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*Administrative Law Review (ALR)* (ISSN 0001 8368) is published quarterly by its student staff members at the Washington College of Law of the American University and by the Section of Administrative Law and Regulatory Practice of the American Bar Association. Price per copy to members and nonmembers, \$10; per year to members, \$10 (included in \$60 dues); per year to law student members, \$40 (electronic access free); to nonmembers who are not eligible to become members of the American Bar Association, \$40 (\$45 outside U.S. and U.S. possessions). A subscription form is available in the back of this issue.

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Manuscripts should be sent to the Editor in Chief, *Administrative Law Review*, Washington College of Law, The American University, 4801 Massachusetts Ave. NW, Suite 622, Washington, DC 20016. Manuscripts may also be sent electronically to [alr.eic@wcl.american.edu](mailto:alr.eic@wcl.american.edu), in Microsoft Word 97 format or higher.

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Issues published two years ago and earlier may be purchased from William S. Hein & Co., Inc., Periodicals Dept., 1285 Main St., Buffalo, NY 14209. More current issues may be obtained from Member Services, American Bar Association, 321 North Clark St., Chicago, IL 60610 (312/988-5522).

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Cite as 63 ADMIN. L. REV.

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Volume 63

Spring 2011

Number 2

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## DUPLICATIVE DELEGATIONS

JASON MARISAM\*

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## INTRODUCTION

The United States Code is riddled with “duplicative delegations”—delegations in separate statutes or statutory provisions that may reasonably be construed as granting the same regulatory authority to different agencies. For example, the Food and Drug Administration’s (FDA’s) authority under the Food, Drug, and Cosmetic Act<sup>1</sup> duplicates the Department of Agriculture’s authority under the Meat Inspection Act.<sup>2</sup> The Environmental Protection Agency’s (EPA’s) authority under the Safe Drinking Water Act<sup>3</sup> duplicates the FDA’s authority under its statute.<sup>4</sup> The Department of Labor’s (DOL’s) authority under the Occupational Safety and Health Act<sup>5</sup> duplicates the EPA’s authority under the Clean Air Act (CAA).<sup>6</sup> And so on.

Duplicative delegations pervade our regulatory and legal systems. For a recent example of duplicative delegations that gained public attention, consider the reform of financial regulation. Before 2010, the Office of Thrift Supervision oversaw savings and loan associations, and the Office of the Comptroller of the Currency oversaw national banks. Because some financial products are issued by both banks and savings and loans, the two agencies had authority to oversee some of the same financial products.<sup>7</sup> For decades, politicians had called for the consolidation of the agencies to eliminate inefficient duplication and streamline oversight.<sup>8</sup> But it was not until after the 2008 financial crisis—when several major savings and loans

1. 21 U.S.C. §§ 301–399 (2006).

2. *Id.* §§ 601–695. For a discussion of the overlap between these two Acts, see generally Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61 (2000).

3. 42 U.S.C. §§ 300f–300j (2006).

4. *See* 21 U.S.C. § 321(f) (2006) (defining “food” broadly to include drink).

5. 29 U.S.C. §§ 651–678 (2006).

6. 42 U.S.C. §§ 7401–7671q (2006).

7. *See, e.g.*, SPGGC, LLC v. Blumenthal, 505 F.3d 183, 188 (2d Cir. 2007).

8. *See New Congress More Likely to Realign Banking Agencies*, BANKING POL’Y REP., Jan. 2, 1995, at 10.

collapsed<sup>9</sup>—that there were enough votes on Capitol Hill to eliminate the duplicative delegations between the two agencies. Thus, the 2010 financial reform legislation abolished the Office of Thrift Supervision and transferred many of its functions to the Office of the Comptroller of the Currency.<sup>10</sup>

Questions regarding some duplicative delegations have reached the Supreme Court. For example, both the EPA and the Atomic Energy Commission (AEC) asserted authority to regulate radioactive emissions from nuclear facilities under their respective authorizing statutes. To avoid duplicative and conflicting regulations, the White House's Office of Management and Budget (OMB) mediated an interagency agreement that left the AEC with sole authority to set emission limits for nuclear facilities.<sup>11</sup> However, because the EPA was seen as the more stringent regulator,<sup>12</sup> a public advocacy group sued the EPA, arguing that the agency was compelled to regulate nuclear emissions under the Clean Water Act.<sup>13</sup> The case landed before the Supreme Court, which effectively endorsed the terms of the interagency agreement by narrowly interpreting the word *pollutant* in the EPA's authorizing statute to exclude pollutants from nuclear facilities.<sup>14</sup>

High profile cases aside, agencies must deal with duplicative delegations on a routine basis. As the regulatory system continues to grow in size and complexity, so too will the duplicative delegations. Although duplicative delegations pervade our legal and regulatory system, their causes and effects have gone largely unexamined. In this Article, I conceptualize and analyze the significant phenomenon that I call duplicative delegations. I look at real-world regulatory dynamics to determine how duplicative delegations arise, how they impact the design of legal and regulatory institutions, and how they affect the balance of powers among the branches of government.

This Article tells two stories about duplicative delegations. One is about the fight against interagency duplication. Here, I argue that because the costs of avoiding duplicative delegations *ex ante* are too great, Congress and the White House should rely on comparatively cheaper *ex post* institutions to screen out duplication among agencies. However, because these *ex post*

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9. Binyamin Appelbaum, *Onetime Cop, Out of Business: Financial Bill Will Close Regulator of Fading Industry*, N.Y. TIMES, July 14, 2010, at B1.

10. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 312, 124 Stat. 1376, 1521–23 (2010).

11. See, e.g., Richard Goldsmith, *Nuclear Power Meets the 101st Congress, a "One-Act" Comedy: Regulation of Nuclear Regulatory Commission Licensees Under the Clean Air Act*, 12 VA. ENVTL. L.J. 103, 105–06 (1992) (describing how this regulation progressed).

12. See *id.* at 105 (pointing to the Environmental Protection Agency's (EPA's) "vigor").

13. *Train v. Colo. Pub. Interest Research Grp., Inc.*, 426 U.S. 1 (1976).

14. *Id.* at 9–10, 23–25.

institutions also have their costs, it is efficient to let some duplication persist. The other story is about balance of powers. Here, I show that duplicative delegations afford the Executive significantly more discretion than it usually has to determine which agencies perform particular tasks. Descriptively, the President and agencies routinely divvy up tasks and set jurisdictional metes and bounds among agencies with duplicative delegations. Normatively I argue that, because the Executive is better than the Judiciary at allocating tasks among agencies, courts should defer to executive arrangements reconciling duplicative delegations.

Both of these stories begin with an understanding of the causes of duplicative delegations. In the few instances in which scholars have puzzled over cases that involve the delegation of the same authority to more than one agency, they have sometimes assumed that Congress created the duplication to spur agency competition.<sup>15</sup> However, I show that duplicative delegations are largely either unintentional or incidental to other legislative aims. Duplicative delegations typically emerge as the by-product of the political, ad hoc process through which agencies are designed. Congress's reliance on blunt drafting tools such as savings clauses and broad, ambiguous delegations also produces duplicative delegations.

Although duplicative delegations are indeed largely incidental and unintentional creations, they are pervasive and critically important to the design of the regulatory system. If all agencies availed themselves of the duplicative authority delegated to them, ceaseless duplication and interagency conflict would plague the regulatory system. Duplication would drain government coffers, interagency conflict would undermine coherent regulatory goals, and overlapping oversight would burden regulated entities. To avoid such a scenario, the Legislative and Executive Branches—and to a lesser extent the Judiciary—have crafted what I call “antiduplication institutions” designed to screen out interagency duplication and conflict. On the legislative side, these institutions include statutory commands that agencies must consult with each other before acting, entire statutory schemes that require agencies to consider whether their proposed regulatory actions duplicate or conflict with other agencies' actions, public hearings on duplication, and agency consolidation. On the executive side, antiduplication institutions include centralized review of proposed agency regulations, centralized resolution of interagency jurisdictional disputes, interagency bodies that allocate tasks among agencies, the designation of a “lead agency” in regulatory matters involving multiple agencies, and White House czars who coordinate agencies' actions. Courts also screen for duplicative or conflicting actions when they

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15. See discussion *infra* Part I.B.

review agency decisions. Although these institutions have been discussed separately in legal literature, they have not previously been recognized for their common antiduplication qualities. By grouping these institutions together in this way, I show how they collectively screen out duplication and shape agency behavior by providing strong incentives for agencies to coordinate and collaborate and thus avoid duplication and conflict.

Indeed, duplicative delegations and antiduplication institutions have a significant impact on agency behavior. If agencies with duplicative delegations are to avoid duplication, they cannot simply regulate as they see fit within the reasonable boundaries of their delegated jurisdiction. Rather, they must coordinate with other agencies to ensure that their actions are neither duplicative nor conflicting. I show that the primary way that agencies with duplicative delegations avoid duplication is by abdicating their authority to perform tasks that other agencies already perform or are better suited to perform. Agencies abdicate either by narrowly interpreting the scope of their jurisdiction or by deciding not to exercise authority under their discretion. An agency may unilaterally abdicate a regulatory task to another agency. Or, abdication may take place as part of a larger interagency negotiating process during which agencies divide tasks among themselves.

Although abdication is a prevalent agency practice, duplication and conflict do still persist. One significant source of persistent duplication comes from what I call “blurred boundary disputes.” These disputes arise when previously clear jurisdictional dividing lines between agencies are unsettled by changes in the regulated environment or by the introduction of new agencies or new regulatory schemes. As agencies jockey for position in the shifting jurisdictional spaces, multiple agencies with duplicative delegations sometimes stake claims to the same tasks. However, given the top-down pressure on agencies to avoid duplication and conflict, blurred boundary disputes are unlikely to drag on for too long before new expectations about which agencies should perform which tasks are adopted.

After describing the causes and effects of duplicative delegations, I discuss their implications for fighting interagency duplication and for balance of powers. I first address the commentary that calls for Congress and the White House to do significantly more to reduce duplication among agencies.<sup>16</sup> I show that the costs of preventing duplicative delegations *ex ante* are prohibitive and that *ex post* antiduplication institutions—while comparatively cheaper—also have significant costs. Ultimately, I argue

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16. See, e.g., Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1470–75 (2009) (arguing that the Executive in particular should reduce duplicative delegations).

that the proper course of action for Congress and the Executive is one close to the status quo. Because it is too costly for Congress to avoid drafting duplicative delegations *ex ante*, Congress should leave it to existing *ex post* institutions to screen out duplication as best they can. I then respond to the literature that stresses the benefits of duplication from healthy agency competition and bureaucratic redundancies that guard against regulatory failure.<sup>17</sup> Some scholars embracing this view argue against antiduplication efforts because such efforts squelch these benefits.<sup>18</sup> However, I show that competition and redundancy among agencies with duplicative delegations are generally not cost-effective, and thus there is little reason for Congress and the White House to reform their antiduplication efforts to focus more on fostering these beneficial forms of duplication.

Next, I analyze duplicative delegations from a constitutional separation of powers perspective. When Congress delegates to a single agency, the President must act through that particular agency.<sup>19</sup> By contrast, when Congress delegates directly to the President, the President has maximum discretion to assign decisionmaking authority within the Executive because, under the President's subdelegation power,<sup>20</sup> the President may subdelegate to the agency of his choosing. There are significant benefits to according the President maximum discretion to empower agencies as he sees fit, but there are significant costs too—in particular, the risks of arbitrary decisionmaking and abuse of power. As it turns out, duplicative delegations provide the Executive a level of discretion to allocate responsibilities among agencies that is less than the discretion accorded through delegation to the President but greater than the discretion accorded when Congress clearly names a specific agency to act. With duplicative delegations, the Executive has discretion to select which agency should perform which tasks. But that discretion is limited to the few agencies with duplicative delegations and to the set of tasks covered by those delegations. This intermediate level of discretion captures some of the key benefits of delegating directly to the President but with fewer of the costs. Indeed, although duplicative delegations are largely unintentional or incidental creations, I suggest that,

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17. See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2324 (2006); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655 (2006) (arguing that delegating the same function to two agencies may benefit both).

18. See, e.g., Dara Kay Cohen et al., *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 710–12 (2006). See generally Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 (2007) (explaining how the Executive power fits into this framework).

19. See *infra* notes 276–77 and accompanying text.

20. 3 U.S.C. §§ 301–303 (2006).

in some regulatory contexts, they are a happy accident because this intermediate level of discretion is beneficial under some conditions.

Finally, I consider how courts should reconcile duplicative delegations. Because of the Executive's comparative advantage at allocating tasks among agencies according to their expertise and policymaking interests, I propose an interpretive default rule under which courts would defer to executive arrangements reconciling duplicative delegations. As a constitutional separation of powers matter, I show that the default rule is not constitutionally problematic and is consistent with precedent on executive powers. As a doctrinal matter, whether agencies' positions will warrant *Chevron* deference or a lesser form of deference will depend on context-specific factors.

This Article proceeds as follows. Part I sharpens the definition of duplicative delegations and then discusses the root causes of duplicative delegations. Part II lays out the antiduplication institutions that the three branches have put in place to prevent duplication and conflict. It then discusses how duplicative delegations lead to agency abdication and blurred boundary disputes. Part III discusses implications. Part IV concludes.

## I. THE DEFINITION AND CAUSES OF DUPLICATIVE DELEGATIONS

### A. *Defining Duplicative Delegations*

Duplicative delegations are delegations in separate statutes or statutory provisions that may reasonably be construed as granting the same regulatory authority to different agencies. In this section, I sharpen this definition by showing how duplicative delegations arise through any combination of broad and narrow delegations. I then clarify the scope of duplicative delegations by distinguishing them from less problematic or better understood statutory arrangements that direct multiple agencies to address the same regulatory problem.

Some duplicative delegations arise because of overlap created between two broad delegations to two different agencies. For example, the CAA gives the EPA broad authority to regulate emissions of toxins into the environment,<sup>21</sup> and the Occupational Safety and Health Act gives the DOL broad authority to regulate the use of toxins in workplaces.<sup>22</sup> Under the

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21. 42 U.S.C. §§ 7401–7671q (2006). For analyses of the Clean Air Act, see generally Thomas O. McGarity, *The Clean Air Act at a Crossroads: Statutory Interpretation and Longstanding Administrative Practice in the Shadow of the Delegation Doctrine*, 9 N.Y.U. ENVTL. L.J. 1 (2000), and Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303 (1999).

22. 29 U.S.C. §§ 651–678 (2006). For analyses of this Act, see generally Thomas O. McGarity & Sidney A. Shapiro, *OSHA's Critics and Regulatory Reform*, 31 WAKE FOREST L.

two broad delegations, both agencies have authority to regulate the use of the same toxins by some of the same regulated entities. Other duplicative delegations arise because a broad delegation to one agency may reasonably be construed as encompassing the authority granted to another agency in a narrow delegation. For example, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has authority under the Federal Alcohol Administration Act to regulate the labeling of alcoholic beverages,<sup>23</sup> while the FDA has broad authority under the Food, Drug, and Cosmetic Act to regulate all food and beverage labeling.<sup>24</sup> The latter power includes the former—thus both agencies have the statutory authority to regulate the labeling of alcoholic beverages. Duplicative delegations also occur even when both agencies have relatively specific delegations—mostly because of complexities in the regulated environment. For example, the EPA has authority under the Toxic Substances Control Act to regulate new genetically modified microorganisms,<sup>25</sup> while the United States Department of Agriculture (USDA) has authority under the Plant Protection Act to regulate “plant pests.”<sup>26</sup> However, some new microorganisms are also plant pests.<sup>27</sup> Thus, both agencies have authority to regulate some of the same microorganisms.

In all of these examples above, the duplicative delegations emerged in separate statutes. Duplicative delegations may also arise from separate provisions in the same statute, though. For example, § 402 of the Clean Water Act authorizes the EPA to permit discharges of pollutants other than dredged or fill materials into waterways,<sup>28</sup> while § 404 of the Clean Water Act authorizes the Army Corps of Engineers to permit the discharge of dredged or fill materials into waterways.<sup>29</sup> However, because it is unclear in the statute whether “fill materials” include solid waste, either agency

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REV. 587 (1996) (analyzing attempts to improve the Occupational Safety and Health Act’s effectiveness), and Cass R. Sunstein, *Is OSHA Unconstitutional?*, 94 VA. L. REV. 1407 (2008) (discussing whether the grants of broad power to the Occupational Safety and Health Administration (OSHA) violate the nondelegation doctrine).

23. 27 U.S.C. § 215 (2006).

24. 21 U.S.C. § 343 (2006). For an analysis of this Act, see generally Lars Noah, *The Little Agency that Could (Act with Indifference to Constitutional and Statutory Structures)*, 93 CORNELL L. REV. 901 (2008) (examining the methods by which the Food and Drug Administration (FDA) exercises its powers).

25. 15 U.S.C. § 2602, §§ 2601–2629 (2006).

26. 7 U.S.C. § 7702(14), §§ 7701–7786 (2006).

27. See 7 C.F.R. §§ 340.1–340.2 (2010) (listing taxonomical groups of microorganisms that the EPA may regulate as plant pests).

28. 33 U.S.C. § 1342(a) (2006).

29. *Id.* §§ 1344(a), (d).



could reasonably claim authority to permit the discharge of solid waste.<sup>30</sup>

Under my definition, duplicative delegations are distinct from several similar but less problematic or better understood jurisdictional arrangements. Duplicative delegations grant the same authority to more than one agency without providing clear instructions about the division of responsibility among the agencies. By contrast, with joint delegations Congress grants the same authority to multiple agencies but clearly directs those agencies to work together and share responsibility for a jointly prepared agency action.<sup>31</sup> Joint jurisdictional arrangements are less problematic than duplicative delegations because there is less ambiguity about what Congress expects of the agencies.

Furthermore, duplicative delegations are distinct from jurisdictional arrangements in which Congress directs one agency to consult with another agency before acting.<sup>32</sup> With these consultative arrangements, the consulted agency's role is "merely advisory."<sup>33</sup> Thus, unlike with duplicative delegations, the two agencies do not have the power to perform the same tasks. Congressional commands that agencies consult with each other are not a focus of this Article, but as I show later, they are a tool that Congress uses to prevent duplicative efforts among agencies with duplicative delegations.

Finally, duplicative delegations are distinct from, but sometimes coincide with, fragmented delegations. Fragmented delegations grant multiple agencies the authority to address a regulatory problem, but each agency is responsible for its own piece of that problem.<sup>34</sup> These fragmented delegations may arise in separate statutes or in a single statutory scheme that allocates regulatory tasks to multiple agencies. For example, various statutes divide oversight of offshore energy projects among several agencies—the Department of the Interior (Interior), Army Corps of

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30. See *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2467–68 (2009) (analyzing which agency has statutory authority to regulate discharge, thus precluding the other from acting).

31. See, e.g., 6 U.S.C. § 596a (Supp. III 2009) (acknowledging that the agencies are being asked to work toward a common objective in the context of global nuclear detection architecture).

32. For a discussion of the value of consultation among agencies, see J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217 (2005), and Eric Biber, *Too Many Things To Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1 (2009).

33. *Natural Res. Def. Council v. Reilly*, 983 F.2d 259, 267 (D.C. Cir. 1993).

34. For analyses of regulatory fragmentation, see William W. Buzbee, *The Regulatory Fragmentation Continuum, Westway and the Challenges of Regional Growth*, 21 J.L. & POL. 323 (2005), and Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795 (2005).

Engineers, EPA, Federal Aviation Administration, and Coast Guard.<sup>35</sup> For the most part, the agencies' oversight comes in a fragmented form with each agency overseeing its own piece of the project. But the Corps—under the Rivers and Harbors Act<sup>36</sup>—and Interior—under the Outer Continental Shelf Lands Act<sup>37</sup>—both have authority to consider the project's impact on navigation. Thus, although the oversight authority as a whole is fragmented among many agencies, at least one small piece of the review process—the navigation piece—is subject to review by more than one agency. For this small piece, the delegations to the agencies are duplicative.

### B. *The Causes of Duplicative Delegations*

Having defined the phenomenon of duplicative delegations, I now explore the root causes of duplicative delegations. Some scholars have adopted models of legislative behavior that assume Congress delegates the same task to more than one agency because it intends to spur agency competition or capture the benefits of bureaucratic redundancies.<sup>38</sup> But there is no evidence that Congress intends to trigger agency competition or build redundancies via duplicative delegations with any frequency. Indeed, the two political scientists who have looked at the issue empirically have separately concluded that “most of the duplication, fragmentation, and overlap in the administrative state is not purposefully chosen to take auxiliary precautions or improve effectiveness via competition,”<sup>39</sup> and that “the intentional creation of redundancy is quantitatively of small importance when compared with the less dramatic causes.”<sup>40</sup> What are

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35. For a list of each agency's role and authorizing statute, see MINERALS MGMT. SERV., U.S. DEP'T OF THE INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT FOR CAPE WIND ENERGY PROJECT § 1 (2009), <http://www.mms.gov/offshore/RenewableEnergy/PDFs/FEIS/Section1.0Introduction.pdf>.

36. 33 U.S.C. §§ 401–467n (2006).

37. 43 U.S.C. §§ 1331–1356a (2006).

38. See, e.g., Gersen, *supra* note 18, at 212–13 (describing how the use of a partial or completely overlapping jurisdictional scheme acts as an incentive to encourage agencies to develop relevant expertise), Todd Kunioka & Lawrence S. Rothenberg, *The Politics of Bureaucratic Competition: The Case of Natural Resource Policy*, 12 J. POL'Y ANALYSIS & MGMT. 700, 700–01, 721–22 (1993) (theorizing that the political motivation behind creating the U.S. Forest Service and the National Parks Service's duplicative authority over federal land administration was primarily to provide politicians with an expanded “menu of options” when solving problems), Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274, 274–76, 287 (2003) (developing a game theory model to help principals—such as Congress—determine how much redundancy in their agents—agencies—may create efficiency).

39. DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* 7 (2003).

40. JONATHAN B. BENDOR, *PARALLEL SYSTEMS: REDUNDANCY IN GOVERNMENT* 41

these less dramatic causes of duplicative delegations? In this section, I expand on the observations of those political scientists and present three systemic causes that are responsible for many if not most duplicative delegations: congressional reliance on blunt drafting techniques, ad hoc agency designs, and politically motivated agency designs.

### 1. *Blunt Legislative Drafting Techniques*

Congress creates duplicative delegations by using two legislative drafting practices: savings clauses, which state that statutes do not supersede earlier statutes, and broad, ambiguous delegations. Congress must use these drafting techniques to ensure that agencies have the flexibility and authority needed to regulate. Nevertheless, these techniques make it more likely that different agencies will have delegations that can be construed as granting them the same authority.

Congress relies on savings clauses because it is impossible to ensure that the statute at hand does not unintentionally duplicate any earlier statute. Every newly introduced bill that delegates some authority to an agency brings with it the risk of duplicating an earlier delegation to a different agency. It would require a Herculean effort for lawmakers to harmonize each new delegation so that it did not duplicate earlier delegations. There are simply too many agencies with too many previous delegations. Such harmonization is made even more difficult by Congress's committee structures.<sup>41</sup> Different committees oversee different agencies. Thus, it is easy for one committee to slip a delegation to its agency into a bill and not notice when another committee later slips a similar delegation into a different bill for its agency. Even thorough attempts at harmonization to avoid duplication cannot foresee all future regulatory problems that may raise jurisdictional issues among agencies. For example, when Congress expanded the FDA's authority to regulate unsafe food additives with the Food Additives Amendment of 1958, it attempted to harmonize that statute with the USDA's Meat Inspection Act of 1906.<sup>42</sup> Congress specifically

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(1985).

41. See J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1488–90 (2003) (demonstrating, through a discussion of the congressional committee structure, the complicated oversight of various agencies); see also HAROLD SEIDMAN, *POLITICS, POSITION, AND POWER* 70 (2d ed. 1975).

42. Compare Food Additives Amendment of 1958, 21 U.S.C. § 348 (2006) (delegating to the FDA the authority to review all food additives), with Meat Inspection Act of 1906, 21 U.S.C. § 624 (2006) (delegating to the U.S. Department of Agriculture (USDA) the authority to regulate all meat products). Congress made efforts to reconcile the duplicative delegation created by passing the Food Additives Amendment. For further treatment of this issue, see *Pub. Citizen v. Foreman*, 631 F.2d 969, 971–72 (D.C. Cir. 1980).

stated in the new bill that any meat additive that the USDA had approved prior to 1958 was presumed safe and therefore exempt from FDA review.<sup>43</sup> But the question soon arose in federal court whether a meat additive approved by the USDA prior to 1958 for one purpose (color fixing) but now used for another purpose (food preservation) was exempt from FDA review and subject only to USDA regulation.<sup>44</sup> Thus, even with Congress's attempt to provide a bright-line rule to prevent the FDA from duplicating or interfering with the USDA's earlier work, complete harmonization between a new delegation and an earlier delegation proved out of reach.

Because complete harmonization to avoid duplication is impossible, Congress must ensure that new delegations do not have the unintended effect of stripping agencies of existing regulatory authority that they may exercise. Thus, Congress sometimes drafts savings clauses to the effect that no jurisdictional mandates in the new statute supersede jurisdictional mandates in earlier statutes. These savings clauses—while necessary to avoid unintentionally undermining agencies' authority—lead to duplicative delegations. For example, in the Clean Water Act, Congress directed the EPA to regulate the discharge of any pollutant into navigable waters of the United States.<sup>45</sup> Decades later, in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, Congress delegated to the Coast Guard the authority to regulate ballast-related discharges of invasive species into the Great Lakes.<sup>46</sup> But at the same time, Congress included a savings clause stating that the delegation to the Coast Guard “shall . . . not affect or supersede any requirements or prohibitions pertaining to the discharge of ballast water” under the Clean Water Act.<sup>47</sup> Therefore, after passage of the 1990 statute, both the EPA and the Coast Guard had authority to regulate ballast water discharges into the Great Lakes—the EPA through a broad mandate under the Clean Water Act and the Coast Guard through a narrower mandate in the later statute.

The need for broad, ambiguous authorizing statutes in a modern, complex risk environment is the second drafting technique that contributes to duplicative delegations.<sup>48</sup> In theory, it is possible for Congress to draft

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43. 21 U.S.C. § 321(s)(4) (2006); *see also Foreman*, 631 F.2d at 972 (discussing the “grandfather,” or “prior sanction,” exemption).

44. *See Foreman*, 631 F.2d at 975, 977 (finding that although there was duplicative jurisdiction, the USDA regulation was appropriate).

45. 33 U.S.C. § 1342 (2006).

46. 16 U.S.C. § 4711(a)–(b) (2006).

47. *Id.* § 4711(b)(2)(C).

48. For reasons why legislators may delegate in broad terms, *see* Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036–37 (2006).

statutes that clearly delineate agencies' borders. While clear, narrow delegations would not get rid of all duplicative delegations, they would eliminate many of the duplicative delegations that come from overlap among broad delegations. But in practice, relying heavily on clear, narrow delegations would have undesirable consequences.<sup>49</sup> Such statutes would interfere with federal agencies' abilities to respond to new information and changing regulatory environments.<sup>50</sup> Agencies would have to turn to Congress every time a slight change in the regulatory environment created a new problem. Congressional committees would likely have trouble keeping up with the demand for new or amended delegations, adding exponentially to the time it would take an agency to address often rapid change in a regulated area. Given these costs, it is understandable that Congress often chooses to delegate in broad, ambiguous terms that allow agencies the flexibility to respond to changing regulatory environments. But again, by doing so, duplicative delegations result.

## 2. *Ad Hoc Agency Design*

Agency design is ad hoc. Agencies' missions are not crafted to fit seamlessly into the existing regulatory structure but rather to respond to particular regulatory problems as they arise. Because of this ad hoc design process, delegations to agencies are often duplicative. Consider delegations to the Nuclear Regulatory Commission (NRC) and the EPA. Each agency's mission was crafted in response to a distinct regulatory problem. In the 1950s, when nuclear energy first became viable in the United States, Congress charged the AEC (now the NRC) with regulating the producers of nuclear power.<sup>51</sup> Later, in the 1970s, when air and water pollution became salient problems, Congress delegated to the EPA broad authority to regulate air and water emissions.<sup>52</sup> The by-product of these ad hoc agency designs was that both agencies could reasonably claim to have been delegated authority to regulate emissions into the air and water from

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49. See generally Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985) (making an affirmative case for broad statutory delegations).

50. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1695 (1975) (specifying situations in which Congress may be unable to narrow the course for agencies to follow).

51. 42 U.S.C. § 2011 (2006); see also *History*, U.S. NUCLEAR REGULATORY COMM'N (last updated May 11, 2011), <http://www.nrc.gov/about-nrc/history.html> (discussing the transition from the Atomic Energy Commission (AEC) to the Nuclear Regulatory Commission (NRC) and the corresponding change in mission).

52. See generally Clean Air Act, 42 U.S.C. §§ 7401–7671 (2006) (air emissions); Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006) (water emissions).

nuclear power plants. Indeed, as I discussed in the Introduction, both agencies asserted authority to regulate emissions from nuclear facilities until it was settled by the OMB—and later the Supreme Court—that the AEC would have sole authority to set emission standards.<sup>53</sup>

Ad hoc agency delegations may not be duplicative at the time they are created, but they may become duplicative over time as regulatory conditions change. Often, Congress does not go back and change the delegations to correct for the duplication that emerged, and thus the duplicative delegations persist. Consider ad hoc delegations to the Army Corps of Engineers and Interior's Bureau of Reclamation. In the mid-nineteenth century, flood control and the regulation of navigable waters became an important issue as interstate trade expanded during the Industrial Revolution. The Army needed to keep its Corps of Engineers occupied while the nation was not at war.<sup>54</sup> Thus, Congress delegated regulation of rivers and harbors to the Army.<sup>55</sup> Several decades later, at the turn of the century, irrigation of arid lands in the west became a pressing problem because of the boom in western settlements. Thus, Congress created what is now the Bureau of Reclamation, and charged it with regulating water use and irrigation projects in the west.<sup>56</sup> The unintended result of these ad hoc agency designs was that, when demand for hydropower in the early-to-mid-twentieth century led to an explosion in the construction of large dams, both agencies had reasonable claims to the authority to oversee some dam projects because dam projects need the Corps's flood control expertise and the Bureau's irrigation expertise.<sup>57</sup> Today, significant duplication in the production and oversight of hydropower between the two agencies still persists.<sup>58</sup>

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53. See Goldsmith, *supra* note 11, at 105–06 (noting that Office of Management and Budget (OMB) settled the dispute by granting “exclusive jurisdiction to translate those environmental standards into emission limitations applicable to individual [nuclear power] licensees” to the AEC).

54. Alan L. Dean, *General Propositions of Organizational Design*, in *FEDERAL REORGANIZATION: WHAT HAVE WE LEARNED?* 131, 134 (Peter Szanton ed., 1981).

55. 33 U.S.C. §§ 401–467n (2006).

56. 43 U.S.C. §§ 371, 373b(a) (2006); see also *BRIEF HISTORY OF THE BUREAU OF RECLAMATION*, U.S. BUREAU OF RECLAMATION 2–4, <http://www.usbr.gov/history/2011newbriefhistoryv1.pdf> (describing the history of the “reclamation movement” and how popular and political support for improved resources in the west led to the creation of the U.S. Reclamation Service).

57. See BEN MOREELL, *OUR NATION'S WATER RESOURCES—POLICIES AND POLITICS* 67–68 (1956) (noting that Congress granted the Bureau authority to build Hoover Dam in 1928 for flood control and other purposes, while granting the Army Corps of Engineers flood control authority on a federal Mississippi River project that same year).

58. See PERI E. ARNOLD, *MAKING THE MANAGERIAL PRESIDENCY* 326–27 (2d ed. 1998) (detailing more recent complaints regarding the inherent irrationality in dual delegations to

Over the past two centuries, the federal regulatory system has grown agency by agency on an ad hoc basis. As the President's Committee on Administrative Management observed in 1937, the Executive Branch has "grown up without a plan or design like the barns, shacks, silos, tool sheds, and garages of an old farm."<sup>59</sup> This largely inevitable ad hoc growth produces duplicative delegations among agencies. Congress and the President do not intend such duplication, but it is nevertheless a consequence of their ad hoc agency designs.

### 3. *Agency Design as Politics*

Agency design is not only ad hoc but also political. It is performed by political actors with political factors in mind. Political considerations often outweigh whatever concerns agency designers have about drafting duplicative delegations, if indeed agency designers even fully realize the extent of the duplication that will result from their decisions. In the end, duplicative delegations sometimes result from these politically motivated agency designs.

During times of divided government when the White House and Capitol Hill are controlled by different parties, the congressional desire to insulate agencies from presidential control can lead to duplicative delegations. Consider the creation of the Consumer Product Safety Commission (CPSC). In the early 1970s, public pressure mounted on Congress to improve the regulation of consumer products.<sup>60</sup> Congress considered expanding the power of the Department of Health, Education, and Welfare to regulate consumer products other than food and drugs,<sup>61</sup> which the Department already regulated through its subagency the FDA.<sup>62</sup> However, Democrats in Congress were concerned that President Nixon—a Republican—would exert too much antiregulatory influence over new consumer protection powers if those powers were granted to a cabinet-level department.<sup>63</sup> The Democratic Congress ultimately opted to delegate

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the two agencies concerning federal water resources).

59. S. DOC. NO. 75-8, at 56 (1937). *See also* LEWIS, *supra* note 39, at 7.

60. *See* Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 42 n.63 (1982) (describing the "political tug-of-war between the Democratic Congress and the Republican President" on whether the Consumer Product Safety Commission (CPSC) should be an independent or executive agency).

61. S. 1797, 92d Cong. §§ 2-3 (1971), *reprinted in* 117 CONG. REC. 13,825, 13,826 (1971) (defining "consumer product" as excluding food and drugs).

62. 21 U.S.C. §§ 301-399 (2006).

63. *See* LEWIS, *supra* note 39, at 30 (noting that this fear led Congress to create seven-year terms for members of the CPSC).

broad consumer protection powers to a newly created independent agency that was insulated from the President's influence.<sup>64</sup> The unintended result of this politically driven agency design: duplicative delegations to the new agency—the CPSC—and to the Department of Health, Education, and Welfare (now the Department of Health and Human Services). For example, both agencies have the power to regulate the packaging of drugs and supplements.<sup>65</sup>

Political actors' concerns about public perception and policy interests can also skew agency designs in ways that produce duplicative delegations. Consider the creation of the EPA. Initially, the Nixon Administration considered whether it would be better to expand and consolidate environmental regulatory powers in an existing department—most likely Interior—than to create a new agency. However, the Administration decided to push for a new independent agency for two reasons.<sup>66</sup> First, the Administration considered it politically necessary to create an agency focused solely on environmental matters because “anything else would not be seen as a fulsome response to the growing public perception that environmental problems were getting out of hand.”<sup>67</sup> Second, the Administration was concerned that placing environmental powers within an existing department, such as Interior, would subject environmental regulation to the influence of the interests that held sway over that department.<sup>68</sup> Thus, political concerns—about public perception and interest group influences—determined the EPA's construction. The unintended result of this political calculus: duplicative delegations to the EPA and Interior. For example, both the EPA and Interior have authority to oversee pollution from offshore energy projects.<sup>69</sup>

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64. See Consumer Product Safety Act, Pub. L. No. 92-573, § 4(a), 86 Stat. 1207, 1210 (1972) (codified as amended at 15 U.S.C. § 2053 (2006)).

65. See *Nutritional Health Alliance v. FDA*, 318 F.3d 92, 101 n.10, 102–05 (2d Cir. 2003) (noting that, for example, the FDA administers the Food, Drug, and Cosmetic Act, and the CPSC administers the Poison Prevention Packaging Act and the Consumer Product Safety Act).

66. See *Douglas M. Costle: Oral History Interview*, U.S. ENVTL. PROT. AGENCY (Jan. 2001) <http://www.epa.gov/history/publications/costle/04.htm>.

67. *Id.* (relating the views of Russ Train, chairman of the Council on Environmental Quality).

68. See *id.*; see also PRESIDENT'S ADVISORY COUNCIL ON EXEC. ORG., EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR THE PRESIDENT ON FEDERAL ORGANIZATION FOR ENVIRONMENTAL PROTECTION (Apr. 29, 1970), <http://www.epa.gov/history/org/origins/ash.htm> (stating that no preexisting agency could exercise environmental powers objectively, without favoring its own interests).

69. 42 U.S.C. § 7627 (2006) (EPA); 43 U.S.C. §§ 1331–1356 (2006) (Department of Interior (Interior)).



Personal political relationships may also alter agency designs in ways that yield duplicative delegations. Consider the creation of the National Oceanic and Atmospheric Administration (NOAA). When it was established in 1970, it was placed in the Department of Commerce—despite recommendations by some presidential advisors that oceanic programs be consolidated within Interior.<sup>70</sup> Why Commerce and not Interior? It appears that one reason was that the Secretary of Commerce at the time, Maurice Stans, lobbied for the new agency to be placed in his department. President Nixon was close to Stans—who would later run Nixon's infamous Committee to Re-Elect the President—while there was some political tension between Nixon and his Secretary of the Interior at the time.<sup>71</sup> Thus, the decision to house NOAA in Commerce instead of Interior was based in part on bureaucratic lobbying and personal politics. The unintended result of this politically influenced decision: duplicative delegations to NOAA and Interior—particularly to NOAA's National Marine Fisheries Service and Interior's Fish and Wildlife Service.<sup>72</sup>

I am not arguing here that the design of the CPSC, EPA, and NOAA should have been different. Rather, I am arguing that the sort of political factors that shaped the formation of these agencies—executive power, partisanship, public perception, interest group influence, and personal political relationships—often trump whatever concerns agency designers have about granting duplicative oversight authority to agencies, if the designers are even aware of any potential duplication. Thus, the political process through which agencies are constructed often yields duplicative delegations.

In short, duplicative delegations are largely the unintentional and incidental by-product of political and ad hoc agency designs coupled with Congress's necessary use of blunt drafting tools to regulate a complex environment. This is not to say that Congress never intentionally creates duplicative delegations. Empirically, it is possible that legislators believe that bargaining by agencies with duplicative delegations over which agency should perform which tasks will produce better outcomes than if the legislators made those determinations themselves—and thus they may

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70. See ARNOLD, *supra* note 58, at 286–87.

71. See *A History of NOAA: Background*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN. [http://www.history.noaa.gov/legacy/noaahistory\\_3.html](http://www.history.noaa.gov/legacy/noaahistory_3.html) (last updated June 8, 2006). For information on Stans's role in Watergate and as the head of the president's reelection committee, see generally CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974).

72. See, e.g., 16 U.S.C. § 665 (2006) (authorizing the Service to investigate pollution in waterways); 33 U.S.C. §§ 883d–883e (2006) (authorizing the National Oceanic and Atmospheric Administration to investigate and survey oceans and waterways).

intentionally draft duplicative delegations. However, for the most part, duplicative delegations are unintended or incidental to other legislative aims.

## II. AVOIDING DUPLICATION FROM DUPLICATIVE DELEGATIONS

Whatever their causes, duplicative delegations are pervasive, and they have a significant impact on legal and regulatory institutions. On their face, duplicative delegations grant multiple agencies the authority to perform the same tasks. If all agencies acted on this authority, agencies would constantly be performing conflicting or duplicative actions. Congress and the White House tend to dislike such governmental inefficiencies. However, because they do not have the capacity, foresight, or political will to avoid duplicative delegations *ex ante*, they instead screen out duplication *ex post* through what I call antiduplication institutions. Collectively, these institutions prevent significant amounts of duplication and put pressure on agencies to avoid duplication on their own.

In this Part, I first present the various antiduplication institutions based on the branch in which they originate or tend to originate. I then show how these institutions trickle down to affect agency behavior, leading agencies to abdicate their duplicative authority. I also discuss how these institutions act to resolve jurisdictional disputes among agencies with duplicative delegations.

### A. Antiduplication Institutions

#### 1. Congress

Despite drafting duplicative delegations, Congress frequently does not want agencies to duplicate or interfere with each other's behavior. Such antiduplication preferences are understandable. Bureaucratic duplication wastes the government resources that legislators are responsible for, impedes the fulfillment of coherent governmental regulatory goals that legislators care about, and burdens regulated entities. In fact, responsiveness to regulated entities' complaints about duplicative regulations appears to drive many of the congressional antiduplication institutions.<sup>73</sup> Congress expresses its antiduplication preferences to agency heads behind closed doors or in relatively private or informal communications.<sup>74</sup> But it also relies on more public and formal institutions

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73. On the role of regulated entities as actors in public governance, see generally Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000).

74. See, e.g., Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61,

such as legislative hearings and statutory language and schemes. Indeed, in the same statute that Congress delegates potentially duplicative authority to an agency, it sometimes also directs that agency to take steps to avoid interagency duplication and conflict. To that end, it fills statutes with commands that agencies “avoid duplication” or act in “consultation” or “coordination” with other agencies that are operating in the same regulatory area. For example, consider the following statutes:

- The CAA commands that the EPA act in “consultation with” the Department of Transportation (DOT) before regulating transportation’s effect on air quality;<sup>75</sup> act in “consultation with” Interior when promulgating air quality standards that could affect Interior’s regulation of offshore energy projects;<sup>76</sup> and “consult with other Federal agencies to ensure that similar research being conducted [on environmental health] in other agencies is coordinated to avoid duplication.”<sup>77</sup>
- The Consumer Product Safety Act commands that the “[Consumer Product Safety] Commission and the heads of other departments and agencies engaged in administering programs related to product safety shall, to the maximum extent practicable, cooperate and consult in order to insure fully coordinated efforts.”<sup>78</sup>
- The Occupational Safety and Health Act directs the DOL to develop work–safety standards only “after consultation with other appropriate Federal agencies.”<sup>79</sup>

It is difficult to know how effective these coordination commands are at reducing duplication. Agencies may simply disregard them. However, there is evidence that agencies with duplicative delegations do indeed consult with each other as directed by Congress.<sup>80</sup> It is common for agencies to note, when publishing proposed or final rules, that they reached their regulatory decisions after talking to other agencies as statutorily required. For example, the CAA requires that the FDA consult with the EPA when regulating medical devices that have ozone-depleting characteristics.<sup>81</sup> And the FDA indeed consults with the EPA before

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121 (2006) (discussing Congress’s use of informal interactions to monitor agencies).

75. 42 U.S.C. § 7408(e) (2006).

76. *Id.* § 7627(a)(1).

77. *Id.* § 7403(d)(1)(C).

78. 15 U.S.C. § 2078(c) (2006).

79. 29 U.S.C. § 652(9) (2006).

80. *See* DeShazo & Freeman, *supra* note 32, at 2221, 2303 (describing interagency lobbying as a constructive mechanism for controlling Congress’s delegated power).

81. 42 U.S.C. § 7671c(d)(2).

regulating—as it professed in a recent rulemaking on the matter.<sup>82</sup> Similarly, DOT has touted in its rulemakings that it has “well-established relationships with EPA, OSHA, and ATF and consult[s] frequently about jurisdictional issues”<sup>83</sup>—as required by the various coordination and consultation provisions in its authorizing statutes.<sup>84</sup>

Aside from specific statutory commands to avoid duplication, Congress has enacted several broad statutory schemes that combat duplication: the Administrative Procedure Act,<sup>85</sup> the Paperwork Reduction Act,<sup>86</sup> and the Regulatory Flexibility Act.<sup>87</sup> Section 553 of the Administrative Procedure Act requires that agencies publish proposed rules in the Federal Register and consider comments on those rules from interested parties.<sup>88</sup> This notice-and-comment requirement serves many purposes—including curbing interagency duplication. Agencies routinely ask for comments on whether their proposed regulations “duplicate, overlap, or conflict with”<sup>89</sup> other agencies’ actions. Regulated entities and other interests often comment that an agency’s “proposed regulations are duplicative because other government agencies . . . already exercise jurisdiction,”<sup>90</sup> that proposed filing or reporting requirements “put an additional burden on the operator by requiring duplicate reporting of events,”<sup>91</sup> or that proposed rules will lead to “duplicate inspections and other burdens.”<sup>92</sup> These

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82. Use of Ozone-Depleting Substances; Removal of Essential-Use Designation (Flunisolid, etc.), 75 Fed. Reg. 19,213 (Apr. 14, 2010) (stating that the FDA consulted with the EPA regarding the amended regulation of ozone-depleting substances in self-pressurized containers).

83. Applicability of the Hazardous Materials Regulations to Loading, Unloading, and Storage, 70 Fed. Reg. 20,018, 20,024 (Apr. 15, 2005).

84. 49 U.S.C. § 301(7) (2006).

85. 5 U.S.C. §§ 551–559, 701–706 (2006).

86. 44 U.S.C. §§ 3501–3520 (2006).

87. 5 U.S.C. §§ 601–612 (2006).

88. *Id.* § 553. For analyses of § 553, see Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 553–54 (2006) (noting that judicial interpretations have expanded notice-and-comment rulemaking requirements and made the process more akin to a “paper hearing”), and Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1122–23 (2008) (highlighting the open-ended nature of the good cause exemption from notice-and-comment rulemaking).

89. See 75 Fed. Reg. 32,994, 33,025 (June 10, 2010) (comments to the Department of Commerce). Sometimes the order of the words is changed, but the sentiment is the same.

90. See 68 Fed. Reg. 66,323, 66,325 (Nov. 26, 2003) (comments to the Federal Energy Regulatory Commission (FERC)).

91. See 75 Fed. Reg. 922, 923 (aviation industry comments to the National Transportation Safety Board).

92. See 74 Fed. Reg. 12,544, 12,548 (Mar. 25, 2009) (nuclear industry comments to FERC).

comments encourage agencies not to regulate where another agency is already doing so, and they educate agencies about what their fellow bureaucrats are up to. Both functions make it less likely that agencies will duplicate each other's regulatory efforts or interfere with each other's jurisdiction. For example, DOT abandoned its plans to regulate food transportation safety because, after considering the comments to its proposed rulemaking, the agency concluded that its regulations "could result in duplication, overlap, or conflict with current or pending FDA and USDA regulations."<sup>93</sup> Moreover, the potential for comments pushing back against duplicative efforts encourages agencies to consider whether their actions are duplicative before they propose them. Indeed, agencies routinely assert in their published proposals that they have looked into the matter and "not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule"<sup>94</sup>—or words to similar effect.

Another statutory scheme, the Paperwork Reduction Act, exemplifies congressional efforts to cut down on bureaucratic duplication that burdens regulated entities. Among other features, the Act requires that, before collecting information from regulated entities, agencies must determine that the information "is not unnecessarily duplicative of information otherwise reasonably accessible to the agency."<sup>95</sup> Most proposed information collections must receive approval from the Office of Information and Regulatory Affairs (OIRA).<sup>96</sup> Requests for information already collected or being collected by other agencies may not receive approval. Thus, the Act pushes agencies to check with other agencies to see if they have the desired information before trying to collect it themselves. For example, the Occupational Safety and Health Administration (OSHA) scrapped its proposal to require regulated entities to notify it of major renovation and demolition projects that may release asbestos after it consulted with the EPA and learned that the EPA already collected similar information that it would share with OSHA. In explaining its decision not to promulgate its own reporting requirement, OSHA pointed out that "the Paperwork Reduction Act requires that federal agencies avoid clearly duplicative reporting requirements."<sup>97</sup>

The Regulatory Flexibility Act similarly combats duplication by reducing duplicative reporting requirements on small businesses.<sup>98</sup> The Act

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93. 70 Fed. Reg. 76,228, 76,229 (Dec. 23, 2005).

94. See 75 Fed. Reg. 31,730, 31,731 (June 4, 2010) (introduction to rule proposed by the USDA).

95. 44 U.S.C. § 3506(c)(3)(B) (2006).

96. *Id.* § 3504(c)(1) (2006).

97. 59 Fed. Reg. 40,964, 40,971 (Aug. 10, 1994).

98. 5 U.S.C. §§ 601–612 (2006). See generally Paul R. Verkuil, *A Critical Guide to the*

requires that, whenever agencies publish a proposed rule, they prepare a “regulatory flexibility analysis” describing the impact of the proposed rule on small businesses. The analysis must contain “identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule.”<sup>99</sup> By performing this analysis, agencies discover that their proposed regulations are duplicative and choose to abandon them. Moreover, each agency is required to prepare an annual “regulatory flexibility agenda” briefly describing any rule that it expects to propose that will have a significant impact on small businesses.<sup>100</sup> This agenda is submitted to the Small Business Administration, which may comment on the agenda and push back on duplicative rules.<sup>101</sup> Although the Small Business Administration’s comments are not binding, agencies have incentives to consider the comments because the Administration may report uncooperative behavior to agencies’ political overseers or, as it has on some occasions, file amicus briefs against agencies in cases challenging the agencies’ regulations.<sup>102</sup> Ultimately, review by the Small Business Administration serves as another check on duplicative regulations. For example, the Small Business Administration successfully lobbied the EPA to alter proposed reporting requirements for chemical importers and manufacturers to avoid duplicating existing Department of Energy regulations.<sup>103</sup>

When statutory commands and broad statutory schemes are not enough to prevent bureaucratic duplication, legislators hold public hearings where they voice antiduplication preferences—often directly to agency officials whom the legislators have called to testify. In recent years, legislators have expressed concern about wasteful and counterproductive duplication in some of the most pressing regulatory matters—such as the reform of the financial regulatory system.<sup>104</sup> Antiduplication statements in hearings are

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*Regulatory Flexibility Act*, 1982 DUKE L.J. 213 (1982) (examining the provisions of the Regulatory Flexibility Act and the manner in which these contribute to regulatory reform).

99. 5 U.S.C. § 603(b)(5).

100. *Id.* § 602(a).

101. *Id.* § 602(b).

102. See *Regulatory Flexibility Act Shepardizing: Case Law*, SMALL BUS. ADMIN. 4, 5, 9 (Aug. 2, 2000), [http://archive.sba.gov/advo/laws/rfa\\_shep.pdf](http://archive.sba.gov/advo/laws/rfa_shep.pdf) (summarizing cases where the agency has either filed or threatened to file an amicus brief and the court ruled in its favor).

103. See OFFICE OF ADVOCACY, U.S. SMALL BUS. ADMIN., ANNUAL REPORT OF THE CHIEF COUNSEL FOR ADVOCACY ON IMPLEMENTATION OF THE REGULATORY FLEXIBILITY ACT, FISCAL YEAR 1999, at 33 (2000), <http://archive.sba.gov/advo/laws/flex/99regflx.pdf> (demonstrating that the agency worked with OMB and EPA to save approximately \$13 million every reporting cycle).

104. See, e.g., *Modernizing Bank Supervision and Regulation—Part I: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 111th Cong. 3 (2009) (statement of Sen. Christopher

not just political grandstanding. They have an effect. For example, the Senate Energy and Natural Resources Committee held a hearing in which senators questioned agency officials about inefficient, duplicative oversight of hydropower by the Federal Energy Regulatory Commission (FERC) and Interior.<sup>105</sup> Several weeks later, the two agencies formalized processes to eliminate duplication and streamline oversight.<sup>106</sup>

Most drastically, Congress may consolidate agencies with duplicative delegations.<sup>107</sup> There are two ways that Congress may consolidate agencies to reduce duplication. First, it may merge two agencies with similar functions, thus eliminating any duplication between the two agencies. For example, as noted in the Introduction, Congress recently voted to merge the Office of Thrift Supervision and the Office of the Comptroller of the Currency to eliminate duplicative oversight from those offices.<sup>108</sup> Second, Congress may consolidate agencies with similar functions into a single department or single large agency. This form of consolidation occurs either when a new department is created and new agencies are placed within it or when agencies are transferred into existing departments where they appear to fit better. Although this form of agency consolidation does not eliminate duplication among agencies with similar functions, it makes agency coordination easier because it groups the agencies together in the same hierarchical management structure instead of leaving them scattered in different departments and thus under the control of different departmental management structures. For example, the Department of Education and the Department of Energy were established in the 1970s to improve the coordination among the various education and energy programs that were scattered throughout various agencies and departments.<sup>109</sup> Agency

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Dodd, Chairman, S. Comm. on Banking, Hous., & Urban Affairs) (asserting that multiple federal banking regulators contributed to the banking crisis).

105. *Energy Development on Public Lands and the Outer Continental Shelf: Hearing Before the S. Comm. on Energy & Natural Resources*, 111th Cong. app. I at 79–80 (2009) [hereinafter *Energy Hearing*].

106. See MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEPARTMENT OF THE INTERIOR AND FEDERAL ENERGY REGULATORY COMMISSION (Apr. 9, 2009), <http://www.ferc.gov/legal/maj-ord-reg/mou/mou-doi.pdf> (assigning exclusive jurisdiction to Interior's Minerals Management Service over non-hydrokinetic facilities and leasing authority for hydrokinetic facilities on the Outer Continental Shelf, and granting licensing authority to FERC for hydrokinetic facilities on the Outer Continental Shelf).

107. For a discussion of the trade-offs involved in agency consolidation, see generally O'Connell, *supra* note 17.

108. Enhancing Financial Institution Safety and Soundness Act of 2010, Pub. L. No. 111-203, §§ 301, 312(b), 124 Stat. 1520, 1521–23 (2010).

109. See ARNOLD, *supra* note 58, at 316–20 (describing the Carter Administration's efforts to reorganize these agencies to reduce the tremendous jurisdictional overlap).

consolidation is often a massive undertaking that generates political opposition from groups invested in the status quo, and thus it is not undertaken lightly. Nevertheless, it remains a potentially potent antiduplication tool that Congress turns to from time to time.

Congress can also prevent duplication by going back and amending the duplicative delegations to more clearly and narrowly define the agencies' jurisdictions. However, Congress is only likely to go through the amendment process if the Executive or Judiciary has reconciled the agencies' duplicative delegations in a way that Congress dislikes.

In short, Congress is the branch directly responsible for creating duplicative delegations, yet in many cases it makes clear that it does not want agencies to duplicate or interfere with each other. It is not normatively inconsistent for Congress to hold antiduplication preferences while also passing duplicative delegations that make the avoidance of duplication more difficult for agencies. It is difficult, if not impossible, for Congress to avoid duplicative delegations in many instances. Simple legislative commands to coordinate or avoid duplication are relatively cheap ways for Congress to try to limit the amount of actual duplication that results from their inevitable duplicative delegations.

## 2. *The White House*

The White House has played perhaps the largest role in influencing agencies to avoid duplication and conflict. As the political actors most responsible for the performance of the Executive Branch,<sup>110</sup> presidents have routinely tried to achieve greater governmental efficiencies by pushing agencies to avoid duplicating each other's efforts and issuing conflicting regulations.<sup>111</sup> The President expresses his antiduplication preferences directly to agencies informally or through formal directives and executive orders.<sup>112</sup> However, presidents over time have also built up several antiduplication institutions that operate without direct presidential communication with agency heads.

Chief among these institutions is the centralized review of agency

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110. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (explaining that presidents may set the direction and influence outcomes of the administrative process).

111. See ARNOLD, *supra* note 58, at 313 (discussing President Carter's Reorganization Project goals).

112. See, e.g., Presidential Memorandum: Improving Energy Security, American Competitiveness and Job Creation, and Environmental Protection Through a Transformation of Our Nation's Fleet of Cars and Trucks, 75 Fed. Reg. 29,399 (May 21, 2010), (requesting that the EPA and National Highway and Traffic Safety Administration work together on fuel efficiency standards).



regulations by OIRA<sup>113</sup>—a subagency of OMB. President Reagan established OIRA review to “minimize duplication and conflict of regulations,”<sup>114</sup> and subsequent presidents have continued to rely on OIRA review as an important antiduplication institution.<sup>115</sup> Agencies must submit all “significant” regulations to OIRA.<sup>116</sup> Significant regulations include those that have an annual effect on the economy of over \$100 million as well as those that “interfere with an action taken or planned by another agency.”<sup>117</sup> OIRA analysts are then tasked with screening for an agency’s “regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.”<sup>118</sup> OIRA may reject and return to the agencies for reconsideration any regulations that it considers unnecessarily duplicative. There is evidence that OIRA review has proven effective in minimizing duplicative regulations. One study found that most EPA officials believe that “OIRA involvement helped to coordinate EPA regulations with the regulations of other federal agencies.”<sup>119</sup> But OIRA review need not discover actual duplication to have an impact. Agencies consult with each other before they act to avoid proposing duplicative regulations that OIRA may reject. That is, the existence of OIRA review encourages agencies to avoid duplication on their own. Indeed, a former OIRA official has observed that “agencies often, but not always, consult with their colleagues in other departments when developing important rules” before OIRA review takes place.<sup>120</sup> OIRA review is particularly valuable in coordinating the actions of the several agencies and departments whose actions make up the lion’s share of the significant regulations screened by the office: the EPA and the Departments of Health and Human Services (which includes the FDA), Transportation

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113. For analyses of Office of Information and Regulatory Affairs (OIRA) review, see generally Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995); and Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469 (2007).

114. Exec. Order No. 12,291, 3 C.F.R. 127 (1981).

115. *E.g.*, Exec. Order No. 12,866 § 6(b)(4)(D), 3 C.F.R. 638, 648 (1993) (President Clinton’s request for transparency in OIRA’s review).

116. *Id.* § 6(a)(3)(A), 3 C.F.R. 645.

117. *Id.* § 3(f), 3 C.F.R. 641–42.

118. *Id.* § 1(b)(10), 3 C.F.R. 640.

119. Bressman & Vandenbergh, *supra* note 113, 72 tbl.B & n.139.

120. Donald R. Arbuckle, *OIRA and Presidential Regulatory Review: A View from Inside the Administrative State* 40 (2008), [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=donald\\_arbuckle](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=donald_arbuckle).

(which includes the National Highway and Traffic Safety Administration), Labor (which includes OSHA), Agriculture, Commerce, and Interior.<sup>121</sup>

Sometimes agencies' attempts at coordination fail. For those instances when agencies with duplicative delegations cannot decide which agency should perform which tasks on its own, the Chief Executive has established institutions to settle matters for them. Presidents have empowered the OMB to resolve interagency disputes that agencies themselves cannot resolve.<sup>122</sup> Professor Peter Strauss explains: "OMB plays a coordinating role also when agencies find themselves in the jurisdictional disputes that are the inevitable consequence of the enormous number of regulatory measures Congress enacts and the many different agencies to which it assigns responsibility."<sup>123</sup> For example, it was reportedly OMB that first determined that the AEC would have exclusive jurisdiction to regulate emissions from nuclear facilities without the EPA exercising duplicative oversight.<sup>124</sup> The Department of Justice's (DOJ's) Office of Legal Counsel (OLC) also has the authority to resolve any "question of which [agency] has jurisdiction to administer a particular program or to regulate a particular activity" whenever the agencies cannot resolve the question themselves.<sup>125</sup> In practice, if litigation addressing the question is not pending, agencies are more likely to turn to OMB than OLC to settle intractable jurisdictional issues because OMB is more involved in the day-to-day life of regulatory agencies.<sup>126</sup> More important than which office addresses the matter are the incentives that these antiduplication institutions create. Agencies may find top-down interference from OMB or OLC unappealing. Thus, agencies with duplicative delegations likely attempt to avoid OMB and OLC interference by figuring out on their own which agency should perform which tasks.

When regulatory problems involve several agencies, interagency coordination becomes more difficult. Presidents have relied on a few institutions to improve coordination for these situations: interagency bodies, lead agencies, and so-called White House czars.<sup>127</sup> Interagency bodies

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121. See Croley, *supra* note 113, at 846.

122. Exec. Order No. 12,866 § 7, 3 C.F.R. 638, 648 (1993).

123. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 588 (1984).

124. See Goldsmith, *supra* note 11, at 105–06.

125. Exec. Order No. 12,146 § 1–401, 3 C.F.R. 409, 411 (1979).

126. See Strauss, *supra* note 123, at 588 (providing an example of the NRC's and EPA's uncertainty as to which agency regulated radioactive discharges).

127. Interagency bodies are sometimes the product of legislative action, but they are more often established by executive action. See SEIDMAN, *supra* note 41, at 147–52 (exemplifying how President Truman's definition trumped congressional intent).

come in many forms and serve different purposes—although spurring interagency coordination and minimizing duplication are often key purposes.<sup>128</sup> By providing forums for multiple agencies to come together, interagency bodies facilitate efforts to set jurisdictional metes and bounds in regulated areas that involve many agencies. For example, the thirteen-agency National Invasive Species Council developed a master plan that spells out, task by task, which agency is expected to do what to address the problem of invasive species.<sup>129</sup>

Interagency bodies have their shortcomings, though. Because they require consensus among many different agencies, they are often slow moving and fail to produce bold actions.<sup>130</sup> To avoid the time-intensive consensus building that must take place within interagency bodies, the Executive may instead rely on a lead agency—a single agency put in charge of coordinating federal action and to which all other agencies should defer. The lead agency approach has been adopted by the executive in the administration of one of the country's most important regulatory schemes—the National Environmental Protection Act (NEPA).<sup>131</sup> NEPA requires that all federal agencies prepare environmental assessments of any actions that significantly affect the environment.<sup>132</sup> If more than one agency is involved in the same action, then the environmental review process may get bogged down or generate duplicative environmental analyses. To avoid these inefficiencies, the Executive has determined that a single lead agency shall supervise the review process.<sup>133</sup> To determine which agency among those with oversight powers should act as lead agency, the Executive has compiled a list of factors that include the magnitude of the agency's involvement, the scope of its statutory authority, and its expertise.<sup>134</sup>

The lead agency approach works well in some day-to-day bureaucratic activities. However, if the White House wants to spur comprehensive regulatory action on a salient political issue, it may instead rely on White House czars.<sup>135</sup> “Czar” is a label attached to White House officials by

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128. *See id.*

129. NAT'L INVASIVE SPECIES COUNCIL, 2008–2012 NATIONAL INVASIVE SPECIES MANAGEMENT PLAN 7 (2008), [http://www.invasivespecies.gov/home\\_documents/2008-2012\\_National\\_Invasive\\_Species\\_Management\\_Plan.pdf](http://www.invasivespecies.gov/home_documents/2008-2012_National_Invasive_Species_Management_Plan.pdf).

130. *See* SEIDMAN, *supra* note 41, at 150.

131. 42 U.S.C. §§ 4321–4370f (2006).

132. *Id.* § 4332(2)(C).

133. 40 C.F.R. § 1501.5 (2010).

134. *Id.* § 1501.5(c).

135. *See* Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 407 (2010) (pointing to the increasing number of “czars” in recent administrations who mediate between the President

journalists, political commentators, and sometimes administrations themselves to refer to various presidential advisors.<sup>136</sup> The label has been attached to dozens of officials working in the Obama Administration and a similar number who worked in the Bush Administration.<sup>137</sup> Czars typically are White House employees who have no formal powers over agencies. But because they are seen as speaking for the President, they strongly influence agencies' actions. Thus, czars coordinate agency behavior and avoid interagency interference and duplication by telling each agency what the White House expects of it.<sup>138</sup> For example, it was reported that President Obama's "climate change czar" Carol Browner was instrumental in coordinating the EPA's and DOT's joint efforts to craft new auto-emissions standards.<sup>139</sup>

In short, presidents have long been enemies of duplication that wastes resources and impedes the administration's regulatory goals. Presidents combat duplication by directly communicating with agencies. However, presidents over time have also crafted several antiduplication institutions that do not require constant presidential oversight. The mere existence of these antiduplication institutions—particularly OIRA review and OMB or OLC settlement of interagency jurisdictional disputes—pushes agencies to coordinate to avoid interagency duplication and conflict.

### 3. *The Judiciary*

Courts occasionally hear cases involving duplicative delegations. Duplicative delegations cases typically arise when a regulated entity or interest group challenges an agency's action by arguing that Congress intended a different agency to exercise jurisdiction,<sup>140</sup> or when in a suit to compel agency action, the agency argues that it cannot act because another

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and agencies).

136. Jess Henig, *Czar Search*, FACTCHECK.ORG (Sept. 25, 2009, 11:25 AM), <http://www.factcheck.org/2009/09/czar-search/>.

137. *See id.*

138. *See* Harold H. Bruff, *Presidential Power Meets Bureaucratic Expertise*, 12 U. PA. J. CONST. L. 461, 489 (2010) (concluding that the President need only control the czars to coordinate bureaucracy).

139. *See* Jim Tankersley, *Emissions Deal Nearly Stalled at the Finish*, L.A. TIMES, May 20, 2009, at A1 (quoting Browner's philosophy for achieving a new national standard).

140. *See, e.g.*, *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235 (2002) (drilling company regulated by both United States Coast Guard and OSHA); *Arcadia v. Ohio Power Co.*, 498 U.S. 73 (1990) (power company regulated by both the Securities and Exchange Commission (SEC) and FERC); *Pub. Citizen v. Foreman*, 631 F.2d 969 (D.C. Cir. 1980) (food additive regulated by both USDA and FDA); *California v. Kleppe*, 604 F.2d 1187 (9th Cir. 1979) (oil companies regulated by both Interior and EPA).

agency has jurisdiction.<sup>141</sup> When reviewing agency action or inaction in these duplicative delegations cases, courts sometimes weigh whether their decisions will prevent or spur interagency duplication and conflict. By considering interagency duplication and conflict as a factor in their decisions, courts encourage agencies to avoid duplication and instead seek out tasks that other agencies do not perform. That is, judicial review of agency action serves as an antiduplication institution—albeit one that is not called on as often as legislative and executive antiduplication institutions.

In a few cases, courts have struck down agencies' attempts to exercise jurisdiction in fields where other agencies are active.<sup>142</sup> For example, in *Nutritional Health Alliance v. FDA*,<sup>143</sup> the Second Circuit struck down the FDA's attempt to regulate the packaging of iron supplements under the Food, Drug, and Cosmetic Act, finding that the agency's action would potentially interfere with the CPSC's decade-long regulation of such packaging under the Poison Prevention Packaging Act.<sup>144</sup> The court concluded that "the FDA's assertion of concurrent jurisdiction rings a discordant tone with the regulatory structure created by Congress."<sup>145</sup> Decisions like this one encourage agencies to avoid regulating in fields already occupied by other agencies.

In other cases, courts have upheld agency actions after finding that other agencies with potentially duplicative delegations were not actively regulating, thus, there was little risk of duplication. For example, in *Chao v. Mallard Bay Drilling, Inc.*,<sup>146</sup> the Supreme Court held that the Coast Guard's statutory authority to regulate the working conditions of seamen did not bar OSHA from regulating the same conditions because "mere possession by another federal agency of unexercised authority to regulate certain working conditions is insufficient to displace OSHA's jurisdiction."<sup>147</sup> Decisions like this one clear the way for agencies to perform tasks that others are not performing.

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141. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007) (EPA's refusal to regulate greenhouse gases); *Train v. Colo. Pub. Interest Research Grp., Inc.*, 426 U.S. 1 (1976) (EPA's refusal to regulate the discharge of radioactive materials); *Nw. Env'tl. Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008) (EPA's refusal to regulate certain marine discharges); *Pub. Citizen Health Research Grp. v. Aucter*, 702 F.2d 1150 (D.C. Cir. 1983) (OSHA's refusal to regulate industrial exposure to ethylene oxide).

142. See, e.g., *Nutritional Health Alliance v. FDA*, 318 F.3d 92 (2d Cir. 2003); *Ohio Power Co. v. FERC*, 880 F.2d 1400 (D.C. Cir. 1989); *California v. Kleppe*, 604 F.2d 1187 (9th Cir. 1979).

143. 318 F.3d 92 (2d. Cir. 2003).

144. *Id.* at 104–05.

145. *Id.* at 104.

146. 534 U.S. 235 (2002).

147. *Id.* at 241.

Courts also consider the potential for bureaucratic duplication in deciding the merits of suits to compel agency action. For example, in *Public Citizen v. Aucther*,<sup>148</sup> OSHA tried to fend off a suit to compel it to regulate a chemical affecting hospital workers' health by arguing that jurisdiction lay with the EPA. The D.C. Circuit rejected the agency's argument, holding that "OSHA is not disabled from issuing [a chemical] standard in areas—such as the health care industry—where EPA has apparently exercised minimal, if any, regulatory authority in an overlapping manner."<sup>149</sup> Decisions like this one prevent agencies from using the mere existence of duplicative delegations as an excuse to shirk their regulatory duties.

This is not to say that courts always rule in ways that minimize interagency duplication and conflict. For example, in *Massachusetts v. EPA*,<sup>150</sup> the Supreme Court considered whether holding that the CAA authorizes the EPA to regulate greenhouse gas emissions from motor vehicles would lead to duplication between the EPA and DOT—which is charged with regulating motor vehicle fuel standards. The Court concluded that the "two [agencies'] obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."<sup>151</sup> However, even in this decision, the Supreme Court weighed the potential for bureaucratic duplication and conflict. Ultimately, courts' considerations of duplication as a factor in their decisions encourage agencies to avoid duplicating each other's efforts and instead to seek tasks that other agencies are not performing.

Overall, agencies' overseers in each of the three branches of government have sought to avoid duplication. Collectively, their actions provide strong incentives for agencies to take steps on their own to avoid duplication.

### *B. Agency Abdication of Regulatory Authority to Avoid Duplication*

The pervasiveness of duplicative delegations has a significant impact on agency behavior. If agencies want to avoid duplication, agencies with

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148. 702 F.2d 1150 (D.C. Cir. 1983).

149. *Id.* at 1156 n.23 (quotations omitted).

150. 549 U.S. 497 (2007). For analyses of this landmark case, see Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2008) (arguing that "the regulatory controversies surrounding global warming illustrate a larger theme: the Court majority's increasing worries about the politicization of administrative expertise"), and Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593 (2008) (contending that the ruling in *Massachusetts v. EPA* wrongly required the EPA to implement a major policy change without explicit authorization from Congress).

151. *Massachusetts v. EPA*, 549 U.S. at 532.

duplicative delegations cannot simply regulate as they see fit within the reasonable confines of their delegated jurisdiction. Instead, they must consider whether their efforts will duplicate or interfere with the operations of other agencies and then act to avoid duplication and conflict. In this section, I show that a primary way that agencies with duplicative delegations avoid duplication is by abdicating their authority to perform tasks that other agencies are already performing or are better suited to perform. I take a broad view of what it means to say that agencies abdicate to avoid duplication—treating such abdication as any agency decision to forgo exercising authority in order to avoid duplication with other agencies.

There are several reasons why agencies may want to avoid duplication. First, agency officials may want to act consistently with their political bosses' antiduplication preferences, and they may want to avoid running afoul of antiduplication institutions. Second, agency officials may care about efficiency, and thus they may want to avoid duplication that wastes government resources.<sup>152</sup> Third, agency officials may care about maintaining good working relationships with their fellow bureaucrats—and thus they may want to avoid duplicating or interfering with the efforts of officials in other agencies. Fourth, agency officials may find it easier to manage an agency and motivate agency employees when they have a unique set of tasks that no other agency performs.<sup>153</sup> Fifth, officials may fear adverse publicity alleging government waste. Regardless of the agency officials' motives, examples of agencies avoiding duplication abound. Abdication is the primary means through which agencies avoid duplication.

Some instances of agency abdication occur when agencies adopt a narrow interpretation of their authority to avoid exercising duplicative jurisdiction. For example, the EPA abdicated its authority to regulate pesticide-treated food packaging by narrowly defining the term *pesticide* in its authorizing statute to exclude food packaging treated with pesticides—leaving such packaging to the regulation of the FDA.<sup>154</sup> The EPA explained, “EPA, in consultation with FDA, believes this rule will eliminate the duplicative [statutory] jurisdiction and economize Federal government resources.”<sup>155</sup>

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152. Cf. STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS 304 (2008) (“Administrative agencies can advance social welfare in cases where lead administrators are motivated to do so in the first place . . .”).

153. See JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 181–83 (1989) (discussing how agency officials strive for autonomy of their agency for better management and organizational maintenance).

154. Food Packaging Treated with a Pesticide, 71 Fed. Reg. 70,667, 70,667 (Dec. 6, 2006).

155. *Id.*

Other instances of agency abdication occur when an agency declines to exercise the authority under its discretion. For example, the Federal Railroad Administration (FRA) scrapped proposed workplace safety standards after public comments on its proposal led the agency to conclude that the standards duplicated existing OSHA standards.<sup>156</sup> The FRA said it would continue to regulate railroad-specific safety issues—such as those involving track roadbeds and switching devices—but it would not duplicate OSHA standards because it was better to “concentrate [its] limited resources in addressing hazardous working conditions in those traditional areas of railroad operations in which we have special competence.”<sup>157</sup>

In these two examples, a single agency abdicated authority. However, abdication often takes place as part of a larger interagency negotiation process in which agencies with duplicative delegations allocate tasks among themselves to avoid duplication and interagency interference. In this process, multiple agencies abdicate—multiple agencies agree to forgo some task over which they have a reasonable statutory claim. These arrangements are often memorialized in the form of interagency memoranda of understanding and published in the Federal Register and on agencies’ websites.<sup>158</sup> Some agreements have specific end dates, while others last indefinitely.<sup>159</sup> Some agreements require that agencies consult with each other as they regulate, and thus name interagency liaisons to serve as contacts.<sup>160</sup> While the details vary, the basic purpose is the same: to avoid duplication and conflict by dividing regulatory tasks and clarifying jurisdictional bounds among agencies. Overall, most—if not all—regulatory agencies have entered into these sorts of interagency arrangements to avoid duplicative and conflicting regulatory efforts. For example:

- The FDA has broad authority to regulate additives to food and water, and the EPA has broad authority to regulate the quality of drinking water.<sup>161</sup> To avoid duplication, the agencies have agreed

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156. Railroad Occupational Safety and Health Standards, 43 Fed. Reg. 10,583, 10,585 (Mar. 14, 1978).

157. *Id.*

158. See, e.g., *Domestic Memoranda of Understanding*, FOOD & DRUG ADMIN., <http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/default.htm> (last updated Apr. 25, 2011) (describing various memoranda of understanding between the FDA and other agencies, such as the Department of Defense).

159. See *id.*

160. See, e.g., Memorandum of Understanding with the Food Safety and Inspection Service, 48 Fed. Reg. 39,509, 39,510–12 (Aug. 31, 1983) (identifying the liaisons and their responsibilities for each agency).

161. 21 U.S.C. § 321(f) (2006) (definitions giving rise to FDA’s authority to regulate food



that the “EPA has the primary responsibility over direct and indirect additives and other substances in drinking water,” while the “FDA retains the responsibility for water, and substances in water, used in food and for food processing and for bottled water.”<sup>162</sup>

- Both the NRC and OSHA have been delegated authority to regulate workplace safety conditions at nuclear facilities, but the two agencies have agreed that the NRC will regulate workplace safety risks directly related to nuclear energy—such as the risk of radiation from nuclear materials—while OSHA will regulate all other “[p]lant conditions which result in an occupational risk.”<sup>163</sup>
- The FDA has broad authority to regulate food and beverage labeling generally, while the ATF has authority to regulate the labeling of alcoholic beverages specifically.<sup>164</sup> To avoid duplication and conflict in the regulation of alcoholic beverages, the two agencies agreed that the “ATF will be responsible for the promulgation and enforcement of regulations with respect to the labeling of distilled spirits, wine, and malt beverages,” while the FDA will use its expertise to provide “laboratory assistance” and “health hazard evaluation” when necessary.<sup>165</sup>

In all of the examples above, the agencies were able to neatly divide regulatory tasks among themselves. But despite agencies’ best efforts, it is not always possible to draw jurisdictional lines so that each agency will perform distinct and separate tasks. After divvying up tasks as much as possible, some duplication may persist. However, there are several steps that agencies take to minimize interference and duplication to the extent practicable when they cannot eliminate it entirely.

When tasks cannot be completely divided among agencies with duplicative delegations, agencies sometimes minimize duplication by deferring to other agencies’ determinations. For example, both FERC and the Army Corps of Engineers are statutorily required to review some of the

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and drink); 42 U.S.C. § 300f (2006) (definitions giving rise to EPA’s authority to regulate drinking water).

162. Pesticides Applied to Bodies of Water, 47 Fed. Reg. 25,746, 25,746 (June 15, 1982).

163. Memorandum of Understanding Between the Nuclear Regulatory Commission and the Occupational Safety and Health Administration, 53 Fed. Reg. 43,950, 43,950 (Oct. 31, 1988).

164. 27 U.S.C. §§ 201–219a (2006) (Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF)); 21 U.S.C. §§ 301–99 (2006) (FDA).

165. MEMORANDUM OF UNDERSTANDING BETWEEN THE FOOD AND DRUG ADMINISTRATION AND THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, MOU 225-88-2000 (Nov. 20, 1987), <http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/ucm116370.htm>.

same aspects of proposed oil pipeline projects. The two agencies have agreed that the “Corps will give deference, to the maximum extent allowable by law, to the project purpose, project need, and project alternatives that FERC determines to be appropriate for the project”—thus minimizing the duplication of effort in reviewing proposed oil pipelines.<sup>166</sup> Overall, deference does not eliminate the duplicative oversight authority, but it reduces the decision costs and possibly the time it takes for the agencies to finalize decisions.

Joint regulation is another way agencies minimize duplication and interference when tasks cannot be neatly divided among agencies with duplicative delegations. For example, joint regulatory efforts are common for product recalls when multiple agencies—such as the FDA, USDA, CPSC, National Highway and Traffic Safety Administration, or the EPA—have jurisdiction over some piece of the physical product or its production processes.<sup>167</sup> Joint regulation may not be agencies’ first choice for how to regulate. They may rather regulate alone. But joint regulation is a viable option when it is impossible for agencies to eliminate duplication and interagency interference completely.

Agencies with duplicative delegations also minimize duplication and conflict by referring relevant data to each other. For example, there are some food manufacturing and processing facilities that both the FDA and USDA are required to inspect. Although the two agencies inspect different aspects of the facilities’ operations—the USDA regulates meat and poultry operations, while the FDA regulates all other foods—they have agreed to inform each other of any unsanitary conditions or instances of adulterated food relevant to each other’s jurisdiction.<sup>168</sup> Sharing information may be easiest for agencies such as the FDA and USDA that have a long history of working together in the same regulatory field.

Overall, regardless of the exact details, the purpose of all of these instances of agency abdication is the same: to avoid duplication and conflicting regulatory efforts by agencies with duplicative delegations. Agency abdication does not occur in response to all duplicative delegations. But it occurs in response to many of them. Rampant agency abdication is understandable given the incentives agencies face to avoid duplication.

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166. MEMORANDUM OF UNDERSTANDING BETWEEN THE ARMY CORPS OF ENGINEERS AND THE FEDERAL ENERGY REGULATORY COMMISSION FOR INTERSTATE NATURAL GAS PIPELINE PROJECTS (July 11, 2005), <http://www.ferc.gov/legal/maj-ord-reg/mou/mou-30.pdf>.

167. For examples of joint recalls, see <http://www.recalls.gov/>.

168. Memorandum of Understanding with the Food Safety and Inspection Service, 48 Fed. Reg. 39,509, 39,510 (Aug. 31, 1983).

*C. Blurred Boundary Disputes Between Agencies with Duplicative Delegations*

By describing rampant agency abdication, I am not claiming that duplicative delegations do not lead to regulatory duplication or interagency conflict. Agencies with duplicative delegations may fail to coordinate for any number of reasons. One significant cause of duplicative regulations comes from what I call blurred boundary disputes. These disputes arise because jurisdictional dividing lines between agencies are unsettled by changes in the regulated environment or by the introduction of a new agency or regulatory scheme. As agencies jockey for position in the shifting jurisdictional spaces, multiple agencies with duplicative delegations sometimes stake claims to the same tasks. However, given the downward pressure on agencies to avoid duplicative and conflicting regulatory actions, blurred boundary disputes over specific tasks are unlikely to persist for too long. The disputes are ultimately resolved when new expectations about which agencies are responsible for which tasks are adopted—either by agencies’ political overseers or by the agencies themselves.

A dispute between FERC and Interior over the regulation of hydropower is emblematic of the kinds of blurred boundary disputes that arise and how they are resolved. For the past several decades, FERC has regulated and licensed hydropower projects,<sup>169</sup> while Interior has regulated and permitted offshore energy projects.<sup>170</sup> Historically, the two agencies’ functions did not overlap much because FERC’s hydropower projects were usually sited inland and not offshore, where Interior’s energy projects were located. That changed in the past decade when new technology enabled the capture of hydropower from ocean waves.<sup>171</sup> New energy projects using this technology are both offshore and hydro—thus implicating both Interior’s job of regulating offshore energy projects and FERC’s job of regulating hydropower. When energy companies began applying for permits to build hydropower projects offshore, both agencies asserted jurisdiction over the projects.<sup>172</sup> In response to the exercise of duplicative oversight by the agencies, regulated entities complained about inefficiencies, and congressional hearings were held in which senators

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169. 16 U.S.C. § 817(1) (2006).

170. 43 U.S.C. §§ 1331–1356 (2006).

171. See *Energy Hearing*, *supra* note 105, at 79 (testimony of Philip D. Moeller, Comm’r, FERC) (stating that FERC remained within its authority when regulating this new technology and that it communicated with other agencies in interagency regulatory matters).

172. See Jon Wellinghoff et al., *Facilitating Hydrokinetic Energy Development Through Regulatory Innovation*, 29 ENERGY L.J. 397, 414–15 (2008) (explaining that FERC relied on “the plain language” of the Federal Power Act to justify its assertion of jurisdiction and that Interior relied on the Energy Policy Act of 2005 to justify its assertion).

pressured the agencies to resolve which agency would exercise jurisdiction over which parts of the hydropower projects.<sup>173</sup> A few weeks after the congressional hearing, FERC and Interior signed an interagency agreement establishing that FERC “has exclusive jurisdiction to issue licenses and exemptions for hydrokinetic projects located [offshore],” Interior has “exclusive jurisdiction to issue leases, easements, and rights-of-way regarding [offshore] lands for hydrokinetic projects,” and Interior will act as the lead agency in conducting “any necessary environmental reviews.”<sup>174</sup> In short, a dispute arose because changes in the regulated environment unsettled the lines dividing jurisdiction between two agencies. Both agencies asserted jurisdiction, leading to duplicative oversight. Pressure to avoid duplication—initiated by regulated entities—ultimately led the agencies to find ways to divide the regulatory tasks.

A similar fact pattern emerged in the regulation of genetically modified organisms (GMOs). In the 1980s, the production of GMOs by biotech companies exploded. The introduction of this new technology unsettled jurisdictional bounds between the FDA, USDA, and EPA. New GMOs appeared to fall under the jurisdiction of more than one of these agencies. Both the FDA and USDA asserted the authority to regulate a genetically modified bovine growth hormone.<sup>175</sup> Both the EPA and USDA exercised authority to regulate the deliberate release of GMOs into the environment.<sup>176</sup> Regulated entities complained about the slow, duplicative oversight.<sup>177</sup> Ultimately, the White House created interagency working groups and committees that included members of the agencies with duplicative delegations.<sup>178</sup> In 1986, the working group issued the Coordinated Framework for the Regulation of Biotechnology, which

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173. See *id.*; see also *Energy Hearing*, *supra* note 105.

174. MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEPARTMENT OF INTERIOR AND FEDERAL ENERGY REGULATORY COMMISSION (Apr. 9, 2009), <http://www.ferc.gov/legal/maj-ord-reg/mou/mou-doi.pdf>.

175. See Diane E. Hoffmann, *The Biotechnology Revolution and Its Regulatory Evolution*, 38 DRAKE L. REV. 471, 543 (1988) (explaining the jurisdictional fight between the FDA and USDA, and its impact on the time and resources expended).

176. See Scott D. Deatherage, *Scientific Uncertainty in Regulating Deliberate Release of Genetically Engineered Organisms: Substantive Judicial Review and Institutional Alternatives*, 11 HARV. ENVTL. L. REV. 203, 239–40 (1987) (identifying the acts that give the agencies the authority to regulate release and the “maze” that parties must go through in order to obtain permits for release).

177. See *White House Plan Calls for Joint Reviews When EPA, Agriculture Jurisdictions Overlap*, 10 CHEM. REG. REP. (BNA) 59, 59 (Apr. 18, 1986) (noting that the EPA and USDA’s “turf disputes” delayed biotechnology regulation).

178. See *Coordinated Framework for Regulation of Biotechnology*, 51 Fed. Reg. 23,302 (June 26, 1986) (announcing cooperation between the USDA, EPA, FDA, National Institute of Health, National Science Foundation, and OSHA).

spelled out in over one hundred pages each agency's responsibilities for the regulation of GMOs.<sup>179</sup> In short, a change in the regulated environment led to a blurring of jurisdictional bounds and interagency disputes as several agencies sought to stake their claims in this newly uncertain environment. The disputes were resolved when executive oversight pushed the agencies to sign an agreement that divided tasks among the agencies, thus setting new expectations about which agencies should perform which tasks.

Blurred boundary disputes are particularly likely in an agency's infancy. When an agency is first created, there is relatively high uncertainty about the scope of its jurisdiction—in particular how its jurisdiction meshes with the web of existing agencies' jurisdictions. The EPA is a good example. In its first decade, it found itself bogged down in several interagency disputes. There was a dispute between the EPA and OSHA over which agency should regulate the use of pesticides by farm workers.<sup>180</sup> It was resolved in the EPA's favor according to the terms of an interagency agreement—terms that were later approved by the D.C. Circuit.<sup>181</sup> There was a dispute between the EPA and the AEC over the EPA's assertion of jurisdiction over emissions from nuclear facilities. This dispute over the scope of the EPA's jurisdiction was resolved by the OMB and later by the Supreme Court.<sup>182</sup> And there was a dispute between the EPA and Interior over whether the EPA had authority to regulate emissions from offshore energy projects regulated by Interior. This dispute was resolved in the EPA's favor by DOJ,<sup>183</sup> then decided against the EPA by the Ninth Circuit,<sup>184</sup> and ultimately settled when Congress amended the CAA expressly to grant the EPA jurisdiction over emissions from offshore energy projects.<sup>185</sup> In each of these examples, the disputes arose because the creation of a new agency led to uncertainty about how that new agency's jurisdiction fit with other agencies' jurisdictions. The disputes did not lead to larger interagency battles though and all were all settled either through interagency agreements or decisions from agencies' overseers.

Overall, it is not uncommon for disputes over tasks to arise because

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179. *Id.* at 23,303.

180. *Organized Migrants in Cmty. Action, Inc. v. Brennan*, 520 F.2d 1161 (D.C. Cir. 1975).

181. *Id.*

182. *Train v. Colo. Pub. Interest Research Grp., Inc.*, 426 U.S. 1, 25 (1976); *see also* Goldsmith, *supra* note 11, at 105–06.

183. *See* Note, *Judicial Resolution of Inter-Agency Legal Disputes*, 89 YALE L.J. 1595, 1599 n.16 (1980) (discussing the Department of Justice's defense of the EPA's claim of jurisdiction to regulate emissions in air space against that of Interior).

184. *California v. Kleppe*, 604 F.2d 1187, 1198–99 (9th Cir. 1979).

185. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 801, 104 Stat. 2399, 2685 (1990) (codified at 42 U.S.C. § 6727 (2006)).

changes in the regulated environment or the introduction of a new agency or regulatory scheme create uncertainty about the jurisdictional boundaries among agencies. As agencies adapt to the new regulatory environment, multiple agencies may seek to perform the same tasks. The disputes are ultimately resolved when agencies' overseers or the agencies themselves set new expectations and jurisdictional bounds that determine agencies' behavior in the changed regulatory environment.

### III. IMPLICATIONS

In the previous Part, I showed how Congress and the White House rely on *ex post* institutions to screen out duplication among agencies with duplicative delegations. In this Part, I assess the effectiveness of these *ex post* institutions. I argue that these institutions are more efficient than leading normative theories and models assume and that existing antiduplication efforts need not be substantially reformed. I also assess how duplicative delegations alter the balance of powers among the branches of government. I show how duplicative delegations provide the Executive more discretion than it usually has to determine which agency performs a task. I then argue that, because the Executive is better than the Judiciary at allocating tasks among agencies, courts should defer to executive arrangements reconciling duplicative delegations.

#### A. *Implications for the Elimination of Duplication*

Early public administration scholars often railed against duplication as a hindrance to efficient government and advocated for the elimination of interagency duplication.<sup>186</sup> Today, commentators still bemoan the amount of duplication that persists among regulatory agencies despite the efforts of existing antiduplication institutions, and they call for Congress and the White House to do significantly more to eliminate duplication.<sup>187</sup> In this section, I argue that—when it comes to the elimination of duplication—the optimal course of action for Congress and the White House is close to the status quo. Because it is too costly for Congress to eradicate the statutory sources of duplication, Congress should rely instead on comparatively cheaper, existing *ex post* institutions to screen out duplication. Moreover, because these *ex post* institutions also have significant costs, there are limits to how much more duplication should be screened out *ex post*. At some

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186. See ARNOLD, *supra* note 58, at 326–27.

187. See Kavanaugh, *supra* note 16, at 1475 (“Congress and the administration should seek to better organize the executive branch, eliminating overlapping responsibilities . . .”); see also O’Connell, *supra* note 17, at 1701 (noting that elected officials’ calls for “‘cutting duplication’ plays well to constituents”).

point, the costs of removing duplication will outstrip the costs from the duplication itself. Ultimately, in such a large regulatory system, some amount of duplication is not only inevitable but cost-effective.

At the outset, to reduce duplication, Congress could do more during the drafting process to prevent duplicative delegations from arising in the first place. However, the costs of legislating in ways that do not create duplicative delegations are prohibitive. As discussed earlier, Congress does not have the time or resources to harmonize every new delegation with ones that came before in order to avoid duplication. Although Congress could avoid some duplicative delegations by drafting narrower delegations, such delegations deprive agencies of the flexibility needed to address changes in the regulated environment.

After agencies start to issue duplicative regulations, Congress may use the potent tool of agency consolidation to attempt to eliminate the duplication. However, agency consolidation has severe costs and limits. Agency consolidation generates short-term uncertainty about the new agency's regulatory tasks and jurisdictional bounds, and generates the one-time cost of actually having to assemble a new agency.<sup>188</sup> But perhaps more problematic are the potential coordination costs that limit the applicability of agency consolidation. Agency consolidation to coordinate agency actions along one policy axis inevitably aggravates coordination problems along other policy axes. Take the creation of the Department of Homeland Security (DHS). Several agencies that were transferred to the Department perform functions that are not strictly security functions. These agencies must now coordinate their nonsecurity functions with agencies in the departments that they came from. For example, DHS received parts of the USDA's agricultural inspection service.<sup>189</sup> Now, DHS's agricultural inspection service must coordinate its actions with its former sister agencies in the USDA. Similarly, the Coast Guard was transferred from DOT to DHS.<sup>190</sup> Now, the Coast Guard "coordinate[s] with the Department of Transportation for the peacetime maintenance of the coast."<sup>191</sup> Overall, because of these potential coordination costs, agency consolidation is only worthwhile as an antiduplication institution when the agencies being

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188. See Cohen et al., *supra* note 18, at 710–11 (describing the effects of agency consolidation, which can include reorganization, reshaping of agency activities, and negative repercussions ranging from monopolistic control over a government function to decreased efficiency within the agency).

189. 6 U.S.C. §§ 231 (2006).

190. *Id.* § 468(b).

191. NORMAN M. WADE, *THE JOINT FORCES OPERATIONS & DOCTRINE SMARTBOOK: GUIDE TO JOINT, MULTINATIONAL & INTERAGENCY OPERATIONS*, at 1-26 (2d rev. ed. 2009).

consolidated perform substantially similar functions that sensibly should be grouped together in a single hierarchical management structure. However, even with agencies that have similar functions, if other antiduplication institutions are capable of reducing duplication and conflict among the agencies to acceptable levels, then consolidation may still prove too costly and risky. Overall, consolidation is not a panacea for duplication and conflict in the regulatory system. It may make sense in some regulatory areas—such as food safety regulation and financial regulation, where multiple agencies are performing substantially similar functions. But in many instances, it is wiser to forgo the costs and risks that accompany consolidation and leave it to *ex post* antiduplication institutions to screen out duplication as best they can.

Other antiduplication institutions also have costs. Regulatory delay is probably the most significant of these costs. Indeed, most of the antiduplication institutions discussed in this Article have been criticized for how they delay regulatory action. For example, a large body of literature has discussed how notice-and-comment rulemaking delays regulatory action in part because agencies take a long time to “write the lengthy preambles and technical support documents and to address public comments on proposed rules.”<sup>192</sup> The requirement under the Regulatory Flexibility Act that agencies prepare a flexibility analysis with their proposed rulemakings may bring about similar delays. Likewise, OIRA review of proposed regulations has been criticized for generating regulatory delays.<sup>193</sup> Reforms instituted by the Clinton Administration cut down those delays by requiring that OIRA analysts take no more than ninety days to review a typical regulation.<sup>194</sup> But such requirements highlight the trade-off at issue: avoiding duplication versus generating regulatory delay. OIRA analysts could likely catch more instances of duplication and conflict if they had more time, but giving them more time delays regulatory action. Perhaps OIRA could review regulations faster and without sacrificing results if the agency were given more resources and personnel. But of course, resources and personnel represent costs too. My point here is not

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192. Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1387 (1992); see also Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 70 (2000) (arguing that notice-and-comment rulemaking has “encouraged parties to marshal an enormous volume of irrelevant evidence, adopt extreme positions, and use information defensively”).

193. See, e.g., Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1280–82 (2006) (stating that deregulatory measures need not undergo OIRA review, thus giving deregulatory measures an advantage over proregulatory alternatives).

194. Exec. Order No. 12,866 § 6(b)(2)(B), 3 C.F.R. 638, 647 (1993).



that OIRA review and these other antiduplication institutions as presently constituted are inefficient. Rather, my point is that these antiduplication institutions come with costs—the most important of which is regulatory delay—that limit how much duplication they can and should be tasked with eliminating.

Antiduplication institutions administered by the Executive Branch—in particular OIRA review, OMB oversight, and the use of White House czars—have also been criticized for expanding presidential control over agency decisions.<sup>195</sup> The critiques of all three institutions center on concerns that increased presidential involvement in regulatory matters may overpoliticize regulatory decisions and move policies away from congressional preferences.<sup>196</sup> Of course, proponents of strong presidential involvement have advanced counterarguments.<sup>197</sup> I do not intend to wade into this normative debate here. My point is only that Executive-administered antiduplication institutions come at the expense of whatever one sees the cost of expanded presidential involvement to be.

Overall, there is no reason to think that the elimination of duplication has been a disregarded function because political actors—the Executive in particular—have incentives to reduce duplication. It may be cost-effective to augment the resources dedicated to existing antiduplication institutions such as OIRA review and OMB oversight. But the additional resources will only help on the margins. Moreover, any massive new efforts to eliminate duplication will come with their own costs—costs which may outweigh the costs of the duplication itself. There is no panacea for duplication. If the cost-effective reduction of duplication is the goal, then ironically, it is efficient to let some amount of duplication persist.

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195. For critiques of OIRA review and OMB involvement in agency decisionmaking, see Bressman & Vandenberg, *supra* note 113, at 71 (reporting that 60% of EPA respondents surveyed said that “OIRA involvement never or rarely helped to avoid inconsistencies” between EPA regulations), Croley, *supra* note 113, at 822, 827, and Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1135, 1140 (2010) (exploring the pros and cons of presidential oversight of the regulatory process). For critiques of White House czars, see Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 641–42 & n.22 (2010) (noting criticism of President Obama’s repeated use of policy czars), and Farina, *supra* note 135, at 407 n.233 (citing two Senate hearings on Obama’s use of czars).

196. See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 504–05 (2003) (arguing that the President has “unfettered discretion” to use agencies to the benefit of his supporters).

197. See Kagan, *supra* note 110, at 2335, 2339–46 (stating that the President’s national constituency provides strong incentives to ensure the effectiveness of agency actions). See generally Pildes & Sunstein, *supra* note 113 (discussing presidential power to regulate agency matters in the context of Executive Order 12,866).

*B. Implications for Bureaucratic Redundancy and Agency Competition*

Legal scholars have recently begun to note the virtues of valuable forms of duplication among agencies—such as healthy agency competition and bureaucratic redundancies—that guard against regulatory failure.<sup>198</sup> Indeed, some have argued against policies that squelch duplication among agencies because these policies eliminate valuable forms of duplication.<sup>199</sup> In this view, the question becomes whether Congress and the Executive should reform their antiduplication efforts to avoid screening out valuable forms of duplication. In this section, I rely on bureaucratic redundancy theory and public choice models of agency competition to show that redundancies and competitions among agencies with duplicative delegations are generally not cost-effective. Thus, Congress and the White House need not reform their general antiduplication efforts to promote these forms of duplication. Moreover, I argue that, in the exceptional circumstances when competition or redundancy is cost-effective, Congress or the White House should directly order agencies to compete or perform redundant tasks—and thus avoid any ambiguity in agency officials' minds about whether they are expected to coordinate or duplicate each other's efforts.

*1. Bureaucratic Redundancy*

Redundancy theory grew out of studies of complex mechanical systems. The basic idea is that, by adding redundant parts to a system, the probability that the system as a whole will fail may decrease. For example, consider an automobile with dual breaking circuits.<sup>200</sup> Assume that a malfunction in one circuit does not affect the performance of the other circuit. If the probability of one circuit malfunctioning is 1/10, then the probability of both circuits malfunctioning at the same time is 1/100. Introduce a third circuit and the probability that the breaks will fail drops to 1/1000. The key point is that a system properly engineered with

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198. See Cohen et al., *supra* note 18, at 710–11 (listing five arguments in support of duplication); Gersen, *supra* note 18, at 211–12 (claiming that Congress can incentivize jurisdictional overlap to bring agencies closer to congressional preferences); Katyal, *supra* note 17, at 2324 (noting that creation of the House and Senate is an example of a constitutional redundancy); O'Connell, *supra* note 17, at 1657 (advocating balance between unification and redundancy); Nancy Staudt, *Redundant Tax and Spending Programs*, 100 NW. U. L. REV. 1197, 1200–01 (2006) (adding that diversity of expertise fosters innovation and creative problem solving); David A. Weisbach, *Tax Expenditures, Principal-Agent Problems, and Redundancy*, 84 WASH. U. L. REV. 1823 (2006) (claiming that redundancy might increase the use of tax expenditures).

199. See Cohen et al., *supra* note 18, at 710–11; Gersen, *supra* note 18, at 211–12.

200. See BENDOR, *supra* note 40, at 26.

redundant parts may have a lower probability of system failure than a system with no such safeguards built in.

However, redundancy theory does not counsel in favor of rampant redundancies. Rather, it shows only that redundancies are desirable when they are cost-effective. Dual braking circuits in cars may prove cost-effective because the potential magnitude of harm is high when braking systems fail and the cost of installing additional braking circuits is relatively low, but dual car radios or dual spare change holders may not be cost-effective because the magnitude of harm from system failure is low. The goal is to discover those areas where redundancies are cost-effective and build the redundancies there.

In 1969, Martin Landau first applied redundancy theory to bureaucratic systems to challenge the public administration dogma that the “wholesale removal of duplication and overlap” is ideal.<sup>201</sup> He argued that having more than one agency perform the same task may reduce the risk of administrative failure in much the same way that redundant circuits may reduce the risk of mechanical failure.<sup>202</sup> Subsequent political scientists have expanded the theory to include notions of interagency diversity. The basic idea here is that different agencies—because of their different expertise, internal processes, interests, and statutory mandates—will take different approaches to the same problem and thus make it more likely that at least one agency will hit on the right approach.<sup>203</sup> Bureaucratic redundancy theory has recently migrated from political science into administrative and constitutional law.<sup>204</sup> Professor Neal Katyal expressly draws on the theory when he argues that “reliance on just one agency is risky. It is a form of ‘administrative brinkmanship.’”<sup>205</sup>

However, bureaucratic redundancies are not cost-effective for most regulatory tasks. There are two reasons. First, the costs of bureaucratic redundancies are significant. These costs include the following: public budgetary expenses, burdens on regulated entities that must comply with two agencies’ regulations, increased monitoring costs because agency

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201. Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346, 348 (1969).

202. *Id.* at 349.

203. See BENDOR, *supra* note 40, at 49 (using mathematics to illustrate that redundant systems are always at least as likely to be successful and sometimes more likely); Weisbach, *supra* note 198, at 1839 (explaining redundancy as diversification of risk).

204. See Katyal, *supra* note 17, at 2324 (noting that “academic concern focuses on the extent to which the President and Congress should control agency decision-making”); O’Connell, *supra* note 17, at 1678, 1703 n.274; Weisbach, *supra* note 198 (examining the principle-agent problem and agency redundancy in the context of tax policy); Staudt, *supra* note 198, at 1214–22.

205. Katyal, *supra* note 17, at 2324 (quoting Landau, *supra* note 201, at 354).

overseers have more bureaucrats to oversee for each regulatory problem, interagency conflicts that distract agencies from more important regulatory matters and may generate incoherent regulatory policies, free riding by agencies that assume other agencies are on top of regulatory problems, and opportunity costs from having an agency perform a redundant task instead of focusing on other tasks. Opportunity costs are one of the most significant of these costs. Agencies have limited resources and attention spans.<sup>206</sup> When an agency performs a redundant task, it is not focusing on other potentially critical tasks.

Because of these potentially high costs, bureaucratic redundancies are most often worthwhile when the redundant agency provides a significant benefit by safeguarding against high-magnitude harm. Unsurprisingly, many examples of redundancies among executive agencies come in areas where there are potentially catastrophic or irreversible risks from agency failures. For example, multiple agencies gather intelligence to prevent terrorist attacks,<sup>207</sup> and both the Departments of Commerce and the Interior must sign off on orders to delist some species from the Endangered Species List.<sup>208</sup> These redundancies are likely cost-effective because they reduce the risk of catastrophic and irreversible harms.<sup>209</sup> However, these redundancies are also expressly ordered by the White House and Congress and thus are not susceptible to being screened out by antiduplication institutions, which are generally designed to catch unwanted duplication. Thus, the benefits from these mandated redundancies provide no reason to reform the application of antiduplication institutions.

The second reason that bureaucratic redundancies are not cost-effective for most regulatory tasks: some of the benefits from redundancies may be captured through intraagency redundancies that are cheaper to maintain than interagency redundancies. For example, the Department of Energy retains three nuclear weapons laboratories to ensure “the safety and reliability of the nuclear weapons stockpile in the absence of nuclear testing.”<sup>210</sup> Some of the benefits from redundancy accrue even though the redundancies here are intraagency—and they accrue without the addition

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206. See Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 69 (2008).

207. See O’Connell, *supra* note 17, at 1660–62 (describing the growth of the intelligence community after the 9/11 attacks).

208. 16 U.S.C. § 1533(a)(2)(B)–(C) (2006).

209. For a discussion of catastrophic and irreversible risks, see generally CASS R. SUNSTEIN, *WORST-CASE SCENARIOS* (2007).

210. Presidential Statement on the Future of Federal Laboratories, 31 WEEKLY COMP. PRES. DOC. 1708, 1708 (Sept. 25, 1995), available at <http://clinton3.nara.gov/wh/eop/ostp/nstc/html/pdd5.html>.

of the coordination costs that would arise if the labs were scattered throughout multiple departments and thus under the oversight of different management structures. This is not to say that intraagency redundancies are perfect substitutes for interagency redundancies. Interagency redundancies—by staffing two agencies with potentially diverse skills and viewpoints—are stronger than intraagency redundancies in some instances. However, in other instances intraagency redundancies will prove more cost-effective. Moreover, intraagency redundancies are the responsibility of the agency head and are generally not subject to antiduplication institutions, which focus on interagency redundancies.

Ultimately, most duplication subjected to antiduplication institutions does not involve tasks that satisfy the conditions necessary to make interagency bureaucratic redundancies cost-effective. In the rare occasion when duplicative delegations entail tasks for which interagency redundancies are cost-effective, Congress or the White House can explicitly direct agencies to perform redundant functions—as they have proven capable of doing in the antiterrorism and endangered species contexts. Such direct instruction is preferable because it helps avoid confusion about how agencies should behave given potentially contrary signals sent to agencies from antiduplication institutions. Overall, so long as Congress and the White House direct agencies to perform redundant tasks when desirable, there is no reason to reform antiduplication institutions generally in order to ensure that beneficial redundancies are not screened out.

## 2. *Agency Competition*

Public choice models of agency competition emerged around the same time as bureaucratic redundancy theory. These models also were designed to question the canon of public administration that favors coordinating the behavior of agencies with similar powers to avoid duplication.<sup>211</sup> The models—by analogizing public agencies to private, profit-seeking firms—show how competition among agencies may generate valuable information for agencies' congressional principals. There are several variants of models of agency competition. I focus on two influential variants that are most relevant to the duplicative delegations issue—what I will call the price competition model and the jurisdictional competition model.<sup>212</sup> Under these models, competition is generally considered a “natural” tendency for

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211. WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 196 (1971).

212. Cf. Kathleen A. Carroll, *Bureau Competition and Inefficiency: A Reevaluation of Theory and Evidence*, 13 J. ECON. BEHAV. & ORG. 21 (1990) (calling the same models “Niskanen-type models” and “models of bureaucratic conduct,” respectively).

agencies.<sup>213</sup> Thus, even if Congress does not draft duplicative delegations with the intent to spur agency competition, the duplicative delegations may nevertheless generate valuable competition because agencies are prone to compete when given the chance. If one accepts the models' assumptions, the loss of beneficial interagency competition is one of the costs of avoiding duplication through antiduplication institutions. Indeed, the models suggest that Congress and the White House should not continue to apply antiduplication institutions that prevent duplication generally and should instead selectively encourage those duplications that generate beneficial competition. William Niskanen—the original developer of the price competition model—argues along these lines. He asserts that more beneficial “competition would develop if it were not artificially constrained”<sup>214</sup> by public policies that favor “the coordination of similar government services [and] the elimination of redundancy and overlap.”<sup>215</sup> Several legal scholars have also adopted the position that some antiduplication institutions will squash beneficial interagency competition. For example, Professor Mariano-Florentino Cuéllar and his coauthors argue that agency consolidation “can diminish the competition among agencies.”<sup>216</sup> However, the problem with such conclusions is that—at least to the extent that the conclusions are based on public choice models of agency competition—they rest on highly questionable assumptions about bureaucratic and legislative behavior and processes. I conclude that, while there are some potential benefits from agency competition, the benefits are not as robust as the models predict and there is little risk that antiduplication institutions will squelch beneficial competition.

*a. A Price Competition Model*

The price competition model predicts that duplication among agencies provides valuable information to Congress about how much it costs an agency to provide a service—information that Congress may use to make wiser decisions during the appropriations process. When agencies with duplicative delegations avoid duplication, they deprive Congress of this cost-saving information.

Under this model, agency officials want to maximize the size of their

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213. William A. Niskanen, *Competition Among Government Bureaus*, 22 AM. BEHAV. SCIENTIST 517, 518 (1979).

214. NISKANEN, *supra* note 211, at 196–97.

215. Niskanen, *supra* note 213, at 518.

216. Cohen et al., *supra* note 18, at 710–11 (referring to the diminishment of beneficial competition); *see also* Merrill & Francer, *supra* note 2, at 133 (“Consolidation could also sacrifice the benefits of competition among agencies.”).

budgets.<sup>217</sup> Thus, the officials submit budget requests to Congress that are higher than needed to provide their agency's services.<sup>218</sup> Congress is ignorant about the agency's true production costs and ends up approving a budget that is higher than necessary for the agency to efficiently provide its services—thus wasting taxpayer dollars.<sup>219</sup> The price competition model suggests that Congress may constrain an agency's highball budgetary requests by having two or more agencies provide duplicative services and submit funding requests for those services. This budgetary "competition among bureaus provides the [congressional] review committee a contemporary basis for comparison, making it easier to recognize unusually efficient or inefficient performance and to reward or penalize bureaus on this basis."<sup>220</sup> The price competition model predicts that these rewards and penalties—likely coming in the form of bigger budgets or expanded powers—will drive the competing agencies to become more efficient, thus saving taxpayer dollars.

Normatively, if the potential cost savings from competition are high enough, then Congress and the White House may want to relax the antiduplication institutions that push agencies to coordinate and avoid duplication. Instead, Congress and the White House may want to encourage more duplication that generates competition.

The problem with drawing this conclusion from the price competition model is that the model rests on several faulty assumptions about executive and legislative behavior and processes. First, the model assumes that bureaucrats are budget maximizers. But there is little reason to assume that bureaucrats care a lot about budgets because an agency's budget has no bearing on bureaucrats' salaries or working conditions. Indeed, bureaucrats may have a number of preferences that are uncorrelated or negatively correlated with the size of their agencies' budgets.<sup>221</sup> Second, the model assumes that agencies have the upper hand in budget negotiations with Congress—a highly dubious assumption given how much power Congress wields over agencies and given the evidence that congressional

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217. NISKANEN, *supra* note 211, at 36–42.

218. *Id.* at 155–68.

219. *Id.*

220. *Id.* at 160.

221. See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 932–33 (2005) [hereinafter Levinson, *Empire-Building*] (noting how bureaucrats may be motivated by self-interests that are contrary to the agency's purpose); see also Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 382–83 (2000) (explaining how bureaucrats may select more expensive means to accomplish their tasks to use up the budget and decrease their workloads).

committees are often stingy and push back on budget requests.<sup>222</sup> Third, the model assumes that price competition is the only tool available for Congress to learn about agencies' costs. However, Congress has other ways of learning about agencies' costs that are more cost-effective than price competition. Most obviously, Congress has tasked the Congressional Budget Office with providing "information and estimates required for the Congressional budget process."<sup>223</sup> Thus, before signing off on agencies' budgets, Congress has in hand its own estimates of the agencies' costs. Moreover, Congress may retrieve additional information on agencies' costs by ordering the Government Accountability Office to audit agencies. Finally, the model ignores the role that the White House plays in the budgeting process. Before agencies' budget requests go to Congress, they are screened by OMB.<sup>224</sup> Because the White House may push back on agencies' budget requests, the requests are often lower than the model assumes by the time they reach Congress.

Overall, it is highly questionable whether duplication among agencies leads to the sort of beneficial agency competition that the model predicts. It is plausible that duplication reveals some valuable information to Congress. But in the end, it appears that competition is not a cost-effective way for Congress to gain information about agencies' costs, given the high price of agency duplication. Thus, price competition is not a compelling reason for Congress and the White House to relax the application of antiduplication institutions.

*b. A Jurisdictional Competition Model*

The jurisdictional competition model of agency competition takes a view of the bureaucratic battlefield that goes beyond the appropriations process. The model suggests that having two agencies with duplicative delegations compete by performing the same tasks is beneficial because it allows Congress to compare the agencies' performances and ensure that agencies are acting in line with congressional preferences.

Under the jurisdictional competition model, agency officials want to expand their agencies' power and jurisdiction.<sup>225</sup> Two agencies with

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222. See Rudolph G. Penner, *The Congress and Statistics*, CHANCE, Fall 2003, at 54, 56, available at [http://www.urban.org/uploadedPDF/1000584\\_congress\\_and\\_stats.pdf](http://www.urban.org/uploadedPDF/1000584_congress_and_stats.pdf).

223. *About CBO*, CONG. BUDGET OFFICE, <http://www.cbo.gov/aboutcbo/> (last visited May 15, 2011).

224. See *The Mission and Structure of the Office of Management and Budget*, OFFICE OF MGMT. & BUDGET, [http://www.whitehouse.gov/omb/organization\\_mission/](http://www.whitehouse.gov/omb/organization_mission/) (last visited May 15, 2011) (detailing how OMB clears all bills that agencies send to Congress).

225. See ANTHONY DOWNS, *INSIDE BUREAUCRACY* 16–18 (1967) (exploring why agencies inherently seek to expand).



jurisdiction to perform the same tasks will compete for sole control of those tasks by trying to outperform each other.<sup>226</sup> Their performances are monitored and judged by Congress. Congress rewards the agency whose regulatory output is closer to Congress's preferences and punishes the agency whose performance is seen as lacking.<sup>227</sup> Rewards may include increased budgets and expanded jurisdiction; punishments may include decreased budgets and diminished jurisdiction. Here, the competition ensures that agencies will act according to Congress's wishes. In particular, if Congress cares about efficiency, then competition will drive the agencies to become more efficient.<sup>228</sup> The corollary point is that in the absence of competition, agencies will waste their resources.<sup>229</sup> Professor Jacob Gersen embraces this basic model of agency competition when he argues, "Giving authority to multiple agencies and allowing them to compete against each other can bring policy closer to the preferences of Congress than would delegation to a single agent."<sup>230</sup>

But again, there are several problems with drawing these conclusions from the jurisdictional competition model. First, there is little reason to assume that removing institutions that influence agencies to coordinate and avoid duplication will actually produce robust agency competition. The reason is that although agency officials may want more power and jurisdiction, they may also want any number of things that would lead them to avoid competing with other agencies' officials. For example, officials may want to minimize their public failures—and thus avoid tasks that they cannot expertly perform or that come with a high risk of failure.<sup>231</sup> They may want to maximize their leisure time—and thus abdicate tasks instead of taking on new ones.<sup>232</sup> They may want to maximize their competence at

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226. BENDOR, *supra* note 40, at 55–56 (emphasizing that agencies will fight one another for jurisdiction).

227. See Gersen, *supra* note 18, at 212–13 (stating that Congress can effectively take advantage of agency knowledge by threatening an agency with jurisdictional loss for failing to invest in expertise); O'Connell, *supra* note 17, at 1704; Ting, *supra* note 38, at 287 (asserting that principals can lead agents to compete against one another with relative ease when redundancy exists).

228. See DOWNS, *supra* note 225, at 200 ("When faced by a threat from functional competitors, a bureau is likely both to invent better ways of performing its functions and to attack its competitors.").

229. See *id.* (explaining that agencies not facing competition must "continue to look busy" during slow periods so Congress will not cut its size or importance).

230. Gersen, *supra* note 18, at 212.

231. See C.F. LARRY HEIMANN, *ACCEPTABLE RISKS* 18 (1997) (asserting that the "cardinal rule" governing agency activity is avoiding visible failures).

232. See Levinson, *Empire-Building*, *supra* note 221, at 933 (describing this subset of bureaucrats as "stereotypical").

work—and thus focus on expertly performing only a small core set of traditional tasks.<sup>233</sup> They may want a quiet life with settled, unvarying long-term assignments. Or they may want to maintain a pleasant work environment—and thus avoid antagonizing other bureaucrats and agencies by trying to take over their tasks. Overall, there are a number of preferences that bureaucrats may have. The most that can be claimed about bureaucrats as competitive expansionists is that some bureaucrats some of the time may want to expand the size and power of their agency.

Second, even if agencies were motivated to compete with each other, it is questionable whether congressional oversight is set up to properly encourage and reward efficient competition. For agency competition to prove efficient, Congress must monitor the agencies' performances well enough to accurately determine which agency performed more to its liking. However, it is doubtful that Congress invests enough resources in monitoring mundane agency competitions to accurately determine the winner. Much congressional oversight is triggered by public complaints about regulatory failure.<sup>234</sup> But in the absence of salient failures, Congress may not pay close enough attention to differences in agencies' everyday performances in order to accurately determine which agency is performing better on a specific regulatory task. Moreover, Congress's accuracy may be further hurt because congressional oversight committees are often biased in favor of the agencies they oversee.<sup>235</sup> That is, in competitions between two agencies under the oversight of two different committees, each committee may push for its agency—regardless of how it performed.

Furthermore, the benefits of jurisdictional competition depend on Congress rewarding agencies that perform well and penalizing those that do not. But Congress may reward agencies that are seen as having failed—if rewards are understood to mean bigger budgets and more power—because Congress may believe that it is better to give the agencies more resources so they can prevent future failures instead of punishing them for past failures. Consider that the House recently proposed new powers for

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233. See WILSON, *supra* note 153, at 181–82 (discussing by way of example USDA's distaste for the food stamp program).

234. See Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 274 (1987) (explaining that administrative procedures allow the public to voice its displeasures with agency policies before those agencies have fully committed to them); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 176 (1984) (arguing that Congress benefits by allowing the public to pull the “fire alarm” when agencies fail to comply with Congress's objectives).

235. See generally DeShazo & Freeman, *supra* note 41 (positing that committee agencies may favor those agencies that allow them to “further their own interests”).

the FDA after it was blamed for failing to prevent food-borne illnesses instead of granting those powers to other agencies such as the USDA.<sup>236</sup> Similarly, Congress expanded the powers of the Federal Reserve after it was blamed for contributing to the collapse of the entire U.S. economy, despite calls for Congress to punish the agency by shifting some of its jurisdiction and power to other agencies.<sup>237</sup> Such rewards for regulatory failure do not induce the kind of competitive efficiencies envisioned by the jurisdictional competition model. Overall, it is far from certain that congressional oversight is set up for agency competitions.

Finally, even if changing agencies' incentives would produce robust competition that was accurately monitored and rewarded by Congress, it remains questionable whether such direct competition is cost-effective. Indirect competition may produce much of the benefit of direct competition but without the costs of duplication and interagency conflict.<sup>238</sup> By indirect competition, I mean agencies' competition for jurisdiction and power that does not entail duplication and head-to-head competition over the exact same tasks. Consider that a single agency performing a task still faces pressure from the possibility that, if it does not perform the task to the legislators' liking, Congress may replace it with another agency. An agency does not need to witness another agency performing the same task to know that its congressional bosses will look elsewhere if they are not happy with the agency's performance.

Overall, jurisdictional competition among agencies with duplicative delegations is generally not cost-effective. The jurisdictional competition model provides little justification for Congress and the White House to reform their antiduplication efforts to focus more on promoting competition than reducing duplication.

### *C. Implications for Separation of Powers*

In the previous two sections, I analyzed duplicative delegations with reference to normative theories and models of interagency duplication. In this section, I analyze duplicative delegations with reference to constitutional separation of powers. In particular, I examine how duplicative delegations alter the balance of powers by affording the Executive significantly more discretion than it usually has to determine

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236. See generally Food Safety Enhancement Act of 2009, H.R. 2749, 111th Cong. (2009) (granting the FDA authority to cancel or suspend the registration of facilities that manufacture, process, pack, or hold food).

237. See Enhancing Financial Institution Safety and Soundness Act of 2010, Pub. L. No. 111-203, § 312(b)(1)(A), 124 Stat. 1520, 1521 (2010).

238. See Ting, *supra* note 38.

which agency performs a task.

When Congress delegates to a single agency, the President must act through that particular agency.<sup>239</sup> By contrast, when Congress delegates authority directly to the President, the President may retain that authority or subdelegate it to the inferior executive officer or agency of his choosing under his subdelegation powers.<sup>240</sup> There are significant benefits to according the President maximum discretion to empower agencies as he sees fit, but there are significant costs too—in particular the risk of arbitrary decisionmaking and abuse of power. As it turns out, duplicative delegations provide the Executive a level of discretion to allocate responsibilities among agencies that is less than the discretion accorded through delegation to the President but greater than the discretion accorded when Congress clearly delegates to a specific agency. With duplicative delegations, the Executive has discretion to select which agency should perform which tasks. But that discretion is limited to the few agencies with duplicative delegations and to the set of tasks covered by those delegations. This intermediate level of discretion captures some of the key benefits of delegating directly to the President but with fewer costs. Indeed, although duplicative delegations are largely unintended and incidental creations, the intermediate level of discretion they afford the Executive has proven beneficial in some regulatory contexts.

Significant trade-offs come from delegation to the President. First, delegation to the President may enhance democratic accountability by linking the exercise of administrative power to the office of the President, who is of course a nationally elected figure.<sup>241</sup> However, when Congress delegates to the President, Congress may then take a more laissez-faire

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239. See Kagan, *supra* note 110, at 2329 (explaining that when Congress delegates authority to an administrative official, it deprives the President of delegating that authority to the agency of his choice). Some have suggested that, under one reading of the Constitution, the President has the power to strip an agency of its congressionally delegated authority and reassign the authority to another agency. See Harold J. Krent, *The Sometimes Unitary Executive: Presidential Practice Throughout History*, 25 CONST. COMMENT. 489, 503 (2009) (reading proponents of a strong unitary Executive as appearing to support this proposition). However, this strong view of presidential power is not the dominant one. For the purposes of this Article, I will adopt the majority and most legally defensible position and assume that Congress's choice to delegate to a particular agency forces the President to act through that agency.

240. 3 U.S.C. §§ 301–303 (2006) (authorizing the President “to designate and empower the head of any department or agency,” contingent on appointment by the Senate, to fulfill “any function which is vested in the President by law”).

241. See Kagan, *supra* note 110, at 2331–32 (identifying two reasons for increased accountability: (1) enhanced public transparency, and (2) improved bureaucratic responsiveness to the public by establishing an electoral link).

approach to oversight—perhaps feeling that agencies acting under presidential delegations instead of congressional delegations are the responsibility of the President. If this is right, then delegation to the President sacrifices some of the benefits of interbranch oversight that come from our constitutional separation of powers. Thus, as a result of delegation to the President, accountability is strengthened because of a connection to the President, but accountability is hurt because congressional oversight of unelected bureaucrats may decrease.

Second, by virtue of his position atop the Executive hierarchy, the President is better situated than Congress to assign tasks to inferior executive agencies in ways that foster a coherent and efficiently hierarchical administrative structure. Delegation directly to the President exploits this comparative advantage.<sup>242</sup> However, delegation to the President also diminishes congressional input into the important question of which agency should regulate. It matters which agency regulates. Different agencies have different expertise and interests and will thus regulate in different ways. When the President alone decides which agency should act, the public is deprived of Congress's views on the matter—views that may reflect majority preferences.<sup>243</sup> Thus, as a result of delegation to the President, the decision about which agency should regulate is improved because of the President's comparative advantage in making such decisions, but the decision is hurt because of the loss of congressional input.

Third, delegation to the President accords the President flexibility to respond to fast-changing or new regulatory problems by assigning oversight to the agency with the greatest expertise and ability to adapt to the new problem without the lengthy delays that come from the congressional process. However, delegation to the President also enables arbitrary decisionmaking by the President.<sup>244</sup> Different agencies have different

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242. See ARNOLD, *supra* note 58, at 17 (describing two theorists' views within the emerging field of public administration that the Executive should have primary administrative delegation authority).

243. See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 59–60 (1998) (explaining how demands from interest groups cause legislators in Congress to make compromises, although it is debatable whether the outcome truly reflects the general public's interests); Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 451, 456–57 (1987) (claiming that “accountability is attenuated, not enhanced,” when presidential intervention controls administrative decisionmaking).

244. See Bressman, *supra* note 196, at 525 (noting that the Supreme Court in *Schechter Poultry* and *Panama Refining* invalidated large delegations to the President because they increased “the possibility of arbitrary action to unacceptable levels”); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 269 (2006) (describing consequences of congressional delegations to the President, including the

interests and internal decisionmaking processes, which will yield different policy outcomes. From the array of agency decisionmaking processes to choose from, the President may select an agency for arbitrary reasons. Moreover, the Supreme Court has held that the APA does not apply to the President.<sup>245</sup> Therefore, when Congress delegates to the President, it enables the President to ignore the procedural constraints of the APA—although the APA would apply if the President subdelegated authority to an agency. Ultimately, as a result of delegation to the President, the President is free to respond to changes in the regulatory environment by quickly shifting responsibility among agencies, but this time-saving benefit comes with the risk of arbitrary decisionmaking by the President.

In short, when Congress delegates to the President, it gives the President maximum discretion to decide which agencies should perform which tasks. This discretion comes with significant benefits and costs. As it turns out, duplicative delegations provide the Executive an intermediate level of discretion that captures some of these key benefits but with fewer costs.

Duplicative delegations provide a menu of agencies from which the President may select which agencies should perform which tasks—assuming the President cares enough about the regulatory matter at hand to become involved instead of leaving it to the agencies to divide tasks among themselves. This discretion allows the President to organize the relationship among agencies with duplicative delegations in a coherent and efficient manner. It affords the President flexibility to shift responsibility among agencies in response to changes in the regulatory environment. And, it enhances accountability by linking the agencies' responsibilities to the President.

At the same time, the President's discretion is subject to significant constraints. The President's decision set is limited to only those agencies with duplicative delegations and to only those tasks that fall under these delegations. Thus, the President cannot comprehensively reorganize the allocation of regulatory tasks without congressional approval. The President cannot act himself, and thus the APA will apply to whichever agencies the President decides should act. Moreover, congressional oversight committees remain invested in the balance of powers among agencies with duplicative delegations—thus retaining the benefits of interbranch oversight. Indeed, Congress has on occasion blocked agreements among agencies with duplicative delegations that it disliked.<sup>246</sup>

This intermediate level of executive discretion afforded by duplicative

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possibility of unilateral presidential action).

245. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

246. *See infra* notes 272–75 & accompanying text.

delegations has proven beneficial on some occasions. Consider the regulation of surface mining. In response to recent studies showing the adverse and irreversible environmental impact of surface mining, the Obama Administration decided to develop new regulatory guidelines to minimize environmental harms from such mining operations.<sup>247</sup> Both Interior's Office of Surface Mining (OSM) and the EPA have authority to regulate the environmental impact of surface mining.<sup>248</sup> In the past, OSM has been the primary federal agency in charge of developing best management practices for surface mining. However, OSM has come under fire for its lax and inept enforcement of environmental regulations.<sup>249</sup> Thus, the Obama Administration chose the EPA and not OSM to take the lead in developing and enforcing new best management practices for surface mining operations.<sup>250</sup> In short, duplicative delegations between two agencies enabled the Executive to rely on one agency when the other agency may not have been up to the task at hand.

The level of executive discretion resulting from duplicative delegations also proved beneficial when the spread of GMOs in the 1980s created significant regulatory problems. The regulatory problems called for the expertise of the FDA, EPA, and USDA, but the decades-old authorizing statutes for those agencies provided little guidance on how to divide the tasks confronting them.<sup>251</sup> However, duplicative delegations in those statutes enabled the White House to craft a coordinated framework for the regulation of GMOs that allocated regulatory responsibility to each agency based on its expertise and capabilities. The White House was able to craft such a resolution faster than new legislation assigning roles to the agencies could have been passed by Congress. As the introduction to the coordinated framework acknowledges, dividing responsibilities among the agencies under their existing statutes provided "more immediate regulatory

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247. MEMORANDUM OF UNDERSTANDING AMONG THE U.S. DEPARTMENT OF THE ARMY, U.S. DEPARTMENT OF THE INTERIOR, AND U.S. ENVIRONMENTAL PROTECTION AGENCY (June 11, 2009), <http://www.osmre.gov/resources/ref/mou/ASCM061109.pdf>.

248. The Office of Surface Mining (OSM) has authority under the Surface Mining and Control Reclamation Act. 30 U.S.C. §§ 1201–1328 (2006). The EPA has authority under the Clean Water Act. 33 U.S.C. §§ 1251–1376 (2006).

249. See, e.g., Ken Ward, Jr., *OSM "At a Crossroads," Rahall Says*, CHARLESTON GAZETTE & DAILY MAIL, Apr. 12, 2009, at B1.

250. See Complaint at 37, *Nat'l Mining Ass'n v. Jackson*, No. 1:10-cv-01220 (D.D.C. July 20, 2010) (alleging that the EPA's rejections of existing practices and implementations of new ones that are not evaluated by OSM "invade and disrupt" Congress's authority).

251. See Gregory N. Mandel, *Gaps, Inexperience, Inconsistencies, and Overlaps: Crisis in the Regulation of Genetically Modified Plants and Animals*, 45 WM. & MARY L. REV. 2167 (2004) (arguing that the regulatory system has failed to efficiently adapt to advances in biotechnology).

protection and certainty for the industry than possible with the implementation of new legislation.”<sup>252</sup> In short, duplicative delegations enabled the Executive to quickly craft a relatively coherent approach to a new, important technology that implicated multiple agencies’ expertise.

Ultimately, duplicative delegations afford the Executive an intermediate level of discretion to choose among agencies when assigning tasks. This discretion is sometimes beneficial. This is not to say that Congress should purposefully create duplicative delegations. If Congress wants the Executive to have some discretion in this regard, it can clearly and expressly provide the Executive with a choice of specified agencies—thus reducing the *ex post* coordination and review costs that come from the ambiguity of duplicative delegations. Indeed, Congress has granted the Executive such discretion on occasion. For example, Congress has established, “Either the Secretary of Agriculture or the Secretary of Energy may be the Secretary concerned in the case of any biomass energy project” that has certain specified characteristics.<sup>253</sup> But even when Congress does not set out with the goal of granting the Executive some discretion to determine which agency regulates, it often does so anyway by unintentionally or incidentally creating duplicative delegations. These duplicative delegations generate their share of *ex post* coordination and review costs. But they also provide the Executive a level of discretion that turns out to be beneficial when one agency is not up to the task at hand or when a relatively rapid regulatory response is needed.

#### D. Implications for Statutory Interpretation

In this section, I build on the analysis in the previous section by offering a separation of powers based argument for how courts should reconcile duplicative delegations. In particular, I propose an interpretive default rule under which courts would defer to executive arrangements reconciling duplicative delegations.

Recall that duplicative delegations cases arise either in suits challenging an agency action on the grounds that Congress wanted another agency to exercise jurisdiction, or in suits to compel agency action when the agency argues that another agency has jurisdiction. These cases often require courts to reconcile one agency’s governing statute with another agency’s governing statute to determine whether both or only one (and if so, which one) of the agencies has authority to regulate. Under *Chevron*, an agency has interpretive authority over silences and ambiguities in its own

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252. Coordinated Framework for Regulation of Biotechnology, 51 Fed. Reg. 23,302, 23,303 (June 26, 1986).

253. 42 U.S.C. § 8812(a)(2)(A) (2006).



authorizing statutes, and courts must defer to the agency's interpretations as long as they are reasonable.<sup>254</sup> However, "an agency decision is not entitled to such deference when it interprets another agency's statute or resolves a conflict between its own statute and the statute of another agency."<sup>255</sup> The question becomes, in duplicative delegations cases in which only one agency is a party, how should courts reconcile the duplicative delegations if the views of the agency at bar are not entitled to deference?

Some courts in duplicative delegations cases have looked to executive arrangements—such as interagency agreements and understandings between the agencies involved—and then accorded some deference to the agencies' collective position on how to reconcile the duplicative delegations (as opposed to the position of the single agency at bar). For example, when an advocacy group challenged a USDA regulation on the grounds that jurisdiction belonged to the FDA, not the USDA, the D.C. Circuit observed that "the two agencies are in agreement on the question now before us, and that agreement in itself is highly significant."<sup>256</sup> Similarly, when a regulated entity challenged an action by FERC on the grounds that the Securities and Exchange Commission (SEC) had exclusive jurisdiction over the matter, the Supreme Court gave some weight to the fact that the "longtime understanding and practice" of the agencies supported the FERC's exercise of jurisdiction.<sup>257</sup>

However, other courts have refused to give weight to interagency arrangements. For example, consider the Seventh Circuit's treatment of an interagency agreement between the SEC and the Commodities Futures Trading Commission (CFTC). As the court stated, "The CFTC regulates futures and options on futures, [while] the SEC regulates securities and options on securities."<sup>258</sup> Some new financial options can reasonably be characterized as either options on futures or options on securities, and thus either the CFTC or SEC can reasonably assert authority over these instruments.<sup>259</sup> In one case involving such a hybrid financial instrument,

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254. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *see also* Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 689 (2007) (describing *Chevron's* "global default rule").

255. *Dep't of the Navy v. Fed. Labor Relations Auth.*, 836 F.2d 1409, 1410 (3d Cir. 1988); *see also* *N.J. Air Nat'l Guard v. Fed. Labor Relations Auth.*, 677 F.2d 276, 281 n.6 (3d Cir. 1982).

256. *Pub. Citizen v. Foreman*, 631 F.2d 969, 975–76 (D.C. Cir. 1980).

257. *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 80 (1990).

258. *Chi. Mercantile Exch. v. SEC*, 883 F.2d 537, 539 (7th Cir. 1989).

259. *See id.* at 539–48 (holding that the instrument in this case, the index participation, is subject to the jurisdiction of the Commodities and Futures Trading Commission, not the SEC).

the two agencies had entered into an agreement that allocated authority to the SEC.<sup>260</sup> However, when the question of which agency had jurisdiction arose before the Seventh Circuit, the court refused to defer to the terms of the interagency agreement and, after independently reviewing the facts and the agencies' statutes, decided that the CFTC had jurisdiction.<sup>261</sup> The court explained that it ignored the interagency agreement because "the two agencies cannot thereby enlarge or relinquish their statutory jurisdictions."<sup>262</sup> However, the dissenting judge chastised the court for ignoring the agreement and thereby "frustrat[ing] the efforts of the concerned regulatory agencies at compromise."<sup>263</sup>

Similarly, the Tenth Circuit declined to defer to an interagency agreement that switched jurisdiction over a facility from the Mining Safety and Health Administration (MSHA) to OSHA.<sup>264</sup> MSHA has jurisdiction over mining facilities, while OSHA has jurisdiction over most other workplaces.<sup>265</sup> The facility in question performed both mining and nonmining functions. The agencies' statutes are ambiguous as to which agency should exercise jurisdiction over such hybrid facilities.<sup>266</sup> The jurisdictional question arose in court after the facility challenged fines levied against it on the grounds that MSHA had exclusive jurisdiction and had improperly ceded its authority to OSHA.<sup>267</sup> The Tenth Circuit declined to defer to the agreement transferring oversight responsibility because the court was troubled by the "laissez-faire view regarding agency modification of legislatively invested authority."<sup>268</sup>

I suggest that these courts are misguided in failing to defer. As an interpretive default rule, courts should extend some deference to executive arrangements reconciling duplicative delegations. Existing doctrine is clear that, when statutes are ambiguous or silent regarding *how* an agency should regulate, then courts should defer to the Executive's decision about *how* to regulate.<sup>269</sup> The rationale behind such deference is that the Executive is better suited than the Judiciary to make technical and policy judgments about *how* to regulate.<sup>270</sup> The default rule I propose extends this same

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260. *Chi. Bd. of Trade v. SEC*, 677 F.2d 1137, 1142 n.8 (7th Cir. 1982).

261. *Id.*

262. *Id.*

263. *Id.* at 1184 (Cudahy, J., dissenting).

264. *United States v. Agronics, Inc.*, 164 F.3d 1343, 1344 (10th Cir. 1999).

265. *See id.* at 1344 n.3.

266. Brief of Appellee at 13–14, *United States v. Agronics, Inc.*, 164 F.3d 1343 (10th Cir. 1999) (No. 94-2258).

267. *Agronics*, 164 F.3d at 1343–44.

268. *Id.* at 1344.

269. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

270. *See* David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89

rationale to the question about *which* agency regulates. When statutes are ambiguous about *which* agency with duplicative delegations should regulate, courts should defer to the executive arrangements. The Executive is better at allocating tasks among agencies based on a comparison of the agencies' technical expertise and policy interests. That is, courts should not apply deference rules that distinguish between decisions about *how* to regulate and decisions about *which* agency regulates.

Different agencies have different technical expertise and policy interests, and thus different agencies will perform the same tasks differently. The decision about which agency should regulate revolves around these differences in expertise and interests. Thus, just as technical and policy considerations inform decisions about how an agency regulates, they also inform decisions about which agency regulates. And just as the Executive is better than the Judiciary at making the technical and policy judgments to decide how to regulate, the Executive is also better at making the technical and policy judgments to decide which agency should regulate. Thus, at least on these grounds, courts should not distinguish between the two kinds of decisions when doling out judicial deference.

From a separation of powers perspective, there is also little appreciable difference between the two kinds of decisions. Congress can oversee decisions about which agency regulates as well as oversee decisions about how an agency regulates. Thus, courts need not withhold deference on questions of which agency regulates in order to protect legislative interests.

Just as Congress constrains an agency's ability to determine how to regulate through *ex post* monitoring, Congress has several tools at its disposal if it is unhappy with the division of responsibilities among agencies with duplicative delegations. Congress may simply pressure agency officials in public hearings or behind closed doors.<sup>271</sup> More definitively, it may amend the duplicative delegations to clearly allocate authority among agencies as it sees fit. Indeed, the mere threat of amending agencies' delegations may prove enough to push agencies with duplicative delegations to divide tasks among themselves according to Congress's liking. But Congress often does not need to act to ensure that agencies with duplicative delegations consider congressional preferences when they decide which tasks to abdicate. Agency abdication and interagency arrangements all take place in the shadow of congressional oversight.

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GEO. L.J. 97, 106–12 (2000) (recognizing that voter participation is best achieved by delegating power to elected officials). See generally ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 183 (2006) (asserting that judges should not attempt to fill in gaps when statutes are ambiguous or vague but should defer to agency interpretations).

271. See Beermann, *supra* note 74, at 121–22 (describing formal and informal methods that Congress employs to oversee the execution of laws).

Agency officials know that if powerful legislators disagree with the agencies' decisions—and care enough about the regulatory problem at hand—the legislators will reverse the bureaucrats. Thus, executive agencies with duplicative delegations are likely to consider congressional preferences when they divide up tasks.

However, if Congress dislikes the agencies' allocations of tasks on a salient issue, Congress may block the agreement. Consider the fate of a 2002 agreement between the Federal Trade Commission (FTC) and DOJ. The two agencies both have authority to review proposed mergers,<sup>272</sup> and in 2002 they crafted an accord dividing up their merger responsibilities.<sup>273</sup> However, strong opposition from one senator, Ernest Hollings, who was displeased with the interagency accord, was enough to force the agencies to repudiate their agreement.<sup>274</sup> Such congressional involvement appears rare, though. Congress is more likely to accept or at least acquiesce in interagency arrangements than to scuttle them. But the possibility of congressional opposition is nonetheless real and forces agency officials to consider legislative preferences when they decide how to divide tasks among themselves. Indeed, in the merger example, the then-chairman of the FTC testified that he knew that Senator Hollings would oppose the accord, but he had contact with other legislators whose support he believed would outweigh Hollings's opposition.<sup>275</sup> His calculation was wrong, but his testimony nevertheless illustrates that agencies with duplicative delegations consider congressional preferences when they divide regulatory tasks.

Overall, there is no reason to assume that the risk of agency action departing from congressional preferences is any greater for questions about which agency regulates than for questions about how an agency regulates. Indeed, the presence of multiple agencies may produce information—such as an interagency agreement—that alerts Congress to what agencies are doing and thus makes Congress's *ex post* monitoring job easier than when only one agency is involved in a regulatory matter. Thus, to protect legislative interests courts should not withhold deference on questions of which agency regulates.

Moreover, courts need not withhold deference in order to guard against

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272. 15 U.S.C. §§ 18–18a (2006).

273. See TIMOTHY J. MURIS, COMMENTS ON THE FTC–DOJ CLEARANCE PROCESS: BEFORE THE ANTITRUST MODERNIZATION COMMISSION 9–10 (2005), [http://govinfo.library.unt.edu/amc/commission\\_hearings/pdf/Muris\\_Statement.pdf](http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Muris_Statement.pdf) (describing how the agencies divided up responsibilities so that each agency could focus on its area of expertise).

274. *Id.* at 17–18.

275. *Id.*

agency expansionism. In duplicative delegations cases in which the agencies are in agreement—the set of cases for which the proposed default rule would apply—the fact of the agencies’ agreement suggests that there is a low risk of improper expansionism. With an agreement, it is less likely that one agency is improperly impinging on the power of the other agency. It is more likely that the agencies are trying to avoid interagency duplication and conflict by setting agreeable jurisdictional metes and bounds according to the kind of technical and policy considerations worthy of judicial deference.

Finally, there is precedent for the Judiciary adopting presumptions that allow the Executive discretion to select which agencies should perform which tasks. A line of Supreme Court cases beginning before the Civil War repeatedly held that the President and agency heads have inherent authority to subdelegate authority vested in them to subordinate agencies and officers of their choosing.<sup>276</sup> In these cases, the power to subdelegate was presumed when Congress was silent on whether subdelegation was allowed.<sup>277</sup> Moreover, when subordinate officers carried out their superiors’ duties, the fact of subdelegation was presumed even if there was no evidence that the President or agency head had formally or in writing subdelegated authority.<sup>278</sup> These presumed powers of the President and agency heads to subdelegate to the subordinate agency and officers of their choosing became so uncontroversial a topic that subdelegation is no longer discussed in administrative law treatises and casebooks as it once was.<sup>279</sup> Indeed, much of the common law of subdelegation was later codified in the Presidential Subdelegation Act of 1950,<sup>280</sup> and there was no debate about

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276. For cases presuming presidential subdelegation power, see *Wolsey v. Chapman*, 101 U.S. 755 (1879), *United States v. Eliason*, 41 U.S. (16 Pet.) 291 (1842), and *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498 (1839). But see *Runkle v. United States*, 122 U.S. 543, 560–61 (1887) (invalidating court martial by Secretary of War on grounds that action required presidential approval). For cases presuming agency heads’ power to subdelegate, see *Parish v. United States*, 100 U.S. 500 (1879), and *McCullum v. United States*, 17 Ct. Cl. 92 (1881).

277. See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1301 (2006) (noting that Congress presumes the President’s subdelegation authority because it cannot expect the President to carry out personally every grant of authority); see also Jerry L. Mashaw & Avi Perry, *Administrative Statutory Interpretation in the Antebellum Republic*, 2009 MICH. ST. L. REV. 7, 28 (2009) (discussing how Congress did not expect the President to “oversee the various and sundry details of the growing administrative state”).

278. See *Wilcox*, 38 U.S. at 513 (Secretary of War as subdelegate); *Parish*, 100 U.S. at 504–05 (Surgeon-General as subdelegate).

279. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2175 n.305 (2004) (noting that attorneys no longer challenge subdelegation power in federal courts) (citation omitted).

280. 3 U.S.C. §§ 301–303 (2006).

whether the Act was on constitutionally shaky ground for granting the Executive too much discretion.<sup>281</sup>

Ultimately, the basis for the common law subdelegation power was a presumed congressional intention—because “it is impossible for a single individual to perform in person all the duties imposed on him by his office,”<sup>282</sup> Congress intends busy Presidents and agency heads to be able to subdelegate their duties.<sup>283</sup> The judicial default rule that stemmed from this presumption was that courts should defer to subordinate executive officers’ assertions that superior officers had subdelegated authority to them and that such subdelegation was permissible under the relevant statute. One can derive a similar presumption of congressional intent for duplicative delegations that is also based on administrative necessity: because it is impossible for Congress to avoid drafting duplicative delegations *ex ante*, Congress intends agencies with duplicative delegations to clarify jurisdictional bounds among themselves *ex post*. The judicial default rule that stems from this presumption is the one I propose: Courts should defer to interagency arrangements reconciling duplicative delegations.

The analogy between duplicative delegations and subdelegations is not perfect, though. The two concepts are distinct in at least two important ways. First, subdelegations involve vertical transfers of power from within the executive hierarchy, while duplicative delegations involve horizontal transactions by separate agencies in the Executive Branch. This distinction may prove important as a doctrinal matter. Several years ago, the D.C. Circuit struck down a subdelegation from the Federal Communications Commission to state regulators on the grounds that “subdelegation to a subordinate federal officer or agency is presumptively permissible,” but added, “There is no such presumption covering subdelegations to outside parties.”<sup>284</sup> This ruling suggests at least the possibility that horizontal subdelegations among agencies are impermissible. However, even if there is a restriction on horizontal subdelegations, it would not affect duplicative delegation cases. In duplicative delegations cases, agencies act under authority delegated by Congress (or subdelegated by their superiors) and not under any authority received through horizontal transfers among agencies. Second, as discussed earlier, the President’s subdelegation power

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281. See Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-Mortem*, 70 U. CHI. L. REV. 1331, 1335 (2003) (positing that the Subdelegation Act has never been found unconstitutional “even though it authorizes executive delegations that lack any intelligible principle”).

282. *Parish*, 100 U.S. at 504.

283. See Mashaw & Perry, *supra* note 277, at 27–28 (explaining that the growth of the administrative state also necessitated and allowed for subdelegation).

284. *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004).

allows him to choose from any inferior executive officer or agency; by contrast, with duplicative delegations, the Executive's choice of agency is significantly constrained. This distinction cuts in favor of being less concerned about abuse of discretion in duplicative delegations cases than in subdelegation cases. Overall, despite a few of key differences, the subdelegation jurisprudence is relevant to duplicative delegations cases as precedent for allowing Executive discretion to determine which agencies should perform which tasks.

Ultimately, there is little reason for courts to distinguish between questions about how an agency regulates and questions about which agency regulates. Just as courts defer to executive decisions about how to regulate, they should too defer in duplicative delegations cases to executive arrangements on which agency should regulate.

To be clear, under the default rule I propose, the level of deference accorded to various interagency arrangements would depend on how those arrangements fit into the existing doctrine on the tiers of judicial deference. *Chevron* deference—that is, deference to reasonable agency actions—is often reserved only for agency actions subjected to formal procedures such as notice-and-comment rulemaking.<sup>285</sup> The less deferential *Skidmore* standard—that is, deference based on an agency's "power to persuade"<sup>286</sup>—may apply to less formal agency actions.<sup>287</sup> Thus, under existing doctrine, whether an interagency agreement would receive *Chevron* or *Skidmore* deference may depend on whether the agreement is subjected to notice-and-comment rulemaking or whether it is merely circulated as a memorandum among the agencies.<sup>288</sup> As for interagency arrangements based on practice and understanding that are not memorialized agreements, the Supreme Court has treated "longstanding practice" by an agency as "persuasive authority,"<sup>289</sup> but it has not to my knowledge extended *Chevron* deference to evidence of longstanding practice that had not been subjected to procedural formalities. Thus, under the proposed default rule, evidence of longstanding practice reconciling duplicative delegations would also receive deference for their persuasive powers but

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285. *United States v. Mead Corp.*, 533 U.S. 218 (2001). For valuable discussions of *Mead*, see Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807 (2002), and Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003).

286. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

287. *Mead*, 533 U.S. at 234–35.

288. *See Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2473 (2009) (granting a "measure of deference" to an internal EPA memo not subject to formal rulemaking).

289. *See Steadman v. SEC*, 450 U.S. 91, 103–04 (1981).

would not receive *Chevron* deference. Overall, different interagency arrangements would receive different levels of deference, but the bottom line would remain the same: courts would grant some deference to executive arrangements instead of independently reconciling duplicative delegations without reference to the agencies' views.

### CONCLUSION

Duplicative delegations pervade our legal and regulatory system. They generate the potential for widespread, inefficient interagency duplication. However, Congress cannot easily or cheaply avoid drafting duplicative delegations *ex ante*. Ultimately, it is better to screen out the undesirable duplication through the use of comparatively cheaper *ex post* institutions. But because these *ex post* institutions also have their costs, it turns out that it is efficient to let some interagency duplication persist in the regulatory system.

Duplicative delegations also alter the balance of powers among the branches of government. Through duplicative delegations, Congress affords the Executive significantly more discretion than it usually has to determine which agency should perform a particular task. Descriptively, the President and agencies routinely divvy up tasks among agencies with duplicative delegations. Normatively, because the Executive is better than the Judiciary at allocating tasks among agencies, courts should defer to executive arrangements reconciling duplicative delegations.



# THE TSUNAMI OF HEALTH CARE RULEMAKING: STRATEGIES FOR SURVIVAL AND SUCCESS

JAMES T. O'REILLY\* & MELISSA D. BERRY\*\*

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## INTRODUCTION

In 2011–2015, health care regulation changes will present new challenges and opportunities to the novice lawyer in a general practice law office. Our purpose in this Article is to guide the novice at federal administrative rulemaking through the very challenging rulemaking aspects of implementing the Patient Protection and Affordable Care Act (PPACA or Act).<sup>1</sup> Even if you skipped the administrative law and health law courses in law school, your clients will ask for your help, and you can cheerily offer to guide them. Individuals, nonprofit groups, companies, doctors, pharmacies, hospitals, local governments, states, insurers, investment analysts, and product manufacturers are among the many types of law firm clients who will struggle with the implementation of the 2010 health care reform legislation. How well you perform in this rule-writing context may shape the future of your practice when more health law issues arise for your clients.

So much money is at stake for these clients that accurate advising and thoughtful preparation on Department of Health and Human Services

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1. Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. For purposes of this Article, “PPACA” refers to these bills collectively unless otherwise noted.

(HHS) rules could be essential to sustaining your role in those clients' profitable health care businesses. Rulemaking comments, well crafted and effectively supported by data, will be your future goal in serving these clients. Your sensitivity to federal and state motivations will result in more effective comments and meeting participation; the clients will benefit from your thoughtful preparatory work.

We confess that a guide to this massive law is impossible in these few short pages. We could try to parse its 406,887 words, slog through the 906-page PDF version from the Government Printing Office website, or even dance through the twelve-page table of contents for Public Laws 111-148 and 111-152, the basic statute and the companion "reconciliation" bill. Instead, in order to be both pragmatic and helpful, we will orient this Article toward aiding the novice in successfully drafting and submitting comments on the many agency rules that implement the new law's complex commands and constraints.

There is no question that PPACA will result in a tsunami of new administrative rulemaking. Although some of this important work has already begun and will be discussed below, there is still much more to come. This rulemaking will be contentious, pitting politicians, agency heads, insurers, industry lobbyists, health care consumer advocates, and individuals against each other in a monumental battle to shape the regulations that will ultimately define health care in America. By analogy, those health care participants who wander onto the PPACA beachfront unaware and unprepared for this particular tsunami could be overwhelmed by the roiling flood of red tape before they have a real opportunity to have any impact on the rulemaking process.

If the aphorism is correct that "the world is run by those who show up," the 2011 world of health care reform rulemaking is being run by a few dozen law firms and corporate lobbyists that represent major industries with financial stakes in the PPACA reforms.<sup>2</sup> They have equal free speech rights, but their sophistication in rulemaking can make them seem more equal than other smaller players.

This Article will target the needs of the small firm, solo, or public interest

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2. See Kevin Bogardus, *Big Health Bucks Roll in for K St.*, THE HILL (Jan. 18, 2011, 7:00 AM), <http://thehill.com/business-a-lobbying/138387-big-health-bucks-roll-in-for-k-st> ("Since Jan. 1, close to a dozen firms and health care companies have hired new lobbyists and lawyers or have been formed to lobby on the new law's regulations, according to a review by The Hill."); Lindsay Renick Mayer, Michael Beckel & Aaron Kiersh, *Diagnosis: Reform* OPENSECRETSBLOG (June 17, 2009, 5:18 PM), <http://www.opensecrets.org/news/2009/06/diagnosis-reform.html>; *Health Care Tools*, OPENSECRETS.ORG, [http://www.opensecrets.org/capital\\_eye/health.php](http://www.opensecrets.org/capital_eye/health.php) (last visited May 14, 2011) (listing contributions made by health-related industries to members of Congress).

attorney who advocates for the economic interests of citizens, patients, and less affluent players. We hope to provide you with the navigational tools you will need to have a say in this critical rulemaking that will define health care delivery and medical cost coverage for decades to come. This Article will also provide an overview of some of the most critical provisions in the legislation and an explanation of where the rulemaking on those segments will take us.

## I. PREPARING FOR RULEMAKING

You may not recall the relevant segment of your law school administrative law course, but federal agency prospective policymaking, the process of rulemaking,<sup>3</sup> comes in different flavors. Agencies use notice-and-comment rulemaking proceedings, guidance documents, informal letter interpretations, policy statements, interpretive rules, revenue rulings, interim final rules, direct final rules, and lots of tricks unfamiliar to the generalist attorney who rarely deals with agency rulemaking.<sup>4</sup> Not all rules are alike, and some rules become final on different time scales than others. Final rules are effective with a thirty-day—or longer—lead time;<sup>5</sup> some interim final rules are effective on the day they are published in the *Federal Register*, with an invitation for subsequent comments for a possible revision in the future.

Does the distinction make a difference? Yes. Jail terms, bans from federal contracts, and large civil penalties may be imposed based upon failure to follow a particular final rule. By contrast, all of the less formal, interpretive policy statements and the like do not bind private conduct and may be changed by the agency with no advance notice of the altered positions.

Timing really matters. The clock starts to run for a proposed rule's comment process<sup>6</sup> when the proposed rule is published in the daily *Federal Register*.<sup>7</sup> This is the day that may bring the client's phone call—"Help, I just learned that this proposed rule is intolerable/essential/expensive; what

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3. 5 U.S.C. § 553 (2006).

4. See, e.g., FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 2–5 (William F. Funk, Jeffrey S. Lubbers & Charles Pou, Jr., eds., 4th ed. 2008) (discussing the variants of formal and informal rulemaking under the Administrative Procedure Act (APA)); JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 3–7 (4th ed. 2006) (providing an overview of federal agency rulemaking after the passage of the APA).

5. 5 U.S.C. § 553(d).

6. *Id.* § 553(c).

7. 1 C.F.R. § 18.17(a) (2010) (noting that all documents submitted for publication in the *Federal Register* will include an effective date or time, either determined by the submitting agency or by the Office of the Federal Register).

do I need to do to track and comment on this proposal before the deadline?” Or the client might awaken late to the potential harm of a new proposal and may ask that you draft and file persuasive opposing comments by next Monday that will ask the agency to remove the worst aspects of the proposed rule.

For the hungry small-firm lawyer, this is a great opportunity. Find paying clients? Answer calls for legal services? Respond to complex government actions? There are several steps that you can take now to prepare. First, go to the website Regulations.gov and become familiar with its operations and its quirks.<sup>8</sup> This will allow you to view each version of the proposed rule as it moves through rulemaking and submit your client's comments on the proposals. Next, get a good book on rulemaking<sup>9</sup> and learn the process for submission of comments<sup>10</sup> and the means for tracking who is saying what on the Regulations.gov website. You will also need to expand your vocabulary and recognize that some actions of the HHS agencies under PPACA will be less than rules—they may be titled as informal guidances—and you have fewer opportunities to change these staff interpretations. By law, these policies do not bind the agency,<sup>11</sup> but on a daily basis, agency staffers use these to guide operations and make decisions that impact your clients.

After grounding yourself in the basics, seek to understand the agency's process for presenting petitions for rulemaking<sup>12</sup> so that you will have the opportunity to express your client's desired alternative. You will also need to study the ways in which the administrative record is set up for judicial review so that the rules which depend on that record are not later invalidated in court as arbitrary and capricious.<sup>13</sup> And, perhaps the biggest challenge for most attorneys, you must learn to respond much more rapidly. Talk with your client about which issues you should monitor and which can be left to others for response.

In practical terms, this advice means that the client might hear that PPACA's new rules on affordable care organizations, medical loss ratios (MLRs), funding of children's health insurance program, and shared

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8. REGULATIONS.GOV: YOUR VOICE IN FEDERAL DECISION-MAKING, <http://www.regulations.gov/> (last visited May 14, 2011).

9. See, e.g. LUBBERS, *supra* note 4 (intending to be used as a starting point for further research pertaining to agency rulemaking); JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING: STRUCTURING, OPPOSING, AND DEFENDING FEDERAL AGENCY REGULATIONS (2d ed. 2010).

10. 5 U.S.C. § 553(c).

11. *Id.* § 552(a)(2).

12. *Id.* § 555(e).

13. *Id.* § 706(2)(A).

Medicaid expense, etc., are being released for comment after many months of development inside the agency. When the proposed rules pop up in the daily *Federal Register*, your clients will have a very short time frame in which to assemble facts and arguments for the changes they want the agency to make in these rules.<sup>14</sup> The best analogy is to tailoring a suit: the client may want your comments to ask for a longer timeline, a shorter payout period, an exception for the client's particular service or product, etc. This is where the lawyer who is a quick study can excel and help the client make those alterations so the rule is a better fit for the client's constituents.

The same legal skills are used for blocking a rule, changing its definitions, promoting its expansion, or winning an exception. The key is to add information to the agency's data set for the administrative record supporting your client's desired outcome. If, for example, your showing of a reason to change the proposed rule is accepted by the agency, the lengthy preamble to the final rule<sup>15</sup> will note the reason behind the change from the rule first proposed. Your short-term task is to marshal a team who can assemble fact and policy arguments that support your client's desired outcome. Expertise for that team effort can be found within the client's organization, or hired from academia or the consulting universe. Proposals to change a rule should select the specific targeted section of the proposed rule, propose the alternative wording or novel alternative, and explain why your outcome meshes better with the statute than the staff's proposed rule. Attitudes matter; be persuasive by praising the agency's effort and by offering your option as an improvement that moves the agency's goals ahead faster, better, or less expensively. Do not refight battles lost in the legislative process.

## II. PUBLIC INTEREST LAWYERS ARE AT A DISADVANTAGE

Rulemaking is a craft highly prized in some circles, but it is often overlooked in the legal aid office or other nonprofit entity that services retail client-by-client needs. Draining a regulatory swamp through rule changes is better than fighting each alligator individually in enforcement or penalty cases. Lawyers who work for the general public outside of government may feel intimidated by the stellar fame of lawyers representing entrenched entities, including many who eloquently resisted the PPACA

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14. Another important resource is the website for the Office of the Federal Register Public Inspection Desk. See *Electronic Public Inspection Desk*, OFFICE OF THE FEDERAL REGISTER, <http://www.ofr.gov/inspection.aspx> (last visited May 14, 2011). Although the notices and proposed rules may be revised before publication in the *Federal Register*, this site can provide a few days' head start in your review of newly proposed rules.

15. 1 C.F.R. § 18.12 (2010).

changes.<sup>16</sup> Do not neglect the reality that agency staff relates more to the public interest advocates' pleas than to the industrial contingent among the commenters.

The unusual public forum of federal agency rulemaking has its own style and machismo. Some say, "Why bother, the insiders will capture the agency rule despite our efforts?" But avoid defeatism: help your client be heard, and if the insider comments are filed before the closing deadline for comments, read those comments online and offer a different view. The insider's comments may be misleading or could be quite impractical at the operational level in ways your client will recognize but the agency may miss, so communicate the best counter argument to the agency.

For example, if your client is a local nonprofit charity hospital, you may notice that health insurers are using statistics. Watch out for the insurer's comments on the HHS rule that define terms such as "patient care." In PPACA, Congress placed controls on the profitability of health insurers, using the concept of MLRs to express what portion of the premiums paid could serve the insured and what portion could be spent for the owners and operators of the health insurance giants.<sup>17</sup> PPACA attempted to place a 15% cap on the overhead cost of providing medical services.<sup>18</sup> Astute insurance company lawyers began immediately to focus on the definition of what statistical categories patient care would include. To maximize their profitability and salaries in what ordinarily would be considered an overhead cost, the insurers sought a federal implementing rule counting the costs of taking all the health care quality measures as patient care expenditures. The protection of the insurers' profits would be optimized by a federal regulation allowing the insurers to load many expense items into the basket marked patient care. These cost items are moved into patient care categories, if the new rules permit, in order to allow a larger amount to be in the administrative overhead—and corporate profits—category of defined costs.

Rulemaking is the forum in which these tough issues are going to be fought. Lawyers, particularly those serving indigent patients, should be prepared to make effective, specific comments on partial aspects of these

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16. For specifics on the resources expended by the health care and insurance industries to shape PPACA, see generally OpenSecrets.org. Of particular interest, see Mayer, *supra* note 2; *Health Care Tools*, OPENSECRETS.ORG, [http://www.opensecrets.org/capital\\_eye/health.php](http://www.opensecrets.org/capital_eye/health.php) (last visited May 14, 2011); *Tracking the Payback*, OPENSECRETS.ORG, <http://www.opensecrets.org/payback> (last visited May 14, 2011).

17. PPACA, Pub. L. No. 111-148, § 10,101(f), 124 Stat. 119, 885–87 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1001(5), 124 Stat. 1030, 1030–32.

18. *Id.*

new rules. In terms of the economics of legal services, this rulemaking task is lopsided; a proposed rule could be a lucrative opportunity for law firms to build or retain profitable client hours. When paying clients see that they have a lot at stake, they are likely to authorize the lawyer to spend the time needed to craft, gain concurrence on, and submit a set of comments on the client's behalf. As a public interest lawyer, standing by in silence while a trade association or medical association "speaks for" your clients risks the loss of their opportunity to have their particular interests protected, since associations tend to homogenize the input of members into a politically palatable package. The lawyer's role in crafting PPACA implementation rules is both essential to a fair process and lucrative, for at least the health care- and insurance- sector advocates.<sup>19</sup> And even for public interest lawyers, already stretched thin by the economic recession, this unbalanced game is still worth playing. Silent advocates would be drowned out by their opponents. Comments to future proposed rules intended to help indigent patients and the health care providers who care for them will be worth the effort expended.

### III. WHAT RULES ARE COMING?

#### A. *Interim Final Rules*

Because effective dates for certain PPACA provisions occurred soon after it was enacted, HHS agencies had limited time to issue these implementing rules and did so by promulgating interim final rules, without allowing a comment period before implementation, instead providing a comment period following publication.<sup>20</sup> For example, on June 28, 2010, the Internal Revenue Service and the Employee Benefits Security Administration published a 196-page set of interim final rules and guidances in cooperation with the new federal Office of Consumer Information and Insurance Oversight (OCIIO).<sup>21</sup> HHS formed the OCIIO to implement, monitor

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19. See *Lobbying: Top Industries*, OPENSECRETS.ORG <http://www.opensecrets.org/lobby/top.php?indexType=i>, (ranking industries by their lobbying expenditures) (last visited May 14, 2011). In 2009 and 2010, pharmaceuticals/health products, insurance, hospitals/nursing homes, health professionals and health services/HMOs all ranked in the top twenty. *Id.*

20. Under the APA, interim final rulemaking occurs under the "good cause" exception to the more common notice-and-comment rulemaking process when the agency for good cause finds that notice-and-comment proceedings are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B) (2006).

21. Requirements for Group Health Plans and Health Insurance Issuers Under the Patient Protection and Affordable Care Act Relating to Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections, 75 Fed. Reg. 37,188,



compliance with, and enforce the new rules governing the insurance market and the new rules regarding MLRs.<sup>22</sup> In 2011, the OCIO became the Center for Consumer Information and Insurance Oversight (CCIO) and is a part of Centers for Medicare & Medicaid Services (CMS).<sup>23</sup>

The interim final rules implement four provisions of PPACA. First, the rules raise the limits on benefit maximums by placing a ban on lifetime benefit caps (applicable for plan years beginning on or after September 23, 2010); a restriction on use of annual caps (applicable for plan years beginning on or after September 23, 2010); and a ban on annual caps (applicable for plan years beginning on or after January 1, 2014). Grandfathered individual policies are exempt.<sup>24</sup>

For benefits that are not “essential health benefits,” a plan or issuer may impose annual or lifetime per-individual dollar limits on specific covered benefits.<sup>25</sup> The annual limits are to be phased in over three periods: (1) \$750,000 (applicable for plan years beginning September 23, 2010, or later); (2) \$1.25 million (applicable for plan years beginning September 23, 2011, or later); and (3) \$2 million (applicable for plan years beginning September 23, 2012, or later).

Anticipating that these new annual caps might result in the loss of coverage some employees receive under so called “mini-med” plans, the interim final regulations allow the Secretary of HHS to establish a program under which the requirements relating to restricted annual limits may be waived, if compliance with these interim final regulations would result in a significant decrease in access to benefits or a significant increase in

37,242 (June 28, 2010).

22. See OCIO Archived Site, U.S. DEP'T OF HEALTH AND HUMAN SERVS., <http://www.hhs.gov/ocio/about/index.html> (last visited May 14, 2011).

23. See 76 Fed. Reg. 4703 (Jan. 26, 2011).

24. See Requirements for Group Health Plans and Health Insurers under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 37,188, 37,223–25 (June 28, 2010) (prohibiting lifetime and annual limits, rescissions; requiring an appeals process, and prohibiting exclusions for preexisting conditions or other discrimination based on health status); See also PPACA, Pub. L. No. 111-148, §§ 1001, 1201, 2704, 2711, 2712, 2719A, 124 Stat. 119, 119, 131, 154, 887 (2010).

25. PPACA § 1302(b)(1) requires the Secretary of HHS to define “essential health benefits,” although it also sets out the minimum benefits that must be included: ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; pediatric services including oral and vision care; and other services “typically covered by employers.” Also this section, the Secretary of Labor is required to conduct a survey of employer-sponsored coverage to determine what benefits are typically covered and report on that survey to the Secretary of HHS. PPACA § 1302(b)(2), 124 Stat. 119, 163.

premiums. HHS has promised additional guidance on this issue.<sup>26</sup>

The second major area addressed by these interim final rules is the elimination of health insurers' exclusion of applicants because of preexisting conditions. The interim final rule prohibits group plans and individual issuers from imposing preexisting condition exclusions for enrollees under age nineteen for plan years beginning on or after September 23, 2010, and for all other enrollees beginning after January 1, 2014. These protections are in addition to the nondiscrimination provisions under the Health Insurance Portability and Accountability Act (HIPAA) that generally provide that group health plans and group health insurance issuers may not set eligibility rules based on factors such as health status and evidence of insurability, including acts of domestic violence or disability.<sup>27</sup>

The third important area addressed under these interim final rules is a ban on the rescission of group health plans and individual health policies, except in cases involving fraud or intentional misrepresentation of a material fact, which became effective on September 23, 2010; only fifty comments were submitted on this interim final rule.<sup>28</sup>

Among the other regulations adopted through interim final rulemaking, on May 5, 2010, CMS and HHS issued "Medicare and Medicaid Programs; Changes in Provider and Supplier Enrollment, Ordering and Referring and Documentation Requirements; and Changes in Provider Agreements."<sup>29</sup> This rule implements a number of provisions of PPACA, including: (1) § 6402(a), which requires all providers of medical or other items or services and suppliers under Titles XVIII (Medicare) and XIX (Medicaid) of the Social Security Act (SSA) that are eligible for a national provider identifier (NPI) to include the NPI on all applications to enroll in such programs, and on all claims for payment under such programs;<sup>30</sup> (2) § 6405(a) and (c), which indicate that orders and referrals for durable medical equipment, prosthetics, orthotics and supplies (DMEPOS) and for other categories of items and services that may be made by a physician or

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26. Memorandum from Steven Larsen, Director, OCIO, *Insurance Standard Bulletin Series—INFORMATION* (Nov. 5, 2010), available at [http://www.hhs.gov/ocio/regulations/11-05-2010annual\\_limits\\_waiver\\_bulletin.pdf](http://www.hhs.gov/ocio/regulations/11-05-2010annual_limits_waiver_bulletin.pdf).

27. See Health Insurance Portability and Accountability Act (HIPAA), 29 U.S.C. §§ 1181, 1182 (2006) (limiting exclusion of preexisting conditions and prohibiting discrimination based on health status).

28. See Comments on Patient Protection and Affordable Care Act: Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections, FR Doc #2010-15278, available at <http://www.regulations.gov/#!docketDetail;D=IRS-2010-0015> (last visited May 14, 2011).

29. 75 Fed. Reg. 24,437 (May 5, 2010) (to be codified at 42 C.F.R. pts. 424 & 431).

30. PPACA, § 6402(a), 124 Stat. at 753–64.

an “eligible professional under § 1848(k)(3)(B)” of the SSA;<sup>31</sup> (3) § 6405(c), which gives the Secretary of HHS the discretion to determine the health professions that can order and refer items and services other than DMEPOS and home health<sup>32</sup> (for example, companies that advertise “free” mobile wheelchairs will find their business practices questioned by HHS); and (4) section 6405(b), which, with respect to suppliers of durable medical equipment, provides that payment may be made under § 1834(a)(11)(B) of SSA only if the written order for the item has been communicated to the DMEPOS supplier by a physician who is enrolled in the programs.<sup>33</sup> These regulations, which are intended to help reduce the incidence of fraud, abuse, and waste in programs perceived to be high risk, became effective on July 6, 2010.<sup>34</sup> In the period between publication and effective date, only thirty-one entities submitted comments.<sup>35</sup>

Also on May 5, 2010, HHS issued an interim final rule implementing PPACA § 1103(a),<sup>36</sup> which required HHS to establish a website for individuals and small businesses to obtain information about insurance coverage options available in their states.<sup>37</sup> The rule sets out the categories of information to be collected and displayed; the data that issuers must report; and the data that states, associations, and high-risk pools are requested to provide. This additional information will allow patients who use these new tools to be more selective.

HHS issued a third set of regulations on May 5, 2010, regarding the early retiree reinsurance program in order to implement PPACA § 1102.<sup>38</sup>

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31. *Id.* § 6405(a), (c), 124 Stat. at 768.

32. *Id.* § 6405(c), 124 Stat. at 768.

33. *Id.* § 6405(b), 124 Stat. at 768.

34. Medicare and Medicaid Programs; Changes in Provider and Supplier Enrollment, Ordering and Referring, and Documentation Requirements; and Changes in Provider Agreements, 75 Fed. Reg. 24,437, 24,437–38 (May 5, 2010) (to be codified at 42 C.F.R. pts. 424, 431).

35. The comments were from home health agencies and/or durable medical equipment suppliers. *See* Comments on Medicare and Medicaid Programs; Changes in Provider and Supplier Enrollment, Ordering and Referring, and Documentation Requirements; and changes in provider agreements, FR Doc #2010-0817, *available at*, <http://www.regulations.gov/#!docketDetail;det=FR+PR+N+O+SR;rpp=10;D=CMS-2010-0187> (last visited May 14, 2011).

36. Health Care Reform Insurance Web Portal Requirements, 75 Fed. Reg. 24, 470, 24,470–71 (May 5, 2010) (to be codified at 45 C.F.R. pt. 159).

37. The website, [HealthCare.gov](http://www.healthcare.gov), was released by the July 1, 2010 deadline and now includes insurance comparisons, prevention information, links to the quality comparison website for hospitals, nursing homes, home health and dialysis facilities, and information on PPACA. *See* HEALTHCARE.GOV: TAKE HEALTH CARE INTO YOUR OWN HANDS, <http://www.healthcare.gov/> (last visited May 14, 2011).

38. Early Retiree Reinsurance Program, 75 Fed. Reg. 24,450, 24,451 (May 5, 2010) (to

§ 1102 requires HHS to reimburse sponsors with certified plans for a portion of the cost of health benefits for early retirees and their spouses or surviving spouses and dependents. Reimbursements will be “80 percent of the portion of the health benefit costs . . . attributable to the claims that exceed \$15,000, but are below \$90,000.”<sup>39</sup>

Other interim final rules published in the early implementation include a rule implementing PPACA § 1001 for group health plans and health insurance coverage in the group and individual markets for dependent coverage of children who are not yet twenty-six, which became effective on July 12, 2010;<sup>40</sup> a rule required by PPACA § 10501(i) defining “underserved rural community” for purposes of the Rural Physician Training Grant Program, which became effective on June 25, 2010;<sup>41</sup> a rule implementing PPACA § 1251 for group health plans and health insurance coverage in the group and individual markets for status as a “grandfathered” health plan, which became effective on June 14, 2010, with the exception of certain amendments that became effective on July 12, 2010;<sup>42</sup> a rule implementing PPACA § 2713 regarding the requirements for group health plans and health insurance coverage in the group and individual markets, which became effective on September 17, 2010, and applies to group health plans and group health insurers for plan years beginning on or after September 23, 2010;<sup>43</sup> a rule implementing PPACA § 2719 regarding the requirements for internal claims and appeals and external review processes for group health plans and health insurance coverage in the group and individual

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be codified at 45 C.F.R. pt. 149).

39. *Id.* at 24,456.

40. *See* Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Dependent Coverage of Children to Age 26 Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 27,122, 27,122–24 (May 4, 2010) (to be codified at 45 C.F.R. pts. 144, 146, & 147) (making dependent coverage available to children until age twenty-six).

41. *See* Public Health Service Act, Rural Physician Training Grant Program, Definition of “Underserved Rural Community,” 75 Fed. Reg. 29,447, 29,448–50 (May 26, 2010) (to be codified at 42 C.F.R. pt. 5a).

42. *See* Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,538, 34,538–40 (June 17, 2010) (to be codified at 45 C.F.R. pt. 147) (defining “grandfathered” plans as those existing at the date of enactment and only subject to certain provisions like the prohibition on rescissions).

43. *See* Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,726, 41,728 (July 19, 2010) (to be codified at 45 C.F.R. pt. 147) (including evidence-based items or services; immunizations for routine use; evidence-informed preventative care and screenings for infants, children, and adolescents; evidence-based preventative care and screenings for women).

markets, which became effective on September 21, 2010, and applies to group health plans and group health insurers for plan years beginning on or after September 23, 2010;<sup>44</sup> and a rule implementing PPACA § 1101 requiring HHS to establish a temporary high-risk insurance pool program to provide affordable health insurance coverage to uninsured individuals with preexisting conditions, which became effective September 30, 2010.<sup>45</sup>

### *B. Rulemaking Still to Come*

#### *1. Medical Loss Ratio*

Among the most hotly contested rulemakings under PPACA is likely to be the rule on health insurers' medical loss ratio. Compromises and sharp disagreements during the adoption of PPACA § 2715 led to an odd form of state–federal allocation of tasks.<sup>46</sup> Section 2715 directed the Secretary of HHS to consult with the National Association of Insurance Commissioners (NAIC) to develop standards for use by a group.<sup>47</sup> On October 27, 2010, the NAIC transmitted to federal agencies its uniform definitions and standard methodologies for MLRs as required under this section of PPACA.<sup>48</sup> HHS announced the regulation<sup>49</sup> and released it through the Office of the Federal Register Public Inspection Desk on November 22, 2010.<sup>50</sup> This unusual form of state–federal partnership in rulemaking might be criticized as an excessive delegation of executive powers to a state authority, but the President's health care negotiating team accepted the

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44. See Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Internal Claims and Appeals and External Review Processes Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 43,330, 43,330–32 (July 23, 2010) (to be codified at 45 C.F.R. pt. 147) (requiring issuers to incorporate the internal claims and appeals processes and update in accordance with HHS's standards).

45. Pre-Existing Condition Insurance Plan Program, 75 Fed. Reg. 45,014, 45,014–15 (July 30, 2010) (to be codified at 45 C.F.R. pt. 152). The temporary high-risk health insurance pool program will continue until 2014 when state-based insurance exchange programs established under PPACA §§ 1311 and 1321 will be available. *Id.* at 45,014.

46. PPACA, Pub. L. No. 111-148, § 2715, 124 Stat. 119, 132–35 (2010).

47. *Id.*

48. Letter from Nat'l Ass'n of Ins. Comm'rs to Kathleen Sebelius, Sec'y, U.S. Dep't of Health & Human Servs. (Oct. 27, 2010), *available at* [http://www.naic.org/documents/committees\\_ex\\_mlr\\_reg\\_asadopted.pdf](http://www.naic.org/documents/committees_ex_mlr_reg_asadopted.pdf).

49. News Release, U.S. Dep't of Health & Human Servs., New Affordable Care Act Rules Give Consumers Better Value for Insurance Premiums (Nov. 22, 2010), <http://www.hhs.gov/news/press/2010pres/11/20101122a.html>.

50. Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 74,864 (Dec. 1, 2010) (to be codified at 45 C.F.R. pt. 158).

NAIC state officials' role in PPACA as part of legislative compromises.

Under PPACA § 2718(b), beginning on January 1, 2011, health insurance issuers in the individual, small group and large group markets have to pay rebates to their enrollees on a pro rata basis if the insurer's MLR in a plan year is less than the minimum ratio established under the law. For individual and small group markets, the MLR is 80%,<sup>51</sup> HHS may adjust the percentage for a state if the Secretary determines the ratio may destabilize the individual market.<sup>52</sup> For the large group market, the minimum MLR is 85%.<sup>53</sup> A state may have a higher MLR requirement and its own rebate program as long as it does not prevent an individual from applying to the federal program.<sup>54</sup>

Under PPACA, the formula for calculating the MLR is: (reimbursement for clinical services + expenditures to improve health care quality) ÷ (total premium revenue – federal and state taxes and licensing or regulatory fees and accounting for risk adjustment, risk corridors, and reinsurance).<sup>55</sup> How the definitions are framed is one of the most controversial issues in the 2010 rulemaking.<sup>56</sup>

PPACA requires the NAIC to establish uniform definitions and standardized methodologies for calculating the MLR.<sup>57</sup> On April 14, 2010, HHS, along with the Treasury and Labor Departments, issued a request for comments regarding PPACA § 2718.<sup>58</sup> The Departments outlined several specific areas for comment, and although inviting comments from all interested parties, they highlighted a special interest in comments from health insurance issuers and the states.<sup>59</sup>

Recognizing its responsibility under PPACA, the NAIC adopted a transparent process to develop its definitions and standards.<sup>60</sup> This process

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51. PPACA § 2718(b)(1)(A)(ii), 124 Stat. at 886.

52. *Id.* § 2718(b)(1)(A)(ii), (d), 124 Stat. at 886, 887.

53. *Id.* § 2718(b)(1)(A)(i), 124 Stat. at 886.

54. *Id.* (“or such higher percentage as a State may by regulation determine . . .”).

55. *Id.* § 2718(b)(1)(B)(i), 124 Stat. at 886.

56. See Arlene Weintraub, *Insurer Mounts Offensive And Defensive Strategies On Health Law*, KAISER HEALTH NEWS, Aug. 16, 2010, <http://www.kaiserhealthnews.org/Stories/2010/August/16/cigna-top-executives-response-to-health-law.aspx>.

57. PPACA § 2718(c), 124 Stat. at 887 (“Such methodologies shall be designed to take into account the special circumstances of smaller plans, different types of plans, and newer plans.”).

58. Medical Loss Ratios; Request for Comments Regarding Section 2718 of the Public Health Service Act, 75 Fed. Reg. 19,297, 19,298 (Apr. 14, 2010).

59. *Id.* at 19,299.

60. Letter from Jane Cline, President, Nat'l Ass'n of Ins. Comm'rs, & Therese M. Vaughan, Chief Exec. Officer, Nat'l Ass'n of Ins. Comm'rs, to Kathleen Sebelius, Sec'y, U.S. Dep't of Health & Human Servs. (June 1, 2010), *available at* [http://www.naic.org/documents/committees\\_e\\_hrsi\\_hhs\\_response\\_mlr\\_100601.pdf](http://www.naic.org/documents/committees_e_hrsi_hhs_response_mlr_100601.pdf) (explaining that the NAIC

included holding open conference calls with NAIC subgroups; receiving letters from stakeholders; and posting all drafts, call summaries, and comment letters on the NAIC website.<sup>61</sup> The NAIC also received ongoing input from congressional offices and HHS.<sup>62</sup>

On August 17, 2010, the NAIC approved a proposed standard form for issuers to use when reporting their financial information to state regulators.<sup>63</sup> The revised form, now twenty-eight pages, assists state regulators in identifying and analyzing the MLR for comprehensive, major medical health insurance as required under PPACA § 2718.<sup>64</sup> On October 27, 2010, the NAIC transmitted its final MLR recommendations to HHS.<sup>65</sup> However, the NAIC continued to express concerns that the MLR requirements might have the unintended consequence of destabilizing insurance markets where consumer choice is limited.<sup>66</sup> The NAIC specifically requested that HHS give deference to the analysis and recommendations of state regulators on how the MLR requirements would be implemented in destabilized markets.<sup>67</sup>

The OCIO published the MLR regulation as an interim final rule with request for comments that became effective on January 1, 2011. Whether the concerns of the NAIC—that strict interpretation and enforcement will result in a destabilized market—are well-taken remains to be seen. However, in reaction to the MLR, employers who provide very low coverage policies to their low-wage workers have also expressed concern that these limits might result in low-wage workers losing their coverage entirely until mandatory coverage provisions become effective in 2014.<sup>68</sup> Under such plans, employees may pay as little as \$14 per week for a mini-med plan that caps annual benefits at \$2,000 per year or about \$32 per

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hosted twelve conference calls and received over fifty comments when developing its definitions and standards).

61. *Id.*

62. *Id.*

63. News Release, Nat'l Ass'n of Ins. Comm'rs, NAIC Approves Form for MLR Financial Reporting Requirements (Aug. 17, 2010), [http://www.naic.org/Releases/2010\\_docs/naic\\_approves\\_mlr\\_reporting\\_form.htm](http://www.naic.org/Releases/2010_docs/naic_approves_mlr_reporting_form.htm).

64. NAT'L ASS'N OF INS. COMM'RS, *Medical Loss Ratio (MLR) Blanks Proposal* 1 (June 18, 2010), *available at* [http://www.naic.org/documents/index\\_health\\_reform\\_mlr\\_blanks\\_proposal.pdf](http://www.naic.org/documents/index_health_reform_mlr_blanks_proposal.pdf).

65. Letter from Nat'l Ass'n of Ins. Comm'rs to Kathleen Sebelius, Sec'y, U.S. Dep't of Health & Human Servs. (Oct. 27, 2010), *available at* [http://www.naic.org/documents/committees\\_ex\\_mlr\\_reg\\_asadopted.pdf](http://www.naic.org/documents/committees_ex_mlr_reg_asadopted.pdf).

66. *Id.*

67. *Id.*

68. See Janet Adamy, *McDonald's May Drop Health Plan*, WALL ST. J., Sept. 30, 2010, at A1.

week for coverage up to \$10,000 per year.<sup>69</sup> According to the *Wall Street Journal*, McDonald's, which offers mini-med plans for its workers at 10,500 U.S. locations, expressed concern to HHS that its insurer will not meet the 2011 requirement to spend at least 80–85% of its premium revenue on medical care.<sup>70</sup> Although McDonald's later issued a statement denying that it had expressed concerns about its ability to continue providing mini-med plan coverage to its employees,<sup>71</sup> it seems almost certain that such issues might arise for at least some employers relying on these plans to cover their employees.

## 2. *Health Information Technology*

On November 3, 2010, the OCIO and CMS issued guidance and a notice of proposed rulemaking to provide federal direction and financial support to help states develop consumer-oriented information technology (IT) systems to implement key coverage provisions of PPACA.<sup>72</sup> The guidance relates to IT systems that states would establish to enroll people who qualify for Medicaid, the Children's Health Insurance Program (CHIP), tax credits, or cost-sharing reductions available under PPACA.<sup>73</sup> HHS also announced new federal funding that will be available to all states to streamline and upgrade their Medicaid eligibility systems.<sup>74</sup> The HHS announcement follows the OCIO's October 29, 2010 release of the Funding Opportunity Announcement (FOA) for the design and implementation of the information technology infrastructure needed to operate health insurance exchanges.<sup>75</sup>

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69. *Id.*

70. *Id.*

71. Media Statement, Steve Russell, Senior Vice President & Chief People Officer, McDonald's USA, *Response to WSJ Health Care Article*, [http://www.aboutmcdonalds.com/mcd/media\\_center/recent\\_news/media\\_press\\_releases/response\\_to\\_wsj\\_health\\_care\\_article.html](http://www.aboutmcdonalds.com/mcd/media_center/recent_news/media_press_releases/response_to_wsj_health_care_article.html) (last visited May 14, 2011).

72. Notice from Joel Ario, Dir., Office of Consumer Info. & Ins. Oversight, and Cindy Mann, CMS Deputy Admin. and Dir., Ctr. for Medicare & Medicaid Servs., to State Medicaid Dirs., Health Officials, and Health Ins. Comm'rs. (Nov. 3, 2010), *available at* [http://www.healthcare.gov/center/letters/improved\\_it\\_sys.pdf](http://www.healthcare.gov/center/letters/improved_it_sys.pdf).

73. *Health Insurance Exchanges Information Technology*, DEP'T OF HEALTH & HUMAN SERVS., [http://www.hhs.gov/ocio/regulations/health\\_insurance\\_exchange\\_info\\_tech\\_sys.html](http://www.hhs.gov/ocio/regulations/health_insurance_exchange_info_tech_sys.html) (last visited May 14, 2011).

74. Press Release, Dep't of Health & Human Servs., HHS Announces New Federal Support for States to Develop and Upgrade Medicaid IT Systems and Systems for Enrollment in State Exchanges (Nov. 3, 2010), <http://www.hhs.gov/news/press/2010pres/11/20101103a.html>.

75. Under PPACA § 1561, HHS, in consultation with the Health Information Technology (HIT) Policy Committee and the HIT Standards Committee, must develop



#### IV. FRAUD AND ABUSE ISSUES

PPACA made major changes in an effort to prevent Medicare and Medicaid fraud and abuse. As discussed below, the rules implementing the fraud and abuse enhancements focus on tightening the regulations for known high-risk industries and services, clarifying intent requirements and when suspension of payments can occur, enhancing screening requirements, and mandating compliance programs.

##### *A. Disclosure Requirements for In-Office Ancillary Services Exception*

PPACA mandates that HHS adopt regulations<sup>76</sup> requiring that with respect to magnetic resonance imaging (MRI), computed tomography (CT), positron emission tomography (PET), and any other designated health services (DHS) deemed appropriate by the Secretary, the referring physician must notify the patient in writing at the time of the referral of other suppliers “who furnish such services in the area in which [the patient] resides.”<sup>77</sup> The term *other designated health services* was defined under this section to include any DHS set out at 42 U.S.C. § 1395nn(h)(6)(D) that HHS “determines appropriate.”<sup>78</sup> Although the SSA includes a broad definition of DHS,<sup>79</sup> the final rule limits the referral notices to only those included in the PPACA text: MRIs, CTs, and PET scans.<sup>80</sup> The final rule also reduces the number of suppliers required to be listed from ten in the proposed rule to five in the final; eliminates the requirement that the supplier’s distance from the physician’s office be listed on the disclosure

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interoperable, secure standards and protocols that facilitate electronic enrollment of individuals in federal and state health and human services programs. See *Electronic Eligibility & Enrollment*, OFFICE OF THE NAT’L COORDINATOR FOR HEALTH INFO. TECH., <http://healthit.hhs.gov/portal/server.pt?open=512&mode=2&objID=3161> (last visited May 14, 2011) (adopting the Policy and Standards Committees’ recommendations, with slight edits, on September 17, 2010).

76. PPACA, Pub. L. No. 111-148, § 6003, 124 Stat. 119, 697 (2010).

77. *Id.* § 6003(a), 124 Stat. at 697.

78. *Id.*

79. The term “designated health services” means any of the following items or services: (A) clinical laboratory services, (B) physical therapy services, (C) occupational therapy services, (D) radiology services, including magnetic resonance imaging, computerized axial tomography scans, and ultrasound services, (E) radiation therapy services and supplies, (F) durable medical equipment and supplies, (G) parenteral and enteral nutrients, equipment, and supplies, (H) prosthetics, orthotics, and prosthetic devices and supplies, (I) home health services, (J) outpatient prescription drugs, and (K) inpatient and outpatient hospital services. 42 U.S.C. § 1395nn(h)(6) (2006).

80. Medicare Program; Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2011, 75 Fed. Reg. 73,170, 73,616 (Nov. 29, 2010) (to be codified at 42 C.F.R. § 411.355(b)(7)(i)).

notice; and eliminates the requirement that the physician obtain the patient's signature on the notice and retain a copy of the disclosure as part of the patient's medical record.<sup>81</sup> These changes from the proposed to final rule were based on comments received in response to the proposed rule.<sup>82</sup>

This requirement was said to be "effective" for services provided on or after January 1, 2010.<sup>83</sup> However, in the final rule, CMS moved the effective date to January 1, 2011.<sup>84</sup>

### B. Compliance Program Requirements

One of the most significant fraud and abuse requirements under PPACA is that all providers and suppliers who enroll with Medicare must adopt compliance plans as a condition of enrollment.<sup>85</sup> The statute requires that HHS, in consultation with the Office of the Inspector General (OIG), must adopt core elements of compliance plans for each type of provider or supplier, and for each industry segment.<sup>86</sup> It seems likely that HHS will adopt core elements based on the compliance guidance documents previously published by the OIG.<sup>87</sup> PPACA § 6401(b)(5) contains a similar requirement for providers and suppliers under Medicaid.<sup>88</sup>

Because states will have an important role in the implementation of compliance plans within the sphere of state Medicaid programs, counsel should also be aware of whether or not their state has adopted (or is in the process of adopting) compliance program requirements for participation in the Medicaid program.<sup>89</sup>

### C. Medicaid Recovery Audit Contractors

In addition to the preventative measures of requiring Medicaid compliance programs, PPACA also requires more aggressive audit protocols. PPACA § 6411 requires the states to establish programs in which they would contract with one or more Recovery Audit Contractors

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81. *Id.*

82. *See id.* at 73,443–47.

83. PPACA § 6003(b), 124 Stat. at 697.

84. Medicare Program; Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2011, 75 Fed. Reg. at 73,447.

85. PPACA § 6401(a)(7), 124 Stat. at 751.

86. *Id.*

87. For links to the OIG's previously published guidance documents, see *Compliance Guidance*, OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVICES, <http://oig.hhs.gov/fraud/complianceguidance.asp> (last visited May 14, 2011).

88. PPACA § 6401(b)(5), 124 Stat. at 752.

89. *See, e.g.*, 18 N.Y.C.R.R. § 521.1 (2009) (listing New York State's Medicaid provider compliance program requirements).

(Medicaid RACs) by December 31, 2010.<sup>90</sup> The Medicaid RACs would review Medicaid claims submitted by providers of services for which payment may be made under § 1902(a) of the SSA or a waiver of the state plan.<sup>91</sup> Medicaid RACs would both identify underpayments and identify and collect overpayments from providers.

On November 10, 2010, CMS issued proposed rules to provide guidance related to federal–state funding of state start-up, operation and maintenance costs of Medicaid RACs, and payment methodology for state payments to Medicaid RACs.<sup>92</sup> The rule also proposes requirements for states to assure that adequate appeal processes are in place for providers to dispute adverse determinations made by Medicaid RACs.<sup>93</sup> Further, the rule “proposes that states and Medicaid RACs coordinate with other contractors and entities auditing Medicaid providers as well as with state and federal law enforcement agencies.”<sup>94</sup> The proposed rules allowed sixty days for comments.<sup>95</sup>

There are a number of areas for concern while the rulemaking is underway. Because Medicaid RACs will be managed at the state level, providers must be aware that the appeal processes may well be different from state to state. Because the stated goal of the Medicaid RAC program is to cut overpayments in half by 2012,<sup>96</sup> Medicaid providers should expect aggressive audit protocols. Medicaid RAC payments are limited to a 12.5% contingency fee, although states can pay more if they pay the excess fee on their own.<sup>97</sup> This contingency fee arrangement will provide a powerful incentive for Medicaid RACs to identify overpayments. States are already seeking exemptions. On November 8, 2010, the South Dakota Department of Social Services published a notice that it was proposing amendments to South Dakota’s Medicaid State Plan effective October 1, 2010, and seeking an exemption from the Medicaid RAC requirements under PPACA § 6411.<sup>98</sup>

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90. PPACA § 6411(a)(1), 124 Stat. at 774–75.

91. *Id.*

92. Medicaid Program; Recovery Audit Contractors, 75 Fed. Reg. 69,037 (Nov. 10, 2010) (to be codified at 42 C.F.R. pt. 455).

93. *Id.* at 69,037–38.

94. *Id.* at 69,038.

95. *Id.* (requiring all comments be received by January 10, 2011).

96. In 2009, the Center for Medicare and Medicaid Services (CMS) identified \$18.6 billion in improper Medicaid payments. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-628T, IMPROPER PAYMENTS: PROGRESS MADE BUT CHALLENGES REMAIN IN ESTIMATING AND REDUCING IMPROPER PAYMENTS 5 (2009), *available at* <http://www.gao.gov/new.items/d09628t.pdf>.

97. Medicaid Program; Recovery Audit Contractors, 75 Fed. Reg. at 69,039.

98. *See* 37 S.D. Reg. 99, 99 (Nov. 8, 2010), *available at* <http://legis.state.sd.us/rules/>

*D. Suspension of Payments Upon Allegation of Fraud*

Although current regulations allow HHS to place a provider's prepayment claims under review or to impose a suspension of payment under certain circumstances, PPACA § 6402(a) expands HHS's authority with regard to the circumstances when suspension can be initiated. On September 23, 2010, CMS issued proposed rules on suspension.<sup>99</sup> A final rule was published on February 2, 2011.<sup>100</sup> Under the previous rules, a suspension of payments was limited to 180 days unless it met one of several exceptions.<sup>101</sup> A Medicare contractor could request a one-time-only extension for up to an additional 180 days if it was unable to complete its investigation within the first 180-day period.<sup>102</sup> The OIG or other law enforcement agency could also request a one-time-only exception in order to complete an investigation.<sup>103</sup> Under the final rule, the time limits do not apply if the case has been referred to, and is being considered by the OIG for administrative action; the rule would also permit HHS to grant an extension beyond the 180-day extension if the Department of Justice (DOJ) requests the continued suspension of payments based on the ongoing investigation and anticipated filing of criminal or civil actions.<sup>104</sup>

CMS is permitted to suspend payments to a supplier or provider where there is a "credible allegation" of fraud.<sup>105</sup> Under the final rule, a credible allegation can include an allegation from any source, including but not limited to fraud hotline complaints, claims data mining, patterns identified through provider audits, civil false claims cases, and law enforcement investigations.<sup>106</sup> Allegations will be considered credible when they have "indicia of reliability."<sup>107</sup> CMS concedes that this will need to be

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register/11082010.pdf (seeking to revise the state Medicaid plan pursuant to PPACA).

99. Medicare, Medicaid, and Children's Health Insurance Programs; Additional Screening Requirements, Application Fees, Temporary Enrollment Moratoria, Payment Suspensions and Compliance Plans for Providers and Suppliers, 75 Fed. Reg. 58,204 (Sept. 23, 2010) (to be codified at 42 C.F.R. pts. 405, 424, 438, 447, 455, 457, 498, 1007).

100. Medicare, Medicaid, and Children's Health Insurance Programs; Additional Screening Requirements, Application Fees, Temporary Enrollment Moratoria, Payment Suspensions and Compliance Plans for Providers and Suppliers, 76 Fed. Reg. 5862 (Feb. 2, 2011) (to be codified at 42 C.F.R. pts. 405, 424, 447).

101. 42 C.F.R. § 405.372(d) (2009).

102. *Id.*

103. *Id.*

104. *Id.*; 42 C.F.R. §§ 405.370–79 (2010).

105. Medicare, Medicaid, and Children's Health Insurance Programs; Additional Screening Requirements, Application Fees, Temporary Enrollment Moratoria, Payment Suspensions and Compliance Plans for Providers and Suppliers, 76 Fed. Reg. at 5961.

106. *Id.*

107. *Id.*

determined on a case-by-case basis.<sup>108</sup>

Under PPACA, the CMS is permitted to suspend payments to a supplier or provider pending an investigation of a credible allegation of fraud.<sup>109</sup> Counsel who are representing smaller suppliers or providers know that any interruption in the Medicare revenue stream can cause significant hardship for the client. An indefinite length of payment suspension pending the outcome of an investigation might well put many of these entities out of business. Where overpayments are characterized as having been obtained through fraud, the overpayment debt will not be dischargeable in bankruptcy.<sup>110</sup> The HHS decision on when and how to suspend has due process implications, and opposition to the final rule could be taken to the appeals court either as a rulemaking challenge or as a defense to an HHS adjudicative decision upholding the suspension of a particular provider who then sues to invalidate the program on constitutional grounds. Although CMS received “numerous comments raising concern over the perceived lack of due process afforded to the provider community,” it declined to “withdraw the suspension provision from the final rule with comment period” because the agency believed “the due process protections are more than adequate and the evidentiary standards for payment suspensions cannot be more precisely defined.”<sup>111</sup>

#### *E. Medicare Self-Referral Disclosure Protocol*

PPACA requires the Secretary to implement regulations establishing a self-disclosure protocol,<sup>112</sup> specifically for hospitals or other providers who have found violations of the Stark (anti-kickback) provisions of the Medicare statute.<sup>113</sup> Under the previous self-referral disclosure protocol, the large strict liability burden was relieved if the provider told the government about its past violation before the government found out about the violation. This allowed a hospital that found such a bad program when it merged with another hospital to inform the government, stop the bad conduct, and avoid severe penalties. But before the passage of PPACA, on March 24, 2009, the OIG announced that it had ceased accepting medical entities’ self-disclosure of Stark violations under its self-disclosure

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108. *Id.* at 5966 (to be codified at 42 C.F.R. § 455.2).

109. PPACA, Pub. L. 111-148, § 6402(a), 124 Stat. 119, 760 (2010).

110. *See* 11 U.S.C. § 523(a)(2)(A) (2006).

111. Medicare, Medicaid, and Children’s Health Insurance Programs; Additional Screening Requirements, Application Fees, Temporary Enrollment Moratoria, Payment Suspensions and Compliance Plans for Providers and Suppliers, 76 Fed. Reg. at 5930–31 (to be codified in 42 C.F.R. pts. 405, 424, 447, 455, 457, 498, 1007).

112. PPACA § 6409, 124 Stat. at 772.

113. *See generally* 24 U.S.C. § 1395nn (2006).

protocol.<sup>114</sup> PPACA reinstates a form of safe harbor and possible reduction of amounts owed for those who report their situations before being detected and punished.<sup>115</sup> Safe harbor provisions to shield a provider from strict liability under the Stark statute<sup>116</sup> are perceived to be so important that the lobbyists for health care companies pressed Congress to reinstate their ability to “confess” their noncompliance.

On September 23, 2010, CMS issued its Voluntary Self-Referral Disclosure Protocol (SRDP).<sup>117</sup> And, while providers and their advocates might have hoped for an opportunity to comment on the SRDP, CMS issued the SRDP without using notice-and-comment rulemaking. Additionally, while PPACA authorizes HHS to “reduce the amount due and owing” to these violations,<sup>118</sup> the SRDP makes it clear that CMS “has no obligation to reduce any amounts due and owing” and will make an “individual determination as to whether a reduction is appropriate.”<sup>119</sup>

#### F. Nursing Homes

PPACA has significant impacts on long-term care institutions such as nursing homes. As is the case with other high-visibility spending programs, rules implementing the new statute will be controversial with many competing constituencies.<sup>120</sup> In particular, a number of PPACA provisions will have long-ranging impacts on the safety of patients in long-term care facilities.

Under PPACA § 6103, HHS must add to the Nursing Home Compare

114. Press Release, Daniel R. Levinson, Inspector Gen., U.S. Dept. of Health & Human Servs., An Open Letter to Health Care Providers (Mar. 24, 2009), *available at* <http://oig.hhs.gov/fraud/docs/openletters/OpenLetter3-24-09.pdf>.

115. PPACA § 6409(b), 124 Stat. at 772–73.

116. 24 U.S.C. § 1395nn(g).

117. DEP'T. HEALTH & HUMAN SERVS., OMB 0938-1106, CMS VOLUNTARY SELF-REFERRAL DISCLOSURE PROTOCOL (Sept. 23, 2010), [https://www.cms.gov/PhysicianSelfReferral/Downloads/6409\\_SRDP\\_Protocol.pdf](https://www.cms.gov/PhysicianSelfReferral/Downloads/6409_SRDP_Protocol.pdf).

118. PPACA § 6409(b), 124 Stat. at 772–773.

119. *Supra* note 117, § VIII.

120. Medicare expenditures for Nursing Care Facilities and Continuing Care Retirement Communities exceeded \$27,991 million in 2009, excluding the federal share of Medicaid costs. *National Health Expenditures by type of service and source of funds, CY 1960–2009*, CENTERS FOR MEDICARE AND MEDICARE SERVS., [https://www.cms.gov/NationalHealthExpendData/02\\_NationalHealthAccountsHistorical.asp#TopOfPage](https://www.cms.gov/NationalHealthExpendData/02_NationalHealthAccountsHistorical.asp#TopOfPage) (last visited May 14, 2011). Compared to Medicare expenditures in 2009 for home health care (\$29,835 million) and durable medical equipment (DME) (\$7445 million). *Id.* Both home health and DME were targeted under PPACA for additional fraud prevention requirements. *See* PPACA § 6407, 124 Stat. at 769–70.

website<sup>121</sup> information including: staffing data, including staffing turnover and tenure; links to state Internet websites with information regarding state survey and certification programs; links to Form 2567 state inspection reports (deficiency reports); guidance for consumers on how to interpret and understand deficiency reports; and the facility plan of correction or other response to such reports; a standardized complaint form; summary information on the number, type, severity, and outcome of substantiated complaints; and the number of adjudicated instances of criminal violations by a facility or its employees that were committed in the facility, including those that involve abuse, neglect, exploitation, “or other violations or crimes that resulted in serious bodily injury.”<sup>122</sup> The information must be presented “in a manner that is prominent, updated on a timely basis, easily accessible, readily understandable to consumers of long-term care services, and searchable.”<sup>123</sup> This information could be indicative of safety issues within the facility.

Under PPACA § 6105, by March 2011, HHS must develop a standardized complaint form that residents or persons acting on their behalf may use to file a complaint with a state survey agency or long-term care ombudsman program. Further, states must establish a complaint resolution process that includes: procedures to assure accurate tracking of complaints; procedures to determine the severity of complaints; procedures for complaint investigations; and deadlines for responding to complaints. In addition to the standardized form, complaints may still be submitted in other ways and formats, including orally.<sup>124</sup>

The health reform bill also requires HHS, by December 31, 2011, to establish and implement a quality assurance and performance improvement program (QAPI program) for skilled nursing facilities and nursing facilities,<sup>125</sup> including multiunit chains of facilities.<sup>126</sup> Under the QAPI program, HHS must “establish standards relating to quality assurance and performance improvement with respect to facilities and provide technical assistance to facilities on the development of best

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121. See *Nursing Home Compare*, MEDICARE.GOV, <http://www.medicare.gov/NHCompare/> (last visited May 14, 2011).

122. PPACA § 6103(a)(1)(B), 124 Stat. at 704.

123. *Id.*

124. *Id.* § 6105(a), 124 Stat. at 711–12.

125. Generally, skilled nursing involves physical, speech, occupational, or other therapy services and is typically reimbursed by Medicare. Nursing facilities are more custodial and are reimbursed under Medicaid programs. See 42 U.S.C. § 1395i-3(a) (2006) (defining *skilled nursing facility*); *Id.* § 1396r(a) (2006) (defining *nursing facility*).

126. PPACA § 6102, 124 Stat. at 702–04.

practices in order to meet such standards.”<sup>127</sup> One year after the regulations are promulgated, “a facility must submit to the Secretary a plan for the facility to meet such standards and implement such best practices, including how to coordinate the implementation of such plan with quality assessment and assurance activities.”<sup>128</sup>

Under PPACA § 6201, HHS must establish a nationwide program “to identify efficient, effective, and economical procedures”<sup>129</sup> for background checks of workers with direct patient access, modeled on the pilot program conducted under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.<sup>130</sup> The procedures must include search of state-based abuse and neglect registries and state and federal criminal history records, as well as a fingerprint check.<sup>131</sup> States must conduct the screening and criminal history background checks under the nationwide program;<sup>132</sup> monitor compliance by long-term care facilities and providers;<sup>133</sup> provide for provisional employment, up to sixty days, for employees and for direct on-site supervision for employees pending completion of an appeal process;<sup>134</sup> provide for an independent process by which a provisional employee or employee may appeal or dispute the accuracy of information;<sup>135</sup> and provide for a single state agency to be responsible for overseeing the process (including specifying the disqualifying offenses).<sup>136</sup> The OIG must evaluate the nationwide program and submit a report to Congress.<sup>137</sup>

PPACA § 2043 provides grants and training to the ombudsman program to identify cases of abuse and neglect.<sup>138</sup> HHS will make the grants to eligible entities with relevant expertise and experience in abuse and neglect in long-term care facilities or long-term care ombudsman programs and responsibilities to: improve the capacity of state long-term care ombudsman programs to respond to and resolve complaints about abuse and neglect; conduct pilot programs with state long-term care ombudsman offices or local ombudsman entities; and provide support for such state long-term care ombudsman programs and pilot programs (such as through the

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127. *Id.*

128. *Id.*

129. *Id.* § 6201(a), 124 Stat. at 721–27.

130. Pub. L. 108-173, § 307(a), 117 Stat. 2066, 2257.

131. PPACA § 6201(a)(3), 124 Stat. at 722.

132. *Id.* § 6201(a)(4)(B)(i), 124 Stat. at 723.

133. *Id.* § 6201(a)(4)(B)(ii), 124 Stat. at 723.

134. *Id.* § 6201(a)(4)(B)(iii), 124 Stat. at 723.

135. *Id.* § 6201(a)(4)(B)(iv), 124 Stat. at 723.

136. *Id.* § 6201(a)(4)(B)(v), 124 Stat. at 723.

137. *Id.* § 6201(a)(7)(B), 124 Stat. at 726–27.

138. *Id.* §§ 2043, 6703(a)(1)(C), 124 Stat. at 304–05, 782–85.



establishment of a national long-term care ombudsman resource center).<sup>139</sup>

So, for attorneys with clients who are residents in or the owners of the long-term care industry, it is going to be vitally important to stay alert for proposed rules and to move as quickly as possible. Those who passively rely on trade groups to take the lead in commenting on proposed rules may be doing a disservice to their clients and to their own bottom line.

### G. *Drug Manufacturers*

How much are the drugs used by seniors on Medicare going to cost? Federal pricing figures for reimbursement of drugs are a twisted jumble of competing discounts and baseline numbers, with serious negative consequences for those who charge the government too much relative to other purchasers. On September 3, 2010, CMS issued a proposed rule withdrawing the prior CMS regulations governing the determination of average manufacturer price, the definition of multiple source drugs, and the application of federal upper reimbursement limits for multiple source drugs (the proposed rule).<sup>140</sup> This withdrawal would impact the applicable regulations finalized by CMS in 2007<sup>141</sup> and 2008<sup>142</sup> but would leave intact other sections of the 2007 regulations, including, for example, the best price provisions and certain definitions (including the definition of “bona fide service fee”). Comments were filed before October 4, 2010.<sup>143</sup> When states, insurance firms, and drugmakers comment on the impact of the withdrawn regulations, they also comment upon the open issues in accounting for wholesale drug pricing that have not been addressed under PPACA.

## V. WHEN ARE ALL OF THE RULES COMING?

Prudent counsel will buy a very big calendar and fill in many of the statutory deadlines. Time pressures on publication of regulations within the tight 180- and 360-day deadlines in this 2010 legislation will force the federal agencies to get their first set of rules in place quickly, and will press

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139. *Id.*

140. Medicaid Program; Withdrawal of Determination of Average Manufacturer Price, Multiple Source Drug Definition, and Upper Limits for Multiple Source Drugs, 75 Fed. Reg. 54,073, 54,075 (proposed Sept. 3, 2010) (to be codified at 42 C.F.R. pt. 447).

141. Medicaid Program; Prescription Drugs, 72 Fed. Reg. 39,142, 39,142 (July 17, 2007) (codified at 42 C.F.R. pt. 447).

142. Medicaid Program; Multiple Source Drug Definition 73 Fed. Reg. 58,491 (Oct. 7, 2008) (to be codified at 42 C.F.R. pt. 447).

143. Medicaid Program; Withdrawal of Determination of Average Manufacturer Price, Multiple Source Drug Definition, and Upper Limits for Multiple Source Drugs, at 54,073.

state Medicaid advisors and state legal officers to bring their health insurance risk pools and exchanges into rapid operation.<sup>144</sup> News media, congressional committees, and affected constituency groups can be expected to publicize “excessive” delays in rulemaking by the agency, so act quickly; the chances for an affected entity receiving a lengthy extension on the comment period are not great. Again, silence is deemed assent.

The rule drafting clock began running as soon as PPACA was enacted in early 2010, and compliance deadlines will sneak up on less-prepared clients. Time pressures on the attorney will arise from the phenomenon that some health care law participants are slowly awakening to impacts that they had not realized. For example, assume that an attorney works for a state health agency, and that the state’s governor returns from a National Governors Association meeting to ask the staff, “What’s up with this topic; they tell me our comments must be filed by x date?” This should have been anticipated. Counsel should monitor the legal publisher services for timelines and time charts on new health care regulations. State employee attorneys should be prepared to predict what this proposed rule might do to the state budget. Their formula for success may be to write a strong draft, make the governor look terrific in responding and leading the charge, and win an accommodation in the final rule that shows victory for the governor’s viewpoint—their careers will flourish!

## VI. WHAT HAPPENS IF I DO NOTHING?

Advocates for reform cannot declare victory in Congress and go home. Rulemaking is just as crucial a challenge as lawmaking. Another consideration for lawyers who file comments representing public sector clients is the tremendous political and legal backlash caused by PPACA’s passage. Efforts by the new Republican majority in the House of Representatives to repeal PPACA, though blocked by the Democratic Senate, are likely to have some trickle-down pressures upon the HHS rulemaking process, with the Administration accommodating some of the criticisms by modifying the rules to meet opponents halfway. Still another consideration is a series of ongoing court challenges to the constitutionality of PPACA itself. Most of these lawsuits have been dismissed by federal district courts, but federal judges in two cases filed by states ruled portions

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144. See, e.g., PPACA § 1001, 124 Stat. at 130–38 (not later than two years); § 6001, 124 Stat. at 684–89 (before July 1, 2011); § 6102, 124 Stat. at 702–04 (not later than December 31, 2011 for some provisions); § 7102, 124 Stat. at 823–27 (not later than 180 days after enactment); § 8002, 124 Stat. at 828–47 (not later than October 1, 2012); PPACA § 10101, 124 Stat. at 883–91 (not later than December 31, 2010); § 10201, 124 Stat. at 917–24 (not later than 180 days after enactment of subsection).

of PPACA unconstitutional.<sup>145</sup>

## VII. LAWYERS, CLIENTS, AND MONEY

PPACA will be an especially important source of income for the health care practice groups of the nation's largest law firms. In 2009–2010, the debates over passage of the several health care reform bills were massively lucrative for lobbyists. Cynics may say that it is now up to the advocates who fight in opposition to health law rules to amass their own profits as they bill the health-related companies who have the greatest amount of financial skin in the game on the outcome of rule drafting and rule review.<sup>146</sup>

We can anticipate that the quality of rulemaking comments produced by the health care companies and associations will be quite impressive, since they have more resources to collect and present data on what rules would cost. By contrast, advocates for patients and taxpayers may have less access to numbers, and therefore a variable quantity and quality of data to add to the agency's rulemaking record. Employers will sometimes allow their associations to collectively present aggregate statistics for their industry. Public interest advocates should match up what these advocates are saying with the public statements that their clients made during the legislative process. The inconsistencies should be noted in the record and in press coverage of the comments filed.

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145. Compare *Florida ex rel. Bondi v. Dep't. of Health & Human Servs.*, No. 3:10-CV-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011), *clarified by* No. 3:10-CV-91-RV/EMT, 2011 WL 723117, at \*1 (N.D. Fla. Mar. 3, 2011) (holding the individual mandate to purchase health insurance in PPACA to be in violation of the Commerce Clause, and declaring the whole act unconstitutional because the individual mandate is not severable from the remainder of the act), and *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 790 (E.D. Va. 2010) (holding the individual mandate in violation of the Commerce Clause, but holding that provision severable from the rest of PPACA) with *Liberty Univ. v. Geithner*, No. 6:10-CV-00015-NKM, 2010 WL 4860299, at \*31 (W.D. Va. Nov. 30, 2010) (holding that PPACA did not violate Commerce Clause, Free Exercise Clause, Free Speech Clause, or equal protection rights of individuals), and *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 895–96 (E.D. Mich. 2010) (holding the individual mandate permissible under the Commerce Clause).

146. See, e.g., Bogardus, *supra* note 2 (“Since Jan. 1, close to a dozen firms and health care companies have hired new lobbyists and lawyers or have been formed to lobby on the new law’s regulations, according to a review by *The Hill*.”); Mayer, *supra* note 2; see also *Health Care Tools*, OPENSECRETS.ORG, *supra* note 2; *Tracking the Payback*, OPENSECRETS.ORG, *supra* note 2.

## VIII. MAKING A SUCCESSFUL COMMENT

The content of a substantive comment to a federal agency will be crucial. The goal is to have one's presentation carefully read by the decisionmakers inside the agency.<sup>147</sup> The agency staff will have already spent many days researching their draft rules. The value of each public interest comment to them is enhanced by the quality of data and utilization information that health officials and hospital providers have supplied to their community's comment writers. Rhetorical flourishes do not win rulemaking disputes; to win on the expected judicial appeals, the administrative record must be supported by statistics and reliable sources. Public sector and nonprofit sector commenters need to anticipate the impact of this disparity between them and the health insurance industry. Public interest advocates should keep the agency staff aware of the effects of PPACA on poor and underserved populations.

## IX. THE TOBACCO MODEL

The best comparative experience with which to study this health care rulemaking may be the massive tobacco rulemaking of the 1990s, one of the largest rulemaking projects in recent history. Years of effort by the Food and Drug Administration (FDA) led to a massive final rule,<sup>148</sup> which the Supreme Court killed by a 5–4 vote in March 2000.<sup>149</sup> The tobacco experience taught the health insurance companies how to be effective in shaping the administrative record against proposed rules. This is a valid comparison, because the two groups have hired similar advisors, similar law firms, and have used similar tactics. Many millions of dollars were spent on lobbying during the statutory phase of health care reform; millions will be spent during rulemaking phases.<sup>150</sup> An instructive comparison is the 2008

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147. For some rules on which very large numbers of comments are expected, an outside law firm or federal contractor may screen every page and seek commonality. See JAMES O'REILLY, ADMINISTRATIVE RULEMAKING § 6:10 (2d ed. 2010).

148. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (Aug. 28, 1996) (codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, 897) (the final rule totaling 1,188 pages).

149. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121–26 (2000) (finding Congress “clearly precluded the FDA from asserting jurisdiction to regulate tobacco products”).

150. See Jennifer Liberto, *Health care lobbying boom continues*, CNNMONEY.COM, Mar. 25, 2011, [http://money.cnn.com/2011/03/25/news/economy/health\\_care\\_lobbying/index.htm](http://money.cnn.com/2011/03/25/news/economy/health_care_lobbying/index.htm) (citing the Sunlight Foundation's finding that “more than 180 groups have registered to continue shaping the law.”); *Lobbying Tracker, Health Issues*, SUNLIGHT FOUND. REPORTING GRP., <http://reporting.sunlightfoundation.com/lobbying/issue/health-issues> (last visited May 14, 2011); see also Mayer, *supra* note 2; *Health Care Tools*,

tobacco control legislation. When tobacco sellers sensed that they could lose the battle over cigarettes at the state level, they hurried to co-opt decisions of the HHS by hiring as many former insiders as they could and by tailoring a compromise cigarette control statute<sup>151</sup> that shielded the largest firms from the toughest controls.<sup>152</sup>

To counter insider maneuvering, counsel representing the public interest should gather data sets, understand search tools for obtaining the fiscal impact information on a rule, assemble the URLs for the legislative history documents, and subscribe to authoritative newsletters.<sup>153</sup> The opponents of PPACA will come to the conflict prepared; to advocate for your clients you must also be prepared.

## X. IMBALANCES OF POWER

Opponents of PPACA, found in think tanks and on op-ed pages, are largely funded by insiders with a financial or ideological stake. Their law firms are very deep in the rulemaking mix, employing the best talent that money can buy. When public sector lawyers assemble their responses, they will need to get fresh data, local impact studies, and wellness or outcome information that your state health department has or can readily obtain.

Be practical as advocates: if implementing this law through this rule is worth the effort, proponents of health care reform must work hard for the survival of this rule, against the opponents' effort to build an insurmountable administrative record explaining why the rule should be weakened or is not justified. Industry counsel will claim a loophole wherever one might be allowed by an interpretation of the statute. If your well-supported rulemaking comment helps HHS to resist an opening for a loophole that the health insurance industry seeks, your work is more likely to be adopted. The satisfaction of public interest lawyers is subtle, for their efforts will have helped countless patients whom they may never meet. If implementation of a key provision of the law fails in the face of the industry-funded attacks on the new rules, a "vacated" rule has no effect, and patients may not be able to get Congress to revisit that particular issue

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OPENSECRETS.ORG, *supra* note 2; *Tracking the Paycheck*, OPENSECRETS.ORG, *supra* note 2.

151. Family Smoking Prevention and Tobacco Control and Federal Retirement Program, Pub. L. No. 111-31, § 3, 123 Stat. 1776, 1781 (2009) (providing the FDA with authority to regulate tobacco products).

152. See James T. O'Reilly, *FDA Regulation of Tobacco: Blessing or Curse for FDA Professionals?*, 64 FOOD & DRUG L.J. 459, 459 (2009) (suggesting FDA professionals would be criticized for "arranging the paperwork for protection of megafirm's market share").

153. See, e.g., *Health Policy Tracking Service on Westlaw*, WEST STORE: TRUSTED LEGAL RESOURCES FROM THOMSON REUTERS (last visited May 14, 2011) <http://west.thomson.com/westlaw/general-counsel/health-policy.aspx>.

for years.

Consider meeting with local officials to discuss the possibility of supporting or coauthoring the comment you plan to file on behalf of your client. Make sure to identify areas of agreement with local governmental entities and officers and underscore common interests or goals in your comments. Ultimately, this debate is about helping the recipients of health care—the constituents of HHS for whom PPACA was adopted—and should not be about raising the share price for health insurance stockholders.

#### XI. WHO'S GOING TO REVIEW THIS RULE?

The fight is not over when the final rule is published. Judicial review of the rules is very likely to occur. The final rule will be appealed to the circuit courts of appeals, or, for some rules, to the district courts. And there will be strategic efforts by opponents of the reform law who will load the administrative record with arguments which are likely to play well with the judges hearing the case—judges who have life tenure and the power to approve or block an agency's implementing rule, or even the new law itself.<sup>154</sup>

Yes, the new law contains ambiguous phrases, which will necessitate court interpretation. In the years since the *Chevron* deference principle was established, deference to agency interpretations has been debated.<sup>155</sup> The attitude of the judge is the wild card in judicial interpretation of regulatory statutes;<sup>156</sup> counsel in health care reform cases must deal with it by making the administrative record as attractive to the reviewing court as possible.

People and organizations with a stake in the law and of its implementing rules need to build the administrative record in support of their client's desired outcome. If a subsection of a proposed rule inadvertently cuts out funds for the State Home for Orphans, for example, lawyers for that state

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154. 5 U.S.C. §§ 701–706 (2006).

155. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (establishing a two-part test for determining when a court should give deference to an agency decision and when it should not because deciding power is not within the agency's authority). But see *Melvin v. Astrue*, 602 F. Supp. 2d 694, 703 (E.D.N.C. 2009) (ruling that just because a case involves an administrative agency and an ambiguous statute, it does not mean that the *Chevron* deference principle applies) (citing to *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006)).

156. See Richard J. Pierce, Jr., *What do the Studies of Judicial Review of Agency Action Mean?*, 63 ADMIN. L. REV. 77, 89 (2011) (reporting that a circuit court is approximately 30% more likely to uphold agency action when it is consistent with panel members' ideological preferences, and that ideology is the “most important” variable leading to different judicial determinations regarding agency action).

must be ready to help their clients in the state attorney general's office to make an effective comment.

Whenever Congress has delegated power with ambiguous statutory language, the outcome of interpretation of that power takes place in the courts, and the agency's outcomes are uncertain. How judicial minds will construe the interstices of the health care law is anyone's guess.

## XII. POWERS OF PREEMPTION

Federal preemption of state and local powers is a crucial issue for state officials.<sup>157</sup> To win arguments for or against federal preemption of a particular issue, you will need to deal with this highly nuanced constitutional area.<sup>158</sup>

If your client is a state or city, learn as much as you can about the reference sources on preemption before the changes appear in proposed rules. Parts of the final rules may prevent your state or city from using its own creativity to solve health care problems. Major health insurers, though regulated by state insurance regulators, dislike state-initiated reforms and will fight them with the Employee Retirement Income Security Act of 1974 (ERISA) or other statutory preemption laws.<sup>159</sup> It is likely that numerous proposed rules announced by federal agencies will demand that each state plan must conform to a federally mandated set of criteria. Be attentive to the preemption doctrine and its practicalities. The use of general agency rulemaking as a predicate to preemption is often challenged in court by those who disagree with the preemption claim.<sup>160</sup>

## XIII. THE WILD CARDS: WHISTLING AND RELATING

If you represent workers, individual physicians, or nurses, do not overlook the personnel aspects of PPACA. There may be a parade of angry

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157. *See generally*, JAMES T. O'REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAWS: LEGISLATION, REGULATION AND LITIGATION* 2 (2006) (noting that "states view preemption as restricting access to their funds").

158. *Compare* U.S. CONST. art. VI, cl. 2 (establishing the Supremacy Clause and providing for the preemption of state laws by federal laws when the state law is incompatible with the policy of the federal law), *with* *Wyeth v. Levine*, 129 S. Ct. 1187, 1191 (2009) (holding that a state law on drug warning labels is not preempted by federal regulations for drug warning labels issued by the FDA).

159. *See* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 202, 88 Stat. 829, 853-54 (codified in scattered sections of 29 U.S.C.) (setting federal minimum standards for private health insurers).

160. *See generally* Paula A. Sinozich et. al., *Project: The Role of Preemption in Administrative Law*, 45 ADMIN L. REV. 107 (1993) (providing an overview of the preemption doctrine and listing sources for further research).

ex-employees who become qui tam relators, and False Claims Act cases may proliferate. Read § 10104(j)(2) of the new law. Then scan through the Labor Department reference materials the ex-employee can use in making their submissions to the Labor Department under the existing whistleblower adjudication systems.<sup>161</sup>

The demographic of whistleblowers has changed. Unlike the factory and mine worker complaints of the past, PPACA now empowers a much more sophisticated and highly educated class of persons who will be losing their positions. Some of them will be unhappy, even vindictive. Some of these aggrieved health care workers may contact attorneys for relief. The best advice one can offer them remains, "Get an experienced advocate, don't go it alone." The twenty federal whistleblower laws are not all alike.<sup>162</sup> The Administrative Law Judges of the Labor Department will prefer that the individual get experienced counsel. Offer that service and the clients will greatly benefit.

A timely example of the profitability of qui tam relator suits comes in the form of the recent GlaxoSmithKline (GSK) settlement.<sup>163</sup> Under the settlement, GSK agreed to plead guilty to charges relating to the manufacture and distribution of certain adulterated drugs.<sup>164</sup> The settlement includes a criminal fine and forfeiture totaling \$150 million and a civil settlement under the False Claims Act and related state claims for \$600 million.<sup>165</sup> The DOJ identified the qui tam relator, Cheryl Eckard, who filed her whistleblower lawsuit in the District of Massachusetts.<sup>166</sup> Ms. Eckard will receive approximately \$96 million from the federal share of the FCA settlement amount.<sup>167</sup>

#### XIV. STUDY THE ELIGIBILITY ISSUES

Lawyers who represent lower income families and the poor will have a new set of questions to ponder: the detailed issues of expanded eligibility for health care under the new sets of rules. Anticipation of new patient

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161. *The Whistleblower Protection Program*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <http://www.whistleblowers.gov> (last visited May 14, 2011).

162. *See id.* (providing the list and provisions of the twenty different whistleblower statutes).

163. *See* Press Release, Office of Pub. Affairs, Dep't of Justice, GlaxoSmithKline to Plead Guilty & Pay \$750 Million to Resolve Criminal & Civil Liab. Regarding Mfg. Deficiencies at P.R. Plant (Oct. 26, 2010), <http://www.justice.gov/opa/pr/2010/October/10-civ-1205.html>.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*



populations entering the medical service community with payment from Medicaid is good news for public health, because delays in medical attention will make their illnesses or conditions worse.

But the rules determine the reality of patient eligibility, not the rhetoric of the legislative debate that drew so much press attention. (In reality, free health care is not offered by PPACA.<sup>168</sup>) Eligibility is complex; lawyers are likely going to have to sort through the new rules to determine whether a denial of subsidized coverage is legal. The general public's expectations from debates on the health care bill—that there would be ample government protections for financial issues and insurability issues—will generate some difficult disputes.

As the health insurance reforms take effect, some early misunderstandings at hospital or surgical billing offices will generate legal questions. The health insurance carriers are constrained and restrained—their is still a for-profit business—and patients of all walks of life will continue to be frustrated by denials and disappointments. Some of these instances will generate requests for legal aid services, some groups of demonstrators will be picketing insurers, and some of these disputes might provoke angry patients or their caregivers to seek guidance. Lawyers are both advocates and peacemakers. Knowing what the PPACA text says can be done now; knowing what the rules will eventually say is dependent on the terms of the final regulations that will be open for public comments.

Consider translating what your clients need to know about health care reform rights into plain English, Spanish, and other foreign languages. Many clients would benefit from plain-language guides to aspects of the health law, understandable by people who are not experts in legal matters. This is a great marketing opportunity for those in elder law, poverty law, or small business counseling. Consider phrasing the material in easy-to-understand questions, such as, “Doesn't the new law require United to pay for this,” or, “Isn't it true that I now have a right to xyz?” Because the local bar association's lawyer referral hotline, or the region's nonprofit legal self-help center if you have one, will get these questions, the practitioner may choose to develop simple marketing tools involving health care simplification documents. These may lead to paying customers with health insurance questions. You are likely to get inquiries wanting you to interpret the statute or predict how the new rules will be implemented. For nonpaying clients, these inquiries would best be answered for the general public by state insurance departments or state attorneys general offices, or by recognized local consumer protection groups.

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168. See Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (amending PPACA, Pub. L. No. 111-148, 124 Stat. 119 (2010)).

## XV. FOLLOW THE MONEY

Prudent lawyers already recognize that these preparatory steps for health care client counseling and commenting will not be inexpensive. You can expect to be offered a proliferation of costly tools and digests. This is a good reason for having a coalition of interested clients who each pay a modest amount for your skilled services. Work with law librarians, who will do what they already do so well—match the hardcover resources with the electronic tools, like Westlaw's health care tracking system that keeps up with statutory and regulatory changes.<sup>169</sup> Look for reliable web news filters and aggregators that have a track record for quality and reliability. Invest prudently in newsletters and ask for sample copies. If you are in a government law office, remember that the Washington offices of the associations of state agency networks like the National Association of Attorneys General and the National Governors Association often disseminate the relevant public information faster than private agencies, and with more accurate predictions.<sup>170</sup>

The advantage of subscribing to private health care publications is that their reporters will scoop the agency announcement of the Federal Register publication of a proposed rule, giving you earlier access to the ideas that will be posted in the near future by the agencies. With early warning, you will be able to line up your comments early and to determine what extra set of data will be needed. Again, it is a rulemaking process that demands your clients establish a record in support of their policy choices. And since the agency has already aggregated its supporting data, you will be aggregating your own data either in opposition to or in the same direction, but on a different slant, as the agency.

## XVI. USING THE REFERENCE MATERIAL WISELY

To provide the best possible representation for your clients and properly advocate their goals in the rulemaking process, you will need to access a range of materials to ensure that you are fully informed about the proposed

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169. See WEST STORE: TRUSTED LEGAL RESOURCES FROM THOMSON REUTERS, *supra* note 153 (providing coverage on delivery, insurance-market and payment reform, state-specific responses, administrative rulemaking, compliance and enforcement issues).

170. See, e.g., *About NAAG*, NAT'L ASS'N OF ATT'Y GENS., [http://www.naag.org/about\\_naag.php](http://www.naag.org/about_naag.php) (last visited May 14, 2011) (stating that all of the nation's attorneys general are members of NAAG and that its mission is to help attorneys general respond to state and federal issues, individually and cooperatively); *About the National Governors Association*, NAT'L GOVERNORS ASS'N, <http://www.nga.org/portal/site/nga/menuitem.cdd492add7dd9cf9e8ebb856a11010a0/> (last visited May 14, 2011) (stating the National Governors Association's purpose is to provide services to all governors to help them deal with key federal issues as well develop and implement innovative solutions to public policy challenges).

regulations and the varied interests that might be driving the rulemaking process. Therefore, it is essential that you make use of as many resources as possible. Below is a cross section of the many available tools you will need to assist your clients in having a voice in the health care rulemaking process to come.

### A. Government Resources

#### 1. The Federal Register

The *Federal Register* is the primary source for the published text of notices, proposed rules, and final rules and regulations, and can be found online.<sup>171</sup> The website includes documents from 1995 through the current release. The website provides simple and advanced search functionality or the option to browse through the individual releases.

The Public Inspection Desk is another resource available from the Office of the Federal Register.<sup>172</sup> Regular filing documents that will be published in the following day's *Federal Register* are generally filed at 8:45 a.m. Eastern time.<sup>173</sup> Special filing documents can be filed at other times and dates prior to publication. And while a day or two might not seem significant, it can provide you with an opportunity to initiate contact with your client and control the schedule rather than waiting for the client to contact you, possibly at the last minute and without enough time to make a well-considered comment.

#### 2. Center for Consumer Information and Insurance Oversight (CCIIO)

The new CCIIO website provides information on its initiatives and programs, regulations and guidance, as well as its collection of insurance information.<sup>174</sup> The CCIIO provides links for news, audio and transcripts of conference calls, fact sheets, and frequently asked questions.<sup>175</sup> Additional information on regulations and guidance is also available.<sup>176</sup>

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171. It also includes contents and preliminary pages, presidential documents, Sunshine Act meetings prior to March 1, 1996, reader aids, and corrections. *Federal Register Contents*, GPO ACCESS, [http://www.access.gpo.gov/su\\_docs/aces/fr-cont.html](http://www.access.gpo.gov/su_docs/aces/fr-cont.html) (last visited May 14, 2011). The *Federal Register* can be found online at <http://www.gpoaccess.gov/fr/> or at <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR>.

172. *Electronic Public Inspection Desk*, OFFICE OF THE FED. REGISTER, <http://www.ofr.gov/inspection.aspx> (last visited May 14, 2011).

173. *See id.*

174. *Center for Consumer Information and Insurance Oversight*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://cciio.cms.gov> (last visited May 14, 2011).

175. *Id.*

176. *Regulations and Guidance*, U.S. DEP'T OF HEALTH & HUMAN SERVS.,

The regulations and guidance page also provides separate information and resources for responding to requests for comment.<sup>177</sup>

### 3. *Regulations.gov*

As mentioned before, Regulations.gov allows interested parties to search for rulemaking notices as well as proposed and final rules, file their comments electronically, and even comment on other comments.<sup>178</sup> The website provides information from nearly 300 federal agencies. Much like electronic case filing in federal court, do not wait until the last minute before a comment deadline to experiment with the website for the first time. It is important to be familiar with the process for submitting comments. Instructions for filing comments electronically are available on the website.<sup>179</sup>

## B. *Private Resources*

### 1. *National Association of Insurance Commissioners (NAIC)*

The NAIC has added a special section on its website for PPACA and state insurance regulation.<sup>180</sup> The site is maintained in association with the NAIC's Center for Insurance Policy and Research, which the NAIC established in 2009 to provide information and analysis for government officials, agencies, and policymakers.<sup>181</sup> Because Congress directed HHS to consult with the NAIC in developing certain implementing regulations under PPACA, the NAIC is an important resource for tracking the progress

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<http://cciio.cms.gov/resources/regulations/index.html> (last visited May 14, 2011).

177. *Requests for Comment*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://cciio.cms.gov/resources/comments/index.html> (last visited May 14, 2011).

178. *About Us*, REGULATIONS.GOV, <http://www.regulations.gov/#!aboutUs> (last visited May 14, 2011).

179. *Help*, REGULATIONS.GOV, <http://www.regulations.gov/#!help> (last visited May 14, 2011).

180. *Patient Protection and Affordable Care Act & State Insurance Regulation*, NAT'L ASSOC. OF INS. COMM'RS & CTR. FOR INS. POLICY & RESEARCH, [http://www.naic.org/index\\_health\\_reform\\_section.htm](http://www.naic.org/index_health_reform_section.htm) (last updated Dec. 17, 2010).

181. *About the CIPR*, NAT'L ASSOC. OF INS. COMM'RS & CTR. FOR INS. POLICY & RESEARCH, [http://www.naic.org/cipr\\_about.htm](http://www.naic.org/cipr_about.htm) (last visited May 14, 2011).

of its recommendations to HHS.<sup>182</sup> The NAIC website also includes information for consumers, employers, and seniors.

## 2. *Trade Associations*

Although we have cautioned against relying on trade associations to speak for your clients, many will provide you with insights into how your clients and their industry peers are approaching PPACA regulations. Of course, it is important to be aware that no association's interests will align perfectly with those of each of their constituents. You will have to maintain a degree of skepticism to ensure that you are speaking for your client and not just adopting the homogenized position of the association.

### C. *Commercial Resources*

Multiple vendors offer information and analysis for a price that often exceeds the viability of legal aid or public interest law group subscriptions. A skilled law librarian is your best intermediary for these selections.

## CONCLUSION

Some see opportunities where others see problems. Small firm lawyers outside the political mainstream of big-city megafirms may be feeling overwhelmed by the prospect of commenting on complex federal rules implementing a huge new statute. This is true, but the converse is also true: adversaries who are working against your client's long-term health care interests are hoping your client will remain silent as they comment, meet, petition, and litigate over the new health care rules. They know the rulemaking process under PPACA is a formidable challenge for you. It is a tsunami they can foresee, while smaller and solo lawyers like you, who have clients needing health care assistance, are just standing on the shore looking out into the vast regulatory ocean. If this article encouraged you to participate, please follow our advice and plunge in.

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182. See PPACA, Pub. L. No. 111-148 § 2715(a), 124 Stat. 119, 132 (2010) (requiring HHS to consult with the NAIC to “develop standards for use by a group health plan and a health insurance issuer offering group or individual health insurance coverage, in compiling and providing to enrollees a summary of benefits and coverage explanation that accurately describes the benefits and coverage under the applicable plan or coverage”); § 1323(b)(8)(A), 124 Stat. at 195 (requiring the HHS to collaborate with NAIC in promulgating regulations to establish additional requirements for a community health insurance option); *id.* § 1341(b)(1), 124 Stat. at 209 (requiring the HHS to consult with the NAIC in developing regulations for the transactional reinsurance program for individual and small group markets in each state); § 3210(a)(1), 124 Stat. at 461–62 (requiring the HHS to request that the NAIC review and revise the standards for benefit packages for certain Medigap plans).

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# THE BOARD OF IMMIGRATION APPEALS’ STANDARD OF REVIEW: AN ARGUMENT FOR REGULATORY REFORM

SCOTT REMPELL\*

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## INTRODUCTION

In 2002, the Attorney General issued regulations that dramatically altered how the Board of Immigration Appeals (Board) would review decisions of immigration judges.<sup>1</sup> The regulations are best known for permitting a single Board member to adjudicate an appeal in most instances,<sup>2</sup> and providing Board members with authority to affirm decisions of immigration judges without the need to issue a separate opinion.<sup>3</sup> These particular changes to the Board's adjudication of immigration appeals caused a strong backlash among commentators and immigrant rights groups, who were highly critical of these aspects of the regulation.<sup>4</sup>

1. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002) (codified as amended at 8 C.F.R. § 1003 (2010)).

2. See 8 C.F.R. § 1003.1(e)(6) (2010) (listing the six circumstances when a case may be assigned to a three-member panel, which include the need to issue a precedential decision construing the meaning of a statute or regulation). An earlier regulation promulgated in 1999 permitted a single Board of Immigration Appeals (Board) member to decide an appeal in much more limited instances. See 8 C.F.R. §§ 1.1–3.11 (1999); Executive Office for Immigration Review, Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,136 (Oct. 18, 1999) (codified at 8 C.F.R. § 3.1(a)(7) (2000)).

3. See 8 C.F.R. § 1003.1(e)(4) (2010).

4. See, e.g., Capital Area Immigrants' Rights Coal. v. U.S. Dep't of Justice, 264 F. Supp. 2d 14 (D.D.C. 2003) (lawsuit filed by immigrant rights coalition seeking to invalidate the streamlining regulations); Susan Burkhardt, *The Contours of Conformity: Behavioral Decision Theory and the Pitfalls of the 2002 Reforms of Immigration Procedures*, 19 GEO. IMMIGR. L.J. 35, 69–71 (2004) (faulting the 2002 regulatory reforms for permitting single Board members to consider appeals that “present close factual questions or more complicated legal issues”); Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, 16 STAN. L. & POL'Y REV. 481, 499–501 (2005); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 604 (2009) (discussing the “[s]erious problems” that “beset adjudication before the Board of Immigration Appeals” that have been caused by the 2002 regulations); John R.B. Palmer,



The 2002 regulations also included another, less-discussed reform to the Board's appellate authority. That reform curtailed the Board's scope of review of decisions rendered by an immigration judge. Before 2002, the Board could evaluate *de novo* all aspects of an immigration judge's decision,<sup>5</sup> but under the 2002 regulations the Board could only reverse the immigration judge's findings of fact if those findings were clearly erroneous.<sup>6</sup> The Board still retained *de novo* authority over all matters other than findings of fact.<sup>7</sup> Accordingly, this regulatory change appeared to do nothing more than place the Board on par with other appellate bodies that defer to the factual findings of the initial adjudicator,<sup>8</sup> and there would seem to be nothing controversial about doing so. However, this small procedural reform has left the Board's scope of review in disarray, and created widespread confusion among immigration adjudicators at the agency level and the federal courts of appeals tasked with review of Board decisions.<sup>9</sup>

The implications of the uncertainty surrounding the scope-of-review regulation are vast. The Board adjudicates tens of thousands of immigration appeals every year, and the standard of review is an issue that the Board must consider in every one of these cases.<sup>10</sup> The decisions

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Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 29–32 (2005); Shruti Rana, "Streamlining" the Rule of Law: *How the Department of Justice Is Undermining Judicial Review of Agency Action*, 2009 U. ILL. L. REV. 829, 831–39, 845–49.

5. See *In re S-H-*, 23 I. & N. Dec. 462, 463–64 (BIA 2002); *In re Vilanova-Gonzalez*, 13 I. & N. Dec. 399, 402 (BIA 1969); *In re B-*, 7 I. & N. Dec. 1, 1 (A.G. 1956).

6. See 8 C.F.R. § 1003.1(d)(3)(i).

7. See *id.* § 1003.1(d)(3)(ii).

8. See *Dickinson v. Zurko*, 527 U.S. 150, 153 (1999) (reviewing the level of deference that the appellate courts must afford to agency decisions governed by the Administrative Procedure Act (APA)); *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (discussing the application of the clearly erroneous standard in appellate courts' review of the factual findings of district court judges); 29 C.F.R. § 1614.405 (2010) (stating the level of deference for factual findings afforded to appeals of administrative law judges within the Equal Employment Opportunity Commission is "substantial evidence"); see also FED. R. CIV. P. 52(a). See generally *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (providing the initial "definite and firm conviction" language employed almost universally in subsequent discussions of the clearly erroneous standard of review).

9. See *infra* Parts III & IV. After the Board issues a decision, an appeal must be filed within thirty days in the federal court of appeals sitting in the applicable venue. See 8 U.S.C. § 1252(a)(5), (b)(1)–(2) (2006). For example, if a removal proceeding is held in an immigration court in New York, then the appeal must be filed in the U.S. Court of Appeals for the Second Circuit.

10. See U.S. DEP'T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2010 STATISTICAL YEAR BOOK S2 fig.27 (2011) [hereinafter STATISTICAL YEAR BOOK], available

rendered by the Board have a far-reaching impact on the immigrants involved. In many cases, these decisions can be the difference between an immigrant's right to remain in the United States and a deportation order that forces an immigrant to leave the country.

This Article seeks to fill a void in the literature by providing a comprehensive analysis of the 2002 reforms to the Board's scope of review.<sup>11</sup> On the basis of this examination of the impact that the scope-of-review regulation has had on the adjudication of immigration cases, this Article will demonstrate why a change in the current regulation is necessary.<sup>12</sup> To do this, Part I will review the language of the 2002 scope-of-review regulation and discuss the Attorney General's commentary accompanying the rule. Part II will shift to a discussion of the Board's precedential decisions that interpret and apply the scope-of-review regulation and an assessment of the shortcomings in these decisions. In Part III, this Article will review how the inconsistent interpretations of the scope-of-review regulation in the federal courts of appeals are indicative of the problems inherent in the current regulatory framework. Subsequently, Part IV will advocate that the current regulation be amended to provide the Board with *de novo* authority to review findings of fact, and specify the justifications for reaching this determination.

#### I. THE CURRENT REGULATORY FRAMEWORK AND THE ATTORNEY GENERAL'S INTERPRETATION OF THE REGULATION

A review of the regulation that altered the Board's scope of review will help to frame the problems that emerged. The regulation provides that:

- (i) The Board will not engage in *de novo* review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly

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at <http://www.justice.gov/eoir/statpub/fy10syb.pdf> (indicating the Board considered 33,305 appeals in fiscal year 2010).

11. Although other articles have discussed the scope-of-review regulation—see, e.g., Burkhardt, *supra* note 4, at 77, and Eliot Walker, *Asylees in Wonderland: A New Procedural Perspective on America's Asylum System*, 2 NW. J.L. & SOC. POL'Y 1, 27–28 (2007)—the regulation is never the primary area of concern, nor does it appear that the analyses of this aspect of the regulation have been particularly detailed—see, e.g., Family, *supra* note 4, at 605, who omits the change in the Board's scope of review from a list of major streamlining reforms, and Cruz, *supra* note 4, at 499–507, who mentions the change in the Board's authority to consider findings of fact within a much longer discussion about the other procedural reforms of the 2002 regulation.

12. *But see* John D. Ashcroft & Kris W. Kobach, *A More Perfect System: The 2002 Reforms of the Board of Immigration Appeals*, 58 DUKE L.J. 1991, 2009 (2009) (justifying the 2002 reforms, including the change to the Board's scope of review).

erroneous.

(ii) The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*.<sup>13</sup>

The regulation does not define in detail the types of findings that should be construed as factual. Indeed, the only findings of fact specifically listed are credibility determinations. The inclusion of credibility determinations is not surprising, since it is a common assumption that a trier of fact's ability to see and hear testimony firsthand puts him or her in a unique position to gauge certain attributes of a witness's veracity.<sup>14</sup> For this reason, many rules expressly include credibility determinations when discussing the findings of fact that require deference from a reviewing body.<sup>15</sup>

More interesting, though, from a cursory review of the regulation, is what exactly is meant by the term *judgment*. While *questions of law* and *matters of discretion* are terms of art frequently employed in appellate procedure, the meaning of the term *judgment*, and how it is supposed to be applied in immigration cases, is not as clear.<sup>16</sup> However, the term *judgment* should be

13. 8 C.F.R. § 1003.1(d)(3) (2010). The scope-of-review regulation contains two additional clauses. The first of these additional clauses concerns appeals taken from decisions of "Service officers." *Id.* § 1003.1(d)(3)(iii). The second of these additional clauses prohibits the Board from engaging in factfinding "[e]xcept for taking administrative notice of commonly known facts such as current events or the contents of official documents . . . ." *Id.* § 1003.1(d)(3)(iv).

14. See *Jibril v. Gonzales*, 423 F.3d 1129, 1137 (9th Cir. 2005); *Chen v. U.S. Dep't of Justice*, 426 F.3d 104, 113 (2d Cir. 2005) ("We give particular deference to credibility determinations that are based on the adjudicator's observation of the applicant's demeanor, in recognition of the fact that the IJ's ability to observe the witness's demeanor places her in the best position to evaluate [credibility]."). But cf. *Mitondo v. Mukasey*, 523 F.3d 784, 788 (7th Cir. 2008) (drawing on empirical studies to conclude that "if you want to find a liar you should close your eyes and pay attention to *what* is said, not *how* it is said or what the witness looks like while saying it").

15. See, e.g., FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.").

16. By noting the more frequent employment of *questions of law* and *matters of discretion*, I do not mean to imply that there is no ambiguity associated with how these terms are defined. Compare *Ramadan v. Gonzales*, 479 F.3d 646, 648 (9th Cir. 2007) (holding that the court has jurisdiction to review whether an asylum applicant established "changed circumstances" excusing an untimely filed application because such a finding concerns the "application of law to undisputed facts"), with *Zhu v. Gonzales*, 493 F.3d 588, 596 & n.31 (5th Cir. 2007) (rejecting the Ninth Circuit's analysis). However, the potential ambiguities in the application of these terms have been evaluated and discussed to a greater degree because their scope often impacts appellate courts' jurisdiction over a decision appealed from the Board. See 8 U.S.C. § 1252(a)(2)(B) (2006) (precluding judicial review over discretionary determinations); § 1252(a)(2)(C) (precluding review of petitions filed by certain criminal aliens); § 1252(a)(2)(D) (reinstating jurisdiction over questions of law and constitutional

defined, its parameters require juxtaposition to the question of what constitutes a finding of fact. For whatever it is that constitutes a judgment, it must be wholly distinguishable from findings of fact, since the regulation assigns a different standard of review to these two categories.<sup>17</sup>

In the supplemental information accompanying the regulation, the Attorney General expanded on some of these potential ambiguities.<sup>18</sup> Recognizing that asylum law represents “[o]ne of the more complicated contexts in which the clearly erroneous standard will be applied,” the commentary discussed how the standard would be applied in asylum cases to illustrate the distinction between questions of law, factual matters, and the elusive notion of judgments.<sup>19</sup> The Attorney General stated that the clearly erroneous standard would not apply to “judgments as to whether the facts established by a particular alien amount to ‘past persecution’ or a ‘well-founded fear of future persecution.’”<sup>20</sup>

From this statement, the Attorney General’s interpretation of the term *judgment* appears to take shape. A *judgment* would represent the Board’s determination of whether findings of fact meet the legal standard of conduct sufficiently severe to constitute persecution.<sup>21</sup> To illustrate, assume that an asylum applicant testified that, while she was in her home country, police beat her until she lost consciousness. Also assume that the immigration judge believed the applicant’s testimony that she was beaten until she lost consciousness, and credited a medical report that described

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issues).

17. An additional question that emerges concerns the catchall in clause (ii), which renders “all other issues” on appeal subject to de novo review. See 8 C.F.R. § 1003.1(d)(3)(ii). The Attorney General may have believed that there is a category of determinations that is neither factual, legal, discretionary, nor “judgmental.” However, it appears more likely that the explanation for this catchall is innocuous and that it was incorporated into the regulation to ensure that the Board retained its de novo authority for all decisions that are not construed as findings of fact.

18. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,878–900 (Aug. 26, 2002). Throughout this Article, the terms *commentary* and *supplemental information* will be used interchangeably to refer to the guidance published by the Attorney General in the *Federal Register* regarding the scope-of-review regulation.

19. *Id.* at 54,890. The commentary also provides an illustration of how the Board should approach the “exceptional and extremely unusual hardship” element in cancellation-of-removal cases. *Id.*; see 8 U.S.C. § 1229b(b)(1)(D).

20. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,890.

21. For cases that address the level of harm required to establish persecution, see *Mirisawo v. Holder*, 599 F.3d 391, 396 (4th Cir. 2010), and *Guo v. Ashcroft*, 361 F.3d 1194, 1202–03 (9th Cir. 2004). For further information on asylum law generally, see 8 U.S.C. §§ 1101(a)(42), 1158.

the extent of the injuries she suffered. What if the immigration judge denied her asylum claim, holding that she failed to establish past persecution? Under the framework enunciated by the Attorney General, the Board would have de novo authority to determine, in its judgment, whether the harm the applicant suffered was sufficiently severe to constitute past persecution. Conversely, the Board would not have authority to review de novo the immigration judge's determination that police beat her until she lost consciousness.

The Attorney General, however, did not limit his use of the term *judgment* to the above statement. Subsequently in the supplemental information, he referred to judgments in his discussion of discretionary determinations, which creates the impression that he is using *matters of discretion* and *judgment* synonymously.<sup>22</sup> The Attorney General's references to *judgment* in multiple contexts leaves the precise meaning and contour of the term largely unsettled, and the supplemental information does not provide any additional insight.

The Attorney General's commentary explained more precisely the scope of the Board's review of discretionary determinations.<sup>23</sup> In such situations, where the agency is required to weigh the equities to determine whether an applicant is entitled to a discretionary form of relief from deportation, the Board still retains its authority to weigh the equities of a case de novo.<sup>24</sup> By contrast, the immigration judge is responsible for developing the record that would form the basis for an assessment of the equities, and the Board could only discount these underlying findings of fact under the clearly erroneous standard of review.<sup>25</sup> Thus, for example, the Board could decide de novo that an individual's past drug use is a substantial negative equity, but it may not review de novo whether the immigration judge correctly determined that this individual used drugs in the past.

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22. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,890.

23. *Id.*

24. *Id.*

25. For examples of some of the frequent positive and negative equities found in a cancellation-of-removal case, see *United States v. Pallares-Galan*, 359 F.3d 1088, 1104 (9th Cir. 2004) (listing as negative equities the applicant's criminal convictions, and including within the discussion of positive equities the fact that the applicant had lived in the United States for a substantial number of years without leaving and his regular payment of taxes), and *Chum v. Attorney Gen.*, 371 F. App'x 334, 336 (3d Cir. 2010) (reviewing findings that the applicant had been "a member of a gang, had dropped out of high school, and had both an adult and juvenile criminal record," but that he also provided evidence "of rehabilitative potential, including earning his GED, having no problems while incarcerated, completing anger management and other prison rehabilitative-type courses, having no intention of returning to his gang, and pursuing a trade in the culinary arts").

In addition to discussing judgments and matters of discretion, the Attorney General also expanded on the parameters of factfinding in the scope-of-review regulation. The supplemental information states unequivocally that “[a] factfinding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder.”<sup>26</sup> In this respect, the Attorney General applied to the Board a customary interpretation of how the clearly erroneous standard should be applied to findings of fact.<sup>27</sup>

Despite shortcomings in its review of judgments, the Attorney General’s supplementary information provided a helpful general framework to guide the Board’s application of the scope-of-review regulation. However, the Board’s application of the regulatory standards suffered from a number of deficiencies that will be explored in the next section.

## II. DEFICIENCIES IN THE BOARD’S INTERPRETATION OF THE SCOPE-OF-REVIEW REGULATION

The Board decisions that interpret its scope of review under the regulation are problematic for many reasons. The problems generally fall into one of two groups. The first group concerns deficiencies in the Board’s analysis itself and the reasoning it used to develop the parameters of its extensive *de novo* authority. The second group concerns instances where the Board fails to consistently define the scope of its review. Irrespective of the analysis employed, the fact that the Board decisions are both internally inconsistent and inconsistent with the Attorney General’s commentary is itself problematic. A review of the three precedential Board cases that addressed its scope of review will help flush out these two problem areas. It will also begin to show that interpreting the appropriate standard of review in immigration proceedings is more complicated and nuanced than a reading of the regulation might suggest. (The nuances will become even more readily apparent after a discussion of the courts of appeals’ decisions

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26. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,889 (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

27. See, e.g., *Freeland v. Enodis Corp.*, 540 F.3d 721, 735 (7th Cir. 2008) (finding that even though “another court might weigh the evidence differently,” the bankruptcy court’s findings of fact warrant deference under the clearly erroneous standard of review); *Thomas v. Cnty. of L.A.*, 978 F.2d 504, 513 (9th Cir. 1993) (Orrick, J., concurring in part and dissenting in part) (chastising the majority for conducting a *de novo* review of district court findings of fact that should have been reviewed under a clearly erroneous standard); *In re Branding Iron Motel, Inc.*, 798 F.2d 396, 400 (10th Cir. 1986) (“When reviewing factual findings, an appellate court is not to weigh the evidence or reverse the finding because it would have decided the case differently.”).

that have reviewed the scope-of-review regulation.)

*A. Framing the Board's Scope of Review: In re A-S-B- and In re V-K-*

*1. The A-S-B- Opinion*

Although the Attorney General issued the regulations that altered the Board's scope of review in 2002, the Board did not publish a precedential decision that interpreted the scope-of-review regulation until 2008, when it decided a pair of cases in tandem. The first of these cases was *In re A-S-B-*,<sup>28</sup> a case with a fairly straightforward set of facts. The case concerned a Guatemalan national who alleged that guerrillas approached him while he was working at a gas station and demanded that he provide them with free gas.<sup>29</sup> He claimed that the guerillas threatened him with kidnapping and forced recruitment if he refused to adhere to their demand.<sup>30</sup> After complying with the request of the guerillas, he departed Guatemala out of fear for his safety and applied for asylum in the United States.<sup>31</sup>

The immigration judge held that though the asylum applicant failed to establish past persecution, he did establish a well-founded fear of future persecution if deported to Guatemala.<sup>32</sup> The Board disagreed, finding that the applicant failed to establish a well-founded fear of persecution.<sup>33</sup>

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28. 24 I. & N. Dec. 493 (BIA 2008).

29. *Id.* at 493.

30. *Id.* at 494.

31. *Id.*

32. *Id.*

33. *Id.* at 498–99. Before the Board issued this precedential decision in 2008, the case weaved its way through the agency and courts for several years. At one point, it made its way to the U.S. Court of Appeals for the Ninth Circuit, where the government filed a motion asking the court to remand the case to the Board so that it could clarify how it applied its scope of review of the immigration judge's (IJ's) decision. *Id.* at 495. At first glance, it might appear peculiar that the government would ask the Ninth Circuit to remand so that the government could further clarify its prior decision. However, this has to do with the different government agencies involved in the adjudication of asylum cases throughout the various stages of litigation. Both the immigration judges and the Board are part of the Executive Office for Immigration Review (EOIR), which is a component of the Department of Justice. When an asylum case is within EOIR, the government is represented by an attorney from the Department of Homeland Security, in the branch of Immigration and Customs Enforcement. *See generally* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441, 471, 116 Stat. 2135, 2192, 2205 (codified as amended at 6 U.S.C. §§ 251, 291 (2006)) (transferring the enforcement functions of the former Immigration Naturalization Services (INS) to the Department of Homeland Security (DHS)). If an asylum applicant appeals a decision of the Board, the case goes to the federal appeals court within the applicable venue. At this stage of the proceedings, the government is then represented by an

Reviewing the Attorney General's supplemental information to the regulation, the Board stated that the "clearly erroneous standard . . . does not apply to the application of legal standards, such as whether the facts established by an alien 'amount to past persecution or a well-founded fear of persecution.'"<sup>34</sup> The Board then discussed the parameters of its scope of review as it pertained to the incidents described by the asylum applicant, stating that "whether these uncontested facts were sufficient to establish a well-founded fear of persecution . . . was a legal determination that was not subject to the clearly erroneous standard of review."<sup>35</sup> The opinion thus made clear that the question of whether an uncontested set of facts constitutes a well-founded fear of persecution is a "matter of law."<sup>36</sup> The Board then discussed how it would go about determining if an applicant established persecution as a matter of law. The Board stated that it was "entitled to weigh the evidence in a manner different from that accorded by the Immigration Judge . . . ."<sup>37</sup>

Applying this analytical framework to the facts of the case, the Board held that the immigration judge erred because his determination that the applicant established a well-founded fear of persecution was based on "speculative findings about what may or may not occur to the respondent in the future."<sup>38</sup> According to the Board, such a finding did not amount to factfinding because "it is impossible to declare as 'fact' things that have not yet occurred."<sup>39</sup>

## 2. *Leaving Judgments Undefined*

There is a noticeable absence in the Board's analysis of any mention of the term *judgment*, let alone the role that judgments play in the Board's authority to exert de novo review over a matter before it. Instead, the Board simply characterizes its persecution finding as a matter of law because it does not constitute factfinding.<sup>40</sup> Consequently, the opinion does

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attorney in the Office of Immigration Litigation, a component of the Civil Division in the Department of Justice. See *Office of Immigration Litigation—Appellate Section*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/civil/oil/OIL\\_Appellate\\_Section.htm](http://www.justice.gov/civil/oil/OIL_Appellate_Section.htm) (last visited May. 11, 2011).

34. *In re A-S-B-*, 24 I. & N. Dec. at 496 (quoting Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 57,890 (Aug. 26, 2002)).

35. *Id.* at 497.

36. *Id.* (citing *Recinos De Leon v. Gonzales*, 400 F.3d 1185, 1194 (9th Cir. 2005)).

37. *Id.*

38. *Id.* at 498.

39. *Id.* (citation omitted).

40. See *id.* at 497–98.



nothing to explain how the term *judgment* fits into its scope of review, even though the Attorney General stated in his commentary that the Board has de novo authority to render “judgments as to whether the facts established by a particular alien amount to . . . persecution.”<sup>41</sup> If anything, the Board’s opinion seems to nullify a central aspect of the term by failing to discuss any role it plays in deciding a persecution claim.

### 3. *Factual Inquiries and Future Events*

Perhaps the most curious aspect of the Board’s analysis in *In re A-S-B-* is its contention that events that have not yet occurred cannot be considered facts. In asylum cases, the entire premise of applicants’ claims is that they cannot return to their home countries because they will face persecution.<sup>42</sup> *A fortiori*, the crux of any asylum claim is the need for an adjudicator to render an opinion about the likelihood of certain events taking place in the future.<sup>43</sup> For whatever reason the Board decided to define facts more narrowly than the Attorney General, the Board’s analysis on this point, even on its face, gives cause for greater scrutiny.

There are numerous examples of factfinding taking place in situations where a specific event in question has not yet occurred.<sup>44</sup> For example, in an assessment of the damages due in a tort action, a factfinder is regularly required to assess a plaintiff’s future medical expenses on the basis of long-term medical ailments that, to a degree of probability but not certainty, may afflict the plaintiff years down the road.<sup>45</sup> The fact that the long-term

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41. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 57,890 (Aug. 26, 2002) (internal quotation marks omitted).

42. There is an exception to this general rule. An immigration judge may grant asylum to an applicant who has not established a well-founded fear of persecution on account of a protected ground if there are “compelling reasons for” the applicant “being unwilling or unable to return to the country arising out of the severity of the past persecution” or if “there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.” 8 C.F.R. § 1208.13(b)(1)(iii) (2010).

43. However, an applicant who establishes past persecution is entitled to a rebuttable presumption that he or she has a well-founded fear of persecution. *See id.* § 1208.13(b)(1); *see also* Ramsameachire v. Ashcroft, 357 F.3d 169, 178 (2d Cir. 2004) (reviewing the two ways in which an applicant can establish that he or she is entitled to asylum protection).

44. *See, e.g.,* United States v. Stewart, 452 F.3d 266, 273–74 (3d Cir. 2006) (likelihood that prisoner released for reasons of insanity will be a threat to society); Onishea v. Hopper, 171 F.3d 1289, 1300–01 (11th Cir. 1999) (en banc) (likelihood of future prison violence).

45. *See, e.g.,* Auto-Owners Ins. Co. v. Tompkins, 651 So. 2d 89, 90 (Fla. 1995) (stating that a recovery of future medical expenses requires a showing that such expenses are “reasonably certain to occur”); McDaniel v. Carencro Lions Club, 934 So. 2d 945, 977 (La. Ct. App. 2006) (“[The plaintiff] must show that, more probably than not, these [medical] expenses will be incurred and must present medical testimony that they are indicated and

effects of such medical ailments have not yet materialized does not transform the role of the jury beyond that of a factfinder.

One could argue that the factfinder in the above example, like the Board in *In re A-S-B-*, is simply required to make a judgment about the probability of future events based on the evidence before it. Perhaps, then, the parameters of judgments in the scope-of-review regulation provide the Board with de novo authority to assess the likelihood of future events. However, because the Board in *In re A-S-B-* did not attempt to make such an argument, its broad pronouncement on the types of events that will never be considered “facts” does not appear correct. (The analytical failing of the Board’s beliefs about predictions not involving factfinding will be discussed *infra* in greater detail after the problem is further illustrated by the Board’s decision in *In re H-L-H-*.)

With such a far-reaching pronouncement made by the Board on the meaning of factfinding, it is helpful to examine what exactly the Board cited to support this statement. In *In re A-S-B-*, the Board drew support through a comparison to the Second Circuit’s decision in *Huang v. INS*.<sup>46</sup> *Huang* concerned an asylum applicant from China who claimed he would be sterilized if deported to his home country.<sup>47</sup> Affirming the Board, the Second Circuit held that the absence of evidence showing that the applicant would be sterilized rendered his claim “speculative at best.”<sup>48</sup>

Unfortunately, *Huang* does not provide the Board with any support for its belief that an assessment of possible future occurrences will never involve factfinding. To the contrary, the Second Circuit reviewed the Board’s holding, including the question of whether the applicant established a well-founded fear of future persecution, under the substantial evidence standard. Substantial evidence is the standard of review that the appellate courts apply to “the factual findings underlying the [Board’s] determinations.”<sup>49</sup>

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the probable cost of these expenses.”); *Pilgrim’s Pride Corp. v. Smoak*, 134 S.W.3d 880, 905 (Tex. App. 2004) (“The jury can determine the amount of probable future medical expenses based on the nature and course of the injuries or disability, the medical care rendered before trial, past medical expenses, and the condition of the injured party at the time of trial.”); *cf.* *Kaplun v. Attorney Gen.*, 602 F.3d 260, 270 (3d Cir. 2010) (stating that if the jury believes expert testimony about injuries, disability, and physical suffering, it is making a “factual finding” as to future pain and suffering). The *Kaplun* decision will be discussed in greater detail *infra* Part III.C.

46. *In re A-S-B-*, 24 I. & N. Dec. 493, 498 (BIA 2008) (citing *Huang v. INS*, 421 F.3d 125, 129 (2d Cir. 2005)).

47. *Huang*, 421 F.3d at 127.

48. *Id.* at 129.

49. *Id.* at 128 (internal quotation marks omitted); *see also* 8 U.S.C. § 1252(b)(4)(B) (2006) (stating “the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary”).

Thus, if anything, *Huang* contradicts the Board's interpretation of factfinding.

#### 4. *The V-K- Opinion*

The Board issued *In re V-K-* on the same day as *In re A-S-B-*, but the analysis employed in *In re V-K-* is noticeably different.<sup>50</sup> Although *In re V-K-* concerned a claim under the regulations implementing the Convention Against Torture (CAT)<sup>51</sup> rather than asylum, the same basic analytical framework should apply. In CAT claims, the applicant must establish that the harm he or she will suffer amounts to torture,<sup>52</sup> and in asylum claims, the applicant must prove that the harm he or she will suffer amounts to persecution.<sup>53</sup> But the success of either claim is based on whether applicants can establish, to a delineated level of certainty, that they will face the requisite harm if returned to their home country.<sup>54</sup> Thus, both claims involve an assessment of the likelihood that certain events will occur in the future.

*In re V-K-* concerned a Jewish national of the former Soviet Union.<sup>55</sup> The immigration judge found that the applicant more likely than not would be tortured if returned to Ukraine.<sup>56</sup> The Board disagreed.<sup>57</sup> Like the *In re*

50. *In re V-K-*, 24 I. & N. Dec. 500 (BIA 2008). It should be noted that different Board members issued the opinions.

51. See 8 C.F.R. §§ 1208.16–1208.18 (2010); see also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, 1465 U.N.T.S. 113, at 197 (Dec. 10, 1984); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(b), 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note (b)) (authorizing the Attorney General to prescribe regulations that ensure aliens are not deported if they are likely to face torture in their home country).

52. See 8 C.F.R. § 1208.16(c)(2); *id.* § 1208.18(a) (defining torture).

53. See 8 U.S.C. § 1101(a)(42); 8 C.F.R. § 1208.13(b).

54. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (commenting on the possibility of establishing a well-founded fear of persecution on the basis of a ten percent chance that the alleged harm would occur in the future); 8 C.F.R. § 1208.16(c)(2) (stating that an applicant under CAT must establish that he or she “more likely than not” would be tortured if returned to his or her home country).

55. *In re V-K-*, 24 I. & N. Dec. at 500–01.

56. See *id.* at 501.

57. As with *In re A-S-B-*, this case also had a longer procedural history. The Board originally vacated the decision of the immigration judge, finding that he relied on the wrong conviction record. See *Kaplun v. Attorney Gen.*, 602 F.3d 260, 263 (3d Cir. 2010) (reviewing the procedural history of *In re V-K-*). When the case again came before the Board, the Board issued an order of removal, and the alien petitioned the Third Circuit for review of that decision. *Id.* at 264. After the Board denied a motion to reopen, the alien petitioned the Third Circuit for review of that decision as well, and the case was

*A-S-B-* decision, the Board noted that it does “not consider a prediction of the probability of future torture to be a ruling of fact.”<sup>58</sup> However, the Board offered greater clarification of what it meant and why it believed its determination conformed to the Attorney General’s commentary accompanying the regulation. The Board stated that “predictions of future events may in part be derived from facts,” but the predictions do not concern the *type* of factfinding that the regulation prohibits it from reviewing de novo.<sup>59</sup> Thus, the Board sought to clarify the distinction between factfinding per se, and factfinding as that term is to be applied in the context of the scope-of-review regulation.

The Board then noted that its interpretation was consistent with the Attorney General’s commentary accompanying the regulation, and that its de novo authority included “*judgments* as to whether the facts established by a particular alien amount to” persecution, and by analogical extension, the requisite likelihood of torture.<sup>60</sup> The judgment void prominently on display in *In re A-S-B-* is filled here. According to *In re V-K-*, a “question of judgment” refers to whether the established facts meet “the ultimate statutory requirement.”<sup>61</sup>

##### 5. *Reconciling A-S-B- and V-K-*

The analytical framework in *In re V-K-* appears more well-grounded than that employed by the Board in *In re A-S-B-*. Unlike *In re A-S-B-*, *In re V-K-* does not assert in conclusory fashion that “it is impossible to declare as ‘fact’ things that have not yet occurred.”<sup>62</sup> Rather, it delves deeper into the distinction between factfinding and judgments, attempting to separate the two terms as they are to be applied under the scope-of-review regulation. Nevertheless, *In re V-K-* still leaves the parameters of judgments largely undefined, perhaps necessarily so, since the straightforward facts of the case did not require it to dig deeper.<sup>63</sup>

Irrespective of which opinion employed a better analytical framework in its assessment of the scope-of-review regulation, the fact remains that their modes of analysis diverged in certain respects. This divergence, in and of

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subsequently remanded to the Board. *Id.* The Board then issued another decision that is the precedential decision being discussed here. *Id.* at 264–65.

58. *In re V-K-*, 24 I. & N. Dec. at 501 (internal quotation marks omitted).

59. *Id.* (internal quotation marks omitted).

60. *Id.* at 501–02 (emphasis added); *see also* 8 C.F.R. § 1208.16(c)(2) (2010) (setting forth the requisite probability of torture that an applicant must establish).

61. *In re V-K-*, 24 I. & N. Dec. at 502 (internal quotation marks omitted).

62. *See In re A-S-B-*, 24 I. & N. Dec. 493, 498 (BIA 2008).

63. But *see Kaplun v. Attorney General*, 602 F.3d 260 (3d Cir. 2010), discussed *infra* Part III.C, which does fault the Board for insufficiently dissecting the facts of the case.

itself, is problematic because it means that even after six years, the Board has yet to come up with a uniform understanding of its scope-of-review regulation. If the Board cannot even agree internally on a uniform way to speak about the framework of its scope of review, then how can it be expected to apply such standards consistently? The next section addresses some of the key problems that became apparent when the Board subsequently applied the enunciated standards of its scope of review to a fact-intensive case.

### B. *In re H-L-H- and Weighing the Evidence*

The case of *In re H-L-H-*, issued in March 2010, is the first precedential decision in which the Board applied its scope-of-review standards to a fact-intensive case.<sup>64</sup> The opinion focused on whether the reweighing of evidence (e.g., testimony, documents, and official reports) in a persecution assessment constituted factfinding. When considered in the abstract, the Board's evidence-based prediction can be seen intuitively as a question of judgment subject to *de novo* review. But the question becomes *how*, exactly, the Board evaluates the evidence and determines whether it may afford different weight to previously rendered findings of fact. At what point does an assessment of the record turn into a reevaluation of facts such that the Board's framework breaks down, and its analysis becomes nothing more than ordinary factfinding under the scope-of-review regulation? A discussion of *In re H-L-H-* will help explore this question.

#### 1. *The H-L-H- Opinion*

*In re H-L-H-* concerned a common factual circumstance that confronts immigration adjudicators. The asylum applicant traveled to the United States from China, gave birth to two children while she was here, and then claimed that if immigration officials deported her the Chinese government would force her to undergo a sterilization procedure because she violated the country's population control policies.<sup>65</sup> At her asylum hearing, the applicant submitted documents from the family planning office of her home village, as well as from friends and family members, stating that she would

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64. 25 I. & N. Dec. 209 (BIA 2010).

65. *Id.* at 210. China's population control policies have evolved over time. Generally speaking, Chinese citizens are only permitted to have one child unless they satisfy additional criteria. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEPT OF STATE, 2009 HUMAN RIGHTS REPORT: CHINA § 1(f) (2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/eap/135989.htm> (stating that couples are generally permitted to have a second child if neither parent had any siblings).

be forced to undergo a sterilization procedure if returned to China.<sup>66</sup>

The immigration judge found the applicant credible and determined that she was entitled to asylum relief, having held that she established an objectively reasonable fear of persecution—i.e., that she would be sterilized.<sup>67</sup> The Board reversed the immigration judge's holding.<sup>68</sup> The Board first reiterated its pronouncement in *In re A-S-B-* that “predict[ion of] future events” does not amount to factfinding.<sup>69</sup> Reviewing the scope of its authority under the regulation, the Board first noted that to determine “whether specific facts are sufficient to meet a legal standard such as ‘well-founded fear,’ the Board has authority to give different weight to the evidence from that given by the Immigration Judge.”<sup>70</sup> The Board labeled this authority as “critical” so that it could reevaluate evidence that is “anecdotal” or “subjective” against other evidence that it presumed to be more reliable.<sup>71</sup> In this case, the presumptively more reliable evidence was an official report issued by the Department of State that found, *inter alia*, that the Chinese government did not have an official policy of forcing returning Chinese to undergo a sterilization procedure.<sup>72</sup> The Board determined that the documents the applicant submitted from the local family planning office were “entitled to minimal weight” because they were unauthenticated and obtained for the purpose of the applicant's asylum hearing.<sup>73</sup> Likewise, the Board found that the letters from friends and family that she submitted were not entitled to significant weight because the authors of these letters were “interested witnesses who were not subject to cross-examination.”<sup>74</sup>

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66. *In re H-L-H-*, 25 I. & N. Dec. at 210, 214–15.

67. *Id.* at 210. The immigration judge also found that the applicant failed to establish that any monetary sanctions levied against her would amount to persecution. *Id.* at 211, 215, 216–17; *see also* *Li v. Attorney Gen.*, 400 F.3d 157, 165–66 (3d Cir. 2005) (discussing when the economic deprivation experienced by an applicant is severe enough to warrant a finding of persecution). However, because the framework of the analysis by the Board for both issues is similar, for the sake of brevity this discussion will only address the sterilization issue to highlight the analytical problems in the case.

68. *In re H-L-H-*, 25 I. & N. Dec. at 213.

69. *Id.* at 212.

70. *Id.* (citing *In re A-S-B-*, 24 I. & N. Dec. 493, 497 (BIA 2008)).

71. *Id.*

72. *Id.* at 213–14 (quoting BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, CHINA: PROFILE OF ASYLUM CLAIMS AND COUNTRY CONDITIONS 29 (2007)).

73. *Id.* at 214.

74. *Id.* at 215.

## 2. *Weighing the Evidence and the Attorney General's Supplementary Information*

The Board's decision brings to bear the threshold question of whether the Board is correctly reading the scope of its authority as defined by the Attorney General in the commentary accompanying the regulation. The commentary contains two references to weight of the evidence. In the first reference, the Attorney General explained that "factfinding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder."<sup>75</sup> By this pronouncement, it would seem clear that reweighing evidence is not supposed to be within the Board's scope of authority.

In the Attorney General's second mention of weighing of the evidence, the commentary states that "'discretion,' or judgment, exercised based on . . . findings of fact, and the weight accorded to individual factors, may be reviewed by the Board *de novo*."<sup>76</sup> At first glance, this pronouncement might appear to interpret the regulation in consonance with the Board *if* the Board consistently interpreted the term judgment to mean that which it stated in *In re V-K*.<sup>77</sup> However, the context of the Attorney General's comment makes clear that this statement was not referring to judgments as the ultimate determination of whether an applicant met a statutory standard on the basis of factual findings. Rather, the Attorney General was discussing the Board's authority to reweigh the evidence in the context of a discretionary determination.<sup>78</sup> In this context, the Attorney General's statement simply refers to the Board's authority to weigh the importance of any one *factor* when determining whether an applicant is entitled to a grant of relief from deportation as a matter of discretion.

To illustrate, assume that an applicant for cancellation of removal is statutorily eligible for that form of relief, and the only question is whether she is entitled to cancellation as a matter of agency discretion.<sup>79</sup> Assume

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75. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,889 (Aug. 26, 2002) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

76. *Id.* at 54,890.

77. See *In re V-K*, 24 I. & N. Dec. 500, 501–02 (BIA 2008) (defining the term *judgment* as whether the established facts meet "the ultimate statutory requirement"). As noted before, the Board's decision in *In re A-S-B* did not address the meaning of judgments. See *In re A-S-B*, 24 I. & N. Dec. 493 (BIA 2008).

78. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,890.

79. The statutory requirements for cancellation of removal are codified at 8 U.S.C. § 1229b (2006). Section 1229b(a) lists the requisite elements for an applicant who is a lawful permanent resident. Section 1229b(b) lists the requisite elements for applicants who are "nonpermanent residents." However, the statute specifies that applicants "may" be granted cancellation of removal if they satisfy the statutory standards. *Id.* § 1229b(a), (b)(1); see also *id.*

also that she submitted evidence that she had paid her taxes every year and engaged in frequent community service to establish that her circumstances warrant a discretionary grant of cancellation. In determining whether to grant the applicant cancellation of removal as a matter of discretion, the Board is entitled to consider de novo how much weight her good deeds are entitled to, in relation to other evidence of record, such as any criminal record.<sup>80</sup> In this light, the Attorney General's use of the word *judgment* in the commentary simply appears to be an extraneous addition to a discussion of situations that are actually limited to matters of discretion. Accordingly, the Attorney General's second mention of the term *judgment* does not support the Board's determination that it may reweigh findings of fact.<sup>81</sup>

From these two comments, there is no express language authorizing the Board to reweigh findings of fact. But putting aside the question of whether the Board's reasoning comports with the Attorney General's interpretation of the regulation as stated in the commentary, the framework established by the Board suffers from several additional shortcomings.

### 3. *Weighing the Evidence in Forward-Looking Determinations*

The first shortcoming concerns how the Board analyzes the evidence before it to render a de novo assessment of the ultimate determination of whether an applicant established a sufficient likelihood of a future event—for example, a well-founded fear of future persecution in an asylum case. As noted in *In re A-S-B-* and reaffirmed in *In re H-L-H-*, the Board does not think its prediction of the likelihood of future events constitutes factfinding.<sup>82</sup> Under this reasoning, it would then follow that the Board's reweighing of the evidence to determine the likelihood of a future event cannot be considered factfinding. After all, if the prediction itself is not factfinding, then certainly the means used by the Board to make the prediction cannot constitute factfinding.

The problem with the Board's reasoning is that its premise is flawed. As noted above, immigration judges do engage in factfinding to determine whether an applicant has established that a future event will occur to a

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§ 1252(a)(2)(B) (listing cancellation-of-removal applications denied as a matter of discretion as among the agency determinations that the courts of appeals lack jurisdiction to review).

80. See generally *In re C-V-T-*, 22 I. & N. Dec. 7, 10–12 (BIA 1998) (discussing the framework the Board must follow in its assessment of whether an applicant is entitled to a discretionary grant of cancellation of removal).

81. See *In re H-L-H-*, 25 I. & N. Dec. 209, 212 (BIA 2010) (holding that “the Board has authority to give different weight to the evidence [than] that given by the Immigration Judge” when determining “whether specific facts are sufficient to meet a legal standard”).

82. *Id.* at 212; *In re A-S-B-*, 24 I. & N. Dec. at 498.



prescribed level of certainty. It is not sufficient for the Board to say that such predictions about the likelihood of future events are simply not factfinding because they require “speculative findings about what may or may not occur . . . in the future.”<sup>83</sup> Speculation is a term used to describe a finding of fact that is not grounded in record evidence or subject to *reasonable* inference. As one commenter has observed, “all fact finding involves a continuous chain of inference so that the finding of basic facts itself is the drawing of an inference.”<sup>84</sup> Thus, the act of rendering a predictive decision on the basis of inferences drawn from the facts of the case necessarily involves factfinding.

To a certain extent, inferences used to predict the likelihood of future events will necessarily involve some level of speculation. The speculative aspects of the inferences become unreasonable when the speculation can be construed as “bald.”<sup>85</sup> As the Second Circuit explained, “The speculation that inheres in inference is not ‘bald’ if the inference is made available to the factfinder by record facts, or even a single fact, viewed in the light of common sense and ordinary experience.”<sup>86</sup> Thus, bald speculation merely refers to a specific type of factfinding, i.e., inferences that are not reasonable. However, the fact that an inference is not reasonable does not somehow alter the mode of analysis employed by the immigration judge when he or she made the inferential determination in question. It still remains a finding of fact, even if a reviewing body determines that the immigration judge erred in reaching that finding. If we assume that the Board has legitimately determined that a factual finding of the immigration judge is speculative, then the Board could simply overrule that finding under its clearly erroneous standard of review for factual findings.<sup>87</sup> But the fact that forward-looking determinations involve predictions, and hence a certain amount of speculation, does not itself create a basis for claiming that such determinations are not factfinding.

A review of the facts from *In re H-L-H-* will help to illustrate this point. Let us divide the germane evidence into two groups. In the first group, we have the letters from friends and family attesting to China’s population-control policies and documentation that relays the opinion of the local family planning office that the applicant would need to be sterilized.<sup>88</sup> In the second group, we have Department of State country reports stating that

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83. *In re A-S-B-*, 24 I. & N. Dec. at 498.

84. Louis L. Jaffe, *Judicial Review: “Substantial Evidence on the Whole Record,”* 64 HARV. L. REV. 1233, 1242 (1951).

85. *See* *Siewe v. Gonzales*, 480 F.3d 160, 168–69 (2d Cir. 2007).

86. *Id.*

87. *See* 8 C.F.R. § 1003.1(d)(3)(i) (2010).

88. *In re H-L-H-*, 25 I. & N. Dec. 209, 210, 214–15 (BIA 2010).

it has found no evidence that individuals returned to China are forced to undergo sterilization procedures.<sup>89</sup> The immigration judge gave the first group of evidence high probative value while the Board believed that the second group was more important.<sup>90</sup> In finding group one highly probative, the immigration judge made several possible inferences, such as the inference that a family planning office that says it will sterilize an applicant will, in fact, sterilize her if she is deported to China. That is not to say that such an inference is correct, but a reviewing body could reasonably characterize it as being grounded in the record evidence that the immigration judge was tasked to assess.

Moving on to the second group, the Board assumed that if the Department of State report mitigated the likelihood that sterilization would take place, then it is reasonable to infer that the applicant would not be sterilized (or at least that the probability of sterilization was sufficiently minimal).<sup>91</sup> The Board also inferred that unsigned reports and documents created by individuals who are unavailable for cross-examination are not entitled to significant weight.<sup>92</sup> Although the Board's holding may be reasonable, the pertinent issue becomes how the Board must engage in its analysis in light of the scope-of-review regulation. This is where the analysis gets more intricate, and the fine line between factfinding and judgments takes shape.

It would appear permissible for the Board to determine that the evidence did not support the immigration judge's well-founded fear of persecution finding if one of two modes of analysis occurred. First, the Board would have to accept the inferences that formed the basis of the immigration judge's opinion. That is to say, if the Board accepted the inferences—i.e., findings of fact of the immigration judge—but still determined in its judgment that the evidence did not support the contention that the applicant established a well-founded fear of persecution, then the Board could reverse the immigration judge's holding on the basis of its *de novo* authority.<sup>93</sup> Second, the Board could determine that the inferences drawn by the immigration judge were neither grounded in the record nor reasonable, thus rendering the immigration judge's findings of fact clearly erroneous.<sup>94</sup> However, where the Board went wrong was substituting its

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89. *Id.* at 213–15.

90. *Id.* at 210, 213–14.

91. *See id.* at 213–14.

92. *Id.* at 214–15.

93. *See* 8 C.F.R. § 1003.1(d)(3)(ii) (2010).

94. *See id.* § 1003.1(d)(3)(i). For example, assume that the letter from the family planning office submitted by the applicant was actually from an office located fifty miles away from the applicant's hometown. Since population control policies are believed to

own inferences for those of the immigration judge to minimize the probative value of several pieces of evidence.<sup>95</sup> In short, the Board's mistake was to reweigh the probative value of the evidence in contravention of its scope of review.

#### 4. *Weighing the Evidence in Determinations About Facts that Have Already Occurred*

In addition to how the Board analyzes factual findings regarding future events, a second shortcoming in its analysis concerns how it would review events that have already happened. Tweaking the facts of *In re H-L-H-* will help to illustrate this point. Assume that the asylum applicant claimed that she *already* was sterilized in China and that she subsequently fled to the United States because of this treatment. When she appeared before an immigration judge at her asylum hearing, the applicant's testimony on her own behalf was particularly brief, lasting no more than two or three minutes. In her testimony, the applicant said nothing contradictory, nor did she provide any other indicia of untruthfulness that would warrant a finding by the immigration judge that she was not credible.<sup>96</sup> However, even though the applicant did not contradict herself, because her testimony was scant, the immigration judge determined that she must submit corroborating evidence in order for her to sustain her burden of proving that she was persecuted in the past.<sup>97</sup> Complying with this request, she

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diverge among different localities, see *In re J-H-S-*, 24 I. & N. Dec. 196, 199 (BIA 2007), the letter submitted by the applicant would not be particularly probative of the likelihood that authorities would sterilize her if she returned to *her* hometown. If the immigration judge based his determination regarding the likelihood of sterilization on this letter, then it would be reasonable to label the inference drawn from this letter as unreasonably speculative.

95. Either mode of analysis may also lead to a third option. Even if the immigration judge's findings are reasonably grounded in the record, a review of the entirety of the administrative record might demonstrate that the immigration judge did not consider or explain sufficiently probative evidence that would tend to contradict his or her assessment. In that case, the Board could decide to remand the case for further factfinding instead of overruling the opinion itself. See 8 C.F.R. § 1003.1(d)(3)(iv); cf. *infra* Part III.A (discussing whether the Board has authority to consider evidence of record that the immigration judge did not consider or use to support his or her holding).

96. For further information on credibility determinations in immigration proceedings, see Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 TEX. INT'L L.J. 185 (2008), which reviews the shortcomings in an applicant's testimony that support an adverse credibility determination, including inconsistent testimony, omissions from an asylum application, implausible testimony, and an applicant's demeanor.

97. See 8 U.S.C. § 1158(b)(1)(B)(ii) (2006) ("Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence."); see also 8 C.F.R. § 1208.13(a) (stating that an asylum applicant bears the burden of proof).

submitted several documents to corroborate her prior residence in her hometown in China, a letter from the family planning office that required her to show up for a bimonthly gynecological examination, and hospital records that showed she underwent a medical procedure, although the records did not specify the type of medical procedure.<sup>98</sup>

Evaluating the evidence, the immigration judge infers from the testimony and submitted exhibits that the medical procedure the applicant underwent was a forced sterilization procedure and holds that the applicant established past persecution. What if the Board disagrees with the immigration judge? The answer would depend on the nature of the disagreement. If the Board does not think that the applicant established past persecution on the basis of a forced sterilization procedure, then this would be a permissible—but incorrect<sup>99</sup>—finding within its scope-of-review authority. Indeed, it would simply be the Board evaluating the uncontested evidence of record as established by the immigration judge and determining *de novo* that the applicant failed to satisfy the ultimate statutory standard for past persecution.<sup>100</sup>

In contrast, what if the Board disagrees with the immigration judge's determination that the applicant provided evidence sufficient to establish that she was forcibly sterilized? Perhaps the Board thought it was unclear why the applicant underwent a medical procedure and what the procedure was for.<sup>101</sup> And, consequently, the Board decided that the medical

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98. *See generally* *Pan v. Mukasey*, 260 F. App'x 387, 389 (2d Cir. 2008) (finding that a required gynecological examination, without more, does not amount to past persecution).

99. *See* 8 U.S.C. § 1101(a)(42) (2010) (“a person who has been forced to abort a pregnancy or to undergo involuntary sterilization . . . shall be deemed to have been persecuted on account of political opinion”); *see also* *Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 309–10 (2d Cir. 2007) (en banc) (finding that spouses of individuals who have been sterilized are not entitled to a finding of *per se* past persecution).

100. Consequently, the Board's decision would be permissible under 8 C.F.R. § 1003.1(d)(3)(ii). *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,890 (Aug. 26, 2002).

101. Such a scenario raises an interesting question about the scope of the Board's authority when reviewing a decision of the immigration judge in which no adverse credibility determination is made. Under 8 U.S.C. § 1158(b)(1)(B)(iii), “if no adverse credibility determination is explicitly made [by the immigration judge], the applicant or witness shall have a rebuttable presumption of credibility on appeal.” Since the Board does not have *de novo* authority to review credibility determinations, it remains to be seen how, exactly, the presumption of credibility could be rebutted. Must the Board accept the applicant's scant testimony in which she indicated that she was sterilized? If not, how can a contrary finding be squared with the rebuttable presumption in the statute? One potential answer is to assume that a finding of credibility does not necessarily mean that the testimony of the applicant should be considered “gospel truth.” *See* *Kumar v. Gonzales*, 444 F.3d 1043, 1060 (9th Cir. 2006) (Kozinski, J., dissenting). In other words, even if there is no

documentation was not entitled to significant probative value. This would be an example where the Board would be reweighing the probative value of the evidence presented during the asylum hearing in contravention of the scope-of-review regulation. For if the immigration judge reasonably inferred that the medical procedure was for a forced sterilization (and we are assuming for purposes of this hypothetical that the inference was reasonable), then there would be no way for the Board to hold that this finding was clearly erroneous. However, according to the Board's reasoning discussed above, reweighing of the evidence falls within the scope of its *de novo* authority.<sup>102</sup>

Although the Board has never stated explicitly that its authority to reweigh evidence of record is limited to forward-looking matters, the cases in which it asserted *de novo* authority to reweigh evidence concerned forward-looking issues such as a well-founded fear of persecution.<sup>103</sup> Irrespective of whether the Board believes its authority to reweigh evidence extends to established past facts, this analysis has shown that reweighing evidence *de novo* is not permitted under the scope-of-review regulation for any factual finding rendered by an immigration judge, whether it concerns past or future events. The only difference between past and future factfinding is that a factual finding that concerns future events includes a greater degree of inferential factfinding—and hence speculation.<sup>104</sup> What is apparent, though, is that the basic analytical framework the Board applies when weighing evidence does not comport to the factfinding parameters laid out in the scope-of-review regulation.<sup>105</sup>

##### 5. *Using the Ultimate Holding as a Justification to Reweigh Evidence*

The discussion above has shown that the Board is incorrect in justifying its authority to reweigh evidence in forward-looking assessments on the basis of its mistaken belief that determinations concerning future events cannot concern facts. In *In re H-L-H-*, the Board provided an additional rationale to justify its interpretation of its authority to reweigh evidence of

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definable basis in the record for finding that an applicant is not credible, every word of the applicant's testimony need not be credited on appeal in every circumstance. An additional possibility would be that the statute trumps the inconsistent language in the regulation in this instance.

102. See *In re H-L-H-*, 25 I. & N. Dec. 209, 212 (BIA 2010).

103. See *id.*; *In re A-S-B-*, 24 I. & N. Dec. 493, 497 (BIA 2008).

104. There is also a potentially separate assessment of the *probability* of a future event occurring that is not present in an analysis of past events. That issue will be taken up in Part III.C, *infra*.

105. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,890.

record. This additional justification warrants mentioning because it further demonstrates the critical failings in the way in which the Board has interpreted its scope of review. To paraphrase, the Board stated that de novo authority to reweigh evidence is critical to ensure that an immigration judge does not erroneously rely on “anecdotal and subjective evidence” to determine that an applicant has established a well-founded fear of persecution.<sup>106</sup>

Setting aside the fact that the Board can still review such perceived shortcomings under the clearly erroneous standard,<sup>107</sup> the problem with the Board’s rationale is that it is using the ends to justify the means. Essentially, the Board is asserting that it needs greater authority to overrule an immigration judge’s decision because it may not agree with that decision on the basis of its assessment of the probative value of certain pieces of evidence. But the importance of correcting decisions believed to be wrong is not the issue here; the issue is whether the Board has authority to do it. And if a regulation limits that authority out of a desire to ensure that two levels of decisionmakers do not separately weigh the probative value of the exhibits submitted during a hearing,<sup>108</sup> then the Board’s desire to make what it believes to be the correct decision cannot subjugate this stated purpose of the regulation.

### C. *A Scope of Review in Disarray*

Even before the Board issued any precedential decisions interpreting the new scope-of-review regulation, the Attorney General recognized that the changes to the Board’s scope of review would require a more careful mode of analysis by the Board.<sup>109</sup> In the precedential cases issued by the Board that have assessed the parameters of its scope of review under the 2002 regulation, the Board has not provided a consistent interpretation of these regulations. The Board has also failed to consistently apply the general framework enunciated by the Attorney General, including the question of what constitutes a judgment.

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106. *In re H-L-H-*, 25 I. & N. Dec. at 212.

107. *See* 8 C.F.R. § 1003.1(d)(3)(i) (2010).

108. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,889 (“The parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one and requiring them to persuade . . . more judges at the appellate level is requiring too much. The clearly erroneous standard of review recognizes that an evidentiary hearing on the merits should be the main event rather than a tryout on the road.” (internal quotation marks, alterations, and citations omitted)).

109. *Id.* at 54,890 (acknowledging that a “more refined analytical approach to deciding cases” would be required of the Board).

Beyond these general problems, Part II of this Article has identified at least two specific areas where the Board's analysis has gone particularly astray. The first is the Board's blanket assertion that things that have not yet occurred cannot be considered facts.<sup>110</sup> The second is the Board's conclusion that it has de novo authority to reweigh evidence of record.<sup>111</sup> In addition to being contrary to the express wording of the Attorney General's commentary,<sup>112</sup> this conclusion appears to contradict the Board's earlier precedential cases that held that it does not have authority to reweigh evidence.<sup>113</sup>

The Board's rule on prospective factfinding is tethered to neither the plain meaning of the scope-of-review regulation and the Attorney General's commentary accompanying it, nor to any of its own precedential decisions. Rather, it is a rule that the Board could have just as easily made in any context before the Attorney General promulgated the scope-of-review regulation. And regardless of whether the Board's pronouncement on prospective factfinding is tied to the regulation or not, it still suffers from the same analytical failings.

All of these shortcomings in the Board's holdings beg the question of just how much the Board is at fault for its flawed analyses and whether the complexity of the issues at hand have played a role in the development of the case law that now governs the Board's scope of review. If the complexity of the regulation as applied to the adjudication of immigration cases is minimal, then reform efforts should be directed predominantly at the Board. Conversely, if a significant amount of the confusion is based on the application of the regulation in immigration proceedings generally, then the regulation itself would warrant closer scrutiny and possibly modification. A discussion of how the courts of appeals have evaluated the Board's scope-of-review regulation will help to explore this question further.

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110. See *In re H-L-H-*, 25 I. & N. Dec. at 212; *In re A-S-B-*, 24 I. & N. Dec. 493, 498 (BIA 2008); see also 8 C.F.R. § 1003.1(d)(3)(i).

111. See *In re H-L-H-*, 25 I. & N. Dec. at 212.

112. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,889.

113. See *In re R-S-H-*, 23 I. & N. Dec. 629, 637 (BIA 2003) ("A factfinding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder." (internal quotation marks omitted)). For examples of cases that have followed *In re R-S-H-* after the Board's decision in *In re A-S-B-*, see *In re Kafilat Adetoro Longe*, File A074-404-848, 2008 WL 4065988, at \*1 (BIA Aug. 8, 2008), and *In re Chable-Cauch*, File A078-185-369, 2008 WL 3919086, at \*1 (BIA July 29, 2008).

### III. FURTHER DIVERGENCE IN THE COURTS OF APPEALS

The case law in the courts of appeals that has evaluated the scope-of-review regulation further supports the case for reform of the regulation. While some of the Board's faulty decisionmaking was clearly of its own making, the problems inherent in the current scope-of-review regulation become more readily apparent when evaluating the decisions in the courts of appeals. These decisions show a large amount of divergence on a multitude of different questions concerning the scope-of-review regulation. The following discussion will highlight and evaluate the three major areas of confusion and disagreement within the opinions rendered by the courts of appeals.

#### A. *Whether the Board Is Limited to the Findings of the Immigration Judge*

Interpreting the scope-of-review regulation, the appellate courts have come to different conclusions about the parameters of the Board's authority to review the record. Several decisions have found that the Board's authority extends to the consideration of record evidence not discussed by the immigration judge nor used as a basis for the immigration judge's ultimate determination. For example, in *Efimova v. Mukasey*, the court held that it was permissible for the Board to vacate the immigration judge's grant of cancellation of removal on the basis of, *inter alia*, portions of the record that were not emphasized by the immigration judge.<sup>114</sup> Other decisions have gone even further, holding that the Board does not engage in impermissible factfinding as long as it bases "its decision on facts already in the record."<sup>115</sup> In *Ye v. Department of Homeland Security (DHS)*, the court found that the Board did not contravene its limited factfinding role when it determined that the applicant was not credible on the basis of an inconsistency that the immigration judge did not cite.<sup>116</sup>

In contrast, in other decisions the courts of appeals have found that the scope-of-review regulation does not permit the Board to base its determination on any facts in the record not reviewed or explicitly considered by the immigration judge in rendering his or her decision. In *Zheng v. DHS*, for example, the Board found the asylum applicant not credible on the basis of inconsistencies that "were not relied on or mentioned by" the immigration judge.<sup>117</sup> The court concluded that the

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114. *Efimova v. Mukasey*, 292 F. App'x 118, 120 (2d Cir. 2008).

115. *Ye v. DHS*, 446 F.3d 289, 296 (2d Cir. 2006); *see also* *Pan v. Mukasey*, 266 F. App'x 21, 22–23 (2d Cir. 2008).

116. *Ye*, 446 F.3d at 296.

117. *Zheng v. DHS*, 332 F. App'x 696, 699 (2d Cir. 2009).



Board's actions "constituted improper fact-finding" under its limited scope of review.<sup>118</sup> Similarly, in the cancellation-of-removal case *Padmore v. Holder*, the court chastised the Board for rendering findings regarding the nature of the applicant's criminal convictions when the immigration judge "made no such findings with respect to them."<sup>119</sup> The court found it inconsequential that the Board's findings were based on its assessment of conviction documents that were part of the administrative record.<sup>120</sup>

The divergence in what courts think the Board can consider provides the Board with inconsistent guidance on how to define the scope of its authority to review an administrative record. What these cases show is that, in large part, it often comes down to the type of inquiry the Board is making, the form of relief or protection from deportation at issue, and the case's procedural posture. Courts afford greater latitude to Board decisions that affirm the immigration judge's determination, but merely supplement the immigration judge's findings.<sup>121</sup> Intuitively, greater latitude in such a scenario makes sense. However, if the parameters of the Board's scope of review are to be understood in a consistent manner, then it would appear necessary for courts to apply that standard uniformly, regardless of the merits of the decision as it pertains to the underlying form of relief.

*B. Whether the Board May Reweigh Evidence of Record for Determinations that Are Not Discretionary*

Because the Board thinks that it has de novo authority to reweigh evidence of record, it is important to consider whether the courts of appeals agree with its interpretation. The cases establish that, by and large, the appellate courts do not *expressly* agree with the Board on this point.<sup>122</sup>

118. *Id.*; cf. *Shao v. Mukasey*, 546 F.3d 138, 162 (2d Cir. 2008) (noting that the Board accepted the immigration judge's "critical finding of fact" and that the petitioner could not establish error on the basis of the Board reviewing evidence because the parties consented to its review).

119. *Padmore v. Holder*, 609 F.3d 62, 68 (2d Cir. 2010).

120. *Id.* at 68–69. Similarly, the Ninth Circuit held in *Brezilien v. Holder* that the Board erred by rendering factual findings not made by the immigration judge regarding the applicant's asylum claim. 569 F.3d 403, 413–14 (9th Cir. 2009). The court essentially ignored the Board's holdings in *In re A-S-B-* and *In re V-K-* and found that deference was not warranted because of the regulation's "clear . . . text." *Id.*

121. See, e.g., *Krishnapillai v. Holder*, 563 F.3d 606, 615 (7th Cir. 2009) ("We review the IJ's decision as supplemented by the Board's own analysis."); *Ye*, 446 F.3d at 293, 296; *Chen v. Gonzales*, 417 F.3d 268, 271 (2d Cir. 2005) ("Where the [Board of Immigration Appeals (BIA)] adopts the decision of the IJ and merely supplements the IJ's decision, however, we review the decision of the IJ as supplemented by the BIA.>").

122. See, e.g., *Sherpa v. Holder*, 374 F. App'x 104, 105 (2d Cir. 2010) ("The BIA may not reject a factual finding simply because it would have weighed the evidence differently or

Court decisions that strike down the Board's authority to reweigh evidence fall generally into one of three categories.

The first reason courts find that the Board may not reweigh evidence of record is simply the express language of the Attorney General's commentary accompanying the scope-of-review regulation,<sup>123</sup> which, as noted above, prohibits reweighing evidence.<sup>124</sup> There can be no question that this reason is justified; the Attorney General's interpretation of its own regulations is binding on the Board.<sup>125</sup> And, as explained before, the pronouncement by the Attorney General that the Board may reweigh evidence *de novo* was only in relation to *discretionary* determinations and the Board's assessment of the equities in a given case.<sup>126</sup>

The second way courts have struck down the Board's authority to reweigh evidence is by analogizing to instances outside the immigration context where courts apply the clearly erroneous standard.<sup>127</sup> This reason is also justified because, even assuming *arguendo* that the Attorney General had the authority to interpret the clearly erroneous standard in a manner contrary to the way it is ordinarily applied, no effort was made to do so. To the contrary, the supplemental information to the regulation draws support for its interpretation of clearly erroneous review from the Supreme Court's decision in *Anderson v. Bessemer City*,<sup>128</sup> a case that reviewed how the federal

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decided the facts differently had it been the factfinder."); *Hernandez Ramirez v. Holder*, 372 F. App'x 502, 503 (5th Cir. 2010) (upholding the Board's decision because it "did not reweigh the facts"); *De La Rosa v. Holder*, 598 F.3d 103, 108 (2d Cir. 2010) ("The standard of review entailed by 'weight of the evidence' cannot be squared with review for clear error in this Circuit."); *Alvarado de Rodriguez v. Holder*, 585 F.3d 227, 234–35 (5th Cir. 2009) (finding that the Board must have reweighed the evidence to reach a conclusion contrary to the immigration judge); *Kabba v. Mukasey*, 530 F.3d 1239, 1245–46 (10th Cir. 2008) (faulting the Board for failing to defer to the immigration judge's determination that the asylum applicant did not know that the documents he submitted were fraudulent); *Wang v. Gonzales*, 190 F. App'x 49, 50–51 (2d Cir. 2006) (holding that the Board erred by substituting its own opinion about whether the Chinese government would count the applicant's United States-born children for purposes of enforcing its population control policies).

123. See, e.g., *Alvarado de Rodriguez*, 585 F.3d at 234; *Kabba*, 530 F.3d at 1245.

124. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,889 (Aug. 26, 2002).

125. See 8 U.S.C. § 1103(a)(1) (2006); see also *In re A-A-*, 20 I. & N. Dec. 492, 502 & n.23 (BIA 1992).

126. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,890.

127. See, e.g., *De La Rosa*, 598 F.3d at 108 (citing *Ceraso v. Motiva Enters.*, 326 F.3d 303, 316–17 (2d Cir. 2003)).

128. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,889 (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

courts of appeals should apply the clearly erroneous standard to a federal district court's de novo assessment of the record. In *Anderson*, the Court stated that "the court of appeals may not reverse [the decision before it] even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."<sup>129</sup> The Supreme Court's language is nearly identical to that used by the Attorney General, and further undermines the Board's conclusion that it has authority to reweigh evidence of record under its scope of review.

The third method courts use is simply to determine that the Board could not have reached the decision it did unless it had reweighed the evidence in contravention of its standard of review for factual findings.<sup>130</sup> Although this reasoning is more precarious and subject to abuse, there is no reason why it would not be legitimate if the record establishes that the Board improperly weighed the evidence. Specifically, the record must show that the Board voiced disagreement with how the immigration judge characterized the evidence, and it does so in a situation where the immigration judge's interpretation of the evidence was reasonable. The Board's disagreement with the immigration judge would demonstrate that there were multiple ways to interpret the facts at hand. The reasonableness of the immigration judge's interpretation would mean that the Board could not overturn it under the clearly erroneous standard of review.<sup>131</sup>

Although there do not appear to be any appellate court cases that *explicitly* condone the Board reweighing evidence, there is *implicit* acceptance in certain instances. This implicit acceptance is based on how an appellate court defines what in the record the Board can consider in the first place. (This was discussed *supra* Part III.A.) If courts do not think the Board has authority to review de novo any aspect of the record not specifically mentioned by the immigration judge, then any meaningful discussion by the Board of the probative value of other evidence could be construed by appellate courts as reweighing the evidence. However, courts that permit the Board to consider evidence that is in the record but not cited by the immigration judge in support of the decision are, in essence, permitting the

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129. *Anderson*, 470 U.S. at 574.

130. See, e.g., *Kaplun v. Attorney Gen.*, 602 F.3d 260, 272 n.9 (3d Cir. 2010) ("[T]he Board applied a *de novo* standard to all of the IJ's relevant factual findings."); *Wang v. Gonzales*, 190 F. App'x 49, 51 (2d Cir. 2006) ("[T]he BIA appears to have simply substituted its own judgment for that of the IJ.").

131. See *Anderson*, 470 U.S. at 573–74 (stating that appellate courts applying the clearly erroneous standard of review cannot overturn plausible findings of fact); see also *Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 138 (3d Cir. 2009) (crediting a trial judge's reasonable inference derived from the facts of the case); *United States v. Stevenson*, 396 F.3d 538, 542 (4th Cir. 2005) (applying the *Anderson* plausibility standard).

Board to reweigh evidence, even though they do not characterize it as such.

A hypothetical will help to illustrate this point. Assume that an administrative record is limited to facts A, B, and C, and the immigration judge issues a decision on the basis of facts A and B. Under the court interpretation allowing the Board to consider any evidence of record, the Board would be permitted to consider fact C in its assessment. If, in its review of the record, the Board does consider fact C and uses it to render its ultimate determination, then the Board has necessarily assigned fact C greater weight than the immigration judge did. This is so because the immigration judge implicitly assigned zero weight to fact C by failing to consider it.

Decisions in the courts of appeals confirm the view that the Board has no *express* authority to reweigh evidence of record under the scope-of-review regulations. This is apparent from the wording of the regulation, the Attorney General's binding interpretation of the regulation, and the general principles of appellate review applicable to the clearly erroneous standard of review. However, if some court decisions implicitly condone the Board reweighing evidence, then these decisions reinforce a mode of analysis encompassing a framework of review comparable to the one the Board would employ if it were to expressly consider *de novo* the weight to afford various parts of the record. Given that the Board has decided tens of thousands of nuanced, fact-intensive cases since the Attorney General implemented the scope-of-review regulation in 2002,<sup>132</sup> it becomes apparent why the current framework has been problematic, even for issues like reweighing evidence that, on the surface, appear straightforward.<sup>133</sup>

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132. See STATISTICAL YEAR BOOK, *supra* note 10, at S2 fig.27 (charting the number of cases that have come before the Board in recent years).

133. Even if the Board did not make the erroneous conclusion that it could reweigh findings of fact, there might still be ambiguity associated with its authority to determine *de novo* whether undisputed facts are sufficient to meet a legal standard. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,890 ("The 'clearly erroneous' standard does not apply to determinations of matters of law, nor to the application of legal standards..."). This is because the Board's determination of whether an applicant satisfied an ultimate legal standard would still require it to assess the undisputed facts before it, and a determination contrary to the immigration judge could still create the *appearance* that the Board has engaged in improper weighing of the evidence. Thus, even though the Board's analysis would be operating well within the parameters of its *de novo* authority, a reviewing court could carelessly conclude that the Board has engaged in improper *de novo* factfinding. Cf. Ramadan v. Gonzales, 479 F.3d 646, 648 (9th Cir. 2007). This problem is exacerbated by the fact that federal appellate courts have long viewed the inquiry into certain forms of relief and protection as entirely questions of fact. See, e.g., Sowe v. Mukasey, 538 F.3d 1281, 1285 (9th Cir. 2008); Butt v. Keisler, 506 F.3d 86, 89 (1st Cir. 2007); Perlera-Escobar v. EOIR, 894 F.2d 1292, 1296 (11th Cir. 1990); Ipina v. INS, 868 F.2d 511, 513 (1st Cir. 1989); Arteaga v. INS, 836 F.2d

*C. Whether the Probability of a Future Event Is a Factual Question Distinct from the Ultimate Determination of a Legal Standard*

There is little dispute that under the scope-of-review regulation, the Board may consider de novo whether a set of undisputed facts is sufficient to meet a legal standard.<sup>134</sup> Thus, for example, if an immigration judge finds that police beat an asylum applicant on three occasions, the Board may consider de novo whether these beatings satisfy the ultimate legal standard for past persecution. However, an interesting issue has emerged in the courts of appeals concerning the scope of the Board's authority to review de novo whether an applicant has satisfied an ultimate legal standard that concerns future events. The issue stems from the predictive component of these legal standards. In CAT claims, for example, an applicant must prove that it is more likely than not that the applicant would be tortured if returned to his or her home country.<sup>135</sup> For asylum claims, it is less clear what precise likelihood of future harm an applicant must establish, but certainly the requisite probability is less than a preponderance, and might even drop to as low as ten percent.<sup>136</sup> The germane inquiry concerns how, exactly, appellate courts factor this predictive component into the Board's assessment of whether an applicant has satisfied an ultimate legal standard. In other words, do appellate courts consider the predictive component a distinct *factual* finding that the Board cannot review de novo? Needless to say, the courts have reached different conclusions.

One of the primary appellate court cases to address this issue is *Kaplun v. Attorney General*.<sup>137</sup> The *Kaplun* decision was the first time that an appellate court rendered judgment over one of the Board's precedential scope-of-review cases. The petitioner, Vadim Kaplun, is the CAT applicant in the Board case *In re V-K*- discussed above. To refresh, in *In re V-K*-, the Board overturned the immigration judge's determination that the applicant established he more likely than not would be tortured if returned to

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1227, 1228 (9th Cir. 1988); Cruz-Lopez v. INS, 802 F.2d 1518, 1519 n.1 (4th Cir. 1986); Espinoza-Martinez v. INS, 754 F.2d 1536, 1539 (9th Cir. 1985); Carvajal-Munoz v. INS, 743 F.2d 562, 567-68 (7th Cir. 1984).

134. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,890; see also Chen v. Mukasey, 293 F. App'x 800, 802 (2d Cir. 2008) ("[R]equiring the BIA to apply a legal standard to a set of uncontested facts [is] permissible under the regulations.").

135. See 8 C.F.R. § 1208.16(c)(2) (2010).

136. See INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987); Karaj v. Gonzales, 462 F.3d 113, 116-17 (2d Cir. 2006); Susanto v. Gonzales, 439 F.3d 57, 60 (1st Cir. 2006); Lukwago v. Ashcroft, 329 F.3d 157, 177 (3d Cir. 2003).

137. Kaplun v. Attorney Gen., 602 F.3d 260 (3d Cir. 2010).

Ukraine.<sup>138</sup>

In *Kaplun*, the Third Circuit determined that the probability that the applicant would be tortured is a question of fact.<sup>139</sup> As such, the Board could only reverse the immigration judge if his findings related to the future probability of torture were clearly erroneous.<sup>140</sup> The court distinguished the likelihood of future harm from the separate “legal question” of whether the harm would constitute torture.<sup>141</sup> Because “[t]orture is a term of art” and the likelihood of harm is a factual determination, the court held that the Board must “break down the inquiry into its parts and apply the correct standard of review to the respective components.”<sup>142</sup>

On its face, the Third Circuit’s logic appears well-grounded because the predictive valuation of future harm can intuitively be seen as a factual inquiry. However, the rationale is contrary to the framework announced by the Board, and the Board’s interpretation of its own regulation is entitled to deference.<sup>143</sup> Recall that in *In re V-K-*, the Board acknowledged that future predictions involve questions of fact, just not the type of facts that fall under the rubric of factfinding when it applies its scope of review under the regulation.<sup>144</sup> In this sense, the Board’s understanding of its scope of review can be seen as an interpretation of the Attorney General’s supplemental information, which stated that the Board has de novo authority to review “judgments as to whether the facts established by a particular alien amount to . . . a ‘well-founded fear of future persecution.’”<sup>145</sup> Interestingly, the Third Circuit did consider this possible interpretation of the term judgments in the regulation but rejected it, instead concluding that the

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138. *In re V-K-*, 24 I. & N. Dec. 500, 502 (BIA 2008).

139. *Kaplun*, 602 F.3d at 269.

140. *Id.* at 272 & n.9.

141. *Id.* at 271.

142. *Id.*

143. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Not surprisingly, the court discounted any deference that would ordinarily be owed to the Board by finding that the Board “plainly err[ed]” by premising its decision on its belief that an “assessment of the probability of future torture is not a finding of fact because the events have not yet occurred . . . .” *Kaplun*, 602 F.3d at 269; see *Auer*, 519 U.S. at 461 (stating that deference is not owed to agency interpretations that are “plainly erroneous or inconsistent” with the regulation (internal quotation marks omitted)). However, this is not exactly what the Board stated in *In re V-K-*. Rather, the court’s rendition of the Board’s analysis is closer to what the Board stated in *In re A-S-B-*, 24 I. & N. Dec. 493, 498 (BIA 2008), and *In re H-L-H-*, 25 I. & N. Dec. 209, 212 (BIA 2010), decisions that were not before the court. See *Kaplun*, 602 F.3d at 269 n.7.

144. *In re V-K-*, 24 I. & N. Dec. 500, 501 (BIA 2008).

145. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,890 (Aug. 26, 2002).

review of judgments de novo discussed by the Attorney General only referred to judgments regarding “legal standards or the exercise of discretion.”<sup>146</sup> In this respect, the Third Circuit’s reasoning is circular—or at least self-fulfilling—because it is entirely based on its previous determination that the predictive component of the inquiry concerns a separate question of fact. If the Third Circuit had determined that the ultimate legal standard did encompass a future prediction, it would follow that such predictions would be included within the scope of “legal standards” that it concedes the Board has authority to review de novo.

The Third Circuit’s analysis is also at odds with other decisions in the courts of appeals that have found no need to distinguish between the purportedly “legal” and predictive components of an ultimate statutory or regulatory standard. In *Lin v. Holder*, for example, the Second Circuit upheld the Board’s determination that the applicant failed to establish a well-founded fear of persecution because the applicant’s “fear of undergoing a mandatory gynecological examination was too speculative to merit relief.”<sup>147</sup> The court determined that the scope-of-review regulation authorized the Board “to review de novo the [immigration judge’s] legal determination regarding [the applicant’s] eligibility for relief,” and that the applicant failed to “establish an objectively reasonable fear” of persecution.<sup>148</sup> Thus, the Second Circuit assumed that the probability of future harm was encompassed within the parameters of the Board’s assessment of whether an applicant satisfied a legal standard.<sup>149</sup>

The distinction in the modes of analysis used by appellate courts to assess the predictive component may also stem from the type of relief or protection at issue, and the specific facts of any one case. As to the type of relief or protection, *Lin* concerned the question of whether the applicant established a well-founded fear of persecution.<sup>150</sup> In assessing such claims, the analysis is often phrased as whether the applicant established an objectively reasonable fear of persecution.<sup>151</sup> This phraseology washes over

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146. *Kaplun*, 602 F.3d at 268 n.6.

147. *Lin v. Holder*, 365 F. App’x 311, 312 (2d Cir. 2010).

148. *Id.* at 312–13.

149. *See id.*; *see also* *Duka v. Holder*, 345 F. App’x 720, 721 (2d Cir. 2009) (labeling the well-founded fear standard as a “legal determination” and defining it as “a *reasonable possibility* of persecution” (emphasis added)).

150. *Lin*, 365 F. App’x at 311–12.

151. *See, e.g.*, *Woldemichael v. Ashcroft*, 448 F.3d 1000, 1004 (8th Cir. 2006); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003); *Alvarez-Flores v. INS*, 909 F.2d 1, 5 (1st Cir. 1990). In addition to demonstrating an objectively reasonable fear of persecution, an applicant must also establish a “subjective” fear of persecution, which means that the applicant “genuinely fears persecution.” *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1289 (11th Cir. 2001). The relevance of the subjective component in an assessment of an applicant’s

the predictive aspect and, in part, drives the manner by which a reviewing court assesses the issue before it. *Kaplun*, by contrast, concerned a CAT claim where the requisite likelihood of torture is expressly codified by regulation.<sup>152</sup> This explicit codification has caused reviewing courts to incorporate the predictive language into the manner by which they speak about CAT claims, and hence assess these claims.<sup>153</sup>

As to the specific facts of any one case, a slight factual distinction between *Kaplun* and *Lin* highlights how the facts of any one case may influence a reviewing court's interpretation of the Board's scope-of-review regulation. In *Kaplun*, an expert testifying on Kaplun's behalf stated that Kaplun would likely be detained and imprisoned in horrid conditions if deported,<sup>154</sup> whereas the applicant in *Lin* did not have any experts testify on her behalf, nor did she submit evidence that authorities in China would force her to undergo a gynecological examination.<sup>155</sup> In both cases, the Board labeled the applicant's fear of harm as "speculative,"<sup>156</sup> but in *Lin*, the court found that it was reasonable for the Board to view the prospect of future harm as speculative.<sup>157</sup> Would the *Lin* court have found the Board's decision equally reasonable if an expert had testified at trial that authorities would likely subject Lin to a gynecological examination if she were deported to China? Perhaps not. At the very least, the added component of expert testimony would likely make the court think twice about whether the predictive component of the well-founded fear test could—or should—be separated from the more obviously legal one.

Neither of the courts' interpretations of the regulation is entirely satisfactory. Both contain merits and drawbacks. Separating the predictive component is intuitively understandable but likely unworkable in the myriad of different factual scenarios that have the potential to muddle the two components together. Leaving them together will allow for a more uniform application, but will lead to circumstances in which the Board oversteps its authority, irrespective of how it interprets its de novo authority to review judgments. Thus, under the current regulation, the different ways to interpret future events will simply lead to greater uncertainty and

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asylum claim is usually limited to instances where the applicant's credibility is at issue.

152. *Kaplun v. Attorney Gen.*, 602 F.3d 260, 263 (3d Cir. 2010); 8 C.F.R. § 1208.16(c)(2) (2010).

153. *See, e.g.*, *Chen v. Gonzales*, 470 F.3d 1131, 1139 (5th Cir. 2006); *Lin v. U.S. Dep't of Justice*, 432 F.3d 156, 157 (2d Cir. 2005); *Auguste v. Ridge*, 395 F.3d 123, 138–39 (3d Cir. 2005).

154. *Kaplun*, 602 F.3d at 272.

155. *Lin*, 365 F. App'x at 312–13.

156. *Kaplun*, 602 F.3d at 272; *Lin*, 365 F. App'x at 312.

157. *Lin*, 365 F. App'x at 312–13.



divergent standards and further support the case for revisiting the regulation.

#### IV. A CASE FOR REGULATORY REFORM

A review of the Attorney General's commentary and cases adjudicated by the Board and courts of appeals shows that the scope-of-review regulation is in disarray. The Attorney General provided an interpretation of the regulation that opened the door to divergent applications of the enunciated standards.<sup>158</sup> Subsequently, the Board issued several precedential decisions that contained multiple interpretations of its scope-of-review authority, creating contradictions between its own opinions,<sup>159</sup> and between its opinions and the Attorney General's commentary.<sup>160</sup> Reviewing the Board's decisions, the courts of appeals reached different conclusions on several principal aspects of the Board's scope-of-review authority.<sup>161</sup> Given all of these shortcomings, it is apparent that the scope-of-review regulation is simply not working.

The scope-of-review regulation also fails to fulfill the Attorney General's two justifications for altering the Board's scope of review in the first place. First, the Attorney General suggested that "immigration judges may be better positioned than the Board to decide factual issues."<sup>162</sup> However, this justification erroneously presupposes that the agency would consistently decipher when an issue is "factual" in the sense that deference would be warranted. Additionally, it merely states that which was already known; the Board assumed long before the scope-of-review regulation that an immigration judge, as the adjudicator privy to the firsthand account of the evidence, is better suited than the Board to evaluate certain aspects of the record.<sup>163</sup>

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158. See *supra* Part I; Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,888–89 (Aug. 26, 2002).

159. See *supra* Part II. Compare *In re A-S-B-*, 24 I. & N. Dec. 493, 498 (BIA 2008) (an assessment of future events can never involve factfinding), and *In re H-L-H-*, 25 I. & N. Dec. 209, 212 (BIA 2010), with *In re V-K-*, 24 I. & N. Dec. 500, 501 (BIA 2008) (future predictions do not involve factfinding under the regulation).

160. See *supra* Part II. Compare Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,889 (stating that the Board may not reweigh evidence), with *In re H-L-H-*, 25 I. & N. Dec. at 212 (stating that the Board has de novo authority to reweigh evidence).

161. See *supra* Part III.

162. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,889.

163. See *In re A-S-*, 21 I. & N. Dec. 1106, 1109 (BIA 1998) ("[I]t is . . . well established that because the Immigration Judge has the advantage of observing the alien as the alien testifies, the Board accords deference to the Immigration Judge's findings concerning

Second, the Attorney General justified the need to limit the Board's scope of review by noting that a duplication of the immigration judge's efforts by the Board can lead to "a huge cost in diversion of judicial [and agency] recourses."<sup>164</sup> While the need to conserve resources is a legitimate justification, in this case, the Board's efforts are largely duplicitous anyway because it defines its *de novo* authority so broadly. Moreover, since the Board deferred to the immigration judge on select findings of fact even before the enactment of the scope-of-review regulation, the regulation did not cause additional duplicitous efforts in those circumstances.<sup>165</sup>

A substantial divergence in recourses has occurred in the federal appellate courts, since they are tasked with assessing whether the Board's decisions comport to the parameters of its scope-of-review authority every time a petitioner raises the issue on appeal. While petitioners already allege on a regular basis that the Board acted outside its scope of review,<sup>166</sup> the

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credibility and credibility-related issues."); *In re Burbano*, 20 I. & N. Dec. 872, 874 (BIA 1994) (stating that the Board would afford deference to an immigration judge for matters other than credibility determinations "that are based upon his or her observance of witnesses when the basis for those findings are articulated in the immigration judge's decision").

164. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,889 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574–75 (1985)).

165. *See id.* In addition to the fact that the Attorney General's justifications have not materialized since it issued the scope-of-review regulation, it should also be pointed out that in justifying the regulation, the Attorney General drew support for greater deference from the rationale provided by the Supreme Court in a case that explained why federal appellate courts should defer to the findings of a district court judge. *Id.* Unlike the federal circuit courts, the Board is a specialty appellate body, which might provide an additional reason why deference to immigration judges need not be applied so rigidly. However, a significant number of judges and commentators have expressed frustration with the quality of Board opinions, which calls into question the extent to which the Board should be given *de novo* authority to review the decisions of immigration judges. *See, e.g.,* *Kadia v. Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007) (remarking on the perceived "egregious failures of the . . . Board"); Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 11–36 (2006). Although the Board's decisions are not regularly models of clarity, the decisions of immigration judges are comparably problematic. Many of the problems stem from the fact that immigration judges typically issue their decisions orally at the conclusion of the hearings, which does not necessarily provide them with sufficient time to consider fully all the evidence of record. Nor do immigration judges have resources sufficient to conduct research to the extent warranted in any given case. Consequently, while the criticisms of the Board's opinions are understandable, these criticisms do not provide a basis for maintaining the codified heightened deference in light of the current deficiencies in the regulatory framework explored in this Article.

166. In addition to the cases cited *supra* Part III, see, e.g., *Ramirez-Peyro v. Gonzales*, 477 F.3d 637, 640–41 (8th Cir. 2007), *Liang v. Holder*, 377 F. App'x 115, 116–17 (2d Cir. 2010), *Perez-Gill v. Attorney General*, 343 F. App'x 824, 825–26 (3d Cir. 2009), and *Figueroa-Matos v. Attorney General*, 312 F. App'x 480, 481–82 (3d Cir. 2009).

frequency of these challenges will only increase as additional—real or perceived—deficiencies in the Board's interpretation and application of the regulatory standards continue to materialize in appellate court decisions. In addition to draining the resources of the federal appellate courts, the scope-of-review regulation also diverts the resources of the Attorney General, since the Justice Department is responsible for defending the decisions of the Board in the thousands of immigration cases filed in the appellate courts every year.<sup>167</sup>

Given the myriad of problems with the scope-of-review regulation, this Article recommends that the Attorney General amend the current regulation to eliminate the requirement that the Board review the findings of fact rendered by an immigration judge under the clearly erroneous standard of review. Instead, the Attorney General should again permit the Board to consider factual determinations *de novo*. Providing the Board with such *de novo* authority will turn the attention of the proceedings back to the substantive issues of a case. As it did before the 2002 regulations, the Board should still provide a certain level of deference to the findings of fact rendered by an immigration judge, particularly when such factfinding is based on the characteristics of a trial that can make direct observation particularly important, such as credibility determinations.<sup>168</sup> Providing such deference as a matter of agency practice instead of obligation will help to avoid the procedural nuances inherent in the interpretation of the scope-of-review regulation that have become the center of so much litigation.

If the Attorney General determines that the scope-of-review regulation should retain the clearly erroneous standard of review for factual findings, additional clarifications should still be made to provide the Board with more precise guidance so that it may better assess when it must defer to the findings of the immigration judge. Indeed, even if the Attorney General were to provide the Board with *de novo* authority to review questions of fact, it would still be helpful to have clarification about the parameters of factfinding to enhance the consistency of opinions, since the Board would still defer to an immigration judge in certain instances as a matter of agency practice. However, any reform action seeking to define the parameters of factfinding must be careful to avoid defining too concretely the types of issues that the Board should construe as factfinding. For as this analysis has shown, it is nearly impossible to classify a category of circumstances as wholly factual or legal without suffering from over-inclusiveness or under-inclusiveness.

Despite the need to tread carefully, the Attorney General should provide

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167. See U.S. DEP'T OF JUSTICE, *supra* note 33.

168. See *In re A-S-*, 21 I. & N. Dec. at 1109; *In re Burbano*, 20 I. & N. Dec. at 874.

additional guidance on some of the main problems identified in this Article. First, the Attorney General should clarify that inferences about future events can constitute factfinding. Similarly, there should be additional clarification about whether the predictive component of forward-looking forms of relief and protection are distinct from the legal question of whether an applicant has satisfied an ultimate statutory or regulatory standard. Further clarification on this point does not necessarily require the Attorney General to render a definitive determination one way or the other. Indeed, recognition of ambiguity can itself be helpful in the evaluation of a nuanced issue.

The Attorney General should also revisit the issue of whether and when the Board can reweigh evidence of record. Although the supplemental information accompanying the scope-of-review regulation states expressly that reweighing evidence is not permissible,<sup>169</sup> this pronouncement should be revisited to determine whether the nature of immigration cases require a more refined approach,<sup>170</sup> given that the courts of appeals sometimes provide the Board with implicit authority to reweigh evidence of record *de novo*.<sup>171</sup> Finally, the Attorney General should clarify the term *judgments*. The use of this term in multiple contexts in the supplemental information accompanying the regulation only serves to obfuscate its meaning,<sup>172</sup> as seen in the different ways the Board has applied the term in its precedential decisions.<sup>173</sup>

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169. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,889.

170. On the issue of reweighing evidence, the comments in the supplemental information accompanying the regulation are based on the relationship between an appellate court and a district court. *See id.*

171. *See supra* Part III.B.

172. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,890.

173. *Compare In re V-K-*, 24 I. & N. Dec. 500, 501–02 (BIA 2008) (using the Board’s authority to review judgments *de novo* as a basis for its decision), *with In re A-S-B-*, 24 I. & N. Dec. 493, 497–98 (BIA 2008) (omitting any reference to judgments in its assessment of the record), *and supra* Part III.A (discussing the omission of judgments from the *In re A-S-B-* analysis). In clarifying these points of the scope-of-review regulation, the Attorney General has two options. First, he can do it in the supplemental information to an amended rule. *See* 8 U.S.C. § 1103(a)(1) (2006) (“[D]etermination and ruling by the Attorney General with respect to all questions of law shall be controlling.”). Second, he can certify a Board opinion to himself and decide the issue. *See* 8 C.F.R. § 1003.1(h)(1)(i) (2010) (“The Board shall refer to the Attorney General for review of its decision all cases that [t]he Attorney General directs the Board to refer to him.”).

### CONCLUSION

The Board's role in assessing immigration claims is not an easy one. Rendering judgment about events that have happened—or that may happen—halfway around the world is a challenging task. But the interpretation and application of the regulation currently guiding the Board's scope of review has only made reviewing immigration claims more precarious, without significant offsetting benefits. Amending the scope-of-review regulation to let the Board review factual determinations *de novo* will allow the Board to focus on the substantive issues of each case and permit courts of appeals to do the same. Without changes or significant clarification to the regulation, the drain on agency and judicial resources will only increase, and the ambiguities surrounding the proper application of the regulation will continue multiplying.

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# COMMENTS

## DEREGULATION BY ANY OTHER NAME: NEW JERSEY'S SITE REMEDIATION REFORM ACT IN FEDERAL CONTEXT

TOM RATH\*

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## INTRODUCTION

Forced through a lame-duck Congress in 1980, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund)<sup>1</sup> was a bold,<sup>2</sup> but flawed,<sup>3</sup> legislative initiative. Superfund never attained the success of previous federal environmental programs, and a dramatic shift in political context played a lead role in that shortcoming.<sup>4</sup> Throughout the 1980s, critics began to accuse federal environmental regulation of impeding economic growth while delivering only marginal results.<sup>5</sup> When subsequent thinking coalesced around “streamlining” the Superfund program, one idea predominated: devolving enforcement duties to the states.<sup>6</sup> This process is now quite advanced<sup>7</sup> and enjoys some current

1. 42 U.S.C. §§ 9601–9675 (2006).

2. See *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1465–66 (1986) [hereinafter *Developments*] (“The courts have enhanced the statute’s radicalism in subsequent interpretation, finding in its language and legislative history a congressional intent to adopt unusually broad and highly controversial standards of liability.”).

3. For example, the Comprehensive Environmental Response and Liability Act (CERCLA or Superfund) was hopelessly vague on the central point of what standard of liability courts should apply. See 42 U.S.C. § 9607(a) (providing that responsible parties shall be liable, but failing to define whether such liability is strictly imposed or conditioned on some other standard). Litigation on this point contributed to excessive delay and cost of initial enforcement efforts. See also *Developments*, *supra* note 2, at 1511–43 (discussing judicial construction of CERCLA liability sections).

4. See Editorial, *Not So Super Superfund*, N.Y. TIMES, Feb. 7, 1994, at A16 (“Apart from throwing some cleanup money at a few favored Congressmen, the Gorsuch-Lavelle team let one industry after another off the hook.”). See generally WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY 42, 110 (1992) (describing lobbying efforts of the Superfund Coalition, which counted among its members former EPA directors and a host of major polluters).

5. See generally MARC K. LANDY ET AL., THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS (1990) (criticizing environmental law broadly for failing to impose enforceable standards and achieve cost-beneficial results).

6. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/RCED-97-77, SUPERFUND: STRONGER EPA–STATE RELATIONSHIP CAN IMPROVE CLEANUPS AND REDUCE COSTS 2 (1997) (“A growing consensus has emerged . . . that the states should take on more responsibility for leading the cleanup of the program’s highest-priority sites . . .”). Some commentators use the “streamlining” argument to go further, even suggesting devolution from states to local municipal bodies. See, e.g., Matthew D. Fortney, Comment, *Devolving Control over Mildly Contaminated Property: The Local Cleanup Program*, 100 NW. U. L. REV. 1863, 1875–76 (2006) (arguing that state programs are too distant and inefficient to account for the smallest sites). And of course, still more radical voices have recommended that government retire from site remediation altogether. E.g., JAMES V. DE LONG, CATO INST. POLICY ANALYSIS NO. 247, PRIVATIZING SUPERFUND: HOW TO CLEAN UP HAZARDOUS WASTE (Dec. 18, 1995), available at <http://www.cato.org/pubs/pas/pa247.pdf>.

7. See generally Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 597–98 (2001) (noting that by 1997, 5552 sites had been



academic support.<sup>8</sup> Yet the same administrative problems, including administrative intransigence<sup>9</sup> and political horse-trading,<sup>10</sup> plague state governments as well. If politics has hindered Superfund administration,<sup>11</sup> some state agencies face similar challenges. This Comment explores that possibility and asks what the federal Environmental Protection Agency (EPA) can do about it.

No state represents the progress of this regulatory evolution quite like New Jersey. Highly developed, densely populated, and heavily industrialized, New Jersey was—and remains—one of the most contaminated states in the nation.<sup>12</sup> Its legislature enacted the first hazardous waste remediation program in the nation in 1976, preceding even the federal government.<sup>13</sup> In the first five years of the federal program, a remarkable number—one quarter—of Superfund sites were in New Jersey.<sup>14</sup> Thus, the state represents the most advanced test of the wisdom of decentralized regimes.<sup>15</sup>

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remediated under state enforcement, while only 200 had been completed by the Environmental Protection Agency (EPA)); Heidi Gorovitz Robertson, *Legislative Innovation in State Brownfields Redevelopment Programs*, 16 J. ENVTL. L. & LITIG. 1 (2001) (surveying state initiatives).

8. See Jonathan H. Adler, *Reforming our Wasteful Hazardous Waste Policy*, 17 N.Y.U. ENVTL. L.J. 724, 724–25 (2009) (advocating a decentralized regime for regulating hazardous waste management).

9. See Revesz, *supra* note 7, at 584 (cautioning that the state laws are sometimes merely symbolic and should not necessarily be taken to indicate robust enforcement).

10. See, e.g., Robert R. Kuehn, *The Limits of Devolving Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373, 2377 (1996) (“Today, states are engaged in what one governor called ‘cannibalism’ in their competition to attract new businesses, wooing them with tax breaks and other taxpayer-financed economic incentives.”).

11. Compare *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982) (“Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal.”), with H.R. REP. NO. 99-253, pt. 1, at 55 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2837 (declaring that the EPA was doomed to fail in administration of CERCLA because Congress allocated insufficient resources). Only politics can explain the chasm between these accounts of congressional intent.

12. See generally N.J. Exec. Order No. 140, 41 N.J. Reg. 2163(a) (May 7, 2009), available at <http://www.state.nj.us/infobank/circular/eojsc140.htm> (linking New Jersey’s long history of economic prosperity with the problem of hazardous waste contamination).

13. See Adler, *supra* note 8, at 746 (arguing that although New Jersey was one of the first states to take the problem seriously, the states are generally more capable today).

14. OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, REPORT NO. 08-P-0169, IMPROVED CONTROLS WOULD REDUCE SUPERFUND BACKLOGS 2 (2008), <http://www.epa.gov/oig/reports/2008/20080602-08-P-0169.pdf> [hereinafter *OIG REPORT*].

15. A few academics have come to the same conclusion. See, e.g., Joel B. Eisen, *Brownfields at 20: A Critical Reevaluation*, 34 FORDHAM URB. L.J. 721, 723–24 (2007).

But New Jersey's site remediation regime has been troubled by many of the same problems as those of the federal government. By the late 2000s, a backlog of more than 19,000 contaminated sites had accumulated under the jurisdiction of the New Jersey Department of Environmental Protection (NJDEP).<sup>16</sup> The press exposed numerous scandals that suggested that the Department had lost track of its own priorities and had failed to enforce its own orders.<sup>17</sup> The state legislature responded in 2009 by enacting a reform<sup>18</sup> that paralleled the federal strategy of years past: it shifted the burden of enforcement to private contractors.<sup>19</sup>

New Jersey's current experiment with privatization punctuates a long evolution of environmental policy under pressure to take economics into account.<sup>20</sup> Today, the state with the oldest site remediation program has one of the nation's most permissive.<sup>21</sup> Given New Jersey's recent history, the obvious question is whether the program goes too far. While New Jersey is free to pursue the policies it chooses,<sup>22</sup> its privatization plan risks tension with the EPA, especially if state standards slip below federal minimums.<sup>23</sup> On the other hand, this tension may be an inescapable attribute of the current distribution of Superfund authority. As New Jersey's path to privatization makes clear, shifting authority to the states has fundamentally altered administrative priorities.<sup>24</sup> Once development

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(highlighting the large number of cases New Jersey's program has processed); Lynn Singband, *Brownfield Redevelopment Legislation: Too Little, but Never Too Late*, 14 FORDHAM ENVTL. L. J. 313, 314–15 (2003) (noting that New Jersey was one of the first states to pass Brownfields legislation).

16. See N.J. Exec. Order No. 140, 41 N.J. Reg. 2163(a) (emphasizing that a new, more efficient program was necessary to maintain industry and prosperity).

17. See *infra* Part III.A.

18. Site Remediation Reform Act (SRRA), N.J. STAT. ANN. § 58:10C–1 (West Supp. 2010).

19. The SRRA provides for the licensing of Site Remediation Professionals, § 58:10C-7, and mandates that the responsible party hire such a professional to conduct remedial actions, § 58:10B–1.3(a) to (b). Direct agency enforcement is generally limited to auditing ten percent of outcomes. § 58:10C-24.

20. See generally Joel B. Eisen, “Brownfields of Dreams”?: *Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883 (1996) (surveying state laws).

21. Although the licensing of professionals for site remediation is not uncommon, few states have so thoroughly privatized the program. Compare CONN. GEN. STAT. ANN. § 22a-133y (West 2010) (permitting licensed professionals to conduct remediation in industrial-use properties, subject to agency oversight), with N.J. STAT. ANN. § 58:10C–27 (West Supp. 2010) (describing limited conditions under which the New Jersey Department of Environmental Protection (NJDEP) will assume oversight of site remediation).

22. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

23. See 42 U.S.C. § 9604(c)(3) (2006) (requiring assurances from the states before EPA enforcement is deferred).

24. Cf. Mark K. Dowd, *New Jersey's Reform of Contaminated Site Remediation*, 18 SETON

became the central rationale for reform of the site cleanup process, “the core, definitional purpose of the regulatory program,” as one commentator noted, was “to provide for compliance with the regulations.”<sup>25</sup> Put simply, if Superfund was designed to distribute liability, state programs like New Jersey’s aim to dispense with it as quickly as possible.

As their proponents frequently point out, states have often been more responsive to calls for Superfund reform than the federal government.<sup>26</sup> However, conflicting goals, such as urban redevelopment, “smart growth,” and economic competition, give the success of these programs a different significance. Decentralization has predictably led to a patchwork not only in terms of written legislation,<sup>27</sup> but also in the prospects that standards will be actually reached, even at sites where cleanup is supposedly complete.<sup>28</sup> Ironically or by design, this kind of shadow deregulation was precisely the policy the Reagan Administration favored.<sup>29</sup> The question this Comment ultimately pursues is what methods remain for a differently motivated EPA to harness state initiative, while reasserting the protective environmental purpose of the law.

The administrative journey from streamlining to privatization suggests it may be time to adjust the EPA’s posture with respect to state agencies that administer site cleanup laws. Part II of this Comment begins the discussion with a historical summary of the political forces that have gutted the environmental focus of hazardous site cleanup programs since 1980 and that have constantly pushed for a state-law solution. Next, Part III critiques New Jersey’s new law in light of the scandals that brought about the reform in the first place, revealing a categorical failure to respond to a crisis of

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HALL LEGIS. J. 207, 209 n.3 (1993) (highlighting a change in terminology accompanying a 1993 reform, and noting the change indicated lower public expectations of state remediation programs).

25. Miriam Seifter, Comment, *Rent-a-Regulator: Design and Innovation in Privatized Governmental Decisionmaking*, 33 *ECOLOGICAL L.Q.* 1091, 1112 (2006).

26. See *infra* Part II. See generally Robertson, *supra* note 7 (surveying state legislative innovations).

27. See generally U.S. ENVTL. PROT. AGENCY, STATE BROWNFIELDS AND VOLUNTARY RESPONSE PROGRAMS: AN UPDATE FROM THE STATES (2009), [http://www.epa.gov/brownfields/state\\_tribal/update2009/bf\\_states\\_report\\_2009.pdf](http://www.epa.gov/brownfields/state_tribal/update2009/bf_states_report_2009.pdf) [hereinafter EPA UPDATE] (reporting basic statistics related to state brownfields laws).

28. See Seifter, *supra* note 25, at 1114 (noting that Massachusetts audits revealed as low as 13% of privately remediated sites were in compliance with the law, but that only 20% of all sites are actually audited).

29. See, e.g., H.R. REP. NO. 99-253, pt. 1, at 55 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2837 (“[T]he program was victimized by gross mismanagement and policies which limited expenditures for site cleanups, in part in an effort to dissuade Congress from extending the funding for the program beyond its scheduled expiration date of October 1, 1985.”).

enforcement at the NJDEP. Finally, Part IV proceeds to the question of a federal response. While the EPA has the discretion to order remediation at any site where a release has occurred,<sup>30</sup> in practice only those listed on the National Priorities List (NPL) are of “federal concern,” and even these may be deferred to state agency leadership.<sup>31</sup> That process and simple budgetary reality means that the EPA needs state programs to work. However, the EPA should not quietly step aside; federalism does not require such a neat division of power. The EPA should therefore maximize its apparent willingness to intervene when state programs fail.

### I. THE POLITICAL ROOTS OF SUPERFUND REFORM TRAJECTORIES

Congress passed the Superfund legislation with a core purpose of making the polluter pay.<sup>32</sup> CERCLA authorized the President (through the EPA) to order responsible parties to conduct cleanup at contaminated sites.<sup>33</sup> Where responsible parties refused or could not be found, the law created the Superfund to allow the EPA to do the work on its own, before it sued for compensation.<sup>34</sup> “Shovels first, lawyers later,” went the refrain.<sup>35</sup> On the heels of a decade of important legislative victories for environmentalists, CERCLA represented the high water mark of federal environmental authority.<sup>36</sup>

But the tide quickly began to ebb. The political process of reversal stemmed from several factors, each of which helped inform calls for state involvement. As we shall see, the political process was forged in an exaggerated sense of crisis, subject to ideological hijacking and mindful, above all else, of the marketplace. In this climate, calls for deregulation and

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30. 42 U.S.C. § 9604 (2006).

31. See 40 C.F.R. pt. 300, app. B (2010) (listing the highest priority sites for Superfund action); see also *id.* § 300.500(b) (describing procedures for state leadership at federally funded sites).

32. See, e.g., S. REP. NO. 96-848, at 98 (1980) (executive communication of Douglas M. Costle, Administrator, EPA) (linking polluters’ responsibilities to past benefit from commerce in hazardous substances).

33. 42 U.S.C. § 9606.

34. See *id.* § 9604 (authorizing remedial action); see also *id.* § 9611 (authorizing use of the Superfund to pay for remedial action); *id.* § 9607(a)(4)(A) (imposing liability for costs).

35. Press Release, U.S. Env’tl. Prot. Agency, The Environmental Protection Agency: A Retrospective (Nov. 29, 1990), available at <http://www.epa.gov/history/topics/epa/20a.htm> (last updated Apr. 14, 2011).

36. See generally Hubert H. Humphrey III & LeRoy C. Paddock, *The Federal and State Roles in Environmental Enforcement: A Proposal for a More Effective and More Efficient Relationship*, 14 HARV. ENVTL. L. REV. 7, 36–37 (1990) (describing how federal regulators took over responsibility from state governments in the 1970s, but that most states had since enacted programs of their own).

for devolution of authority to the states were indistinguishable. The reality was that for the regulated community, devolution to the states was deregulation by another name.<sup>37</sup>

#### *A. Mischaracterizing the Hazardous Waste Problem*

The law was slower to respond to historical contamination than to other, more visible environmental problems.<sup>38</sup> Clean air and water naturally took precedent, largely because those problems were publicized by catastrophes.<sup>39</sup> But when numerous latent environmental disasters hit the news in the late 1970s, including the famous incident at Love Canal, New York,<sup>40</sup> historical contamination became a national priority. Voters feared toxic waste could be lurking under their houses, and Congress made clear that CERCLA was intended to tackle the emergency situation.<sup>41</sup> This hasty response to a perceived crisis with a major piece of environmental law was a familiar practice.<sup>42</sup> However, Love Canal was an atypical case, and it made a poor indicator of the problem Congress had taken on.

For the most part, there is not much drama or obvious heroism in site remediation.<sup>43</sup> The actual health effects of many kinds of hazardous waste exposure are difficult to predict in individuals and are almost always dislocated in time.<sup>44</sup> Furthermore, the characterization and quantification

37. See BARRY D. FRIEDMAN, *REGULATION IN THE REAGAN-BUSH ERA: THE ERUPTION OF PRESIDENTIAL INFLUENCE* 56–57 (1995) (noting that business leaders were initially apprehensive about a patchwork of state cleanup laws, until it became clear that poor funding meant these programs would not be enforced).

38. See *Developments*, *supra* note 2, at 1469–70 (reasoning that part of the delay in the law was due to the need for high technology to detect latent contamination).

39. *Id.*

40. For a news account of that incident, see Donald G. McNeil Jr., *Upstate Waste Site May Endanger Lives*, N.Y. TIMES, Aug. 2, 1978, at A1.

41. See Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 24–25 (1982) (recounting Congressional debate on the subject, but noting that Superfund actually failed to provide any relief for the victims Congress cited).

42. See, e.g., Jonathan H. Adler, *Fables of The Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89 (2002) (chronicling the effect of public outcry over the spontaneous combustion of a river in Cleveland, Ohio); Keith Schneider, *New View Calls Environmental Policy Misguided*, N.Y. TIMES, Mar. 21, 1993, at A1 (criticizing environmental law generally as too responsive to panics, rather than actual risks).

43. Cf. Marc B. Mihaly, *Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions Through Partnership with Experts and Agents*, 27 PACE ENVTL. L. REV. 151, 151–52 (2009) (discussing a lack of meaningful opportunities for public involvement in a process dominated by technicians and paperwork).

44. See, e.g., *Health Effects of PCBs*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/wastes/hazard/tsd/pcbs/pubs/effects.htm> (last updated Aug. 8, 2008) (summarizing the

of risk is a contentious regulatory process subject to all the inherent weaknesses and necessary compromises of democratic government.<sup>45</sup> The very existence of the invisible problem of hazardous waste contamination was susceptible to review once the panic subsided. Today, human health remains the foundation of site remediation laws,<sup>46</sup> but reformers appear intent on minimizing damage from the laws themselves. This is partly the result of original exaggeration of the severity of the problem.

Instead of hidden, highly contaminated hazardous waste sites like Love Canal,<sup>47</sup> the usual case involves a property contaminated by routine uses that resulted in the statistical uptick of a future risk of disease.<sup>48</sup> Although far less politically galvanizing, this problem affected many more sites than anyone anticipated in 1980.<sup>49</sup> CERCLA's radicalism—strict liability for anyone in the chain of title without regard to wrongdoing—is explained by a public perception of crisis.<sup>50</sup> When that image faded, the comparatively mundane reality helped foster the appearance that federal dollars were being wasted on matters of purely local concern. Absent a national crisis, critics began to call federal involvement a “jurisdictional mismatch”; contaminated property was a problem that state and local authority could resolve more efficiently.<sup>51</sup>

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challenges of coming to a consensus on polychlorinated biphenyls (PCBs) because of the difficulty in testing, but concluding the well-known contaminant is a probable carcinogen).

45. See MICHAEL D. REAGAN, REGULATION: THE POLITICS OF POLICY 3–5 (1987) (describing the need to make a qualitative choice even when science is clear).

46. E.g., 40 C.F.R. § 300.430 (2010) (“The purpose of the remedy selection process is to implement remedies that eliminate, reduce, or control risks to human health and the environment.”).

47. One notable exception was discovered in 2006 at a New Jersey nursery school, where the mercury residue from a former thermometer factory poisoned sixty children. Tina Kelley, *After Mercury Pollutes a Day Care Center, Everyone Points Elsewhere*, N.Y. TIMES, Aug. 19, 2006, at B1. The incident helped spur the reform discussed *infra* Part III.

48. See Eisen, *supra* note 20, at 901 (describing the factors differentiating the broader CERCLIS listing from the National Priorities List (NPL), where only the latter denotes the limited set of sites worthy of federal involvement).

49. Compare Sen. Robert T. Stafford, *Why Superfund Was Needed*, EPA J., June 1981, at 8, 8, available at <http://www.epa.gov/history/topics/cercla/04.htm> (last updated Aug. 12, 2009) (explaining that the 1980 Congress had identified over 2000 sites where human health was affected), with Adler, *supra* note 8, at 734 (totaling over 45,000 sites investigated under Superfund since its passage).

50. Cf. Adler, *supra* note 8, at 733–34 (questioning the initial validity of reports of crisis at the Love Canal).

51. See *infra* Part IV. For an outline of the components of the jurisdictional matching argument, see Michael G. Faure & Jason Scott Johnston, *The Law and Economics of Environmental Federalism: Europe and the United States Compared*, 27 VA. ENVTL. L.J. 205, 240–45 (2009).

*B. National Politics*

CERCLA was also crippled by political misfortune. The 1980 presidential election ushered in an administration with a radical attitude toward corporate responsibility and federal regulation.<sup>52</sup> President Reagan's politicization of the administrative state was concentrated and comprehensive, marshalling the appointment power to ensure loyalists took control of key agencies.<sup>53</sup> Once installed, the Administration took steps to insulate its agents from the more liberal permanent bureaucracy in Washington.<sup>54</sup> Most importantly, Reagan initiated a centralized cost-benefit review process for new regulations under the auspices of the Office of Management and Budget.<sup>55</sup> Since no one had defined benefits with any rigor, the program served largely as a veto power for industry in the regulatory process.<sup>56</sup> Finally, the Administration systematically reduced funding and staff to ensure remaining regulation would not be enforced.<sup>57</sup>

These efforts had an especially dramatic effect on the EPA. Action was minimized to the point where the EPA Administrator Anne Gorsuch Burford actually abolished the Office of Enforcement for a time.<sup>58</sup> One commentator noted that the period resembled something like agency capture, except that it was the stated policy of the Executive Branch.<sup>59</sup> This period of agency surrender coincided exactly with CERCLA's infant years, from 1981 to 1983.<sup>60</sup> In 1986, President Reagan openly opposed reauthorization of the program, but Congress rejected this position while reaffirming the most controversial parts of the law.<sup>61</sup> However, with the

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52. See generally FRIEDMAN, *supra* note 37 (evaluating the reactive behavior of the executive agencies, Congress, the courts, and interest groups to President Reagan's regulatory relief programs).

53. See *id.* at 33 (detailing President Reagan's centralization of the budgetary, appointment, decisionmaking, and regulatory processes).

54. *Id.* at 43.

55. Exec. Order No. 12,291, 3 C.F.R. 127 (1981), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

56. See *id.* § 2(e), 3 C.F.R. 128 ("Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.").

57. See REAGAN, *supra* note 45, at 106 (deducing that the Administration clearly intended deregulation when it refused to increase staff).

58. FRIEDMAN, *supra* note 37, at 84.

59. REAGAN, *supra* note 45, at 98.

60. *Id.*

61. See generally Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (codified at 42 U.S.C. § 9621(f) (2006)); *Superfund Cleanups Termed Lax*, N.Y. TIMES, Nov. 24, 1987, at C11.

EPA hamstrung by political opposition, Congress' additional attempt at agency-forcing legislation was a futile response.<sup>62</sup>

*C. Feedback Loops: The Brownfields Problem*

CERCLA generated another unexpected problem on its own terms. Once the courts clarified that the law permitted, without requiring, joint and several liability,<sup>63</sup> property ownership in industrial or formerly industrial areas began to resemble Russian roulette.<sup>64</sup> Unless previous owners could be identified, any current stakeholder could find herself saddled with the entire bill for a cleanup that was guaranteed to be long and expensive.<sup>65</sup> Importantly, this was true even when the owner had purchased an idle property only recently; an environmental assessment was considered part of a buyer's due diligence.<sup>66</sup> Predictably, many investors chose to look elsewhere.

CERCLA's discouragement of investment in industrial property is known as the "Brownfields problem."<sup>67</sup> The extent of the problem has been debated, as it is not entirely clear whether or to what extent disuse of industrial land can be attributed to fear of environmental liability.<sup>68</sup> At the

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62. See *Superfund Cleanups Termed Lax*, *supra* note 61 (detailing post-SARA failures to enforce the law).

63. See, e.g., *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983) ("[A] court performing a case by case evaluation of the complex factual scenarios associated with multiple-generator waste sites will assess the propriety of applying joint and several liability on an individual basis.").

64. See *Eisen*, *supra* note 20, at 902–05 (discussing the serious potential for innocent owners to be named responsible parties under CERCLA).

65. See Anne D. Weber, Note, *Misery Loves Company: Spreading the Costs of CERCLA Cleanup*, 42 VAND. L. REV. 1469, 1474–75 (1989) (discussing the four categories of potentially liable parties under CERCLA and advising that any person "linked by even a tenuous thread" to a contaminated site should assess potential liability).

66. See, e.g., *United States v. Serafini*, 706 F. Supp. 346, 350–52 (M.D. Pa. 1988) (discussing the innocent landowner's burden to prove he had no reason to know of the contamination at the time of purchase).

67. CERCLA was amended in 2002 to reflect the Brownfields problem. The amendment provided that a Brownfield is "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 211 115 Stat. 2356, 2360–61 (2002) (codified at 42 U.S.C. § 9601(39)).

68. See Marie Howland, *The Legacy of Contamination and the Redevelopment of Inner-City Industrial Districts*, NAT'L CTR. FOR SMART GROWTH (July 18, 2002), [http://www.smartgrowth.umd.edu/research/pdf/Howland\\_ContaminationLegacy\\_DateN A.pdf](http://www.smartgrowth.umd.edu/research/pdf/Howland_ContaminationLegacy_DateN A.pdf) (concluding from a case study of industrial property sales in Baltimore that environmental liability was only one of many factors complicating redevelopment).



very least, the perception of Brownfields as a challenge to development added a new dimension to the law. Especially at the state level, new legislation offered incentives for investment in Brownfields as a sweetener to environmental medicine. States created numerous initiatives to spur investment, like environmental land-use restrictions (covenants not to use land for specified purposes in return for relaxed standards)<sup>69</sup> and voluntary programs in which fast-track cleanup was incentivized by state funds and awards of covenants not to sue.<sup>70</sup> Partly in response to states' increased capacity to handle contaminated sites, the EPA accelerated its reliance on state authority.<sup>71</sup>

But state Brownfields laws were primarily intended to alleviate the economic effects of federal requirements, not to fulfill them.<sup>72</sup> The emergence of the Brownfields problem comports with what Professors J.B. Ruhl and James Salzman called "feedback" in their recent study of complex environmental law problems.<sup>73</sup> In their assessment, relationships *between* problems that did not appear correlated at the outset often complicate administration of the law.<sup>74</sup> Lifting one "strand" of policy—in this case hazardous waste cleanup—nudges other apparently discrete strands. In this light, the states' focus on Brownfields is not necessarily "environmental" law at all, but an attempt to attend to the policies—urban redevelopment, economic growth, etc.—affected by environmental law.<sup>75</sup> Yet the widespread adoption of Brownfields legislation in the states is cited in favor of further reduction in federal authority.<sup>76</sup>

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69. See, e.g., CONN. GEN. STAT. ANN. § 22a-133o (West 2006).

70. See, e.g., *id.* §§ 22a-133x to -133y (authorizing voluntary cleanup where cleanup standards and hurdles to state certification vary according to inherent risk to human health associated with site location).

71. See Eisen, *supra* note 20, at 887 ("The rise of state voluntary cleanup statutes is consistent with the trend of devolving responsibility for environmental protection to the states . . .").

72. See, e.g., *id.* at 944 (explaining that state standards for carcinogens incentivize development by allowing risk levels higher than CERCLA permits).

73. J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CAL. L. REV. 59, 84 (2010).

74. *Id.* at 84–85.

75. Cf. Eisen, *supra* note 15, at 723 (advocating a reappraisal of the cleanup system to focus on urban redevelopment generally).

76. See Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 154 (2005) (arguing that extensive environmental regulation at the state level proves states can be trusted with the responsibility).

*D. Decentralization as a Key to Reform*

Decentralization of the Superfund program grew out of the hostile political context outlined above. CERCLA quickly passed through Congress as members responded to a perceived crisis they barely understood, and it was immediately undermined by a new administration intent on deregulation. A decade of expense and delay spread serious doubt that the government was up to the job, and the mere suspicion that a property could trigger government involvement began to complicate investment in these urban Brownfields. Meanwhile, states were developing legislation (if not the funding) to attend to these sites themselves.<sup>77</sup> The solution was obvious.

State responsibility took off in the late 1980s.<sup>78</sup> Under the Superfund Amendments and Reauthorization Act of 1986 (SARA), states were to be given “substantial and meaningful involvement” in the identification and cleanup process.<sup>79</sup> Today, state enforcement leadership is the norm.<sup>80</sup> Regional Memoranda of Understanding with many states set the EPA’s hands-off approach in writing.<sup>81</sup> Even at NPL sites, states often take the lead role, so that EPA involvement is limited to regional review of the paperwork.<sup>82</sup> Federal deferral to state leadership cannot be explained independently of politics. As we have seen, the EPA was purposefully crippled in the 1980s, and drafting the employees of state environmental agencies became the surest way to augment a meager budget.<sup>83</sup> Furthermore, this administrative decision dovetailed with an ideological

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77. See Robertson, *supra* note 7, at 2 n.2 (compiling citations to state legislation).

78. See Humphrey & Paddock, *supra* note 36, at 7–8 (noting that while environmental law had once been a local matter, federal authority was created in the 1970s, and had been reversed in the late 1980s); see also Marc K. Landy, *Local Government and Environmental Policy*, in *DILEMMAS OF SCALE IN AMERICA’S FEDERAL DEMOCRACY* 227, 238–39 (Martha Derthick ed., 1999) (describing a “pendulum swing” toward state authority).

79. Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. § 9621(f) (2006)).

80. See David L. Markell, *The Role of Deterrence-Based Enforcement in a “Reinvented” State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 32 (2000) (cautioning that where states take on this responsibility, the EPA still must find ways to ensure states themselves are complying with the law).

81. See, e.g., Gale Lea Rubrecht, Op-Ed., *EPA Signs Agreement for State Voluntary Cleanup Program*, ST. J., Apr. 30, 2010, 2:44 PM, <http://statejournal.com/story.cfm?func=viewstory&storyid=79110> (announcing that the EPA will not bring enforcement actions at sites that enter West Virginia’s voluntary program).

82. See 40 C.F.R. § 300.5 (2010) (defining lead agencies under the National Contingency Plan).

83. See Humphrey & Paddock, *supra* note 36, at 35–36 (contrasting increased state commitment with new interstate and international demands on the federal EPA).

decision, as devolution of authority to the states became an aspect of deregulation.<sup>84</sup>

Academics also embraced devolution of authority to the states as a key to reforming the broken system. The most nuanced argument to emerge was the “matching principle” advanced by Professor Daniel C. Esty, which held that local problems should be addressed by local agencies.<sup>85</sup> Accordingly, the federal role should be limited to interstate spillovers (e.g., the Chesapeake Bay watershed)<sup>86</sup> and areas where states could benefit from economies of scale (e.g., health-protective standards that require expensive scientific study).<sup>87</sup> Opposing academics generally cited the “race-to-the-bottom” rationale for federal involvement in local affairs.<sup>88</sup> If states were allowed to set their own standards, each would compete for industry by setting the lowest standard the population would support.<sup>89</sup>

Much of this back-and-forth lacks grounding in political reality.<sup>90</sup> The law and economics perspective, in particular, tends to view regulation as a type of widget, produced by government for the consumption of the regulated community.<sup>91</sup> A focus on politics helps remind us that, at some level, government cannot “sell” its regulations without fundamentally altering them; stated another way, the marketplace has warped the law beyond recognition. Eventually, regulations, though unpopular with the regulated community, simply must be enforced. Thus, the pertinent question is not whether a particular jurisdiction is theoretically optimal

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84. See FRIEDMAN, *supra* note 37, at 56, 95 (quoting Jim Florio, architect of the Superfund legislation and former New Jersey governor, to the effect that executive oversight of the regulatory process was forcing responsibility “into the laps of . . . State and local officials” (citation omitted)).

85. See Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 574 (1996) (“[T]he challenge is to find the best fit possible between environmental problems and regulatory responses—not to pick a single level of government for all problems.”).

86. Adler, *supra* note 76, at 141–42.

87. See Esty, *supra* note 85, at 573 (“[Do] we really want every state or hamlet to determine for itself whether polychlorinated biphenyls create additional cancer risks greater than  $10^{-6}$  . . . [?]”).

88. See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1210 n.1 (1992) (compiling numerous arguments for the race-to-the-bottom justification).

89. See *id.* at 1217–18 (comparing the problem of state cooperation to the classic “prisoner’s dilemma”).

90. See *id.* at 1213–19 (contrasting the optimal choices of a hypothetical “island” jurisdiction” with those of a jurisdiction in competition with others to characterize the race-to-the-bottom rationale).

91. See *id.* at 1234 (explaining that states deter firms from investing in their territory through legal and tax measures even if they cannot reject such firms outright, creating an effect which can be seen as “the sale price of a traditional good”).

from a cost perspective, but whether it will manage to actually enforce an unpopular law.

## II. THE NEW JERSEY SITE REMEDIATION REFORM ACT

New Jersey's record reveals striking continuity with the problems that hindered the Superfund from the start, including political opposition, administrative constraints, and short-circuited priorities. By the late 2000s, the site cleanup process in New Jersey was in a state of disarray comparable to that of the EPA in the early 1980s.<sup>92</sup> Similarly, the New Jersey Site Remediation Reform Act of 2009 (SRRA) appears to confirm that a pattern of regulation, nonenforcement, and reform continues to favor developers.<sup>93</sup> If decentralization looked attractive in light of federal failure to enforce the law, privatization responds to the same distrust of state officials.

### A. *The Ill to Be Addressed*

The first point to consider about the SRRA is that it reforms a system widely regarded as a failure.<sup>94</sup> Under the former rules, most private parties in New Jersey could enter a voluntary cleanup program and submit their work for NJDEP review.<sup>95</sup> The NJDEP retained a backdrop of enforcement measures, which theoretically operated to ensure oversight at the most contaminated sites.<sup>96</sup> However, too many sites—more than

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92. *Compare Not So Super Superfund*, *supra* note 4 (“Superfund has failed on nearly every count.”), with Alex Nussbaum, *Cleaning Up the Cleanup Process in New Jersey*, RECORD (Bergen County, N.J.), Apr. 2, 2006, available at [http://www.redorbit.com/news/science/456127/cleaning\\_up\\_the\\_cleanup\\_process\\_in\\_new\\_jersey/](http://www.redorbit.com/news/science/456127/cleaning_up_the_cleanup_process_in_new_jersey/) (“[W]e have multimillion-dollar cleanups with thousands of tons of contaminated soil and we have no one on site. The whole system is broken.” (quoting Bill Wolfe, Director, New Jersey Public Employees for Environmental Responsibility (PEER), on environmentalists’ calls for reform)).

93. See Eisen, *supra* note 15, at 742–43 (suggesting that previous New Jersey reforms that aimed at accommodating redevelopment, including voluntary cleanup with minimized state involvement, encouraged “developer[s to] run[] amok”).

94. Former NJDEP commissioner Lisa Jackson said, “We realize that the state’s system that allows self-reporting for monitoring of these contaminated properties is broken, and we are taking the first steps toward fixing this.” News Release, N.J. Dep’t of Env’tl. Prot., DEP Takes Enforcement Actions Against Responsible Parties for Failure to Meet Contaminated Site Monitoring Requirements (Sept. 24, 2007), [http://www.state.nj.us/dep/newsrel/2007/07\\_0041.htm](http://www.state.nj.us/dep/newsrel/2007/07_0041.htm) [hereinafter News Release].

95. See N.J. ADMIN. CODE § 7:26C–2.3(b) (2010) (describing procedure for no-oversight remedial action); see also *id.* § 7:26C–6.3 (declaring NJDEP policy to issue a “no further action letter” upon completion).

96. See *id.* §§ 7:26C–5.1 to :26C–5.6 (providing for NJDEP oversight at sites subject to administrative consent orders due to high levels of risk).

19,000—entered the program,<sup>97</sup> and no one could say for certain whether sites inappropriate for voluntary action were misrepresenting the extent of contamination.<sup>98</sup> At the same time, NJDEP faced the same constraints the EPA did, including budget cuts, staff reductions, and pressure not to delay economic development.<sup>99</sup> As with the EPA's Superfund efforts, part of the problem in New Jersey was political. When Christine Todd Whitman became governor in 1994, her administration promised New Jersey was "Open for Business," and aggressively targeted environmental regulation.<sup>100</sup> Current Governor Chris Christie appeared ready to reaffirm this policy when he recently declared, "Simply put, the DEP must do less with less, and do it better."<sup>101</sup>

Recent history shows that NJDEP in fact does accomplish less with less. By the late 2000s, reports revealed NJDEP had allowed many sites to take advantage of a "grace period" far in excess of the law, even though this should have led to fines.<sup>102</sup> Even more troubling, there were indications that NJDEP was "rubber-stamping" the work of unlicensed contractors claiming remediation was finished.<sup>103</sup> Around the same time, the EPA was forced to retake control at a series of NPL sites where NJDEP had been designated the lead agency.<sup>104</sup> Federal action was prompted by an EPA study into why certain sites in New Jersey were still contaminated after twenty years on NJDEP's docket.<sup>105</sup> The answer: The department had

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97. N.J. Exec. Order No. 140, 41 N.J. Reg. 2163(a) (May 7, 2009), *available at* <http://www.state.nj.us/infobank/circular/eojsc140.htm>.

98. *See* Eisen, *supra* note 15, at 747 (suggesting that NJDEP never adequately ranked sites in terms of priority as the law requires, making enforcement impossible to guarantee).

99. *See id.* at 745–46 (arguing the developer-centered focus of New Jersey's Brownfields rules made any changes adverse to developers appear contrary to the intent of the law).

100. *See* Tina Kelley, *New Jersey Vows to Overhaul Environmental Cleanup Work*, N.Y. TIMES, Oct. 24, 2006, at B2 (noting that the Whitman administration cut funding, hours, and staff of the environmental agency while increasing responsibilities).

101. *See* Scott Fallon, *N.J. Gov. Christie's Transition Team Has Harsh Words About State's Environmental Department*, RECORD (Bergen County, N.J.), Jan. 31, 2010, [http://www.northjersey.com/news/environment/local\\_environment/83187117\\_Rein\\_in\\_DEP\\_s\\_power\\_Christie\\_team\\_urges.html](http://www.northjersey.com/news/environment/local_environment/83187117_Rein_in_DEP_s_power_Christie_team_urges.html) (reporting on plans to slash the powers of the Department to avoid driving business out of state).

102. *See* News Release, *supra* note 94 (vowing to impose fines in accordance with the rules).

103. *See* Kelley, *supra* note 100 (interviewing the chairman of a New Jersey engineering firm on the lack of qualifications necessary to report to NJDEP).

104. *See* Letter from Jeff Ruch, Exec. Dir., PEER, to Barack Obama, President-elect (Dec. 5, 2008), *available at* [http://www.peer.org/docs/epa/08\\_8\\_12\\_peer\\_ltr\\_opposing\\_jackson.pdf](http://www.peer.org/docs/epa/08_8_12_peer_ltr_opposing_jackson.pdf) (describing how the EPA took over New Jersey's lead role of supervising Superfund cleanups because of the state's inability to resolve cleanups in a timely manner).

105. *See* OIG REPORT, *supra* note 14, at 4 (finding that the state failed to initiate

declined to use the tools it had to enforce the law.<sup>106</sup> Given fewer resources, NJDEP predictably accomplished less.

Demand for reform reached a crescendo after a high-profile incident in which toddlers attending a day care center called Kiddie Kollege were exposed to levels of mercury so high that masks were required to even enter the building.<sup>107</sup> NJDEP failed to inspect the former thermometer plant because the agency believed it was vacant—even though the owner claimed he contacted the department.<sup>108</sup> Tests eventually revealed that Kiddie Kollege exuded nearly thirty times the acceptable level of mercury, and beads of the toxic metal were found in the floorboards.<sup>109</sup> NJDEP claimed the owner was responsible for failing to conduct tests on his own, but state law actually mandated cleanup at the site a decade before.<sup>110</sup> The only reason it remained contaminated was NJDEP's failure to enforce the law.<sup>111</sup>

Just as state oversight became less likely, private site remediation grew into a big business in New Jersey. State and local subsidies, a willingness to consider impermanent (and therefore cost-sensitive) remediation plans, and a healthy market in urban redevelopment prompted one company alone, Cherokee Investment Partners (Cherokee), to spend hundreds of millions of dollars on contaminated properties all over the state.<sup>112</sup> Projects like Cherokee's plan to occupy the landfills of the Meadowlands with new condos and golf courses delighted local officials, who were keenly aware that the sheer amount of work necessary would make any other redevelopment unlikely.<sup>113</sup> However, scandal erupted at the site when Cherokee's partner, EnCap, admitted it could not finish the job despite having taken over \$300 million in public assistance.<sup>114</sup> In other cases, even

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discussions and effectively prioritize and define each party's responsibilities).

106. *Id.* at 9–10.

107. See Tina Kelley, *Memo Shows Agency Knew of Danger in Child Care Building*, N.Y. TIMES, Sept. 1, 2006, at B6.

108. *Id.*

109. Kelley, *supra* note 100.

110. Kelley, *supra* note 47.

111. See *id.* (quoting Bill Wolfe, Director, PEER) (“Had [responsibility under the Spill Compensation and Control Act] been addressed appropriately by [NJDEP], all the other stuff would not have occurred.”).

112. See Jill P. Capuzzo, *Striking Gold in Acres of Brownfields: How a North Carolina Firm Has Come to Dominate Development in the State*, N.Y. TIMES, Apr. 17, 2005, at NJ1 (highlighting Cherokee Investment Partners' (Cherokee's) political connections and contributions and noting its reliance on local funding).

113. See *id.* (quoting former NJDEP Commissioner Bradley Campbell to the effect that Cherokee's willingness to take risks advanced New Jersey policy).

114. Ken Belson & David W. Chen, *Sharp Rebuke for Developer in Big Project at Landfills*, N.Y. TIMES, Feb. 29, 2008, <http://www.nytimes.com/2008/02/29/nyregion/29encap.html>.

when projects like Cherokee's were successful from a business perspective, advocates worried whether private cleanups actually met the standards set by the law.<sup>115</sup>

In addition to controversial mistakes, New Jersey witnessed numerous cases where developers were found to have intentionally misrepresented the extent of contamination or to have exaggerated the steps they took to fix it.<sup>116</sup> This cynical disregard for environmental regulation in general was on display when Cherokee became concerned that the nesting of a protected bald eagle pair at a worksite could derail plans for a massive development in Pennsauken, New Jersey.<sup>117</sup> The company hired a "consultant" to study the birds, but it chose an agent with a long record of illegal bird smuggling and other offenses against wildlife to do the job.<sup>118</sup> The consultant was eventually fired, but only after a baby eagle was found dying at the site, apparently scared out of the nest when Cherokee's consultant set up his tent too close, in violation of state and federal wildlife regulations.<sup>119</sup>

### *B. The New Program*

If New Jersey's reform had an agenda, Kiddie Kollege put clear, comprehensive obligations at the very top.<sup>120</sup> At the same time, egregious, intentional disregard of the law should have at least called into question New Jersey's reliance on developers to police themselves.<sup>121</sup> Measured against these dual priorities, the resulting legislation is a decidedly poor performance, and one whose emphasis on efficiency is a jarring non sequitur.<sup>122</sup> While the SRRA sensibly created a licensing board for the

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115. See, e.g., Nussbaum, *supra* note 92 (describing environmentalists' concerns about new luxury condominiums in Edgewater, New Jersey that were built on contaminated land capped with asphalt).

116. See *id.* (citing a Hamilton, New Jersey scandal where property was certified without state inspection, even though the land was later discovered to contain 15,000 tons of soil laced with asbestos in concentrations as high as forty percent).

117. Jill P. Capuzzo, *The Fight over the Future of Pennsauken*, N.Y. TIMES, Apr. 24, 2005, Sec. 14, at 1.

118. *Id.*

119. *Id.*

120. See Eisen, *supra* note 15, at 745 ("That a site such as Kiddie Kollege may fall through the cracks should serve as a warning to New Jersey and other states to revise the assumptions they make about [B]rownfield sites and look for more of a demonstration from innocent developers up front.").

121. See Nussbaum, *supra* note 92 ("It's now not enough that a company steps forward and says, 'Here is a report from a licensed engineer.' We've all learned the hard way that can't be trusted," Hamilton Mayor Glen Gilmore said. "We're a community that's been dumped on and lied to.").

122. See, e.g., Carol Lawrence, *N.J.'s New Law Promises Faster Remediation, at a Price*,

professionals who already dominated the industry,<sup>123</sup> it simultaneously undermined this progress by devolving even more oversight authority onto these same professionals.<sup>124</sup> The bottom line is that the SRRA would not have prevented the crises to which it purports to respond.

The idea to regulate site remediation professionals through licensing is a natural extension of voluntary site remediation programs. Because voluntary programs permit site owners to do the cleanup themselves, they create a demand for environmental professionals familiar with both the law and the science necessary to comply with it.<sup>125</sup> Without a licensing program for these professionals in New Jersey, some questioned how thoroughly NJDEP actually vetted their reports before issuing the covenants not to sue that constituted the end of the process.<sup>126</sup> The SRRA responded to this concern with a Licensing Board<sup>127</sup> modeled on a similar program in Massachusetts.<sup>128</sup> Massachusetts, however, was a questionable model if the program's aim was to bolster compliance. While Massachusetts' experience with privatization was sold as a success within New Jersey,<sup>129</sup> its actual record is more complicated. Sites are ushered through the process more quickly in Massachusetts, but there is evidence to suggest widespread compliance failures.<sup>130</sup> Thus, the Massachusetts model is a better fit for a state seeking efficiency gains than one hoping to avoid a Kiddie Kollege-type fiasco, or worse.

The SRRA attends to compliance concerns through the requirements the Licensing Board is authorized to impose on license seekers. Under the

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RECORD (Bergen County, N.J.) Feb. 28, 2010, [http://www.northjersey.com/news/85754562\\_Privatizing\\_toxic\\_cleanups.html](http://www.northjersey.com/news/85754562_Privatizing_toxic_cleanups.html) (“[T]he answer to expediting the sluggish process of removing toxic waste from properties is giving more responsibility to the remediators.”).

123. See Kelley, *supra* note 100 (criticizing unlicensed contractors as too beholden to private parties to reliably complete work).

124. Cf. Belson & Chen, *supra* note 114 (“[In] New Jersey’s political culture . . . large developers work with well-connected law firms to lobby state agencies for the purpose of waiving environmental regulations and other rules.”).

125. See Seifter, *supra* note 25, at 1107 (dividing professional responsibilities into categories of compliance decisions and supplementary work, including testing and drilling).

126. See Eisen, *supra* note 15, at 748 (warning of a risk of abuse when NJDEP exercises discretion whether to consider violations serious).

127. N.J. STAT. ANN. § 58:10C-3 (West Supp. 2010).

128. Cf. MASS. GEN. LAWS ANN. ch. 21A, § 19A (West 2008) (establishing a licensing board for hazardous waste site cleanup professionals).

129. See, e.g., Letter from William G. Dressel, Jr., Exec. Dir., N.J. State League of Municipalities (Feb. 23, 2009), <http://www.njslom.org/ml022309-remediation.html> (touting the efficiency of the Massachusetts program).

130. See Seifter, *supra* note 25, at 1114 tbl.1 (tabulating audit data from Massachusetts showing that only 28% attained a passing or “no follow-up” rate of compliance).



SRRA, Licensed Site Remediation Professionals (LSRPs) must meet minimum education and experience requirements<sup>131</sup> and pass a licensing test.<sup>132</sup> The law also imposes a duty of care<sup>133</sup> and corresponding threat of liability on the LSRPs.<sup>134</sup> Hiring an LSRP is a positive duty for any responsible party<sup>135</sup> and, once hired, the LSRP has the power to tell his client whether the site is clean enough.<sup>136</sup> The law attempts to balance this responsibility with an array of duties and declarations that theoretically direct the LSRP's loyalty to the public standards the law requires.<sup>137</sup>

However, these rules are unlikely to deter willful violations and may well impede their discovery. Since the SRRA allows LSRPs to certify compliance without the Department's review, audits are the only means of determining the extent to which purported remediation plans are actually enacted.<sup>138</sup> In addition to providing information, audits could also deter noncompliance if the consequences of a failure are strong enough.<sup>139</sup> However, the small sample of sites—ten percent—that will be examined may not prevent property owners from viewing noncompliance as a manageable risk.<sup>140</sup> Furthermore, even audited properties may be able to manipulate the data to depict compliance.<sup>141</sup> The audits provide NJDEP with only the final snapshot of a remedial plan, potentially obscuring faulty intermediate steps. Retesting in such a situation may not be possible, so auditors will be left with only the paperwork to determine whether initial testing—upon which every subsequent action rests—was properly

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131. N.J. STAT. ANN. § 58:10C-7(d).

132. *Id.* § 58:10C-5(b).

133. *Id.* § 58:10C-16(a) to (z).

134. *Id.* § 58:10C-17.

135. *Id.* § 58:10B-1.3(b).

136. *See id.* § 58:10B-13.2(a) (deeming Licensed Site Remediation Professional (LSRP) issuance of a “response action outcome” the equivalent of the state’s covenant not to sue, as independently ending the remediation process).

137. *See, e.g., id.* § 58:10C-16(a) (“A licensed site remediation professional’s highest priority in the performance of professional services shall be the protection of public health and safety and the environment.”).

138. *See* Seifter, *supra* note 25, at 1104 (noting that under the Massachusetts program, there is no check on private licensees’ work at nonaudited sites).

139. *See* Lawrence, *supra* note 122 (reporting that environmental professionals fear consequences such as the loss of a license or fines).

140. N.J. STAT. ANN. §§ 58:10C-24; 58:10C-25 (providing for audits of 10% of licensed remediation professionals, but only of response action outcomes issued within three years); *cf.* MASS. GEN. LAWS ANN. ch. 21E, § 3A(o) (West Supp. 2010) (“In each year the department shall, at a minimum, audit twenty percent of all sites . . .”).

141. *See* Seifter, *supra* note 25, at 1115 & n.127 (listing opportunities for professionals to exercise judgment within a defensible conception of the vague command to protect the public under Massachusetts law).

conducted.

Of course, it is not possible to know how broad the class of scofflaws actually is. However, as Professor Joel B. Eisen has discussed, New Jersey's approach to site remediation has long depended on the assumption that if the law was only streamlined, developers would tackle both the environmental *and* economic problems associated with disused industrial sites.<sup>142</sup> This story is simply not credible in New Jersey after EnCap, Kiddie Kollege, and other abuses of public trust. Yet with the SRRA, New Jersey continues to tout the need for more efficient work above all else.<sup>143</sup>

### III. FEDERAL IMPLICATIONS

New Jersey's uninspiring experience suggests the state programs that helped justify decentralization of Superfund authority were built on shakier ground than originally suspected.<sup>144</sup> Most state cleanup programs took shape in the 1990s, as a decade of political attack on the regulatory state was followed by a period of congressional inertia on environmental issues. But, at least in New Jersey, the environmental agency charged with administering these innovations was either unable or unwilling to do the job.<sup>145</sup> Now, the same deregulation arguments have been retooled to enact a reform that promises further efficiency gains but fails to address the serious compliance failures that animated the change from the start.

New Jersey's record of nonenforcement, coupled with the state legislature's mandate for further diminished agency involvement, seriously undercuts rationales for federal reliance on state enforcement. But even if a federal response is warranted, the question of its scope implicates the ongoing academic debate over the proper federal-state balance in environmental law. The first question here is what New Jersey's experience

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142. See Eisen, *supra* note 15, at 723 (“[Brownfields policies] seek to discover and rehabilitate neglected sites, reverse the decay of urban cores, and, in some cases, link with smart growth strategies by slowing the march of development to suburban and exurban America.”).

143. See *Site Remediation Reform Act (SRRA)*, N.J. DEP’T. OF ENVTL. PROT., <http://www.state.nj.us/dep/srp/srra> (last updated May 11, 2011) (“Implementation of SRRA will therefore result in contaminated sites being cleaned up more quickly, thus providing a greater measure of environmental protection to the citizens of New Jersey and ensuring that development of underutilized properties are returned to the tax rolls more quickly.”).

144. Cf. William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 112–13 (2005) (cautioning that state activism cannot be generalized out of the political and historical context that created it).

145. See, e.g., *Interfaith Cmty. Org. v. Honeywell Int’l, Inc.*, 399 F.3d 248, 265 (3d Cir. 2005) (“The evidence demonstrates a substantial breakdown in the agency process that has resulted in twenty years of permanent clean-up inaction.”).

suggests about existing theories of environmental federalism. The second is what, if anything, this means for the EPA.

### *A. Optimal Jurisdictions*

Proponents of state leadership in environmental enforcement gather support from the principle of “jurisdictional matching.” States, the argument proposes, are more responsive to local concerns, more knowledgeable about local conditions, and better able to respond to citizens’ demands.<sup>146</sup> Contaminated property most directly affects the neighbors it puts at risk and the businesses asked to pay for the response.<sup>147</sup> This limited class will be most effectively represented at lower levels of government, where incentives are clearest.<sup>148</sup> According to the matching theory, the states should be the optimal jurisdictions for efficient responses to local issues with contamination.

Theory aside, it is clear that New Jersey’s citizens have not reaped a representational advantage from their access to the NJDEP. As an illustration, consider the case of Jersey City’s Honeywell International (Honeywell) site. The site was opened in 1895 by Mutual Chemical Company of America—eventually the largest chromate processor in the world—as a dump for waste products on the banks of the Hackensack River.<sup>149</sup> One of the byproducts of chromate processing is hexavalent chromium, a carcinogen the EPA and NJDEP rate as more dangerous than polychlorinated biphenyls (PCBs) or arsenic.<sup>150</sup> Hexavalent chromium at the site exceeded 8,000 times the acceptable levels in places, and 1,500,000 tons of soil was contaminated.<sup>151</sup> The pollution was so bad that even Honeywell (which had succeeded to the title through acquisition of the previous corporate owner) acknowledged that there was “something terribly not right with the site.”<sup>152</sup> However, even though New Jersey ordered

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146. See Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 536–38 (1997) (arguing for a presumption in favor of decentralization to account for local differences).

147. See generally Adler, *supra* note 8 (discussing arguments in favor of decentralizing regulatory authority, including the ability to narrowly tailor protection efforts).

148. See Adler, *supra* note 76, at 133 (“Environmental protection efforts are most likely to be optimal where those who bear the costs and reap the benefits of a given policy determine how best, and even whether, to address a given environmental concern.”).

149. *Interfaith*, 399 F.3d at 252.

150. *Interfaith Cmty. Org. v. Honeywell Int’l, Inc.*, 263 F. Supp. 2d 796, 816 (D.N.J. 2003), *aff’d*, 399 F.3d 248 (3d Cir. 2005).

151. See *Interfaith*, 399 F.3d at 261 (examining the degree to which hexavalent chromium in the soil exceeded the state standard).

152. *Id.* at 253.

Honeywell to clean up the site as early as the mid-1980s, no action was taken until 1993, when an interim concrete cap was placed over the site.<sup>153</sup> Though the cap was designed to last only five years, no further work began for well over a decade, when community organizers convinced a federal judge to order the site excavated.<sup>154</sup>

In *Interfaith Community Organization v. Honeywell International*,<sup>155</sup> Judge Van Antwerpen of the Third Circuit dealt summarily with Honeywell's argument that the federal remedy infringed on state agency process.<sup>156</sup> "Honeywell's dilatory tactics and NJDEP's inability to deal effectively with those tactics . . . cast[] strong doubt as to whether there *is* a process to override in this case," he wrote.<sup>157</sup> Maddeningly then, it took ten years of citizen advocacy in federal court to enforce an order NJDEP issued in 1993. The citizen plaintiffs, frustrated that a massive chemical dump sat within a block of their grocery store, were not better served because local officials were in charge of the site; in fact, the mismatch probably went the other way. Honeywell had revenues of over \$30 billion in 2009,<sup>158</sup> while the entire State of New Jersey passed a budget of \$29 billion this past summer.<sup>159</sup> Thus, whatever theoretical value the matching principle has (a question that will not be settled in this Comment), it offers no guidance when the circumstances do not fit its assumptions.

It is not easy to reconcile this story, or Judge Van Antwerpen's remarks, with the claim that states are optimal, matching jurisdictions. Yet even without reopening the theoretical debate about jurisdictional matching, we can acknowledge that states will sometimes fail. New Jersey's recent history supports the limited assertion that in some political, geographic, and economic contexts, states are not effective enforcers of environmental law,

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153. *Id.*

154. *Id.* at 268 ("Enough time has already been spent in the history of this matter and the time for a clean-up has come.").

155. 399 F.3d 248 (3d Cir. 2005).

156. *Id.* at 267–68. The procedural argument may have been more promising than it appears, since *Interfaith* was decided under the Resource Conservation and Recovery Act (RCRA). Unlike CERCLA, the RCRA delegates authority to the states entirely upon EPA authorization. See *Harmon Indus. v. Browner*, 191 F.3d 894, 897–99 (8th Cir. 1999) (ruling that the EPA lacked authority under RCRA once powers were delegated to the state). While the laws differ, the point about jurisdictional matching is the same.

157. *Interfaith*, 399 F.3d at 267.

158. Honeywell Int'l Inc., Annual Report prepared for the Sec. & Exch. Comm'n (Form 10-K) 22 (Feb. 12, 2010), available at [http://www.sec.gov/Archives/edgar/data/773840/000093041310000784/c60039\\_10k.htm](http://www.sec.gov/Archives/edgar/data/773840/000093041310000784/c60039_10k.htm).

159. Richard Pérez-Peña, *Christie and Legislature Avoid a Showdown Over Money (for Now)*, N.Y. TIMES, June 30, 2010, at A22.

despite their representational advantages over the federal government.<sup>160</sup> If the states are sometimes suboptimal jurisdictions, the EPA needs effective means correcting these situations when they arise.

### *B. Cooperative Federalism*

Federal intervention, however, potentially conflicts with the cooperative model of environmental federalism.<sup>161</sup> This design was chosen in an effort to assert centralized control while respecting traditional notions of state sovereignty.<sup>162</sup> Because most environmental problems are essentially local, they were traditionally the province of local government.<sup>163</sup> However, by the 1970s it was apparent that the states had largely failed to tackle the pressing concerns that environmental disasters raised.<sup>164</sup> The cooperative federalism design was a compromise that allowed the federal government to seize control by demanding minimum standards and practices, while preserving a major enforcement role for the states.<sup>165</sup> To capriciously reassert federal enforcement authority could upset this balance.

On the other hand, New Jersey does not appear to be holding up its end of the cooperative bargain either. CERCLA was unique in that it did not provide for much state involvement as originally drafted.<sup>166</sup> However, once states took over responsibilities, various conflicting political impulses—toward efficiency, economic growth, and urban redevelopment—clouded the purpose of the law. The resulting feedback could be devastating to the

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160. See Buzbee, *supra* note 144, at 112–13 (advocating a contextual, case-by-case approach to analyses of federal–state approaches to environmental enforcement, rather than monolithic, theoretical justification).

161. Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1174 (1995) (providing an overview of the basic principles of cooperative federalism).

162. See Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 722–23 (2006) (describing cooperative federalism as a way to pursue federal goals without “running roughshod” over state sovereignty).

163. See Adler, *supra* note 76, at 157–58 (highlighting the local character of environmental concerns). *But see* Percival, *supra* note 161, at 1182 (noting that conceptions of the proper level of government to address various problems vary widely over time).

164. See Percival, *supra* note 161, at 1144 (analogizing the federalization of environmental law to the migration of civil rights law to federal jurisdiction after manifest state failure).

165. See Glicksman, *supra* note 162, at 754 (“[A] cooperative federalism program affords considerable discretion to the states to decide how to achieve the goal, thereby minimizing the extent to which pursuit of the federal goal infringes on state sovereignty.”).

166. See Percival, *supra* note 161, at 1163 (explaining that CERCLA imposed a regime of strict liability for hazardous-substance releases and authorized the federal government to delegate cleanup decisions to the states).

cooperative model. In New Jersey's case, entrusting enforcement to NJDEP assumes a uniformity of goals that simply does not exist.<sup>167</sup> New Jersey's reform experience suggests that when sovereign state actors pursue nominally federal goals, their true cooperation is conditioned on the political reality of their jurisdiction.<sup>168</sup> Thus, if federal intervention is problematic, cooperation is equally threatened when local politics dictate a strategy of nonenforcement under delegated authority.

Political choices have a dramatic effect even when the final goal—a clean environment—is not up for debate.<sup>169</sup> Inevitably, then, when multiple levels of differently motivated decisionmakers collaborate in the manner cooperative federalism suggests, the potential exists for conflict among the ideological bases that inform their decisions.<sup>170</sup> When that happens, “cooperation” is no longer a viable course of action. It is unrealistic—not to mention inconsistent with cooperative federalism's supposed respect for state sovereignty—to expect states to quietly do the federal government's bidding. At the same time, recognizing the intergovernmental conflict inherent in the model is not a call for federal deference. Rather than reopening an interminable debate about which jurisdiction is optimal, New Jersey's reform should challenge the EPA to join the fray.

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167. Cf. Buzbee, *supra* note 144, at 121 (citing state and federal tax and employment goals to explain diverging preferences between state and federal lawmakers).

168. See Mark Atlas, *Enforcement Principles and Environmental Agencies: Principal-Agent Relationships in a Delegated Environmental Program*, 41 LAW & SOC'Y REV. 939, 965 (2007) (examining correlations between states' political and demographic characteristics and the relative strength of their enforcement measures).

169. Cf. Cass R. Sunstein, *The Arithmetic of Arsenic*, 90 GEO. L.J. 2255, 2257–58 (2002) (comparing the regulatory preferences of the “intuitive toxicologist” with a more rigorously scientific cost–benefit analysis, but concluding that neither provides an absolute answer for arsenic levels).

170. This interaction has been labeled “contextual federalism” or “dynamic federalism.” See Buzbee, *supra* note 144, at 112 (“Environmental problems and regulatory responses must be examined with attention to their historical context, their political environment, and realities of what really are, at most, regulatory propensities and incentives.”); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 161 (2006) (“[A] static allocation of authority between the state and federal government is inconsistent with the process of policymaking in our federal system, in which multiple levels of government interact in the regulatory process.”). For purposes of this Comment, both theories are incorporated as instructions to attend to the dynamic features inherent in federal–state “cooperation.”

*C. Federal Response*

If rigid adherence to theory is removed as an obstacle, the question remains as to what form a federal intervention should take. The crux of the problem in New Jersey is that by delegating authority to private parties, the SRRA makes noncompliance easier to hide, even as NJDEP's recent record reveals poor enforcement efforts.<sup>171</sup> This problem is not limited to New Jersey: even where federal law makes violations easy to detect, state level nonenforcement tends to obscure the extent to which standards are obtained.<sup>172</sup> The EPA's interest in New Jersey's new program should therefore focus on enhancing transparency and ensuring that consequences are imposed when failures come to light. This approach is not punitive; it presumes that if New Jersey keeps its promises, the SRRA could achieve a level of enforcement consistent with federal law, while incorporating the state's strong economic concerns. This is precisely the balance cooperative federalism intends.

The problem with transparency strikes at the heart of what makes the SRRA suspicious. The streamlining process has whittled away the points at which NJDEP collects information, from every step of the way to now only rarely. By renouncing the power to collect information at each and every site, NJDEP can no longer reliably tell whether standards are met.<sup>173</sup> New Jersey developers are not ready for an "honor system" approach, and yet without information there can be no independent assurance of their compliance. To enhance the likelihood that at least one actor—either the public, NJDEP, or the EPA—will hold licensees accountable, information gleaned from yearly audits should be shared between agencies and made accessible to the public.<sup>174</sup>

This suggestion requires minimal investment or change in law. New Jersey has in fact already promised to publish LSRP documents online "as soon as an internet site with document posting capability is established . . . ."<sup>175</sup> The EPA is also already involved in initiatives to make

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171. See *supra* Part III.

172. See Atlas, *supra* note 168, at 972 (explaining the results of an empirical study indicating widespread nonenforcement).

173. NJDEP could be operating on a theory of "out of sight, out of mind." See Percival, *supra* note 161, at 1180 (pointing out that shifting authority is often a tactic to make problems less visible).

174. Cf. Richard Webster, *Federal Environmental Enforcement: Is Less More?*, 18 FORDHAM ENVTL. L. REV. 303, 324–26 (2007) (showing that transparency is necessary to evaluate state innovations and make efficient choices between policies).

175. N.J. Exec. Order No. 140, 41 N.J. Reg. 2163(a) (May 7, 2009), available at <http://www.state.nj.us/infobank/circular/eojsc140.htm>.

state enforcement results publicly available in a centralized format.<sup>176</sup> The existence of these structures makes the solution plausible, but more specific efforts are necessary to boost the chances of successfully encouraging accountability.

The SRRA promises that each year 10% of LSRP documents stretching back three years will be audited.<sup>177</sup> In Massachusetts, a similar auditing program revealed widespread compliance failures, the most common of which were administrative shortcomings such as improper documentation of the reasons a course of action was chosen.<sup>178</sup> This kind of administrative failure is especially important because it will obstruct NJDEP's ability to gauge more substantial aspects of the program's success or failure. Therefore, it makes sense to emphasize that online publishing should make audit failures of any category recognizable as such, rather than bury them in a database of technical reports and correspondence. Clearly publicizing audit failures should encourage a high level of professionalism among LSRPs, driving down negligent mistakes and ensuring proper paperwork is submitted to NJDEP. Further, intentional obfuscation will be publicly identified, so that interested parties—like the community activists in *Interfaith*—can demand consequences. Publication will also serve as a form of promotion for good actors, since a clean audit record would likely drive business to these firms.

Interagency informational sharing could also lead to stricter enforcement of consequences when private cleanups fail. Under the SRRA, if an LSRP fails an audit, he or she is liable, but it is not entirely clear what consequences attach to the owner of the site.<sup>179</sup> Accordingly, the EPA should be ready to investigate and initiate unexpected federal action at the worst of these failed audit sites, even if it was not originally interested in the site.<sup>180</sup> Since cleanup of contamination is the goal of both the federal and state programs, this is consistent with the concept of a dynamic federal—

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176. See Webster, *supra* note 174, at 327 (describing the EPA's Enforcement and Compliance History Online (ECHO) system, which tracks data on state enforcement of various delegated federal environmental mandates, not including CERCLA).

177. N.J. STAT. ANN. §§ 58:10C-24, :10C-25 (West Supp. 2010).

178. See Seifter, *supra* note 25, at 1113-17 (analyzing audit data).

179. See N.J. STAT. ANN. § 58:10C-22 (providing for department invalidation of LSRP-certified outcomes if the department determines the remedy is not protective of human health and the environment); *id.* § 58:10C-24 (directing responsible parties to cooperate and provide information in conduct of an audit).

180. Cf. Atlas, *supra* note 168, at 964-65 (describing the effect of more-aggressive-than-usual enforcement at Chicago's Region 5 EPA office on uniformity of state penalty assessments). But see Revesz, *supra* note 7, at 599-600 (noting that the EPA practice of determining where to act makes the risk of federal enforcement low at most sites that fall to state jurisdiction).



state relationship, in which responsibilities are fluid and optimal enforcement varies in context.<sup>181</sup> Opposing views will note that the practice of EPA intervention where a state has already acted, called “overfiling,”<sup>182</sup> is an extreme measure that can duplicate private costs, allocate public funds inefficiently, and cause interagency tension.<sup>183</sup> Here, though, the investment would reap rewards beyond the particular site at issue. Duplicative EPA action would reinforce pressure on responsible parties to contract with the best LSRPs, and on LSRPs to conduct actions in demonstrable compliance with the law. Furthermore, tension between the EPA and NJDEP is not something that necessarily should be avoided. The EPA can leverage NJDEP’s desire to avoid federal interference by strategically manifesting its willingness to interfere when NJDEP lets out the reigns too far.

Finally, another EPA option is to engage New Jersey in negotiations for a Memorandum of Agreement (MOA). MOAs constitute a statement of EPA policy not to take action when a responsible party enters a state program, and they have been important tools in state efforts to encourage Brownfields redevelopment.<sup>184</sup> However, when Ohio adopted a privatized program similar to New Jersey’s, the EPA balked at providing any assurances without changes in the program.<sup>185</sup> This led Ohio to create a “MOA Track” which allows property owners to engage in Ohio EPA oversight instead of private certification, in exchange for federal guarantees under the MOA.<sup>186</sup> As of 2009, twenty sites had entered the MOA Track program, compared with over three hundred in the private program.<sup>187</sup> This suggests that property owners in Ohio are not generally concerned about EPA overfiling, but that some self-select for the more rigorous MOA Track because they believe their situation justifies the added expense. Therefore, the EPA’s skeptical stance toward Ohio’s privatization can be credited with effectively engaging the regulated community without

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181. See Engel, *supra* note 168, at 161 (rejecting the necessity of allocating power to one jurisdiction or another with minimal overlap).

182. Federal action is characterized here as “overfiling,” even though the New Jersey program no longer features any initial agency “filing.”

183. See Webster, *supra* note 172, at 329–31 (recommending a system of sanctions and incentives to encourage state compliance rather than federal overfiling in order to avoid antagonizing officials).

184. See Revesz, *supra* note 7, at 602–03 (highlighting Memoranda of Agreement (MOAs) as examples of federal accommodation of state innovations).

185. See Robertson, *supra* note 7, at 56–57 (explaining that Ohio’s privatized program made it the only state in Region 5 lacking an MOA).

186. See EPA UPDATE, *supra* note 27, at 86 (outlining the ramifications of the MOA Track program).

187. *Id.* at 88.

spending agency resources on any particular site in that state.

The potential for worthwhile federal action depends on a combination of techniques, none of which is too costly or intrusive. Informational transparency and strategic federal overfiling at audit-failing sites would make the EPA a legitimate threat where NJDEP is not. At the same time, a MOA Track in New Jersey could attract the sites where EPA overfiling would present the greatest risk, and thus help enforce the SRRA's criteria for agency oversight rather than private cleanup at the most contaminated sites.<sup>188</sup> Combined, these EPA actions would encourage compliance by casting correct implementation of New Jersey standards as a condition of federal forbearance. Using all the tools available to it, the EPA can help provide the incentives and sanctions to convince private parties to choose alternatives that are protective of the environment and human health. Again, this is no more than the SRRA actually commands. Yet, by eliminating the promise of lax enforcement, the EPA could dramatically change the political subtext of New Jersey's reform.

#### CONCLUSION

New Jersey's reform of its environmental cleanup laws reveals much about the state's aims and ideology. What it does not show is a particular concern for a pristine environment. A streamlined NJDEP failed to enforce its own laws around the state; in response, the state legislature streamlined the program even more. As a result, New Jersey citizens are exposed to toxins that should not exist under federal law. This process of decaying standards demands greater attention than the EPA customarily gives to the operation of state law, yet federalism concerns appear to guard the way. Thus, an EPA response must avoid unnecessary intrusion or expense, while communicating the limits of federal patience.

Of course, there is one strategy that would ensure compliance with the law: uniform, direct oversight of every step of the process. This is the method Superfund proscribed, and one that has been wholly rejected since. But the process of compromise and accommodation ends in privatization; the only further step is outright deregulation. By intervening when states fail to enforce minimum standards, the EPA can signal it intends to hold off that result.

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188. See N.J. STAT. ANN. § 58:10C-27(b) (West Supp. 2010) (allowing department oversight in certain situations, including the highest ranked priority sites).

# ADDRESSING THE UNINTENDED CONSEQUENCES OF AN ENHANCED SEC WHISTLEBLOWER BOUNTY PROGRAM

TED ULIASSI\*

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## INTRODUCTION

The phrase “bounty hunter,” for most people, conjures up images of gun fights with dangerous fugitives. For the truly geeky, bounty hunter will forever bring to mind the beloved character Boba Fett from *Star Wars*.<sup>1</sup> However, Congress recently brought bounty hunting from a long time ago in a galaxy far, far away to the front and center of securities law enforcement.

On July 21, 2010, President Obama signed into law the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank), the most sweeping overhaul of the nation’s financial regulatory system since the Great Depression.<sup>2</sup> Among the Act’s hundreds of provisions is § 922. Section 922 significantly enhances the Securities and Exchange Commission’s (SEC’s) existing whistleblower bounty program, requiring that a person who reports any securities law violation to the SEC be paid between 10% and 30% of the monetary sanctions imposed upon the violator in any resulting SEC action in which the sanctions exceed \$1,000,000.<sup>3</sup> The new bounty program is considerably more robust than the one it replaces.<sup>4</sup> Previously, the whistleblower award was dispensed solely at the SEC’s discretion, was capped at 10% of the sanctions, and was available only for tips regarding insider trading.<sup>5</sup> In addition to—or perhaps because of—these structural weaknesses, the former bounty program was rarely used in practice.<sup>6</sup>

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1. See *Boba Fett*, WOOKIEEPEDIA: THE STAR WARS WIKI, [http://starwars.wikia.com/wiki/Boba\\_Fett](http://starwars.wikia.com/wiki/Boba_Fett) (last visited May 11, 2011) (“I see why they call you [Boba Fett] the best bounty hunter in the galaxy.” (quoting Darth Vader)).

2. See Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank), Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of the U.S.C.) (reforming, among other things, federal regulation of systemically risky financial firms and activities, hedge funds, private equity funds, insurance, derivatives, broker-dealers, investment advisors, credit-rating agencies, and consumer financial products and services).

3. See *id.* § 922, 124 Stat. at 1841–49 (to be codified at 15 U.S.C. § 78u-6). Section 922 amended the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. §§ 78a-78kk (2006), by adding section 21F.

4. See Erich T. Schwartz, *Investor Protection and SEC Enforcement: New Authority and Directed Studies Increase Risks and Costs for Firms*, in THE DODD–FRANK ACT: COMMENTARY AND INSIGHTS 147, 148 (Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates eds., 2010), [http://www.skadden.com/Cimages/siteFile/Skadden\\_Insights\\_Special\\_Edition\\_Dodd-Frank\\_Act1.pdf](http://www.skadden.com/Cimages/siteFile/Skadden_Insights_Special_Edition_Dodd-Frank_Act1.pdf) (citing the former program set forth in 15 U.S.C. § 78u-1(e) and detailing the enhancements to the whistleblower bounty program found in Dodd–Frank § 922).

5. See 15 U.S.C. § 78u-1(e) (2006).

6. See H. DAVID KOTZ, INSPECTOR GENERAL, U.S. SEC. & EXCH. COMM’N, ASSESSMENT OF THE SEC’S BOUNTY PROGRAM 4–8 (2010), <http://www.sec-oig.gov/Reports/AuditsInspections/2010/474.pdf> (reporting that since the beginning of the bounty program in 1989, the Securities and Exchange Commission (SEC) has only made payments

After a review by the SEC's Office of Inspector General revealed its infrequent utilization and problematic design and implementation,<sup>7</sup> SEC Director of Enforcement Robert Khuzami stated that the SEC supported a wholesale congressional rewriting of the program.<sup>8</sup> The SEC has certainly gotten what it wished for in § 922, which is likely to lead to a greater number of tips regarding securities law violations.<sup>9</sup> In light of the accounting scandals at the turn of the millennium,<sup>10</sup> the global financial crisis,<sup>11</sup> and the Bernard Madoff debacle,<sup>12</sup> a program that will provide the SEC with more information on illegal financial activities is certainly a positive development as a matter of general public policy.

This is not to say, however, that § 922 has no drawbacks or unintended consequences. A greater number of tips to the SEC is not equivalent to greater compliance with the federal securities laws. As several early commentators have noted, the enhanced bounty program drastically alters the incentive structure that operates on persons who become aware of potential securities law violations.<sup>13</sup> While in one sense this merely states the obvious intent of § 922, in another sense it begins to reveal the more problematic aspects of the new bounty program. The financial incentive of a large bounty encourages those who become aware of a securities law violation at a company to turn first to the regulators rather than the

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to five whistleblowers totaling \$159,537).

7. See *id.* at iii (describing deficiencies in, for example, the user-friendliness of the program and the extent to which the SEC staff maintain ongoing communications with whistleblowers).

8. See *id.* at 29 (“[I]t is our hope that pending legislation before the Congress . . . will create a new program wholly replacing the current one.”).

9. See Schwartz, *supra* note 4, at 150 (asserting that the § 922 program is likely to lead to an increased number of tips given the track record of the Internal Revenue Service (IRS) bounty program upon which § 922 is based).

10. See generally Thor Valdmanis, *Senate Report Blasts SEC's Enron Oversight*, USA TODAY, Oct. 7, 2002, at 2B (describing a Senate report that determined the SEC had received indicators of Enron's pending collapse but failed to act).

11. See generally Edward Wyatt, *S.E.C. Is Pursuing More Inquiries Tied to the Financial Crisis*, *Chairwoman Says*, N.Y. TIMES, July 21, 2010, at B2 (noting congressional criticism of the SEC for lack of prominent enforcement actions against firms involved in the financial crisis).

12. See generally Binyamin Appelbaum & David S. Hilzenrath, *SEC Didn't Act on Madoff Tips*, WASH. POST, Dec. 16, 2008, at D1 (asserting that the SEC ignored a 1999 letter accusing Madoff of conducting a massive Ponzi scheme).

13. See, e.g., Schwartz, *supra* note 4, at 150 (highlighting problems with the § 922 program regarding tips to the SEC that violate confidentiality or professional conduct standards); Comments of Esther Lum, Whistleblower Award Program: Title IX Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Aug. 5, 2010), <http://www.sec.gov/comments/df-title-ix/whistleblower/whistleblower-5.htm> (arguing that employees who become aware of securities law violations will now report violations to the SEC immediately rather than working through internal compliance programs).

company's internal securities compliance program,<sup>14</sup> even in borderline cases where the informant's knowledge of the wrongdoing is underdeveloped. This risks undermining the role of corporate compliance programs in detecting and preventing securities law violations.<sup>15</sup> Moreover, persons who discover potential securities law violations are likely to be public company employees or financial professionals whose fiduciary or professional ethics obligations may come into conflict with the incentive to directly reveal potential wrongdoing to the SEC that § 922 provides.<sup>16</sup>

This Comment will explore the potential drawbacks of the SEC's enhanced whistleblower bounty program in detail. Part I will more fully explain the mechanics of § 922, investigate its legislative history, and examine the performance of a similar bounty program in place at the IRS for tax law violations.<sup>17</sup> Part II will address whether and how the new bounty program might undermine the role of internal corporate compliance programs in achieving conformity with the federal securities laws and will assess the potential conflicts the new bounty program might create with the professional ethics obligations of whistleblowers who are employees or third party financial consultants of the violator. Finally, Part III will present recommendations intended to preserve the value of the new bounty program while ensuring that financial professionals and internal compliance programs continue to play a central role in securities law compliance. Part III will also comment on the SEC's Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (Proposed Rules).<sup>18</sup>

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14. See Lum, *supra* note 13 (recommending that the new bounty program be modified to mandate that employees follow established internal reporting requirements).

15. Cf. *id.* (asserting that the best method for addressing violations would be whistleblowers reporting first to the company).

16. See Schwartz, *supra* note 4, at 150 (pointing out the conflict between the incentive to collect the bounty and professional conduct and confidentiality requirements).

17. See generally 26 U.S.C. § 7623 (2006) (requiring that whistleblowers who report tax law violations be paid between 15% and 30% of the sanctions if the amount in controversy exceeds \$2,000,000).

18. 75 Fed. Reg. 70,488 (Nov. 17, 2010) (to be codified at 17 C.F.R. pts. 240, 249). As of May 14, 2011, the SEC has not yet issued final rules implementing the whistleblower provisions of Dodd-Frank. The statutory deadline for issuing the final rules passed in April. Readers should be aware that the final rules, which may differ materially from the Proposed Rules, may soon be issued.

## I. BACKGROUND

### A. *Mechanics of the Bounty Program*

Under § 922, a whistleblower can be any “individual . . . or 2 or more individuals” who provide the SEC with information on a violation of the securities laws.<sup>19</sup> While this definition encompasses any “natural person” who reports a violation to the SEC, employees of companies that issue securities or that provide financial services to securities issuers are most likely to become aware of violations and therefore to become whistleblowers.<sup>20</sup> Section 922 explicitly disqualifies four categories of whistleblowers from the bounty program: whistleblowers who are employees of certain governmental, regulatory, self-regulatory, or law enforcement agencies;<sup>21</sup> whistleblowers who are convicted of criminal violations related to the SEC action that resulted from their tip;<sup>22</sup> whistleblowers who fail to submit the information to the SEC in the required form;<sup>23</sup> and whistleblowers who gain the information provided to the SEC through an audit of financial statements and who violate § 10A of the Securities Exchange Act of 1934 (the Exchange Act) in providing that information to the SEC.<sup>24</sup>

Regarding this last category of disqualified whistleblowers, the Exchange Act requires specific procedures to be followed by an auditor of a securities issuer’s financial statements who discovers potentially illegal activities.<sup>25</sup> The auditor must first determine whether it is likely that an illegal act has occurred and if so what the effects of the act will be.<sup>26</sup> The auditor must then inform the “appropriate level of the management” of the issuer as well as the audit committee of the issuer (or the board of directors generally in the absence of an audit committee).<sup>27</sup> If the board and management do not take timely corrective action, the auditor must then submit a report to the

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19. Dodd–Frank § 922, 124 Stat. 1376, 1842 (2010) (Exchange Act § 21F(a)(6)).

20. *Cf.* Dodd–Frank § 922, § 21F(h), 124 Stat. at 1845 (Exchange Act § 21F(h)) (protecting employees from employer retaliation for reporting violations); BLACK’S LAW DICTIONARY 1734 (9th ed. 2009) (defining “whistleblower” as “[a]n *employee* who reports employer wrongdoing to a governmental or law enforcement agency”) (emphasis added).

21. Dodd–Frank § 922, 124 Stat. at 1843 (Exchange Act § 21F(c)(2)(A)) (specifically listing the Department of Justice and the Public Company Accounting Oversight Board as such agencies).

22. *Id.* (Exchange Act § 21F(c)(2)(B)).

23. *Id.* (Exchange Act § 21F(c)(2)(D)).

24. *Id.* (Exchange Act § 21F(c)(2)(C)).

25. 15 U.S.C. § 78j-1 (2006).

26. *Id.* § 78j-1(b)(1)(A) (listing collateral effects such as fines, penalties, and damages).

27. *Id.* § 78j-1(b)(1)(B) (requiring notification unless the illegal act is clearly inconsequential to the issuer financially).

board of directors.<sup>28</sup> The board is then to report the auditor's findings to the SEC; the auditor is only to report the violation directly to the SEC if the board fails to notify the auditor that it has notified the SEC.<sup>29</sup> Presumably, an auditor who reports violations after adhering to these procedures would still qualify for a bounty.<sup>30</sup>

While there are few restrictions on qualifying for the bounty program based on the identity or status of the whistleblower, the whistleblower must provide "original information" to the SEC that leads to a successful enforcement action against the issuer.<sup>31</sup> This means that the information the whistleblower provides to the SEC must be "derived from the independent knowledge or analysis of a whistleblower," "must not be known to the SEC from any other source," and must not be exclusively derived from allegations in a judicial or administrative action, from a governmental report, or the news media.<sup>32</sup>

A bounty is only available when the monetary sanctions imposed on the violator by the SEC exceed \$1,000,000.<sup>33</sup> While awarding the whistleblower a percentage of the sanctions imposed is no longer discretionary, the SEC retains discretion to determine the amount of the award as long as it awards between 10% and 30% of the sanctions.<sup>34</sup> The Dodd–Frank Act enumerates certain factors the SEC must weigh in determining the award, including "the significance of the information provided by the whistleblower to the success of the case" and the level of assistance provided by the whistleblower.<sup>35</sup> Aside from extending the

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28. *Id.* § 78j-1(b)(2).

29. *Id.* § 78j-1(b)(3) (allotting only one business day during which the board can report this information to the SEC before the auditor is required to report or resign).

30. *See* Dodd–Frank § 922, 124 Stat. 1376, 1843 (2010) (Exchange Act § 21F(c)(2)(C)) (disqualifying whistleblowers who gain information through a legally required audit only when they report the information to the SEC in violation of the provisions set forth in § 10A of the Exchange Act, 15 U.S.C. § 78j-1).

31. *Id.* (Exchange Act § 21F(b)(1)).

32. *See id.* (Exchange Act § 21F(a)(3)) (defining the term *original information*).

33. *See id.* (Exchange Act § 21F(a)(1)) (defining the term *covered judicial or administrative action*). SEC sanctions of over \$1,000,000 are common. *See* SEC. & EXCH. COMM., <http://www.sec.gov/litigation/litreleases.shtml> (last modified Apr. 22, 2010) (listing several SEC cases in which civil penalties, disgorgements, and other monetary sanctions exceed one million dollars); SIMPSON THACHER & BARTLETT LLP, *Client Memorandum: New SEC Chairman Schapiro Announces Changes Aimed at Reinforcing Enforcement Program* (Feb. 9, 2009), <http://www.stblaw.com/content/publications/pub793.pdf> (stating that the average SEC civil penalty in 2007 was approximately \$18,000,000).

34. *See* Dodd–Frank § 922, 124 Stat. at 1842, 1844 (Exchange Act § 21F(b), (f)).

35. *Id.* (Exchange Act § 21F(c)(1)(B)(i)). The SEC may also adopt rules or regulations establishing other factors to be considered in determining the amount of the award. *See id.* The SEC has received public comments regarding which additional factors should be



bounty program to cover all securities law violations rather than just insider trading, the 10%–30% mandatory award provision is the most significant departure from the former program.<sup>36</sup>

Finally, in addition to the provisions that reinvigorate the bounty program, § 922 also provides for the protection of whistleblowers.<sup>37</sup> Whistleblower tips are treated confidentially—the SEC is not to take any action that might reveal the whistleblower’s identity, except when necessary under federal law, until it has to disclose the whistleblower’s identity to the defendant in an SEC action.<sup>38</sup> A § 922 whistleblower is also afforded a federal cause of action against his or her employer if the employer takes retaliatory actions such as discharging or harassing the whistleblower.<sup>39</sup> While the antiretaliation cause of action provided by the Sarbanes–Oxley Act of 2002 (Sarbanes–Oxley) to public company employee whistleblowers<sup>40</sup> is likely to be available to many § 922 whistleblowers, the § 922 cause of action is not limited to whistleblowers who are employees of publicly traded companies.<sup>41</sup> Moreover, the longer statute of limitations and more generous remedies are likely to make the § 922 cause of action the more attractive option for many § 922 whistleblowers.<sup>42</sup>

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considered. See Comment of Harold R. Burke, Whistleblower Award Program: Title IX Provisions of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Sept. 14, 2010), <http://www.sec.gov/comments/df-title-ix/whistleblower/whistleblower-12.pdf> (arguing that the SEC should consider, among other things, whether the whistleblower reported the fraud promptly or delayed reporting it).

36. See 15 U.S.C. § 78u-1(e) (2006) (allowing the SEC to determine whether to give an award and capping any award at 10% of the penalty imposed). The legislators who enacted Dodd–Frank considered the mandatory whistleblower payment requirement to be essential in motivating whistleblowers to come forward. See *infra* notes 48–63 and accompanying text.

37. See Dodd–Frank § 922, 124 Stat. at 1845–47 (Exchange Act § 21F(h)) (prohibiting retaliation and requiring confidentiality, among other protections).

38. *Id.* (Exchange Act § 21F(h)(2)).

39. *Id.* (Exchange Act § 21F(h)(1)(A)–(B)).

40. See 18 U.S.C. § 1514A(b) (2006) (allowing public company whistleblowers to file a complaint with the Secretary of Labor or in federal district court if the Secretary of Labor has not issued a final decision within 180 days).

41. See Dodd–Frank § 922, 124 Stat. at 1842 (Exchange Act § 21F(a)(6)) (defining whistleblower as “any individual who provides . . . information relating to a violation of the securities laws to the Commission”); *id.* (Exchange Act § 21F(h)(1)(A)) (stating that “no employer may . . . discriminate against[] a whistleblower” (emphasis added)).

42. Compare *id.* (Exchange Act § 21F(h)(1)(B)–(C)) (providing a six-year statute of limitations and remedies including double the back pay owed to an employee plus interest), with 18 U.S.C. § 1514A(b)–(c) (providing a ninety-day statute of limitations and back pay plus interest). Note that Dodd–Frank amends the ninety-day statute of limitations in the Sarbanes–Oxley provision to 180 days. See Dodd–Frank § 922(c), 124 Stat. at 1848 (amending 18 U.S.C. § 1514A(b)(2)(D)).

*B. Legislative History of the Bounty Program*

The legislative history of Dodd–Frank does not reveal whether the problems relating to undermining internal corporate compliance programs or to promoting the violation of professional ethics or fiduciary obligations were raised in congressional hearings or debated by lawmakers prior to the Act’s passage. It does reveal, however, that the SEC itself desired to implement an enhanced bounty program and proposed legislation outlining the program to Congress,<sup>43</sup> and that the Obama Administration proposed the basic idea of the expanded program in its initial white paper on financial regulatory reform.<sup>44</sup> Also influential in the enactment of § 922 was the testimony of Madoff-whistleblower Harry Markopolos before the Senate Banking Committee.<sup>45</sup> Markopolos explicitly endorsed the creation of a strong whistleblower program with a mandatory award provision,<sup>46</sup> citing statistics showing that whistleblower tips revealed a far greater proportion of the fraudulent schemes uncovered at public companies than tips from external auditors, including SEC investigators.<sup>47</sup>

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43. See KOTZ, *supra* note 6, at 28 (noting that the Division of Enforcement’s review of pre-Dodd–Frank whistleblower programs “resulted in legislation currently under consideration by Congress that would create a new, more-comprehensive whistleblower program related to all securities violations”); see also *Strengthening the SEC’s Vital Enforcement Responsibilities: Hearing Before the Subcomm. on Sec., Ins., and Inv. of the S. Comm. on Banking, Hous., & Urban Affairs*, 111th Cong. 7 (2009) (statement of Robert Khuzami, Director of Enforcement, SEC) (requesting a number of legislative changes to increase the SEC’s enforcement capabilities, including an expansion of the existing whistleblower program).

44. See U.S. DEPT. OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 72 (2009) (proposing that the SEC be granted authority to establish a fund to pay whistleblowers for tips resulting in “significant financial awards” and that the existing program should be expanded beyond insider trading).

45. See S. REP. NO. 111-176, at 110–11 (2010) (discussing Markopolos’s testimony extensively in explanation of the significance of § 922); *Oversight of the Securities and Exchange Commission’s Failure to Identify the Bernard L. Madoff Ponzi Scheme and How to Improve SEC Performance: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 111th Cong. 60 (2009) (statement of Harry Markopolos, Chartered Financial Analyst, Certified Fraud Examiner) [hereinafter Markopolos Testimony].

46. See Markopolos Testimony, *supra* note 45, at 71.

47. *Id.* at 70 (“[W]histleblower tips detected 54.1 percent of uncovered fraud schemes in public companies. External auditors, and [SEC investigators] would certainly be considered external auditors, detected a mere 4.1 percent of uncovered fraud schemes. Whistleblower tips were 13 times more effective than external audits . . .”).

*C. The IRS Bounty Program as a Model and a Bellwether*

The § 922 bounty program was explicitly modeled after the IRS bounty program that was enacted in 2006.<sup>48</sup> The IRS bounty program requires that individuals who provide information about tax underpayments or fraud be paid between 15% and 30% of the proceeds of any action based on that information where the amount of uncollected taxes and penalties exceeds \$2,000,000.<sup>49</sup> The IRS determines the amount of the award based on the extent to which the whistleblower “substantially contributed to such action.”<sup>50</sup> If the information provided by the whistleblower is mainly derived from a judicial or administrative hearing or a government or media source, the IRS has the discretion to deny an award or to award no more than 10% of the sanctions.<sup>51</sup> The awards to individuals who planned or initiated the reported violation can also be reduced, and a whistleblower convicted of criminal conduct in connection with such planning or initiation is denied an award.<sup>52</sup> Whistleblowers can appeal the IRS’s determination of the amount of the award to the U.S. Tax Court.<sup>53</sup>

It is unclear exactly why Congress, in enacting § 922, reduced the lower bound of the mandatory payment to 10%,<sup>54</sup> lowered the sanctions necessary to trigger a mandatory payment to \$1,000,000,<sup>55</sup> or made the award amount unappealable.<sup>56</sup> What is clear is that the legislators who enacted Dodd–Frank—or at least the majority members of the Senate Banking Committee—considered the mandatory payment provision of § 922 to be the most critical aspect of the SEC program in terms of encouraging whistleblowers to come forward despite the personal and professional risks of reporting violations.<sup>57</sup>

If the performance of the IRS bounty program is an accurate indicator, § 922 should be successful in generating a greater number of tips to the SEC.<sup>58</sup> Indeed, SEC Chairman Mary Schapiro has indicated that the SEC

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48. See S. REP. NO. 111-176, at 111 (stating that § 922 is “modeled after a successful IRS Whistleblower Program enacted into law in 2006”).

49. 26 U.S.C. § 7623 (2006).

50. *Id.* § 7623(b)(1).

51. See *id.* § 7623(b)(2)(A).

52. *Id.* § 7623(b)(3).

53. *Id.* § 7623(b)(4).

54. Dodd–Frank § 922, 124 Stat. 1376, 1842 (2010) (Exchange Act § 21F(b)(1)(A)).

55. *Id.* (Exchange Act § 21F(a)(1)).

56. *Id.* (Exchange Act § 21F(f)).

57. See S. REP. NO. 111-176, at 111 (2010) (“The [Banking, Housing, and Urban Affairs] Committee feels the critical component of the Whistleblower Program is the minimum payout that any individual could look towards in determining whether to take the enormous risk of blowing the whistle in calling attention to fraud.”).

58. See Schwartz, *supra* note 4, at 150 (asserting that the IRS received a “pronounced

has seen an increase in the number and quality of tips since the passage of Dodd–Frank.<sup>59</sup> While the IRS has experienced logistical problems relating to accurate inventorying and timely processing of tips in connection with its bounty program,<sup>60</sup> the IRS bounty program appears to be fundamentally well designed. The same can be said of § 922, despite its slight deviations from the IRS program.

The IRS has identified and made efforts to address the issue of whistleblower tips that are made in violation of professional ethics obligations.<sup>61</sup> Guidance issued by the IRS’s Chief Counsel takes a firm stand on information provided by an individual—presumably an attorney—representing the violator in any judicial or administrative matter involving the IRS: “Under no circumstances” is it appropriate for the IRS to accept such information.<sup>62</sup> While the Chief Counsel also points out that complications may arise in the more general context of information provided to the IRS by attorneys, accountants, or other professionals in violation of professional ethics obligations of confidentiality, no strict prohibition on using such information is advised.<sup>63</sup>

In summary, it is unclear whether Congress, in enacting Dodd–Frank, considered the potential effects of a stronger SEC whistleblower program on internal corporate compliance programs or professional ethics standards. The IRS has identified the potential of its whistleblower award program to attract tips made in violation of professional ethics standards, but has not issued a rule or otherwise recommended denying whistleblower

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and sustained uptick” in the number of tips since the establishment of its whistleblower bounty program and that likewise the SEC program will generate an increase in tips); *see also* TREASURY INSPECTOR GEN. FOR TAX ADMIN., DEFICIENCIES EXIST IN THE CONTROL AND TIMELY RESOLUTION OF WHISTLEBLOWER CLAIMS 6 (2009) (reporting that claims under the IRS bounty program increased from eighty-three in 2007, the year the IRS’s whistleblower office was established, to 1,890 in 2008).

59. *See Implementing the Dodd–Frank Wall Street Reform and Consumer Protection Act: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 111th Cong. 13 (2010) (statement of Mary Schapiro, Chairman, SEC) (reporting a “slight uptick” in the number of complaints and an “uptick” in the quality of complaints).

60. *See* TREASURY INSPECTOR GEN., *supra* note 58, at 3 (summarizing identified problems and implemented solutions).

61. *See* OFFICE OF CHIEF COUNSEL, INTERNAL REVENUE SERV., NOTICE CC-2010-004, CLARIFICATION OF CC NOTICE 2008-011—LIMITATIONS ON INFORMANT CONTACTS: CURRENT EMPLOYEES AND TAXPAYER REPRESENTATIVES 2–3 (2010) [hereinafter IRS CHIEF COUNSEL] (stating guidelines for handling tips made by employees or representatives of the violating taxpayer).

62. *Id.* at 3.

63. *See id.* at 4 (discussing the impact of such professional ethics violations on the IRS’s ability to use the information provided by the whistleblower as evidence in proceedings against the violator).

awards on that basis. The remaining Parts of this Comment will examine specific ways in which the § 922 program may create tension with corporate compliance programs and professional ethics standards and will suggest ways in which that tension might be reduced.

## II. HOW THE BOUNTY PROGRAM MAY DISRUPT CORPORATE COMPLIANCE PROGRAMS AND UNDERMINE PROFESSIONAL ETHICS STANDARDS

### A. *Effects on Corporate Compliance Programs*

A corporate compliance program is a corporation's internal system for achieving conformity with the myriad of securities laws and regulations under which it operates.<sup>64</sup> An important component of a compliance program is a system for internally reporting violations.<sup>65</sup> Indeed, the Federal Sentencing Guidelines, which provide organizations that have implemented an "effective compliance and ethics program"<sup>66</sup> with reduced criminal fines,<sup>67</sup> state that one of the minimal requirements of an effective compliance program is a publicized system for a company's employees or agents to report potential criminal conduct without fear of retaliation, possibly allowing the informant to report the information confidentially or anonymously.<sup>68</sup> Many large corporations have set up toll-free, confidential telephone hotlines and post office boxes to facilitate the reporting of violations.<sup>69</sup> In addition to lower fines for effective compliance programs, the Federal Sentencing Guidelines also provide for lower fines when the organization self-reports the violation to governmental authorities, cooperates in the investigation, or accepts responsibility for the violation.<sup>70</sup>

Similarly, the SEC's "Seaboard Report" proclaims the benefits of businesses "seek[ing] out, self-report[ing] and rectify[ing] illegal conduct" and suggests that the SEC may refrain from bringing actions, impose lower

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64. See ROBERT J. WILD, CORPORATE COMPLIANCE SERIES: DESIGNING AN EFFECTIVE SECURITIES COMPLIANCE AND CORPORATE GOVERNANCE PROGRAM § 1:1 (2010) (explaining the need for corporations to comply with the Securities Act of 1933, the Securities Exchange Act of 1934, the Sarbanes–Oxley Act of 2002, and the rules and regulations of the SEC).

65. See *id.* § 3:34.

66. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2010).

67. See *id.* § 8C2.5(f)(1) (providing that three points should be subtracted from the organization's culpability score when an effective compliance and ethics program is in place).

68. *Id.* § 8B2.1(b)(5)(C).

69. See WILD, *supra* note 64, § 3:34.

70. See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2010) (subtracting up to five points from the organization's culpability score if all three indicators are present).

penalties, or otherwise enforce the securities laws in a more lenient manner when an individual or company cooperates extensively with an SEC investigation.<sup>71</sup> Among the factors the SEC considers in “determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation” are the compliance procedures in place at the company, how the misconduct was discovered, and how long the company took to respond to the misconduct.<sup>72</sup> A more recent SEC “Enforcement Cooperation Initiative” reinforces the principles of the Seaboard Report and allows the Enforcement Division to use more formalized cooperation agreements, deferred prosecution agreements, and non-prosecution agreements.<sup>73</sup>

Courts have also emphasized the importance of well-functioning internal compliance systems and internal investigations in achieving conformity with securities and other laws.<sup>74</sup> In *Higginbotham v. Baxter International, Inc.*,<sup>75</sup> a case involving Baxter International’s restatement of earnings due to fraud at a foreign subsidiary, the Seventh Circuit held that it is proper for corporate managers to take a reasonable amount of time to investigate initial reports of securities or accounting misconduct rather than coming forward before they “have a full story to reveal.”<sup>76</sup> In addition, the Delaware Court of Chancery, in an opinion that was later endorsed by the Delaware Supreme Court, indicated that a corporate director may be liable for breach of fiduciary duty for failing to ensure that an adequate

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71. See U.S. SEC. & EXCH. COMM’N, SECURITIES EXCHANGE ACT OF 1934 RELEASE NO. 44969, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS (2001), <http://www.sec.gov/litigation/investreport/34-44969.htm> (setting forth the criteria that will be used in determining if and to what extent such practices will impact potential charges or sanctions).

72. *Id.*

73. Press Release, U.S. Sec. & Exch. Comm’n, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), <http://www.sec.gov/news/press/2010/2010-6.htm> (outlining the new cooperation tools available to the SEC in future enforcement actions); U.S. SEC. & EXCH. COMM’N, DIV. OF ENFORCEMENT, ENFORCEMENT MANUAL 128–135 (2011), <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf#6.2> (describing procedures for Cooperation Agreements, Deferred Prosecution Agreements, and Non-Prosecution Agreements).

74. *Cf. Higginbotham v. Baxter Int’l Inc.*, 495 F.3d 753, 761 (7th Cir. 2007) (emphasizing the importance of corporate managers taking the time to investigate potential wrongdoing before publicly announcing it); *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996) (emphasizing the directorial duty to assure the existence of an effective compliance and information reporting system); *Stone ex rel. AmSouth Bancorp. v. Ritter*, 911 A.2d 362, 373 (Del. 2006) (endorsing the reasoning of the *Caremark* court).

75. 495 F.3d 753 (7th Cir. 2007).

76. *Id.* at 761.

“corporate information and reporting system” is in place.<sup>77</sup>

Congress has also emphasized the importance of internal compliance programs in detecting and rectifying corporate wrongdoing.<sup>78</sup> Indeed, Sarbanes–Oxley requires an issuer’s annual reports to include an “internal control report” stating management’s responsibility for having in place and maintaining adequate “internal control structure and procedures for financial reporting,” as well as an assessment of that system.<sup>79</sup>

Section 922 threatens to undermine the proper functioning of corporate compliance programs, internal investigations, and the role these can play in SEC and other government enforcement proceedings in several related ways. Most generally, employees who become aware of a securities law violation now have two competing options for reporting the violation: their company’s compliance program or the SEC’s § 922 system. Given the potentially enormous reward associated with the latter, many whistleblowers who would have brought wrongdoing to light internally may no longer do so.<sup>80</sup> Since corporate compliance programs depend upon information provided by employees to detect irregularities or fraud—through confidential hotlines or nonconfidential reporting to the general counsel’s office or the audit committee—§ 922 may weaken the upward information flow that is central to a company’s ability to police its own financial activities.<sup>81</sup> Compounding this general problem is that awards under § 922 depend upon whether the whistleblower brings “original information” to the SEC.<sup>82</sup> Information that is “known to the Commission from any other source, unless the whistleblower is the original source of the information,” is not original information.<sup>83</sup> This language may produce additional reluctance to report internally, especially in borderline cases where the whistleblower is unsure if the conduct is wrongful, since the whistleblower may lose original source status to the internal recipient of the information who eventually identifies the conduct as illegal and reports it to the SEC.<sup>84</sup> Additionally, in light of the fact that whistleblower awards do

77. *Caremark*, 698 A.2d at 970.

78. *Cf.* Sarbanes–Oxley Act of 2002 § 404, 15 U.S.C. § 7262(a) (2006).

79. *Id.*

80. *But see* Public Comments, Whistleblower Award Program (Dec. 18, 2010), <http://www.sec.gov/comments/s7-33-10/s73310-212.pdf> (presenting evidence that most False Claims Act qui tam plaintiffs first report problems internally).

81. *Cf. Caremark*, 698 A.2d at 970 (“[R]elevant and timely *information* is an essential predicate for satisfaction of the board’s supervisory and monitoring role.”); WILD, *supra* note 64, §§ 2:4, 2:8, 3:34 (recommending hotlines and identifying the general counsel and audit committee as key players in the compliance program).

82. Dodd–Frank § 922, 124 Stat. 1376, 1841 (2010) (Exchange Act § 21F(a)(3)).

83. *Id.* (Exchange Act § 21F(a)(3)(B)).

84. *Cf.* Mike Koehler, Public Comment on Whistleblower Award Program (Sept. 3,

not kick in until monetary sanctions resulting from the whistleblower tip exceed \$1,000,000—and that the whistleblower recovers a percentage of the sanctions imposed<sup>85</sup>—§ 922 may encourage employees who become aware of wrongdoing to delay reporting until the case is of sufficient magnitude to trigger the award provision or to generate an award of an amount of their liking.<sup>86</sup>

In addition to the ways in which § 922 might directly undermine corporate compliance programs and internal investigations, § 922 might also frustrate the statutory, regulatory, and judicial policies favoring lenience in culpability and penalty determination when well-functioning corporate compliance programs are in place or careful managerial investigations are carried out. As discussed above, § 922 encourages external rather than internal reporting, and in certain ways sets the whistleblower's interests at odds with the prompt internal resolution of the violation.<sup>87</sup> Not only might this disrupt the upward flow of information that facilitates the initiation of internal investigations and self-reporting, but it might also make it more difficult for corporate managers, boards, or committees conducting internal inquiries to garner the cooperation of employees knowledgeable of the misconduct. These internal difficulties might impede the violator's efforts to self-report, cooperate with regulatory inquiries or investigations, and obtain the concomitant reward of lesser penalties. This could also compromise the effectiveness of the SEC's Seaboard Report and Enforcement Cooperation Initiative and other federal policies that promote cooperation by making it financially attractive to potential violators.

The existence of these lenience-for-cooperation policies might also create tension with an active bounty program in a more basic respect. Beyond the

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2010), <http://www.sec.gov/comments/df-title-ix/whistleblower/whistleblower-10.htm> (describing a race between the company and the whistleblower to report the violation to the regulators).

85. Dodd–Frank § 922, 124 Stat. at 1841–42 (Exchange Act § 21F(a)(1), (b)(1)).

86. See James Fisher et al., *Privatizing Regulation: Whistleblowing and Bounty Hunting in the Financial Services Industries*, 19 DICK. J. INT'L L. 117, 134 (2000) (discussing the problem of whistleblowers delaying to create a bigger case and other adverse consequences of whistleblower programs). Section 922's "original information" provision may counteract the whistleblower's incentive to delay reporting to the SEC; such a delay may allow others knowledgeable of the wrongdoing to come forward first and to become the source of original information. Both the original information and percentage of sanctions provisions may dissuade prompt *internal* reporting, however. For example, if A has information about a violation, there is little incentive for A to share this information with co-worker B because B can then use the information to make a § 922 report to the SEC, thereby making B, rather than A, the original information source.

87. See *supra* pp. 361–63 and accompanying notes.



de jure existence of a mandatory whistleblower reward provision, the regular distribution of large rewards to whistleblowers will be critical to § 922's success.<sup>88</sup> So even if violators still have the incentive of lower penalties to induce cooperation with regulators investigating a § 922 tip, the lower rewards that should result from this cooperation might actually hinder a fledgling bounty program.

### *B. Effects on the Professional Ethics Standards of Financial Professionals*

The IRS Chief Counsel has acknowledged that the IRS's ability to use information provided by whistleblowers who have submitted information in violation of professional ethical obligations may be compromised.<sup>89</sup> While this applies with equal force in the context of the SEC bounty program, an agency's ability to use such information and to reward whistleblowers for providing it should be considered from the perspective of broader public policy objectives in addition to agency enforcement strategy.

Employees and outside financial consultants of securities issuers or of individuals or companies who are otherwise engaged in securities matters are most likely to become aware of securities law violations—and therefore to become whistleblowers—simply by virtue of their proximity to the financial information of their employers or clients. Many of these potential whistleblowers are likely to have professional certifications that carry with them professional ethics obligations. For example, certified public accountants, chartered financial analysts, and certified financial planners all have codes of professional ethics.<sup>90</sup> All professional financial consultants are required to maintain confidentiality in client information.<sup>91</sup> All must also act in the best interest of their clients rather than for personal gain.<sup>92</sup>

88. *Cf.* KOTZ, *supra* note 6, at 4 (stating that the low number of awards given under the old bounty program resulted in its lack of success).

89. *See* IRS CHIEF COUNSEL, *supra* note 61, at 4 (noting potential evidentiary questions that might result from information obtained in violation of ethical obligations).

90. CODE OF PROFESSIONAL CONDUCT OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS (2010), <http://www.aicpa.org/Research/Standards/CodeofConduct/DownloadableDocuments/2010June1CodeofProfessionalConduct.pdf> [hereinafter CPA CODE]; CHARTERED FINANCIAL ANALYST INSTITUTE CODE OF ETHICS AND STANDARDS OF PROFESSIONAL CONDUCT (2010), <http://www.cfapubs.org/doi/pdf/10.2469/ccb.v2010.n14.1> [hereinafter CFA CODE]; CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC. STANDARDS OF PROFESSIONAL CONDUCT (Certified Fin. Planner Bd. of Standards, Inc. 2009), <http://www.cfp.net/Downloads/2010Standards.pdf> [hereinafter CFP CODE].

91. *See* CPA CODE, *supra* note 90, at 129; CFA CODE, *supra* note 90, at 2; CFP CODE, *supra* note 90, at 6, 10.

92. *See* CPA CODE, *supra* note 90, at 15 (describing “due care” standard applicable to CPAs); CFA CODE, *supra* note 90, at 1 (describing duty of “loyalty, prudence, and care”

While client confidentiality requirements will yield to government initiated investigations and enforcement actions,<sup>93</sup> it is difficult to square the obligations to act in the best interest of the client or employer, or even the confidentiality requirements, imposed by these codes of ethics with the kind of self-interested tipping that § 922 encourages.<sup>94</sup> A § 922 tip is made for personal gain and exposes the client or employer to liability and public opprobrium. The potentially enormous financial rewards that can be reaped under § 922 may outweigh the disincentive to violate professional ethical obligations normally provided by the sanctions that professional standards bodies can impose, assuming such bodies would even impose sanctions when the violator has acted under the auspices of federal law.

Moreover, professional financial consultants like certified public accountants, chartered financial advisors, and certified financial planners may have ethical obligations to be knowledgeable of the laws and regulations applicable to their respective fields and to make sure that they serve their clients or employers within these legal bounds.<sup>95</sup> Allowing professionals charged with ensuring legal compliance—albeit to a lesser extent than attorneys—to profit from the noncompliance of their clients or employers would add an element of moral perversity to a program that

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standard applicable to CFAs); CFP CODE, *supra* note 90, at 6 (explaining that “integrity” requires “honesty and candor *which must not be subordinated to personal gain and advantage*” (emphasis added)).

93. *Cf.*, e.g., CPA CODE, *supra* note 90, at 129 (stating an exception to the confidentiality rule for “validly issued and enforceable subpoena or summons”).

94. Note, however, that there may be cases in which the external reporting of violations discovered through confidential professional engagements is in the best interest of a client or employer. For example, the SEC’s professional conduct standards for attorneys practicing before the Commission emphasize that although an attorney representing a securities issuer might work with the officers and directors of the issuer, these officers and directors do not thereby become the attorney’s client; the attorney’s professional and ethical duties remain with the issuer as an institution. *See* Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205.3(a) (2003). The client—as an institution—may be best served by the attorney externally reporting violations being perpetrated by the officers and directors, which will bring about an end to illegal activities that may be harmful to the institution. Although § 922 encourages external reporting per se, in many cases, external reporting will not be in the best interests of a financial professional’s clients, including institutional clients.

95. *See*, e.g., CFA CODE, *supra* note 90, at 1 (“Members and Candidates must understand and comply with all applicable laws, rules, and regulations (including the CFA Institute Code of Ethics and Standards of Professional Conduct) of any government, regulatory organization, licensing agency, or professional association governing their professional activities. In the event of conflict, Members and Candidates must comply with the more strict law, rule, or regulation. Members and Candidates must not knowingly participate or assist in and must dissociate from any violation of such laws, rules, or regulations.”).

intends to encourage greater compliance with the securities laws.<sup>96</sup> Section 922, by creating an incentive for financial professionals to provide tips to the SEC regarding violations by their clients or employers, may therefore undermine the principles of client confidentiality and action in the client's or employer's best interest that are embodied in the codes of ethics of these professions.

The ethical obligations of attorneys who become aware of ongoing illegal activities of their clients may provide a useful point of comparison, especially in considering what actions might be taken to mitigate § 922's potentially adverse effects on adherence to professional ethics standards.<sup>97</sup> Section 307 of Sarbanes–Oxley authorizes the SEC to issue rules of professional conduct for attorneys practicing before the Commission.<sup>98</sup> It specifies that the SEC rules must require attorneys to report evidence of material securities law violations to the chief executive officer or chief legal officer of the client company and then to the audit committee or full board of directors if the chief executive officer or chief legal officer does not take appropriate remedial action.<sup>99</sup> SEC rules have implemented this “reporting up” process set forth in Sarbanes–Oxley<sup>100</sup> and have also permitted attorneys to report confidential client information to the SEC if the attorney reasonably believes that doing so is necessary “[t]o prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors.”<sup>101</sup> Two proposed SEC rules that would have *required* such “reporting out” when the company failed to take appropriate corrective action in response

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96. Note, however, that at least in the case of an accountant performing an audit, a bounty under § 922 may not be available. *See supra* notes 24–30 and accompanying text (discussing disqualification of auditors from the SEC bounty program and the procedure that must be followed when auditors detect illegal activities).

97. *See infra* Part III (discussing proposed solutions to the unintended consequences of § 922).

98. *See* Sarbanes–Oxley Act of 2002 § 307, 15 U.S.C. § 7245 (2006); Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205 (2003) (codifying the professional standards of conduct issued by the SEC).

99. *See* 15 U.S.C. § 7245.

100. *See* 17 C.F.R. § 205.3(b) (outlining the “duty to report evidence of a material violation”).

101. *Id.* § 205.3(d)(2)(i); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2010) (permitting attorneys to reveal confidential client information “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services”); *id.* R. 1.13 (permitting attorneys to reveal the confidential information of corporate clients only after first reporting the matter to higher authorities in the organization).

to the attorney's internal report were never adopted.<sup>102</sup> Finally, attorneys who disclose violations to the SEC pursuant to Sarbanes–Oxley § 307 are also covered by Sarbanes–Oxley's antiretaliation protections.<sup>103</sup>

### III. MITIGATING THE POTENTIALLY ADVERSE EFFECTS OF THE BOUNTY PROGRAM ON CORPORATE COMPLIANCE PROGRAMS AND PROFESSIONAL ETHICS OBLIGATIONS

The SEC's whistleblower bounty program is, in a general sense, an appropriate response to recent developments in the accounting and financial sectors.<sup>104</sup> Generating a greater number of tips to the SEC by promising whistleblower awards is one way of achieving greater compliance with the federal securities laws. However, this new method should not—and need not—come at the expense of other means of achieving that goal. Part II explored the ways in which § 922 may compromise two existing structures that play an important role in securities law compliance: corporate compliance programs and the professional ethical standards of financial professionals. This Part suggests ways in which the tension between § 922 and these existing structures can be reduced and assesses the extent to which the SEC's proposed rules for implementing the bounty program achieve this goal.

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102. See Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670 (proposed Dec. 2, 2002); Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6324 (proposed Feb. 6, 2003). See generally Harva R. Dockery, *The Attorney–Client Privilege and the Sarbanes–Oxley Act of 2002*, in THE ATTORNEY–CLIENT PRIVILEGE IN CIVIL LITIGATION: PROTECTING AND DEFENDING CONFIDENTIALITY 193–210 (Vincent S. Walkowiak ed., 2008) (discussing the SEC's proposed and final reporting up and reporting out rules and their impact upon attorney–client privilege); Jenny E. Cieplak & Michael K. Hibey, Current Development, *The Sarbanes–Oxley Regulations and Model Rule 1.13: Redundant or Complementary?*, 17 GEO. J. LEGAL ETHICS 715, 715–16 (2004) (comparing the SEC's proposed and final reporting up and reporting out rules to Rule 1.13 of the ABA's *Model Rules of Professional Conduct*).

103. See STEPHEN M. KOHN, MICHAEL D. KOHN & DAVID K. COLAPINTO, WHISTLEBLOWER LAW: A GUIDE TO LEGAL PROTECTIONS FOR CORPORATE EMPLOYEES 133–34 (2004) (stating that Sarbanes–Oxley's whistleblower protections cover both in-house and outside counsel who disclose violations pursuant to § 307 from retaliation because Sarbanes–Oxley extends whistleblower protections not just to employees of public companies but also to the contractors and agents of such companies).

104. See *supra* notes 10–12 and accompanying text (citing the accounting fraud scandals, the financial crisis, and the Madoff ponzi scheme).

### A. Measures Regarding Corporate Compliance Programs

Stated simply, § 922 threatens to undermine internal corporate compliance programs because it provides whistleblowers with a competing—and now more financially attractive—recipient of their information, namely the SEC. Some have suggested that whistleblowers should not be eligible for the award until they have first reported the violation internally.<sup>105</sup> While this proposal is an useful starting point, it is something of a blunt instrument, at least in its unqualified form. Most importantly, it is insensitive to the most basic of whistleblower concerns: employer retaliation.<sup>106</sup> This concern is most pronounced when a well-functioning corporate compliance system, which would provide whistleblowers with anonymity, confidentiality, and a direct route to an appropriate “corporate monitor,” such as a chief legal officer or an audit committee, is absent.<sup>107</sup> Requiring internal disclosure, in all cases, as a prerequisite to § 922 eligibility might therefore encourage employees to become whistleblowers only to expose them to retaliation.

A simple solution to this problem would be to require internal disclosure as a prerequisite to § 922 eligibility only when an effective corporate compliance program, including a confidential or anonymous internal

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105. Lum, *supra* note 13 (“At a minimum, the Whistleblower Award should not be made available to individuals who fail to report illegal activities first to their employer, so that the appropriate action can be taken by the company.”).

106. Cf. 18 U.S.C. § 1514A (2006) (providing that no publicly traded company shall “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against” a whistleblower); Dodd–Frank § 922, 124 Stat. 1376, 1845 (2010) (Exchange Act § 21F(h)(1)(A)) (prohibiting the same forms of retaliation when used against § 922 whistleblowers); *Private Sector Whistleblowers: Are There Sufficient Legal Protections?: Hearing Before the Subcomm. on Workforce Prots. of the H. Comm. on Educ. & Labor*, 110th Cong. 32, 34–39 (2007) (statement of Richard E. Moberly, Assistant Professor of Law, Cline Williams Research Chair, University of Nebraska College of Law) (stating that one of the principal rationales of whistleblower laws is the “fairness” of protecting whistleblowers from the retaliation that they might incur by disclosing corporate misconduct).

107. Cf. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(5)(C) (2010) (providing that one of the minimal requirements of an effective corporate compliance program is a publicized system for a company’s employees or agents to report potential criminal conduct without fear of retaliation, possibly allowing the informant to report the information confidentially or anonymously); WILD, *supra* note 64, § 3:34 (stating that many large corporations have implemented anonymous whistleblower hotlines or post office boxes); Richard E. Moberly, *Sarbanes–Oxley’s Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1131–32 (endorsing a “Structural Model” of whistleblowing where employee complaints are channeled internally to those who are in a position to take action, like independent directors on an audit committee, rather than corporate managers or executives, who may be more likely to cover up or block the upward flow of whistleblower information).

system for reporting violations to proper personnel, is in place at the entity where the violations are occurring.<sup>108</sup> While this would be preferable to a blanket prohibition on receiving a bounty in the absence of internal reporting, it would add a layer of complexity—and one arguably not envisioned by Dodd–Frank<sup>109</sup>—to the administration of the bounty program. Whenever a whistleblower tips the SEC without first reporting the violation internally, the SEC would have to assess whether the whistleblower should have reported internally first based on the effectiveness of the compliance program in place at the company. Requiring the SEC to make this nuanced assessment as a threshold question of bounty eligibility would undermine the goal of a simple, user-friendly bounty program.<sup>110</sup> Moreover, the detrimental effects of bypassing

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108. One of the central debates unfolding in the public comments submitted after the SEC's release of the proposed rules concerns whether to require prior (or contemporaneous) internal reporting as a prerequisite to § 922 eligibility. *Compare* Comments of the National Whistleblowers Center, Comments on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (Dec. 18, 2010), <http://www.sec.gov/comments/s7-33-10/s73310-212.pdf> (submitting a study of qui tam cases filed pursuant to the False Claims Act showing that “approximately 90% of all employees who would eventually file a qui tam lawsuit initially attempted to resolve their disputes internally,” and arguing that § 922 will not undermine internal compliance programs, and concluding that an internal reporting requirement is not justified), *with* Comments of Jeffrey W. Rubin, Chair, Committee on Federal Regulation of Securities, Section of Business Law, American Bar Association, Comments on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (Jan. 4, 2011), <http://www.sec.gov/comments/s7-33-10/s73310-253.pdf> (proposing that the SEC's rules should require the whistleblower to exhaust internal reporting mechanisms before qualifying for an award), *and* Comments of the Center For Capital Markets Competitiveness of the United States Chamber of Commerce, Comments on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (Feb. 15, 2011), <http://www.sec.gov/comments/s7-33-10/s73310-145.pdf> (questioning the significance and methodology of the National Whistleblower's Center qui tam study).

109. *See* Dodd–Frank § 922, 124 Stat. at 1843 (Exchange Act § 21F(c)(2)) (listing several categories of individuals who are ineligible for the whistleblower award but not explicitly referencing an individual's failure to report the violation internally).

110. *See* Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70,488 (Nov. 17, 2010) (to be codified at 17 C.F.R. pts. 240, 249) (stating that the program rules should be “clearly defined and user-friendly”). But perhaps compliance with Sarbanes–Oxley § 404 or with the Federal Sentencing Guidelines' definition of “effective compliance and ethics program” could be used to create a presumption in favor of the existence of an effective compliance program, which might streamline such an SEC assessment. *Cf.* Sarbanes–Oxley Act of 2002 § 404, 15 U.S.C. § 7262(a) (2006) (requiring corporate managers to state responsibility for and assess the company's internal controls in annual reports); U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2010) (defining an “effective compliance and ethics program”).

effective compliance programs will be lessened to the extent that the SEC itself makes the suspected violations known to compliance personnel at the company.<sup>111</sup>

A more effective way to harmonize internal compliance programs with the bounty program would be to allow the SEC to adjust the whistleblower's award, within the 10%–30% bounds, based on whether or not the whistleblower took advantage of an effective corporate compliance program.<sup>112</sup> In one sense, half of this proposal might seem to run counter to the strong appeal to the whistleblower's financial self-interest that lies at the heart of the bounty program.<sup>113</sup> *Reducing* the amount of the whistleblower's award for pursuing the very self-interested course of action the bounty program is designed to encourage—i.e., reporting violations to the SEC for a monetary award rather than internally (or not at all) for nothing—might seem inappropriate. However, § 922 grants the SEC broad authority to determine the amount of the award, and specifically

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111. See Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. at 70,496 (“We expect that in appropriate cases, consistent with the public interest and our obligation to preserve the confidentiality of a whistleblower, our staff will, upon receiving a whistleblower complaint, contact a company, describe the nature of the allegations, and give the company an opportunity to investigate the matter and report back.”).

112. See Comments of Baker, Donelson, Bearman, Caldwell & Berkowitz, Whistleblower Award Program: Title IX Provisions of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Oct. 12, 2010), <http://www.sec.gov/comments/df-title-ix/whistleblower/whistleblower-19.pdf> (urging the SEC to adopt a rule whereby a factor in determining the level of the whistleblower's award would be whether the whistleblower had access to internal whistleblower procedures and if so whether the whistleblower made a reasonable effort to pursue those procedures); George J. Terwilliger III, *The New and Expanded SEC Whistleblower Bounty Program*, METROPOLITAN CORP. COUNS., Oct. 2010, at 5, 19 (recommending an SEC rule that would encourage employee use of internal reporting systems by adjusting the whistleblower award depending upon whether employee used an internal reporting system contemporaneously with the SEC system, unless internal reporting system is absent or “the employee demonstrates that extraordinary circumstances preclude the use of contemporaneous internal reporting”).

113. See S. REP. NO. 111-176, at 110 (2010) (stating that the aim of the whistleblower program is to “motivate” persons knowledgeable of wrongdoing to come forward and assist in government prosecutions). But see Baker, Donelson, Bearman, Caldwell & Berkowitz, *supra* note 112, at 3 (“[A]n important policy underlying the creation of Section 21F in the Dodd–Frank Act is to provide a way for individuals to report securities law violations when they either (i) have no other means to report and stop those violations, or (ii) have exhausted all available means.”). Whatever the merits of this claim taken as a normative statement about when employees *should* report out, there is little evidence to support it as a descriptive claim about the policy underpinnings of § 922. Section 922 provides a strong financial incentive for employees to report information to the SEC in the hope that this will alert the SEC to more illegal financial activities; nothing in the structure or legislative history of the program suggests that Congress intended the program to be a last resort for whistleblowers.

empowers the SEC with rulemaking authority to enumerate additional factors to be considered in determining that amount.<sup>114</sup> Adjusting the award in either direction based upon the extent of a whistleblower's efforts to utilize an effective internal compliance program is therefore an appropriate elaboration of Dodd–Frank, and one that draws upon § 922's appeal to a whistleblower's financial self-interest in encouraging the use of internal compliance programs.

Moreover, this solution should reduce the extent to which reporting internally and externally constitute competing options. An SEC rule clarifying that voicing one's concern internally—either through a formalized compliance system or otherwise—before or after reporting the violation to the SEC will not be a basis for denying an award based on § 922's original information requirement<sup>115</sup> or for any other reason might accomplish that end. This would encourage whistleblowers to use internal compliance programs, preserving the information flows critical to the success of these programs in detecting and preventing securities law violations,<sup>116</sup> while at the same time assuring that the distribution of awards important to the success of the bounty program will occur.<sup>117</sup>

In conjunction with these changes, concerns about employees waiting to report the violation to gain a larger award<sup>118</sup> could be addressed through an SEC rule that a whistleblower award could be reduced or even denied if there is evidence of such whistleblower conniving.<sup>119</sup> A similar solution could be applied to address the concerns regarding employees not cooperating with internal investigations to prevent reduced penalties against the violator from being assessed under the SEC's Seaboard Report

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114. See Dodd–Frank § 922, 124 Stat. at 1844 (Exchange Act § 21F(f)) (limiting whistleblower's ability to appeal the amount of the award); *id.* (Exchange Act § 21F(c)(1)(B)(i)(IV)) (permitting the SEC to promulgate rules on additional factors to be considered in determining the amount of the award).

115. See *id.* (Exchange Act § 21F(a)(3)); *supra* notes 78–82 and accompanying text (discussing problems relating to the original information requirement).

116. Cf. *In re Caremark Int'l Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996) (emphasizing the importance of information reaching corporate directors to their monitoring role); Moberly, *supra* note 107, at 1113–25 (emphasizing the proximity of “rank-and-file” employees to information about violations and the importance of these employees in bringing violations to higher level “corporate monitors” such as directors of the corporation).

117. See S. REP. NO. 111-176, at 112 (“The Committee intends for this program to be used actively with ample rewards to promote the integrity of the financial markets.”).

118. See *supra* notes 81–82 and accompanying text.

119. See *supra* note 49 and accompanying text (discussing the ability of the IRS under analogous bounty program to reduce an award below 15% floor or to deny an award under certain circumstances).



or Enforcement Cooperation Initiative.<sup>120</sup>

Admirably, the SEC's proposed rules for implementing the bounty program address § 922's potential to undermine corporate compliance programs, and do so without imposing a general report-internally-first requirement.<sup>121</sup> The proposed rules acknowledge that corporate compliance programs are important in achieving conformity with the securities laws and that the whistleblower program should not create unnecessary tension with corporate compliance programs.<sup>122</sup> Since effective compliance programs that assure whistleblower confidentiality are not in place at every company, however, the SEC does not *require* internal reporting.<sup>123</sup> Rather, the proposed rules interpret the term "original information" in § 922 such that reporting a violation internally before

120. See *supra* notes 83–85 and accompanying text.

121. See Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70,488, 70,520–21 (Nov. 17, 2010) (to be codified at 17 C.F.R. § 240.21F–4(b)(4)(iv)–(v)) (excluding persons who acquire knowledge of a securities law violation through a company's legal, compliance, audit, or similar functions, from the bounty program unless the company does not report the violation to the SEC in a reasonable time or acts in bad faith); *id.* at 70,521 (to be codified at 17 C.F.R. § 240.21F–4(b)(7)) (interpreting § 922 such that whistleblowers who report violations through internal compliance programs preserve their original source status); *id.* at 70,494 (stating that the SEC will consider a whistleblower's role in delaying reporting of a violation to the SEC in determining whether to grant an award); *id.* at 70,500 (citing a whistleblower's recourse to internal compliance program as factor in upward adjustment of the whistleblower award).

122. See *id.* at 70,493–96 ("Compliance with the Federal securities laws is promoted when companies implement effective legal, audit, compliance, and similar functions. . . . Internal compliance and similar functions, when effective, can constrain the opportunities for unlawful activity. . . . [Proposed Rule 21F–4(b)(iv)–(v)] is intended to strike a balance between two competing goals. On the one hand, it is designed to facilitate the operation of effective internal compliance programs by not creating incentives for company personnel to seek a personal financial benefit by 'front running' internal investigations and similar processes that are important components of effective company compliance programs. On the other hand, it would permit such persons to act as whistleblowers in circumstances where the company knows about material misconduct but has not taken appropriate steps to respond. . . . [The objective of Proposed Rule 21F–4(b)(7)] is to support, not undermine, the effective functioning of company compliance and related systems by allowing employees to take their concerns about potential violations to appropriate company officials first while still preserving their rights under the Commission's whistleblower program.").

123. See *id.* at 70,496 ("Given the policy interest in fostering robust corporate compliance programs, we considered the possible approach of requiring potential whistleblowers to utilize in-house complaint and reporting procedures, thereby giving employers an opportunity to address misconduct, before they make a whistleblower submission to the Commission. Among our concerns was the fact that, while many employers have compliance processes that are well-documented, thorough, and robust, and offer whistleblowers appropriate assurances of confidentiality, others lack such established procedures and protections.").

reporting to the SEC poses a lower risk of the whistleblower's bounty being compromised as a result of § 922's original information requirement.<sup>124</sup> Specifically, the proposed rules provide that if a whistleblower reports information concerning a violation through an internal compliance program and then submits the same information to the SEC within ninety days, the SEC will consider the date of the whistleblower's report to the SEC to be the same as the whistleblower's internal disclosure.<sup>125</sup>

While this general approach is sound, the SEC's final rules should clarify that *informal* internal reports or discussions of potential securities law violations are covered by this interpretation. As currently written, the proposed rules *suggest* that bounty eligibility will be preserved only for whistleblowers who provide information to compliance, legal, or audit personnel prior to reporting to the SEC.<sup>126</sup> As the proposed rules acknowledge, however, not all companies have internal compliance programs.<sup>127</sup> Moreover, even at companies with effective compliance programs, an employee who becomes aware of a potential violation, especially when uncertainty exists as to whether the activity is illegal or otherwise wrongful, may consult co-workers other than designated compliance, legal, or audit personnel regarding the potential violation. A culture of employee willingness to communicate problems internally, which would nurture effective *formal* compliance programs, would be fostered by

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124. *See id.* at 70,520–21 (to be codified at 17 C.F.R. § 240.21F–4(b)(7)).

125. *Id.*

126. The proposed rules “suggest” (rather than “provide”) this because § 240.21F–4(b)(7)'s effective submission date provision refers to whistleblower submissions to “persons described in paragraphs (b)(4)(iv) and (v) of this section,” who are persons “with legal, compliance, audit, supervisory, or governance responsibilities for an entity.” *Id.* at 70,520–21. Ultimately, however, a whistleblower will be eligible for a bounty as long as he or she is the original source of the information about the violation. *See* Dodd–Frank § 922, 124 Stat. 1376, 1842 (2010) (Exchange Act § 21F(a)(3)(B)). The SEC will consider a whistleblower to be the “original source” of the information, even if another person reports the information to the SEC first, if that person obtained the information from the whistleblower. *See* Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. at 70,521 (to be codified at 17 C.F.R. § 240.21F–4(b)(5)). While this interpretation of original source might technically solve the problem of putting one's bounty at risk through informal internal discussion, Proposed Rule § 240.21F–4(b)(7), which effectively solves the same problem in the case of information submitted through formal internal compliance programs, should be extended to cover informal internal discussion as well in the interest of greater clarity. *See id.* at 70,488 (stating that the proposed rules, in accordance with Congress's intent, attempt to make the “whistleblower rules . . . clearly defined and user-friendly”).

127. *See id.* at 70,496 (stating that “while many employers have compliance processes that are well-documented, thorough, and robust, and offer whistleblowers appropriate assurances of confidentiality, others lack such established procedures and protections”).

*explicitly* extending the effective date of submission policy to whistleblowers who informally voice concerns internally, whether or not a formal compliance program is in place.

The SEC's proposed rules also address, albeit indirectly, concerns about manipulative whistleblower delay.<sup>128</sup> According to the description of the proposed rules, an SEC determination that a whistleblower played a role in causing the company to delay disclosure of a violation may be grounds for *denying* the whistleblower an award.<sup>129</sup> Denial of an award for manipulative whistleblower delay is the correct policy outcome. However, while Congress granted broad authority to the SEC to enact rules to implement § 922,<sup>130</sup> and while the SEC's final rules on the bounty program will likely be reviewed under *Chevron* deference in any future litigation,<sup>131</sup> the SEC should consider how best to effectuate this policy outcome within its authority in light of Dodd–Frank's explicit requirement of *mandatory* whistleblower awards.<sup>132</sup> Further, to the extent that the SEC desires an award-denial-for whistleblower-delay provision in its final rules, the SEC should consider whether a statement in its description of the proposed rules, rather than in the text of the proposed rules themselves, provides sufficient notice to all stakeholders.<sup>133</sup> Lastly, this award-denial policy should be

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128. See *id.* at 70,494 (“[I]f we determine that the whistleblower played a role in causing the company not to disclose the violations, or to *delay in disclosing them*, we will take this fact into consideration in our determination of whether to consider the whistleblower eligible for an award.” (emphasis added)); *id.* at 70,500 (listing timeliness of a whistleblower's complaint as a factor in determining the amount of whistleblower award).

129. See *id.* at 70,494 (“If we determine that the whistleblower played a role in causing the company not to disclose the violations, or to delay in disclosing them, we will take this fact into consideration *in our determination of whether to consider the whistleblower eligible for an award*.” (emphasis added)).

130. See Dodd–Frank § 922, 124 Stat. at 1847–49 (Exchange Act § 21F(j)) (“The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.”).

131. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984) (articulating a deferential standard of review for an agency's interpretations of the statute it administers).

132. See *id.* at 843 n.9 (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”). Given Congress's clear intent to make whistleblower payments mandatory, see *supra* note 57 and accompanying text, the SEC's assertion that it can deny a whistleblower award based on whistleblower delay is not certain to receive *Chevron*'s lenient permissibility review. See *Chevron*, 467 U.S. at 842–43.

133. See, e.g., *Chocolate Mfrs. Ass'n of the U.S. v. Block*, 755 F.2d 1098, 1104–05 (4th Cir. 1985) (maintaining that proposed rules must put interested parties on notice of what may be in final rules and that final rules must be a “logical outgrowth” of proposed rules and comments).

extended to whistleblowers who intentionally interfere with internal investigations in order to prevent lower penalties from being imposed under the SEC's Seaboard Report, Enforcement Cooperation Initiative, or similar federal policies.<sup>134</sup>

The proposed rules also provide additional incentives for internal reporting that will promote well-functioning compliance programs.<sup>135</sup> The description of the proposed rules sets forth an upward award adjustment policy for whistleblowers who choose to report violations through an internal compliance program.<sup>136</sup> This is a step in the right direction, and is effectuated without issue through the SEC's discretionary authority to determine the amount of whistleblower awards.<sup>137</sup> However, a rule that would also *reduce* a whistleblower's award for failing to utilize an effective compliance program would create a stronger incentive for internal reporting and would thus go further in harmonizing § 922 with the existing compliance framework.

#### *B. Measures Regarding Professional Ethics Obligations*

A more exacting set of whistleblower procedures may be appropriate in the case of employee or financial consultant whistleblowers who hold certifications that impose professional ethics obligations to act in the client's best interest and maintain client confidentiality. Section 922 already excludes auditors who contravene the reporting procedures set out in federal law—which requires auditors to report violations internally before turning to the SEC—from participating in the bounty program.<sup>138</sup> Moreover, the SEC's standards of professional conduct for attorneys practicing before the Commission set out what is effectively a requirement that attorneys report violations internally before reporting them to the

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134. *See supra* notes 71–73 and accompanying text.

135. *See* Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70,488, 70,500 (Nov. 17, 2010) (listing a whistleblower's internal reporting of violations as a factor for upward adjustment of award and stating, "Corporate compliance programs play a role in preventing and detecting securities violations that could harm investors. If these programs are not utilized or working, our system of securities regulation will be less effective. Accordingly, the Commission believes that encouraging whistleblowers to report securities violations to their corporate compliance programs is consistent with the Commission's investor protection mission").

136. *Id.*

137. *See* Dodd–Frank § 922, 124 Stat. 1367, 1842 (2010) (Exchange Act § 21F(c)(1)(A)) (stating that the "determination of the amount of an award . . . shall be in the discretion of the Commission").

138. *See supra* notes 21–30 and accompanying text (discussing the disqualification of auditors from the SEC bounty program and the procedure that auditors must follow when they detect illegal activities).

SEC.<sup>139</sup> The professional duties of acting in the client's best interest and maintaining client confidentiality,<sup>140</sup> as well as the special role certified financial professionals play,<sup>141</sup> may justify extending procedures similar to those that apply to auditors and attorneys to certified financial professionals. This could be accomplished through an SEC rule requiring certified financial professionals to take recourse to an internal system for reporting wrongdoing before becoming eligible for the bounty program<sup>142</sup>—if an effective system exists and the whistleblower has not shown “extraordinary circumstances,” such as a well-founded fear of retaliation or cover-up.<sup>143</sup>

One possible downside of imposing such a report-up-first requirement on financial professionals is that it might deprive the SEC of many would-be § 922 tipsters, since financial professionals are likely to encounter securities law violations in the course of their professional activities. The ultimate policy objective of the whistleblower bounty program, however, is not merely to generate more SEC tips—it is to achieve greater compliance with the federal securities laws. Requiring internal action of those with the skills and knowledge not only to *detect* but also to *correct* potential securities law violations<sup>144</sup> before they become significant enough to harm investors

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139. See *supra* notes 95–98 and accompanying text (discussing Sarbanes–Oxley § 307 and the rules for attorneys practicing before the SEC that Sarbanes–Oxley authorizes the SEC to institute).

140. See *supra* Part II.B (discussing the ethical obligations of financial professionals).

141. Cf. CPA CODE, *supra* note 90, at 1691 (“[C]ertified public accountants perform an essential role in society.”); CFP CODE, *supra* note 91, at 6 (recognizing the responsibilities of certified financial planners to the public).

142. Following Proposed Rule 21F-4(b)(4)(iv)–(v), a report-up-first rule for financial professionals could be implemented through an SEC interpretation of Dodd–Frank’s “independent knowledge or analysis” language that would exclude information obtained by financial professionals *through work for clients or employers in which the financial professional’s professional ethics obligations apply*, unless that information is first reported through the violator’s internal compliance program (if one exists). See *infra* note 146 and accompanying text. Of course, there is no reason to exclude financial professionals from the bounty program when professional ethics, client openness, and trust issues are not implicated, which explains the italicized qualification. *Id.*

143. Cf. Terwilliger, *supra* note 112, at 19 (recommending that an award be adjusted depending upon whether employee used internal reporting system contemporaneously with tip to SEC unless internal reporting system is absent or “the employee demonstrates that extraordinary circumstances preclude the use of contemporaneous internal reporting”). Note, however, that Terwilliger is not restricting this solution to financial professionals with professional ethical obligations toward their employers or clients.

144. Cf. Moberly, *supra* note 107, at 1116–17 (“[C]orporate accounting and finance employees, who are trained in the proper methods of conducting business, should recognize when corporate actions fall outside legal boundaries.”); Markopolis Testimony, *supra* note 45, at 67–68 (arguing that experienced financial professionals should conduct SEC

or shareholders is in keeping with the goal of achieving compliance with the federal securities laws and the mission of the SEC.<sup>145</sup>

Moreover, a report-up-first requirement will reassure the clients and employers of financial professionals that those on whom they rely for financial advice are not operating within an incentive structure that would encourage them to alert the regulators at the first sign of any irregularity. This will preserve trusting relationships in which the clients and employers of financial professionals remain willing to share financial information, enabling financial professionals to steer their clients and employers toward compliance with the securities laws. At the very least, however, the SEC should make it clear that violating professional ethics obligations in bringing a § 922 tip will result in a downward adjustment in the amount of the award.<sup>146</sup>

The SEC's proposed rules do partially address § 922's potential to undermine the professional ethics obligations of financial professionals and the willingness of their employers or clients to share financial information. The proposed rules exclude people with "legal, compliance, audit, supervisory, or governance responsibilities for an entity" or people who obtain information about the violation "from or through an entity's legal, compliance, audit or other similar functions or processes for identifying, reporting and addressing potential non-compliance with law . . . ."<sup>147</sup> Even these potential whistleblowers will be eligible for a bounty, however, if the entity does not report the violation to the SEC in a reasonable time or acts in bad faith.<sup>148</sup> Tips based on information obtained through engagements by independent public accountants that are required under the securities laws are also excluded from the bounty program under the proposed rules.<sup>149</sup> While this policy is a step in the right direction, it does not go far enough. Whistleblower reports to formal compliance personnel or in connection with accounting engagements required by the securities laws

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investigations because their industry knowledge would better equip them to detect violations).

145. See *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SEC. & EXCH. COMM., <http://www.sec.gov/about/whatwedo.shtml> (last modified Feb. 28, 2011).

146. See Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. 70,488, 70,500 (enumerating factors that will be considered in the SEC's determination of amount of whistleblower award but failing to consider professional ethics violations).

147. *Id.* at 70,520–21 (to be codified at 17 C.F.R. § 240.21F–4(b)(4)(iv)–(v)) (interpreting Dodd–Frank's requirement that bounties be paid to whistleblowers who bring information based on independent knowledge or analysis as excluding these categories of whistleblowers).

148. *Id.*

149. See *id.* at 70,520 (to be codified at 17 C.F.R. § 240.21F–4(b)(4)(iii)).

constitute only a small subset of all interactions between certified financial professionals (acting in their professional capacities) and their clients or employers.<sup>150</sup> In all other contexts, financial professionals who encounter securities law violations in the course of professional engagements will still qualify for a § 922 award. The bounty program, as it would be implemented under the proposed rules, might therefore compromise compliance with professional ethics standards and risk eroding open and trusting relationships between financial professionals and their employers or clients. Requiring certified financial professionals who discover violations in the course of professional activities to report those violations internally before reporting to the SEC would more effectively address these problems. The SEC's final rules should incorporate such a requirement.<sup>151</sup>

### CONCLUSION

A strong whistleblower bounty program will help the SEC enforce the nation's securities laws at a time when enforcement is sorely needed. As it is currently written, however, § 922 may undermine internal corporate compliance programs and the professional ethical standards of financial professionals—other tools that work, directly or indirectly, toward achieving conformity with the securities laws. The recommendations set forth in Part III, which attempt to refine the SEC's proposed rules for implementing the bounty program, will help harmonize these existing tools with § 922. Bounty hunting has a role to play in securities enforcement and regulation, but the SEC—and Congress, if necessary—should work toward making bounty hunting less disruptive to the larger framework of laws, policies, and norms of which it is part.

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150. *Cf.* Comment of PricewaterhouseCoopers LLP, Whistleblower Award Program (Dec. 22, 2010) (stating that the exclusion of independent public accountants from the bounty program “should extend to all reports by employees of accounting firms with respect to information obtained through performing services of any nature for an audit client. The exclusion should not be limited to information obtained through the engagement required by the securities laws itself”).

151. *See supra* note 136. Such a requirement in the final rules would likely be a “logical outgrowth” of Proposed Rule 21F-4(b)(4), especially in light of the statement that Proposed Rule 21F-4(b)(4) “focuses on those groups with established professional obligations that play a critical role in achieving compliance with the Federal securities laws.” *See* Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 75 Fed. Reg. at 70,488. *See generally* *Chocolate Mfrs. Ass'n of U.S. v Block*, 755 F.2d 1098, 1104–05 (4th Cir. 1985) (discussing the “logical outgrowth” standard).

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# RECENT DEVELOPMENTS

## THE PETITION IS MIGHTIER THAN THE SWORD: REDISCOVERING AN OLD WEAPON IN THE BATTLES OVER “REGULATION THROUGH GUIDANCE”

SEAN CROSTON\*

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The right of petition is an old undoubted household right of the blood of England, which runs in our veins. When we fled from the oppressions of Kings and Parliaments in Europe, to found this great republic in America, we brought with us the laws and the liberties which formed a part of our heritage . . . . [W]e brought with us the right of petition, as the necessary incident of such institutions. . . . Go back . . . and, so far as you find a Government to exist, you find the right to petition that Government existing also . . . .<sup>1</sup>

### I. WHAT'S GREAT ABOUT GUIDANCE?

Federal agencies love to publish guidance documents—those official “statement[s] of general applicability and future effect, other than [regulations]” that set forth “a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue.”<sup>2</sup> They “come in a variety of formats and names, including interpretive memoranda, policy statements, guidances, manuals, circulars, memoranda, bulletins, advisories, and the like,” and some agencies may even offer guidance “in new and innovative formats, such as video or audio tapes, or interactive web-based software.”<sup>3</sup>

Scholars have repeatedly indicated that guidance documents “greatly outnumber legislative rules”<sup>4</sup> and are issued “in a volume dwarfing the [underlying] regulations.”<sup>5</sup> Things were not always this way. Agencies formerly announced most positions through notice-and-comment rulemaking or adjudication, and have only more recently begun to rely on guidance documents.<sup>6</sup>

But agencies have some good reasons to issue large amounts of guidance. First, of course, many agency stakeholders “earnestly” seek it,<sup>7</sup> for meaningful guidance “helps regulated entities comply with complicated regulations” and is essentially equivalent to free legal advice for parties

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1. 12 REG. DEB. 2327–28 (1836) (remarks of Rep. Caleb Cushing).

2. Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3434 (Jan. 25, 2007) (defining “guidance document” by borrowing terminology from the Administrative Procedure Act’s (APA’s) definition of “rule” at 5 U.S.C. § 551(4) (2006)).

3. *Id.*

4. Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 785 (2010).

5. Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 805 (2001).

6. See M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1411 (2004) (citing Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 168 (2000)).

7. See Strauss, *supra* note 5, at 806.

confronted with complex legal requirements.<sup>8</sup> This potentially reduces an agency’s burden of replying to repeated stakeholder requests for individual interpretations of particular regulations. As the D.C. Circuit long ago recognized, “businessmen engaged in forward planning may rightly call for” agency guidance in order “to permit optimum allocation of resources in the light of careful assessments of the alternatives.”<sup>9</sup>

Generalized agency interpretations and policies announced in guidance also support agency staff as they attempt to apply and enforce the law.<sup>10</sup> This “contribute[s] to the discipline of staff action, its predictability and regularity,”<sup>11</sup> and “[a]gency administration is aided when central officials can advise responsible bureaucrats”<sup>12</sup> by supplying official agency positions on complicated regulatory issues.

In addition, average “[c]itizens are better off if they can know about these instructions and rely on agency positions.”<sup>13</sup> As Judge Richard Posner wrote for the Seventh Circuit, “Every governmental agency that enforces a less than crystalline statute must interpret the statute, and it does the public a favor if it announces the interpretation in advance of enforcement.”<sup>14</sup>

Moreover, the Administrative Procedure Act (APA), which governs federal agencies’ rulemaking procedures, exempts most guidance documents from the notice-and-comment process required for most regulations.<sup>15</sup> Agencies can therefore “issue guidance more quickly than legislative rules, reducing the time that regulated parties are uncertain about their legal obligations.”<sup>16</sup> Thus, “appropriate use of guidance documents allows agencies to avoid devoting scarce time and resources to

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8. Raso, *supra* note 4, at 822.

9. Nat’l Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 699 (D.C. Cir. 1971).

10. Strauss, *supra* note 5, at 804.

11. *Id.* at 806.

12. *Id.* at 808.

13. *Id.*

14. Hocht v. USDA, 82 F.3d 165, 167 (7th Cir. 1996).

15. See 5 U.S.C. § 553(b)(A) (2006) (exempting “interpretative rules” and “general statements of policy” from notice-and-comment requirements unless “notice or hearing is required by statute”). See also U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947) [hereinafter ATTORNEY GENERAL’S MANUAL] (defining “interpretative rules” as “rules or statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers” and “general statements of policy” as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power”). The APA exemption, therefore, covers most guidance.

16. Raso, *supra* note 4, at 822.

unnecessary rulemaking” and clarification.<sup>17</sup> Or, as summarized by the Office of Management and Budget (OMB), guidance, “used properly, can channel the discretion of agency employees, increase efficiency, and enhance fairness by providing the public clear notice of the line between permissible and impermissible conduct while ensuring equal treatment of similarly situated parties.”<sup>18</sup>

Federal agencies therefore have good reasons for loving to issue guidance.

## II. WHAT’S WRONG WITH REGULATING THROUGH GUIDANCE?

On the other hand, although it is sometimes helpful to agencies’ stakeholders, they do not always appreciate this flood of new guidance. While empirical studies “suggest that agencies do not engage in widespread abuse of guidance,”<sup>19</sup> the Executive and Judicial Branches, scholars, and stakeholders have not always agreed.

As far back as 1992, the Administrative Conference of the United States (ACUS)—a small independent agency tasked with studying and helping improve the operation of federal agencies<sup>20</sup>—first declared that it was “concerned . . . about situations where agencies issue policy statements which they treat or which are reasonably regarded by the public as binding and dispositive of the issues they address.”<sup>21</sup> This type of guidance document, which “cannot be binding *legally*, may nevertheless be binding *as a practical matter* if the agency treats it as dispositive of the issue it addresses.”<sup>22</sup>

Fifteen years later, when OMB issued its *Agency Good Guidance Practices*, it noted that “guidance documents also may be poorly designed or improperly implemented,” and “[b]ecause it is procedurally easier to issue guidance documents, there also may be an incentive for regulators to issue guidance documents in lieu of regulations.”<sup>23</sup>

The courts have not shied away from these issues. One D.C. Circuit opinion in particular described how agencies interpreted a “broadly worded statute” by issuing “regulations containing broad language, open-ended

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17. *Id.*

18. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3432 (Jan. 25, 2007).

19. Raso, *supra* note 4, at 823.

20. See *The Conference*, ADMIN. CONF. OF THE U.S., <http://www.acus.gov/about/the-conference> (last visited May 17, 2011).

21. Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure, 57 Fed. Reg. 30,101, 30,103 (proposed July 8, 1992).

22. *Id.* at 31,104 n.3 (emphasis added).

23. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. at 3432.

phrases, [and] ambiguous standards.”<sup>24</sup> These were inevitably followed by “circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations” until there were “hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities.”<sup>25</sup> And this process would take place “without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.”<sup>26</sup>

Some legal scholars have been even more caustic in their evaluations of agencies’ use of guidance. Commenting on the lack of stakeholder participation, Gwendolyn McKee proclaimed that “guidance documents have long since ceased to be mere information. They have become process-free vehicles for agency declarations of explicit standards and principles that have a real, direct, and potentially devastating impact.”<sup>27</sup> Robert Anthony, whose report formed the basis for ACUS’s 1992 recommendation,<sup>28</sup> argued that this practice “dishonors our system of limited government.”<sup>29</sup>

Of course, “process-free” guidance documents should not have a binding effect outside the agency. Under the APA, guidance documents may proclaim an agency’s general policies and interpretations, but they cannot set forth binding legal requirements without undergoing notice-and-comment rulemaking and a thirty-day delay after publication.<sup>30</sup> But Robert Anthony explained that while guidance documents “cannot *legally* bind, agencies often inappropriately issue them with the intent or effect of imposing a *practical* binding norm upon the regulated or benefited public.”<sup>31</sup>

An agency imposes a “practically binding” norm by treating the guidance “as dispositive of the issues that it addresses—or leads the affected public to believe it will treat the document that way,” such as by regularly applying the standards set forth in the document, by basing or threatening enforcement action upon nonobservance of the guidance, or reasonably leading regulated entities “to believe that failure to conform will bring

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24. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000).

25. *Id.*

26. *Id.*

27. Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN. L. REV. 371, 377 (2008).

28. See *supra* note 21 and accompanying text.

29. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1312 (1992).

30. 5 U.S.C. § 553(b)–(d) (2006).

31. Anthony, *supra* note 29, at 1315.

adverse consequences” like the “denial of an application.”<sup>32</sup> As one D.C. Circuit panel recognized, “If an agency acts as if a [guidance] document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document,” and “if it leads private parties . . . to believe that it will declare [their actions] invalid unless they comply with the terms of the document, then the agency’s document is for all practical purposes ‘binding.’”<sup>33</sup>

Moreover, when given guidance, agency “[s]taff members acting upon matters to which the guidance documents pertain will routinely and indeed automatically apply those documents, rather than considering their policy afresh before deciding whether to apply them. Staffers generally will not feel free to question the stated policies, and will not in practice do so.”<sup>34</sup> This is “the quick and simple thing to do, and leaves staff members relatively invulnerable to criticism,” because they can always blame the “nonbinding” policy or interpretation on the document’s drafter, regardless of which officials actually issued the guidance.<sup>35</sup> Thus, many regulated entities understandably believe that “the agency will insist upon strict compliance, but conclude that there is little they can do to resist.”<sup>36</sup>

Some frustrated stakeholders may consider filing lawsuits, but “bringing a legal challenge to guidance documents is actually more difficult” than challenging a regulation.<sup>37</sup> In particular, an agency can often successfully argue that its guidance is either not final<sup>38</sup> or not ripe<sup>39</sup> enough to create a viable case or controversy for judicial review under the Constitution.<sup>40</sup> Many guidance documents therefore “will escape immediate judicial review” and “may escape judicial review altogether.”<sup>41</sup>

Regulated entities who cannot obtain early judicial review of

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32. *Id.* at 1328 (emphasis omitted).

33. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

34. Anthony, *supra* note 29, at 1364.

35. *Id.* at 1364 & n.311.

36. *Id.* at 1317.

37. Raso, *supra* note 4, at 795.

38. *See, e.g., Nat’l Ass’n of Home Builders v. Norton*, 415 F.3d 8, 9 (D.C. Cir. 2005) (refusing to review “recommended” guidance on finality grounds); *Indep. Equip. Dealers Ass’n v. EPA*, 372 F.3d 420, 421–22 (D.C. Cir. 2004) (declining to review agency interpretation on finality grounds). *See generally* McKee, *supra* note 27.

39. *See, e.g., Pub. Citizen, Inc. v. NRC*, 940 F.2d 679, 680 (D.C. Cir. 1991) (declining to review policy statement on ripeness grounds); *Am. Fed’n of Gov’t Emps. v. O’Connor*, 747 F.2d 748, 749 (D.C. Cir. 1984) (denying preenforcement review of Hatch Act advisory guidance on ripeness grounds).

40. *See* U.S. CONST. art. III, § 2.

41. Anthony, *supra* note 29, at 1318.

questionable guidance are therefore “put in the unenviable position of having to conform” or risk enforcement actions or some other adverse response from the agency.<sup>42</sup> William Funk argued that in most cases, the balance will tilt in favor of grudging compliance, “even when the doubts as to the lawfulness of the [guidance] are substantial.”<sup>43</sup> Peter Strauss agreed that “conformity may be so simple, and the consequences of disregarding” a new guidance document “so severe, as to make those who learn of [new guidance] unwilling to take the risk of its concrete application to them.”<sup>44</sup> Because they cannot “challenge it in advance of its application, they will follow the course it counsels, and its validity will never be assessed.”<sup>45</sup>

Agencies are aware of these facts. They know that their guidance will often escape preenforcement review,<sup>46</sup> and “may count on the coercive (extortionate) effect of the unreviewable [guidance]” even if they doubt that their interpretation or policy would survive an actual legal test.<sup>47</sup> So the guidance continues, unabated.

Regulated entities are therefore often “frustrated at their inability to escape the practical obligations or standards the [guidance] documents impose.”<sup>48</sup> Besides the difficulty of obtaining judicial review, a further problem with these practically binding guidance documents is the seeming “absence of an opportunity for affected private parties to be heard on proposed policy alternatives . . . and to have their proposals considered with an open mind by the agency’s policymakers.”<sup>49</sup>

But there is an old, often unnoticed solution to both of these problems, and it lies within the same venerable law that set up the framework for agency rulemaking and guidance: the APA.

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42. William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1340 (2001).

43. *Id.*

44. Strauss, *supra* note 5, at 817.

45. *Id.*

46. *But see* *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (finding “guidance” reviewable where it “commands,” “requires,” “orders” or “dictates,” or gives external parties “their ‘marching orders,’” and makes it clear that the agency expects regulated parties to “fall in line”).

47. Funk, *supra* note 42, at 1340.

48. Anthony, *supra* note 29, at 1372.

49. *Id.* at 1329–30.

### III. WHAT CAN AGENCY STAKEHOLDERS DO ABOUT REGULATION BY GUIDANCE?

[T]here are petitions—and then there are *petitions*.<sup>50</sup>

In 1992, ACUS announced that agencies issuing policy statements (a common form of guidance) should allow “requests for modification or reconsideration of such statements” beyond “merely . . . an opportunity to challenge the applicability of the document or to request waivers or an exemption from it.”<sup>51</sup> Specifically, “affected persons should be afforded a fair opportunity to challenge the legality or wisdom of the document and to suggest alternative choices in an agency forum that assures adequate consideration by responsible agency officials.”<sup>52</sup> This was a thoughtful suggestion, but such an opportunity already existed and still lives on, although it has recently been reinvigorated by the courts.

The APA provides all “interested person[s]” with the right to petition federal agencies “for the issuance, amendment, or repeal of a rule.”<sup>53</sup> When most judges, scholars, lawyers, and agency staff think of “rules,” they think of binding legislative rules—regulations—published and codified in the *Code of Federal Regulations*.<sup>54</sup> In practice, not many parties submit petitions for rulemaking, but when they do, almost all petitions ask for changes to these legally binding regulations.

But the APA’s right to petition for a rule extends as broadly as its definition of “rule”—to any “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.”<sup>55</sup> Thus, nonbinding agency statements that simply interpret law or prescribe policy—otherwise known as interpretive rules or policy statements (the two most common forms of agency guidance documents)—are rules under the APA.

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50. Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other than Global Warming*, 102 NW. U. L. REV. 1029, 1043 (2008).

51. Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure, 57 Fed. Reg. 30,101, 30,104 (July 8, 1992).

52. *Id.*

53. 5 U.S.C. § 553(e) (2006).

54. See, e.g., KENNETH CULP DAVIS, ADMINISTRATIVE LAW § 5.01, at 123 (3d ed. 1972) (“‘[R]egulation’ [is] a term used interchangeably with ‘rule.’”); William Funk, *When is a “Rule” a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN. L. REV. 659, 660 n.7 (2002) (noting that “the terms ‘rule’ and ‘regulation’ are generally considered [to be] synonymous,” although there is a legal distinction between “rules—anything that met the definition of rule in the APA—[and] regulations,” which must be “legislative” (citation omitted)).

55. 5 U.S.C. § 551(4).



The plain text of the statute indicates that the right to submit petitions for rulemaking goes far beyond the limited category of legislative rules and regulations and allows interested agency stakeholders to petition an agency for changes to its agency guidance documents. The APA then orders each agency to “proceed to conclude a matter presented to it,” including a petition, “within a reasonable time,”<sup>56</sup> and to give “prompt notice” of “the denial in whole or in part of a . . . petition” along with “a brief statement of the grounds for denial.”<sup>57</sup> In other words, agencies cannot simply ignore petitions for rulemaking.

*A. Practical Advantages of Using Petitions to Seek New Guidance*

Using petitions for rulemaking as a vehicle to challenge agency guidance documents “would confer several advantages.”<sup>58</sup> Namely, it would allow any interested stakeholder (not just a regulated entity) to “engage an agency on the substance of a guidance document,” and it would force the agency “to respond in a reasoned way” and “supply coherent reasons for its guidances,” which “would in turn make judicial review of these documents more effective.”<sup>59</sup> But agencies need not worry that *every* guidance document would be challenged in this manner, as “petitions would be unlikely for the vast number of truly routine guidance documents aimed at regulated entities and those that simply boil down statutory or regulatory requirements or give uncontroversial compliance examples.”<sup>60</sup> In other words, petitions would force agencies to simply but reasonably explain the substance of any controversial guidance document, rather than hiding behind procedural exemptions to standard notice-and-comment rulemaking.

Scholars have pointed out that agencies could also avoid drives to amend the APA (and the unforeseeable consequences of such amendments) if their stakeholders knew that “there is already a process in place” to review guidance documents.<sup>61</sup> And judicial review of these documents would be “likely to enhance rather [] than undermine, the underlying statutory or regulatory scheme”<sup>62</sup> because courts could ensure that the regulatory structure remained rationally connected to the authorizing statutes.

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56. *Id.* § 555(b).

57. *Id.* § 555(e).

58. Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 440–41 (2007).

59. *Id.*

60. *Id.* at 442.

61. See Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 742–43 (2007).

62. Kevin M. McDonald, *Are Agency Advisory Opinions Worth Anything More than the*

*B. Procedural Barriers to Using Petitions to Seek New Guidance*

Yet some parties have pointed out that a portion of the APA, 5 U.S.C. § 553(b), exempts interpretive rules and policy statements from some rulemaking procedures with the statement that “this subsection does not apply” to those guidance documents. Although the plain text seems to indicate that “this subsection” is limited to the “notice-and-comment” provisions in § 553(b), some courts have read it to apply, in effect, to “this section,” i.e., all of § 553, including the right to petition in § 553(e). For example, the Seventh Circuit referred to this section in stating, without analysis or explanation, that “interested parties do not have the right to petition the agency for review of its interpretive rulings.”<sup>63</sup>

But as indicated above, there is little textual basis for such a conclusion, and the D.C. Circuit has much more recently ordered a district court to review an agency’s denial of a rare Petition To Repeal and Amend Guidance (regarding the agency’s policy interpretation).<sup>64</sup> Likewise, shortly after the APA’s enactment, the Department of Justice declared unambiguously that the statute’s right to petition “applies not only to substantive rules but also to interpretations and statements of general policy, and to organizational and procedural rules.”<sup>65</sup> Finally, in early 2011, the Federal Circuit specifically recognized that the right to petition in § 553(e) “is not so limited. On its face the provision applies to ‘a rule’ without qualification, a term that . . . encompasses, as the APA itself states, more than legislative rules.”<sup>66</sup>

Legal scholars looking at the question have also concluded that “[a]ll rules,” including guidance documents, “are subject to the right of an interested person to petition,”<sup>67</sup> because “[r]ead plainly,” the § 553(b)(A) exception for interpretative rules and general statements of policy “seem[s] to exempt guidance documents only from 553(b), the notice requirements, . . . and not from 553(e), the subsection that provides the petition right.”<sup>68</sup> After agreeing that the APA petition process encompasses not only binding legislative rules and regulations but also “procedural rules, interpretative rules and general statements of policy,” William Luneburg

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*Government Paper They’re Printed On?*, 37 TEX. TECH L. REV. 99, 126 (2004).

63. *Atchison, Topeka & Santa Fe Ry. Co. v. Peña*, 44 F.3d 437, 442 (7th Cir. 1994) (en banc); *United Transp. Union v. Del. & Hudson Ry.*, 977 F. Supp. 570, 574 n.2 (N.D.N.Y. 1997).

64. *Coll. Sports Council v. Dep’t of Educ.*, 465 F.3d 20, 23 (D.C. Cir. 2006).

65. ATTORNEY GENERAL’S MANUAL, *supra* note 15, at 38.

66. *Preminger v. Sec’y of Veterans Affairs*, 632 F.3d 1345, 1351 (Fed. Cir. 2011).

67. Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43, 44 n.5 (1992).

68. Mendelson, *supra* note 58, at 439 n.226.

explained that “the right to petition serves a distinctive purpose regarding these other statements of agency position” because it “require[s] agencies to receive, consider, and respond to the views and information of interested persons who may suggest the need for reconsideration.”<sup>69</sup>

However, one further provision in the APA could also be cited to block agency stakeholders from petitioning for the amendment of certain categories of agency guidance documents. The very beginning of the APA’s rulemaking provision, § 553(a), provides that “This section applies . . . except to the extent that there is involved—(1) a military or foreign affairs function of the United States; or (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.”<sup>70</sup>

By using the broader term “section” rather than “subsection,” § 553(a) could reasonably be interpreted to apply to the entirety of § 553, which would therefore bar all petitions for rulemaking (whether involving binding regulations or guidance) regarding any of the topics listed in § 553(a)(1)–(2).

And in fact, William Luneberg noted that it is “generally assumed that the § 553(e) right to petition is subject to the exceptions found in § 553(a).”<sup>71</sup> But he argued that “this conventional view is incorrect.”<sup>72</sup>

For example, the APA’s legislative history states that the § 553(a) exception was included because Congress felt that it was “wise to encourage and facilitate the issuance of [the listed categories of] rules by dispensing with all mandatory procedural requirements,” although “[c]hanges can then be sought through the petition procedures of [§ 553(e)].”<sup>73</sup> Likewise, at least one federal court implicitly suggested that an interested party could petition an agency regarding rules issued without following notice-and-comment procedures under § 553(a)(2).<sup>74</sup> And Professor Arthur Bonfield repeatedly argued that § 553(a) should not be interpreted to exclude petitions for rulemaking regarding the topics listed in that subsection.<sup>75</sup>

69. William V. Luneberg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1, 13–14 (1988).

70. 5 U.S.C. § 553(a) (2006) (emphasis added).

71. Luneberg, *supra* note 69, at 9 n.39.

72. *Id.* (citing William V. Luneberg, *Petitions for Rulemaking: Federal Agency Practice and Recommendations*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATIONS AND REPORTS 493, 506–08 (1986)).

73. S. DOC. NO. 79-248, at 257 (1946).

74. See *Wash. Hosp. Ctr. v. Heckler*, 581 F. Supp. 195, 198–99 (D.D.C. 1984).

75. See Arthur Earl Bonfield, *Military and Foreign Affairs Function Rule-Making Under the APA*, 71 MICH. L. REV. 221, 356 (1972); Arthur E. Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540, 600 (1970).

That the enacted text seems to lead to the contrary result is perhaps indicative of sloppy legislative drafting rather than an intent to bar petitions on these topics.

*C. Judicial Barriers to Using Petitions to Seek New Guidance*

Although the APA's petition for rulemaking procedure seems to offer quite a convenient vehicle for challenging federal agencies' use of guidance documents, the long-held view was that filing a petition was only "a symbolic or futile endeavor."<sup>76</sup> Traditionally, courts' deference to agencies' decisions regarding petitions for rulemaking was on the high end of the range given in arbitrary and capricious review,<sup>77</sup> and courts would interfere with an agency's denial of a petition "only in the rarest and most compelling of circumstances."<sup>78</sup>

But in 2007, the Supreme Court decided *Massachusetts v. EPA*,<sup>79</sup> which "made the right to judicial review under the [APA] much more than a mere formality," opening up "a potentially powerful tool for individuals and organizations trying to shape the administrative rulemaking process."<sup>80</sup> In particular, the Court narrowed an agency's options in responding to petitions, holding that it must "ground its reasons for action or inaction in the [relevant] statute" rather than relying upon "prudential and resource-based policy" arguments.<sup>81</sup> In summary, "*Massachusetts* means that parties can now argue that courts must look carefully at the reason agencies give for declining to institute rulemaking proceedings."<sup>82</sup>

Of course, the courts can only scrutinize agencies' decisions to deny petitions for rulemaking *if* the petitioners can get into court. This could be a problem for creative petitioners seeking amendments to agencies' guidance documents. In particular, these petitioners would almost certainly face formidable challenges regarding their standing, finality, ripeness, and timing. However, these challenges are not always insurmountable.

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76. Jeffrey A. Rosen, *A Chance for a Second Look: Judicial Review of Rulemaking Petition Denials*, ADMIN. & REG. L. NEWS, Fall 2009, at 7.

77. *Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 4–5 (D.C. Cir. 1987).

78. *WWHT, Inc. v. FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981).

79. 549 U.S. 497 (2007).

80. Rosen, *supra* note 76, at 7.

81. *Id.* at 8 (citations omitted).

82. *Id.* at 9. *See generally* Watts & Wildermuth, *supra* note 50.

### 1. *Standing*

As noted previously, the APA grants all interested persons the right to submit petitions for rulemaking.<sup>83</sup> There is little evidence that the term “interested” has been interpreted to seriously limit this right to a certain category of individuals. A broad academic or policy interest in the topic of a petition is more than sufficient to warrant an official agency response under the APA. But this sort of interest is *not* sufficient to supply standing in court under the Constitution, for under current judicial doctrine, “the class of persons with standing to petition appears far broader than the class generally entitled to judicial review of agency action or inaction.”<sup>84</sup>

Petitioners must still satisfy traditional standing requirements when seeking judicial review of an agency’s response to their petition for rulemaking. As the D.C. Circuit once held, petitioners “may be ‘interested part[ies]’ under the statute, and therefore able to petition the agency, and yet not have Article III standing to bring [an] action in federal court.”<sup>85</sup> The fact that an agency denied a rulemaking petition is not sufficient for standing. “If the party petitioning the agency lacks Article III standing, he has not been independently wronged simply because the agency denied his . . . request.”<sup>86</sup> Likewise, “Mere interest as an advocacy group is not enough”—petitioners must be able to show “a concrete and particularized injury” resulting from the agency action.<sup>87</sup> And courts are not afraid to dismiss petitioners’ appeals of agency denials when there is no such injury.<sup>88</sup>

This may present a difficult hurdle for some petitioners seeking amended guidance. Those who do simply have an academic or advocacy interest in a matter will not be able to show standing. While those who do have a stronger interest may still face challenges that they cannot show a likelihood of future harm, regulated entities and some other stakeholders may be able to surmount this obstacle by showing that the agency’s continuing policies (as expressed in guidance and officially upheld in a petition denial) have

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83. 5 U.S.C. § 553(e) (2006).

84. *Lunenburg*, *supra* note 69, at 10.

85. *Gettman v. Drug Enforcement Admin.*, 290 F.3d 430, 433 (D.C. Cir. 2002) (citing *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 27 (D.C. Cir. 2002)). *See also* *Shipbuilders Council of Am. v. United States*, 868 F.2d 452, 456 n.3 (D.C. Cir. 1989) (petitioners must establish Article III standing to appeal denials of their petitions).

86. *Hydro Investors, Inc. v. FERC*, 351 F.3d 1192, 1197 (D.C. Cir. 2003).

87. *Gettman*, 290 F.3d at 433.

88. *See, e.g., Crane v. NRC*, 344 F. App’x 316, 317 (9th Cir. 2009) (holding that the court lacked jurisdiction to review a “hypothetical controversy” regarding the agency’s denial of a rulemaking petition submitted by an individual who did not show a likelihood of concrete, particularized injury resulting from the denial).

real, coercive, and chilling effects on them, even if they are not binding as a matter of law.<sup>89</sup>

## 2. *Finality*

The APA provides for judicial review of “final agency action.”<sup>90</sup> Whether a new guidance document can be considered a final agency action can be a “difficult question.”<sup>91</sup> Gwendolyn McKee complained that the Supreme Court’s “strained interpretation” of the APA’s finality requirement in *Bennett v. Spear*<sup>92</sup> can lead to an agency guidance document “becoming a de facto legislative rule simply because parties can never [directly] challenge it.”<sup>93</sup>

It can be difficult to argue that agency guidance determines rights or obligations—or causes legal consequences—because by its very nature, guidance is not supposed to have binding legal effects. Of course, guidance documents can be practically binding in their coercive effect, which creates a difficult situation for stakeholders seeking judicial review of guidance.<sup>94</sup>

But the petition for rulemaking device offers a way around this difficulty because the D.C. Circuit has held that “refusals to engage in requested rulemaking constitute final agency action normally though narrowly reviewable in accordance with the APA.”<sup>95</sup> Presumably, the APA’s requirements that agencies conclude rulemaking petitions<sup>96</sup> and give a reasoned explanation for any denial constitute sufficient finality and consequences for purposes of obtaining judicial review. The courts have not distinguished between agency denials of rulemaking petitions asking for changes to binding regulations and denials of petitions for changes to agency guidance, so there is no indication that the latter denials would not also offer a vehicle for obtaining judicial review under the *Massachusetts v. EPA* test.

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89. See discussion *supra* Part II.

90. 5 U.S.C. § 704 (2006).

91. Strauss, *supra* note 5, at 818.

92. 520 U.S. 154, 177–78 (1997) (requiring aggrieved parties to show that the guidance represents an action “by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow’” (citation omitted)).

93. McKee, *supra* note 27, at 402.

94. See, e.g., cases cited *supra* note 38.

95. *Env’tl Def. Fund v. Reilly*, 909 F.2d 1497, 1504 n.97 (D.C. Cir. 1990). See also *Yousuf v. Samantar*, 451 F.3d 248, 251 (D.C. Cir. 2006) (equating the denial of a request with an agency action for the purpose of § 704).

96. 5 U.S.C. § 555(b) (2006).

### 3. *Ripeness*

Where agency guidance is involved, the more difficult issue with judicial review “will much more often be ripeness than finality.”<sup>97</sup> The classic Supreme Court test for ripeness, announced in *Abbott Laboratories v. Gardner*,<sup>98</sup> considers “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.”<sup>99</sup> The “fitness of the issues” depends on “whether judicial intervention would inappropriately interfere with further administrative action” and “whether the courts would benefit from further factual development of the issues presented”<sup>100</sup>—is the issue presented “a purely legal one?”<sup>101</sup>

In a 2010 case, *Reckitt Benckiser Inc. v. EPA*,<sup>102</sup> the D.C. Circuit held that an agency’s “definitive” or “authoritative interpretation” of its authority may be fit for judicial review if it raises purely legal questions that could “apply in many situations” and is not based on “the specific facts of [one] case.”<sup>103</sup> Many guidance documents offer broad, purely legal interpretations of agency regulations, but a key question is whether these interpretations are “definitive”—would the issue be “subject to further agency consideration or possible modification”?<sup>104</sup> After all, agencies can release and modify their guidance documents without notice or comment.<sup>105</sup> In another 2010 case, the Tenth Circuit noted that an agency could cynically issue “tentative” rather than “definitive” interpretations of its regulations to “tell regulated parties what it wants them to do” while avoiding judicial review and remaining “free to embrace some new (assuredly tentative) interpretation whenever it wants.”<sup>106</sup> It is therefore unsurprising that many courts have refused to consider direct judicial

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97. Strauss, *supra* note 5, at 822.

98. 387 U.S. 136 (1967).

99. *Id.* at 149.

100. Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 733 (1998).

101. See *Reckitt Benckiser Inc. v. EPA*, 613 F.3d 1131, 1137 (D.C. Cir. 2010) (citation omitted).

102. 613 F.3d 1131 (D.C. Cir. 2010).

103. *Id.* at 1137–38.

104. *Id.* at 1138.

105. But see *Alaska Prof’l Hunters Ass’n v. Fed. Aviation Admin.*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (“When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.”).

106. *United States v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1143 n.16 (10th Cir. 2010) (“What’s to motivate the agency, then, ever to make an interpretation definitive if it can just add ‘tentative’ to [all its] proclamations as a magic word, a sort of abracadabra of administrative decisionmaking that frees it to change direction whenever it likes?”).

challenges to guidance on ripeness grounds.<sup>107</sup>

But of course *every* legal policy or interpretation is subject to possible modification. Every regulation can be altered through notice-and-comment rulemaking. Congress can also vote to modify the statute authorizing the regulation. And even the Constitution itself is subject to amendment. Nothing is set firmly in stone, and thus the “subject to modification” test for ripeness cannot be read too broadly.

Moreover, when applied to petitions to amend guidance this test loses some of its harshness. While a court may note that many guidance documents are issued by lower levels of agencies, are subject to few procedural requirements, and may be altered at the agencies’ whim, the APA requires a slightly more formal approach for responding to petitions for rulemaking. When an agency denies a petition to amend a guidance document, it is not quite “setting in stone” the policies or interpretations in that guidance, but it is taking a more final agency position on the matter, usually coming from a higher (if not the highest) level of the agency, accompanied by an official, APA-required explanation of its position. In short, it is giving a more definitive or authoritative policy or interpretation, which is thus more fit for judicial review.

But beyond the fitness of the issues, petitioners must still satisfy the “hardship” prong of the ripeness test. In *Reckitt Benckiser*, the D.C. Circuit held that an agency interpretation with “practical and significant legal effects” such as burdensome compliance costs (or the alternative “risk of serious civil and criminal penalties” for defying the interpretation) or other “direct effect[s]” on a stakeholder’s “day-to-day business” may be reviewable in court.<sup>108</sup> And the court stated that the interpretation is no less effective when the stakeholder or the court do “not know whether, or ha[ve] no idea whether or when” the agency will act to enforce its interpretation.<sup>109</sup>

There is no reason to believe that an agency position first expressed in guidance and then *reaffirmed* in the denial of a petition to amend that guidance would have any less potential effects on a stakeholder’s operations. If anything, the stakeholder might sense a *greater* risk in refusing to comply with the “nonbinding” agency interpretation or policy when the agency has strongly backed its original guidance in denying the petition and has thus dug in to its position.

Historically, the D.C. Circuit expressed its sympathy and its “inability to understand why the plaintiffs . . . should be required to violate the

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107. See, e.g., cases cited *supra* note 39.

108. 613 F.3d at 1138, 1140 (citing *Abbot Labs. v. Gardner*, 387 U.S. 136, 152 (1967)).

109. *Id.* at 1139 (internal quotations omitted).



challenged [agency position]” to obtain judicial review.<sup>110</sup> Likewise, it declared that “the interpretative character of a regulation does not necessarily make it unripe for review,” as there was “no reason why a rule . . . subject[ing] to regulation activities contended to be immune should be exempt from immediate review because it purports to *interpret* a statute although it would not be [exempt] if made in the exercise . . . of a substantive rule-making power.”<sup>111</sup> Rather, “the sooner the [stakeholder’s] claims as to the coverage of the Act in these respects are determined, the better for everybody,” because of the public “interest in early implementation of policy” and the stakeholder’s “legitimate interest” in planning its activities.<sup>112</sup>

That position is no less persuasive today. Another 2010 D.C. Circuit opinion, *Unity08 v. FEC*,<sup>113</sup> agreed that “parties are commonly not required to violate an agency’s legal position and risk an enforcement proceeding before they may seek judicial review.”<sup>114</sup> This is especially true where “First Amendment rights are implicated [by the agency position] and arguably chilled by a ‘credible threat of prosecution.’”<sup>115</sup> This “chilling effect” applies where “a specific organization has sought advice on the legal consequences of pursuing a detailed, concrete course of action, and its only other route for seeking judicial review of the unfavorable advice would be to disregard the [agency’s] opinion and risk enforcement penalties.”<sup>116</sup> The same reasoning should easily extend to an agency stakeholder, threatened by a position advocated in current agency guidance, who petitions for a change to that guidance (a more formal way of seeking advice on the matter). An official agency denial would only further chill the petitioner’s conduct, which would seem to be a hardship under the current judicial test for ripeness.

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110. *Toilet Goods Ass’n v. Gardner*, 360 F.2d 677, 687 (2d Cir. 1966), *aff’d*, 387 U.S. 167 (1967).

111. *Id.* at 686 (emphasis added).

112. *Id.* at 687.

113. 596 F.3d 861 (D.C. Cir. 2010).

114. *Id.* at 865 (D.C. Cir. 2010) (citing *Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461, 483 (2004) (agreeing that the courts could review a preenforcement challenge where the “EPA had spoken its ‘last word’” on the legal issue in dispute and the regulated party “would risk civil and criminal penalties if it defied [the] EPA directive”)).

115. *Id.* (quoting *Chamber of Commerce v. FEC*, 69 F.3d 600, 603–04 (D.C. Cir. 1995) (rejecting the agency’s argument that its refusal to issue a favorable advisory opinion to petitioners was unripe where the “issue presented is a relatively pure legal one that subsequent enforcement proceedings will not elucidate”)).

116. *Id.* at 866.

#### 4. *Timing*

One last potential obstacle to using petitions for rulemaking as a vehicle for reviewing agency guidance is timing. May a petitioner who has labored to comply with the current agency guidance for a period of time since its enactment successfully challenge it through the petition process at a later date? An agency might reasonably argue that if the guidance was really so coercive and harmful, then the petitioner should have challenged it immediately following its issuance.

But in 1997, the Supreme Court noted that where a stakeholder does not assert that a “regulation is substantively unlawful” or that its enactment violated “a clear procedural prerequisite” set forth in statute (such as notice-and-comment requirements), “but rather that it was ‘arbitrary’ and ‘capricious’ not to conduct amendatory rulemaking,” then the APA supplies “[t]he proper procedure” for seeking review.<sup>117</sup> Specifically, the stakeholder should file “a petition to the agency for rulemaking, [5 U.S.C.] § 553(e), denial of which must be justified by a statement of reasons, § 555(e), and can be appealed to the courts.”<sup>118</sup> Moreover, in 2009, the D.C. Circuit spelled out the “general rule . . . that it is a perfectly valid ‘method of obtaining judicial review of agency regulations once the [standard] limitations period has run . . . to petition the agency for amendment or rescission of the regulations and then to appeal the agency’s decision’” in court.<sup>119</sup>

The courts have therefore clearly blessed the use of the petition process to challenge the substance of existing regulations and there is no reason to think that this reasoning would not apply to agency guidance documents.

### IV. SO NOW WHAT?

The preceding analysis indicates that stakeholders should be able to challenge agency guidance documents through the use of petitions for rulemaking. So why aren’t there more of these petitions?

First, of course, the petition process is a relatively obscure part of the APA and it is likely that few parties understand their rights as interested

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117. *Auer v. Robbins*, 519 U.S. 452, 459 (1997).

118. *Id.*

119. *Am. Rd. & Transp. Builders Ass’n v. EPA*, 588 F.3d 1109, 1112 (D.C. Cir. 2009) (citation omitted). *See also* *S. Hills Health Sys. v. Bowen*, 864 F.2d 1084, 1094 (3d Cir. 1988) (“Unlike ordinary adjudicative orders, administrative *rules* and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.” (emphasis added) (quoting *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958))).

persons under the law.

Second, it is not a completely painless or cost-free process. It costs money to hire an attorney with the sophistication and ability to understand and file successful petitions, up through final judicial review, and the process can take a while. The law only requires agencies to conclude petitions within a “reasonable” time,<sup>120</sup> and the precise measure of that period is anyone’s guess.

Finally, and perhaps most importantly, the difficulty of obtaining meaningful judicial review of petition denials until the recent Supreme Court decision in *Massachusetts v. EPA* probably dissuaded many would-be petitioners from going through with the process. If agencies could cite virtually any quasi-rational reason to deny a petition (after waiting an inestimable period of time), then why bother?

But now the situation has changed and those would-be petitioners, frustrated with seemingly coercive agency guidance documents have a real, viable option of challenging that guidance. And such petitions have slowly started to trickle in. For example, in late 2009, a group of families harmed by *E. Coli*-contaminated food filed a Petition for an Interpretive Rule to the Department of Agriculture’s Food Safety and Inspection Service, asking the agency to officially interpret the term *adulterants* in the Federal Meat Inspection Act to include certain forms of *E. Coli*.<sup>121</sup>

In light of the changing law, there is a good chance that this petition won’t be the last.

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120. 5 U.S.C. § 555(b) (2006).

121. William Marler, Petition for an Interpretive Rule Declaring all enterohemorrhagic Shiga Toxin-producing Serotypes of *Escherichia coli* (*E. coli*), Including Non-O157 Serotypes, to be Adulterants Within the Meaning of 21 U.S.C. § 601(m)(1) (Oct. 5, 2009), available at [http://www.fsis.usda.gov/PDF/Petition\\_Marler\\_100509.pdf](http://www.fsis.usda.gov/PDF/Petition_Marler_100509.pdf).

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*ADMINISTRATIVE LAW REVIEW*

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# ADMINISTRATIVE LAW JUDGES’ REMOVAL “ONLY FOR CAUSE”: IS THAT ADMINISTRATIVE PROCEDURE ACT PROTECTION NOW UNCONSTITUTIONAL?

JEROME NELSON\*

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## INTRODUCTION AND SUMMARY

Under the Administrative Procedure Act (APA), administrative law judges (ALJs) are removable by the employing agency “only for good cause established and determined by the Merit Systems Protection Board.”<sup>1</sup> The constitutionality of that sixty-four-year-old protection may now be questionable under the recent Supreme Court decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.<sup>2</sup>

The Sarbanes–Oxley Act (the Act) created the Public Company Accounting Oversight Board (PCAOB or Board) with extensive regulatory powers over the accounting industry.<sup>3</sup> Board members are appointed by the Securities and Exchange Commission (SEC or Commission) and can be removed only “for good cause” by SEC members, who themselves can be removed by the President only “for cause.”<sup>4</sup> In an opinion by Chief Justice Roberts, the Court (by a 5–4 vote) held that this double “for cause” protection created an unconstitutional legislative intrusion on the President’s power to remove officers<sup>5</sup>—a violation of the constitutional separation of powers principle. To cure this defect, the Court excised the Board members’ “for cause” protection and declared that they would now be removable by the Commission at will.

Justice Breyer’s dissent argued that the two “for cause” layers passed muster under a “functional” approach to separation of powers.<sup>6</sup> He also reasoned that the job security and decisions of many high-ranking federal employees with double for cause protection—including all ALJs—were left “constitutionally at risk.”<sup>7</sup> These nearly 1,600 judges<sup>8</sup> generally hear and decide a variety of cases which Congress thought significant enough to warrant formal hearings,<sup>9</sup> and Justice Breyer questioned whether “every

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1. Section 11 of the original Administrative Procedure Act (APA) referred to hearing examiners and to the Civil Service Commission. Pub. L. No. 79-404, 60 Stat. 237, 244 (1946). The provision is now codified at 5 U.S.C. § 7521 (2006).

2. 130 S. Ct. 3138 (2010).

3. Pub. L. No. 107-204, 116 Stat. 745 (2002).

4. As to the Public Company Accounting Oversight Board (PCAOB or Board), see 15 U.S.C. §§ 7211(e)(6), 7217(d)(3) (2006); as to the Securities and Exchange Commission (SEC), see *infra* note 74.

5. *Free Enterprise*, 130 S. Ct. at 3161.

6. *Id.* at 3167–68.

7. *Id.* at 3179, 3180–81.

8. Justice Breyer’s dissent included a table showing the number of administrative law judges (ALJs) employed at the various agencies and the total (1,584 ALJs) employed by all agencies. *Id.* at 3214.

9. The APA’s trial-type procedures, including the use of ALJs as presiding officers, apply “in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . .” 5 U.S.C. § 554(a) (2006).

losing party before an ALJ now ha[s] grounds to appeal on the basis that the decision entered against him is unconstitutional?”<sup>10</sup>

This Recent Development argues that ALJs are fundamentally different from PCAOB members and should not be covered by the *Free Enterprise* rationale. Eliminating the adjudicatory independence conferred by the APA’s good cause provision would undermine the adjudicatory process by subjecting ALJs to agency pressure and possible retaliatory agency action for decisions perceived as unfavorable.

#### I. THE BOARD AND THE *FREE ENTERPRISE* LITIGATION

The Board consists of five members appointed by the SEC “with expansive powers to govern an entire industry.”<sup>11</sup> These powers include: registering every accounting firm, promulgating rules for auditing and industry ethics, performing inspections of all firms, demanding documents and testimony, and conducting formal investigations and disciplinary proceedings. In the Court’s language, “the Board may regulate every detail of an accounting firm’s practice.”<sup>12</sup>

The Board’s activities are subject to supervision by the SEC, which is empowered to review all PCAOB rules and sanctions. The Commission, however, as noted, may remove the Board members only “for good cause shown,” upon a finding that the Board member:

- (A) has willfully violated any provision of th[e] Act, the rules of the Board, or the securities laws;
- (B) has willfully abused the authority of that member; or
- (C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.<sup>13</sup>

After inspecting the operations of a small Nevada accounting firm, the Board found audit deficiencies “of such significance that it appeared to the inspection team that the Firm did not obtain sufficient competent evidential matter to support its opinion on the issuers’ financial statements.”<sup>14</sup> The firm replied that it was representing developmental stage clients whose high risks were known to investors, that the Act imposed burdensome additional costs on small firms, and that the Act unfairly forced such firms to be

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10. *Free Enterprise*, 130 S. Ct. at 3181.

11. *Id.* at 3147.

12. *Id.* at 3148.

13. 15 U.S.C. §§ 7211(e)(6), 7217(d)(3)(A)–(C) (2006).

14. PUB. CO. ACCOUNTING OVERSIGHT BD., PCAOB RELEASE NO. 104-2005-082, INSPECTION OF BECKSTEAD & WATTS, LLP 3 (2005) (on file with author).

judged by standards applicable to larger accounting firms who audit major corporations.<sup>15</sup>

Thereafter the Board began a formal investigation, and the accounting firm, joined by the Free Enterprise Fund (of which it was a member),<sup>16</sup> filed suit in U.S. District Court seeking to enjoin further PCAOB proceedings on the ground that the Board was unconstitutional. The plaintiffs argued that the members' appointments violated the Constitution's Appointments Clause<sup>17</sup> and that the statutory "double for cause" protection violated the separation of powers principle by placing the Board members too far from the President's executive power to remove officers.<sup>18</sup> The district court rejected these attacks and entered summary judgment for the Board.<sup>19</sup> The Court of Appeals for the D.C. Circuit (in a 2–1 decision) affirmed.<sup>20</sup>

## II. THE SUPREME COURT'S *FREE ENTERPRISE* OPINIONS

### A. *The Majority*

#### 1. *District Court Jurisdiction*

The majority first found that the district court had jurisdiction, notwithstanding a statute authorizing Court of Appeals' judicial review of SEC orders sustaining Board rules or Board-imposed sanctions.<sup>21</sup> Direct attack in District Court was appropriate when preclusion "could foreclose all meaningful judicial review," when the suit was "wholly collateral to a statute's review provisions," and when the claims are "outside the agency's expertise."<sup>22</sup>

Petitioners could not "meaningfully pursue their constitutional claims" because the judicial review statute focused on SEC action and not Board action.<sup>23</sup> The challenges were "collateral" because the petitioners

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15. *Id.* pt. IV, at 8–9.

16. The Complaint described the Free Enterprise Fund (the Fund) as "a non-profit, public interest organization" which promoted "economic growth, lower taxes, and limited government." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 06-0217, 2007 U.S. Dist. LEXIS 24310, at \*7 (D.D.C. Mar. 21, 2007).

17. U.S. CONST. art. II, § 2.

18. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3149 (2010).

19. *Free Enterprise*, 2007 U.S. Dist. LEXIS 24310, at \*18.

20. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 669 (D.C. Cir. 2008).

21. 15 U.S.C. § 78y (2006); *Free Enterprise*, 130 S. Ct. at 3150.

22. *Free Enterprise*, 130 S. Ct. at 3150 (citations omitted).

23. *Id.* at 3150.



“object[ed] to the Board’s existence,” not its auditing standards.<sup>24</sup> Nor would the Court force the firm to go through a proceeding and incur a sanction in order to challenge the Board. The Supreme Court noted, “We normally do not require plaintiffs to ‘bet the farm . . . by taking violative action’ before ‘testing the validity of the law,’” and the constitutional claims were “outside the Commission’s competence and expertise.”<sup>25</sup> The tests for shortcutting agency proceedings and conventional judicial review were thus satisfied here. The dissenters did not disagree with this holding.

## 2. *Separation of Powers*

Two preliminary findings were essential to the Court’s separation of powers analysis. First, though the Act declared that the PCAOB was not a government agency or establishment,<sup>26</sup> the majority nevertheless described it as a “Government-created, Government-appointed entity” and ratified the parties’ agreements that the Board was “‘part of the Government’ for constitutional purposes” and that its members were “Officers of the United States.”<sup>27</sup> The dissent did not take issue with this finding. Second, although the securities statutes said nothing about removing SEC members, the majority also accepted the parties’ agreement that such Commissioners could be removed only for “inefficiency, neglect of duty, or malfeasance in office”<sup>28</sup>—i.e., one of the layers of the ultimately fatal dual “good cause” protection.<sup>29</sup>

Turning to separation of powers, the Chief Justice explained that the power to remove officers was inherent in the Constitution’s placement of the “executive Power” in the President, who must “take care that the Laws be faithfully executed.”<sup>30</sup> The Constitution, although silent about removal of officers, has nevertheless always “been understood to empower the President to keep these [executive] officers accountable—by removing them from office, if necessary.”<sup>31</sup> The Court recognized that its precedents had created exceptions to absolute removal power: Congress may create independent agencies whose members may be removed only for cause and that may restrict the power of principal officers, serving at the President’s

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24. *Id.*

25. *Id.* at 3151 (citations omitted).

26. 15 U.S.C. § 7211(a)–(b).

27. *Free Enterprise*, 130 S. Ct. at 3147–48 (citations omitted).

28. *Id.* at 3148–49.

29. For further discussion of this finding, which the dissent did challenge, see *infra* note 75.

30. U.S. CONST. art. II, §§ 1, 3.

31. *Free Enterprise*, 130 S. Ct. at 3146 (citing *Myers v. United States*, 272 U.S. 52 (1926)).

pleasure, to remove certain inferiors.<sup>32</sup> As to these cases, the Court said “[t]he parties do not ask us to reexamine any of these precedents, and we do not do so.”<sup>33</sup>

But two layers of “for cause” protection presented “a new situation not yet encountered by the Court,”<sup>34</sup> and that “added layer of tenure protection makes a difference.”<sup>35</sup> Absent “good cause” protection for Board members, the SEC could remove them at will and the President could then “hold the Commission to account for its supervision of the Board.”<sup>36</sup> But under the dual for-cause structure,

[n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control of the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.<sup>37</sup>

The separation of powers principle also enables voters to hold the President accountable for the actions of his executive officers: “Without a clear and effective chain of command” the public cannot know whom to blame.<sup>38</sup> The Chief Justice concluded:

By granting the Board executive power without the Executive’s oversight, this Act subverts the President’s ability to ensure that the laws are faithfully executed—as well as the public’s ability to pass judgment on his efforts. The Act’s restrictions are incompatible with the Constitution’s separation of powers.<sup>39</sup>

Finally, the majority rebutted the dissent’s arguments. A need for independence in expert regulation of the accounting profession did not justify the dual for cause protection. There was no reason to sanction “being ruled by experts,” especially where there is already “concern” that the “vast” agency power, touching “almost every aspect of daily life . . . may slip from the Executive’s control, and thus from that of the people.”<sup>40</sup> The argument that budgets, interagency relationships, and congressional

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32. *Id.* at 3146–47 (citing *Morrison v. Olson*, 487 U.S. 654 (1988); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935); *United States v. Perkins*, 116 U.S. 483 (1886)).

33. *Id.* at 3147. The Court could, of course, reexamine those cases in the future, particularly if there is a change in its composition. Justice Scalia’s strong dissent in *Morrison* suggests that he may well be ready to overrule *Humphrey’s Executor*.

34. *Id.*

35. *Id.* at 3153–54.

36. *Id.* at 3154.

37. *Id.*

38. *Id.* at 3155.

39. *Id.*

40. *Id.* at 3156.

influence can also control agencies was dismissed by the majority as reliance upon “bureaucratic minutiae.”<sup>41</sup>

Though Congress did not augment its own powers in the Act, the majority found that it nevertheless “impaired [the Executive Branch] in the performance of its constitutional duties.”<sup>42</sup> That accounting abuses reflect a “pressing national problem” did not justify congressional intrusion on Executive powers.<sup>43</sup> “[A] judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse.”<sup>44</sup>

Nor could SEC oversight of the Board save the day. “Broad power over Board functions is not equivalent to the power to remove Board members.”<sup>45</sup> Moreover, “the Act nowhere gives the Commission effective power to start, stop, or alter individual Board investigations, executive activities typically carried out by officials within the Executive Branch.”<sup>46</sup> In addition, the Act’s grounds for SEC removal of Board members<sup>47</sup> are narrower than “good cause” and thus “present[ ] an even more serious threat to executive control than an ‘ordinary’ dual for-cause standard.”<sup>48</sup>

Having concluded that the double for-cause protection for Board members was unconstitutional, the majority then turned to devising an appropriate remedy for this defect. The Act and all Board actions under it were potentially vulnerable. The petitioners’ complaint argued that the separation of powers violation “rendered [the Board] ‘and all power and authority exercised by it’ in violation of the Constitution,”<sup>49</sup> and their brief urged that the Court “declare the Board and the Act unconstitutional.”<sup>50</sup> Moreover, the Act did not contain a severability clause, whereby voiding of any one provision would preserve the remainder of the statute.

The Court, however, declined petitioners’ broad invitation, invoking precedents which “limit the solution to the problem” by severing the “problematic portions while leaving the remainder intact,” and reflect the “normal rule” that partial invalidation is the course.<sup>51</sup> Applying those

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41. *Id.*

42. *Id.* (citation omitted).

43. *Id.* at 3157.

44. *Id.* (quoting *New York v. United States*, 505 U.S. 144, 187–88 (1992)).

45. *Id.* at 3158.

46. *Id.* at 3159.

47. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204 § 107(d)(3), 116 Stat. 745, 767–68 (codified at 15 U.S.C. § 7217(d)(3) (2006)).

48. *Free Enterprise*, 130 S. Ct. at 3158.

49. *Id.* at 3161 (citation omitted).

50. Brief for Petitioners at 62, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (No. 08-861), 2009 WL 2247130, at \*62.

51. *Free Enterprise*, 130 S. Ct. at 3161 (citations omitted).

concepts, the Court reasoned that the Board's existence did not violate the Constitution—only the removal restrictions did. Nor was there any reason to believe that without the double for-cause provisions, Congress would not have created the PCAOB to regulate the accounting industry. Thus the Court fashioned a narrow remedy: excising only the Board members' layer of "good cause" protection and leaving everything else alone. "Concluding that the removal restrictions are invalid leaves the Board removable by the Commission at will, and leaves the President separated from Board members by only a single level of good-cause tenure."<sup>52</sup>

This result gave the petitioners a narrow victory. Despite language which may have pleased the plaintiffs philosophically,<sup>53</sup> the decision had no impact on the Board's investigation of the accounting firm, nor did it alter the PCAOB's rules, policies, or procedures. "The Sarbanes-Oxley Act remains 'fully operational as a law' with these tenure restrictions excised."<sup>54</sup>

### 3. *The Appointments Clause*

Finally, the Court rejected the Appointments Clause challenges, concluding first that Board members were "inferior" officers, who may be constitutionally appointed by department heads.<sup>55</sup> Such officers have a "superior," and their "work is directed and supervised at some level" by other officers appointed by the President with the Senate's consent.<sup>56</sup> The PCAOB members can now be removed at will by the SEC (under the separation of powers holding); they obviously fit the definition of inferior officers<sup>57</sup> and thus may be appointed by a department head.

Next the Court held that the SEC was a "Department" within the

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52. *Id.* "The basic principle of at-will employment is that an employee may be terminated for a 'good reason, bad reason, or no reason at all.'" *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 606 (2008) (citation omitted). That is also the rule in the District of Columbia, where the Board operates under the District's Nonprofit Corporation Act. *See* 15 U.S.C. § 7211(b) (2006) (giving the Board all of the powers of a nonprofit corporation); *see also* *Liberatore v. Melville Corp.*, 168 F.3d 1326, 1329 (D.C. Cir. 1999) (employee at will "may be discharged 'at any time and for any reason, or for no reason at all'" (citation omitted)).

53. The majority noted a "concern" that the government's "vast power [which] touches almost every aspect of daily life . . . may slip from the Executive's control, and thus from that of the people," *Free Enterprise*, 130 S. Ct. at 3156, and described separation of functions as among the "protections against abuse of power [which] were critical to preserving liberty." *Id.* at 3157 (citation omitted).

54. *Id.* at 3161 (citations omitted).

55. U.S. CONST. art. II, § 2, cl. 2.

56. *Free Enterprise*, 130 S. Ct. at 3162 (citing *Edmond v. United States*, 520 U.S. 651, 662–63 (1997)).

57. *Id.*

meaning of the Constitution—the first time that the Court treated a regulatory agency as a Department for these purposes. Many “inferiors” are appointed by chairmen of multi-member agencies, generally subject to agency approval (e.g., the general counsel and bureau or division chiefs),<sup>58</sup> and this holding resolves any question as to the constitutionality of such appointments. Petitioners also argued under the Appointments Clause that the “head” of the SEC was the Chairman and not the Commissioners themselves.<sup>59</sup> Citing provisions of the securities statutes and the Reorganization Act of 1949,<sup>60</sup> the Court found that the Commission as a whole, not the Chairman, qualified as the head.<sup>61</sup> The dissent did not challenge these Appointments Clause holdings.

### B. *The Dissent*

Justice Breyer’s opinion reasoned that because removal power is implicit, not explicit, the Court should avoid “bright-line rules” and instead employ a “functional approach,” permitting “Congress and the President the flexibility needed to adapt statutory law to changing circumstances.”<sup>62</sup> Under that approach, the dissenters argued that Sarbanes–Oxley’s “for good cause” provision would not actually “limit the President’s exercise of executive authority,” considering control of budget, inter-agency relationships, congressional influence, and other political factors.<sup>63</sup> They said that in fact, presidents rarely test the removal provision and have not sought to define “cause.”<sup>64</sup> Adding a layer of good cause protection for the benefit of PCAOB members did not affect the President’s power over the SEC, “an already independent agency.”<sup>65</sup> The SEC, which can remove PCAOB members, can only be reached by the President for good cause; thus, the layer of good-cause protection for the Board does not practically reduce the President’s existing removal power.<sup>66</sup>

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58. See Marshall J. Breger & Gary J. Edles, *Established By Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1167, 1173 (2000) (discussing the typical division of power in appointing and supervising agency staff).

59. Brief for Petitioners at 56, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (No. 08-861), 2009 WL 2247130, at \*56.

60. Pub. L. No. 81-109, 63 Stat. 203 (codified in relevant part at 15 U.S.C. §§ 77s, 77t, 77u, 77w (2006); 5 U.S.C. § 904 (2006)).

61. *Free Enterprise*, 130 S. Ct. at 3163.

62. *Id.* at 3167–68 (Breyer, J., dissenting) (citations omitted).

63. *Id.* at 3170.

64. *Id.* (citations omitted).

65. *Id.*

66. See *id.* at 3170–71 (arguing that as long as the President can only remove Commissioners for cause, “nullifying the Commission’s power to remove Board members only for cause will not resolve the problem the Court has identified”).

The dissent also stressed the breadth of the SEC's statutory "comprehensive control over all of the Board's functions."<sup>67</sup> Contrary to the majority position, as Justice Breyer read the statute, the Commission has control over the Board's investigatory (i.e., executive) activities. Finding that the SEC's powers over the PCAOB's rulemaking, adjudication, and budget, among other things, was especially significant, the dissenters concluded: "And if the President's control over the Commission is sufficient, and the Commission's control over the Board is virtually absolute, then, as a practical matter, the President's control over the Board should prove sufficient as well."<sup>68</sup>

Justice Breyer next noted the Court's longstanding recognition of the appropriateness of good-cause protection in fostering adjudicatory independence.<sup>69</sup> The dissent also stressed the need for expertise in addressing accounting issues, and reasoned that agency independence insulates Board members "from fear of losing their jobs due to political influence."<sup>70</sup> It further argued that the Sarbanes-Oxley Act did not involve Congress aggrandizement of its own powers.<sup>71</sup>

The dissent then argued that the majority's "broad, basically mechanical" double for-cause rule<sup>72</sup> could impact many other government officials: "I still see no way to avoid sweeping hundreds, perhaps thousands of high level government officials within the scope of the Court's holding, putting their job security and their administrative actions and decisions constitutionally at risk."<sup>73</sup>

Included among those, who, like PCAOB members, were also subject to dual for cause protection, were all 1,584 ALJs, removable only for cause by the Merit Systems Protection Board, whose members, in turn, are removable only for cause.<sup>74</sup> Thus Justice Breyer's question: "Does every

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67. *Id.* at 3172.

68. *Id.* at 3173.

69. *Id.* (citations omitted).

70. *Id.* at 3174. Under the Act, Board members must be "appointed from among prominent individuals of integrity and reputation" who have "an understanding of the responsibilities for and nature of the financial disclosures required of issuers under the securities laws and the obligations of accountants with respect to the preparation and issuance of audit reports with respect to such disclosures." 15 U.S.C. § 7211(e)(1) (2006). Such persons, who can command salaries of over \$500,000 may not be overly concerned about losing their Board jobs. *Free Enterprise*, 130 S. Ct. at 3147 n.1.

71. *Id.* at 3175–76 (Breyer, J., dissenting).

72. *Id.* at 3177–78.

73. *Id.* at 3179.

74. *See* 5 U.S.C. §§ 7521(a), 1202(d) (2006).

losing party before an ALJ now have grounds to appeal on the basis that the decision entered against him is unconstitutional?”<sup>75</sup>

### III. *FREE ENTERPRISE* AND ALJS

#### A. *Preliminary Considerations*

A party who lost before an ALJ confronts practical problems in challenging that judge on separation of powers grounds. Under *Free Enterprise*, a successful double “for cause” attack could produce nothing more than transformation of the ALJ into an at-will employee, leaving his or her underlying decision intact. To achieve meaningful relief on the merits, the losing party would likely be required to complete the agency proceeding, seek judicial review in the prescribed statutory reviewing court, and persuade that court to reverse or remand. Though the *Free Enterprise* shortcut (direct attack in district court) would be available for the constitutional challenge, attacks on the merits would not qualify for that route because they are neither “collateral” to an agency order nor “outside

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75. *Free Enterprise*, 130 S. Ct. at 3181 (Breyer, J., dissenting). Justice Breyer also questioned the majority’s assumption that SEC Commissioners were removable only for cause, noting that the relevant statute, silent about removal, was enacted after *Myers v. United States*, 272 U.S. 52 (1926) and before *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). *Free Enterprise*, 130 S. Ct. at 3182–83 (Breyer, J., dissenting). The dissent explained that during that interval, “it would have been unconstitutional” for Congress to impose conditions on removal, that Congress accordingly created the Federal Communications Commission and Federal Power Commission without such provisions, and that shortly after *Humphrey’s*, it returned to the pre-*Myers* practice of authorizing removals only for cause. *Id.* at 3183 (emphasis and citations omitted).

But such congressional silence does not necessarily establish a right to remove without cause, as noted by Professors Breger and Edles, *supra* note 58, at 1146 (citing *Wiener v. United States*, 357 U.S. 349 (1958)), where the Court found an implied good cause restriction on the President’s power to remove a member of an adjudicatory agency. Indeed, *Free Enterprise’s* result (effectively reading a “for cause” requirement into an otherwise silent statute) can be seen as re-affirming *Wiener*. As Professors Loss and Seligman acknowledge, “it now seems quite clear that the legislative silence does not empower the President to remove members of an ‘adjudicatory body’ like the SEC, except presumably for ‘inefficiency, neglect of duty, or malfeasance in office.’” LOUIS LOSS & JOEL SELIGMAN, *FUNDAMENTALS OF SECURITIES REGULATION* 68 (5th ed. 2004) (citing *Wiener*, 357 U.S. at 356; *Humphrey’s Executor*, 295 U.S. at 602). Several courts have also recognized that SEC Commissioners are removable only for cause. *See, e.g.*, *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988) (stating that it is “commonly understood” that SEC members are removable only under the above standard); *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 619 (2d Cir. 2004); *SEC v. Bilzerian*, 750 F. Supp. 14, 16 (D.D.C. 1990); *SEC v. Shared Med. Sys. Corp.*, No. 91-6546, 1992 U.S. Dist. LEXIS 12314, at \*12 (E.D. Pa. Aug. 17, 1992). The dissent did not discuss these authorities.

the agency's expertise."<sup>76</sup> Indeed, *Free Enterprise* could lead to piecemeal review—with a separation of powers challenge in the District Court and litigation on the merits in the prescribed court (often a court of appeals).

*B. Differences Between Board Members and ALJs*

The majority made clear that none of the positions identified in the dissent's "premonitions of doom"—a phrase suggesting skepticism about the dissent's concerns—was "similarly situated to the Board."<sup>77</sup> The ALJs were among those positions, and a footnote stated explicitly that the holding did not address them.<sup>78</sup> The distinctions between PCAOB members and ALJs suggest that *Free Enterprise* should be inapplicable to the ALJs.

As noted, the PCAOB has "expansive powers to govern an entire industry" by regulating "every detail of an accounting firm's practice."<sup>79</sup> The Board is a powerful combination of governmental powers. It legislates—promulgating rules and standards; it conducts law enforcement functions and exercises prosecutorial discretion—classic executive functions;<sup>80</sup> and it adjudicates individual proceedings. Even if these powerful PCAOB roles, including prosecutorial functions, justified bringing the Board closer to presidential removal power, they have nothing to do with ALJs, who have only the power to adjudicate. The *Free Enterprise* Court explained that its holding did not address ALJs because "unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions."<sup>81</sup> The majority itself thus recognized that the adjudicatory function makes the ALJs different from PCAOB members and properly beyond the reach of presidential removal power.<sup>82</sup>

There are also significant differences in the removal standards. The ALJs are removable only for "good cause."<sup>83</sup> But the PCAOB members are removable "in accordance with section 7217(d)(3) . . . for good cause shown."<sup>84</sup> Section 7217(d)(3) lays out precise categories: willful violation of

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76. *Free Enterprise*, 130 S. Ct. at 3150 (citation omitted).

77. *Id.* at 3160.

78. *Id.* at 3160 n.10.

79. *Id.* at 3147–48.

80. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 691 (1988) ("[L]aw enforcement functions . . . typically have been undertaken by officials within the Executive Branch.").

81. 130 S. Ct. at 3160 n.10.

82. *See generally Wiener v. United States*, 357 U.S. 349 (1958) (discussing the President's limited power to remove members of adjudicatory bodies without cause).

83. 5 U.S.C. § 7521 (2006).

84. 15 U.S.C. § 7211(e)(6) (2006).



the Act, Board rules, or securities laws; willful abuse of authority; and unjustified failure to enforce the Act, or a Board rule or standard. Indeed, the majority saw the statute as creating an “unusually high standard” for removal and thus “present[ing] an even more serious threat to executive control than an ‘ordinary’ dual for-cause standard.”<sup>85</sup> The dissenters would have “welcome[d]” a statement limiting the holding to § 7117(d)(3)’s demands.<sup>86</sup> Though no such pronouncement appeared, the door is presumably open to that distinction in subsequent litigation involving challenges to ALJs.

Moreover, some ALJs may be a step closer to the President than the PCOAB members. For separation of powers purposes, there may be a distinction between judges employed by agencies whose heads serve at the pleasure of the President (e.g., cabinet departments) and those at agencies whose members themselves may be removed only for cause. Acting for any reason or for no reason, the President could direct a cabinet member to file and pursue charges against a particular ALJ. Such action could trigger resignation or other settlement and in any event would launch a proceeding which could result in removal. At an independent agency, commissioners who may be removed only for cause could more readily resist such a command.

But under this theory, ALJs at the Department of Agriculture, for example, would retain their “for cause” protection, while NLRB judges would lose theirs. But ALJs “are all executive officers”<sup>87</sup> and should be treated equally for constitutional purposes. The separation of functions principle should not create a patchwork, whereby the constitutionality of an ALJ’s protection turns on who heads the agency.

### C. ALJs as “Officers”

*Free Enterprise* makes clear that presidential removal power applies to “executive officers.”<sup>88</sup> In explaining that its holding did not apply to ALJs, the majority said that many judges possess “purely recommendatory powers” and that their status as “officers” was “disputed.”<sup>89</sup> It cited *Landry v. FDIC*,<sup>90</sup> which held (in a 2–1 decision) that ALJs who issue only

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85. *Free Enterprise*, 130 S. Ct. at 3158.

86. *Id.* at 3177 (Breyer, J., dissenting).

87. *Freytag v. Commissioner*, 501 U.S. 868, 910 (1991) (Scalia, J., concurring) (emphasis omitted).

88. 130 S. Ct. at 3151–52.

89. *Id.* at 3160 n. 10.

90. 204 F.3d 1125 (D.C. Cir. 2000).

recommended decisions<sup>91</sup> are not “officers” because they lack power of final decision.<sup>92</sup>

But if ALJs issuing recommended decisions are not officers because they lack final decisional power, what is the status of ALJs who issue initial decisions? These become final only if not appealed to or reviewed by the agency. In any instance where an initial decision is appealed, those judges would similarly lack final decisional power. The appealed initial decision is no less “recommendatory” than a recommended decision itself; there is no practical difference between the two. In each instance the ALJ presides over the hearing and makes a decision which requires further agency action before any final administrative decision.<sup>93</sup> Moreover, in each instance the ALJ’s decision is subject to the same standard of agency review.<sup>94</sup> Thus, many courts have referred to appealed initial decisions as “recommending” or making “recommendations.”<sup>95</sup>

If the presence or absence of final decisional authority is determinative, then ALJs would be “officers” only when issuing initial decisions that were neither appealed nor reviewed. Judges in agencies requiring initial decisions would be “constitutionally at risk,” to use Justice Breyer’s phrase, while judges employed by others would not. Indeed, the same judge could be at risk on one day and not the next. His or her status would turn first on whether the agency required recommended or initial decisions, and if

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91. Under the APA, 5 U.S.C. § 557(b) (2006), a recommended decision requires further agency action before any final decision; an initial decision becomes the agency decision unless there is an appeal to or review by the agency. See U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 82 (1947).

92. *Landry* thereby avoided deciding whether the banking regulatory agencies’ ALJs were unconstitutionally appointed because the agencies were not “Departments,” an issue now resolved in *Free Enterprise*. 130 S. Ct. at 3162–63. *Landry* distinguished *Freytag*, where the Court held that special trial judges were officers, though they lacked final decisional power in certain cases. 501 U.S. at 870. The *Landry* majority found that ALJs issuing only recommended decisions differed from the special trial judges because the latter had final authority in some other matters, whereas the banking agencies’ ALJs were required to issue recommended decisions in all cases. See 204 F.3d at 1134.

93. As shown *infra* at page 415, the judges’ powers and impact are significant even in those cases.

94. The APA gives the agency on review “all the powers which it would have in making the initial decision,” a standard which applies whether the decision is recommended or initial. 5 U.S.C. § 557(b); see also ATTORNEY GENERAL’S MANUAL, *supra* note 91, at 83.

95. See, e.g., *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 359 (1955) (the “initial decision recommended that the Allentown application be granted”); *Macktal v. Chao*, 286 F.3d 822, 824 (5th Cir. 2002); *New Radio Corp. v. FCC*, 804 F.2d 756, 757 (D.C. Cir. 1986); *P. R. Mar. Shipping Auth. v. Fed. Mar. Comm’n*, 678 F.2d 327, 333 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 906 (1982); *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 975 (8th Cir. 1981); *Wingate Trucking Co. v. ICC*, 535 F.2d 909, 910 (5th Cir. 1976).

initial, on third-party choices about appealing or reviewing them. The ALJs are all appointed in the same way, and their constitutional status should not depend on such variables.

The Court has repeatedly recognized that “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States.’”<sup>96</sup> The officer must have “significan[t] . . . duties and discretion.”<sup>97</sup>

ALJs meet that test; as Justice Scalia has said, “[ALJs] are all executive officers.”<sup>98</sup> Like the special trial judges in *Freytag*, “They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders,” and these “important functions” involve “significant discretion.”<sup>99</sup> As noted, their initial decisions become the agency decisions unless appealed to or reviewed by the agency,<sup>100</sup> and they are thus the final deciders in many instances. Moreover, under the APA the ALJ hears and decides cases which Congress thought important enough to warrant formal hearings.<sup>101</sup>

Even on appeal, the judges play a significant role in framing the issues and focusing the case for agency decision and any later judicial review. As expressed by former Chief Judge Wald of the D.C. Circuit,

[ALJs] with the help of counsel, define the issues, lay down the law at least preliminarily, and, most important, make the findings of fact that drive the rest of the process. . . . A reviewing court will generally use the ALJ’s recommended decision as the benchmark for its first impression on agency reasonableness.<sup>102</sup>

Though agencies have broad review powers under 5 U.S.C. § 557(b), a reversal of the ALJ, particularly on credibility and demeanor issues, often raises a red flag on judicial review.<sup>103</sup> In managing the prehearing process,

96. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) *quoted in Freytag*, 501 U.S. at 881; *Free Enterprise*, 130 S. Ct. at 3148.

97. *Freytag*, 501 U.S. at 881–82 (citations omitted).

98. *Id.* at 910 (Scalia, J., concurring) (emphasis omitted).

99. *Id.* at 882 (majority opinion).

100. *See* 5 U.S.C. § 557(b) (2006).

101. *See id.* §§ 554, 556.

102. Patricia M. Wald, *Some Thoughts on Beginnings and Ends: Court of Appeals Review of Administrative Law Judges’ Findings and Opinions*, 67 WASH. U. L.Q. 661, 661, 666 (1989). Judge Wald here used the adjective *recommended* generically—covering both initial and recommended decisions.

103. *See, e.g., Zoltanski v. FAA*, 372 F.3d 1195, 1201 (10th Cir. 2004) (agency must have “substantial justification” for rejecting ALJ’s credibility findings; findings based on demeanor are “particularly influential” with reviewing court); *Bosma v. U.S. Dep’t of Agric.*, 754 F.2d 804, 808 (9th Cir. 1984) (“Where . . . ‘credibility is at issue or when findings of motive or purpose depend entirely on credibility, the decision of the ALJ will be given special weight.”

ALJs also control scheduling, subpoenas, document production, and depositions—actions which are generally unreviewable and thus final as a practical matter. Additionally, during the hearing they rule on all procedural matters, including the admission of evidence.

As the Supreme Court stated in *Butz v. Economou*,<sup>104</sup> “The conflicts which federal hearing examiners seek to resolve are every bit as fractious as those which come to court. . . . There can be little doubt that the role of the modern federal . . . administrative law judge . . . is ‘functionally’ comparable’ to that of a judge.”<sup>105</sup>

#### *D. Adjudicatory Independence of ALJs*

Allowing removal of ALJs for any reason or no reason (i.e., at-will employment) would clash with a longstanding policy reflecting the importance of adjudicatory independence. The APA’s “good cause” provision reflects complaints that hearing examiners “were mere tools of the agency concerned and subservient to the agency heads” in deciding cases.<sup>106</sup> The “good cause” requirement and other APA protections gave hearing examiners “independence and tenure within the existing Civil Service system.”<sup>107</sup>

The Court has recognized the propriety of good-cause protection for adjudicators. In *Wiener v. United States*,<sup>108</sup> a unanimous Court rejected the President’s attempt to remove a member of the War Claims Commission “merely because he wanted his own appointees.”<sup>109</sup> The statute empowered the agency to “adjudicate according to law,” and was silent about removal. Noting “the intrinsic judicial character” of the Commission’s work, and the fact that “[w]e have not a removal for cause,” the Court concluded that neither the Constitution nor the statute gave the President a power to remove at will.<sup>110</sup>

While later scuttling the labels “quasi-legislative” or “quasi-judicial” as

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Moreover . . . the agency’s findings of fact will be scrutinized more critically if they contradict those of the ALJ.” (quoting *Butler-Johnson Corp. v. NLRB*, 608 F.2d 1303, 1305 (9th Cir. 1979)); see also Wald, *supra* note 102, at 666 (“[A] reviewing court’s antenna picks it up immediately when the agency has reversed or overridden in substantial part the ALJ’s decision, particularly findings of fact.”).

104. 438 U.S. 478 (1978).

105. *Id.* at 513.

106. *Ramspeck v. Fed. Trial Exam’rs Conference*, 345 U.S. 128, 131 (1953).

107. *Id.* at 132 (citing ADMINISTRATIVE PROCEDURE ACT—LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 215 (1946)).

108. 357 U.S. 349 (1958).

109. *Id.* at 356.

110. *Id.* at 355–56.

determining separation of powers issues,<sup>111</sup> the Court also said that those terms may nevertheless properly describe

the circumstances in which Congress might be more inclined to find that a degree of independence from the Executive, such as that afforded by a “good cause” removal standard, is necessary to the proper functioning of the agency or official. It is not difficult to imagine situations in which Congress might desire that an official performing “quasi-judicial” functions, for example, would be free of executive or political control.”<sup>112</sup>

“Good cause” protection for the judges creates a “high degree of independence of ALJs”<sup>113</sup> from “agency influence and manipulation,”<sup>114</sup> and “protect[s] the rights of individuals affected by agency adjudicatory decisions from any potential sources of bias.”<sup>115</sup> Neutrality in adjudicative proceedings safeguards against “erroneous or distorted” conclusions and “preserves both the appearance and reality of fairness.”<sup>116</sup> Indeed, some scholars have said that “the participation of an independent adjudicator” is a “core element” of procedural due process, and the Supreme Court has agreed that an independent or impartial decisionmaker is among the elements of due process.<sup>117</sup>

### CONCLUSION

Transforming ALJs into at-will employees (the potential effect of *Free Enterprise*), removable for any reason or no reason, would substantially undermine adjudicatory independence, leaving agencies free to demand particular adjudicative results through the prospect of removing those who did not get the “message.” “[O]ne who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will.”<sup>118</sup> Even if the Board members’ sweeping legislative and executive powers warranted at-will status to facilitate possible presidential removal, there is no reason to bring the ALJs’

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111. *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

112. *Id.* at 691 n.30.

113. II RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 685 (4th ed. 2002).

114. *Vesser v. Office of Pers. Mgmt.*, 29 F.3d 600, 605 (Fed. Cir. 1994).

115. PIERCE, *supra* note 113, at 685.

116. *Marshall v. Jerico, Inc.*, 446 U.S. 238, 242 (1980).

117. Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 *YALE L.J.* 455, 457 (1986); *see also* *Vitek v. Jones*, 445 U.S. 480, 494–95 (1980); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

118. *Wiener v. United States*, 357 U.S. 349, 353 (1958) (citation omitted).

more limited and purely adjudicatory roles closer to presidential removal. Such a radical outcome, with a serious adverse impact on the fairness of the administrative adjudicatory system, is not required by *Free Enterprise's* treatment of PCAOB members.



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