Recent Developments in Federal Administrative Law

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I. Are Federal Administrative Law Judges (ALJs) unconstitutional under the Appointments Clause or the Separation of Powers?

A. Appointments Clause – the Appointments Clause (Article II, Sec. 2, cl. 2) states that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . all other officers of the United States, . . . but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

1. ALJs might be characterized as principal officers, inferior officers, or employees.

a. If ALJs are principal officers, then their appointments have been clearly unconstitutional, because they were not appointed by the President with the advice and consent of the Senate.

b. If ALJs are inferior officers, then the appointments of many ALJs are unconstitutional because they were not appointed by the head of a department. For example, apparently the SEC ALJs are routinely appointed by the SEC's Office of Administrative Law Judges. And the Social Security Administration's ALJs are appointed by the Chief Judge. If, however, they were appointed by the head of the department, then the Appointments Clause would not be violated.

(1) What constitutes a "department" for constitutional purposes is not clear, but the Supreme Court has taken a broad view of the term, applying it to an independent regulatory agency (the SEC) and apparently to an Article I court (the Tax Court) [In *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), the Court split 5-4 on the question whether the Tax Court was a "court" or a "department" for purposes of the Appointments Clause, with the majority choosing "court." However, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the Court adopted the analysis of the minority that any "freestanding component of the Executive Branch, not subordinate to or contained within any other such component, . . . constitutes a 'Departmen[t]' for the

purposes of the Appointments Clause." 561 U.S. at 511.] The D.C. Circuit has found the Library of Congress to be a Department for purposes of the Appointments Clause.

(a) Whether the Federal Energy Regulatory Commission is a "department" is unclear, because, while it is contained within the Department of Energy, 42 U.S.C. § 7171(a), its "members, employees, [and] other personnel of the Commission shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent of any other part of the Department." 42 U.S.C. § 7171(d).

c. If ALJs are not officers at all but employees of the agencies for which they work, then there is no Appointments Clause problem.

2. The dividing line between officers and employees is not well established. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court described one set of powers given to the Federal Election Commission as investigative and informative, and it said that one need not be an officer to exercise these powers. However, it went on to say that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States.'"

a. In *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), the DC Circuit concluded that the FDIC's ALJs were employees rather than officers. The primary reason for this conclusion was a reading of the Supreme Court's decision in *Freytag v. Commissioner of Internal Revenue*, 111 S.Ct. 2631 (1991), that placed primary importance on whether the person could make final decisions binding the agency. In *Freytag*, the Special Tax Judges could and so were held to be officers, but in *Landry* the FDIC ALJs could not.

(1) Judge Randolph dissented in *Landry* from this conclusion, believing that in *Freytag* the Court's discussion of the STJs' ability to make final decisions for the agency was an alternative holding as to why they were officers. He noted that the Court appeared also to hold that the STJs were officers because they could "take testimony, conduct trials, rule on the admissibility of evidence, and have power to enforce compliance with discovery orders" (citing *Freytag*), and because in the course of "carrying out these important functions . . . [they] exercise significant discretion."

(2) District court decisions from two district courts last year reached the same conclusion as Judge Randolph and on the same basis to conclude that SEC ALJs are officers, not employees. *See Duka v. U.S. S.E.C.*, 2015 WL 4940057 (S.D.N.Y. Aug. 3, 2015), *abrogated on other grounds by Tilton v. Securities and Exchange Comm'n*, --- F.3d ---- , 2016 WL 3084795 (2d Cir. 2016); *Hill v. SEC*, 2015 WL 4307088 (N.D. Ga. 2015), *rev'd on other grounds by Hill v. SEC*, --- F.3d ----, 2016 WL 3361478 (11th Cir. 2016); *Gray Fin. Grp., Inc. v. SEC*, 2015 WL 10579873 (N.D. Ga. 2015), *rev'd on other grounds by Hill v. SEC*, --- F.3d ----, 2016 WL 3361478 (11th Cir. 2016); *Timbervest, LLC v. SEC*, 2015 WL 7597428 (N.D. Ga. 2015); *Ironridge Global IV, Ltd. v. SEC*, 146 F.Supp.3d 1294 (N.D. Ga. 2015).

(a) The Second Circuit and Eleventh Circuit has explicitly or implicitly overruled each of these district court decisions on the ground that the district court did not have subject matter jurisdiction to hear the case while the administrative proceedings were underway. The circuit courts, however, did not address whether ALJs are inferior officers or employees.

b. Conclusion: Whether ALJs are for constitutional purposes to be considered officers or employees is unclear.

(1) On the one hand, to the extent that agencies retain final decision authority with respect to cases before ALJs, even if that authority is generally exercised as a rubber stamp, one could say, consistent with *Buckley*, that ALJs are really just engaged in obtaining information and making recommendations to the agency and therefore are not exercising significant authority under the laws of the United States. Moreover, in the Supreme Court's most recent decision regarding the Appointments Clause, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the Court seemed to refer to ALJs as "employees" rather than officers ('our holding . . . does not address that subset of independent agency employees who serve as administrative law judges.") And it cited the *Landry* case in saying that there was a dispute over whether ALJs are officer. In addition, the APA refers to ALJs as "employees" in sections 554, 556, and 557.

(a) Of course, Congress's characterization in a statute of a person as an employee is not determinative of whether that person is an employee, rather than an officer, under the Constitution.

(2) On the other hand, Judge Randolph's interpretation of the Court's opinion in *Freytag* seems more accurate than the majority's in *Landry*, and the same conclusion reached by two district courts further suggests that the functions of an ALJ might constitute the exercise of significant authority of the United States. Finally, in *Edmond v. United States*, 520 U.S. 651 (1997), not discussed by the majority in *Landry*, in which the status of judges of the Coast Guard Court of Criminal Appeals was at issue, the Supreme Court stated that "What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." But this statement was made to justify the finding that these judges were *inferior* officers rather than principal officers. It certainly did not mean that they were employees rather than officers.

3. If ALJs are officers, it remains to be seen whether they are principal officers or inferior officers. The principal test of whether an officer is a principal officer or an inferior officer was established in *Edmond v. United States*, 520 U.S. 651 (1997), which involved judges on the Coast Guard Court of Criminal Appeals. There it was said: "Whether one is an 'inferior' officer depends on whether he has a superior." And "we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."

a. In determining whether someone's work is "directed and supervised" by a principal officer, the Court has said that the "power to remove officers . . . is a powerful tool for control." *Edmond* (quoting *Bowsher v. Synar*, 478 U.S. 724, 727 (1986). It is a particularly powerful tool if the removal need not be for cause, but the Court has noted that the existence of "for cause" removal limitations does not eliminate the ability to direct and supervise someone's work. *See Free Enterprise Fund*, citing *Morrison v. Olson*, 487 U.S. 654 (1988). However, the D.C. Circuit has said that the Court in *Morrison* "did not hold that such a restriction on removal was generally consistent with the status of an inferior officer." *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 684 F.3d 1332, 1340 (D.C. Cir. 2012).

(1) ALJs can be removed for cause by the employing agency but only for cause after a determination by the Merit Systems Protection Board, so it could be said that this supports a determination that they are inferior officers.

(a) But in *Intercollegiate Broadcasting* the D.C. Circuit suggested that the fact that Copyright Royalty Judges could only be removed for cause weighed in favor of them being principal officers rather than inferior officers.

b. In *Edmond*, the Court found that the work of judges of the Coast Guard Criminal Appeals Court was directed and supervised in two different ways.

(1) First, there was an executive branch entity that reviewed the decisions of the court.

(a) Under the APA, the agency may always review the initial decision of an ALJ. *See* 5 U.S.C. 557(b) (providing that the agency may in specific cases or by general rule require the entire record to be certified to it).

(2) Second, while he could not attempt to influence the outcome of individual proceedings, the Judge Advocate General of the Coast Guard was responsible for prescribing uniform rules of procedure for the court.

(a) Under the APA, the agency promulgates the procedural rules applicable to hearings before ALJs. *See* 5 U.S.C. § 556(c) (stating that ALJs preside at hearings "subject to published rules of the agency").

4. Conclusion: If ALJs are officers, they are probably inferior officers because they may be removed by a principal officer, albeit for cause, and are under the direction and supervision of a principal officer. ALJs can be distinguished from the Copyright Royalty Judges because the decisions of the CRJs are final for purposes of the executive branch. Consequently, unless they are appointed by the head of the agency, their appointments are unconstitutional. However, this problem has an easy fix: have the head of the agency appoint the ALJs.

B. Separation of Powers

1. Assuming that ALJs are inferior officers, and that any Appointments Clause problem could be cured by their appointment by the head of the agency, there is a remaining question whether their protection from removal except for cause violates the Separation of Powers under the analysis used in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010).

2. In *Free Enterprise Fund*, the Court by a 5-4 margin held that the Sarbanes-Oxley Act's for-cause limitation on removal of members of the Public Company Accounting Oversight Board (PCAOB) was unconstitutional because the persons who could remove them (the members of the Securities and Exchange Commission) could themselves only be removed for cause. The Court said that such a dual for-cause removal scheme attenuated too far the President's responsibility to take care that the laws are faithfully executed. The Court acknowledged that it had approved for-cause removal provisions for principal officers in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and for an inferior officer in *Morrison v. Olson*, 487 U.S. 654 (1988), but those cases did not suggest that a dual for-cause removal scheme would be constitutional.

    a. Almost all ALJs are appointed by someone who is protected from removal except for cause. For example, the Commissioner of Social Security can only be removed for cause. 42 U.S.C. § 902(a)(3).

3. *Free Enterprise Fund* did not by its terms extend its analysis to ALJs. Indeed, in a footnote the Court explicitly stated that: "our holding also does not address that subset of independent agency employees who serve as administrative law judges. See, e.g., 5 U.S.C. §§ 556(c), 3105. Whether administrative law judges are necessarily 'Officers of the United States' is disputed. *See, e.g., Landry v. FDIC*, 204 F.3d 1125 (C.A.D.C.2000). And unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, see §§ 554(d), 3105, or possess purely recommendatory powers." 487 U.S. at 507 n. 10. The footnote thus provides two separate arguments as to why, perhaps, the analysis in *Free Enterprise Fund* would not apply to ALJs.

    a. First, it holds open the idea that ALJs are not officers at all, and in the text of *Free Enterprise Fund* the Court stated unequivocally that "Nothing in our opinion . . . should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies."

b. Second, even if ALJs are considered inferior officers, the fact that they perform solely adjudicative functions would distinguish them from the PCAOB, which possessed not only adjudicative functions but also wide-ranging rulemaking and policy making functions. Moreover, the Court has recognized greater limits on Presidential control of adjudicative functions than on policy making functions, indeed, to the extent of denying the President the power to remove members of the War Claims Commission except for cause, even though they were principal officers and the statute did not even require for-cause removal. *See Wiener v. United States*, 357 U.S. 349 (1958).

c. Finally, the solution in *Free Enterprise Fund* was to declare the for-cause removal provision of the Act unconstitutional with respect to the PCAOB members, meaning they could be removed by the SEC at will. A similar solution with respect to ALJs is difficult to conceive. The Court has indicated numerous times that adjudicators need independence and being subject to removal at will by an agency would potentially destroy ALJs' independence.

d. The district court in *Duka v. U.S. Securities and Exchange Comm'n*, 2015 WL 1943245 (S.D.N.Y 2015), *abrogated on other grounds by Tilton v. Securities and Exchange Comm'n*, --- F.3d ---- , 2016 WL 3084795 (2d Cir. 2016), responded to a claim that the dual for-cause removal restrictions applicable to ALJs fell under the analysis of *Free Enterprise Fund* and held that it did not, essentially for the reasons addressed above. Similarly, the district court in *Hill v. Securities and Exchange Comm'n*, 2015 WL 4307088 (N.D. Ga. 2015), *rev'd on other grounds by Hill v. SEC*, --- F.3d ----, 2016 WL 3361478 (11th Cir. 2016), while it declined to decide the issue, opined that it had "serious doubts" that the dual for-cause removal limitations applicable to ALJs interfered with the President's ability to perform his duties, citing *Duka*.

4. Nevertheless, the D.C. Circuit relied upon *Free Enterprise Fund*'s solution to craft its own solution to the unconstitutional appointment of Copyright Royalty Judges (CRJs). *See Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340-1341 (D.C. Cir. 2015). There the court found that the CRJs were principal officers because their decisions were not subject to review by anyone in the executive branch, but they were not appointed by the President with the advice and consent of the Senate. In order to cure this constitutional problem, the court held unconstitutional the for-cause limitation on the removal of CRJs. Because CRJs now could be fired at will, the court found that they would be inferior officers instead of principal officers, and their appointment by the Librarian of Congress (the head of a department, the court held) was

therefore constitutional. In deciding on this cure, the court explicitly noted that in this way the Librarian, through the threat of removal, could significantly constrain the decisions of the CRJs.

a. While this decision is disturbing because it ignored any question about the need for independence by judges, two aspects of the case can distinguish it from a case involving ALJs.

(1) First, the CRJs exclusive function is ratemaking, which normally is classified as rulemaking, rather than adjudication, which is what almost all ALJs perform, and traditionally there has been less need for independence from political influence in the rulemaking context. The court stressed the degree of discretion CRJs exercise in their ratemaking function and its potential impact on companies.

(2) Second, CRJs' decisions are not subject to review by anyone, whereas ALJs' decisions are subject to review by the agency. Thus, there may have been a felt need for some political control over such decisions, even if indirectly through the threat of removal.

C. Conclusion: Whether by classifying ALJs as employees, rather than as officers, or by distinguishing ALJs from the PCAOB members in *Free Enterprise Fund* the courts will not find a violation of the Separation of Powers in the for-cause removal limitation on ALJs.

II. Chevron Doctrine – Courts should defer to the reasonable interpretation of an ambiguous statutory provision made by the federal agency responsible for implementing that provision, at least when that interpretation is made in the context of rulemaking or formal adjudication.

A. In *King v. Burwell*, 135 S.Ct. 2480 (2015), the Court had to interpret a provision of the Affordable Care Act. That provision allowed for taxpayers to receive a tax credit if they purchase a health care insurance plan through "an Exchange established by the State." The Act required states to establish Exchanges, but it required the Federal Government to establish an Exchange in a state, if the state did not. The question was whether an Exchange established by the Federal Government in a state qualified as an "Exchange established by the State" for purposes of the tax credit. The Internal Revenue Service, the agency responsible for administering the tax credits, adopted a regulation that interpreted such Federal exchanges as "an Exchange established by the State."

1. The Government argued that the Court should apply *Chevron*, but the Court in an opinion by Chief Justice Roberts rejected that argument. He

accepted that the phrase was ambiguous, because, despite its apparent lack of ambiguity, "when read in context, 'with a view to [its] place in the overall statutory scheme,' . . . may not be as clear as it appears when read out of context." 135 S.Ct. at 2490. Nevertheless, he found *Chevron* inapplicable here because the question was of such deep political and economic significance that it was unlikely that Congress would have intended to delegate its resolution to an agency without explicitly so stating. This was especially so here, because the IRS has no expertise in health care policy. Instead, the Court used ordinary principles of statutory interpretation to reach the same conclusion as the IRS – the Federal Exchanges qualified as an "Exchange established by the State."

2. This avoidance of *Chevron* has occurred before, although not often. Its first appearance was in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), when the Court did not apply *Chevron* to the FDA's regulation interpreting cigarettes to be drug delivery devices. Its other appearance was in *Gonzales v. Oregon*, 546 U.S. 243 (2006), in which the Court did not apply *Chevron* to the Attorney General's interpretation that "the practice of medicine" did not include prescribing drugs for the purpose of suicide under Oregon's Death with Dignity law.

3. While some have suggested *King v. Burwell*'s refusal to apply *Chevron* is of some novel significance, perhaps implying its future reconsideration, that does not seem likely. Not only is this not a new exception to *Chevron*, but it has been around long enough to have its own title – *Chevron* Step Zero.

B. Four days later the Court decided *Michigan v. EPA*, 135 S.Ct. 2699 (2015), in which it applied *Chevron* in the traditional fashion. EPA had adopted a regulation limiting emissions of hazardous pollutants from power plants. The Clear Air Act authorizes such limitations on power plants only if EPA concludes that "regulation is appropriate and necessary." In adopting its regulation, EPA found that it was appropriate and necessary but admitted that in reaching its conclusion it had not considered the costs imposed on power plants or the relation of those costs to the benefits of the regulation. The Court applied *Chevron*, agreed that the terms of the statute were ambiguous, but held that to ignore the costs and their relation to the benefits of the regulation was not a reasonable interpretation of the statute.

1. Justice Thomas concurred in the Court's opinion but wrote separately to suggest that *Chevron* might violate either Article III's clause vesting the judicial power of the United States in the federal courts or Article I's clause vesting the legislative powers of the United States in Congress.

    a. Do not expect a majority of the Court to follow Justice Thomas's lead on this.

2. The four "liberal" justices dissented from the Court's opinion. They believed that EPA's interpretation was entirely reasonable.

III. *Seminole Rock/Auer* Doctrine – The *Chevron* Doctrine applies to judicial review of an agency interpretation of a statute it is responsible for administering; the *Seminole Rock/Auer* Doctrine applies to judicial review of an agency interpretation of its own regulation. The doctrine comes from the case of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and its more recent affirmation in *Auer v. Robbins*, 519 U.S. 452 (1997). In essence, it provides that if an agency regulation is ambiguous, courts should defer to the agency's reasonable interpretation of the regulation.

A. There is an exception to the doctrine where the regulation merely parrots the language of the statute, and the interpretation of the regulation is made by the agency in a form that would not qualify for *Chevron* deference.

B. Recently, there has been language in some Supreme Court concurrences and dissents questioning the validity of the *Seminole Rock/Auer* Doctrine. Justices Scalia and Thomas have openly said the doctrine is improper; the Chief Justice and Justice Alito have indicated openness to reconsidering the Doctrine. The passing of Justice Scalia may blunt this reconsideration movement.

IV. Reviewability

A. Constitutional Standing – The canonic test for whether a plaintiff satisfies constitutional standing requirements is whether (1) the plaintiff has suffered or is about to suffer a concrete, particularized injury to a legally protected interest that is actual or imminent and not conjectural or hypothetical, (2) the injury is fairly traceable to the alleged unlawful action, and (3) a favorable court decision would likely redress or reduce the injury.

1. A continuing problem is identifying what injuries satisfy the first of these requirements.

a. One problem deals with risks. When is the risk of a concrete injury sufficient to satisfy the requirement? Some cases have seemed to address an increased risk of an injury to be an injury itself and have focused on whether the risk itself is sufficiently great to be concrete and not conjectural. Other cases seem to focus on the ultimate injury and whether it is imminent or certainly impending or only conjectural. Finally, there are some environmental cases in which "a reasonable fear" has been found to satisfy the injury requirement.

2. Another continuing problem is whether Congress, by creating a statutory right, including a judicial remedy for its violation, necessarily creates an injury that satisfies the standing requirement.

   a. Last term, in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), the Court was faced with a provision of the Fair Credit Reporting Act of 1970, which provides that a person who violates its provisions "with respect to any [individual] is liable to that [individual]" for "actual damages" or statutory damages of $100 to $1000." Spokeo provided inaccurate information about Robins; it said that he was married, had children, was in his 50s, had a job, was relatively affluent, and had a graduate degree, but none of this was true. The question, therefore, was how he was injured by this inaccurate information.

      (1) The Ninth Circuit said that Spokeo had violated "*his* statutory rights, not just the statutory rights of other people," and that "Robins's personal interests in the handling of his credit information are individualized rather than collective." The Supreme Court said that this analysis was limited to whether the alleged injury was "particularized," but that it omitted a consideration of whether the injury was "concrete" or actual.

      (2) The Court made clear that a concrete injury did not have to be "tangible." In determining whether an intangible harm can be a concrete injury, the Court provided certain guidance.

         (a) One might look to history to see if "an alleged intangible harm has a close relationship to a harm that has been traditionally been regarded as providing a basis for a lawsuit."

         (b) In addition, "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important." But this does not mean "that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." For example, a "bare procedural violation, divorced from any concrete harm, [could not] satisfy the injury-in-fact requirement." However, a violation of a procedure

designed to protect person, which violation causes "the risk of real harm" may satisfy concreteness.

(c) Applied to this case, the Court said, Robins cannot satisfy the injury requirement simply by showing that the statute was violated by providing false information. Some false information, such as providing an incorrect zip code, would work no concrete harm. Here, the Court remanded the case to the Ninth Circuit to assess the concreteness of Robins's injury, and it expressed no view itself on the outcome.

(d) Justice Ginsburg, joined by Justice Kagan, dissented. They believed that the facts indicated that Robins indeed had satisfied the concreteness requirement, so that there was no need for remand. After all, she wrote, one can be rejected for a job by being overqualified.

B. Finality – Under the federal APA, judicial review is available only for "final agency action for which there is no other adequate remedy in a court." Recently, the Supreme Court has rendered two opinions clarifying (or muddying) what this language means.

1. *Sackett v. EPA*, 132 S.Ct. 1367 (2012), involved regulation of wetlands under the Clean Water Act. The EPA had issued a "compliance order" to the Sacketts directing them to stop building their house and immediately to undertake activities to restore the half acre which they had filled with rocks and dirt, because EPA found that their land contained wetlands subject to regulation under the CWA. There had been no prior administrative proceeding. The Sacketts, disagreeing with EPA that their land contained jurisidictional wetlands, sued under the APA for judicial review of the compliance order. The lower courts, however, said that they lacked subject-matter jurisdiction. The Supreme Court unanimously reversed. The first issue it addressed was whether the order was final agency action.

a. The Court applied the test described in *Bennett v. Spear*, 520 U.S. 154, 178 (1997): "First, the action must mark the 'consummation' of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"

(1) The Court found that the order was the consummation of the agency's decisionmaking process; it was not subject to further agency review.

(2) The court also found that the order created a "legal obligation" to restore their property and that "legal consequences" flowed from the order – specifically, that it exposed them to double penalties in a future enforcement proceeding and limited their ability to seek a permit for their activity.

b. The Court also found that there was no other adequate remedy in court. The Sacketts could challenge the agency's determination in court if EPA sought to enforce its order in court, but as the Court said, "the Sacketts cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue . . . an additional $75,000 in potential liability." This was not an "adequate" remedy.

c. Finally, the Court found that review was not precluded by another statute. Noting that there is a presumption of review under the APA, the Court said the mere fact that Congress had provided EPA two paths of enforcement – going to court to obtain a court order or issuing a compliance order – did not suggest that the order would not be subject to judicial review.

2. Last term, in *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S.Ct. 1807 (2016), the Court, again unanimously, rejected the government's attempt to avoid judicial review of its determination that a person's property is subject to CWA jurisdiction. This time the case arose after the Corps issued an "approved Jurisdictional Determination" (JD) concluding that the Hawkes Co.'s property contained wetlands subject to CWA jurisdiction. Although the agency's regulation described the JD as "final agency action," it resisted judicial review of the JD on the ground that, unlike the order in *Sackett*, the JD did not require Hawkes to do anything, nor did it prohibit them from doing anything. Therefore, the Corps argued, the JD did not create legal obligations or have legal consequences.

a. The Chief Justice, writing for the Court, found to the contrary. First, it said, a "negative JD," a JD that finds *no* jurisdiction over the person's property has a legal consequence – a five-year safe harbor from government assertion of jurisdiction. "It follows that affirmative JDs have legal consequences as well: They represent the denial of the safe harbor. . . ." And it cited to the definition of agency action in the APA as including the denial of a license or its equivalent.

b. Second, the Chief Justice wrote, this approach "tracks the 'pragmatic' approach [the Court] has long taken to finality." He cited to a 1956 case, *Frozen Food Express v. United States*, 351 U.S. 40 (1956), in which the Court found finality in an agency decision that simply warned a person that if they proceed without a permit, they will run the risk of significant criminal and civil penalties.

(1) Justice Ginsburg concurred in the Court's opinion but wrote to make clear that it was not necessary for her that a negative JD would have legal consequences. For her it was enough that the JD had "an immediate and practical impact," citing to *Frozen Food Express*. She rejected the idea that *Bennett v. Spear* displaced the approach to finality established by *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), and *Frozen Food Express* to require legal consequences, as opposed to actual practical effects.

(2) Justice Kagan also concurred in the Court's opinion but wrote to reject Justice Ginsburg's approach, saying that legal consequences were necessary for her to find finality.

3. These cases establish that the Court will go a long way to find some legal consequence to a final, definitive, authoritative agency action, but the Chief Justice's opinion, melding both the legal consequences approach of *Bennett v. Spear* and the practical consequences approach of *Abbott Laboratories*, does not resolve whether the practical consequences approach survives *Bennett v. Spear*.

a. This is important because the D.C. Circuit in particular has stated unequivocally that interpretive rules and statements of policy are not final agency action subject to judicial review because by definition they cannot have binding legal effect.

(1) In *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710 (2015), for example, a flight attendant's union petitioned for review of a notice that the Federal Aviation Administration issued to safety inspectors. The petitioner contended that this notice, which related to use and stowage of personal electronic devices, constituted an amendment to a regulation that should have gone through notice-and-comment. The court dismissed on the ground that the notice constituted a guidance document that the court lacked jurisdiction to review. The court's opinion is notable for clarifying that, as far as the D.C. Circuit is

concerned, guidance documents—i.e., policy statements and interpretive rules—never amount to final agency actions. Finality requires: (a) that an action be "consummated" within the agency; and (b) that the action determine legal rights and obligations or otherwise create legal consequences. Policy statements "are binding on neither the public nor the agency," and interpretive rules "do not carry the force and effect of law." Neither, therefore, satisfies the second prong of the finality inquiry.

C. Prudential Standing

1. For years, courts have denied review to plaintiffs based on something they have denominated as "prudential standing" – that is, standing not based on Article III of the Constitution but on judge-made prudential bases. Recently, however, the Supreme Court clarified this doctrine by essentially eliminating it.

a. In *Lexmark Intern., Inc. v. Static Control Components, Inc*.,134 S.Ct. 1377 (2014), the Court explained that the whole concept of "prudential standing" "is in some tension with [the Court's] reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" Nevertheless, it admitted that it has used the term in three different contexts: the general prohibition on a litigant's raising another person's legal rights; the rule barring adjudication of generalized grievances; and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

(1) It explained that the zone-of-interests test is not prudential in any way; it is simply a question of statutory interpretation. Either the plaintiff has a cause of action under the statute or he does not.

(a) Sometimes the zone-of-interests test has been referred to as statutory standing, but this too is a misnomer because the zone-of-interests test is not jurisdictional.

(2) In addition, it clarified that there is nothing prudential about the prohibition on hearing generalized grievances; such cases do not qualify under Article III at all.

(3) Third party standing, it said, was harder to classify, but usually it also was a question of statutory interpretation;

whether the statute would authorize the person to bring the suit.

b. The Court did not mention ripeness as a prudential standing doctrine in *Lexmark*, but it did later in the same term in *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014). In that case, the Court said in response to an argument that the case was not ripe, "[t]hat request is in some tension with our recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." However, it concluded that it did not need to resolve the continuing vitality of the prudential ripeness doctrine, because in this case the claim was clearly ripe.

V. Death of the *Paralysed Veterans/Alaska Professional Hunters* Doctrine

A. In *Paralysed Veterans of America v. D.C. Arena*, 117 F.3d 579 (D.C. Cir. 1997), the D.C. Circuit suggested that an agency must use notice-and-comment rulemaking to make a fundamental change to an interpretation of one of its regulations, notwithstanding that the original interpretation did not require notice-and-comment rulemaking. In *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999), the D.C. Circuit held invalid the agency's change to its longstanding interpretation, in light of the substantial reliance interests on that interpretation, because the change had not gone through notice and comment. And in *Metwest, Inc. v. Secretary of Labor*, 560 F. 3d 506 (D.C. Cir. 2009), the D.C. Circuit expanded this requirement to any material change to a formal interpretation made by an agency.

B. This doctrine was controversial, with three circuits adopting the doctrine and two rejecting it. In the last term, the Supreme Court unanimously rejected the doctrine in *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2015).

1. The Court noted that the APA does not require interpretive rules to be adopted through notice and comment, and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), held that courts cannot require agencies to use more procedures than required by the APA or other statute.

2. Although they concurred in the Court's opinion that the D.C. Circuit's doctrine was inconsistent with the APA and *Vermont Yankee*, Justices Scalia and Thomas wrote separately to take aim at the Supreme Court's *Seminole Rock/Auer* doctrine, which holds that courts should defer to agency's reasonable interpretations of their own regulations.

VI. Administrative Law Judges and "Decisional Independence"

A. An annual case-volume "goal" established by the Social Security Administration (SSA) met strong opposition from the Association of Administrative Law Judges, the union representing SSA's ALJs. In 2007 SSA issued a "directive" setting forth a "goal" that each ALJ "manage" his or her "docket in such a way that they will be able to issue 500-700 legally sufficient [disability benefits] decisions each year." The Association challenged the goal—alleged really to be a "quota"—by filing suit in federal district court under the Administrative Procedure Act (APA). It claimed that the quota interfered with an ALJ's "decisional independence" in violation of the APA (in particular, 5 U.S.C. § 554). The Association's argument, as the Seventh Circuit summarized it, was "that because it takes less time for an administrative law judge to award . . . benefits than to deny benefits, because an award is not judicially appealable and therefore the administrative law judge doesn't have to be as careful in his analysis of the disability claim . . . , the effect of the quota . . . is to induce administrative law judges to award more benefits; were it not for the quota, they would deny benefits whenever they thought the applicant wasn't entitled to them under law, even if making that determination took a lot of time." *Ass'n Admin. Law Judges v. Colvin*, 777 F.3d 402, 404 (7th Cir. 2015).

1. The district court dismissed the suit for lack of subject matter jurisdiction on the ground that the administrative enforcement scheme established by the Civil Service Reform Act provides the exclusive remedy for challenging any adverse personnel action affecting an ALJ (or any other civil servant). The Civil Service Reform Act creates remedies for "prohibited personnel practices" taken against federal employees, and defines "personnel practices" to include "significant change in duties, responsibilities, or working conditions." 5 U.S.C. §§ 2302(a)(1), (2)(A)(xii), (b) That was so, the district court held, whether or not the challenged personal practice (here, the imposition of a quota) was redressable under the Act. And here the challenged personnel practice would not be redressable under the Act, because the Act does not prohibit an increase in a production quota unless the increase violates a prohibition listed in 5 U.S.C. § 2302(b), and the increase challenged in this case does not.

2. In an opinion by Judge Posner, the Seventh Circuit affirmed on a different basis. Judge Posner allowed, contrary to the D.C. Circuit's recent holding in *Mahoney v. Donovan*, 721 F.3d 633 (D.C. Cir. 2013), that the Act might not limit a federal court's jurisdiction to hear a claim directly arising under the APA if SSA had imposed the alleged quota with the object of interfering with ALJs' decisional independence. A contrary "ruling," Judge Posner explained, "would nullify the express protection of . . . independence" provided for in the APA. 777 F.3d at 405. But here the alleged quota had no such impermissible intent. It was not alleged, Judge Posner explained, that SSA had imposed the quota with the object of "prod[ding] administrative laws judges to grant more applications for

disability benefits." (If anything, Judge Posner noted, the facts showed otherwise: SSA has been under pressure to reduce the rate of benefit grants.) Rather, SSA's only "aim" in imposing the quota, as the plaintiffs themselves conceded, was to "speed up decision-making." *Id.*, at 404. Any increase in grant rates that might have resulted from the imposition of the quota was "an unintended and presumably unwanted byproduct." Id.

a. Judge Ripple, concurring, would have followed the D.C. Circuit's approach and held that the Civil Service Reform Act, with its exclusive remedial scheme, forecloses resort to federal court under the APA. *Id.*, at 406 (Ripple, J., concurring). At the same time, he allowed for the possibility that a particular agency policy, no matter the intent underlying its adoption, might "so burden the exercise of" the "judicial decision-making process that the congressional intent of protecting the administrative law judges" could "be impaired," in which case a litigant might have redress in the courts as a matter of due process. *Id.*, at 409. Judge Ripple characterized a litigant's burden as "gargantuan." *Id.* Judge Posner expressed concern about the implications of such an exception, but conceded that he could "imagine a case in which a change of working conditions could have an unintentional effect on decisional independence so great as to create a serious risk of due process." *Id.*, at 406. He gave as a sample a rule limiting without exceptions every SSA hearing to 15 minutes. "The quality of the justice meted out by the" ALJ, he said, "would be dangerously diminished." *Id.*