefer Corp., 318 F.3d 58, 62-63 (1st Cir. 2003) ("A lack of authorization could be established by an explicit statement on the website restricting access. (Whether public policy might in turn limit certain restrictions is a separate issue.) Many webpages contain lengthy limiting conditions, including limitations on the use of scrapers."); *see also* Kerr, *supra* note 29, at 1617-21 (discussing access and authorization).

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42 Ed Felten, *Why were CERT researchers attacking Tor?*, Freedom to Tinker, July 31, 2014, https://freedom-to-tinker.com/blog/felten/why-were-cert-researchers-attacking-tor/ (last accessed Oct. 8, 2015).

43 *See* Brian Krebs, Spam Nation 233-36 (2014); *Microsoft takes on global cybercrime epidemic in tenth malware disruption*, The Official Microsoft Blog, June 30, 2014, http://blogs.microsoft.com/blog/2014/06/30/microsoft-takes-on-global-cybercrime-epidemic-in-tenth-malware-disruption/ (last accessed Oct. 8, 2015); Department of Justice Press Release, U.S. Leads Multi-National Action Against "Gameover Zeus" Botnet and "Cryptolocker" Ransomware, Charges Botnet Administrator, June 2, 2014, *available at* http://www.justice.gov/opa/pr/us-leads-multi-national-action-against-gameover-zeus-botnet-and-cryptolocker-ransomware (last accessed Oct. 8, 2015); Department of Justice Press Release, *Department of Justice Takes Action to Disable International Botnet*,

Apr. 13, 2011, *available at* http://www.justice.gov/opa/pr/department-justice-takes-action-disable-international-botnet (last accessed Oct. 8, 2015).

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48 *See*, *e.g.*, Richard A. Epstein, Intel v. Hamidi*: The Role of Self-Help in Cyberspace?*, 1 J.L. Econ. & Pol'y 147 (2005).

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Environmental Law & Property Rights

Utility Air Regulatory Group v. EPA: A Foreshadowing of Things to Come?

By Paul Beard II and Daniel Cheung***

On June 23, 2014, the United States Supreme Court issued its decision in *Utility Air Regulatory Group v. EPA*, holding that under the Clean Air Act ("CAA" or "Act"), the emission of greenhouse gases ("GHGs") alone could not trigger requirements for the Prevention of Significant Deterioration ("PSD") or Title V programs.[1] The Court also held that the Act allows regulation of GHG emissions from sources which emit other pollutants that subject them to PSD requirements "anyway"—so-called "anyway sources";[2] more than 83% of the stationary sources that the Environmental Protection Agency ("EPA") sought to regulate were anyway sources.[3] The Court's decision highlights the Court's ambivalence with respect to the EPA's regulatory authority and may foreshadow its position on future GHG-related litigation.

I. Background

In 2007, the U.S. Supreme Court decided *Massachusetts v. EPA*, holding that the Act would authorize EPA to regulate GHGs from new motor vehicles if the agency determined that GHG emissions endangered public health or welfare.[4] The Court's opinion engendered a series of rulemakings to regulate GHGs that was "the single largest expansion in the scope of the [Act] in its history."[5] In its 2009 "Endangerment Finding," EPA determined that GHGs endanger public health and welfare by contributing to global climate change.[6] EPA then issued a determination that the regulation of GHGs from motor vehicles would "trigger" regulation of GHGs from stationary sources under Title V and Title I of the Clean Air Act ("Triggering Rule").[7] The EPA promulgated GHG emissions standards for new motor vehicles in its "Tailpipe Rule" (effective January 2, 2011), which—according to its Triggering Rule—triggered GHG standards for stationary sources.[8]

Realizing that a literal application of the original PSD and Title V statutory threshold would be administratively impracticable, EPA issued the "Tailoring Rule" to raise the permitting threshold from between 100 and 250 tons per year to between 7,500 and 10,000 tons per year.[9] Several states, industry groups, and nonprofit organizations filed actions in the United States Circuit Court of Appeals for the D.C. Circuit, challenging all of EPA's GHG-related actions, including the Endangerment Finding, the Triggering Rule, and the Tailoring Rule.[10] The D.C. Circuit agreed with EPA's interpretation of the statute, holding that "any air pollutant" could be interpreted only as "any air pollutant regulated under the Clean Air Act."[11] The court also reasoned that this definition should be applied to determine the scope of the PSD program.[12] The D.C. Circuit denied rehearing en banc, with Judge Brown dissenting on the grounds that the full court should consider the propriety of extending *Massachusetts v. EPA*,[13] and Judge Kavanaugh dissenting on the grounds that "any air pollutant" under the PSD program should be narrowly construed to include only those pollutants regulated under the National Ambient Air Quality Standards ("NAAQS").[14]

The United States Supreme Court granted review in October 2013 on the question of whether EPA permissibly determined that its motor vehicle GHG regulations automatically triggered permitting requirements under the Act for stationary sources that emit GHGs.[15]

II. The Decision

Justice Scalia delivered the majority opinion. Justices Breyer and Alito wrote separate opinions concurring in part and dissenting in part.

A. Justice Scalia's Majority Opinion

In announcing the majority opinion, Justice Scalia noted that the EPA, "is getting almost everything it wanted in this case."[16] But while the EPA did retain significant regulatory authority for stationary sources, the opinion is widely seen as a reprimand of the EPA's regulatory overreach and as a strong signal of the Court's skepticism of the EPA's regulation of GHGs.

The decision is fractured, but each section of Justice Scalia's opinion was supported by at least a majority of the justices. Justice Breyer, joined by three other justices, dissented but joined with respect to Part II-B-2, which held that Best Available Control Technology (BACT) standards can be applied to anyway sources.[17] Justice Alito wrote a concurring opinion, joined by Justice Thomas, but dissented with respect to Part II-B-2.[18]

The majority opinion begins with a brief overview of the Clean Air Act and the history of GHG regulation since *Massachusetts v. EPA*.[19] It then analyzes two questions: first, whether the Clean Air Act compelled or permitted EPA's interpretation of the Trigger Rule; and second, whether the EPA reasonably interpreted the Clean Air Act to require anyway sources to comply with permitting requirements for GHGs.

1. EPA's Triggering Rule Was Neither Compelled Nor Permitted

The EPA claimed that regulation of GHGs under Title II of the Clean Air Act both permitted and compelled regulation of GHGs under PSD and Title V.[20] The majority opinion begins with a sharp critique of this argument, saying that this conclusion was the result of a "flawed syllogism."[21] Under the PSD program, a "major emitting facility," defined as a stationary source "which emit[s], or [has] the potential to emit, one hundred tons per year or more of *any air*

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pollutant" is subject to permitting requirements.[22] A "major stationary source" under Title V is defined with nearly identical language.[23] EPA argued that "any air pollutant" had to mean "any air pollutant regulated under the Clean Air Act" because the Court held in *Massachusetts v. EPA* that the Act-wide definition of "air pollutant" "embraces all airborne compounds of whatever stripe."[24] However, the mere fact that the Act-wide definition of the term "air pollutant" includes GHGs does not mean that the same definition applies to this section. In fact, the EPA historically followed Justice Scalia's reading of the phrase "any air pollutant," narrowly limiting the types of pollutants and sources that were subject to regulation under this provision.[25] Justice Scalia points out that, given this fact, "It takes some cheek for EPA to insist that it cannot possibly give 'air pollutant' a reasonable, context-appropriate meaning in the PSD and Title V contexts when it has been doing precisely that for decades."[26]

The opinion then shifts to whether the EPA's construction of the Clean Air Act was permissible in the first instance. Even within the *Chevron* framework—where agency interpretation of ambiguous statutes is given deference so long as that interpretation is a reasonable one—the majority concludes that the EPA's construction was impermissible.[27] Citing the EPA's own figures on the resulting increase in administrative costs (increasing the administrative costs for Title V permits from $62 million to $21 billion, for example), the Court holds that "the excessive demands on limited governmental resources is alone a good reason for rejecting [EPA's Triggering Rule]. EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[28]

Justice Scalia reserved his harshest words for the Tailoring Rule, which he addressed separately, saying that if the rule were upheld, "we would deal a severe blow to the Constitution's separation of powers."[29] Since the numerical permitting thresholds for PSD and Title V are written into the statute, the agency did not have authority to rewrite the requirements out of administrative convenience.[30] For the Court to allow the EPA to tailor regulation would be to, "stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery," and the Court had no intention of doing that.[31]

2. EPA Is Permitted To Regulate GHGs From Anyway Sources

While the majority opinion clearly rejects EPA's Triggering and Tailoring Rules, it does give the EPA authority to apply BACT standards to "anyway" sources – stationary sources that are already subject to PSD requirements.[32] While the definition of a "major emitting facility" does not specifically require regulation of all Act-wide pollutants, the BACT provisions apply "'for each pollutant subject to regulation under this chapter' (i.e., the entire Act)."[33] Since GHGs are a pollutant regulated under the Clean Air Act, they can be subject to BACT requirements.

B. Justice Breyer's Dissenting and Concurring Opinion

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, rejected all but Part II-B-2 of the majority opinion, joining only the holding that BACT could be applied to regulation of GHGs from anyway sources. Instead of reading EPA's rules as trying to exempt certain pollutants (in this case GHGs), Justice Breyer suggests applying the "tailoring" exemption to sources—in this case, smaller sources.[34] He reasons that Congress intended to regulate only those facilities which are significant contributors to air pollution and are able to bear the costs imposed by CAA regulations.[35] Applying the "tailoring" to the category of sources instead of pollutants would serve the Clean Air Act's purpose without straying from the statutory language.[36]

C. Justice Alito's Concurring and Dissenting Opinion

Justices Alito and Thomas agreed with most of the majority opinion, but took exception to its endorsement of regulating GHG emissions from anyway sources. Their opinion begins with an unequivocal rejection of the majority opinion in *Massachusetts v. EPA*, arguing that, "these cases further expose the flaws with that decision."[37] Justice Alito argues that the Clean Air Act was meant to regulate "conventional pollutants," and that it is not suited for regulation of GHGs. This conclusion also leads him to reject the majority's position that BACT analysis should apply to "anyway" sources, arguing that the nature of the PSD program, which emphasizes local harms, and BACT, which requires a case-by-case balancing of costs and benefits from control technologies, cannot be used to regulate GHGs.[38]

III. The EPA's Subsequent Regulatory Action

One month after the Supreme Court's decision, the EPA issued a memorandum saying that it would continue to enforce BACT standards for GHG emissions from anyway sources.[39] On December 19, 2014, the EPA issued further guidance on the rescission of PSD and Title V permits that were required solely because of the source's potential to emit GHGs.[40] It simultaneously issued a no-action letter assuring that sources would not be penalized for failure to comply with the terms of these permits in the interim.[41] On April 25, 2015, the D.C. Circuit amended its decision in accordance with the Supreme Court's opinion and vacated the relevant portions of the EPA's regulation.[42]

According to the EPA, this change will likely affect only a small group of sources, including municipal or commercial landfills that are large, but not large enough to be covered by other EPA regulations; pulp and paper facilities; electronics manufacturing plants; some chemical production plants; and beverage producers.[43]

IV. Impact of *UARG v. EPA*

The most immediate impact of this decision has been the restriction of EPA's toolkit for regulating GHGs. For example, the Court unanimously agreed that small sources are categorically exempt from PSD and Title V permitting requirements for GHGs.[44] The majority opinion also laid out explicit limitations on PSD-based emissions controls for larger sources, suggesting that EPA may not regulate energy efficiency, compel a fundamental redesign of facilities, or regulate the energy grid directly. Lastly, the Court suggested that GHGs can only be regulated under the PSD program for anyway sources if more than a "de minimis" amount is

emitted—what that threshold is was left open by the Court.[45]

The most significant impact of this opinion, of course, remains to be seen in the EPA's ongoing battle to regulate GHGs. Leading up to this case, the EPA issued the Tailpipe Rule, regulating GHG emissions from small and mid-sized motor vehicles under Clean Air Act Section 202(a).[46] Just weeks before the Court issued its opinion, the Obama administration released its proposed Clean Power Plan, which attempts to cut GHG emissions from existing—mostly coal-fired—power plants by up to 30 percent under Clean Air Act Section 111(d), a little-known and rarely-used provision in the Clean Air Act.[47] In June 2015, the EPA and Department of Transportation released GHG standards for new trucks, again under Section 202(a).[48]

According to some commentators, this case was a "warning shot" to the EPA that a majority of the Court is skeptical of its regulation of GHGs through the Clean Air Act.[49] The Court expressly invited future challenges of GHG regulation in its opinion, most notably by invoking *Brown & Williamson v. FDA*, a case establishing a canon of anti-deference in situations where "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'"[50] It is difficult to know whether this refers to the present case or to the Obama administration's Clean Power Plan, which is based on an obscure provision of the Clean Air Act.

It has also been pointed out, however, that the Court heard this case in the same term as *EPA v. EME Homer City Generation*, in which the Court deferred to the EPA on a question of cross-state NAAQS regulation.[51] The Court's holding in *EME Homer City Generation* stands in stark contrast to its holding in *UARG*, suggesting that the narrative about GHG regulation is still being written.[52] Is GHG regulation clearly permitted under the Clean Air Act such that EPA's interpretation of the statute is entitled to deference, or is the EPA forcing a round peg into a square hole by attempting to regulate GHGs under a statute ill-suited for that purpose?

V. Conclusion

As a practical matter, the Court's decision in *UARG v. EPA* did little to change permitting requirements for most stationary sources. However, it did reveal that the Court is deeply divided on the issue of whether the EPA can reasonably regulate GHGs under the Clean Air Act. Congressional action to *increase* regulation seems unlikely, because most bills currently before Congress are attempting to *block* regulation. The uncertainty around whether and how the EPA will regulate emission of GHGs continues, but the Court seems eager to decide on this issue in the near future. With the Clean Power Plan that came out in August 2015, it likely will have that opportunity very soon.

Endnotes

1 Util. Air Regulatory Group v. EPA (UARG), 134 S.Ct. 2427, 2446 (2014).

2 *Id.* at 2448.

3 *Id.* at 2438.

4 Massachusetts v. EPA, 549 U.S. 497, 528-29 (2007).

5 Julie R. Domike & Alec C. Zacaroli, The Clean Air Act Handbook xxi (3rd ed. 2011)

6 *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1) ["Endangerment Finding"].

7 *See* Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, 71) ["Triggering Rule"].

8 *See* Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified in various sections of 42 and 49 C.F.R.) ["Tailpipe Rule"].

9 Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 50, 51, 70, 71) ["Tailoring Rule"].

10 Coal. For Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012) (per curiam), *aff'd in part, rev'd in part sub nom.* UARG, 134 S. Ct. 2427.

11 *Id.* at 133 (internal quotation marks omitted).

12 *Id.*

13 Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 WL 6621785, *3 (D.C. Cir Dec. 20, 2012) (Brown, J., dissenting from denial of rehearing en banc).

14 *Id.* at *15 (Kavanaugh, J., dissenting from denial of rehearing en banc).

15 Util. Air Regulatory Group v. EPA, 134 S.Ct. 418 (2013) (granting certiorari on the question of "Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.").

16 Debra Cassens Weiss, *SCOTUS Partially Limits EPA's Greenhouse Gas Authority; Scalia Says EPA Got Most of What It Wanted*, ABA Journal (June 23, 2014), *available at* http://www.abajournal.com/news/article/scotus_partially_limits_epas_global_warming_authority.

17 UARG, 134 S.Ct. at 2455.

18 *Id.* at 2458.

19 *See id.* at 2435. For an excellent overview of the Clean Air Act and GHGs, *see also* Domike & Zacaroli, *supra* note 5, at 521-548.

20 UARG, 134 S.Ct. at 2439.

21 *Id.*

22 42 U.S.C.S. § 7479(1).

23 *Id.* at § 7602(j).

24 Massachusetts, 549 U.S. at 529.

25 *See* UARG, 134 S.Ct. at 2440.

26 *Id.*

27 Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If . . . the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

28 UARG, 134 S.Ct. at 2445.

29 *Id*. at 2446.

30 *See* Chevron, *supra*.

31 UARG, 134 S.Ct. at 2446.

32 *Id.* at 2448.

33 *Id.*, *citing* 42 U.S.C. § 7475(a)(4).

34 *Id.* at 2452-53.

35 *Id.* at 2453.

36 *Id.* at 2454.

37 *Id.* at 2455.

38 *Id.*

39 Memorandum from Janet G. McCabe, Acting Assistant Administrator, Office of Air and Radiation, and Cynthia Giles, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance, to Regional Administrators, *Next Steps and Preliminary Views on the Application of Clean Air Act Permitting Programs to Greenhouse Gases Following the Supreme Court's Decision in Utility Air Regulatory Group v. Environmental Protection Agency*, at 3 (July 24, 2014), *available at* http://www.epa.gov/region7/air/nsr/nsrindex.htm (last visited June 24, 2015).

40 Memorandum from Janet G. McCabe, Acting Assistant Administrator to Air Division Directors, *Next Steps for Addressing EPA-Issued Step 2 Prevention of Significant Deterioration Greenhouse Gas Permits and Associated Requirements* (Dec. 19, 2014), *available at* http://www.epa.gov/region7/air/nsr/nsrindex.htm (last visited June 24, 2015).

41 Memorandum from Cynthia Giles, Assistant Administrator to Janet McCabe, Assistant Administrator, Office of Air and Radiation, Regional Administrators, *No Action Assurance Regarding EPA-Issued Step 2 Prevention of Significant Deterioration Permits and Related Title V Requirements Following Utility Air Regulatory Group v. Environmental Protection Agency* (Dec. 19, 2014), *available at* http://www.epa.gov/region7/air/nsr/nsrindex.htm (last visited June 24, 2015).

42 Coal. for Responsible Regulation v. EPA, No. 09-1322, 2015 U.S. App. LEXIS 10619 at *1 (D.C. Cir. Apr. 10, 2015).

43 Robert Barnes, *Supreme Court: EPA Can Regulate Greenhouse Gas Emissions, With Some Limits*, Washington Post (June 23, 2014), http://www.washingtonpost.com/politics/supreme-court-limits-epas-ability-to-regulate-greenhouse-gas-emissions/2014/06/23/c56fc194-f1b1-11e3-914c-1fbd0614e2d4_story.html.

44 *See* UARG, 134 S. Ct. at 2443 (EPA acknowledges that PSD review is not suitable for "tens of thousands of smaller sources); *see also id.* at 2452 (Breyer, J., dissenting) (shifting the implicit permitting exception to "smaller sources that Congress did not mean to cover").

45 *Id.* at 2449.

46 Tailpipe Rule, *supra* note 8.

47 Carbon Pollution Emissions Guidelines for Existing Stationary Sources: Electric Utility Generation Units, 79 Fed. Reg. 34,830 (June 18, 2014); *see also* 42 U.S.C.S. § 7411(d).

48 *See* Greenhouse Gas Emissions and Fuel Efficiency Standards For Medium- and Heavy-Duty Engines and Vehicles – Phase 2, EPA-HQ-OAR-2014-0827 (proposed June 19, 2015) (to be codified at scattered provisions of 40 C.F.R.).

49 Jody Freemon, *Why I Worry About* UARG, 39 Harv. Envtl. L. Rev. 9 (2014).

50 UARG, 134 S.Ct. 2427 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 156 (2000)).

51 EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584 (2014).

52 Ann E. Carlson & Megan M. Herzog, *Text in Context: The Fate of Emergent Climate Regulation After* UARG *and* EME Homer, 39 Harv. Envtl. L. Rev. 23 (2014).

Horne v. United States Department of Agriculture: The Takings Clause and the Administrative State

By Brian T. Hodges & Christopher M. Kieser***

Note from the Editor:

This article discusses and praises *Horne v. United States Department of Agriculture*, a recent Supreme Court decision. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the authors. Generally, the Federalist Society refrains from publishing pieces that advocate for or against particular policies. When we do so, as here, we will offer links to other perspectives on the issue, including ones in opposition to the arguments put forth in the article. We also invite responses from our readers. To join the debate, please e-mail us at info@fedsoc.org.

• Brief for the Respondent, *Horne v. United States Department of Agriculture*, No. 14-275, *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV5/14-275_resp.authcheckdam.pdf.

• Andrew W. Schwartz, *No Competing Theory of Constitutional Interpretation Justifies Regulatory Takings Ideology*, 34 Stan. Envtl. L.J. 247, 302-03 (2015), *available at* http://journals.law.stanford.edu/sites/default/files/stanford-environmental-law-journal-selj/print/2015/09/schwartz_article.pdf.

Introduction

The U.S. Supreme Court's recent decision in *Horne v. United States Department of Agriculture (Horne II)* was a significant victory for property rights advocates, and an even more significant victory for opponents of the administrative state.[1] In an 8-1 decision, the Court held that a government program that seeks to control market prices by seizing a portion of a farmer's crop violates the Takings Clause of the Fifth Amendment.[2] In broad terms, the Court reaffirmed that personal property and real property enjoy the same protected status under the Fifth Amendment.[3] It clarified that when the government adopts a regulation that authorizes it to physically appropriate personal property, the regulation effects a taking—the fact that the owner might derive some ancillary benefit from the regulation is irrelevant to the question of whether a taking occurred.[4] Importantly, the Court also allowed property owners to challenge the imposition of such a regulation *before* the government takes their property, instead of having to seek compensation for it later.[5] The decision is particularly notable in that it continued the Roberts Court's trend toward a pragmatic and limited-government interpretation of the Takings Clause.

I. Background

The Agricultural Marketing Agreement Act of 1937 ("AMAA"),[6] a product of New Deal-era thinking, was passed "with the objective of helping farmers obtain a fair value for their agricultural products."[7] Congress at that time believed that excess competition was to blame for the low prices many commodities fetched on the open market,[8] so it undertook to "avoid unreasonable fluctuations in supplies and prices" of certain agricultural goods.[9] To accomplish its goal, the AMAA "authorizes the Secretary of Agriculture to promulgate 'marketing orders' to help maintain stable markets for particular agricultural products"—in other words, the secretary was authorized to prop up demand for agricultural products by throttling the supply.[10] One such marketing order regulates the California raisin market.[11]

The raisin marketing order created the Raisin Administrative Committee ("RAC"), an unelected group of 47 people—35 of whom represent raisin producers, 10 of whom represent raisin "handlers,"[12] and one each who represent cooperative bargaining associations and the general public.[13] The RAC is an agent of the federal government.[14] As the Supreme Court explained, each year the RAC "reviews crop yield, inventories, and shipments" and recommends to the Secretary whether or not there should be a "reserve pool" of raisins—that is, raisins transferred to the government and kept off the open market.[15] Raisin handlers are then required to transfer the demanded amount of raisins to the RAC.[16] The amount varies yearly, and has been as high as 47 percent of inventory in 2002.[17] In return, the raisin handlers receive a contingent interest in a percentage of the proceeds generated by the reserve, which in some years amounts to nothing.[18]

Marvin and Laura Horne had been farming raisins in the Central Valley of California since 1969.[19] Mr. Horne once even served as an alternate member of the RAC.[20] But over the years, they became disillusioned with a regulatory scheme that they thought was unconstitutional and sought a way to avoid it.[21] Because the marketing order regulates only raisin handlers, "the Hornes devised a plan to bring their raisins to market without going through a traditional handler."[22] They entered into a partnership with Mrs. Horne's parents and "contracted with more than 60 other raisin growers to clean, stem, sort, and, in some cases, box and stack their raisins for a fee."[23] The operation was substantial—cumulatively, it produced more than 3 million pounds of raisins during the 2002-03 and 2003-04 crop years.[24]

Despite the Hornes' best efforts, the Department of Agriculture declared that they were raisin handlers and thus subject to the marketing order.[25] The Hornes refused to comply with the order. When government trucks showed up at their

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facility one morning in 2002, they denied entry and refused to set aside any raisins for the reserve.[26] As a result, the government assessed almost $700,000 in fines and penalties against the Hornes—$480,000 for the value of the raisins and over $200,000 for not complying with the order to turn them over.[27] Rather than pay the fines, the Hornes defended themselves against the government's attempt to enforce the fines and penalties, arguing that the demand that they surrender their raisins to the government was an unconstitutional attempt to take their personal property without compensation.[28]

Their challenge was just the beginning of what would turn out to be a protracted legal battle that included two successful appeals to the Supreme Court of the United States. The proceedings started poorly for the challengers. The Hornes lost the enforcement action and lost again on administrative appeal before a federal district court.[29] Then the Ninth Circuit held that it lacked jurisdiction to even consider the Hornes' takings arguments, explaining that the Hornes would have to pay the fines or surrender the demanded raisins, then sue in the Federal Court of Claims under the Tucker Act before any court could consider whether the marketing order violated the Takings Clause.[30] But the Supreme Court unanimously reversed that decision, holding that because the AMAA authorized district courts to determine whether an enforcement action was lawful, the takings defense was properly before the court.[31] As the Court explained, "when a party raises a constitutional defense to an assessed fine, it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding."[32] So it remanded the Hornes' takings claim to the Ninth Circuit for a determination on the merits.[33]

On remand, the Ninth Circuit produced one of the worst property rights decisions in recent memory. First, contrary to decisions of the Supreme Court and several circuit courts, the Ninth Circuit held that the per se physical takings rule announced in *Loretto v. Teleprompter Manhattan CATV Corp*.[34] applies only to real property—not personal property like money, cars, or raisins.[35] Because of this threshold conclusion, the court opted to subject the marketing order to the type of complex balancing test that is ordinarily employed in regulatory takings cases (as opposed to physical takings cases) to determine when a law goes too far in diminishing the value of property. This analysis essentially ignored the Supreme Court's instruction to apply a bright-line rule when the government physically appropriates an owner's property.[36] Balancing tests are wholly inappropriate in physical invasion cases. As the Court explained in *Loretto*, the right to exclude others from your property is "perhaps the most fundamental of all property interests."[37] Accordingly, a physical occupation of property, no matter how small, is a taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[38] Inquiries into the degree to which the property is diminished by the government's actions or the purposes served are irrelevant to whether a physical taking occurred.[39] If the government exercises physical control over private property, it is obligated to compensate a property owner—even where it takes only a portion of the owner's property.[40]

Searching for a test to apply to avoid the result of *Loretto*'s clear instruction,[41] the Ninth Circuit settled on the exactions trilogy of *Nollan v. California Coastal Commission*,[42] *Dolan v. City of Tigard*,[43] and *Koontz v. St. Johns River Water Management District*.[44] Together, those cases hold that government agencies cannot condition permission to use one's property on the relinquishment of a property interest unless there is "a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal."[45] *Nollan*, *Dolan*, and *Koontz*, however, involve a "special application of the doctrine of unconstitutional conditions," and apply tests specifically designed to scrutinize conditions placed on land-use permit decisions.[46] Overlooking that doctrinal limitation,[47] the Ninth Circuit reasoned that the exactions test should apply because the raisin reserve requirement operated like a permit condition on the right to sell raisins. After all, the Ninth Circuit noted that, just like a land-use permit, the Hornes could have "avoid[ed] the reserve requirement of the Marketing Order by . . . planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins."[48]

The Court of Appeals then proceeded to apply an unrecognizable version of the exactions test. It transformed the robust *Nollan/Dolan* cause-and-effect test into a mere rational-basis, means-ends inquiry.[49] According to the panel, the reserve requirement satisfied the nexus requirement because it does what it is intended to do: create "orderly market conditions."[50] And it satisfied the proportionality requirement because the order only demanded that percentage of raisins the RAC determined were necessary to achieve the committee's goals.[51] In reaching its conclusions, the Ninth Circuit failed to acknowledge that *Nollan* and *Dolan* do not simply ask whether an exaction advances a particular government goal—the tests include an important causation element that requires the government to show that the regulated property use *directly causes* the problem an exaction addresses and, if so, that the exaction is proportionate to that impact.[52] Therefore, not only did the Ninth Circuit treat personal property as inferior to real property, but it effectively nullified the exactions cases in order to uphold the reserve requirement.

Perhaps because the Ninth Circuit's decision was such an outlier, the Supreme Court granted certiorari once again.

II. The Parties' Arguments

The Court granted certiorari on three discrete questions. The first was whether the "categorical duty" to pay compensation for a physical taking applies to personal property as well as real property.[53] The Solicitor General's brief did not attempt to defend the Ninth Circuit's conclusion on this point.[54] In fact, the Deputy Solicitor General who argued the case explicitly disavowed it at oral argument.[55] The Hornes' brief catalogued the long history of cases in the Supreme Court and the lower courts treating personal and real property as equal under the Takings Clause.[56] Their brief also forcefully argued that personal property has been protected by fundamental law dating back 800 years to the Magna Carta.[57]

The second question asked the Court whether the government can avoid the duty to pay just compensation for a per se taking "by reserving to the property owner a contingent

interest in a portion of the value of the property, set at the government's discretion."[58] The Solicitor General's brief did not address this question head-on. Rather, it argued that the contingent proceeds prevented the application of *Loretto*'s per se test in the first instance.[59] Because raisins are a fungible good, the government contended that so long as the Hornes retained some interest in the proceeds, there could be no taking.[60] But the Hornes pointed out that even if the proceeds were relevant, their value was speculative and often amounted to nothing.[61] In their view, the marketing order offered illusory compensation by taking raisins in return for whatever the RAC might view as appropriate in that particular year.

The final question for the Court was whether a requirement to "relinquish specific, identifiable property as a 'condition' on permission to engage in commerce effects a per se taking."[62] On this point, the government strongly defended the Ninth Circuit's conclusion that the raisin reserve program was a constitutional "exaction" under *Nollan* and *Dolan*. It made the sweeping claim that "[t]he government may condition the benefits provided by an orderly market on handlers' compliance with the reserve requirement."[63] In other words, the government may take property so long as it is doing so to create an "orderly market" that will, in the government's judgment, benefit the property owners. The Hornes rephrased that argument in their brief, saying that "[U]nder the Ninth Circuit's theory, the government can extract whatever property concessions it wants by effecting takings as a condition on the 'government benefit' of not being forbidden to do anything the government has power to forbid."[64]

III. The Decision

On June 22, 2015, the Supreme Court gave the Hornes a total victory, ruling in their favor on all three questions. Eight justices, led by Chief Justice Roberts, agreed that the raisin reserve was a taking; only Justice Sotomayor dissented. But Justice Breyer, joined by Justices Kagan and Ginsburg, wrote separately to say he would have remanded the case for a calculation of damages/offset rather than excuse the Hornes from paying the fines altogether.[65]

Writing for the majority, Chief Justice Roberts called the raisin reserve requirement a "clear physical taking."[66] He easily dismissed the Ninth Circuit's distinction between real and personal property, noting that the Takings Clause "protects 'private property' without any distinction between different types."[67] As the Hornes had suggested in their brief, "[t]he principle reflected in the Clause goes back at least 800 years to Magna Carta, which specifically protected agricultural crops from uncompensated takings."[68] Eight justices therefore agreed that *Loretto*'s per se rule was the correct analytical framework to apply.

The same eight justices also rejected the government's argument that providing a contingent interest in the proceeds from the seized property can avoid takings liability. The majority recognized that the government conflated the standards for physical and regulatory takings, noting that "when there has been a physical appropriation, 'we do not ask . . . whether it deprives the owner of all economically valuable use' of the item taken."[69] Instead, the fact that the government has permanently occupied private property is enough to effect a taking. No contingent interest in the proceeds can change that; at most, anything left over would count towards just compensation, not the question of liability.[70]

The majority also rejected the government's exactions argument. In response to the government's suggestion that the Hornes could do something else with their raisins to avoid regulation, the Chief Justice wrote that "'[l]et them sell wine' is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history."[71] Rather, the right to sell raisins, like the right to build a house on one's property,[72] is "not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection."[73] As the Court explained, this argument would allow the government to characterize many things as benefits and circumvent the requirement to pay compensation for physical takings.[74] But "property rights 'cannot be so easily manipulated.'"[75]

On the question of the proper remedy, the Court was more closely divided. The Chief Justice, writing for a five-justice majority including Justices Kennedy, Alito, Scalia, and Thomas, invalidated the fines and penalties altogether.[76] The majority reasoned that the government had already determined the fair market value of the raisins when it assessed the fine.[77] Therefore, it concluded that there was "no need for a remand; the Hornes should simply be relieved of the obligation to pay the fine and associated civil penalty they were assessed when they resisted the Government's effort to take their raisins."[78] Justice Breyer, joined by Justices Kagan and Ginsburg, disagreed. They would have remanded for a determination of compensation, offsetting the benefits created by the marketing order's reserve requirement.[79]

In dissent, Justice Sotomayor argued that the majority misunderstood *Loretto*. In her view, the per se physical takings rule applies only when the government takes "each and every property right" from the property owner (an understanding neither supported by *Loretto* nor the Court's body of physical taking case law).[80] Because the Hornes retained, at least in theory, "the right to receive some money for [the raisins'] disposition," they had not lost "every property right."[81] Furthermore, she adopted the government's (and the Ninth Circuit's) argument that a government agency may condition the right to sell a good on the open market on a "voluntary" agreement to give up property rights.[82] As a result, she would have affirmed the Ninth Circuit's judgment.

IV. The Implications of *Horne*

The Supreme Court's *Horne* decisions hold promise for advocates of property rights and limited government. Most immediately, the decisions embraced three common sense principles that will be extremely helpful for future takings litigants. First, the *Horne I* opinion recognizes that an administrative order imposing penalties may be a cognizable constitutional injury, even when the terms of the order have not yet been enforced.[83] Second, the recent decision recognizes that remedies available under the Takings Clause are not limited to just compensation—in some circumstances, an order invalidating a government action may be the appropriate remedy.[84] And third, the Court held that a property owner does not need to surrender his or her property as a prerequisite to seeking judicial

review of an unconstitutional agency order.[85]

Horne II provides more precedent supporting the recently reinvigorated unconstitutional conditions doctrine. But, perhaps more important to the big picture, the *Horne* decisions continue a trend of the Roberts Court—support for clear, administrable rules that benefit property owners at odds with powerful government agencies. That is in stark contrast with the final term before the Chief Justice joined the Court, which included the infamous *Kelo v. City of New London*[86] decision upholding a forced transfer of a private home to a corporation.

A. The Possibility of Injunctive Relief Against a Taking

For years, government attorneys have wielded the Supreme Court's frequent statement that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."[87] Such reasoning has led to the creation of the *Williamson County* state-litigation requirement,[88] one of the modern Court's most criticized doctrines.[89] It has also, in conjunction with the *Kelo* decision, which severely limited the Constitution's Public Use Clause, fostered an assumption that a taking can never be improper in the first instance. Therefore, the burden is always on property owners to contest a taking in court, asking for compensation after the fact. That gives the government significant leverage in takings cases.

An exchange at oral argument illustrates just how pervasive that assumption has become. Justice Breyer asked the Hornes' attorney, former federal judge Michael McConnell, whether, considering that "the Constitution forbids [only] takings without compensation," the Court shouldn't just remand the case for a just compensation calculation.[90] Mr. McConnell responded that, "in cases where there's . . . a taking, and the program does not contemplate compensation, the standard judicial remedy for that is to . . . invalidate the taking."[91] In other words, "a takings violation occurred when it was clear that there was no compensation at the time of the excessive governmental action; it was this absence that called for the remedy of invalidation."[92]

But the Supreme Court has moved away from that position. In modern times it has become axiomatic that the remedy for a taking that "goes too far" is just compensation, and the only way to invalidate such a law is through the Due Process Clause. For example, after finding a takings claim unripe, the *Williamson County* Court considered a due process challenge to the same zoning decision.[93] The Court explained that the essence of a regulatory taking is a government action that goes so far that it cannot be constitutionally accomplished without a condemnation proceeding.[94] In a due process claim, however, the remedy "is not 'just compensation,' but invalidation of the regulation, and if authorized and appropriate, actual damages."[95] As a result, plaintiffs must generally show that a regulation bears no rational relationship to a legitimate government objective to be entitled to invalidation. This is a much more difficult standard to meet.[96]

Horne II pokes a small hole in that orthodoxy. The Court invalidated the fines and penalties in large part because it was clear that the government had already determined the value of the raisins, so there was no mechanism to provide for compensation. Because the government thought it could seize the raisins without committing a taking, it felt comfortable setting up a scheme of penalties to enforce the regulations. Thus, this is precisely the type of program Mr. McConnell had in mind that "does not contemplate compensation."[97] It is a significant development that a majority of the Supreme Court essentially adopted that argument and disavowed the need for a remand.

However, it is not likely that this approach will spread to more typical takings cases. So long as the rationale of *Williamson County* still controls, the Court will likely continue to view inverse condemnation as within the "contemplation" of compensation.[98] If a government agency has a statutory means to pay compensation once a court determines that a taking has occurred, invalidation is unlikely to be an available remedy. But *Horne II* does at least represent a small step in favor of property owners in this area.

B. More Evidence of Skepticism About the Administrative State

This term was not a particularly good one for supporters of the so-called fourth branch of government, the ever-expanding administrative state. Earlier in the year, several justices expressed severe doubts about the federal courts' ongoing practice of deferring to administrative agencies under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.[99] And in one of the biggest cases of the term, the Court refused to defer to the IRS' interpretation of the Affordable Care Act provision providing federal tax subsidies for those purchasing health insurance on ACA exchanges.[100] *Horne II* is another example of the third branch's skepticism of administrative agencies.

In *Perez v. Mortgage Bankers Association*,[101] the Court unanimously reversed the D.C. Circuit and held that agencies do not have to go through notice-and-comment rulemaking under the Administrative Procedure Act when they announce a new interpretation of a regulation that "deviates significantly from one the agency has previously adopted."[102] While they joined in the result, three justices used the occasion to state their concerns with the regime of agency deference, particularly the practice of deferring to agency rules interpreting their own regulations. Justice Scalia argued that the APA's exemption for so-called "interpretive rules" was meant to be quite narrow, but "judge-made doctrines of deference" have significantly expanded the power of agencies to make binding law.[103] He said that the APA's plain text requires "that courts, not agencies, will authoritatively resolve ambiguities in statutes and regulations."[104] Such a reading calls into question not only deference to an agency's interpretation of its own regulations—mandated under *Auer v. Robbins*[105]—but also *Chevron* itself. Justice Alito even came close to asking someone to bring a case challenging the constitutionality of so-called *Auer* (or *Seminole Rock*[106]) deference.

Twice this term, Justice Thomas stated his view that *Chevron* and *Auer* deference are violations of the separation of powers. In *Perez*, he called *Seminole Rock/Auer* deference a "deviation" from general principles of separation of powers, reasoning that it is a transfer of power from the judiciary to executive agencies and prevents judges from exercising their duty to independently determine the meaning of regulations.[107] And a few months later in *Michigan v. EPA*,[108] he directly attacked the constitutionality of *Chevron* deference on similar grounds.[109]

Although Justice Thomas' views of the administrative state have long been well known, this time they added to a growing chorus urging reconsideration of long-held views on agency deference.

In *King v. Burwell*, the Chief Justice surprised many when he rejected the government's argument for *Chevron* deference.[110] The government had argued that the IRS rule allowing insurance purchasers to claim tax credits whether they purchased insurance on a federal or state-run exchange was a reasonable interpretation of the Affordable Care Act and thus entitled to deference.[111] But the majority concluded that this case was simply too important to be left to the discretion of the IRS.[112] The Court made it clear it would not defer to an agency's conclusion in such "extraordinary cases."[113] Instead, if Congress wanted to delegate such an important power to an agency, it should have done so expressly. As others have acknowledged, the "extraordinary cases" doctrine is a significant limit on and departure from traditional *Chevron* deference.[114] It illustrates that the Court will still require Congress to make the really important and difficult policy choices itself.

Among all these cases, *Horne II* was perhaps the strongest rebuke to the administrative state this term. In both *Horne* oral arguments, justices expressed significant doubts about the policy behind the raisin reserve requirement. The first time, Justice Kagan elicited laughter when she remarked that, on remand, the Ninth Circuit would have to "figure out whether this marketing order is a taking or it's just the world's most outdated law."[115] This time around, Justice Scalia compared the requirement to the central planning economy favored by the Soviet Union.[116] And the Chief Justice's opinion recognized that, much to the chagrin of would-be central planners at the Department of Agriculture, raisins "are private property—the fruit of the growers' labor—not 'public things subject to the absolute control of the state.'"[117] Hard as the fourth branch might try to regulate markets, it cannot do so by seizing private property. After nearly 80 years, the federal raisin reserve is a casualty of both the Court's stronger protection of property rights and its increasing skepticism of administrative agencies.

C. A Reinvigorated Unconstitutional Conditions Doctrine

Perhaps related to its skepticism toward the administrative state, the Court has increasingly relied on the doctrine of unconstitutional conditions in recent years. The doctrine was long a staple of the Supreme Court's jurisprudence until it all but disappeared over the past several decades. The judicial doctrine first appeared in the mid-nineteenth century in response to a wave of state laws that had placed severely restrictive conditions on out-of-state companies seeking permission to do business in the state.[118] In its original form, the doctrine operated as a structural doctrine, limiting state authority over interstate commerce and the national courts.[119] Under that version of the doctrine, the Court struck down conditions requiring that out-of-state companies waive their right to remove lawsuits to federal court, agree to taxes not applicable to other companies, and agree to taxation of out-of-state property and profits.[120] But by the early twentieth century, the doctrine had changed into one that directly protected the substantive rights of individuals against state and federal government by declaring void any condition that compelled a waiver of a right or privilege secured by the Constitution. The Court recognized that:

> [T]he power of the state [...] is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.[121]

The Court's reliance on the doctrine waned until the late 1950s through the 1970s. During that period, the doctrine was frequently invoked to strike down laws that conditioned the receipt of government benefits upon the waiver of individual rights, such as rights to free speech, free exercise of religion, travel, and equal protection of the laws.[122] In its modern formulation, the doctrine provides that government may not grant an individual a benefit or permit on the condition that he surrender a constitutional right.[123] Thus, the modern doctrine operates as a shield from government "deals" that would strip individuals of their constitutionally protected rights.

In the past few years, the Court has repeatedly relied on the doctrine to "vindicate[] the Constitution's enumerated rights by preventing the government from coercing people into giving them up."[124] For example, in *Agency for International Development v. Alliance for Open Society International, Inc.*,[125] the Court struck down a federal law requiring organizations to have a policy of opposing prostitution and sex trafficking to qualify for certain appropriations to be used in the fight against HIV/AIDS. The majority explained that Congress cannot condition a grant of federal funds for a specific purpose on the relinquishment of all speech rights on a topic.[126] Rather, it can (and in this case, it did) only restrict the funds themselves from being used for the disfavored purpose.[127] In this way, the unconstitutional conditions doctrine prevents the government from controlling speech by dangling too-good-to-refuse funding programs in front of organizations.

Koontz, following up on *Nollan* and *Dolan*, applied that principle in the context of land-use permitting. It extended *Nollan* and *Dolan* to prevent government agencies from holding the benefits of a building permit hostage to force property owners to contribute to unrelated government projects.[128] This limitation on government power exists even though, as with the federal money in *Agency for International Development*, the government is under no obligation to grant a permit in most situations.[129] But despite the power to deny the permit outright, the *Koontz* Court recognized that the government cannot use that power as leverage to require a permit applicant to pay for a city project unless it satisfies the requirements of *Nollan* and *Dolan*.

In *Horne II*, the Department of Agriculture made the novel argument that it could take a significant portion of a grower's raisin crop in return for the *privilege* of selling the remaining raisins on the open market. By rejecting this formulation of the unconstitutional conditions doctrine, the Court further strengthened it. In a part of the opinion joined by eight justices, the Chief Justice clarified that *Nollan* and its progeny recognize that, like building a home, "[s]elling produce in interstate commerce, although certainly subject to reasonable government regulation, is . . . not a special governmental benefit that the Government may hold hostage, to be ransomed by the

waiver of constitutional protection."[130] This result strengthens the unconstitutional conditions doctrine, making it more difficult for agencies to use the permitting process to restrict reasonable uses of property.

D. A Trend in Property Rights

In just the last few terms, the Court has several times rejected a government agency's argument for broader discretion in favor of applying bright-line rules. These cases—including *Horne II*—have uniformly benefitted property owners. As a result, the Court has solidified the protections of the Fifth Amendment and steadily reduced government power to diminish property rights through ad hoc decisionmaking.

In *Arkansas Game & Fish Commission v. United States*, a state agency sued the U.S. Army Corps of Engineers over repeated flooding of its land.[131] Between 1993 and 1999, the Corps deviated from past practice and decreased the rate at which it released water from a dam it constructed.[132] The change was meant to give farmers a longer harvest, but it had the effect of periodically flooding a portion of the Commission's land, used as a wildlife and hunting preserve as well as a timber resource.[133] The Commission claimed it was entitled to damages for repeated temporary takings.[134] In response, the Corps argued that even though government-induced flooding could be a taking, an exception for "temporary flooding" should be recognized.[135]

A unanimous Court rejected the Corps' argument.[136] Justice Ginsburg found no support in any case or principle of takings law for the proposition that flooding cases are different from run-of-the-mill government intrusions on private property.[137] The Corps had relied on a sentence from the 1924 case of *Sanguinetti v. United States*,[138] which it took to mean that only permanent flooding was compensable under the Takings Clause.[139] But the Court carefully reasoned that, even assuming the sentence was precedential, subsequent cases had eroded it and made clear that all temporary takings are compensable.[140] It thus rejected a government attempt to limit the application of the Takings Clause using a meaningless distinction.

The same happened the next term in *Koontz*. There, as described above, the Florida agency argued that the *Nollan* and *Dolan* rules limiting government power to exact property in exchange for a permit did not apply when: (1) the permit was ultimately denied, and (2) the agency demanded money instead of real property in return for the permit.[141] All nine justices rejected the first exception to *Nollan* and *Dolan*. The majority recognized that "[a] contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval."[142]

Five justices also rejected, for similar reasons, the agency's argument that exactions of money should be treated differently than those of real property.[143] The majority reasoned that, were the government's argument correct, agencies could easily avoid *Nollan* and *Dolan* by "offering" "the owner a choice of either surrendering an easement or making a payment equal to the easement's value."[144] In fact, this would have entirely obliterated the constitutional protections against exactions because the government could then just condemn the easement it wanted in the first place, using the money it exacted as "compensation." Like in *Arkansas Game & Fish*, the Court in *Koontz* rejected an exception that would have undermined constitutional property protections.

Finally, in *Marvin M. Brandt Revocable Trust v. United States*,[145] the federal government and a Wyoming landowner disputed ownership of an abandoned railroad right of way. In the government's view, when the right of way—granted by Congress under an 1875 Act that was meant to encourage railroad development in the West—was abandoned, it should have reverted back to the government's ownership.[146] The landowner argued that the right of way was a mere easement that, under common law property rules, should have been extinguished after the railroad abandoned it, leaving him with free and clear title.[147] Once again, the Supreme Court sided with the property owner and declined to create an exception to the common law for railway rights-of-way.

In *Great Northern Railway Co. v. United States*,[148] the Court had adopted what was then the government's position that the 1875 Act conveyed only easements to the railroads.[149] That case involved rights to drill for oil below the surface of the right of way: the United States claimed that the railway did not own these rights because it had only an easement.[150] Despite the Court's clear agreement that the Act granted only an easement, the government in *Brandt* attempted to avoid the effect of this clear rule. It urged the Court to read *Great Northern* narrowly and hold "that the right of way is not an easement for purposes of what happens when the railroad stops using it."[151] The eight-justice majority emphatically rejected what it termed this "self-serving" reading of the Act.[152] Once again, the Court sided with a clear, established rule for the benefit of property owners.

Horne II is the latest evidence of this trend. Rather than apply any of the complex regulatory takings tests that the Court has developed, the Court simply observed that the reserve requirement was a physical taking of raisins.[153] Furthermore, it declined the government's and Justice Breyer's invitations to remand the case and allow the lower courts to determine the regulatory scheme's ancillary benefits. The Roberts Court has sided with property owners in a major case each of the past four terms and has done so while emphasizing simple and understandable rules. It is safe to say that the Court's property-rights jurisprudence has changed course in the years since its decision in *Kelo*.

Conclusion

The Supreme Court's decision in *Horne II* is the latest in a recent line of cases that have endorsed clear rules protecting property rights. While the case did not announce any novel rules of law, it did illustrate that property owners may in some circumstances be able to halt a taking before it occurs. More broadly, *Horne II* fits into the general theme of skepticism about the actions of administrative agencies evinced in many cases this term. It remains to be seen whether these factors will spur challenges to other administrative regimes in the near future.

Endnotes

1 135 S. Ct. 2419 (2015).

2 *Id.* at 2428.

3 *Id.* at 2425–27.

4 *Id.* at 2429 ("[O]nce there is a taking, as in the case of a physical appropriation, any payment from the Government in connection with that action goes, at most, to the question of just compensation." (citing Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 747–48 (1997) (Scalia, J., concurring in the judgment)).

5 *Id.* at 2432–33.

6 7 U.S.C. §§ 671–74 (2012) (Agricultural Marketing Agreement Act); 7 U.S.C. §§ 601–627 (2012) (Agricultural Adjustment Act).

7 Lion Raisins, Inc. v. United States, 416 F.3d 1356, 1358 (Fed. Cir. 2005).

8 Horne v. U.S. Dep't of Agriculture, 133 S. Ct. 2053, 2056–57 (2013) (*Horne I*).

9 7 U.S.C. § 602(4) (2012).

10 *Horne II*, 135 S. Ct. at 2424.

11 *See* 7 C.F.R. pt. 989 (2012)

12 A "handler" is "(a) [a]ny processor or packer; (b) [a]ny person who places . . . raisins in the current of commerce from within [California] to any point outside thereof; (c) [a]ny person who delivers off-grade raisins . . . into any eligible non-normal outlet; or (d) [a]ny person who blends raisins [subject to certain exceptions]." *Horne I*, 133 S. Ct. at 2057 (quoting 7 C.F.R. § 989.15 (2012)).

13 7 C.F.R. § 989.26 (2012).

14 Horne v. U.S. Dep't of Agriculture, No. CV–F–08–1549, 2009 WL 4895362, at *2 (E.D. Cal. Dec. 11, 2009).

15 *Horne I*, 133 S. Ct. at 2057.

16 *Horne II*, 135 S. Ct. at 2424.

17 *Id.*

18 *Id.* at 2429.

19 *Horne* I, 133 S. Ct. at 2058.

20 *Horne*, 2009 WL 4895362, at *3.

21 Mr. Horne wrote to the Secretary of Agriculture in 2002, voicing his displeasure about the reserve requirement. He wrote: "[W]e are growers that will pack and market our raisins. We reserve our rights under the Constitution of the United States . . . [T]he Marketing Order Regulating Raisins has become a tool for grower bankruptcy, poverty, and involuntary servitude. The Marketing Order Regulating Raisins is a complete failure for growers, handlers, and the USDA . . . [W]e will not relinquish ownership of our crop. We put forth the money and effort to grow it, not the Raisin Administrative Committee. This is America, not a communist state." *Horne I*, 133 S. Ct. at 2058 n.3.

22 *Id.* at 2058.

23 *Id.*

24 *Id.* at 2058–59.

25 *Id.* at 2059.

26 *Horne II*, 135 S. Ct. at 2424.

27 *Id.* at 2425.

28 *Horne I*, 133 S. Ct. at 2059.

29 The district court agreed with the Court of Federal Claims in *Evans v. United States*, 74 Fed. Cl. 554 (2006), that the raisin reserve requirement was essentially a reasonable admissions toll to the raisin market, and the only property interest the Hornes could possibly have was in the proceeds from the reserve raisins. *Horne*, 2009 WL 4895362, at *25–27 (citing *Evans*, 74 Fed. Cl. at 563-64).

30 Horne v. U.S. Dep't of Agriculture, 673 F.3d 1071, 1079–80 (9th Cir. 2011). The Tucker Act, 28 U.S.C. § 1491 (2012), requires that property owners file takings claims against the federal government seeking payment of just compensation in the Court of Federal Claims.

31 *Horne I*, 133 S. Ct. at 2063.

32 *Id.*

33 *Id.* at 2064.

34 458 U.S. 419 (1982).

35 Horne v. U.S. Dep't of Agriculture, 750 F.3d 1128, 1139–41 (9th Cir. 2014). The Ninth Circuit's conclusion was particularly stunning given that, earlier in the same year, the U.S. Supreme Court held that a demand for money—personal property—is subject to the same per se rules as a demand for land in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2600 (2013). *See also* Brown v. Legal Found. of Wash., 538 U.S. 216, 235 (2003) (applying per se rule to a taking of interest from an IOLTA account, noting that "the transfer of the interest . . . here seems more akin to the occupation of a small amount of rooftop space in *Loretto*"); United States v. Gen. Motors Corp., 323 U.S. 373, 377–78 (1945) (analyzing the property rights protected by the Fifth Amendment as a group of rights citizens possess in a "physical thing"); Nixon v. United States, 978 F.2d 1269, 1285 (D.C. Cir. 1992) ("[T]he Government's inference that the *per se* doctrine must be limited to real property is without basis in the law" because "[o]ne may be just as permanently and completely dispossessed of personal property as of real property."). Many other circuits have reached the same conclusion. *See* Cerajeski v. Zoeller, 735 F.3d 577, 580 (7th Cir. 2013) (bank account interest); Anderson v. Spear, 356 F.3d 651, 669–70 (6th Cir. 2004) (surplus political contributions); Porter v. United States, 473 F.2d 1329, 1335 (5th Cir. 1973) (Lee Harvey Oswald's personal papers); United States v. Corbin, 423 F.2d 821 828-29 (10th Cir. 1970) (fish).

36 *Loretto*, 458 U.S. at 434–35. The standards for determining whether an invasion of property rights violates the Constitution generally vary depending on whether it occurs through a physical or regulatory imposition. Government actions tantamount to a physical invasion or occupation, like those that take possession of private property, are subject to a strict, per se test that automatically requires the government to pay just compensation. Regulatory restrictions on property that deny a property owner all economically beneficial use of property are also subject to a per se test. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017–19 (1992). Lesser regulatory impositions are subject to the multi-factor test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

37 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

38 *Loretto*, 458 U.S. at 451.

39 *Id.* at 426.

40 *Id.* at 421–22, 441.

41 The Hornes deliberately chose not to address the general regulatory takings test set out in *Penn Central*, because the marketing order would almost certainly satisfy that test. *Horne*, 750 F.3d 1138.

42 483 U.S. 825 (1987).

43 512 U.S. 374 (1994).

44 133 S. Ct. 2586 (2013).

45 *Koontz*, 133 S. Ct. at 2595 (quoting *Nollan*, 483 U.S. at 837, and *Dolan*, 512 U.S. at 391); *see also Lingle*, 544 U.S. at 547 ("[T]hese cases involve a special application of the 'doctrine of unconstitutional conditions,' which provides that 'the government may not require a person to give up a constitutional right-here the right to receive just compensation when property is taken for a public use-in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.'" (quoting *Dolan*, 512 U.S. at 385)).

46 Typically, a government demand that a person waive a constitutional right in exchange for a discretionary benefit constitutes a per se violation of the doctrine. *Koontz* explains, however, that every demand for property in exchange for a land use permit is not a violation; instead, such conditions are subject to heightened scrutiny. *Koontz*, 133 S. Ct. at 2595. It is that distinction that makes *Nollan* and *Dolan* a "special application" of the unconstitutional conditions doctrine. *Id.* The nexus and proportionality tests recognize that there are circumstances where a permit condition compelling the dedication of property to the public will be allowed under the Constitution. Permitting agencies enjoy broad discretion in considering development applications. When properly applied, an agency's permitting authority allows the government to demand that the owner mitigate for any negative impacts caused by a proposed development. But that same discretion can result in demands for dedications of property so onerous that, outside the exactions context, they would be deemed takings. Such unfettered power exposes landowners to the type of unlawful coercion that the unconstitutional conditions doctrine protects against. As the Court recognized:

> [L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take. By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.

Koontz, 133 S. Ct. at 2594-95. *Nollan* and *Dolan* address the realities of the permitting process by "allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Id.* at 2595.

47 The Court has made clear that these are land-use condition tests, not general takings standards. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999) ("[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use."). This does not mean, however, that *every* condition that seeks to exact property is a *Nollan*/*Dolan* issue—often, as was the case in *Horne II*, the less forgiving doctrine of unconstitutional conditions will apply to invalidate a condition on other use of property without regard to the nexus and proportionality standards.

48 *Horne*, 750 F.3d at 1143.

49 Many have noted that *Nollan* and *Dolan* require a cause-and-effect inquiry. Exactions are only constitutional if they remedy a social cost of the property owner's proposed use. *See, e.g.*, Timothy M. Mulvaney, *Proposed Exactions*, 26 J. Land Use & Envtl. L. 277, 281 (2011) (In *Nollan*, "the state did not meet its burden of proving that a condition requiring a beach access pathway bore an 'essential nexus' to the impacts *caused by the development*." (emphasis added)); Pierson Andrews, Nollan *and* Dolan*: Providing a Roadmap for Adopting a Uniform System to Determine Transportation Impact Fees*, 25 BYU J. Pub. L. 143, 146 (2011) ("In *Nollan*, the United States Supreme Court concentrated on the *connection between* the exaction required by the government and *the burden imposed by the new development*." (emphases added)); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go from Here*, 59 Wash. & Lee L. Rev. 373, 378 (2002) ("*Nollan* . . . established that an 'essential nexus' must exist between a development condition and the amelioration of a legitimate public problem *arising from the development*." (emphasis added)); James E. Holloway & Donald C. Guy, *Land Dedication Conditions and Beyond the Essential Nexus: Determining "Reasonably Related" Impacts of Real Estate Development Under the Takings Clause*, 27 Tex. Tech L. Rev. 73, 96 (1996) ("*Nollan*'s essential nexus test . . . requires the government to establish a more direct, causal connection between land dedication conditions and the impact of real estate development on infrastructure and public facilities."); *see also* Pennell v. City of San Jose, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part) (traditional land-use regulation is valid because there exists "a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy").

50 *Horne*, 750 F.3d at 1143.

51 *Id.* at 1143–44.

52 *Koontz*, 133 S. Ct. at 2591; *id.* at 2595.

53 *Horne II*, 135 S. Ct. at 2425.

54 *See* Brief for Respondent, Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015) (No. 14-275), 2015 WL 1478016.

55 Transcript of Oral Argument at 26–27, Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015) (No. 14-275).

56 Brief for Petitioner at 31–36, Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015) (No 14-275), 2015 WL 881767 ("In holding that the per se taking rule applies only to real property, the Ninth Circuit stands alone.").

57 *Id.* at 36–38 ("Indeed, protection of personalty—and especially of farmers' crops—has been a central concern of takings jurisprudence since the Magna Carta.").

58 *Horne II*, 135 S. Ct. at 2428.

59 Brief for Respondent at 24–28, Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015) (No. 14-275), 2015 WL 1478016.

60 *Id.* at 27–28 ("Because reserve raisins are a fungible commodity, useful to their owners only by generating revenue, any interests in lasting possession and control affected by the marketing order cannot reasonably be viewed as 'the most treasured strands in [the] owner's bundle of property rights.'" (quoting *Loretto*, 458 U.S. at 435)).

61 Brief for Petitioner at 42–43, Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015) (No 14-275), 2015 WL 881767.

62 *Horne II*, 135 S. Ct. at 2430.

63 Brief for Respondent at 29, Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015) (No 14-275), 2015 WL 1478016.

64 Brief for Petitioner at 56, Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015) (No 14-275), 2015 WL 881767; *see also id.* at 57 ("The panel's decision ultimately stands for the proposition that the government can take farmers' property as a condition of its grace in allowing them to sell part of their crop. Not since the barons prevailed at Runnymede has that been the law.").

65 *Horne II*, 135 S. Ct. at 2433 (Breyer, J., concurring in part and dissenting in part). Justice Thomas also filed a concurring opinion, noting that he had some doubts as to whether the raisin reserve program even complied with the "public use" requirement of the Fifth Amendment. *Id.* (Thomas, J., concurring).

66 *Id.* at 2428 (majority opinion).

67 *Id.* at 2426.

68 *Id.*

69 *Id.* at 2429 (quoting *Tahoe-Sierra*, 535 U.S. at 323).

70 *Id.* (citing *Suitum*, 520 U.S. at 747–48 (1997) (Scalia, J., concurring in the judgment)).

71 *Id.* at 2430.

72 *See Nollan*, 483 U.S. at 834 n.2.

73 *Horne II*, 135 S. Ct. at 2430–31.

74 *Id.* at 2430.

75 *Id.* (quoting *Loretto*, 458 U.S. at 439 n.17).

76 *Id.* at 2432–33.

77 *Id.* at 2433.

78 *Id.*

79 *Id.* at 2435–36 (Breyer, J., concurring in part and dissenting in part).

80 *Id.* at 2437 (Sotomayor, J., dissenting).

81 *Id.* at 2439.

82 *Id.* at 2440–41.

83 *Horne I*, 133 S. Ct. at 2061–62.

84 *Id.* at 2062–63.

85 *Id.*

86 545 U.S. 469 (2005).

87 Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985).

88 In *Williamson County*, the Court reasoned that takings plaintiffs must be denied just compensation by a state court before their claim for compensation is "ripe" in federal court. *Id.* at 194–95.

89 *See, e.g.*, San Remo Hotel, L.P. v. City & Cnty. of San Francisco, 545 U.S. 323, 349–52 (2005) (Rehnquist, C.J., concurring in the judgment); Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671 (2004); Scott A. Keller, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the* Williamson County *State Litigation Requirement for Regulatory Takings Claims*, 85 Tex. L. Rev. 199, 239 (1996); J. David Breemer, *The Rebirth of Federal Takings Review? The Courts' "Prudential" Answer to* Williamson County*'s Flawed State Litigation Ripeness Requirement*, 30 Touro L. Rev. 319 (2014).

90 Transcript of Oral Argument at 16–17, Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (2015) (No. 14-275).

91 *Id.* at 18.

92 J. David Breemer, *Overcoming* Williamson County*'s Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 225 (2003).

93 *Williamson Cnty.*, 473 U.S. at 197.

94 *Id.* ("Should the government wish to accomplish the goals of such regulation, it must proceed through the exercise of its eminent domain power, and, of course, pay just compensation for any property taken.").

95 *Id.*

96 *See* Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 Geo. L.J. 555, 571–72 (1997).

97 *See supra* text accompanying n.93.

98 This is one of the many serious flaws of the *Williamson County* ripeness doctrine: it assumes that a taking doesn't *really* happen until an inverse condemnation claim is rejected by a state court. Rather than presume that the government must go through eminent domain to take property, courts allow the taking and then force property owners to prove they should be compensated. This removes much of the government's incentive to use formal condemnation proceedings in many cases. And it ignores the fact that "[t]here is nothing in . . . the language of the Fifth Amendment that requires municipal nonpayment [of compensation] to be certified by a state court before it is complete." Berger & Kanner, *supra* note 91, at 694.

99 467 U.S. 837 (1984).

100 King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015).

101 135 S. Ct. 1199 (2015).

102 *Id.* at 1203.

103 *Id.* at 1211–12 (Scalia, J., concurring in the judgment).

104 *Id.* at 1211.

105 519 U.S. 452, 461 (1997).

106 After *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), which predates the APA.

107 *Perez*, 135 S. Ct. at 1217–20 (Thomas, J., concurring in the judgment).

108 135 S. Ct. 2699 (2015).

109 *Id.* at 2712 (Thomas, J., concurring) ("Interpreting federal statutes—including ambiguous ones administered by an agency—'calls for that exercise of independent judgment.'" (quoting *Perez*, 135 S. Ct. at 1219 (Thomas, J, concurring in the judgment)); *id.* (*Chevron* deference "wrests from Courts the ultimate interpretative authority to 'say what the law is,' and hands it over to the Executive." (citation omitted) (quoting Marbury v. Madison, 1 Cranch. 137, 177 (1803)).

110 *See, e.g.*, Chris Walker, *What* King v. Burwell *Means for Administrative Law*, Notice & Comment (June 25, 2015), http://www.yalejreg.com/blog/what-king-v-burwell-means-for-administrative-law-by-chris-walker; Jonathan H. Adler, *In* King v. Burwell*, Chief Justice Roberts Rewrites the PPACA in Order to Save It (Again)*, Volokh Conspiracy (June 25, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/25/in-king-v-burwell-chief-justice-roberts-rewrites-the-ppaca-in-order-to-save-it-again/.

111 *King*, 135 S. Ct. at 2488.

112 *Id.* at 2488–89.

113 *Id.*

114 Walker, *supra* note 112 ("[A] good sign that a court is departing from traditional administrative law principles is if it cites Justice O'Connor's opinion in [*FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)]."); Adler, *supra* note 124 ("If there's any consolation in the Chief Justice's opinion, it is that it seems to try to revive the Chief Justice's dissent in [*City of Arlington v. FCC*, 133 S. Ct. 1863 (2013)] which sought to constrain the application of *Chevron* deference.").

115 Transcript of Oral Argument at 49, Horne v. Dep't of Agriculture, 133 S. Ct. 2053 (No. 12-123).

116 Transcript of Oral Argument at 26–27, Horne v. Dep't of Agriculture, 135 S. Ct. 2419 (No. 14-275) ("Central planning was thought to work very well in 1937, and Russia tried it for a long time.").

117 *Horne II*, 135 S. Ct. at 2431 (quoting Leonard v. Earle, 141 A.2d 714, 716 (Md. 1928)).

118 *See* Doyle v. Continental Ins. Co., 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) ("Though a State may have the power, if it sees fit to subject

its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so.").

119 Lafayette Ins. Co v. French, 59 U.S. (18 How.) 404, 407 (1855) ("This consent [to do business as a foreign corporation] may be accompanied by such condition as Ohio may think fit to impose; . . . provided they are not repugnant to the constitution or laws of the United States.").

120 *See* Terral v. Burke Const. Co. 257 U.S. 529, 532 (1922) ("The principle established by the more recent decisions of this court is that a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not."); Western Union Telegraph Co. v. Kansas ex rel. Coleman, 216 U.S. 1 (1910) (striking down a tax on out-of-state property as a condition of doing business in Kansas).

121 *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926) (invalidating state law that required trucking company to dedicate personal property to public uses as a condition for permission to use highways).

122 *See*, *e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972) (refusal to renew professor's employment contract in retaliation for professor's critical testimony regarding the university's board of regents violated unconstitutional conditions doctrine); Sherbert v. Verner, 374 U.S. 398 (1963) (denial of unemployment benefits held unconstitutional where government required person to "violate a cardinal principle of her religious faith"); Speiser v. Randall, 357 U.S. 513 (1958) (denial of tax exemption for applicants' refusal to take loyalty oath violated unconstitutional conditions doctrine); *see also* James Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 407 (2009) (The unconstitutional conditions doctrine has been invoked in a wide range of cases in which "government has traded with people for their right to free speech, their right to freedom of religion, their right to be free from unreasonable searches, their right to equal protection, and their right to due process of law.").

123 Richard A. Epstein, Bargaining with the State 5 (1993) (The doctrine holds that even if the government has absolute discretion to grant or deny any individual a privilege or benefit—such as a land-use permit, "it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

124 *Koontz*, 133 S. Ct. at 2594.

125 133 S. Ct. 2321 (2013).

126 *Id.* at 2328.

127 *Id.* at 2330 ("By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects 'protected conduct outside the scope of the federally funded program.'" (quoting Rust v. Sullivan, 500 U.S. 173, 197 (1991))).

128 *Koontz*, 133 S. Ct. at 2595.

129 *Id.* at 2596 ("Nor does it make a difference . . . that the government might have been able to deny petitioner's application outright without giving him the option of securing a permit by agreeing to spend money to improve public lands.")

130 *Horne II*, 135 S. Ct. at 2430–31.

131 133 S. Ct. 511 (2012).

132 *Id.* at 516.

133 *Id.* 515–16.

134 *Id.* at 516.

135 *Id.* at 519.

136 The vote was 8-0; Justice Kagan did not participate.

137 *Id.* at 521.

138 264 U.S. 146 (1924).

139 *Ark. Game & Fish*, 133 S. Ct. at 520.

140 *Id.* (citing, among others, First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., 482 U.S. 304 (1987), United States v. Causby, 328 U.S. 256 (1946), and United States v. Gen. Motors Corp., 323 U.S. 373 (1945)).

141 *Koontz*, 133 S. Ct. at 2593–94.

142 *Id.* at 2595. The dissent explicitly agreed. *See* id. at 2603 (Kagan, J., dissenting).

143 *Id.* at 2603 (majority opinion).

144 *Id.* at 2599.

145 134 S. Ct. 1257 (2014).

146 Id. at 1263.

147 *Id.*

148 315 U.S. 262 (1942).

149 *Brandt*, 134 S. Ct. at 1264 ("The Court adopted the United States' position in full, holding that the 1875 Act 'clearly grants only an easement, and not a fee.'" (quoting *Great Northern*, 315 U.S. at 271)).

150 *Great Northern*, 315 U.S. at 270-71.

151 *Brandt*, 134 S. Ct. at 1266.

152 *Id.*

153 *Horne II*, 135 S. Ct. at 2428.

Free Speech & Election Law

One Person, One Vote: Advancing Electoral Equality, Not Equality of Representation

By Hans A. von Spakovsky & Elizabeth Slattery***

Note from the Editor:

This article previews *Evenwel v. Abbott*, which will be heard by the Supreme Court this fall, and advocates for a judicially enforceable right to equal electoral power. The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the authors. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please e-mail us at info@fedsoc.org.

• Derek Muller, *One Man, One Vote in Texas*, Library of Law & Liberty (May 29, 2015), *available at* http://www.libertylawsite.org/2015/05/29/one-man-one-vote-in-texas/.

• *Evenwel v. Abbott*, SCOTUSblog, *available at* http://www.scotusblog.com/case-files/cases/evenwel-v-abbott/; Special Feature: One person, one vote and Evenwel, SCOTUSblog, *available at* http://www.scotusblog.com/category/special-features/one-person-one-vote-and-evenwel/.

• Tierney Sneed, *5 Points On How 'One Person, One Vote' Is Suddenly In Jeopardy*, Talking Points Memo (May 27, 2015), *available at* http://talkingpointsmemo.com/fivepoints/texas-supreme-court-districting.

• J. Douglas Smith, *When Not All Votes Were Equal*, The Atlantic (July 26, 2015), *available at* http://www.theatlantic.com/politics/archive/2015/07/one-person-one-vote-a-history/399476/.

In its October 2015 term, the Supreme Court of the United States will hear arguments in a case arising out of the Texas legislature's use of total population in drawing the state Senate's districts. This case, *Evenwel v. Abbott*, raises the issue of which population states can or should use when determining the legislative boundaries of representative districts. The question is whether the principle of "one person, one vote" requires that states use particular demographic information, such as total population versus voting-age population, or some other variant that includes or excludes individuals like noncitizens or felons who are ineligible to vote.

One Person, One Vote

Following each decennial Census, state legislatures reapportion voting districts for their state and federal representatives. The guiding principle—"one person, one vote"—requires that all voters have approximately equal voting power. This principle comes from a line of cases decided by the Supreme Court in the 1960s. In *Baker v. Carr* (1962), the Court determined that it is within the judicial power for courts to review and alter state legislatures' attempts to reapportion voting districts.[1] The majority dismissed the argument that reapportionment is a political question best left to the accountable political branches.

In *Gray v. Sanders* (1963), the Court ruled that a state's reapportionment giving rural votes more weight than urban votes was unconstitutional:

> The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women. If a State in a statewide election weighed the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable.... How then can one person be given twice or 10 times the voting power of another... because he lives in a rural area or because he lives in the smallest rural county?[2]

The following year, in *Reynolds v. Sims* (1964), the Court held that the Fourteenth Amendment's Equal Protection Clause demands substantially equal legislative representation for all citizens in a given state. This "one person, one vote" principle means that "the seats in both houses of a bicameral state legislature must be apportioned on a population basis," and it prohibits the apportionment of state legislatures based on geographic or political subdivisions.[3]

The Court did not limit what population basis—such as total population or citizen voting-age population—states may use in drawing districts. However, warning against diluting the weight of some voters, the Court noted that "if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted."[4] This means that "[f]ull and effective participation by all citizens in state government

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requires…that each citizen have an equally effective voice in the election of members of his state legislature."[5] Thus, under the principle established in *Reynolds*, districts must be drawn "on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials."[6]

Prior to *Reynolds*, states like Alabama and Tennessee had refused to redistrict for more than half a century, despite a dramatic nationwide population shift from rural to urban areas. These state legislatures were dominated by rural legislators, who were not willing to reapportion and lose their power and control. Within two years of the *Reynolds* decision, however, legislative districts were redrawn in nearly every state, and urban areas gained a substantial number of legislative seats.

Today, lawmakers from urban areas dominate many state legislatures because of the huge influx of noncitizens, both legal and illegal, into predominantly urban settings. This greatly increases the population of non-voters who can be and are used to fill in urban legislative districts. The Supreme Court's decision in *Evenwel v. Abbott* has the potential for a loss of clout by urban areas similar to the loss that rural districts experienced after Reynolds.

Evenwel v. Abbott

Sue Evenwel and Edward Pfenninger challenged the state Senate districts drawn by the Texas legislature in 2013. The legislature used total population in determining whether the population of each Senate district met the requirements of the Equal Protection Clause's "one person, one vote" principle. Evenwel and Pfenninger, registered voters in Senate Districts 1 and 5, respectively, filed suit because both the number of citizens of voting age and the number of registered voters in their districts deviate substantially—between 31 and 49 percent—from the "ideal" population of a Texas Senate district.[7]

The plaintiffs argue that this disparity significantly dilutes their votes in comparison to those of voters who live in districts with large numbers of non-voters, particularly districts with large numbers of noncitizens who are ineligible to vote and may not be in the country legally. According to this logic, their votes were worth roughly half those of voters in other districts. In other words, they claimed that their districts were allotted the same number of representatives as other districts that contained the same number of people but only half the number of eligible voters. Although Texas used total population data, data on the citizen voting-age population compiled by the U.S. Census Bureau that would have remedied this disparity was available to the state.

Evenwel and Pfenninger lost their constitutional challenge before a three-judge panel, which determined that the legislature's choice of total population for reapportionment was judicially unreviewable. The panel concluded that the plaintiffs sought judicial "interference with a choice that the Supreme Court has unambiguously left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals."[8] The plaintiffs appealed directly to the Supreme Court, arguing that a "statewide districting plan that distributes voters or potential votes in a grossly uneven way… is patently unconstitutional under *Reynolds* and its progeny."[9]

The Supreme Court has left unresolved the issue of what population is appropriate for redistricting: whether it is total population, voting-age population, citizen voting-age population, citizen-eligible voting-age population, or some variant thereof. In *Gaffney v. Cummings* (1973), the Court noted that total population "may not actually reflect the body of voters whose votes must be counted and weighed for the purposes of reapportionment, because 'census persons' are not voters," and in *Burns v. Richardson* (1973), the Court said it was up to states to choose what population to use "unless a choice is one the Constitution forbids."[10]

In *Burns*, the Court upheld Hawaii's choice of registered voters as the reapportionment basis because many people counted in the Census, such as members of the military stationed there, were not actually Hawaii voters. The Court concluded that using total population was not mandated when it would result in "a substantially distorted reflection of the distribution of state citizenry."[11] The Court did warn about using registered voters or "actual voter basis," because that population is "susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process."[12]

However, in a point directly applicable to the issue being raised by Evenwel and Pfenninger, the Court also said that states are not "required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime."[13] Additionally, while absolute parity of population is not required, the Court has established that a state legislative redistricting plan with a population deviation that exceeds 10 percent creates a prima facie case of discrimination.[14]

In 2001, the Court declined to review *Chen v. City of Houston*, another Texas case that raised this same issue. Justice Clarence Thomas dissented from the Court's refusal to hear that case, saying that the Court had "left a critical variable in the ['one person, one vote'] requirement undefined. We have never determined the relevant 'population' that States and localities must equally distribute among their districts."[15] According to Thomas, this failure means that the "one-person, one-vote principle may, in the end, be of little consequence if we decide that each jurisdiction can choose its own measure of population."[16]

The plaintiffs in *Evenwel* agree and point out in their Jurisdictional Statement that, absent such a determination, the legislature could have drawn a Senate districting plan with 31 districts of equal population without violating the "one person, one vote" principle "even if 30 of the districts each contained one voter and the 31st district contained all other voters in the State."[17] As they argue, "That cannot be correct."[18]

In 1990, the U.S. Court of Appeals for the Ninth Circuit ruled in a similar case, *Garza v. County of Los Angeles*, that total population was the correct population to use regardless of voters because "the people, including those who are ineligible to vote, form the basis for representative government."[19] However, a dissenting judge, Alex Kozinski, pointed out that the theory "at the core of one person one vote is the principle of electoral equality, not that of equality of representation."[20]

Kozinski wrote that "the name by which the Court has consistently identified this constitutional right—one person one vote—is an important clue that the Court's primary con-

cern is with equalizing the voting power of electors, making sure that each voter gets one vote—not two, five or ten…or one-half."[21] Kozinski further added that a "districting plan that gives different voting power to voters in different parts of the county…even though raw population figures are roughly equal…certainly seems in conflict with what the Supreme Court has said repeatedly" with regard to equal protection and "one person, one vote."[22] Equal protection "protects a right belonging to the individual elector and the key question is whether the votes of some electors are materially undercounted because of the manner in which districts are apportioned."[23]

One issue that has been raised in the *Evenwel* case is the accuracy and availability of population data on noncitizens who are ineligible to vote. Some claim that there is no database of citizenship that "exists at the level of granularity necessary to draw legislative districts that comply with one person, one vote."[24]

However, according to a brief filed with the Supreme Court by a number of demographers, including Dr. Peter Morrison of the RAND Corporation's Population Research Center, citizen voting-age population (CVAP) data are readily available through the American Community Survey conducted by the U.S. Census Bureau.[25] The Census Bureau designed this survey to "collect detailed demographic information on an ongoing basis."[26] The data are compiled on "running 1-, 3-, and 5-year summaries" that include citizenship information, and the federal government relies on this survey to distribute "more than $450 billion in federal programs."[27]

The reliability of the American Community Survey and its CVAP data, according to these demographers, "is demonstrated by its widespread use and acceptance," including by the U.S. Justice Department, states, and local governments to "ensure compliance with the Voting Rights Act."[28] In fact, the Supreme Court, federal courts of appeals, and district courts routinely use the American Community Survey's CVAP data. The demographers assert that the Census Bureau's "CVAP data is reliable enough to allow states, like Texas, to draw, analyze, and adjust voting district boundary lines of substantially equal numbers of eligible voters."[29]

The Possible Effect of a Decision

If the Supreme Court rules in favor of the plaintiffs in *Evenwel*, its decision could have a huge effect on state legislative districts as they currently stand. Democrat-controlled legislative seats tend to have larger numbers of noncitizens than do Republican-controlled seats. For example, in the heavily Democratic areas of Queens and Kings County, New York, only 78 percent of the residents are citizens, whereas in the more Republican Nassau County, 91 percent of the residents are citizens.[30] If the Court finds that Texas violated the "one person, one vote" guarantee, legislative districts likely would be redrawn in parts of the country with large noncitizen populations, with a noticeable shift toward Republicans. Yet it is not the potential political effects that make this case important; rather, it is the principle of "one person, one vote."

While states have a great deal of leeway under our federalist system, the Supreme Court determined 50 years ago that equal protection applies to the election process—particularly when determining the districts in which voters exercise their basic right to choose their representatives. As Judge Kozinski said, that principle protects the value of the vote of individual voters. When the value of the votes of Sue Evenwel and Edward Pfenninger is half the value of their neighbors' votes, it seems clear that this principle has been violated.

Endnotes

1 369 U.S. 186 (1962).

2 Gray v. Sanders, 372 U.S. 368, 379 (1963).

3 Reynolds v. Sims, 377 U.S. 533, 568 (1964). The Court recognized the "dangers of entering into political thickets and mathematical quagmires" but ultimately found that "a denial of constitutionally protected rights demands judicial protection." *Id.* at 566.

4 *Id.* at 562.

5 *Id.* at 565.

6 Hadley v. Junior College District of Metropolitan Kansas City, Missouri, 397 U.S. 50, 56 (1970).

7 Jurisdictional Statement of Appellants at 11, Evenwel v. Abbott (Feb. 2, 2015) (No. 14-940).

8 Evenwel v. Perry, 2014 WL 5780507 at *4 (W.D. Texas 2014) (internal citation omitted).

9 Jurisdictional Statement at 12.

10 Gaffney v. Cummings, 412 U.S. 735, 746 (1973); Burns v. Richardson, 384 U.S. 73, 92 (1966).

11 Burns, 384 U.S. at 94.

12 *Id.* at 92.

13 *Id.*

14 Brown v. Thomson, 462 U.S. 835 (1983)(2001).

15 Chen v. City of Houston, 532 U.S. 1046 (Thomas, J., dissenting from denial of certiorari).

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19 Garza v. County of Los Angeles, 918 F.2d 763, 774 (1990).

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21 *Id.*

22 *Id.* at 780.

23 *Id.* at 782.

24 Nathaniel Persily, Symposium: Evenwel v. Abbott and the Constitution's big data problem, SCOTUSblog (Aug. 3, 2015), http://www.scotusblog.com/2015/08/symposium-evenwel-v-abbott-and-the-constitutions-big-data-problem/.

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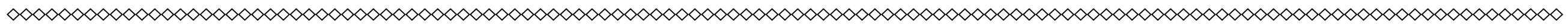

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28 *Id.*

29 *Id.*

30 Sean Trende, *The Most Important Redistricting Case in 50 Years*, RealClearPolitics (June 3, 2015), http://www.realclearpolitics.com/articles/2015/06/03/the_most_important_redistricting_case_in_50_years_126831.html.

Intellectual Property

A Look Back at the Supreme Court's 2013-14 Term—Is More "Reform" Needed?

*By Arthur Gollwitzer III**

Note from the Editor:

This article reviews the Supreme Court's patent decisions from the 2013-14 term. The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please e-mail us at info@fedsoc.org.

• Charlene M. Morrow & Brian Lahti, *Highmark and Octane Helped, But Legislation on Fee Shifting Still Necessary*, Fenwick & West LLP Blog (October 31, 2014), *available at* https://www.fenwick.com/publications/pages/highmark-and-octane-helped,-but-legislation-on-fee-shifting-still-necessary.aspx.

• Andrew Williams, *Patent Litigation Reform -- Will the Outcome of the Mid-Term Elections Matter, and Is Reform Still Necessary?*, Patent Docs (October 30, 2014), *available at* http://www.patentdocs.org/2014/10/patent-litigation-reform-will-the-outcome-of-the-mid-term-elections-matter-and-is-reform-still-neces.html.

• Daniel Nazer, *Big Patent Reform Wins in Court, Defeat (For Now) in Congress: 2014 in Review*, Electronic Frontier Foundation Deeplinks Blog, (December 25, 2014), *available at* https://www.eff.org/deeplinks/2014/12/2014-review-big-patent-reform-wins-court-defeat-now-congress.

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The Supreme Court under Chief Justice Roberts has shaped patent law like no other Court in recent memory. Since 2010, the Court has issued eighteen patent law decisions compared to only eleven decisions in the entire prior decade and eight in the 1990s.[1]

Indeed, in its October 2013 term alone, the Court issued more patent law decisions than in any term since the current version of the Patent Act was enacted in 1952, and possibly much longer.[2] These decisions began with *Medtronic*, which addressed the burden of proof in declaratory judgment actions,[3] and culminated in the much-discussed *Alice* decision, which tackled the patentability of abstract ideas under Patent Act section 101.[4] Topping off this string of important decisions, in January 2015, the Court issued its opinion in *Teva*, which addressed the standard of appellate review for claim construction decisions.[5] Strikingly, in this partisan era, every one of these decisions was unanimous.

A year has passed since this series of decisions, affording time to district courts and the Federal Circuit Court of Appeals to apply the Supreme Court's new guidance in a variety of cases. At the same time, patent reform is again at the top of Congress' agenda, with comprehensive bills pending in both the House of Representatives and the Senate. The pending bills, however, do not necessarily take into account how the Roberts Court is revising patent law on its own. Some argue that comprehensive "reform" is still needed, but there is a good argument that modest action will suffice—such as simply addressing the current venue statute that allows a disproportionate number of patent cases to be filed in only a handful of courts such as the United States District Court for the Eastern District of Texas.

This article reviews how the leading Supreme Court decisions from the October 2013 Term are playing out in practice to help readers decide what, if any, further reforms are truly needed.

I. Attorneys' Fees

The Supreme Court issued decisions in *Octane* and *Highmark* on the same day, both of which govern the award of attorneys' fees under 35 U.S.C. § 285. Under section 285, a district court may award attorneys' fees to a prevailing party in "exceptional" cases.

In *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, the Court held that an "exceptional case is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated."[6] District courts going forward will look at the totality of the circumstances and award fees based on a preponderance of the evidence.[7] In adopting this standard, the Court rejected the prior standard, which required district courts to find by clear and convincing evidence that the suit was objectively baseless *and* brought or litigated with subjective bad faith, deeming it "too rigid" and not consistent with the statute.[8]

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In *Highmark Inc. v. Allcare Health Mgmt. Sys.*, the Court held that district court decisions regarding attorneys' fees should be reviewed on appeal for abuse of discretion, rejecting the Federal Circuit's de novo standard.[9]

Since the Court issued its *Octane* and *Highmark* decisions, district courts are showing an increased willingness to grant attorneys' fee motions. In the year before *Octane*, district courts granted only 13% of such motions. But in the year after *Octane*, district courts granted nearly triple that number—36%.[10] Not surprisingly, prevailing parties also were twice as likely to seek fees in the year following the *Octane* decision.[11]

Reasons for granting attorneys' fee motions include: (i) finding that the plaintiff failed to conduct an adequate pre-filing investigation; (ii) finding that the plaintiff should have known its claim was meritless; (iii) evidence that the plaintiff used litigation to extract settlements from defendants who wanted to avoid costly litigation; (iv) finding that the plaintiff proceeded with the case in bad faith; and (v) litigation misconduct.[12]

The Federal Circuit provided an example in *Oplus Techs. Ltd. v. Vizio, Inc.*, in which it concluded that the district court abused its discretion by refusing to award fees.[13] In that case, the district court found several instances of litigation misconduct, stated that the plaintiff's attorneys at Niro Haller & Niro Ltd. "flouted the standards of appropriate conduct and professional behavior," and found the case exceptional. Nevertheless, the district court refused to award attorneys' fees.[14] The Federal Circuit stated that it could not accept or understand the lower court's decision not to award fees in light of the plaintiff's misconduct.[15]

Similarly, the Federal Circuit affirmed an award of fees in *Housewares LLC v. Sorenson Research & Dev. Trust*.[16] In *Housewares*, the accused infringer prevailed on summary judgment and moved to recover fees. The district court granted the motion and the Federal Circuit affirmed, concluding that the award was not an abuse of discretion because the patent holder failed to produce admissible evidence of infringement and in light of its overall litigation conduct.[17]

On the other hand, the Federal Circuit affirmed a decision from the Eastern District of Texas declining to award fees.[18] In that case, the defendant Newegg argued that SFA filed suit in bad faith to obtain a nuisance value settlement. SFA then dismissed its suit only after an unfavorable claim construction ruling and six months before trial. Nevertheless the Federal Circuit held that it "could not say that the district court abused its discretion in finding that Newegg's evidence was insufficient to show that SFA actually litigated the case in an 'unreasonable manner.'"[19]

In *Biax Corp. v. Nvidia Corp.*, the court reversed a district court fee award in favor of the defendant.[20] The court held that the patent holder had a reasonable infringement argument even under the district court's claim construction.

Disparities also continue at the district court level. While some courts are granting fee requests more readily after the *Octane* and *Highmark* decisions, as the Court's loosening of the test for awarding fees suggests should be happening, other courts make no secret of their continued aversion to fee requests. For example, in the *Oplus* case discussed above—where the Federal Circuit reversed a denial of attorneys' fees —Judge Pfaelzer in the Central District of California reportedly stated that she is not inclined to grant fee requests: "I want to make this representation to you. I don't give attorneys' fees."[21] Likewise, no judge in the Eastern District of Texas has granted a fee request since the *Octane* decision.

With that range of decisions in mind, the leading patent reform bills currently pending in the House and the Senate continue to address attorneys' fees. In the House bill, fee shifting would be the default rule subject to various exceptions.[22] In contrast, the Senate bill appears to memorialize the *Octane* standard.[23] Supporters of the House bill contend that, even under the *Octane* standard, certain district courts or individual judges will retain their historical reluctance to award fees and, therefore, that further legislation is needed. However, the House bill itself still allows those courts to avoid awarding fees in many cases. At the same time, the statistics above show that most courts are taking the *Octane* decision seriously and awarding fees in an increasing number of cases, raising questions about whether further reform is really needed.

II. Indefiniteness

In *Nautilus, Inc. v. Biosig Instruments, Inc.*, the Court rejected the "insolubly ambiguous" test used to assess whether or not patent claims are invalid for indefiniteness under 35 U.S.C. § 112(a).[24] The new test for indefiniteness is whether the claims, read in light of the specification and prosecution history, "fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention."[25] The Court based its holding on the importance of the public notice function served by a patent's claims and specification.[26]

Since the *Nautilus* decision issued in April 2014, the Federal Circuit has addressed several cases based on the new indefiniteness standard. First, in *Interval Licensing LLC v. AOL, Inc.*, the court began by acknowledging the new standard.[27] Based on that standard, the court held that the disputed claim language, viewed in light of the intrinsic evidence, failed to "inform those skilled in the art about the scope of the invention with reasonable certainty."[28]

On the other hand, upon rehearing the *Nautilus* case, the Federal Circuit again found the patents at issue in that case to be valid.[29] In doing so, the court appeared dissatisfied with the Supreme Court's guidance, as revealed by Judge Moore's statement that, in light of the high court's ruling, "we may now steer by the bright star of 'reasonable certainty,' rather than the unreliable compass of 'insoluble ambiguity.'"[30] Indeed, some commentators argue that Federal Circuit's second *Nautilus* decision demonstrates that the move away from the "insolubly ambiguous" standard will not have much impact on patent law. Others believe that the *Nautilus* case is not the right case to justify a jump to that conclusion, as the disputed term "spaced relationship" was understandable in light of the facts of that case.

Likewise, in *Eidos Display, LLC v. AU Optronics Corp.*, the Federal Circuit reversed a finding of indefiniteness by a court in the Eastern District of Texas.[31] The appellate court reversed the finding of indefiniteness even though the trial court found the disputed claim terms indefinite under the older, hard-to-satisfy, "insolubly ambiguous" standard. The court emphasized that, while the disputed phrase might seem ambiguous to someone unknowledgeable in the technology, a skilled artisan would

understand what was being described.[32]

Whether or not the heightened standard for claim definiteness mandated by the Supreme Court is a game-changer may depend on the facts of individual cases, whether the Federal Circuit is true to the Supreme Court's wishes, and whether the Supreme Court opts to keep the Federal Circuit in check more than once.[33]

Moreover, in *Williamson v. Citrix Online, LLC*, the Federal Circuit breathed new life into the indefiniteness defense as applied to means-plus-function claims.[34] In *Williamson*, the court lowered the bar for finding that a claim is written in means-plus-function format under 35 U.S.C. § 112(f) when that claim does not use "means" language. And once a defendant persuades a district court that section 112(f) applies, then the patent holder must point to sufficient structure in the specification to satisfy section 112(f) as well as the holding in *Nautilus*.[35]

The pending patent bills do not address the definiteness requirement or take the *Nautilus* decision into account. But time will tell whether *Nautilus* presents a viable new defense against broad and ambiguous patent claims that can be raised and ruled on at claim construction without waiting for summary judgment.[36] To the extent decisions like *Nautilus* and *Alice*, combined with the patent office review proceedings created just a few years ago by the America Invents Act, may be causing a downturn in patent suits and lowering the settlement demands of non-practicing entities in the cases that are filed, further revisions to the Patent Act seem less necessary and should be weighed carefully so as not to devalue patent rights so far as to depress innovation.

III. Abstract Ideas

The Supreme Court ended its 2013 Term with *Alice Corp. Pty. Ltd v. CLS Bank Int'l.*[37] In *Alice*, the Court reiterated that abstract ideas are ineligible for patent protection under 35 U.S.C. § 101. While this decision only reaffirmed the Court's prior holding in *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*,[38] it has received the most attention of the patent decisions handed down by the Court last year. Many suits brought by non-practicing entities are based on patents claiming methods of doing business. The Court instructed that mere computerization of an already known method of doing business is not patentable, and parties have cited that instruction hundreds of times already.

Subsequent district court and appellate decisions suggest that the Supreme Court's message has been heard loud and clear. Hardly a week goes by without patents being found invalid for having claimed unpatentable subject matter under *Alice*. From the *Alice* decision in June 2014 to the beginning of 2015, the Federal Circuit had already invalidated patents under *Alice* in eight out of nine cases.[39] The district courts found patents invalid under *Alice* in 29 out of 40 cases in the same period.[40]

The Federal Circuit invalidated a patent under *Alice* less than one month after *Alice* was decided.[41] Next, in *Planet Bingo, LLC v. VKGS LLC*, the court invalidated patents covering computerized bingo games.[42] In *BuySAFE, Inc. v. Google, Inc.*, the court invalidated a method of providing secure online sales, saying it was an "easy call" in light of *Alice*.[43] In *Ultramercial, Inc. v. Hulu, LLC*, the court invalidated the abstract idea of showing an advertisement before delivering content via the Internet.[44] In *Content Extraction & Transmission, LLC v. Wells Fargo Bank, N.A.*, the court invalidated a method of using a scanner in an ATM to recognize the amount written on a check.[45] The court found that the patent covered nothing more than the abstract idea of collecting data, recognizing certain data, and storing the data in computer memory. In *Internet Patents Corp. v. Active Network, Inc.*, the court affirmed the invalidity of a patent covering the idea of retaining information in the navigation of online forms.[46] The court also rejected the plaintiff's argument that additional limitations in the patent's dependent claims saved its patent because those dependent claims did not add any inventive concept.[47] Finally, in *Intellectual Ventures I LLC v. Capital One, N.A.*, the court rejected several online banking patents that generally involve the abstract ideas of budgeting and customizing web page information based on information known about the user.[48]

The only outlier is *DDR Holdings, LLC v Hotels.com, L.P.*[49] In *DDR*, the court upheld the validity of a patent addressing problems in website design. The key to this decision appears to be the court's finding that the claimed invention solved an Internet-centric problem rather than simply applying a computer or the Internet to a common business practice.[50]

The *timing* of *Alice* rulings in the district courts is even more striking. In *Ultramercial*, Judge Mayer issued a strongly-worded concurring opinion encouraging evaluation of patentability "at the very outset" of a case and even questioning whether there is any presumption of validity at that stage.[51] More than 60 district courts have cited Judge Mayer's concurring opinion for this proposition, and courts have granted more than two-thirds of all Rule 12 motions to dismiss based on *Alice*.[52] The Federal Circuit endorsed early evaluation of patentability in *OIP Techs., Inc. v. Amazon.com, Inc.*, where it affirmed a dismissal under *Alice* on a Rule 12 motion for judgment on the pleadings.[53]

As with *Nautilus*, the pending patent bills do not address the *Alice* decision. Moreover, they do not appear to recognize the significant pro-defense impact that *Alice* is having on patent litigation as demonstrated above. At the same time, certain courts and judges are reluctant to grant *Alice* motions, especially prior to claim construction. For example, Judge Rodney Gilstrap in the Eastern District of Texas issued a new standing order in June 2015 directing parties to seek permission to file motions to dismiss under Rule 12 based on *Alice* before his court will even consider such motions.[54] Therefore, patent reform provisions that would require district courts to entertain Rule 12 motions or stay cases pending Rule 12 motions could supply another valuable tool to defendants facing "shakedown" litigation based on faulty patents.

Such provisions, however, cannot force courts to grant motions based on *Alice*. Indeed, reluctant judges will remain free to reject *Alice* challenges until after claim construction, or in all but the most egregious cases. Recent data from district courts across the county illustrate this challenge. As of this writing, courts nationwide have granted 71% of the 76 motions raising *Alice*. In the Northern District of California, the grant rate is 82%. In the District of Delaware, the grant rate is 90%. In contrast, the grant rate in the Eastern District of Texas is only

27%.[55] Unsurprisingly, given these numbers, more than 20% of all patent cases in the United States are filed in the Eastern District of Texas.[56]

Addressing this issue, the Innovation Act pending in the House of Representatives includes modified venue language. Section 3(g) of the Innovation Act would modify 28 U.S.C. § 1400(b) and limit patent cases to (i) the defendant's principal place of business, (ii) the defendant's place of incorporation, (iii) where the defendant has committed an act of infringement and has a regular and established physical facility, (iv) where the defendant has consented to be sued, (v) where the claimed invention was conceived or reduced to practice, (vi) where significant research and development of the claimed invention occurred at a regular and established physical facility, or (vii) where a party has a regular and established physical facility that such party controls and had engaged in management of significant research and development of a claimed invention, manufactured a product embodying a claimed invention, or implemented a manufacturing process embodying a claimed invention.[57] This change in the law would cause patent cases to be more evenly distributed throughout the country, thereby limiting any one court's ability to shape patent law by virtue of its unilateral application of decisions like *Alice*.[58]

IV. Standard of Review

The newest of these leading Supreme Court decisions is *Teva Pharms. USA v. Sandoz*, Inc.[59] In *Teva*, the Court rejected the de novo standard of review on appeal for all claim construction decisions. In its place, the Court held that only claim constructions based on intrinsic evidence are subject to de novo review. Claim construction decisions based on extrinsic evidence—that is, factual findings—are subject to the more deferential clearly erroneous standard of review.

Since, the *Teva* ruling, the Federal Circuit has addressed claim construction by first examining whether the district court relied on anything beyond the intrinsic record when addressing claim construction.[60] In *Shire Dev. v. Watson Pharms.*, the court specifically addressed a case in which the district court heard expert testimony during the claim construction hearing.[61] The Federal Circuit held that the more deferential standard of review outlined in *Teva* is not triggered any time a district court receives extrinsic evidence. Instead, the district court must make factual findings based on extrinsic evidence that underlie its claim constructions to trigger the more deferential review.[62]

Thus, the lesson for litigants and district courts post-*Teva* appears to be this: If parties want greater deference on appeal, they should (i) introduce extrinsic evidence in support of their claim construction arguments, and (ii) do their best to ensure that the district court rests at least part of its claim construction on that extrinsic evidence.

Neither of the leading patent reform bills addresses the claim construction standard of review any further.

Conclusion

The Supreme Court's October 2013 Term is having a dramatic impact on patent litigation. During that term, the Court issued a record number of decisions affecting patent law, and at least some of those holdings are frequently influencing decisions in the lower courts. Some commentators will take issue with the Court's decisions, and others will debate whether these decisions diminish the need for further so-called "patent reform." Regardless, all can agree that our patent laws are not applied uniformly nationwide. Something is amiss when a decision as influential as *Alice* leads to invalidity findings in 90% of cases in one district but only 27% of cases in another, or when certain district courts flatly state that they do not award attorneys' fees notwithstanding the *Octane* decision. This problem is compounded by local patent rules and standing orders that further attempt to circumvent *Alice* or otherwise balkanize patent litigation practice.[63] Additional revisions to the Patent Act should be made with great care, as decisions handed down during the Supreme Court's October 2013 Term (along with reforms already implemented in the America Invents Act) are having a profound impact on patent litigation. Nevertheless, modest changes may be in order, such as revising venue statutes to ensure that no one district court can exercise undue influence over patent law.

Endnotes

1 Dennis Crouch, *Supreme Court Patent Cases Per Decade*, Patently-O (July 30, 2014), *available at* http://patentlyo.com/patent/2014/07/supreme-patent-decade.html.

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4 134 S. Ct. 2347 (2014)

5 574 U. S. ____ (2015).

6 134 S. Ct. 1749, 1756 (2014).

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16 581 F. App'x 877 (Fed. Cir. 2014).

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18 *SFA Sys., LLC v. Newegg Inc.*, No. 2014-1712, 2015 U.S. App. LEXIS 11892 (Fed. Cir. July 10, 2015).

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27 766 F.3d 1364, 1369-70 (Fed. Cir. 2014).

28 *Id.* at 1371-74.

29 *Biosig Instruments, Inc. v. Nautilus, Inc.*, 783 F.3d 1374 (Fed. Cir. 2015).

30 *Id.* at 1379.

31 779 F.3d 1360 (Fed. Cir. 2015).

32 *Id.* at 1365-68.

33 It has done so in the area of subject matter patentability. *See* the discussion of *Alice* below.

34 792 F.3d 1339 (Fed. Cir. 2015).

35 *See Medical Instrumentation & Diagnostics. Corp. v. Elekta AB*, 344 F.3d 1205, 1211 (Fed. Cir. 2003).

36 *See Praxair, Inc. v. ATMI, Inc.*, 543 F.3d 1306, 1319 (Fed. Cir. 2008).

37 134 S. Ct. 2347 (2014).

38 132 S. Ct. 1289 (2012).

39 Robert Sachs, *A Survey of Patent Invalidations Since Alice*, Law 360 (January 13, 2015), *available at* http://www.law360.com/articles/604235/a-survey-of-patent-invalidations-since-alice. *See also* Robert Sachs, *#AliceStorm: The Summertime Blues Continue*, BilskiBlog (August 29, 2015), *available at* http://www.bilskiblog.com/blog/2015/08/alicestorm-summertime-blues-continue.html.

40 *Id.*

41 *Digitech Image Techs., LLC v. Elecs. for Imaging, Inc.*, 758 F.3d 1344 (Fed. Cir. 2014) (holding that a patent covering methods of reducing distortion in digital image processing merely covered a process of organizing information through mathematical correlations).

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56 Darryl Towell, *A Snapshot of Patent Litigation in 2014*, Law360 (Feb. 18, 2015), *available at* http://www.law360.com/articles/622097/a-snapshot-of-patent-litigation-in-2014.

57 Innovation Act at § 3(g), H.R. 9, *available at* http://judiciary.house.gov/_cache/files/57d3eba8-347d-439b-adb8-b384210312eb/goodla-028-xml---managers-substitute---june-9-2015.pdf

58 In 1948, section 1400 was added to Title 28, adding specific venue language for patent and copyright suits. In most federal civil actions, venue is proper for an entity-defendant in any court that has personal jurisdiction over that entity. 28 U.S.C. § 1391(c). Section 1400 is more narrowly drafted and, on its face, limits venue to a defendant's residence. The Federal Circuit, however, interpreted section 1400 as a complement to section 1391(c), holding that an entity "resides" everywhere that it is subject to personal jurisdiction. *See, e.g.*, VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574 (Fed. Cir. 1990). *See also* Prof. Tun-Jen Chiang, *The Problematic Origins of Nationwide Patent Venue*, Patentlyo (September 21, 2012). Simply reversing that holding could be all that is needed to limit the influence of any one district court over patent cases.

59 135 S. Ct. 831 (2015). *Teva* was decided in the Supreme Court's October 2014 Term, but a discussion of the case is included because it is potentially important and reflects the Roberts Court's continued trend of addressing important patent law issues.

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61 787 F.3d 1359 (Fed. Cir. 2015).

62 *Id.* at 1368.

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Labor & Employment

Working on Overtime: The U.S. Department of Labor's Proposal to Revise the Overtime Exemption Regulations

*By Tammy D. McCutchen**

Note from the Editor:

This article is about the Department of Labor's proposed revisions to overtime regulations. The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please e-mail us at info@fedsoc.org.

• *FACT SHEET: Middle Class Economics Rewarding Hard Work by Restoring Overtime Pay*, White House Press Release (June 30, 2015), *available at* https://www.whitehouse.gov/the-press-office/2015/06/30/fact-sheet-middle-class-economics-rewarding-hard-work-restoring-overtime.

• *Comments on Department of Labor Expanded Overtime Rules*, The Leadership Conference on Civil and Human Rights (September 4, 2015), *available at* http://www.civilrights.org/advocacy/letters/2015/comments-on-department-of.html.

• Yuki Noguchi, *Giving More Workers Overtime Could Have Downsides, Employers Say*, NPR (September 15, 2015), *available at* http://www.npr.org/2015/09/15/440569766/giving-more-workers-overtime-could-have-downsides-employers-say.

In March 2014, President Obama ordered the U.S. Department of Labor ("DOL") to revise the Fair Labor Standards Act ("FLSA" or the "Act") regulations governing when white collar employees can be classified as "exempt" from the FLSA minimum wage and overtime requirements. Declaring that "Americans have spent too long working more and getting less in return," the President ordered the revision of the overtime regulations with a goal of making millions more workers eligible for overtime pay. In a May 5, 2015 blog post, Secretary of Labor Thomas Perez stated, "The rules governing who is eligible for overtime have eroded over the years. As a result, millions of salaried workers have been left without the guarantee of time and a half pay for the extra hours they spend on the job and away from their families."

The message from the Administration was clear: Using the power of the pen, and without Congressional approval, the DOL intends to revise overtime regulations to require employers to pay overtime to millions of additional employees. The only question is how many millions of employees.

Now we know—well, sort of. In its Notice of Proposed Rulemaking ("NPRM"), published in the Federal Register on July 6, 2015, the DOL proposed to increase the minimum salary level required for exemption to $970 per week ($50,440 annually), more than double the current level of $455 per week. Thus, if adopted as proposed, every employee in the country earning less than $50,440 per year will be entitled to overtime pay. That rule is nice and clear, even if the salary level is unjustifiably high.

However, even employees earning over $50,440 a year will be entitled to overtime pay under the revised rules unless they perform the job duties set forth in the regulations. In the NPRM, the DOL requested comments from the public on possible changes to the duties tests in general, but did not propose any specific changes to the regulatory text; thus, it leaves the public to guess whether and how extensively DOL will revise the duties tests. DOL has opined that its request for comments is sufficient to allow sweeping changes to the duties tests under the Administrative Procedures Acts, stating:

> [W]hile no specific changes are proposed for the duties tests, the NPRM contains a detailed discussion of concerns with the current duties tests and seeks comments on specific questions regarding possible changes. The Administrative Procedure Act does not require agencies to include proposed regulatory text and permits a discussion of issues instead.[1]

Only time, and legal challenges to any duties test changes, will tell whether DOL has this right.

I. A Brief History of the FLSA Overtime Regulations

The FLSA requires employers to pay their employees at least the federal minimum wage (currently $7.25 per hour) for all hours worked, along with overtime pay of one and a half times an employee's regular rate of pay for all hours worked over 40 in a work week.

Although courts expansively interpret the FLSA in order to effectuate its broad remedial purposes, the Act also includes

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over 50 partial or complete exemptions from the minimum wage and overtime requirements. The broadest of these exemptions, included in the FLSA when the Act was passed by Congress in 1938, are the "white collar exemptions" found in section 13(a)(1) of the Act.[2] Section 13(a)(1) provides a complete exemption from both the minimum wage and overtime requirements for "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman." The FLSA itself does not include any definitions of these key terms – "executive," "administrative," "professional," or "outside sales." Rather, Congress granted the Secretary of Labor authority to "define and delimit" these terms "from time to time by regulations."[3]

The DOL first issued such regulations to define the white collar exemptions on October 20, 1938, at 29 C.F.R. Part 541. The original regulations, only two columns in the Federal Register, set a minimum salary level for exemption at $30 per week and established the job duties employees must perform to qualify for the exemptions.

From 1940 to 1975, the DOL raised the minimum salary level for exemption every 5 to 10 years; after 1975, making those increases became politically difficult. Thus, the 1975 weekly salary requirements—$155 for executive and administrative employees, $170 for professionals, and $250 for "high salaried" employees—remained in effect until 2004.

The duties tests were significantly revised in 1949, including the addition of "special proviso[s] for high salaried" executive, administrative, and professional employees (known as the "short tests"). Except for revisions in 1961 implementing the FLSA amendments eliminating the exemption for employees employed in a "local retailing capacity," and in 1992, made at the direction of Congress to allow certain computer employees to qualify for exemption,[4] the duties tests in the Part 541 regulations were unchanged for 55 years—from 1949 until 2004.

In 2004, the DOL eliminated the "long" and "short" tests, instead adopting one standard test with a minimum salary of $455 and a test for highly compensated employees with total annual compensation of at least $100,000.

II. Proposed Increases to the Salary Levels

In the NPRM, the DOL proposes to increase both the minimum salary level for the white collar exemptions and the salary level for highly compensated employees. Additionally, the DOL proposes to adopt a mechanism for automatic annual increases to the salary levels.

A. Minimum Salary Level

The DOL proposes to set the minimum salary threshold, using data from the Bureau of Labor Statistics (BLS), at the 40th percentile for all non-hourly paid employees. Currently, according to the DOL, this methodology would result in a minimum salary level of $921 per week or $47,892 annually. When a Final Rule is published in 2016, the DOL expects that the minimum salary level based on the 40th percentile will increase to $970 per week or $50,440 annually—more than doubling the current requirement of $455 per week or $23,660 per year. *The DOL's methodology and the amount of the increase are unprecedented in the FLSA's 77 year history.*

In the past, the DOL has used information regarding employee salaries to set the minimum salary levels for exemption, but never used a salary level even close to the 40th percentile. In the 1958 rulemaking, for example, the DOL used data on actual salary levels of employees which wage and hour investigators found to be exempt during investigations conducted over an eight-month period. Based on this data, the DOL set the minimum salary required for exemption at a level that would exclude the lowest 10th percentile of employees in the lowest wage region, the lowest wage industries, the smallest businesses and the smallest size city. If the 1958 methodology were applied today, the resulting minimum salary level would be $657 per week or $34,167 annually.[5] Similarly, in 2004, using BLS data, the DOL set the minimum salary level to exclude the lowest 20th percentile of employees in the lowest wage region (South) and industry (Retail). The DOL doubled the percentile used, from 10 percent to 20 percent, to account for changes to the duties test made in the 2004 Final Rule. According to the NPRM, if the 2004 methodology were applied today, the resulting minimum salary level would be $577 per week or $30,004 annually.[6]

Thus, DOL's proposed methodology of setting the minimum salary level at the 40th percentile of all non-hourly-paid employees[7] results in a minimum salary for exemption which is $20,000 higher than the salary level that would be reached through the 2004 methodology, and $15,000 higher than that reached through the 1958 methodology. The DOL justifies the jump from the 20% of lower wage regions and industries used in 2004 to its proposed 40% of all non-hourly-paid employees by asserting it made a "mistake" in 2004 in not accounting for changes in the duties tests. But the DOL did account for those changes in 2004 by increasing the percentile from 10% to 20%. Further, the DOL has not explained its failure to use salary levels in the lowest wage regions, the lowest wage industries, the smallest businesses and the smallest cities—or its inclusion of earnings data from lawyers, doctors, and sales employees who are not subject to the Part 541 salary requirements. The DOL's data set also includes salaries of federal workers, who generally earn wages higher than employees working in the private sector.

The $50,440 wage level is also unsupported by any other reasonable methodology.

Historically, with only a few exceptions, the DOL has increased the salary levels at a rate of between 2.8 percent and 5.5 percent per year. Applying the median annual increase of 4.25% would result in a new salary level of $35,727. The DOL's proposed increase to $50,440 represents an increase of 9.43% per year. Over the last decade, however, according to the BLS Employment Cost Index (ECI), earnings for private sector workers in management, professional and related occupations increased an average of only 2.6% annually. Applying the ECI would result in a new salary level of $32,194.

Since 1949, and in the 2015 NPRM, the DOL has consistently stated that the purpose of setting a minimum salary threshold is to provide a "ready method of screening out the *obviously* nonexempt employees." After all, in Section 13(a)(1), Congress exempted white collar employees from both the minimum wage and overtime requirements of the FLSA. Thus, to implement Congress' intent, the DOL should not set the

minimum salary threshold at a level that excludes many employees who *obviously meet* the duties tests for exemption. Or, put another way, DOL should not set the level so high that it expands the number of employees eligible for overtime beyond what Congress envisioned when it created the exemptions. Yet, this is exactly what the DOL proposes in this rulemaking. Particularly in the retail, restaurant, hospitality, and health care industries—and in the non-profit and public sectors—where many employees earning below $50,440 have been found exempt under the duties tests both in DOL investigations and by the federal courts.

Perhaps most tellingly, the DOL's proposed minimum salary level of $970 per week, $50,440 annually, is higher than the current minimum salary levels for exemption under California and New York law. As with the minimum wage, states may set higher standards for exemptions from state overtime requirements; federal law is a floor. In New York, the minimum salary level for exemption is $34,124—$16,320 *lower* than what the DOL has proposed on a national level. In California, the minimum salary level is currently $37,440 annually—$13,000 *lower* than the DOL's proposal. Although California's minimum salary level will increase to $41,600 in 2016, this will still leave California's minimum almost $9,000 lower than the proposed federal level. If the DOL's proposed salary level is $9,000 to $16,000 higher than the salary level required for exemption under the laws of two states with some of the highest incomes and costs of living, how can it possibly reflect the local economies in the rural South and Midwest?

The DOL is also seeking comments on the possibility of allowing nondiscretionary bonuses provided to exempt employees to satisfy up to 10% of the standard salary level. Although this proposal would provide some relief, the DOL's intention to limit the credit to bonuses paid monthly or more frequently negates most of this relief. Most bonuses earned by exempt employees are only paid quarterly or annually.

B. Automatic Annual Increases to the Salary Levels

The DOL has also proposed to establish a mechanism for automatically increasing the salary levels annually based either on the percentile methodology or on inflation (CPI-U). Such annual automatic increases appear inconsistent with Congressional intent and would be unprecedented in the 77 year history of the FLSA.

In Section 13(a)(1), Congress directed the DOL to revise its overtime regulations "from time to time by regulations of the Secretary subject to the provisions of [the Administrative Procedure Act." Putting the minimum salary levels, a central part of the regulations for 77 years, on automatic pilot seems to contradict this directive. In addition, although Congress has provided indexing under other statutes, it has never done so under the FLSA. Congress has never provided for automatic increases of the minimum wage, although state minimum wages are sometimes indexed. Nor has Congress indexed the minimum hourly wage for exempt computer employees under section 13(a)(17) of the Act, the tip credit wage under section 3(m) or any of the subminimum wages available in the Act. Thus, it seems unlikely that Congress intended the DOL to impose automatic annual increases for the salary-based exemption from the FLSA's minimum wage and overtime requirements.

The regulatory history of Part 541 provides no precedent for indexing. Public commenters have suggested automatic updates to the salary levels in at least two past rulemakings. In 1970, for example, a "union representative recommended an automatic salary review" based on an annual BLS survey.[8] The DOL quickly dismissed the idea as "needing further study," although stating that the suggestion "appear[ed] to have some merit particularly since past practice has indicated that approximately 7 years elapse between amendment of these salary requirements."[9] However, the "further study" came in 2004, after *29 years* had elapsed between salary increases. Nonetheless, in 2004, the DOL rejected indexing as contrary to congressional intent, disproportionately impacting lower-wage geographic regions and industries, and because the Department intended to do its job:

> [S]ome commenters ask the Department to provide for future automatic increases of the salary levels tied to some inflationary measure, the minimum wage or prevailing wages. Other commenters suggest that the Department provide some mechanism for regular review or updates at a fixed interval, such as every five years. Commenters who made these suggestions are concerned that the Department will let another 29 years pass before the salary levels are again increased. The Department intends in the future to update the salary levels on a more regular basis, as it did prior to 1975, and believes that a 29-year delay is unlikely to reoccur. The salary levels should be adjusted when wage survey data and other policy concerns support such a change. Further, the Department finds nothing in the legislative or regulatory history that would support indexing or automatic increases. Although an automatic indexing mechanism has been adopted under some other statutes, Congress has not adopted indexing for the Fair Labor Standards Act. In 1990, Congress modified the FLSA to exempt certain computer employees paid an hourly wage of at least 6.5 times the minimum wage, but this standard lasted only until the next minimum wage increase six years later. In 1996, Congress froze the minimum hourly wage for the computer exemption at $27.63 (6.5 times the 1990 minimum wage of $4.25 an hour). In addition, as noted above, the Department has repeatedly rejected requests to mechanically rely on inflationary measures when setting the salary levels in the past because of concerns regarding the impact on lower wage geographic regions and industries. This reasoning applies equally when considering automatic increases to the salary levels. The Department believes that adopting such approaches in this rulemaking is both contrary to congressional intent and inappropriate.[10]

Now, the DOL seems to be admitting that it is incapable of doing its job:

> This history underscores the difficulty in maintaining an up-to-date and effective salary level test, despite the Department's best intentions. Competing regulatory priorities, overall agency workload, and the time-intensive nature of notice and comment rulemaking have all con-

> tributed to the Department's difficulty in updating the salary level test as frequently as necessary to reflect changes in workers' salaries. These impediments are exacerbated because unlike most regulations, which can remain both unchanged and forceful for many years if not decades, in order for the salary level test to be effective, frequent updates are imperative to keep pace with changing employee salary levels. Confronted with this regulatory landscape, the Department believes automatic updating is the most viable and efficient way to ensure that the standard salary level test and the HCE total annual compensation requirement remain current and can serve their intended function of helping differentiate between white collar workers who are overtime-eligible and those who are not.[11]

The DOL also states that automatic annual increases to the salary will "promote government efficiency by removing the need to continually revisit this issue through resource-intensive notice and comment rulemaking."[12] The DOL seems to be missing the point of the Administrative Procedure Act: Congress *intended* rulemaking to be "resource-intensive."

Further, the DOL's proposed methodology for determining the amount of the annual increase is not well thought out. Particularly troubling is the proposal to reset the salary level every year using a "fixed percentile" (the 40th percentile of full-time, non-hourly paid earnings).[13] The DOL has apparently missed a huge problem with this approach: An index that recalibrates the 40th percentile, each year, based on salaries of non-hourly paid employees will be relying on an ever shrinking pool of such employees, causing a never ending, upward ratcheting effect. In response to the final rule, employers may give a salary increase to some exempt employees already near $50,440. However, employers will need to reclassify millions of other employees to non-exempt status. Although non-exempt employees may be paid on a salary, a significant percentage of reclassified employees will be converted to hourly pay. Consequently, the lowest paid salary employees are likely to leave the pool of "non-hourly paid" employees. As a result, the 40th percentile of employees remaining in the data set will correspond to a higher salary level, which will further reduce the number who meet the salary threshold. The following year that will increase even further the salary corresponding to the 40th percentile, etc. The result will be that tomorrow's 40th percentile and its salary level will be an even poorer proxy for the actual work performed by exempt employees because the measure itself will drive the outcome.

In a recent analysis, Edgeworth Economics illustrates how quickly the minimum salary level for exemption will increase: "If just *one quarter* of the full-time nonhourly workers earning less than $49,400 per year ($950 per week) were re-classified as hourly workers, the pay distribution among the remaining nonhourly workers would shift so that the 40th percentile of the 2016 pay distribution would be $54,184 ($1,042 per week), about 9.6 percent higher than it was in 2015." [14] This process would repeat each year as the lowest paid nonhourly workers fail the salary test and are re-classified as non-exempt hourly workers. After five years, even in the absence of inflation, "the new 40th percentile of the nonhourly pay distribution would be $72,436 ($1,393 per week), which is about 46.6 percent more than the minimum salary threshold in 2015.[15]

This upward ratcheting "becomes more pronounced if more nonhourly workers who failed the salary test are reclassified into hourly positions each year."[16] For example, if half of the reclassified employees are paid hourly, the 40th percentile "will increase by 19.9 percent in the first year and by 94 percent over a five year period. This means that a salary threshold of $49,400 ($950 per week) in 2015 would increase to $95,836 ($1,843 per week) by 2020, even in the absence of inflation."[17]

C. Changes to the Duties Tests

For an employer to classify an employee as exempt, in addition to paying more than the minimum salary level on a salary basis, the employee must also meet one of the duties tests for exemption. The Part 541 regulations establish different duties tests for executive, administrative, learned professional, creative professional, computer, and outside sales employees. Many employees earn above the minimum salary level, but cannot be classified as exempt because they do not supervise employees, are not involved with managing the business, or do not hold professional degrees—engineering technicians, who often earn $80,000 or even $100,000 annually depending on the industry, are a good example.

There is much confusion and concern in the business community regarding what changes the DOL intends to make to the duties tests. In the NPRM, the DOL stated that it "is not proposing specific regulatory changes at this time" and that the agency "seeks to determine whether, in light of our salary level proposal, changes to the duties test are also warranted."

Instead, the DOL raises "issues" for discussion that seems to indicate that the agency is considering some very significant and unprecedented changes:

> What, if any changes, should be made to the duties test?
>
> Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for the exemption? If so, what should that minimum be?
>
> Does the single standard duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Or, should the Department reconsider our decisions to eliminate the long/short duties test structure?
>
> Is the concurrent duties regulation for executive employees (allowing the performance of both exempt and nonexempt duties concurrently) working appropriately or does it need to be modified to avoid sweeping nonexempt employees into the exemption? Alternatively, should there be a limitation on the amount of nonexempt work? To what extent are lower-level executive employees performing nonexempt work?

The DOL also is requesting comments regarding what additional occupational titles or categories as well as duties should be included as examples in the regulations, especially in the computer industry.

The business community is deeply concerned that the DOL will implement the California over-50% quantitative rule for primary duty. The California example is instructive:

the implementation of the quantitative rule, rather than the federal qualitative standard that has been the test for exemption under the white collar exemptions since 1949, has resulted in considerably higher levels of litigation in California. Plaintiffs' attorneys understand how difficult it is for employers to prove the amount of time that employees spend on exempt versus non-exempt tasks.

Similarly, employers are concerned that the DOL will eliminate the concept of concurrent duties in the final rule. Currently, exempt employees such as store or restaurant managers are permitted to perform duties that are non-exempt in nature while simultaneously acting in a managerial capacity. If this "concurrent duties" provision is eliminated, it could mean the wholesale loss of the exemption for both assistant store managers and store managers, particularly in smaller establishments.

Finally, returning to the "long test"—a test effectively inoperable since the early 1980s because of the low salary level—seems to be a radical change, but cannot be ruled out.

The DOL's failure to provide specific regulatory text for any of these "issues" (or any other changes to the duties tests) is perhaps the most alarming aspect of the NPRM. On the duties tests, the NPRM reads more like a preliminary Request for Information than proposed revisions to a regulation. Never before has the DOL made changes to the duties tests without proposing specific regulatory language. Yet, now, the DOL has publicly stated that the Administrative Procedures Act ("APA") requires no more than "a discussion of issues."

Most likely, if the DOL makes changes to the duties tests, the agency will rely on the "logical outgrowth" doctrine. The APA requires that an agency's proposed rulemaking include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[18] This notice requirement is fulfilled if the final rule is a "logical outgrowth" of the proposal.[19] But the DOL's "discussion" of potential changes to the duties test, which runs less than three pages in the federal register,[20] is incredibly vague. Does seeking comments on "what, if any changes should be made to the duties test" give the DOL carte blanche to make every change suggested by the AFL-CIO?

"Outgrowth" implies *something* to grow out of. The public cannot be asked to "divine" the agency's "unspoken thoughts."[21] And words matter. Specific word choices, and even the placement of a comma, can make a significant difference in how a regulation is interpreted and applied by the DOL itself and federal courts. In comments to the DOL's 2003 Notice of Proposed Rulemaking, for example, the AFL-CIO argued that changing the word "whose" to the word "a" resulted in a significant weakening of the duties tests.[22] Yet, apparently, the DOL is signaling that it plans to make significant changes to the specific text of the regulations if the business community objects to the high $50,440 salary level, without giving the public any chance to review and comment on that language.

Regardless of the legal arguments, the DOL's failure to propose specific changes to the regulatory text, as the agency did in 2003, seems contrary to President Obama's commitment to "creating an unprecedented level of openness in Government" by ensuring "transparency, public participation, and collaboration."[23]

Endnotes

1 Ben James, *Final OT Rule May Go Beyond Salary Hike, Lawyers Say,* Law360 (June 30, 2015).

2 29 U.S.C. § 213(a)(1).

3 *Id.*

4 In 1992, at the direction of Congress, DOL revised the duties tests to allow computer employees to qualify as exempt professionals. In 1996, Congress enacted a separate exemption for some computer employees in 29 U.S.C. § 213(a)(17), incorporating some, but not all, of DOL's regulations in the Act itself. Unlike the Section 13(a)(1) exemptions, however, Congress did not give DOL authority to issue regulations on Section 13(a)(17).

5 NPRM at Table 12.

6 *Id.*

7 "Non-hourly-paid employees" include employees paid on a salary basis, but also includes employees paid on a fee basis, by commission, and any other arrangement which is not hourly pay.

8 35 FR 883, 884 (Jan. 22, 1970).

9 *Id.*

10 2004 Final Rule at 22171-72.

11 2015 NPRM at 38539.

12 *Id.* at 38537.

13 2015 NPRM at 38540.

14 *"Indexing the White Collar Salary Test: A Look at the DOL's Proposal,"* Edgeworth Economics (Aug. 27, 2015), *available at* http://www.edgeworth-economics.com/experience-and-news/edgewords-blogs/edgewords-business-analytics-and-regulation/article:08-27-2015-12-00am-indexing-the-white-collar-salary-test-a-look-at-the-dol-s-proposal/.

15 *Id.*

16 *Id.*

17 *Id.*

18 5 U.S.C. § 553(b)(3).

19 *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (explaining that an agency may issue rules that "do not exactly coincide with the proposed rule," as long as the final rule is the logical outgrowth of the proposed rule).

20 80 Fed. Reg. 38516, 38542-44 (July 6, 2015).

21 *Arizona Public Serv. Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000) (citation omitted).

22 *See, e.g.,* 69 Fed. Reg. 22122, 22131 (April 23, 2004).

23 President Barack Obama, *Transparency and Open Government*, Memorandum for the Heads of Executive Departments and Agencies (January 21, 2009), *available at* https://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment.

Religious Liberties

Religion and the Republic

*By David F. Forte**

Note from the Editor:

This article is about the positive role that religion plays in the American republic. The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please e-mail us at info@fedsoc.org.

• Simon Brown, *Symbols and Civil Religion*, Church & State (March 2015), *available at* https://www.au.org/church-state/march-2015-church-state/featured/symbols-and-civil-religion.

• *Special Feature: Legislative Prayer Symposium*, SCOTUSblog, *available at* http://www.scotusblog.com/category/special-features/town-of-greece-symposium/.

• Alana Semuels, *Should Adoption Agencies Be Allowed to Discriminate Against Gay Parents?*, The Atlantic (September 23, 2015), *available at* http://www.theatlantic.com/politics/archive/2015/09/the-problem-with-religious-freedom-laws/406423/.

• Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516 (2015), *available at* http://www.yalelawjournal.org/article/complicity-based-conscience-claims.

A true republic respects religious speech. Such speech represents a different authority from governing power and affirms its limited nature.

In *Town of Greece* v. *Galloway*, the Supreme Court considered whether it was constitutional for a town to open its board meetings with a prayer offered by clergy members. During oral arguments, Justice Elena Kagan, who enjoys spinning hypotheticals as only a law professor can, asked the town's advocate:

> Mr. Hungar, I'm wondering what you would think of the following: Suppose that as we began this session of the Court, the Chief Justice had called a minister up to the front of the courtroom, facing the lawyers, maybe the parties, maybe the spectators. And the minister had asked everyone to stand and to bow their heads in prayer and the minister said the following: He said, we acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength from His resurrection. Blessed are you who has raised up the Lord Jesus. You who will raise us in our turn and put us by His side. The members of the Court who had stood responded amen, made the sign of the cross, and the Chief Justice then called your case.

Realizing that the example was not germane to the proceedings of a legislative session, the town's advocate competently dodged the bullet. But in retrospect, there was a much more direct answer available. "But, your honor," Hungar could have replied, "we have already begun with a prayer."

At 10:00 a.m. on every day when the Supreme Court is in session, the Justices proceed to their chairs while the Court's Marshal proclaims:

> The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!

It is a real prayer, asking for God's protection. The source of the prayer is the first book of Samuel: "Samuel said to all the people, See ye him whom the Lord hath chosen, that there is none like him among all the people? And all the people shouted, and said, God Save the King."[1] In English history, that prayer was first intoned in the coronation of King Edgar in 973, predating the Magna Carta by 242 years.

In spite of its royal roots, such a prayer is also a necessary element in a republic dedicated to preserving the liberties of the people. And, in a larger sense, respect for religion is necessary for a republic to exist at all.

Religion: The First of America's Institutions

The words "God save the United States and this Honorable Court!" are not mere "ceremonial deism." This phrase was made up by Eugene Rostow in 1962 when he was Dean of Yale Law School, and used calculatingly and wrongly by Justice Brennan in *Lynch* v. *Donnelly* (1984) to claim that these references to God "have lost through rote repetition any significant religious content."

As Professor Martha Nussbaum at the University of Chicago Law School noted, "'Ceremonial Deism' is an odd name for a ritual affirmation that a Deist would be very reluctant to endorse, since Deists think of God as a rational causal principle but not as a personal judge and father." The phrase arose in the 1960s when the paradigm of strict separation of church and state was in its legal ascendancy, and there had to be an excuse for all these references in our political literature to a personal

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and immanent God. But in fact, these many references to God are not mere rhetorical flourishes, but point to a necessary mythos for a republic.

A republic, that is, a true republic, respects religious speech because such speech represents a different authority from governing power and hence affirms the limited nature of the governing power. It avows, by explicit reference, that the government is not the only game in town. The religious speech that a republic respects can be evidenced in the very source of the right to govern, in the deliberative process, or spoken by the public authority itself.

These references to God as judge, or as helper, or as protector, are the chorus in our republican Greek play. They are the slave holding the garland of laurel over the head of the triumphant returning Roman General while intoning, "Remember that thou art only mortal."

That is why Tocqueville noted that religion was the "first of [America's] political institutions." He explained, "I do not know whether all Americans have a sincere faith in their religion—for who can search the human heart?—but I am certain that they hold it to be indispensable to the maintenance of republican institutions."

Religion Combats Political Hubris

The iconic phrases that swirl about us in motto, oath, and Presidential statement have the salutary lesson of warning the state of the danger of political hubris—that is, the conceit that it is only through government and the political process that social and moral problems can be addressed. They signal that, for the sake of liberty, there are limits to what government can do.

We are all familiar with the mechanical checks that the framers erected in the Constitution to restrain government and limit what the people's democratic will might do to undermine liberty. But they, and their successors, went further. Guarding against sectarian use of government to suppress others, the framers confined the enterprise of government normatively by affirming the existence of God, by acknowledging him as judge, and by admitting their own human limits by relying upon him for beneficent aid.

Recall Jefferson's plaint about slavery in his *Notes on Virginia*. "Can the liberties of a Nation be secure," he asked, "when we have removed a conviction that these liberties are the gift of God? Indeed I tremble for my country when I reflect that God is just and that his justice cannot sleep forever." Or think of the Declaration's famous justification for the existence of government itself: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." And recall Madison's conclusion: "Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe."[2]

The very nature of a republican limited government, therefore, is grounded in the acknowledgement of the presence of another, higher sovereign, to whom individuals owe their loyalty and into which loyalty the government has not a right to intrude.

But the framers of our republic went further. They placed the actual governmental institutions in the presence of this immanent divine power. The week after the passage of the Bill of Rights, Congress hired a chaplain to begin each day's deliberation with a prayer to this very same God. Congress provided for chaplains for the armed forces. And they soon would begin the tradition, continued for a century or more, of hiring missionaries to convert the Indians so that they could adopt more civilized and republican ways. When Lincoln rededicated the torn republic back to work of the founders, he too did so with the prayer, "that this nation, under God, shall have a new birth of freedom."

The Framers turned to the God of our liberties when it came to the deliberative process as well. Washington, to whom all looked to for example, and whose practice shaped our mode of constitutional governance, declared as part of his "first official act," his "fervent supplications to the … Almighty Being who rules over the Universe … that his benediction may consecrate to the liberties and happiness of the People of the United States, a Government instituted by themselves." And in his Thanksgiving Proclamation, he offered a prayer to God "to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed." In his farewell address he charged, "Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."

Lincoln too called upon God to provide the wisdom by which the nation could possess good laws: "With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right." And when national morality breaks down, then the judgment of that beneficent Governor of the Universe can be terrible indeed. Lincoln:

> Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn by the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said, "The judgments of the Lord are true and righteous altogether."

Today, when government officials take an oath, they call upon God to help them fulfill it. In Ohio, the standard "So help me God" is replaced by the more formidable "And so shall I answer unto God." We have added to the Pledge of Allegiance the declaration that we are "a republic, under God." We have adopted as the national motto, "In God we trust." None of these are instances of empty "ceremonial deism." On the contrary, they are explicit affirmations of the necessity of a divine authority that is the ultimate source of rights, of guidance for public policy, and of judgment.

Eradicating the Social Good of Religion

Virtually every major political social reform in our nation's history has been motivated by religious belief: common

education, abolition, worker's rights, protection of women, temperance, desegregation. Religion has transformed and refined our society as no other source has. Think of the hundreds of hospitals, the thousands of institutions of education, the social services of feeding the hungry, ministering to prisoners, caring for the millions subject to addiction and alcoholism, protecting immigrants, the unborn, the marginalized, the widow, and the orphan.

In recent years, the good that religion has accomplished in society has come under attack. Catholic Charities of Massachusetts cannot offer its renowned adoption services any longer because it cannot in good conscience offer children to same-sex couples.[3] The recent dust-up about forcing closely held companies to pay for abortifacient is only a small part of a much larger trend. Increasingly, the state is seeking to supplant the role of religious social action, making it subject to whatever rules the government thinks appropriate. Instead of acknowledging God as a limiting principle on the role of government, the state seeks to replace him with its own sovereignty and to turn all public references to God into so much verbal decoration.

Earlier this month, San Francisco's archbishop was threatened with legal action by city and state legislators for daring to require that the teachers in the diocesan Catholic schools proclaim the moral teachings of the Catholic Church.[4] It used to be—in the days of Father Richard John Neuhaus—that religion was kept from the public square. Then, the authorities, as in Massachusetts, began forcing it out of the social space. Now, political powers threaten the right of religious believers to even hold certain beliefs.

Without an affirmation of God, without religious speech being welcomed in public discourse, and without a space for religion to be itself, the very notion of a republic is disintegrating before our eyes.

Endnotes

1 1 Samuel 10:24.

2 James Madison, *Memorial and Remonstrance against Religious Assessments* at 1.

3 Sarah Torre and Ryan T. Anderson, *Adoption, Foster Care, and Conscience Protection*, The Heritage Foundation Backgrounder No. 2869 (January 15, 2014), *available at* http://www.heritage.org/research/reports/2014/01/adoption-foster-care-and-conscience-protection.

4 Ryan T. Anderson and Leslie Ford, *A Fight to Keep Catholic Schools Catholic*, Wall Street Journal (March 5, 2015), *available at* http://www.wsj.com/articles/ryan-t-anderson-and-leslie-ford-fighting-to-keep-catholic-schools-catholic-1425600547.

Telecommunications & Electronic Media

The Procrustean Problem of Prescriptive Regulation: Three Principles to Promote Innovation

*By Maureen K. Ohlhausen**

In Greek mythology, Procrustes was a rogue blacksmith, a son of the sea god Poseidon, who offered weary travelers a bed for the night. He built an iron bed especially for his tired guests, but there was a catch: if the visitor was too small for the bed, Procrustes would forcefully stretch the guest's limbs until they fit. If the visitor was too large, Procrustes would amputate limbs as necessary to fit the guest to the bed. Eventually, Procrustes met his demise at the hand of Greek hero Theseus, who fit Procrustes to his own bed by cutting off his head.

The story of Procrustes warns against our human tendency to squeeze complicated things into simple boxes, to take complicated ideas, technologies, or people, and force them to fit our preconceived models. We often do not recognize this backward fitting tendency, observes risk analyst Nassim Taleb, or are even oddly proud of our cleverness in reducing something complicated to something simple.[1]

Regulators should embrace the lesson of Procrustes. They should resist the urge to simplify, make every effort to tolerate complexity, and develop institutions that are robust in the face of complex and rapidly changing phenomena. Unfortunately, due to regulators' limited knowledge and foresight, regulation too often is a procrustean bed for the regulated industry. And when the regulated industry rapidly evolves, yesterday's comfortable regulatory bed can quickly become a torture rack for tomorrow's technologies.

How can we avoid this dire scenario? I propose three key principles for regulators. First, approach issues with regulatory humility, recognizing the fundamental limits of regulatory action. Second, prioritize such action to address real consumer harm. Third, use the appropriate regulatory tools. Regulators and regulatory institutions that embrace these three principles will better promote innovation and avoid procrustean regulation.

I. Embrace Regulatory Humility

It is exceedingly difficult to predict the path of technology and its effects on society. The massive benefits of perhaps the most influential technology in history, the Internet, in large part have been a result of entrepreneurs' freedom to experiment with different technologies and business models. The best of these experiments have survived and thrived, even in the face of initial unfamiliarity and unease about the impact on consumers and competitors. For example, there was early widespread skepticism of online shopping. Now, online shopping is an every-day occurrence. Early skepticism does not predict potential consumer harm. Conversely, as the failures of thousands of dotcoms show, early enthusiasm does not predict consumer benefit.

Because it is so difficult to predict the future of technology, government officials, like myself, must approach new technologies and new business models with a significant dose of regulatory humility, recognizing the inherent limitations of regulation and acting according to those limits.

Of course, the idea that regulatory action has inherent limits is much older than my use of this term.[2] Nobel-prize winning economist F.A. Hayek spent much of his illustrious career demonstrating the limits of centralized planning as compared to decentralized market structures, and his insights apply equally to regulation by the administrative state. Hayek's 1945 paper, *The Use of Knowledge in Society*, describes regulators' fundamental knowledge problem, which limits the effective reach of regulation.[3] As Hayek explained, a regulator must acquire knowledge about the present state and future trends of the industry being regulated. The more prescriptive the regulation, and the more complex the industry, the more detailed knowledge the regulator must collect. But regulators simply cannot gather all the information relevant to every problem.

What limits the ability of regulators to collect such information? First, collecting and analyzing such information is very time-consuming because such knowledge is generally distributed throughout the industry, in what Hayek calls "the dispersed bits of incomplete and frequently contradictory knowledge."[4]

Second, in most cases, critical information lies latent in the minds of the individuals or in the institutional structures of the industry involved. That is, even those directly involved in the industry itself cannot themselves fully explain how things get done. James C. Scott, in his book *Seeing Like a State*, uses the Greek term "mētis" to describe this "practical knowledge," or "the wide array of practical skills and acquired intelligence in responding to a constantly changing natural and human environment."[5] These are the types of skills that can only be learned by doing – think of riding a bike, for example, or speaking a language, or conducting an effective board meeting. Much of human knowledge falls into this category. And Scott argues quite convincingly that although formal organizations, including regulatory bodies, fail to recognize and capture such knowledge, they rely heavily on it. In fact, Scott indicates that regulation "is always and to some considerable degree parasitic on informal processes, which the formal scheme does not recognize, without which it could not exist, and which it alone cannot create or maintain."[6] In short, regulation cannot effectively capture practical knowledge.

The knowledge problem has a third characteristic:

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I would like to acknowledge the important contributions of my attorney advisor, Neil Chilson, to this article. This article reflects my views, not necessarily those of the Federal Trade Commission or FTC Staff.

even when a regulator manages to collect information, that information quickly becomes outdated as a regulated industry continues to evolve. Obsolete data is a particular concern for regulators of fast-changing technological fields.

The knowledge problem means that centralized problem solving cannot make full use of the available knowledge about a problem and, therefore, in many cases offers worse solutions when compared to distributed decision-making.

Hayek's insight is actually not very controversial today. At the time Hayek wrote his paper, centralized planning was the en vogue solution for just about every social ill. Today, there is a strong consensus that markets and other distributed social learning mechanisms are much better at solving the vast majority of problems. And even the most interventionist regulators often talk about preferring market mechanisms and "light touch" regulation. Yet, despite the lip service paid, regulators still too often instinctually react to apparent problems by proposing top-down solutions. This instinct is the opposite of regulatory humility. And to be more effective regulators, we must suppress this instinct.

The modern age offers a potential new source of regulatory hubris. The success of information technology means that regulators can now gather large amounts of data. Much more of the world has become "legible" to regulators. This data certainly can help enhance regulatory decisions. But data isn't knowledge or wisdom. Data cannot capture much of the practical knowledge Scott describes. So "data-driven" decisions can be wrong. Even worse, data-driven decisions can *seem* right while being wrong. Political polling and statistics expert Nate Silver notes, "One of the pervasive risks that we face in the information age … is that even if the amount of knowledge in the world is increasing, the gap between *what we know* and what *we think* we know may be widening."[7] Regulatory humility can help narrow that gap.

So, Principle One is to recognize the limits of regulation and embrace regulatory humility. Having done so, then what? Congress has tasked agencies such as the FTC with regulatory tasks—some of them quite important—so how can a decision maker act with regulatory humility and still carry out its mission? My next two principles address this practical problem.

II. Focus on Identifying and Addressing Real Consumer Harm

My second principle, and a key way to practice regulatory humility, is to focus on identifying and addressing real consumer harm. As noted in the FTC at 100 Report, "[T]he improvement of consumer welfare is the proper objective of the agency's competition and consumer protection work."[8] The most effective way to improve consumer welfare under the FTC's mandate is to find and address the most severe consumer harms.

At the FTC, this focus is part of our statute. Congress charged us in Section 5 of the FTC Act with preventing deceptive or unfair acts and practices. Deceptive acts violate Section 5 only if they are material—that is, if they actually harm consumers. And practices are only unfair if there is a substantial harm that consumer cannot avoid and that outweighs any benefits to consumers or competition. In both cases, the law concerns itself with addressing actual consumer harms. Likewise, the FTC carefully evaluates consumer welfare (or, its corollary, consumer harm) when it exercises its antitrust authority to challenge unfair methods of competition.

Not only does the law require the FTC to focus on consumer harm; such a focus is also good policy. Agencies have limited resources. We should generally spend those resources to stop existing or likely harms, rather than trying to prevent speculative or insubstantial harms.

When we analyze harms and benefits, both in our enforcement efforts and in policy making more generally, we ought to follow the advice of Frederic Bastiat. In 1850, in a famous essay titled *That Which is Seen, and That Which is Not Seen*, Bastiat argued that he could tell the difference between a good and a bad economist based on single methodological habit.[9] A bad economist, he said, judges a policy or action based only on the "seen," first order effects of that action. In contrast, a good economist takes account "both of the effects which are seen, and also of those which it is necessary to foresee."[10] Bastiat explained that the bad economist's myopic analysis might lead him to prevent a small present harm, yet trigger a much bigger overall harm. In contrast, the good economist's thorough analysis will lead her to be more tolerant of the risk of a small present harm, if it will avoid a much larger harm later.

Regulators face the same challenge and should therefore engage in diligent cost-benefit analysis. The appropriate depth of such analysis might vary, depending on the situation. In cases of clear fraud by a single party, where there are no consumer benefits, the costs and benefits need not necessarily be detailed exhaustively. However, for cases where there are both costs and benefits, and the decision could affect a wide range of parties, regulators ought to carefully assess consumer harms and benefits. This will help keep the agency resources focused on where they can do the most good.

When the FTC has properly focused on practices that are actually harming or likely to harm consumers, it has generally limited its forays into speculative harms, thereby preserving its resources for clear violations. Such self-restraint has been important to the FTC's success in alleviating a wide range of disparate consumer harms without disrupting innovation. I think this is a model worth replicating.

III. Use Appropriate Tools

The final principle that will help regulators avoid procrustean regulation is to use appropriate tools. An agency using the wrong tools will be ineffective. For fast changing technologies, agencies need tools that are nimble, transparent, and incremental. A good example of a nimble, transparent, and incremental regulatory tool is the FTC's case-by-case enforcement process.

Often, we equate regulation with detailed agency rulemakings. Such ex ante rulemaking sets out rules, often covering an entire industry, to prevent future harms. For the reasons discussed above, including the knowledge problem, regulators struggle to construct effective ex ante rules and to update such rules in a timely manner. And such prescriptive

ex ante regulations can hinder innovation. For example, if an innovative new project or service does not easily fit in a particular statutory or regulatory box, the innovator may be uncertain about how to comply with the law. Such legal uncertainty exacerbates the already risky effort to develop something new, which discourages innovation.

Regulation at the FTC is generally quite different. Although the Commission does have rulemaking authority, the vast majority of our actions are ex post case-by-case enforcement of our general Section 5 authority. This incremental approach, which we have been using for nearly 100 years, has significant benefits. Consistent with Hayek's thesis about the knowledge problem, it requires far less information to apply generally applicable, well-understood legal principles to a specific case at hand, for example, than it does to execute an industry-wide rulemaking to address more general concerns about future conduct. Thus, a case-by-case approach makes the knowledge problem more tractable. Furthermore, this ex post enforcement requires specific facts on the ground and a specifically alleged harm, and it generally only directly applies to the party to the enforcement action. Thus, an incrementalist approach better limits the potential unintended consequences of a regulatory action.

(As an aside, a case-by-case approach also dampens the incentives that fuel agency capture problems. But public choice challenges in regulatory design is a topic worthy of an entirely separate article.)

Perhaps somewhat paradoxically, incremental approaches are particularly well-suited to dealing with fast-developing areas of technology. Even small distortions in such fast-moving industries can quickly divert the industry from its previous trajectory. A case-by-case approach allows the regulatory body to address specific problems without derailing an entire industry, and it enables the law to evolve alongside the technology in a much more organic fashion.

Industry self-regulation is another nimble, transparent and incremental tool that is well suited to regulation in fast changing industries, with agency enforcement as a backstop. Compared to traditional government regulation, self-regulation has the potential to be more prompt, flexible, and responsive when business models or technologies change. Self-regulatory frameworks are easier to reconfigure than major regulatory systems that must be adjusted via legislation or agency rulemaking. Self-regulation can also be well attuned to market realities where self-regulatory organizations have obtained the support of member firms. A regulatory backstop that holds companies to the promises they make under a self-regulatory framework—like the FTC's deception authority—ensures that companies take seriously their responsibilities under a self-regulatory framework.

Conclusion

Regulators will better fulfill their regulatory missions and minimize negative effects on innovation when they embrace regulatory humility, focus on identifying and addressing real consumer harms, and use the proper regulatory tools. Applying these principles can help avoid subjecting tomorrow's technologies to an ill-fitting procrustean bed of regulation.

Endnotes

1 Nassim N. Talib, The Bed of Procrustes, xii (2010).

2 I have focused on what I think is the most fundamental limitation of regulation, the knowledge problem. However, there are many other obstacles to effective regulation, as public choice scholars have well documented. *See, e.g.*, William A. Niskanen, Jr., Bureaucracy and Public Economics (1994).

3 Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519-30 (1945).

4 *Id.*

5 James C. Scott, Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed 313 (1998).

6 *Id.* at 310.

7 Nate Silver, The Signal and the Noise: Why So Many Predictions Fail—But Some Don't 46 (2012).

8 William E. Kovacic, The Federal Trade Commission At 100: Into Our 2nd Century, The Continuing Pursuit Of Better Practices at iii (Jan. 2009), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf.

9 Frederic Bastiat, That Which is Seen, and That Which is Not Seen (1850).

10 *Id.*

Book Reviews

A Conflict of Principles: The Battle Over Affirmative Action at the University of Michigan

By Carl Cohen

*Reviewed by Roger Clegg**

Note from the Editor:

This book review discusses the contentious issue of affirmative action. The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please e-mail us at info@fedsoc.org.

• Richard Rothstein, *The Colorblind Bind*, The American Prospect (June 22, 2014), *available at* http://prospect.org/article/race-or-class-future-affirmative-action-college-campus.

• Janet Napolitano, *How to Diversify a Campus, In Spite of the Supreme Court*, The Washington Post (April 25, 2014), *available at* https://www.washingtonpost.com/opinions/how-to-diversify-a-campus-in-spite-of-the-supreme-court/2014/04/25/e229a030-cbcc-11e3-a75e-463587891b57_story.html.

• Eric Hoover, *Colleges Seek Diversity, but 'Admissions Calculus' Hasn't Changed*, The Chronicle of Higher Education (July 21, 2015), *available at* http://chronicle.com/article/Colleges-Seek-Diversity-but/231769/.

• Fisher v. University of Texas at Austin, SCOTUSblog, *available at* http://www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin-2/; Special Feature: Fisher II Symposium, SCOTUSblog, *available at* http://www.scotusblog.com/category/special-features/fisher-ii-symposium/.

• Carl Cohen, *Affirmative Action Actually Hurts Campus Race Relations*, Pope Center Commentaries (September 15, 2015), *available at* http://www.popecenter.org/commentaries/article.html?id=3259.

This book is important for anyone who cares about the use of race and ethnicity in making university admissions decisions, the practice widely referred to as "affirmative action." The author, University of Michigan professor Carl Cohen, was not only an observer but also a key participant in the long struggle against the use of racial and preferences at his school. So the book is part memoir, part history, part policy—and all excellent. Because of the part he played in this fight, Professor Cohen has insights, knowledge, and perspectives unavailable to anyone else.

The book begins with some political and legal background, and then turns specifically to the use of racial and ethnic admission preferences at the University of Michigan. Professor Cohen played an important role in uncovering the extent to which race was weighed in admission decisions, which was in turn an important contribution to the legal challenge that followed and that resulted in a pair of Supreme Court decisions in 2003, *Gratz v. Bollinger* (undergraduate)[1] and *Grutter v. Bollinger* (law school).[2]

Those decisions, while limiting the extent to which discrimination would be allowed, still permitted it, and so the stage was set for the successful ballot initiative that amended the state constitution in Michigan to ban the use of racial, ethnic, and gender discrimination and preference in state employment, contracting, and education—including university admissions. That ballot initiative was then challenged in a lawsuit, which also found its way to the Supreme Court, and the Court upheld the ban on racial preferences.

I especially enjoyed Professor Cohen's discussion of some of the relevant social science research (pages 206-08), his debunking of the supposed benefits of racial diversity (pages 241 and 253-55), and his useful litany of the costs of racial preferences (pages 245-46). The appendices of the book are likewise useful, and include the Freedom of Information Act requests that Professor Cohen filed, the 1996 report he wrote on what he found as a result of those requests, and the text of the ballot initiative that was passed in 2006.

* * *

I see by the word-count feature on my computer that I still have several hundred words left to write in this review, and so I turn now to the only thing I didn't like about this book. That is its title, which suggests an equivalence between the two sides that, as the rest of the book documents, does not exist. The documentation is rancor-free, to be sure—Professor Cohen is unfailingly gracious; more on that later—but there's no denying my conclusion: There is no "conflict of principles" here because the pro-racial-preference side is, by and large, unprincipled.

This is perhaps most obvious in the scofflaw attitudes of universities, which is something I know about, so allow me to

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A Conflict of Principles *is available for order on Amazon.com: http://www.amazon.com/Conflict-Principles-Affirmative-University-Michigan/dp/0700619968.*

give some chapter and verse on this.

You would think that, as the twenty-five year clock set in 2003 by Justice O'Connor in *Grutter v. Bollinger* has been ticking—"We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today" —schools that use racial and ethnic preferences would be weaning themselves off them. But this isn't happening, as studies published by the Center for Equal Opportunity show. Our post-*Grutter* study of undergraduate admissions at the University of Wisconsin found the severest discrimination that we've ever seen, before or after *Grutter*. We found the worst law school discrimination we ever saw at Arizona State, also post-*Grutter*. We likewise found severe post-*Grutter* law school and undergraduate discrimination in, respectively, Nebraska and Ohio. And we even found law school, undergraduate, and medical school discrimination at the University of Michigan (before voters banned it) —and indeed worse undergraduate discrimination than there was in the system that the Supreme Court struck down in *Gratz v. Bollinger*. Fewer schools may be using preferences; many states have banned them, and most schools don't use them since they are nonselective.[3] But those that continue have doubled down.

Nor have things improved since the Supreme Court's more recent decision in Fisher v. University of Texas ("*Fisher I*").[4] That case required universities to reevaluate their use of racially selective admissions policies; presumably, if the costs of racial preferences were found to outweigh the purported benefits, or if less discriminatory means could achieve similar benefits, the discrimination would have to stop. Consider one obvious potential cost, much discussed in the run-up to *Fisher I*: Recent empirical research provides strong evidence for the "mismatch" theory, which posits that racial preferences cause significant harm to the very students who are supposedly the *beneficiaries* of racial admission preferences.[5] Even if some academics continue, in the face of all this evidence, to dispute the mismatch effect,[6] any fair reading of *Fisher I* would require schools to determine that the benefits of using racial preferences outweigh any obvious costs, and one would think that this would in turn include at least a consideration of the possible mismatch effects on minority students.

There is, however, no evidence that universities have undertaken this type of introspection in the wake of *Fisher I*. To the contrary: Last year, the Center for Equal Opportunity sent public records requests to twenty-two public universities seeking information detailing how the institutions had considered the costs of their racially selective admissions policies after *Fisher*. In particular, CEO sought to find out how the universities had considered the mismatch effect on their students. Astonishingly, half (eleven) of those institutions responded that they had *zero* documents responsive to the request.

The response at the remaining eleven universities was no better. Two universities sent documents that confirmed that they had failed to consider the costs of mismatch at their schools. Seven of the institutions refused to honor the request—saying it failed to meet their requirements for some reason or another. One university quoted a price for searching for the documents that was too expensive for CEO—even though CEO engaged in extensive attempts to negotiate around the cost difficulty. The last request went to the University of Texas itself, which is still going back and forth with CEO on it.

During the same time period as CEO's requests, state-based affiliates of the National Association of Scholars likewise asked universities for documents confirming that they had considered the costs of racial preferences and investigated race-neutral methods of achieving the same benefits. NAS's requests met the same fate. Not a single university responded with documents showing it had seriously considered race-neutral alternatives as *Fisher I* requires, and not a single university responded with documents showing it had seriously considered the costs of their racially preferential admissions policies. Stanford and Yale are destroying student records that would likely open them to charges of illegal racial discrimination.[7] There are many more such examples of intransigence.[8]

* * *

I hate to end the review on this dyspeptic note, not so much because I regret casting aspersions on the character of those supporting racial discrimination in university admissions, but because it suggests that Professor Cohen is to be faulted for not sharing this dyspepsia. To the contrary: That's to Professor Cohen's credit.

So let me wrap things up by quoting from a tribute to the late Irving Kristol written by Peter Wehner in *Commentary* (a magazine to which Professor Cohen contributes as well, by the way). In it, Mr. Wehner makes an important point, and so I keep this passage on my desk. It's a message implicit in Professor Cohen's book, too—and it's an important message for conservatives generally, in my humble opinion.

> A fifth quality of Irving Kristol's that conservatism today would be wise to replicate is what his friend Charles Krauthammer called "his extraordinary equanimity."
>
> *His temperament was marked by a total lack of rancor. Angst, bitterness and anguish were alien to him. That, of course, made him unusual among the fraternity of conservatives because we believe that the world is going to hell in a handbasket. That makes us cranky. But not Irving. Never Irving. He retained steadiness, serenity and grace that expressed themselves in a courtliness couched in a calm quiet humor.*
>
> When you think about some of the leading figures on the right today, words like "steadiness" and "serenity," "grace" and "calm quiet humor" are not ones that immediately come to mind. Instead the tone and approach we often hear can best be described as apocalyptic, brittle, angry, and embittered. This approach to politics, by the way, was not simply stylistic; it was rooted in a deep understanding of conservatism itself. Kristol believed conservatism was "antiromantic in substance and temperament." "Its approach to the world," he wrote, "is more 'rabbinic' than 'prophetic.'"
>
> It also would help for conservatism to embody a kind of cheerfulness that was a hallmark of Kristol. As his writings show, he was deeply realistic. He certainly didn't sugarcoat things. In fact, he described himself as "cheerfully pessimistic." But one sensed that deep down, the needle leaned a bit more in the direction of cheerfulness than pessimism.

> In any event, as long as I've been alive (and well before I was born) there have been people on the right issuing dark warnings of the decomposition and dissolution of the West; people who warn about impending tyranny and America's march toward Gomorrah. I'm all for cursing the darkness when necessary, and have done a bit of it myself now and then. But that cast of mind, without any leavening agent, can lead to despair and radicalism. Those attitudes were unknown to Irving Kristol. He seemed very much at home in the world in the best sense and nudged it along in the right direction when he could. And my how he did.[9]

I will note in passing here that Cohen's tone in this book is quite opposite from that of one of today's leading civil rights commentators on the Left, Ta-Nehisi Coates.

Now, I don't know what Professor Cohen thought of Irving Kristol or whether he would describe himself as a conservative or neoconservative on any issue other than racial preferences (he has served as chair of the Michigan affiliate of the ACLU, and for years as a member of its national board of directors). And "serenity" and "calm" and "quiet" are not the words I would choose to describe Professor Cohen; "animated" and "passionate" and "exuberant" are more like it. But I admire both men, and an important part of each's charm is his "extraordinary equanimity" and "total lack of rancor."

So perhaps I shouldn't even complain about the too-generous title that Professor Cohen chose for his wonderful book.

Endnotes

1 539 U.S. 244 (2003).

2 539 U.S. 306 (2003).

3 Note that, where schools are not using racial preferences, students continue to receive a perfectly good education, showing that racial discrimination is not necessary.

4 133 S. Ct. 2411 (2013).

5 Gail Heriot, *A "Dubious Expediency": How Race-Preferential Admissions Policies on Campus Hurt Minority Students*, The Heritage Foundation Special Report, No. 167 (August 31, 2015). *See also* Richard Sander & Stuart Taylor, Jr., Mismatch: How Affirmative Action Hurts Students It's Intended to help, and Why Universities Won't Admit It (2012).

6 *See* Richard Sander, *A Reply to Critics*, 57 Stan. L. Rev. 1963 (2005), *available at* http://www2.law.ucla.edu/sander/Systemic/critics/ReplyCritics.pdf (the pioneer of mismatch theory summarizes criticisms of the theory and responds to them).

7 Peter Schmidt, *Students' Requests for Their Admissions Records Prompt Colleges to Purge Documents*, The Chronicle of Higher Education (March 20, 2015), *available at* http://chronicle.com/blogs/ticker/students-requests-for-own-admissions-records-prompt-colleges-to-purge-documents/95831?cid=at&utm_source=at&utm_medium=en.

8 *See, e.g.*, Roger Clegg, *Scofflaw Universities*, National Review Online (July 22, 2015), *available at* http://www.nationalreview.com/phi-beta-cons/421439/scofflaw-universities-roger-clegg; Richard D. Kahlenberg, *How a New Report May Hasten the End of Racial Preferences in Admissions*, The Chronicle of Higher Education (July 23, 2015), *available at* http://chronicle.com/article/How-a-New-Report-May-Hasten/231837/; Sara Harberson, *The Truth About 'Holistic' College Admissions*, Los Angeles Times (June 9, 2015), *available at* http://www.latimes.com/opinion/op-ed/la-oe-harberson-asian-american-admission-rates-20150609-story.html; Roger Clegg, *Lee Bollinger's Mask Slips*, National Review Online (September 17, 2014), *available at* http://www.nationalreview.com/corner/388205/lee-bollingers-mask-slips-roger-clegg; Brief for Richard Sander as Amicus Curiae, Fisher v. University of Texas, No. 14-981 (2015), *available at* http://www.scotusblog.com/wp-content/uploads/2015/09/Sander-brief-for-Fisher-v-Univesrity-of-Texas-corrected.pdf.

9 Peter Wehner, *A Cheerful Conservative*, Commentary (May 12, 2014), *available at* https://www.commentarymagazine.com/politics-ideas/conservatives-republicans/a-cheerful-conservative/ (emphasis added).

By the People: Rebuilding Liberty Without Permission
By Charles Murray

*Reviewed by Jonathan H. Adler**

By the People: Rebuilding Liberty without Permission, starts with a dispiriting premise: "we are at the end of the American project as the founders intended it" (xiii). The federal government has become a true Leviathan, freed from meaningful constitutional restraints and dominated by special interests and a self-interested elite. The legal system has become "lawless" and "Congress and the administrative state have become systematically corrupt" (9). It's a bracing indictment. Yet all is not lost, for author Charles Murray also believes that we are in a "propitious moment" to, if not reverse course, take steps to preserve "the best qualities of the American project in a new incarnation" (xiii). *By the People* presents a compelling diagnosis and offers a speculative cure.

The fundamental problem, as Murray sees it, is that the growth in the size, scope, cost, and intrusiveness of the federal government is squelching the promise of America for all but a fortunate elite. Even as classical liberal ideas have proliferated in the public square, government has grown to a previously unimaginable size. It's not merely that the federal budget has increased more than five-fold since 1960 or that the Code of Federal Regulations has grown even faster. Or that, according to the Competitive Enterprise Institute's latest *Ten-Thousand Commandments* report, the annual costs of federal regulation now top $1.8 trillion, or nearly $15,000 for every household in the land. It's that "federal rules about permissible conduct" touch virtually every aspect of American life, particularly when one accounts for the myriad conditions attached to federal funds (5). Since the 1950s, "the federal government went from nearly invisible in the daily life of ordinary Americans . . . to an omnipresent backdrop today" (7).

With the growth in government has come the erosion of the rule of law. The state's legal prohibitions are no longer confined to truly bad acts, but extend to all manner of behavior; "so many things have become federal crimes that it is impossible to keep track of them" (33). Your dentist's office, of all places, is a hotbed of potential violations. Legal defenses remain on the books, but many find legal defense too costly to mount. The tort system and regulatory enforcement routinely bring defendants to their knees, with little regard for actual fault. Those who have done nothing wrong may still find themselves on the wrong side of the law.

Consider the case of the Sacketts, who purchased a small plot of land in 2005 to build a home. In 2007 they were informed by the U.S. Environmental Protection Agency that they had illegally polluted the "waters of the United States" by laying gravel on the site. This was because, in the eyes of the EPA, the site was a wetland. The EPA presented the Sacketts with a choice: cease all construction, restore the site, and conduct extensive restoration, or else be fined up to $32,500 each for violating the Clean Water Act and the EPA's commands.

The Sacketts sought to contest the EPA's order, maintaining that their property was not a wetland subject to federal regulation, only to be told by the agency and federal courts that they would have to wait until EPA sought to enforce its order, even though the potential fines would continue to accumulate. In 2012 the Supreme Court unanimously rebuked the EPA, but after five years of litigation, all the Sacketts won was the right to challenge the EPA's actions in court. Had their case not attracted the attention of the Pacific Legal Foundation, the non-profit public interest group that represented them in court, it's not clear how the Sacketts would even have had their day in court.

The Sacketts' experience is becoming all too common. Regulatory enforcers know few of the regulated have the courage to fight back, particularly when they know that resistance can be costly. One EPA official was caught on tape suggesting the agency should model its enforcement efforts on the Roman Empire and "crucify" a few regulated firms. After all, as the Romans found, making an example of a select few can make one's subjects "really easy to manage."

As more and more power has been concentrated in the nation's capital, the administrative state has become untethered from any meaningful political accountability. Broad delegations of regulatory authority are compounded by judicial deference to administrative findings and legal interpretations. Influencing the administrative process is beyond the hope of all but the most organized, and well-financed, interest groups and those who can afford to pay for access to policymakers. Larger corporations, for their part, have largely made their peace with this state of affairs, and content themselves with manipulating rules, where possible, for competitive advantage. The result is a gargantuan "government of special interests, by special interests, and for special interests" (254).

This state of affairs was not created overnight, and there is no conventional cure. Those who believe in limited government—those Murray refers to as "Madisonians"—are deluding themselves if they believe that electing Republicans or confirming the right justice to the Supreme Court will save the day. As much as conservatives like to complain about the current Administration's excesses, the pathologies about which Murray complains did not begin in 2009. Government grew even when Republicans controlled the Capitol and 1600 Pennsylvania, as did the scope of federal power. Supreme Court decisions have drawn the occasional line in the sand, but they have (as yet) done nothing to alter the existing trajectory.

Does this mean things are hopeless? Not to Murray. He believes it is possible to turn the tide through strategic civil disobedience. If enough of those subject to unreasonable regulatory demands resist, he reasons, the government will be unable to take action against them all, and the inanities

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By the People: Rebuilding Liberty Without Permission *is available for order on Amazon.com: http://www.amazon.com/By-People-Rebuilding-Liberty-Permission/dp/0385346514.*

and excesses of the modern regulatory state will be exposed. "[P]our sugar into the government's gas tank" (153), he urges, and it will become possible for more Americans "to safely ignore large portions of the laws and regulations with which we are burdened" (129).

Resisting the regulatory state comes at great risk, however. The Sacketts benefitted from pro bono legal support from the Pacific Legal Foundation, but they still faced the prospect of substantial fines. Imagine, however, if there were an entity that would not only offer them legal support, but might indemnify them as well, allowing them to go about their work without fear of violating some ticky-tacky government rule.

Enter the Madison Fund, Murray's idea for a new type of legal defense fund to support those who would resist the excesses of the regulatory state. More than a public interest legal group, the Fund would defend those guilty of violating pointless or excessive rules, publicize their cause, and even to indemnify them for the costs of their resistance.

Eventually, Murray hopes, trade associations might assume a similar role, collecting funds to protect their members from regulatory excess. The American Dental Association (ADA), for example, might offer a form of regulatory insurance to its members, reimbursing fines and covering legal expenses for those members who, despite following applicable ADA guidelines, find themselves subject to regulatory enforcement for failure to comply with every jot and tittle of the hundreds of pages of regulations to which dentists are subject. Such efforts could "make enforcement of certain regulations more trouble than it's worth" (147).

This is a novel and provocative idea, as Murray himself admits. Such an institution would be overtly subversive, and that's the point. It's not enough to make regulatory enforcement more expensive; Murray wants to delegitimize it—at least when regulations are not truly necessary.

Murray's target is not all regulations. He carefully enumerates those sorts of regulations which should be presumed legitimate, and exempt from systematic civil disobedience (such as the tax code or laws prohibiting violent acts), while also highlighting categories of rules that should be most suspect (such as occupational licensing rules and limitations on non-harmful private land uses). Murray's goal is to push the government towards a "no harm, no foul" approach to regulatory enforcement.

The categories he draws are imperfect and at times contradictory. For instance, while Murray calls for a presumption against regulations that limit the use of private land, he accepts regulations that aim to control pollution. Yet such regulations may be one and the same. Limitations on wetland development, such as those to which the Sacketts were subject, may prevent a private landowner from building a home, but they may also help control runoff and nonpoint source pollution.

Many absurd-seeming regulations are adopted for bad reasons, such as suppressing competition or chasing phantom risks, but just as many if not more were responses to perceived needs, even if only a media-driven panic over a miniscule risk or freak accident. Many restrictions on seemingly harmless behavior were adopted to address the outliers. It may be absurd to regulate dental offices like factory floors, but what happens when a patient is poisoned or contracts a contagious disease from unclean instruments? In today's culture, that's sufficient to revive the regulatory demands. Highlighting the absurdities that result from such rules can help, but there must ultimately be a more principled and foundational attack on the premises of the regulatory state.

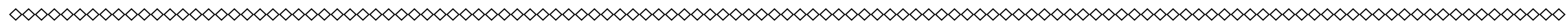
Murray is certainly correct that ridicule and exposure are powerful weapons against an overweening state. It can be just as important to try a case in the court of public opinion as in the court of law. As innovative liberty-oriented public interest groups such as the Institute for Justice have shown, litigation creates a platform upon which a public case can be made. A court case can transform an ordinary regulatory dispute into a newsworthy event. Forcing the government to defend its policies can lay the absurdities bare, particularly if there is a sympathetic client. As property rights activists showed in the 1990s, exposing the absurdity of much federal regulation can catalyze political support for reform.

Murray hopes his strategy would pressure the courts to adjust their posture toward the administrative state and curb deference to agency determinations. This is a worthy aim, but also a larger endeavor than Murray seems to appreciate. I share Murray's belief that "The premises of the regulatory state are wrong" (176), but many of these premises are embedded into federal statutes, not to mention decades of jurisprudence. Murray may have identified a useful tactic, but it will take more than a Madison Fund—or even a dozen such funds—to dislodge the foundations of the contemporary regulatory state.

Murray is, as noted, something of an optimist, and he believes the time is right for an audacious effort of the sort he describes. As he sees it "the stars are in fact aligning for a much broader rebuilding of liberty than we could have imagined a decade ago" (189). Technological innovations have eroded the state's ability to constrict key industries. Government efforts may be well intentioned, but the sclerotic operation of most agencies, particularly those at the federal level, compares unfavorably with the relative efficiency and responsiveness of a technologically enabled private sector. At the same time, subcultures have proliferated that want little more than to be left alone to pursue their own zen, and portions of the business community may be waking up to the true consequences of the modern regulatory state. All this, Murray suggests, has created a propitious moment to act. It's a hopeful claim, but obviously one that can only be evaluated in hindsight.

Murray's book is self-consciously aimed at a Madisonian audience. He makes no effort to convert liberals or progressives to his cause. But the sort of transformation he urges will necessarily require expanding the constituency for reform beyond the Madisonian cadre. It's not enough to point out silly things that result when government overreaches. Alternative ways to satisfy the contemporary demands for safety and security must also be explicated. Building a coalition for reform requires compromise too, and to that end, Murray suggests those on the right should make their peace with the welfare state and embrace a more federalist approach to divisive cultural issues. There are only so many battles to fight at any one time.

By the People provides an excellent, compact indictment of the modern regulatory state, even if Murray has not, in



fact, alighted on a silver bullet. Murray's plan of action may be audacious, but it may still be worth a try. Madisonians of the nation resist; you have nothing to lose but your chains.