2018 UPDATES FOR GELLIHORN & BYSE’S ADMINISTRATIVE LAW: CASES & COMMENTS 12th EDITION

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PART I:
OVERVIEW

CHAPTER I:
AN INTRODUCTION TO ADMINISTRATIVE LAW

SECTION 1: AN INTRODUCTORY EXAMPLE

Add before “How do administrative agencies do their work?”, p. 25:

In January 2018, the D.C. Circuit, sitting en banc, rejected the constitutional challenge to the structure of the CFPB in PHH Corp. v. CFPB, 881 F.3d 75 (D.C. Cir. 2018) (en banc). Litigants did not seek review by the Supreme Court. Other challenges to the agency’s design are working their way through the courts. See, e.g., CFPB v. RD Legal Funding, LLC, 2018 WL 3094916 (S.D.N.Y. 2018) (holding “the CFPB’s structure is unconstitutional”); Supplement to Chapter VII, at p. 944.

SECTION 2: THE BASICS

Add before (a.), p. 32:


In the first category, among other items, the Administration proposes to “[m]erge the Departments of Education and Labor into a single Cabinet agency, the Department of Education and the Workforce,” to “[m]ove the Army Corps of Engineers (Corps) Civil Works out of the Department of Defense (DOD) to the Department of Transportation (DOT) and Department of the Interior (DOI),” and to “[r]estructure the U.S. Postal System to return it to a sustainable business model or prepare it for future conversion from a Government agency into a privately-held corporation.” Id. at 15, 17. In the second group, in part, the Administration calls to “[s]trengthen the Small Business Administration (SBA) as the voice of small business within the Government” and to “[t]ransition Federal agencies’ business processes and recordkeeping to a fully electronic environment, and end the National Archives and Records Administration’s acceptance of paper records by December 31, 2022.” Id. at 17-18. In the third category, the plan advances, among other proposals, to “[t]ransform the way Americans interact with the Federal Government by
establishing a Government-wide customer experience improvement capability” and to “[s]olve the Federal cybersecurity workforce shortage by establishing a unified cyber workforce capability across the civilian enterprise, working through DHS and OMB in coordination with all Federal departments and agencies.” Id. at 18. (The fourth category details more minor changes.)

The Administration can carry out some of its proposals without congressional authorization. But since 1984, Congress has not delegated reorganization authority to the White House for more substantial changes, such as consolidating federal agencies. After OMB released its plan, legislators introduced the 2018 Reforming Government Act, which would create a fast-track congressional approval process for these changes.

Separately, there have been calls from across the political spectrum to “[m]ove big chunks of the federal government outside of Washington, D.C.” Such a transformation would make the nation’s capital less entwined with the government, where at least one-quarter of jobs are government or government-related (contracting). And it “would benefit smaller, less costly, more economically distressed cities and metros across the country, generating employment and investment in these places ….” Richard Florida, It’s Time to Move Some Federal Agencies Out of D.C., CityLab, Nov. 30, 2017; see also David Fontana, Fiscal Decentralization,104 Va. L. Rev. 727 (2018).
PART II:
UNDERSTANDING STATUTES

CHAPTER II:
STATUTORY INTERPRETATION

SECTION 3: TOOLS OF STATUTORY INTERPRETATION

e. Legislative History

Add a new Note (5), p. 178:

(5) The Latest Skirmish. The most recent version of the ongoing debate over the use of legislative history played out in Digital Realty Trust, Inc. v. Somers, 138 S.Ct. 767 (2018). The majority, in an opinion by Justice Ginsburg, relied on a committee report to support her interpretation of a provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Justice Thomas, joined by Justices Alito and Gorsuch, responded in a concurring opinion that it was not proper to rely on legislative history because “we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended.” Lawson v. FMR LLC, 571 U.S. 429 __ (2014) (Scalia, J., concurring in part and concurring in judgment).” 138 S.Ct. at 783. Justice Sotomayor, joined by Justice Breyer, responded to that concurring opinion in a concurrence of her own, which she ended this way: “I do not think it wise for judges to close their eyes to reliable legislative history—and the realities of how Members of Congress create and enact laws—when it is available.” Id.
PART III:
THE AGENCY AT WORK

CHAPTER IV:
RULEMAKING

SECTION 1: INTRODUCTION

Add before the Hamilton excerpt, p. 284:

The Uncertain Hour, a podcast on American Public Media’s Marketplace, ran a fascinating three-
part episode on the peanut butter rulemaking, which not only describes the formal proceedings,
but also details the critical role of women (as consumer advocates) in the proceedings as well as
connects those proceedings to recent efforts to generate more formal rulemaking in the
Regulatory Accountability Act (described in Note (3) on p. 286):

https://www.marketplace.org/2017/10/25/business/uncertain-hour/s02-1-peanut-butter-
grandma-goes-washington


Add to the end of Note (3), p. 290:

The Regulatory Review, an on-line forum for Administrative Law issues hosted by the
University of Pennsylvania Law School, ran a series of essays with differing perspectives on the
RAA in May 2017: https://www.theregreview.org/2017/05/30/assessing-regulatory-
accountability-act/.

Add to the end of Note (4), p. 290:

For an examination of withdrawn rulemakings at the start of the Trump Administration, see
Public Citizen, Sacrificing Public Protections on the Altar of Deregulation, Nov. 28, 2017
(noting 457 such withdrawals and finding that “[t]his total is the most of any [Unified] Agenda
since 1995,” which is the earliest the Agenda appears on-line) (https://www.citizen.org/sites/default/files/trump-withdrawn-regs-report.pdf).
SECTION 2: THE REQUIREMENTS OF § 553 NOTICE-AND-COMMENT RULEMAKING

b. Notice

Add a new Note (6), p. 321:

(6) Recent ANPRMs. Although the Trump Administration is engaging in fewer rulemakings than prior administrations at this point in the term, rulemaking has not come to a halt. In part, agencies are using rulemaking to repeal earlier regulations. But agencies are also using rulemakings to impose additional obligations. The FDA has several rulemakings in process, including to lower the amount of nicotine in cigarettes and to restrict the use of flavors in tobacco products. These rulemakings are at a very early stage, with the agency having issued Advance NPRMs and sought comments. The regulatory dockets are here: https://www.regulations.gov/docket?D=FDA-2017-N-6189 (nicotine levels) and https://www.regulations.gov/docket?D=FDA-2017-N-6565 (flavors in tobacco products).

c. An Opportunity to Comment and a Concise General Statement of a Rule’s Basis and Purpose

Add to the end of Note (2), p. 333:

As you know, President Trump has nominated Judge Kavanaugh to be an Associate Justice of the Supreme Court. Judge Kavanaugh’s views on agency structure and the separation of powers are well known (see pp. 941-944), and his dissenting opinion was largely adopted by the Court in Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010) (p. 922). We also provide his views on Chevron below in Chapter VIII, p. 1159, of the Supplement. While his views on the separation of powers and Chevron may have a majority on the Court, if he is confirmed, his take on the paper hearing likely will be less popular.

Add new Notes (6)-(8), p. 335:

(6) Recent Examples of the Paper Hearing Mandates. A recent district court opinion on a challenge to a Department of Commerce regulation on seafood imports nicely illustrates the paper hearing mandates and their limits, ALFA INTERNATIONAL SEAFOOD v. ROSS, 264 F.Supp.3d 23, 53, 55-57 (D.D.C. 2017); “Plaintiffs advance a multifaceted attack. First, they argue that the Rule violates the APA’s notice-and-comment requirements because the Department failed to publicly disclose certain data [Ed. called Data below] that it relied upon in developing the priority species list. … A series of cases from the D.C. Circuit makes clear that when an agency relies on data that is critical to its decision-making process, that data must be disclosed in order to provide the public an opportunity to meaningfully comment on the agency’s rulemaking rationale. … Federal Defendants nevertheless defend the Department’s non-disclosure of the … Data …. [T]hey assert that the agency conveyed general information about the … Data to the
public as part of the ‘brief summaries’ published in the Federal Register that contained the Department’s reasons for each priority species’ selection. … None of the summaries contain a synopsis of the [missing] Data, or at least none that is obvious. ... The Department’s withholding of the … Data does not, however, sink the Rule …. Plaintiffs are still required to demonstrate prejudice flowing from the agency’s non-disclosure. The D.C. Circuit has stated that in cases where, as here, ‘an agency has relied on data or information that was not disclosed to commenters,’ the plaintiff must ‘show that an opportunity to comment regarding an agency’s important information created enough uncertainty as to its possible affect on the agency’s disposition.’ Allina Health Servs. v. Sebelius, 746 F.3d 1102, 1109–10 (D.C. Cir. 2014) (internal quotation marks omitted). Put another way, to demonstrate prejudice, Plaintiffs must demonstrate that they ‘had something useful to say’ about the undisclosed data that could have impacted the Department’s decision-making. Chamber of Commerce, 443 F.3d at 905. On this score, Plaintiffs fall short.” See also Competitive Enterprise Institute v. U.S. Department of Transportation, 863 F.3d 911 (D.C. Cir. 2017) (noting that an agency “may include new ‘supplementary’ information that ‘expands on and confirms’ data in the rulemaking record” that was not provided for commenting and finding that “[t]his case falls in th[at] … category”).

(7) **Missing Data.** What happens when the agency does not want to use certain data but that data could be helpful to commenters? The data are not “critical” in the sense of Note (6) but they likely are part of the record if considered by the agency in the sense of Note (5). See Ben Penn, Labor Dept. Ditches Data Showing Bosses Could Skim Waiters’ Tips. Bloomberg Law, Feb. 1, 2018 ([https://bnanews.bna.com/daily-labor-report/labor-dept-ditches-data-showing-bosses-could-skim-waiters-tips](https://bnanews.bna.com/daily-labor-report/labor-dept-ditches-data-showing-bosses-could-skim-waiters-tips)): “Labor Department leadership scrubbed an unfavorable internal analysis from a new tip pooling proposal, shielding the public from estimates that showed employees could lose out on billions of dollars in gratuities, four current and former DOL sources tell Bloomberg Law. … The move to drop the analysis means workers, businesses, advocacy groups, and others who want to weigh in on the tip pool proposal will have to do so without seeing the government’s estimate first. … The Labor Department ‘works to provide the public accurate analysis based on informed assumptions’ a DOL spokesman told Bloomberg Law in an email. The spokesman noted that the department asked the public to comment with suggestions about how to quantify the rule’s impact as part of the proposal. ‘As previously stated, after receiving public comment, the Department intends to publish an informed cost benefit analysis as part of any final rule.’” News accounts reported that OIRA (see Section 4.d) disagreed with the removal of the study from the rulemaking docket but was overruled. Ben Penn, Mulvaney, Acosta Override Regulatory Office to Hide Tips Rule Data, Bloomberg Law, March 21, 2018 ([http://bnanews.bna.com/daily-labor-report/mulvaney-acosta-override-regulatory-office-to-hide-tips-rule-data-1](http://bnanews.bna.com/daily-labor-report/mulvaney-acosta-override-regulatory-office-to-hide-tips-rule-data-1)).

(8) **Agency-Imposed Restrictions on Data.** In April, the EPA proposed a rulemaking that if finalized would require “when EPA develops regulations for which the public is likely to bear the cost of compliance, with regard to those scientific studies that are pivotal to the action being taken, EPA should ensure that the data underlying those are publicly available in a manner sufficient for independent validation.” EPA, Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18768, 18768 (Apr. 30, 2018). The EPA argues that the rule would “strengthen the transparency of EPA regulatory science.” Id. The NY Times reported that “regulators crafting future rules would quite likely find themselves restricted from using some
of the most consequential environmental research of recent decades, such as studies linking air pollution to premature deaths or work that measures human exposure to pesticides and other chemicals. The reason: These fields of research often require personal health information for thousands of individuals, who typically agree to participate only if the details of their lives are kept confidential.” Lisa Friedman, The E.P.A. Says It Wants Research Transparency. Scientists See an Attack on Science, N.Y. Times, March 26, 2018 (https://nyti.ms/2DXg3Xe).

Add to the end of Note (1), p. 336:

The regulationroom.org site no longer seems to be available, except in cached versions. Other web sites have popped up; www.climatecomments.org explains how to comment on the repeal of the Clean Power Plan (see p. 953), providing examples in favor and in opposition to the repeal. (The comment period has since closed but the web site is still operating.)

Add to the end of Note (2), p. 336:

For more on issue exhaustion in rulemaking, see Ronald M. Levin, Making Sense of Issue Exhaustion in Rulemaking, 70 Admin. L. Rev. 177 (2018); Jeffrey S. Lubbers, Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?, 70 Admin. L. Rev. 109 (2018).

Add to the end of Note (4), p. 338:

See the addition at p. 765 below.

<table>
<thead>
<tr>
<th>SECTION 3: EXCEPTIONS TO § 553 NOTICE-AND-COMMENT REQUIREMENTS</th>
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<td><strong>a. The Good Cause Exception</strong></td>
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Add to the end of Note (1), p. 349:

The Supreme Court has recently decided to hear a challenge to the Act’s constitutionality under the non-delegation doctrine, Gundy v. United States, No. 17-6086. See new Note (7) at p. 807 below.

Add to the end of Note (5), p. 352:

Add a new Note (8), p. 353:

(8) The Affordable Care Act, the Trump Administration, and Good Cause. Late in President Trump’s first year, the Department of Health and Human Services issued two interim final rules (IFRs) (see p. 353 for a definition of interim rules) to exempt certain organizations from the ACA’s requirement that employers provide coverage for contraception. Two district courts granted preliminary injunctions, holding that the agency did not have good cause to forgo prior notice and comment. The government has appealed. (A third district court found the plaintiff lacked standing to sue on the alleged procedural violation).

CALIFORNIA V. HEALTH AND HUMAN SERVICES, 281 F. Supp.3d 806, 827-29 (N.D. Cal 2017) (citations omitted):

“Defendants fail to show that their decision to forgo advance notice and comment was justified by good cause under section 553. In the Religious Exemption IFR, they set forth several purported justifications: (1) the ‘[d]ozens’ of pending lawsuits challenging the contraceptive mandate; (2) the desire to cure violations of RFRA, based on the contention that ‘requiring certain objecting entities or individuals to choose between the Mandate, accommodation, or penalties for [noncompliance]’ constitutes such a violation; (3) the desire to bring HRSA guidelines into ‘accord with the legal realities’ of the temporary injunctions issued in various cases; (4) the desire ‘to provide immediate resolution’ to parties with religious objections to the mandate; (5) the desire to avoid increases in the costs of health insurance caused by entities remaining on more expensive grandfathered plans—which are exempt from the mandate—to avoid becoming subject to the mandate; and (6) the desire to avoid delay in making the accommodation available to a broader category of entities. In the Moral Exemption IFR, Defendants set forth similar justifications.

“None of these proffered reasons justified the use of the ‘emergency procedure’ that is the good-cause exception. Defendants make no argument that the above considerations made it impossible for them to both satisfy the notice and comment requirement and execute their statutory duties under the ACA. Defendants also fail to establish (or even claim) that notice and comment would have effectively prevented them from operating. Instead, they argue that ‘any additional delay in issuing the Rules would be contrary to the public interest,’ because ‘[p]rompt effectiveness would provide entities and individuals facing burdens on their sincerely held religious beliefs and moral convictions with important and urgent relief.’ But ‘[i]f “good cause” could be satisfied by an Agency’s assertion that ‘normal procedures were not followed because of the need to provide immediate guidance and information ... then an exception to the notice requirement would be created that would swallow the rule.’

“Defendants also argue that they ‘demonstrated a willingness to consider public comment, both prior and following issuance of the rules.’ But Defendants’ willingness to consider comments ‘on the exemption and accommodation issues’ generally does not excuse their failure to do so before enacting the 2017 IFRs. This is particularly true because the 2017 IFRs represent a direct repudiation of Defendants’ prior well-documented and well-substantiated public positions. Moreover, these IFRs are much broader in scope, and introduce an entirely new moral conviction basis for objecting to the contraceptive mandate. Until October 6, 2017, the
The public had no notice of Defendants’ intent to dramatically broaden eligibility for the exemption and to make the accommodation optional. The fact that the public may have previously commented on these broad topics in the context of past iterations of the rules does not change that.

“In addition, whether or not Defendants are willing to consider post-promulgation comments, it remains ‘antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later.’ … (noting that ‘[t]he Attorney General’s request for post-promulgation comments in issuing the interim rule casts further doubt upon the authenticity and efficacy of the’ asserted basis for good cause under section 553). The same reasoning defeats Defendants’ argument that ‘the Rules are effective only until final rules are issued.’ And that argument is further undercut by the fact that on November 30, 2017 the Centers for Medicare & Medicaid Services, which are part of HHS, issued guidance for the implementation of the 2017 IFRs. The Court agrees with Plaintiffs that the issuance of this guidance, before the end of the post-promulgation comment period, suggests that ‘it does not appear that the Defendants expect public comment to inform implementation.’

“In short, Defendants had no good cause to forgo the APA’s notice and comment requirements, because their asserted justifications do not ‘overcome the high bar’ they must clear to do so.”


“‘The desire to eliminate uncertainty, by itself, cannot constitute good cause.’ Even if it could, the Agencies’ stated need to resolve uncertainty is undercut by the request, contained in the New IFRs, for post-issuance comments regarding ‘whether these regulations expanding the exemption should be made permanent or subject to modification.’ The request for comments particularly as to whether the New IFRs should be modified ‘implicitly suggests that the rule[s] will be reconsidered [and] means the level of uncertainty is, at best, unchanged....’

“The Agencies stated in the New IFRs that the clarity offered by the expanded exemptions will decrease insurance costs; they hypothesize that groups with grandfathered health plans will wish to make changes to other components of their health plans in order to reduce costs, while still avoiding coverage for contraceptive services. Under the ACA, as long as grandfathered plans do not make any changes to their health coverage, they need not cover women’s preventive services. However, the New IFRs do not cite a single comment from an employer with a grandfathered plan which suggests that they will make changes to health plans in light of the new agency interpretation. This is merely speculation, unsupported by the record.

“Last, the Agencies asserted in the New IFRs that notice and comment was unnecessary because the Agencies considered past comments and requested post-issuance comments. … Defendants cite no case, and research has not disclosed any, finding that notice and comment is unnecessary where an agency has received ample commentary on its prior interpretations of the same law. In fact, the significance of this issue and the outpouring of public comments reflect the opposite: the overwhelming public interest demonstrates that notice and comment is critical. …
“The Agencies also assert that their provision for a post-issuance commentary period does away with the need for pre-issuance notice and comment. They solicited comments for 60 days following the issuance of the New IFRs. None of the cases that Defendants cite support that position. Instead, each of them stand for the proposition that an agency may seek post-issuance commentary only if and only after having shown that it had good cause to avoid notice and comment rulemaking, a situation that is not present here.

“There are several reasons why post-issuance comments do not comply with the notice and comment provisions of the APA. First, there is nothing in the APA that provides for post-issuance commentary. Second, participants are less likely to influence agency action in later stages of the agency decision-making process. This is especially the case where an agency has already issued interim rules which suggest that it has decided what federal policy should be. Post-issuance commentary does not ameliorate the need for notice and comment because by the time agencies issue interim rules, they are less likely to heed public input. Last, permitting post-issuance commentary carte blanche would write the notice and comment requirements out of the APA.”

b. The Exception for Interpretive Rules, Guidance, and Policy Statements

Add to the end of Note (3), p. 375:

ACUS recently issued a recommendation on agency guidance. It stressed that an “agency should not use a policy statement to create a standard binding on the public, that is, as a standard with which noncompliance may form an independent basis for action in matters that determine the rights and obligations of any member of the public.” But the recommendation also noted: “Although a policy statement should not bind an agency as a whole, it is sometimes appropriate for an agency, as an internal agency management matter, and particularly when guidance is used in connection with regulatory enforcement, to direct some of its employees to act in conformity with a policy statement. … For example, a policy statement could bind officials at one level of the agency hierarchy, with the caveat that officials at a higher level can authorize action that varies from the policy statement. Agency review should be available in cases in which frontline officials fail to follow policy statements in conformity with which they are properly directed to act.” ACUS, Agency Guidance Through Policy Statements, Recommendation 2017-5 (adopted Dec. 14, 2017) (https://www.acus.gov/sites/default/files/documents/Recommendation%202017-5%20Agency%20Guidance%20Through%20Policy%20Statements%202017-5.pdf). How does this fit with Texas v. United States?

Add a new Note (6), p. 377:

(6) DACA and the Trump Administration. The DACA program was not challenged when it was enacted. But after President Trump took office, Acting DHS Secretary Elaine Duke rescinded the program, prompting litigation that the action was arbitrary and capricious, in part
because the agency’s short explanation that it was relying on the Fifth Circuit’s decision in Texas v. United States (p.357) was insufficient. The Northern District of California agreed and issued a preliminary injunction, as did other district courts. (Then, Texas and some other states sued to end the program, asking for a competing injunction). The cases are working their way through the courts.

Add a new Note (6), p. 382:

(6) The Trump Administration’s Dislike of Guidance. While ACUS has endorsed the use of guidance in many contexts, calling policy statements “of great value to agencies and the public alike,” the Department of Justice has recently taken a different stance. In November 2017, Attorney General Sessions sent a memorandum to the department’s components, discouraging the use of guidance. In part, the memorandum read:

“It has come to my attention that the Department has in the past published guidance documents—or similar instruments of future effect by other names, such as letters to regulated entities—that effectively bind private parties without undergoing the rulemaking process.

“The Department will no longer engage in this practice. Effective immediately, Department components may not issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch (including state, local, and tribal governments). To avoid circumventing the rulemaking process, Department components should adhere to the following principles when issuing guidance documents:

• Guidance documents should identify themselves as guidance, disclaim any force or effect of law, and avoid language suggesting that the public has obligations that go beyond those set forth in the applicable statutes or legislative rules.
• Guidance documents should clearly state that they are not final agency actions, have no legally binding effect on persons or entities outside the federal government, and may be rescinded or modified in the Department’s complete discretion.
• Guidance documents should not be used for the purpose of coercing persons or entities outside the federal government into taking any action or refraining from taking any action beyond what is required by the terms of the applicable statute or regulation.
• Guidance documents should not use mandatory language such as ‘shall,’ ‘must,’ ‘required,’ or ‘requirement’ to direct parties outside the federal government to take or refrain from taking action, except when restating— with citations to statutes, regulations, or binding judicial precedent—clear mandates contained in a statute or regulation. In all cases, guidance documents should clearly identify the underlying law that they are explaining.
• To the extent guidance documents set out voluntary standards (e.g., recommended practices), they should clearly state that compliance with those standards is voluntary and that noncompliance will not, in itself, result in any enforcement action.”

Does this memorandum announce a genuine change? After all, guidance is not supposed to bind the public. Perhaps, agency officials have different takes not on what is binding. Soon
after issuing the memorandum, Sessions rescinded 25 guidance documents. The city of San Francisco has sued to undo the repeal of six related to civil rights.

c. The Other Exceptions

Change in the second line of the first full paragraph, p. 390:

“Muslin-majority” should be “Muslim-majority”

Add to the end of Note (3), p. 389:

See Judge Kavanaugh in Allina Health Services v. Price, 863 F.3d 937, 944 (D.C. Cir. 2017): “HHS argues that the Medicare Act incorporates the APA’s exceptions to notice-and-comment requirements. According to HHS, even if the decision to include Part C days in the fiscal year 2012 Medicare fractions is a rule, it is at most an ‘interpretive rule’ for purposes of the APA. As a result, it is exempt from the APA’s—and, by extension, the Medicare Act’s—notice-and-comment requirements. The problem with that argument is that the Medicare Act does not incorporate the APA’s interpretive-rule exception to the notice-and-comment requirement. (Therefore, we need not decide whether HHS’s decision to include Part C days in the 2012 Medicare fractions was in fact an interpretive rule.) Unlike the APA, the text of the Medicare Act does not exempt interpretive rules from notice-and-comment rulemaking.”

SECTION 4: GETTING RULEMAKING STARTED

b. Public Initiation of Rulemaking

Add to the end of Note (1), p. 403:

See also Daniel E. Walters, Capturing Regulatory Agendas?: An Empirical Study of Industry Use of Rulemaking Petitions, 43 Harv. Envt’l L. Rev. (forthcoming 2019) (examining petitions to three agencies between 2000 and early 2016 and finding “while they succeed in petitioning more often by some measures, business interests have something less than a stranglehold on regulators’ agendas”) (https://scholarship.law.upenn.edu/faculty_scholarship/1969/).

d. Regulatory Planning and Review

Add to the end of Note (2), p. 418:

A recent Brookings Institution study, using data from the GAO’s Federal Rules Database, finds that “agencies under Trump significantly reduced the total amount of rulemaking relative to prior administrations. This drop held for both routine and important rules, and for both Cabinet

Add to the end of Note (7), p.425:

Public interest groups have challenged Executive Order 13771 in court, alleging that the order’s mandates infringe on other statutory mandates. The district court dismissed their lawsuit, holding that the plaintiffs did not have standing to sue. Public Citizen, Inc. v. Trump, 297 F.Supp.3d 6 (D.D.C. 2018). The plaintiffs have appealed.

Add a new Note (9), p. 426:

(9) IRS Avoidance of OIRA Review. The Treasury Department’s Internal Revenue Service had long avoided OIRA review of its tax regulations, even major ones, relying on a Memorandum of Agreement formed in the Reagan Administration and renewed in the Clinton Administration to encourage timely guidance to taxpayers. The GAO had called for the agencies to reexamine this exemption in light of recent substantial regulations bypassing OIRA review. In April 2018, the Treasury Department and OMB signed a new Memorandum of Agreement, bringing more tax regulations under OIRA’s purview. The MOA is available here: https://home.treasury.gov/sites/default/files/2018-04/04-11%20Signed%20Treasury%20OIRA%20MOA.pdf.

Add a new Note (10), p. 444:

Add to the end of Note (5), p. 507:

In *Lucia v. SEC*, 138 S.Ct. 2044 (2018), the Supreme Court resolved the conflict in the lower court cases. ALJs working for the SEC were “inferior officers” under the Constitution and therefore had to be appointed by the Constitutional process, which is to say, by the SEC Commissioners themselves. As to the immediate case, it had to be retried; as to other cases, the SEC Commissioners had already, while the Court case was pending, reappointed the agency’s ALJs, which presumably covered most of the pending matters. As to the long-run issue most important to assessing ALJ independence—the terms of an ALJ’s tenure of office and the grounds for removing an ALJ—the Court refused to address the matter. The opinions in the case are discussed in this Supplement in Chapter VII, p. 887.

Following on the Lucia case, on July 10, 2018, President Trump issued an Executive Order entitled: “Excepting Administrative Law Judges from the Competitive Service.” Insofar as the order deals with the appointment of ALJs, the thrust of the E.O. is to release agencies from the previously applicable requirement that they appoint only from the list of candidates certified to them through civil service procedures after going through a competitive examination process. The E.O. explained:

As evident from recent litigation, Lucia may also raise questions about the method of appointing ALJs, including whether competitive examination and competitive service selection procedures are compatible with the discretion an agency head must possess under the Appointments Clause in selecting ALJs. Regardless of whether those procedures would violate the Appointments Clause as applied to certain ALJs, there are sound policy reasons to take steps to eliminate doubt regarding the constitutionality of the method of appointing officials who discharge such significant duties and exercise such significant discretion.

Pursuant to my authority under section 3302(1) of title 5, United States Code, I find that conditions of good administration make necessary an exception to the competitive hiring rules and examinations for the position of ALJ. These conditions include the need to provide agency heads with additional flexibility to assess prospective appointees without the limitations imposed by competitive examination and competitive service selection procedures. Placing the position of ALJ in the excepted service will mitigate concerns about undue limitations on the selection of ALJs, reduce the likelihood of successful Appointments Clause challenges, and forestall litigation in which such concerns have been or might be raised. This action will also give agencies greater ability and discretion to assess critical qualities in ALJ candidates, such as work ethic, judgment, and ability to meet the particular needs of the agency. These are all qualities individuals should have before wielding the significant authority conferred on ALJs, and each agency should be able to
assess them without proceeding through complicated and elaborate examination processes or rating procedures that do not necessarily reflect the agency’s particular needs.

As regards removal from office, the E.O. modified existing regulations to provide that “Except as required by statute, the Civil Service Rules and Regulations shall not apply to removals from positions listed in Schedules . . . E.” “Schedule E” is described by the E.O. as comprising those holding the “position of administrative law judge appointed under 5 U.S.C. 3105.” If applied, this provision seems to portend a revolution in the position of the ALJ. However, 5 U.S.C. § 7521—a statutory requirement that dates back to the passage of the APA—provides: “An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.” It would thus seem that, as regards the E.O.’s removal provision, the introductory “except as required by statute” serves to neutralize most, perhaps all, of its impact.

SECTION 4: DUE PROCESS AS A SOURCE OF PROCEDURAL RIGHTS IN ADJUDICATION

b. Applications

Add to the end of Note (3), p. 611:

Eventually Judge Brown ruled that the process the government followed after prodding by the court—(1) telling individual plaintiffs whether they were, or were not, on the No-Fly List; (2) providing the plaintiffs on the List with the criteria used, and at least some of the information used, to put them on the list; and (3) providing those plaintiffs with a summary of the information withheld and the court with further information to be considered in camera—satisfied the requirements of due process. There remained the issue of whether the decision to place them on the list was proper, judged by the appropriate, substantive standard of review. This substantive review, the court held, belonged by statute in the Court of Appeals, which would now be able to do its work because it would have before it an administrative record generated by the procedures the government now had to provide, along with the plaintiffs’ responses. Latif v. Sessions, 2017 WL 1434648 (2017).
CHAPTER VI:  
TRANSPARENCY, E-GOVERNANCE, AND THE INFORMATION AGE

SECTION 1: INTRODUCTION

Add to the end of Note (4), p. 659:

As expected, the website of the (renamed) Office of E-Government & Information Technology is now working: https://www.whitehouse.gov/omb/management/egov/.

Add before first full paragraph, p. 660:

As expected, the website of the Office of Information and Regulatory Affairs is now working: https://www.whitehouse.gov/omb/information-regulatory-affairs/.

Add a new Note (6), p. 661:

(6) Family Separation and FOIA. In early April 2018, the American Immigration Council and other immigrant groups filed various FOIA requests (including to the Departments of Health and Human Services, Homeland Security, and Justice) seeking information about the Administration’s policies regarding the “processing and treatment of families, including any group of two or more persons holding themselves out as such, containing at least one adult family member and one related minor child, who arrive or are found inadmissible at the border, particularly the U.S.-Mexico border, including ports of entry.” These FOIA requests can be found here: https://www.americanimmigrationcouncil.org/foia/family-separation-foia-request. When federal agencies did not respond within FOIA’s time limits, the groups sued. Their complaint can be found here: https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/uncovering_the_governments_internal_family_separation_policies_guidance_and_data_complaint.pdf.

Take a look at both the FOIA requests and the FOIA complaint. The Department of Justice will presumably soon file a motion for an Open America stay to allow the agencies more time to process the requests. For more on Open America stays, see Note (2) on p. 728.

SECTION 2: SECRET LAW

Add to the end of Note (5), p. 669:

The D.C. Circuit held oral argument in May. As of mid-July, it had not issued an opinion in the case.

16
Add after first paragraph of Note (7), p. 670:

    Apparently, the combination of President Trump’s habit of ripping up documents and statutory mandates about the preservation of presidential records has yielded government employees “[a]rmed with rolls of clear Scotch tape … put[ting] them back together.” As POLITICO reported: “White House aides realized early on that they were unable to stop Trump from ripping up paper after he was done with it and throwing it in the trash or on the floor, according to people familiar with the practice. Instead, they chose to clean it up for him, in order to make sure that the president wasn’t violating the law. Staffers had the fragments of paper collected from the Oval Office as well as the private residence and send it over to records management across the street from the White House for [employees] to reassemble.” Annie Karni, Meet the Guys who Tape Trump’s Papers Back Together,” POLITICO, June 10, 2018.

Add to the end of parenthetical starting “In 2017” in Note (8), p. 671:

    The government contractor, Reality Winner, pleaded guilty in late June, and was sentenced to 63 months in prison. The Trump Administration also prosecuted a former FBI agent, Terry Albury, for leaking; he pleaded guilty in April.

SECTION 3: FREEDOM OF INFORMATION LEGISLATION

a. FOIA Overview

Change in first paragraph from Craig’s memorandum in Note (1), p. 676:

    The word “equities” should be “entities”.

Add to the end of Note (2), p. 677:

    In FY 2017, the government received 818,271 FOIA requests. As with the previous year presented, DHS received the largest number (366,036), and the Department of Justice took in the second most (82,088). Of the processed requests, 22 percent asked for records that did not exist; 21.9 percent were granted in full, and 36.8 percent were granted in part.

    According to the FOIA Project, there has been a 26 percent increase in FOIA lawsuits from FY 2016 to FY 2017, when 651 lawsuits were filed. By comparison, in FY 2012, there were 382 suits, according to the organization. In FY 2017, the Department of Justice was sued more than two times more (197 suits) than DHS. In January 2018, one federal judge called his duty to enforce FOIA’s mandates but not impose “unreasonable” obligations on agencies a “no-win situation”. Bryan Koenig, Can Courts Handle the Increased FOIA Strain Under Trump?, Law360, Feb. 16, 2018 (https://www.law360.com/articles/1013602).
Add to the end of Note (5), p. 727:

The E-Government Act of 2002 also helps protect private information by requiring agencies to conduct and distribute a “Privacy Impact Assessment” before collecting personal data using certain technologies. Opponents of President Trump’s Advisory Commission on Election Integrity sued to stop collection of voter data under this statute (and state privacy laws). President Trump disbanded the commission after it could not get the desired data.

Add to the end of the first indented quote in Note (1), p. 727:

For FY 2017, DOJ reported:

4,506.36 “full-time FOIA staff” were devoted to the administration of the FOIA throughout the government. The total estimated cost of all FOIA related activities across the government was $520,981,560.57. Over 92% ($480,309,048.09) of the total costs was attributed to the processing of requests and appeals by agencies. Roughly 8% was reported to have been spent on litigation-related activities. By the end of the fiscal year, agencies reported collecting a total of $2,998,359.68 in FOIA fees. The FOIA fees collected in FY 2017 amounts to less than 1% of the total costs related to the government’s FOIA activities.


Add to the end of the first paragraph of Note (2), p. 728:

At the end of FY 2017, there were slightly fewer backlogged requests than in the previous year, 111,344. DHS accounted for 40 percent of those backlogged requests; the Department of State had the second highest number (13,021). The average processing time for completed simple requests in FY 2017 was 27.97 days; the FY 2017 report did not provide an average for completed complex requests (instead providing frequencies in different time spans).

Add to the end of Note (5), p. 730:

Because many top officials in the Trump Administration have largely kept their calendars off agency web sites, FOIA requests have been submitted to acquire information about officials’ meetings after the fact. See, e.g., Eric Lipton & Lisa Friedman, E.P.A. Chief’s Calendar: A Stream of Industry Meetings and Trips Home, N.Y. Times, Oct. 3, 2017 (https://nyti.ms/2xPTzpK).
c. The Reverse FOIA Action

Add to the end of Note (5), p. 740:

As of mid-July, there has been no ruling on Princeton University’s reverse FOIA suit. In litigation also brought by Students for Fair Admission against Harvard University, the judge ordered the parties to work together on what Harvard admissions documents should be publicly available. Those documents were released in June, generating much discussion of Harvard’s admissions practices. The federal government had not been investigating Harvard, so FOIA has not played a role in the document disclosure.

SECTION 4: GOVERNMENT IN THE SUNSHINE

Change in first line of Note (6), p. 746:

The reference should be to Chapter III, not Chapter II.

Add a new Note (7), p. 748:

(7) EPA’s New Restrictions on Advisory Committees. In October 2017, then-EPA Administrator Scott Pruitt directed that recipients of EPA grants (or in positions that could benefit directly from EPA grants) could not serve on the agency’s advisory committees, arguing that such a bar would “strengthen and improve the independence” of those entities. In practice, the order affects many of the academic scientists who had served on the committees. Several lawsuits have been filed by scientific groups, arguing that the directive violates FACA’s mandate for balanced memberships. (The directive also calls for more state, tribal, and local government participants and for more geographic diversity). See: https://www.epa.gov/sites/production/files/2017-10/documents/final_draft_fac_directive-10.31.2017.pdf

SECTION 5: INTERNET DISCLOSURE AS REGULATION

Add to the end of Note (3), p. 756:

See new Note (8) at p. 335.
Add to the end of Note (7), p. 765:

The 2017 issues with the agency’s website generated a FOIA request for records on whether the issues were due to a cyberattack or simply from the large number of commenters who went to the web site after watching John Oliver’s segment. The 2017 rulemaking to repeal the 2015 net neutrality regulation received approximately 22 million comments. One data scientist, Jeff Kao, using “natural language processing techniques”, estimated that there were “at least 1.3 million fake pro-repeal comments”, where fake means that the comments appeared to be from specific individuals but were in fact created by bots/computer programs. Kao also found that it was “highly likely that more than 99% of the truly unique comments were in favor of keeping net neutrality,” where unique is defined as not part of a mass commenting campaign. Jeff Kao, More than a Million Pro-Repeal Net Neutrality Comments were Likely Faked, Nov. 23, 2017 (https://hackernoon.com/more-than-a-million-pro-repeal-net-neutrality-comments-were-likely-faked-e9f0e3ed36a6). Another study commissioned by Broadband for America and conducted by Emprata LLC (a data analysis firm) found similar results, including that all but about 25,000 of approximately 1.8 million unique comments favored repeal of the 2015 rule. Kelcey Griffis, Net Neutrality Comments Marked By Duplicates, Study Says, Law360, Aug. 30, 2017 (https://www.law360.com/articles/959309/net-neutrality-comments-marked-by-duplicates-study-says).
PART IV:
THE AGENCY AND THE CONSTITUTION

CHAPTER VII:
AGENCY RELATIONSHIPS WITH CONGRESS & THE PRESIDENT: THE STRUCTURAL CONSTITUTION

SECTION 2: CONGRESS AND ADMINISTRATIVE AGENCIES

Add a new Note (7), p. 807:

(7) Is a Revival of Non-Delegation Doctrine on the Horizon? Nondelegation doctrine will return to the Supreme Court next term in Gundy v. United States, which presents the question of whether “the federal Sex Offender Registration and Notification Act’s delegation of authority to the attorney general to issue regulations under 42 U.S.C. § 16913 violates the nondelegation doctrine.” Section 16913, in addition to requiring sex offenders to register going forward, grants the Attorney General authority to determine whether the registration requirement applies to sex offenders convicted before SORNA’s enactment. (The Attorney General’s regulations under § 16913 provide the background to United States v. Dean on the good cause exception to notice and comment rulemaking, p. 344.) Gundy argues that § 16913 fails to provide an intelligible principle by which the Attorney General can decide whether SORNA should apply to those convicted before its enactment, and that § 16913 also fails originalist versions of nondelegation doctrine (advocated by Justice Thomas) because it transfers to the Attorney General the authority to make generally applicable rules of private conduct.

The Court’s decision to grant on the nondelegation question in Gundy was a surprise; there was no circuit split and the Court declined to grant on three other questions, including whether he was required to register and had crossed state lines, suggesting it was reaching for the nondelegation issue. On the other hand, Justice Scalia’s dissent in Reynolds v. United States, 565 U.S. 432 (2012) (joined by Justice Ginsburg) had signaled concern over the Attorney General’s broad discretion in determining the scope of criminal liability under SORNA. The delegation of authority in § 16913 also implicates retroactivity concerns, although the Court has previously rejected Ex Post Facto challenges to sex offender registration statutes. See Smith v. Doe, 538 U.S. 84 (2003). Hence, the Court could uphold Gundy’s nondelegation challenge on a narrow basis with limited implication for broad regulatory statutes.

Add to the end of Note (4), p. 843:

Legislative vetoes continue to surface. Consider in this regard Section 216 of H.R. 3364, America’s Countering America’s Adversaries Through Sanctions Act, which among other things imposes sanctions on Russia for meddling in the 2016 election. Section 216 requires the President to submit a report to Congress and wait for thirty days before lifting or waiving sanctions on Russia. Section 216 further provides that if the House and Senate pass a joint resolution disapproving of the President’s proposed action, the President may not take that action for twelve
days after the joint resolution’s passage; if the President vetoes the joint resolution, then the President cannot undertake that action for another ten days. In a signing statement, President Trump argued that this ran afoul of Chadha. Do you agree? For an argument in support of President Trump’s view, see Daniel Hemel, The Russia Sanctions Bill Is Unconstitutional — and Unnecessarily So, 36 Yale J. on Reg.: Notice & Comment (July 25, 2017), http://yalejreg.com/nc/the-russia-sanctions-bill-is-unconstitutional-and-unnecessarily-so/.

Add to the end of Note (2), p. 847:

The latest saga over the reinvigoration of the CRA involves its application to guidance. In May 2018, the CRA was used to invalidate a 2013 Bulletin issued by the Consumer Financial Protection Bureau that provided guidance regarding liability for discrimination in indirect auto lending. The Bulletin was expressly denominated non-binding guidance and was not issued using notice and comment procedures. This marked the first time the CRA has been applied to a rule not adopted through notice-and-comment or formal rulemaking procedures. The GAO had determined that the Bulletin constituted a rule for CRA purposes in December 2017.

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Replace the last two paragraphs of Note (4), p. 887, with the following:

The Supreme Court resolved this uncertainty in Lucia v. SEC, 138 S.Ct. 2044 (2018). ALJs at the SEC were appointed by the Chief ALJ, and not the SEC itself, the relevant “head of department.” Justice Kagan wrote the majority opinion concluding that SEC ALJs are inferior officers and thus had been unconstitutionally appointed:

“Two decisions set out this Court’s basic framework for distinguishing between officers and employees. [United States v.] Germaine held that ‘civil surgeons’ (doctors hired to perform various physical exams) were mere employees because their duties were ‘occasional or temporary’ rather than ‘continuing and permanent.’ … [T]he Court there made clear that an individual must occupy a ‘continuing’ position established by law to qualify as an officer. Buckley [v. Valeo] then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they ‘exercis[ed] significant authority pursuant to the laws of the United States.’ 424 U.S., at 126. …

“Both the amicus and the Government urge us to elaborate on Buckley’s ‘significant authority’ test, but another of our precedents makes that project unnecessary. … [I]n Freytag v. Commissioner, 501 U.S. 868 (1991), we applied the unadorned ‘significant authority’ test to adjudicative officials who are near-carbon copies of the Commission’s ALJs. … [O]ur analysis there … necessarily decides this case. The officials at issue in Freytag were the ‘special trial
judges’ (STJs) of the United States Tax Court. The authority of those judges depended on the significance of the tax dispute before them. In ‘comparatively narrow and minor matters,’ they could both hear and definitively resolve a case for the Tax Court. In more major matters, they could preside over the hearing, but could not issue the final decision; instead, they were to ‘prepare proposed findings and an opinion’ for a regular Tax Court judge to consider. This Court held that the Tax Court’s STJs are officers, not mere employees. … They serve on an ongoing [basis, with their duties and terms of appointment] … all specified in the Tax Code. … Describing the responsibilities involved in presiding over adversarial hearings, the Court said: STJs ‘take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders.’ And the Court observed that ‘[i]n the course of carrying out these important functions, the [STJs] exercise significant discretion.’ That fact meant they were officers, even when their decisions were not final. …

“…[T]he Commission’s ALJs, like the Tax Court’s STJs, hold a continuing office established by law. Still more, the Commission’s ALJs exercise the same significant discretion when carrying out the same important functions as STJs do. Both sets of officials have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges. … First, the Commission’s ALJs (like the Tax Court’s STJs) take testimony … they ‘[r]eciev[e] evidence’ and ‘[e]xamine witnesses’ at hearings, and may also take pre-hearing depositions [citing governing regulations]. Second, the ALJs conduct trials … they administer oaths, rule on motions, and generally ‘regulat[e] the course of’ a hearing, as well as the conduct of parties and counsel. Third, the ALJs (like STJs) rule on the admissibility of evidence [and] … thus critically shape the administrative record … And fourth, the ALJs (like STJs) ‘have the power to enforce compliance with discovery orders’ [and] may punish all ‘[c]ontemptuous conduct,’ including violations of those orders, by means as severe as excluding the offender from the hearing. So point for point—straight from Freytag’s list—the Commission’s ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries.

“And at the close of those proceedings, ALJs issue decisions much like that in Freytag—except with potentially more independent effect. … [T]he SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review (and issues an order saying so), the ALJ’s decision itself ‘becomes final’ and is ‘deemed the action of the Commission.’ That last-word capacity makes this an a fortiori case: If the Tax Court’s STJs are officers, as Freytag held, then the Commission’s ALJs must be too.”

A striking aspect of Lucia was the Government’s change in position in the case. The Government had argued ALJs were employees before the lower courts, but switched its position with the advent of the Trump Administration. Indeed, the Solicitor General urged the Court not just to grant review in Lucia and hold that ALJs were unconstitutionally appointed, but also to take up the question of whether the strong removal protection for ALJs was then an unconstitutional form of double-for-cause removal protection of the type the Court had invalidated in Free Enterprise Fund v. PCAOB. (p. 922). After the Court did not grant on this additional question, the Solicitor General proceeded to brief it anyway. The majority was unmoved: “When we granted certiorari, we chose not to take that step. The Government’s merits brief now asks us again to address the removal issue. We once more decline. No court has addressed that question [yet].”
The case sparked several concurrences and dissents. JUSTICE THOMAS, joined by Justice Gorsuch, concurred in full, agreeing that the case was “indistinguishable” from Freytag but arguing that “our precedents in this area do not provide much guidance … [and] have never clearly defined what is necessary” for an official to be an officer. Justice Thomas “would resolve that question based on the original public meaning of ‘Officers of the United States.’” According to Justice Thomas, “[t]he Founders likely understood th[is] term … to encompass all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant a duty.” The majority’s express reaffirmance of Buckley’s restriction of officers to those exercising significant authority appears a clear rejection of Thomas’s suggested approach.

JUSTICE SOTOMAYOR similarly complained about the need for more guidance on the line between officers and employees in her dissent, joined by Justice Ginsburg, arguing that the resultant “confusion can undermine the reliability and finality of proceedings and result in wasted resources.” While acknowledging the criterion of continuous office was “relatively easy to grasp,” Sotomayor argued that was less true of significant authority: “To be sure, to exercise ‘significant authority,’ the person must wield considerable powers in comparison to the average person who works for the Federal Government. As this Court has noted, the vast majority of those who work for the Federal Government are not ‘Officers of the United States.’ … But this Court’s decisions have yet to articulate the types of powers that will be deemed significant enough to constitute ‘significant authority.’ To provide guidance to Congress and the Executive Branch, I would hold that one requisite component of ‘significant authority’ is the ability to make final, binding decisions on behalf of the Government. Accordingly, a person who merely advises and provides recommendations to an officer would not herself qualify as an officer.” Acknowledging that SEC ALJs “wield ‘extensive powers,’” Sotomayor argued that they were “not officers because they lack final decisionmaking authority. As the Commission explained below, the Commission retains ‘plenary authority over the course of [its] administrative proceedings and the rulings of [its] law judges.’”

JUSTICE BREYER, concurring in the judgment in part and dissenting in part, agreed that the SEC’s ALJs were improperly appointed, but reached that conclusion on statutory grounds. He argued that the APA required the agency itself to appoint ALJs and that no provision of the APA or another statute allowed the agency to delegate ALJ appointment to the agency’s staff. Breyer also emphasized the strong removal protections that the APA grants ALJs, describing the “substantial independence” that the APA thereby provides as “a central part of the Act’s overall scheme.” Turning to the question of ALJs’ constitutional status, Breyer insisted that “Congress’ intent … matters” here as well, “because the Appointments Clause is properly understood to grant Congress a degree of leeway as to whether particular Government workers are officers or instead mere employees not subject to the Appointments Clause. … The use of the words ‘by Law’ to describe the establishment and means of appointment of ‘Officers of the United States,’ together with the fact that Article I of the Constitution vests the legislative power in Congress, suggests that (other than the officers the Constitution specifically lists) Congress, not the Judicial Branch alone, must play a major role in determining who is an ‘Office[ ]r of the United States.’ … Congress’ leeway is not, of course, absolute[,] … [b]ut given the constitutional language, the Court, when deciding whether other positions are ‘Officers of the United States’ under the Appointments Clause, should give substantial weight to Congress’ decision.”
As a result, Justice Breyer insisted the Court should not reach the question of the SEC ALJs’ constitutional status “without first deciding the pre-existing Free Enterprise Fund question—namely, what effect that holding would have on the statutory ‘for cause’ removal protections that Congress provided for administrative law judges. If … Free Enterprise Fund means that saying administrative law judges are ‘inferior Officers’ will cause them to lose their ‘for cause’ removal protections, then I would likely hold that the administrative law judges are not ‘Officers,’ for to say otherwise would be to contradict Congress’ enactment of those protections in the [APA].” Put slightly differently, “[i]n that case, it would be clear … that Congress did not intend that consequence, and that it therefore did not intend to make administrative law judges ‘inferior Officers’ at all.

Are the concurrences’ complaints about lack of guidance in the majority opinion a fair critique? Does the decision offer much insight on the officer or employee status of government officials not performing adjudicatory functions? Even for those who do perform adjudicatory functions, are its implications clear? As noted in Chapter V, ALJs make up only a small part of a broad and variegated administrative judiciary, whose members are charged with a range of responsibilities and given very differing degrees of independence. What if an agency by regulation clearly specifies that the administrative judge’s decisions are purely recommendatory and that it retains full power to deviate from the judge’s determinations on evidence, the record, sanctions, and result; is such an administrative judge an inferior officer under Lucia?

Finally, what about Breyer’s argument that the status of a government official as an officer or employee should turn largely on congressional intent. Does the text of the Appointments Clause, perhaps particularly if viewed in conjunction with the Necessary and Proper Clause, support that view? Alternatively, what about Justices Thomas’s insistence that “Officer of the United States” should be read today in line with its original public meaning? Should it matter that Thomas’s account of the original meaning of officer—any official performing “an ongoing, statutory duty”—would result in a vast number of federal officials being inferior officers, notwithstanding that Congress did not provide for inferior officer appointment and treated them as employees? In developing this argument, Justice Thomas relied heavily on an article by Jennifer L. Mascott, Who Are “Officers of the United States”? 70 Stan. L. Rev. 443 (2018), which provides a detailed exploration of the original public meaning of officers.

The result in Lucia created a question about the status of current ALJs not appointed by the heads of their department and about the appointment of ALJs in the future. As discussed above, pp. 14-15, President Trump issued an EO exempting ALJs from the excepted service and authorizing their selection instead by agency heads. Although the EO also states that civil service laws and regulations on removal will not apply, it adds “except as required by statute.” As the removal protections for ALJs are statutorily based, their removal protection is not currently threatened. If, however, this removal protection were held a form of unconstitutional double-for removal protection, the EO would make ALJs immediately removable at will.

Add to the end of Note (4), p. 912:

The Federal Vacancies Reform Act is now surfacing in suits against the Trump Administration, particularly with respect to the Department of Veterans Affairs. In late March
2018, President Trump fired the VA secretary and named a Pentagon undersecretary, Robert Wilkie, to serve as acting secretary under the FVRA. This raised a question about the scope of the FVRA’s application, specifically whether it applies when the vacancy is created by the president firing the incumbent. Veterans groups filed suit arguing no. Subsequently, President Trump announced he was appointing Wilkie to be the next secretary. Because the FVRA prohibits Wilkie from being both the nominee and the acting (as he had not served at least 90 days as the first assistant), another person was named acting secretary while the nomination is pending. For a discussion, see Steve Vladeck, The Federal Vacancies Reform Act and the VA: A Study in Uncertainty and Incompetence, LAWFARE, May 23, 2018.

(2) The Removal Power

Add to the end of Note (4), p. 944:

At the end of January 2018, the D.C. Circuit issued its en banc decision in PPH CORP. v. CFPB, 881 F.3d 75 (2018), overturning the panel decision and upholding the CFPB’s single-director structure and removal protections as constitutional. PILLARD, CIRCUIT JUDGE: “To analyze the constitutionality of the CFPB’s independence, we ask two questions:

“First, is the means of independence permissible? The Supreme Court has long recognized that, as deployed to shield certain agencies, a degree of independence is fully consonant with the Constitution. The means of independence that Congress chose here is wholly ordinary: The Director may be fired only for ‘inefficiency, neglect of duty, or malfeasance in office,’ 12 U.S.C. § 5491(c)(3)—the very same language the Supreme Court approved for the Federal Trade Commission (FTC) back in 1935. Humphrey’s Executor, 295 U.S. at 619, 629-32; see 15 U.S.C. § 41. The CFPB’s for-cause removal requirement thus leaves the President no less removal authority than the provision sustained in Humphrey’s Executor; neither PHH nor dissenters disagree. The mild constraint on removal of the CFPB Director contrasts with the cumbersome or encroaching removal restrictions that the Supreme Court has invalidated as depriving the President of his Article II authority or otherwise upsetting the separation of powers. In Free Enterprise the Court left in place ordinary for-cause protection at the Securities and Exchange Commission (SEC)—the same protection that shields the FTC, the CFPB, and other independent agencies—even as it invalidated an unusually restrictive second layer of for-cause protection of the SEC’s Public Company Accounting Oversight Board (PCAOB) as an interference with Article II. In its only other decisions invalidating removal restrictions, the Supreme Court disapproved of means of independence not at issue here, specifically, Congress’s assigning removal power to itself by requiring the advice and consent of the Senate in Myers and a joint resolution of Congress in Bowsher. The Supreme Court has never struck down a statute conferring the standard for-cause protection at issue here.

“Second, does ‘the nature of the function that Congress vested in’ the agency call for that means of independence? Wiener v. United States, 357 U.S. 349, 353 (1958). The CFPB is a financial regulator that applies a set of preexisting statutes to financial services marketed ‘primarily for personal, family, or household purposes.’ 12 U.S.C. § 5481(5)(A). Congress has historically

1 [Ed.] Although the agency’s current leadership decided to switch its acronym to BCFB, we are retaining the familiar CFPB here to avoid confusion and inconsistency with the D.C. Circuit’s decision.
given a modicum of independence to financial regulators like the Federal Reserve, the FTC, and
the Office of the Comptroller of the Currency. That independence shields the nation’s economy
from manipulation or self-dealing by political incumbents and enables such agencies to pursue the
general public interest in the nation’s longer-term economic stability and success, even where
doing so might require action that is politically unpopular in the short term. In Humphrey’s
Executor, the Supreme Court unanimously sustained the requirement of cause to remove members
of the FTC, a consumer protection agency with a broad mandate to prevent unfair methods of
competition in commerce. … The CFPB’s focus on the transparency and fairness of financial
products geared toward individuals and families falls squarely within the types of functions granted
independence in precedent and history. Neither PHH nor our dissenting colleagues have suggested
otherwise. …

“There is nothing constitutionally suspect about the CFPB’s leadership structure. Morrison
and Humphrey’s Executor stand in the way of any holding to the contrary.” Judge Pillard insisted
that “[h]istorical practice of independent agencies, including the earliest examples of independent
financial regulators which operated under single heads, suffices to place the CFPB on solid footing.
And there is no reason to assume an agency headed by an individual will be less responsive to
presidential supervision than one headed by a group. It is surely more difficult to fire and replace
several people than one. And, if anything, the Bureau’s consolidation of regulatory authority that
had been shared among many separate independent agencies allows the President more efficiently
to oversee the faithful execution of consumer protection laws. Decisional responsibility is clear
now that there is one, publicly identifiable face of the CFPB who stands to account—to the
President, the Congress, and the people—for all its consumer protection actions. The fact that the
Director stands alone atop the agency means he cannot avoid scrutiny through finger-pointing,
buck-passing, or sheer anonymity. What is more, in choosing a replacement, the President is
unhampered by partisan balance or ex-officio requirements; the successor replaces the agency’s
leadership wholesale. Nothing about the CFPB stands out to give us pause that it—distinct from
other financial regulators or independent agencies more generally—is constitutionally defective.

“PHH suggests that, even if budgetary independence and for-cause removal protection are
not separately unconstitutional, their combination might be. But that combination is not novel.
And, in any event, for two unproblematic structural features to become problematic in
combination, they would have to affect the same constitutional concern and amplify each other in
a constitutionally relevant way. [But t]he CFPB’s budgetary independence primarily affects
Congress, which has the power of the purse; it does not intensify any effect on the President of the
removal constraint. …

“…[B]reaking with traditional separation-of-powers analysis and precedent, PHH and its
amici assail the CFPB as somehow too powerful. But nothing about the focus or scope of the
agency’s mandate renders it constitutionally questionable; indeed, the Bureau’s powers have long
been housed in and enforced by agency officials protected from removal without cause. That fact
underscores our fundamental point: The exercise of those powers by an independent official does
not interfere with the President’s constitutional role.

“… [PHH further argues that the CFPB’s structure is constitutionally suspect because it is
novel. We reject both premises—that whatever novelty the CFPB may represent calls into question

The independent counsel, the Sentencing Commission, and the FTC were each ‘novel’ when initiated … Our political representatives sometimes confront new problems calling for tailored solutions. The 2008 financial crisis, which Congress partially attributed to a colossal failure of consumer protection, was surely such a situation. The Constitution was ‘intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.’ McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819). The judiciary patrols constitutional boundaries, but it does not use the Constitution merely to enforce old ways. Even if we agreed that the CFPB’s structure were novel, we would not find it unconstitutional on that basis alone.’

Although rejecting the panel’s decision holding the CFPB’s structure unconstitutional, the en banc majority reinstated the panel’s further decisions on the meaning of RESPA and its application to PHH Corporation, which had overturned the CFPB’s imposition of a penalty on PHH. In a concurring opinion, Judge Tatel, joined by Judges Millett and Pillard, argued that had the en banc court reached the question of RESPA’s scope, he would have upheld the CFPB’s reading of the statute and the penalty the CFPB had imposed on PHH Corporation. Judge Kavanaugh dissented, joined by Senior Judge Randolph, reprising the arguments from his panel majority opinion and similarly concluding that severing the removal provision rendered the statute constitutional. Judge Henderson also argued that the CFPB’s structure was unconstitutional, but concluded that the CFPB had to be invalidated in its entirety. The en banc decision also included a debate among concurring judges over what would constitute sufficient good cause to allow removal of the CFPB Director, discussed below in the Addendum for Note (2), p. 947.

The D.C. Circuit’s en banc decision is not the last word yet on the constitutionality of the CFPB’s structure. In Consumer Financial Protection Bureau v. RD Legal Funding, LLC, 2018 WL 3094916 (S.D.N.Y. June 21, 2018), Judge Preska adopted the reasoning of Judge Kavanaugh’s dissent on why the CFPB’s structure was unconstitutional but agreed with Judge Henderson that the proper remedy was to invalidate Title X of Dodd-Frank as a whole.

Even more recently, the Fifth Circuit in COLLINS v. MNUCHIN, 2018 WL 3430826 (5th Cir. July 16, 2018), held that the Federal Housing Finance Agency (FHFA) was unconstitutionally structured on the same grounds as Judges Kavanaugh and Henderson argued invalidated the CFPB. The FHFA was created in 2008, in the aftermath of the financial crisis and housing market meltdown that contributed to the crisis, to oversee two of the nation’s largest financial companies, the government-chartered mainstays of the U.S. mortgage market: the Federal National Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage Corporation (“Freddie Mac”). FHFA also oversees the Federal Home Loan Bank System. Like the CFPB, the FHFA is headed by a single director, appointed by the President and confirmed by the Senate, who is only removable for cause. Also like the CFPB, the FHFA is funded independently from the normal appropriations process, through annual assessments collected from the entities it regulates. The FHFA is overseen by a Federal Housing Finance Oversight Board, composed of two cabinet secretaries, the SEC chair, and the FHFA director, and charged with “advis[ing] the Director with respect to the overall strategies and policies in carrying out” of his or her duties.

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One of FHFA’s first actions was to put Fannie Mae and Freddie Mac into conservatorship, and the Treasury Department immediately purchased large amounts of their stock to provide the companies with needed capital. Treasury also agreed to pump $200 billion into each in exchange for a right to preferred shares that provided Treasury with a liquidation preference, stock warrants up to nearly 80% of common shares, quarterly dividends, and the possibility of additional fees. Fannie Mae and Freddie Mac struggled to pay Treasury the dividends it was owed, and ultimately in 2012 amended their agreement so that instead of dividends and fees the companies would periodically pay Treasury with their excess net worth above required capital reserves. By 2018, Treasury’s financial commitment had been largely repaid. But private shareholders in Fannie Mae and Freddie Mac were not happy and sued, claiming that FHFA and Treasury had acted in excess of their statutory authority and in violation of the APA, and further claiming that the FHFA’s structure was unconstitutional.

After concluding the shareholders had standing, the Fifth Circuit rejected the statutory and APA claims but agreed that FHFA’s structure was unconstitutional: “We hold that Congress insulated the FHFA to the point where the Executive Branch cannot control the FHFA or hold it accountable. We reach this conclusion after assessing the combined effect of the: (1) for-cause removal restriction; (2) single-Director leadership structure; (3) lack of a bipartisan leadership composition requirement; (4) funding stream outside the normal appropriations process; and (5) Federal Housing Finance Oversight Board’s purely advisory oversight role.” Citing Judge Kavanaugh’s PHH en banc dissent, the panel particularly argued that the single-director structure prevented the President’s ability to influence the FHFA by designating a chair and further prevented a bipartisan makeup that would “give[] the President allies.” Citing Judge Henderson’s PHH dissent, the Fifth Circuit also insisted that “an agency’s funding stream bears on presidential influence. If the agency is subject to the normal appropriations process, the President can veto a spending bill containing appropriations for the agency. Also, the President submits an annual budget to Congress, which he uses to influence the policies of independent agencies.” Chief Judge Stewart dissented from the panel’s constitutional holding.

Add to the end of Note (6) p. 946:

In Lucia, Justice Breyer argued that it was necessary to determine the potential impact of Free Enterprise Fund’s prohibition on double-for-cause removal on removal and independence protections for ALJs in assessing whether or not ALJs at the SEC were inferior officers. However, he was alone in that view, and no other justice engaged the question.

Add to the end of Note (2) p. 947:

The meaning of for cause rose to the fore in Lucia. As noted above, the Government switched positions in Lucia with the advent of the Trump Administration, arguing that SEC ALJs were inferior officers and further urging the Court to address the constitutionality of removal protections for ALJs under Free Enterprise Fund. Under 5 U.S.C. 7521(a), an ALJ may be removed by an agency head “only for good cause established and determined by the Merit Systems
Protection Board on the record after opportunity for hearing before the Board.” Emphasizing the need to ensure that “the President [has] … constitutionally adequate authority to ensure that ALJs are faithfully executing the law” and invoking the constitutional avoidance canon, the Government advocated a broad reading of § 7521: “[T]he ‘good cause’ for removing an ALJ is properly read to include an ALJ’s misconduct or failure to follow lawful directives or to perform adequately. That interpretation would not permit removal of an ALJ for a legally prohibited reason, or to direct the result in a particular case. But it would ensure that ALJs could be held sufficiently accountable, even in independent agencies, for failure to execute the laws properly.” The Government also urged a narrow reading of the Merit System Protections Board’s role in reviewing agency for cause determinations: “[R]ather than substitute its own judgment for that of the agency, the MSPB should confine its role to determining whether evidence exists to support the agency’s view that ‘good cause’ as defined above exists.”

The Supreme Court denied the Government’s effort to add the removal issue, but Justice Breyer responded to the Government’s argument. “This technical-sounding standard would seem to weaken the administrative law judges’ ‘for cause’ removal protections considerably, by permitting the Commission to remove an administrative law judge with whose judgments it disagrees—say, because the judge did not find a securities-law violation where the Commission thought there was one, or vice versa. In such cases, the law allows the Commission to overrule an administrative law judge’s findings, for the decision is ultimately the Commission’s. But it does not allow the Commission to fire the administrative law judge.”

A debate over for cause removal’s scope also arose in the D.C. Circuit’s en banc decision in PHH CORP. Judge Griffith, concurring in the en banc judgment, “agree[d] that the CFPB’s structure does not impermissibly interfere with the President’s ability to perform his constitutional duties.” He based this agreement on his view that the statutory provision specifying that CFPB Director could be removed only for “inefficiency, neglect of duty, or malfeasance in office” imposed “only a minimal restriction on the President’s removal power, even permitting him to remove the Director for ineffective policy choices.” Focusing on “inefficiency” because it was “the broadest of the three … removal grounds,” Griffith argued that “[d]ictionaries consistently defined the word ‘inefficiency’ to mean ineffective or failing to produce some desired result. … While ordinary usage reveals that an officer is ‘inefficient’ when he fails to produce or accomplish some end, one might wonder who or what sets the end that the officer must efficiently pursue. In context, it is clear that the end cannot be set by the officer himself. After all, it is a removal ground that we are interpreting. Congress establishes the broad purposes of an independent agency … and the President assesses whether the officer has produced the ‘desired effect.’ Put differently, an officer is inefficient when he fails to produce or accomplish the agency’s ends, as understood or dictated by the President operating within the parameters set by Congress. … The breadth of the standard—particularly the inefficiency ground—preserves in the President sufficient supervisory power to perform his constitutional duties.”

Judge Wilkins, joined by Judge Rogers and concurring fully in the en banc majority, agreed that precedent on what constitutes removal for cause “demonstrates that the CFPB Director would be subject to supervision and discipline for ‘inefficiency’ if he or she failed to comply with the various statutory mandates of coordination and consultation. It also shows that ‘inefficiency’ is relatively broad and provides a judicially manageable standard. I agree with the overall
sentiment of Judge Griffith that the broad removal authority gives the President adequate ability to supervise the CFPB Director, but I do not agree that ‘inefficiency’ is properly construed to allow removal for mere policy disagreements. Such a capacious construction would essentially remove the concept of ‘independence’ from ‘independent agencies.’ After all, Congress established the CFPB as ‘an independent bureau,’ and an agency subject to the President’s blanket control over its policy choices is hardly ‘independent.’ … Judge Griffith’s broad reading of the removal power is inconsistent with the common understanding of ‘independent’ and ‘would render part of the statute entirely superfluous.’”

SECTION 4. CONSTITUTIONAL FRAMEWORKS FOR ADMINISTRATIVE ADJUDICATION

Add a new Note (7), p. 1027, and renumber current Note (7) as Note (8):

(7) The 2017 Term Decisions: Oil States and Ortiz. The constitutionality of non-Article III adjudication arose in two cases during the Supreme Court’s 2017 Term. In Oil States Energy Servs. v. Greene’s Energy Corp., 138 S.Ct. 1365 (2018), the Court addressed the implications of Stern and the constitutionality of non-Article III adjudication in a more decidedly administrative context. At issue in Oil States was the constitutionality of inter partes review, a form of administrative review of granted patents established by the Leahy–Smith America Invents Act in 2011. Anyone other than a patent holder can file a petition with the Director of the Patent and Trademark Office (PTO) for inter partes review, seeking cancellation of patent claims for failing the patentability requirements of novelty and nonobviousness. The Director can grant inter partes review if he or she determines a reasonable likelihood exists that the petitioner would prevail with respect to at least one claim challenged. If instituted, the Patent Trial and Appeal Board (PTAB), an adjudicatory body within the PTO created to conduct inter partes review, examines the patent’s validity. The petitioner and the patent owner are entitled to certain discovery, briefing, and hearing rights and the petitioner bears the burden of proving unpatentability by a preponderance of the evidence. Review of PTAB decisions on inter partes review is available in the Federal Circuit, with the PTAB’s legal determinations reviewed de novo and its factual determinations reviewed under the substantial evidence standard.

Oil States sued Greene’s for infringing its patent for protecting wellhead equipment used in hydraulic fracturing, and Greene’s responded in part by filing a petition for inter partes review to challenge Oil State’s patent. The PTAB instituted inter partes review and ultimately determined that Oil State’s claims were unpatentable. On review, Oil States argued, inter alia, that actions to revoke a patent must be tried in an Article III court before a jury and that inter partes review was therefore unconstitutional. The Federal Circuit upheld the PTAB, and the Supreme Court affirmed by a 7-2 vote.

Justice Thomas wrote for the majority: “Article III vests the judicial power of the United States ‘in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.’ § 1. Consequently, Congress cannot ‘confer the Government’s ‘judicial Power’ on entities outside Article III.’ Stern. When determining whether a proceeding involves an exercise of Article III judicial power, this Court’s precedents have distinguished between ‘public rights’ and ‘private rights.’ Those precedents have given Congress significant latitude to assign adjudication of public rights to entities other than Article III courts.
“This Court has not ‘definitively explained’ the distinction between public and private rights, Northern Pipeline, and its precedents applying the public-rights doctrine have ‘not been entirely consistent,’ Stern. But this case does not require us to add to the ‘various formulations’ of the public-rights doctrine. Ibid. Our precedents have recognized that the doctrine covers matters ‘which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.’ Crowell. In other words, the public-rights doctrine applies to matters ‘arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.’ Inter partes review involves one such matter: reconsideration of the Government’s decision to grant a public franchise” and “falls squarely within the public-rights doctrine.”

“… This Court has recognized, and the parties do not dispute, that the decision to grant a patent is a matter involving public rights—specifically, the grant of a public franchise. … Ab initio, the grant of a patent involves a matter ‘arising between the government and others.’ Ex parte Bakelite Corp. … Additionally, granting patents is one of ‘the constitutional functions’ that can be carried out by ‘the executive or legislative departments’ without ‘judicial determination,’ Crowell. Accordingly, the determination to grant a patent is a ‘matte[r] involving public rights.’ Murray’s Lessee. It need not be adjudicated in Article III court. …

“Inter partes review involves the same basic matter as the grant of a patent. So it, too, falls on the public-rights side of the line. … The Board considers the same statutory requirements that the PTO considered when granting the patent. … The primary distinction between inter partes review and the initial grant of a patent is that inter partes review occurs after the patent has issued. But that distinction does not make a difference here. Patent claims are granted subject to the qualification that the PTO has ‘the authority to reexamine—and perhaps cancel—a patent claim’ in an inter partes review. Cuozzo. … As a public franchise, a patent can confer only the rights that the statute prescribes. One such regulation is inter partes review. As a result, the PTO can reconsider a grant of a patent through inter partes review ‘without violating Article III.’

“Oil States and the dissent contend that inter partes review violates the ‘general’ principle that ‘Congress may not withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.’ Stern. They argue that this is so because patent validity was often decided in English courts of law in the 18th century. … But there was another means of canceling a patent in 18th-century England, which more closely resembles inter partes review: a petition to the Privy Council to vacate a patent. The Privy Council was composed of the Crown’s advisers … [and] was a prominent feature of the English system. It had exclusive authority to revoke patents until 1753, and after that, it had concurrent jurisdiction with the courts. … The Patent Clause in our Constitution was written against the backdrop of the English system. Based on the practice of the Privy Council, it was well understood at the founding that a patent system could include a practice of granting patents subject to potential cancellation in the executive proceeding of the Privy Council. The parties have cited nothing in the text or history of the Patent Clause or Article III to suggest that the Framers were not aware of this common practice. Nor is there any reason to think they excluded this practice during their deliberations. And this Court has recognized that, within the scope established by the Constitution,
Congress may set out conditions and tests for patentability. We conclude that inter partes review is one of those conditions.”

Justice Thomas emphasized that he was not reaching the question of “whether other patent matters, such as infringement actions, can be heard in a non-Article III forum” “whether inter partes review would be constitutional” without any judicial review. He also rejected Oil States’ Seventh Amendment claim, noting that “[o]ur Court’s precedents establish that, when Congress properly assigns a matter to adjudication in a non-Article III tribunal, ‘the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.’ Granfinanciera.”

Concurring, Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan) cautioned that “the Court’s opinion should not be read to say that matters involving private rights may never be adjudicated other than by Article III courts, say, sometimes by agencies. Our precedent is to the contrary. Stern; Schor.”

Justice Gorsuch dissented, joined by Chief Justice Roberts: “We sometimes take it for granted today that independent judges will hear our cases and controversies. But it wasn’t always so. Before the Revolution, colonial judges depended on the crown for their tenure and salary and often enough their decisions followed their interests. … Once free, the framers went to great lengths to guarantee a degree of judicial independence for future generations that they themselves had not experienced. … Today, the government invites us to retreat from the promise of judicial independence. Until recently, most everyone considered an issued patent a personal right—no less than a home or farm—that the federal government could revoke only with the concurrence of independent judges. But in the statute before us Congress has tapped an executive agency … for the job. Supporters say this is a good thing because the Patent Office issues too many low quality patents; allowing a subdivision of that office to clean up problems after the fact, they assure us, promises an efficient solution. And, no doubt, dispensing with constitutionally prescribed procedures is often expedient. Whether it is the guarantee of a warrant before a search, a jury trial before a conviction—or, yes, a judicial hearing before a property interest is stripped away—the Constitution’s constraints can slow things down. But economy supplies no license for ignoring these—often vitally inefficient—protections. …

“… No doubt the efficient scheme [of inter partes review] is well intended. But can there be any doubt that it also represents a retreat from the promise of judicial independence? Or that when an independent Judiciary gives ground to bureaucrats in the adjudication of cases, the losers will often prove the unpopular and vulnerable? Powerful interests are capable of amassing armies of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies. But what about everyone else? 

“Of course, all this invites the question: how do we know which cases independent judges must hear? The Constitution’s original public meaning supplies the key, for the Constitution cannot secure the people’s liberty any less today than it did the day it was ratified. The relevant constitutional provision, Article III, explains that the federal ‘judicial Power’ is vested in independent judges. As originally understood, the judicial power extended to ‘suit[s] at the common law, or in equity, or admiralty.’ Murray’s Lessee. From this and as we’ve recently
explained, it follows that, ‘[w]hen a suit is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789 ... and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with’ Article III judges endowed with the protections for their independence the framers thought so important. Stern. The Court does not quarrel with this test. We part ways only on its application.” In a footnote, Justice Gorsuch added: “Some of our concurring colleagues see it differently. They point to language in Schor promoting the notion that the political branches may ‘depart from the requirements of Article III’ when the benefits outweigh the costs. Color me skeptical. The very point of our written Constitution was to prevent the government from ‘depart[ing]’ from its protections for the people and their liberty just because someone later happens to think the costs outweigh the benefits.”

Justice Gorsuch disagreed with the majority’s historical account, arguing that by the time of the founding, only courts could hear patent challenges in England, paralleling a shift in how patents were viewed. “Patents began as little more than feudal favors. … But by the 18th century, … patents … came to be viewed not as endowing accidental and anticompetitive monopolies on the fortunate few but as a procompetitive means to secure to individuals the fruits of their labor and ingenuity; encourage others to emulate them; and promote public access to new technologies that would not otherwise exist.” Gorsuch criticized the majority’s reliance on the Privy Council’s role, arguing that “appealing to the Privy Council was seen as a last resort” and Privy Council revocation last occurred in 1779. In any event, he put more emphasis on U.S. historical practice, that “it was widely accepted that the government could divest patent owners of their rights only through proceedings before independent judges. … This view held firm for most of our history. In fact, from the time it established the American patent system in 1790 until about 1980, Congress left the job of invalidating patents at the federal level to courts alone. …

“With so much in the relevant history and precedent against it, the Court invites us to look elsewhere. Instead of focusing on the revocation of patents, it asks us to abstract the level of our inquiry and focus on their issuance. Because the job of issuing invention patents traditionally belonged to the Executive, the Court proceeds to argue, the job of revoking them can be left there too. But that doesn’t follow. Just because you give a gift doesn’t mean you forever enjoy the right to reclaim it. And, as we’ve seen, just because the Executive could issue an invention (or land) patent did not mean the Executive could revoke it. To reward those who had proven the social utility of their work (and to induce others to follow suit), the law long afforded patent holders more protection than that against the threat of governmental intrusion and dispossession. The law requires us to honor those historical rights, not diminish them.”

Figuring out Oil States’ implications for administrative adjudication is no easy task. On the one hand, the Court sustained inter partes review by a lopsided 7-2 vote, notwithstanding the traditional property features of patents or the way that inter partes review could be used (as it was here) to negate a court action for patent infringement. Add in inter partes review’s notably administrative character, particularly compared to bankruptcy courts, and Oil States may seem to signal a lack of appetite on the Court for seriously curtailing administrative adjudication on Article III grounds. On the other hand, the majority’s insistence on portraying the dispute as a matter of public right because the government was a party is a reach against the background dispute between two private companies that plainly drove the action. Particularly given that the alternative framing of a public right as one that is closely integrated with a regulatory scheme—affirmed as recently
as Stern—would have been an ample basis for upholding inter partes review, the Court’s reluctance to invoke that definition may indicate concern about the potential breadth of the public rights exception. Equally significant is the majority’s unwillingness to invoke Schor, its formalist and originalist reasoning, and its reinforcement of the public right-private right divide for Article III purposes. The strong rhetoric against administrative adjudication of private rights—and express questioning of Schor’s authority—in Justice Gorsuch’s dissent is also worth noting, and suggests that Chief Justice Roberts is moving away from his support of Crowell in Stern.

Article III played a less central role in Ortiz v. United States, 138 S.Ct. 2165 (2018). The stated issue in Ortiz was the legality of a military officer serving as a judge on both an Air Force appeals court and the Court of Military Commission Review. The Court held that such a dual appointment accorded with the statute and did not violate the Appointments Clause. But to reach that question the Court first addressed a challenge, raised by an amicus, to its authority to review decisions of the Court of Appeals for the Armed Forces (CAAF) because the CAAF is not an Article III court. Writing for the Court, Justice Kagan held that a CAAF decision was a proper subject for the Supreme Court’s appellate jurisdiction, emphasizing the judicial nature of military justice proceedings and court martials and their similarity to other non-Article III proceedings, such as state courts and territorial courts, that the Court historically reviewed. But she added a cautionary note: “[W]e say nothing about whether we could exercise appellate jurisdiction over cases from other adjudicative bodies in the Executive Branch, including those in administrative agencies. Our resolution of the jurisdictional issue here has rested on the judicial character, as well as the constitutional foundations and history, of the court-martial system. We have relied, too, on the connections that our cases have long drawn between that judicial system and those of the territories and the District. If Congress were to grant us appellate jurisdiction over decisions of newer entities advancing an administrative (rather than judicial) mission, the question would be different—and the answer not found in this opinion.”
Add to the end of Note (9), p. 1159:

In a long book review published in 2016, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118 (2016), Judge Kavanaugh—now Supreme-Court-nominee Kavanaugh—criticized the use of statutory “ambiguity” as the gate keeper for various interpretive doctrines, including Chevron. “Ambiguity,” he argued, was mostly in the eye of the beholder. Judges would do better—and be more even-handed—if they tried to determine what was the best (even if not only) interpretation of the statutory language. He then wrote, 129 Harv. L. Rev. at 2153-54:

“As I stated above, my goal is to help make statutory interpretation a more neutral, impartial process where like cases are treated alike by judges of all ideological stripes, regardless of the issue and regardless of the identity of the parties in the case. That objective is hard to achieve—at least in many cases—if the threshold trigger for Chevron deference to the agency is ambiguity.

“What’s the solution?

“To begin with, courts should still defer to agencies in cases involving statutes using broad and open-ended terms like ‘reasonable,’ ‘appropriate,’ ‘feasible,’ or ‘practicable.’ In those cases, courts should say that the agency may choose among reasonable options allowed by the text of the statute. In those circumstances, courts should be careful not to unduly second-guess the agency’s choice of regulation. Courts should defer to the agency, just as they do when conducting deferential arbitrary and capricious review under the related reasoned decisionmaking principle of State Farm. This very important principle sometimes gets lost: a judge can engage in appropriately rigorous scrutiny of an agency’s statutory interpretation and simultaneously be very deferential to an agency’s policy choices within the discretion granted to it by the statute.

“But in cases where an agency is instead interpreting a specific statutory term or phrase, courts should determine whether the agency’s interpretation is the best reading of the statutory text. Judges are trained to do that, and it can be done in a neutral and impartial manner in most cases.

“In short, the problem with certain applications of Chevron, as I see it, is that the doctrine is so indeterminate—and thus can be antithetical to the neutral, impartial rule of law—because of the initial clarity versus ambiguity decision. Here too, we need to consider eliminating that inquiry as the threshold trigger.”
Add as Note (11), p. 1160:

(11) A Revolt from Within? The most recent sign that Chevron’s days may be numbered came at the end of the October 2018 Term in PEREIRA v. SESSIONS, 138 S.Ct. 2105 (2018). There, the Court considered the meaning of a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), that allows nonpermanent residents who are subject to removal proceedings to seek cancellation of removal if they have “been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [an] application” for cancellation. 8 U.S.C. §1229(b)(1)(A). A separate provision of IIRIRA, however, sets forth what is known as the stop-time rule, by stating that the period of continuous presence is “deemed to end . . . when the alien is served a notice to appear under section 1229(a).” §1229(d)(1)(A). With respect to this so-called stop-time rule, the Department of Homeland Security promulgated a regulation in 1997 that a “notice to appear” need only provide “the time, place and date of the initial removal hearing, where practicable,” 62 Fed. Reg. 10332, and the Board of Immigration Appeals (BIA) ruled that notices to appear may trigger the stop-time rule even when they do not provide the time and place of the removal proceedings.

The case at hand concerned a native of Brazil, Wescley Fonseca Pereira, who had come to the United States and overstay his visa. More than 10 years after he had received a “notice of removal” that did not provide the time and place of the removal proceedings but that ordered him to appear at some place and time to be set in the future, he sought cancellation of removal. The BIA ruled that, in consequence of his having received this “notice to appear,” he was barred from seeking cancellation of removal by the stop-time rule. The First Circuit upheld the BIA’s decision.

The Supreme Court, in an opinion by Justice Sotomayor, reversed, after concluding at Chevron step one that Congress had spoken clearly to the precise question at issue, because a “notice to appear” could not qualify as such without providing the date and place at which the alien had to appear. For administrative law purposes, though, the news of the case was to be found in the following concurrence from Justice Kennedy, in which he cast doubt on Chevron as a whole: “This separate writing is to note my concern with the way in which the Court’s opinion in Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837 (1984), has come to be understood and applied. The application of that precedent to the question presented here by various Courts of Appeals illustrates one aspect of the problem.

“The first Courts of Appeals to encounter the question concluded or assumed that the notice necessary to trigger the stop-time rule found in 8 U. S. C. §1229b(d)(1) was not ‘perfected’ until the immigrant received all the information listed in §1229(a)(1). . . . That emerging consensus abruptly dissolved not long after the Board of Immigration Appeals (BIA) reached a contrary interpretation of §1229b(d)(1) in Matter of Camarillo, 25 I. & N. Dec. 644 (2011). After that administrative ruling, in addition to the decision under review here, at least six Courts of Appeals, citing Chevron, concluded that §1229b(d)(1) was ambiguous and then held that the BIA’s interpretation was reasonable. . . . The Court correctly concludes today that those holdings were wrong because the BIA’s interpretation finds little support in the statute’s text.

“In according Chevron deference to the BIA’s interpretation, some Courts of Appeals engaged in cursory analysis of the questions whether, applying the ordinary tools of statutory
construction, Congress’ intent could be discerned, 467 U. S., at 843, n. 9, and whether the BIA’s interpretation was reasonable. . . . In Urbina v. Holder, for example, the court stated, without any further elaboration, that ‘we agree with the BIA that the relevant statutory provision is ambiguous.’ 745 F. 3d, at 740. It then deemed reasonable the BIA’s interpretation of the statute, ‘for the reasons the BIA gave in that case.’ Ibid. This analysis suggests an abdication of the Judiciary’s proper role in interpreting federal statutes.

“The type of reflexive deference exhibited in some of these cases is troubling. And when deference is applied to other questions of statutory interpretation, such as an agency’s interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still. See Arlington v. FCC, 569 U. S. 290, 327 (2013) (Roberts, C. J., dissenting) (‘We do not leave it to the agency to decide when it is in charge’). Given the concerns raised by some Members of this Court, see, e.g., id., at 312–328; Michigan v. EPA, 576 U. S. ___, ___ (2015) (Thomas, J., concurring); Gutierrez-Brizuela v. Lynch, 834 F. 3d 1142, 1149–1158 (CA10 2016) (Gorsuch, J., concurring), it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie Chevron and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary. See, e.g., Arlington, supra, at 312–316 (Roberts, C. J., dissenting).”

JUSTICE ALITO dissented after affording the agency Chevron deference, as he found the statutory term “notice to appear” ambiguous in the relevant respect and the agency’s resolution of it reasonable. But JUSTICE ALITO made clear that he understood the case to be a potential sign that Chevron was at risk. In fact he opened his dissent this way: “Although this case presents a narrow and technical issue of immigration law, the Court’s decision implicates the status of an important, frequently invoked, once celebrated, and now increasingly maligned precedent, namely, Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837 (1984). Under that decision, if a federal statute is ambiguous and the agency that is authorized to implement it offers a reasonable interpretation, then a court is supposed to accept that interpretation. Here, a straightforward application of Chevron requires us to accept the Government’s construction of the provision at issue. But the Court rejects the Government’s interpretation in favor of one that it regards as the best reading of the statute. I can only conclude that the Court, for whatever reason, is simply ignoring Chevron.”

JUSTICE ALITO then circled back to what he perceived to be the Court’s implicit disdain for Chevron in his closing passage: “Once the errors and false leads are stripped away, the most that remains of the Court’s argument is a textually permissible interpretation consistent with the Court’s view of ‘common sense.’ That is not enough to show that the Government’s contrary interpretation is unreasonable. Choosing between these competing interpretations might have been difficult in the first instance. But under Chevron, that choice was not ours to make. Under Chevron, this Court was obliged to defer to the Government’s interpretation. In recent years, several Members of this Court have questioned Chevron’s foundations. See, e.g., ante, at 2–3 (Kennedy, J., concurring); Michigan v. EPA, 576 U. S. ___, ___ (2015) (Thomas, J., concurring) (slip op., at 1–5); Gutierrez-Brizuela v. Lynch, 834 F. 3d 1142, 1149 (CA10 2016) (Gorsuch, J., concurring). But unless the Court has overruled Chevron in a secret decision that has somehow escaped my attention, it remains good law.”
CHAPTER IX: ACCESS TO JUDICIAL REVIEW: JUSTICIABILITY

SECTION 1. STANDING

Add to the end of Note (2), p. 1328:

The Supreme Court avoided the question of whether adequacy of psychological and dignitary harms can suffice for standing in TRUMP v. HAWAII, 138 S.Ct. 2392 (2018), involving statutory and Establishment Clause challenges to President Trump’s Proclamation prohibiting nationals of certain countries from entering the United States. Chief Justice Roberts’s 5-4 majority opinion noted that the “Plaintiffs first argue that they have standing on the ground that the Proclamation ‘establishes a disfavored faith’ and violates ‘their own right to be free from federal [religious] establishments.’ Brief for Respondents 27–28 (emphasis deleted). They describe such injury as ‘spiritual and dignitary.’ Id., at 29. We need not decide whether the claimed dignitary interest establishes an adequate ground for standing. The three individual plaintiffs assert another, more concrete injury: the alleged real-world effect that the Proclamation has had in keeping them separated from certain relatives who seek to enter the country. We agree that a person’s interest in being united with his relatives is sufficiently concrete and particularized to form the basis of an Article III injury in fact.” Roberts proceeded to reject the Establishment Clause challenge on the merits.

Add to the end of Note (3), p. 1437:

In TRUMP v. HAWAII, 138 S.Ct. 2392 (2018), several lower courts had enjoined the Trump Administration’s travel ban on a nationwide basis. Rejecting the constitutional and statutory challenges to the ban, the majority stated it was “unnecessary to consider the propriety of the nationwide scope of the injunction issued by the District Court.” In his concurrence, JUSTICE THOMAS took up the question, arguing that nationwide injunctions, which he termed “‘universal injunctions’ because they prohibit the Government from enforcing a policy with respect to anyone, including nonparties … are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.” He was “skeptical that district courts have the authority to enter” such injunctions because universal injunctions do not “comply with longstanding principles of equity that predate this country’s founding. These injunctions are a recent development, emerging for the first time in the 1960s and dramatically increasing in popularity only very recently. And they appear to conflict with several traditional rules of equity, as well as the original understanding of the judicial role.”

Reviewing the history of equity, Thomas argued that “[t]he English system of equity did not contemplate universal injunctions. As an agent of the King, the Chancellor had no authority to enjoin him. American courts inherited this tradition. Moreover, as a general rule, American courts of equity did not provide relief beyond the parties to the case. If their injunctions advantaged nonparties, that benefit was merely incidental. Injunctions barring public nuisances were an example. While these injunctions benefited third parties, that benefit was merely a consequence of
providing relief to the plaintiff. American courts’ tradition of providing equitable relief only to parties was consistent with their view of the nature of judicial power. For most of our history, courts understood judicial power as fundamentally the power to render judgments in individual cases. They did not believe that courts could make federal policy, and they did not view judicial review in terms of striking down laws or regulations. A plaintiff could not bring a suit vindicating public rights—i.e., rights held by the community at large—without a showing of some specific injury to himself. Spokeo (Thomas, J., concurring.) And a plaintiff could not sue to vindicate the private rights of someone else.”

Add a new Note (6), p. 1440:

(6) The Rise of the Remedial Dimension. The 2017 Term saw remedial questions arising in a number of the Supreme Court’s administrative law decisions and in public law disputes more generally. In addition to Justice Thomas’s discussion of nationwide or universal injunctions in Trump v. Hawaii, see above Note (3) p. 1437, disputes over remedies surfaced in Murphy v. NCAA, 138 S.Ct. 1461 (2018), and in Lucia. In Murphy, after concluding that the prohibition on states authorizing, licensing, or sponsoring sports gambling in the Professional and Amateur Sports Protection Act represented unconstitutional commandeering, the Court proceeded to hold that this regulation of the states was inseverable from the provisions of PASPA that regulated private individuals and invalidated the entire statute over dissents from three justices.

In Lucia v. SEC, 138 S.Ct. 2044 (2018), after concluding that the ALJ who heard Lucia’s case was an unconstitutionally appointed inferior officer, Justice Kagan’s majority opinion turned to the question of remedy, holding that the case should be remanded to be heard before a different ALJ: “This Court has held that ‘one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case’ is entitled to relief. Ryder v. United States, 515 U.S. 177, 182–183 (1995). Lucia made just such a timely challenge: He contested the validity of Judge Elliot’s appointment before the Commission, and continued pressing that claim in the Court of Appeals and this Court. So what relief follows? This Court has also held that the ‘appropriate’ remedy for an adjudication tainted with an appointments violation is a new ‘hearing before a properly appointed’ official. Id., at 183. And we add today one thing more. That official cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a constitutional appointment. Judge Elliot has already both heard Lucia’s case and issued an initial decision on the merits. He cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.”

In a footnote, Justice Kagan added that this approach had the benefit of “creat[ing] incentive[s] to raise Appointments Clause challenges.” She also noted that “[w]hile this case was on judicial review, the SEC issued an order ‘ratifying’ the prior appointments of its ALJs. Lucia argues that the order is invalid. We see no reason to address that issue. The Commission has not suggested that it intends to assign Lucia’s case on remand to an ALJ whose claim to authority rests on the ratification order. The SEC may decide to conduct Lucia’s rehearing itself. Or it may assign the hearing to an ALJ who has received a constitutional appointment independent of the ratification.”
Justice Breyer, joined by Justices Ginsburg and Sotomayor, dissented from the majority’s insistence on remanding to another ALJ. “The [SEC] has now itself appointed the Administrative Law Judge in question, and I see no reason why he could not rehear the case. After all, when a judge is reversed on appeal and a new trial ordered, typically the judge who rehears the case is the same judge who heard it the first time. The reversal here is based on a technical constitutional question, and the reversal implies no criticism at all of the original judge or his ability to conduct the new proceedings. For him to preside once again would not violate the structural purposes that we have said the Appointments Clause serves.” Justice Breyer also expressed concern that “the majority seems to state a general rule that a different ‘Officer’ must always preside after an Appointments Clause violation. In a case like this one, that is a relatively minor imposition, because the Commission has other administrative law judges. But in other cases … no substitute [may] be available.”

What do you make of the majority’s decision to remand to another ALJ in Lucia? Is its concern with incentivizing challenges a persuasive one? Recall that in Free Enterprise Fund the Court simply severed the removal provision it found unconstitutional, which as a practical matter meant the plaintiff gained little from its constitutional challenge. Is there a reason to be more solicitous of Appointments Clause challenges? Or is Lucia, perhaps alongside Murphy, best read as an implicit pullback from the minimalist remedial approach of Free Enterprise Fund?

In addition, what about Justice Kagan’s comments on ratification: Do you think the Court would find the SEC ALJs whose appointments were ratified to be constitutionally appointed? Of course, the Government may decide that it doesn’t want to risk finding out the answer to that in court and opt to provide its current ALJs with a “constitutional appointment independent of the ratification.” But what counts as such an appointment? If the SEC individually hires each ALJ, would that be enough? Or would the SEC have to go through the system for selecting ALJs from the beginning? If the latter, wouldn’t that give a lot of weight to Justice Breyer’s concern that the majority’s remedial approach holds much greater disruptive potential than the majority appears to acknowledge? As discussed above, pp. 14-15 and p. 25, President Trump issued an EO that governs future ALJ hires, expressly exempting them from the existing system for ALJ hiring.