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# Administrative Law (Fifth Circuit Survey)

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# ADMINISTRATIVE LAW

by Michael A. Scaperlanda\*

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## I. INTRODUCTION

The Oxford English Dictionary defines “survey” as “to take a broad, general, or comprehensive view of.”<sup>1</sup> “Survey” is also defined as “[t]o look carefully into or through; to view in detail; to examine, inspect, scrutinize.”<sup>2</sup> In this survey article, I endeavor to utilize both of these definitions of “survey.” In Part II of the Article, I present a broad overview of the Administrative Law cases decided by the Fifth Circuit during the survey period. While not purporting to list every case decided during the survey period, it will, I hope, give the reader a convenient reference upon which further investigation of a particular subject may be launched. The purpose of Part III is different. In that section, I closely examine Fifth Circuit cases in two areas of Administrative Law. Part III A will scrutinize cases reviewing agency inter-

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1. XVII THE OXFORD ENGLISH DICTIONARY (2d ed. 1989).

2. *Id.* Courts, at times, attempt to justify a certain result by quoting a dictionary definition of a word. Compare *John Doe Agency v. John Doe Corp.*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_, 110 S. Ct. 471, 476, 107 L. Ed. 2d 462, 469 (1989) (To determine the meaning of “compile” for purposes of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C) (1988), the Court cited two dictionaries.) with *id.* at \_\_\_\_, 110 S. Ct. at 480, 107 L. Ed. 2d at \_\_\_\_ (Scalia, J., dissenting) (By referring to a leading thesaurus, the dissent attempted to cast a different shadow on the meaning of “compile.”).

pretation of statutory mandates. Part III B will review the Fifth Circuit's recent treatment of the Freedom of Information Act.

## II. SUMMARY OF CASES DECIDED DURING SURVEY PERIOD

During the survey period, a myriad of Administrative Law questions came before the Fifth Circuit. As usual, the court affirmed many agency adjudications under the substantial evidence standard.<sup>3</sup> Some agency adjudications were reversed, however, because the agency determination was not supported by substantial evidence.<sup>4</sup> The administrative law judges at the Department of Health and Human Services had a difficult year on another front, being reversed for applying the wrong legal standard in more than one case.<sup>5</sup> In another case involving social security benefits, the Fifth Circuit held that the Social Security Administration was not estopped from denying benefits on the ground that the application for benefits was not timely filed even though the

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3. See, e.g., *McQuiddy v. United States Dept. of Health & Human Servs.*, 888 F.2d 1047, 1048 (5th Cir. Oct. 1989) (reviewing denial of social security disability benefits and supplemental security income benefits); *Tamez v. Sullivan*, 888 F.2d 334, 336 (5th Cir. Oct. 1989) (reviewing denial of supplemental security income benefits).

4. See, e.g., *Ivy v. Sullivan*, 898 F.2d 1045, 1049 (5th Cir. Apr. 1990) (reversing despite the absence of precise medical records because substantial evidence showed that the claimant was disabled prior to termination of insured status); *Albritton v. Sullivan*, 889 F.2d 640, 642-44 (5th Cir. Dec. 1989) (reversing because the factual conclusion that disability claimant was illiterate was not supported by substantial evidence); *Garcia ex rel Rodriguez v. Sullivan*, 883 F.2d 18, 19-20 (5th Cir. Sept. 1989) (reversing a denial of application for surviving child's insurance benefits because the agency erred in not effectuating a state court judgment legitimating the child and when the state court judgment is recognized, denial would not be supported by substantial evidence).

5. See, e.g., *Moore v. Sullivan*, 895 F.2d 1065, 1069-70 (5th Cir. Mar. 1990) (holding that the agency applied the wrong legal standard in denying a claimant supplemental security income because it failed to follow *Singletary v. Bowen*, 798 F.2d 818 (5th Cir. 1986), which held that the statutory and regulatory requirement that "impairment last or be expected to last twelve months" did not require proof that the claimant had been incapacitated for a continuous 12 month period); *Leidler v. Sullivan*, 885 F.2d 291, 294 (5th Cir. Oct. 1989) (holding that the agency applied the wrong legal standard in a denial of social security benefits on the basis of severe mental illness because it failed to follow *Singletary* when the court held that in cases involving severe mental illness a claimant can be disabled even though he can work sporadically but not for any length of time); *Garcia ex rel Garcia v. Sullivan*, 874 F.2d 1006, 1008 (5th Cir. June 1989) (holding that the agency improperly construed the ambiguous acknowledgements of paternity presumptively in favor of the illegitimate claimant in a claim for survivors' benefits).

late filing occurred because the agency made erroneous oral statements to the applicant concerning the time for filing an application.<sup>6</sup>

The court encountered administrative law questions in a number of other substantive areas ranging from nuclear power regulation to immigration.<sup>7</sup> The court affirmed the Nuclear Regulatory Commission's denial of a citizen group's petition to intervene in a nuclear power plant licensing proceeding.<sup>8</sup> The court concluded that the group had failed to demonstrate that (1) it had good cause for failure to timely intervene, (2) it would contribute to the agency record in a meaningful manner, and (3) its intervention would not lead to a delay of the proceedings or a broadening of the issues to be decided.<sup>9</sup>

Several cases involving the oil and gas industry raised administrative law questions during the survey period. The court addressed the issue of statutory preclusion of judicial review of agency action in *Enserch Exploration, Inc. v. Federal Energy Regulatory Commission*.<sup>10</sup> In *Enserch*, the court determined that the agency's organic act precluded the judicial review sought.<sup>11</sup> Although the court upheld a Federal Energy Regulatory Commission's ("FERC") interpretation of its own policy in one case,<sup>12</sup> it reversed two other FERC actions on the basis that FERC acted in an arbitrary and capricious manner.<sup>13</sup>

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6. See *Duthu v. Sullivan*, 886 F.2d 97, 99-100 (5th Cir. Oct. 1989), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 3213, 110 L. Ed. 2d 661 (1990).

7. See, e.g., *infra* notes 8-35 and accompanying text.

8. See *Citizens for Fair Util. Regulation v. United States Nuclear Regulatory Comm'n*, 898 F.2d 51, 56 (5th Cir. Apr. 1990), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 111 S. Ct. 246, 112 L. Ed. 2d 205 (1990).

9. *Id.* at 55. The Citizens for Fair Utility Regulation had originally intervened in the proceeding but had withdrawn, relying on another group's participation to protect its interest. When the other group failed to represent the interest of the prospective intervenor, the Citizens for Fair Utility Regulation unsuccessfully attempted to reintervene. See *id.* at 53-54.

10. 887 F.2d 81 (5th Cir. Oct. 1989), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 2206, 109 L. Ed. 2d 532 (1990).

11. See *id.* at 87 (holding that a statute prohibited judicial review of an agency decision to reopen 75 tight formation well determinations).

12. See *Gulf S. Pipeline Co. v. Federal Energy Regulatory Comm'n*, 876 F.2d 431, 433-34 (5th Cir. June 1989) (holding that the authority to reject, as well as accept, filings concerning proposed rates and charges was implicitly delegated by FERC to the Director of Office of Pipeline and Producer Regulation).

13. See *Acadian Gas Pipeline Sys. v. Federal Energy Regulatory Comm'n*, 878 F.2d 865, 869-70 (5th Cir. Aug. 1989) (FERC, in failing to explain a departure from prior practice, acted arbitrarily and capriciously in requiring a pipeline operation to file separate petitions (and pay fees) for the rate approval of each new service despite the previous approval of a

Four exhaustion questions came before the Fifth Circuit during the survey period. In a pro se suit filed by an inmate alleging a violation of constitutional rights, the court held that a dismissal of the complaint for the failure to exhaust administrative remedies was premature where the inmate made a substantial effort to obtain administrative relief and where it was alleged that the failure to exhaust may have been due to "irregularities in the administrative process."<sup>14</sup> In another prisoners' rights case, the court held that inmates were required to exhaust administrative remedies prior to filing a court action because an "effective remedy" could be received through the prison grievance procedure even though the procedure would not provide a monetary remedy.<sup>15</sup> In a Title VII class action suit against the Air Force, the court concluded that Air Force employees, who had not obstructed the administrative process, had exhausted their administrative remedies where 180 days had lapsed since the filing of their initial administrative claim.<sup>16</sup> Finally, the court held that where the Department of Labor denies an employer's application for temporary employment certifications for nonimmigrant aliens, the employer's administrative remedies are not exhausted until the Immigration and Naturalization Service has ruled on the denial.<sup>17</sup>

In another immigration case, the Fifth Circuit concluded that a form prepared by an Immigration and Naturalization Service investigator from an interview with the allegedly deportable alien was prima facie evidence of deportability. The hearsay character of the form, the absence of the investigator at the deportation hearing, and the lack of a *Miranda* warning did not compel a contrary result.<sup>18</sup>

Two interesting cases construing the National Historic Preservation Act ("NHPA")<sup>19</sup> came before the court during the survey period. *Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown*<sup>20</sup> in-

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systemwide rate.); *Florida Gas Transmission Co. v. Federal Energy Regulatory Comm'n*, 876 F.2d 42 (5th Cir. June 1989) (Where FERC failed to factually substantiate or reasonably explain its reasons for limiting individual transportation certificates for natural gas to one year rather than the longer period requested, FERC action was set aside as arbitrary and capricious.).

14. See *Shah v. Quinlin*, 901 F.2d 1241, 1244 (5th Cir. May 1990).

15. See *Martin v. Catalanotto*, 895 F.2d 1040, 1041 (5th Cir. Mar. 1990).

16. See *Munoz v. Aldridge*, 894 F.2d 1489, 1492 (5th Cir. Feb. 1990).

17. See *Sweet Life v. Dole*, 876 F.2d 402, 408-09 (5th Cir. June 1989).

18. See *Bustos-Torres v. Immigration & Naturalization Serv.*, 898 F.2d 1053, 1055-58 (5th Cir. Apr. 1990).

19. 16 U.S.C. §§ 470-470t (1988).

20. 875 F.2d 453 (5th Cir. June 1989), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 720, 107 L. Ed. 2d 739 (1990).

volved a suit brought by a citizens group against the Army Corp of Engineers, alleging that the Corp had violated the NHPA and the Rivers and Harbors Act ("RHA").<sup>21</sup> The citizens group contended that a proposed aquarium and park required permits from the Corp, which could only be issued after the Corp considered the NHPA.<sup>22</sup> The Corp concluded that the aquarium was located outside of its jurisdiction under the RHA and that the park was already within a nationwide permit, thus dispensing with the need for a NHPA assessment.<sup>23</sup> In *Bywater Neighborhood Association v. Tricarico*,<sup>24</sup> a neighborhood association filed an action against the Federal Communications Commission ("FCC") and others seeking the removal of a television microwave tower and a satellite earth station because the FCC allegedly failed to consider the dictates of the NHPA in approving the structures.<sup>25</sup>

In both cases the court concluded that the NHPA provided a private right of action, separate from the review available under the Administrative Procedures Act ("APA") judicial review provisions, against administrative agencies but not against nonfederal governmental entities.<sup>26</sup> Additionally, in *Vieux Carre*, the court concluded that although the Rivers and Harbors Act contained no private right of action, judicial review of the Corp's activity was available through the APA's<sup>27</sup> judicial review mechanism.<sup>28</sup> In *Bywater*, however, the court concluded that it lacked jurisdiction to review the FCC's compliance or noncompliance with the strictures of the NHPA because review of FCC licensing decisions rests solely with the District of Columbia Circuit.<sup>29</sup>

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21. 33 U.S.C. §§ 403, 406, 408 (1988); see 875 F.2d at 454.

22. 875 F.2d at 455.

23. *Id.* at 456.

24. 879 F.2d 165 (5th Cir. Aug. 1989), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 1296, 108 L. Ed. 2d 474 (1990).

25. *Id.* at 166.

26. See *Vieux Carre Property Owners, Residents & Assocs., Inc. v. Brown*, 875 F.2d 453, 458 (5th Cir. June 1989) (holding that the district court lacked jurisdiction under NHPA to enjoin nonfederal entities), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 720, 107 L. Ed. 2d 739 (1990); 879 F.2d at 167 (holding that the NHPA provides a private right of action only against an administrative agency). In *Vieux Carre*, the court concluded that an aggrieved party could seek review of the Corps' actions under the Rivers and Harbors Act through the APA judicial review mechanism. 875 F.2d at 456.

27. 5 U.S.C. §§ 701-706 (1988).

28. 875 F.2d at 456.

29. *Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165, 167 (5th Cir. Aug. 1989),

The court also addressed in *Vieux Carre* the question of whether the plaintiffs had standing to challenge the Corp's action.<sup>30</sup> Under the APA, a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" has standing in federal court.<sup>31</sup> Thus, standing exists if a person "is injured in fact" and the "interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute."<sup>32</sup> The court did not decide whether a citizens group interested in historic preservation had standing under the RHA.<sup>33</sup> The court concluded that the NHPA was a "relevant statute" and that the plaintiffs' concerns were within the NHPA's zone of interest; therefore, the citizens group had standing under the NHPA.<sup>34</sup> The court concluded that the Corp's determination that the aquarium project fell outside navigable waters and thus outside its jurisdiction was not arbitrary and capricious, but the court remanded to the district court for further determination the issue of whether the riverfront park fell under a nationwide permit.<sup>35</sup>

### III. A DETAILED EXAMINATION OF TWO AREAS OF ADMINISTRATIVE LAW

#### A. *Fifth Circuit Treatment of Agency Interpretation of Statutes After Chevron*

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>36</sup> the Court stated:

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*cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 1296, 108 L. Ed. 2d 474 (1990). The court recognized a tension between 16 U.S.C. § 470w-4 (1988), which provides a private right of action in NHPA cases, and 47 U.S.C. § 402(b) (1988), which vests exclusive jurisdiction in the District of Columbia Circuit to review FCC licensing decisions. 879 F.2d at 168. The court noted that the APA states, "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute, . . ." and resolved the tension in favor of the special rules concerning appeals of FCC actions. *Id.*; 5 U.S.C. § 703 (1988).

30. 875 F.2d at 458-59.

31. 5 U.S.C. § 702 (1988).

32. *Association of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970).

33. *See Vieux Carre Property Owners, Residents & Assocs., Inc. v. Brown*, 875 F.2d 453, 458 (5th Cir. June 1989) (intimating that standing may be proper under RHA alone), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 720, 107 L. Ed. 2d 739 (1990).

34. *See id.* at 459. The plaintiffs were also arguably within the "zone of interest" of the Corp's regulation, requiring a historic impact study on certain projects within nationwide permits, which was allegedly violated by the Corp in the case. *Id.*

35. *See id.* at 466.

36. 467 U.S. 837 (1984).



When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>37</sup>

In this section, I will discuss the Fifth Circuit's application of the principles set forth in *Chevron*. The cases indicate that the Fifth Circuit, while purporting to follow *Chevron*, has in actuality substituted its own interpretation of the relevant statutes for that of the agency in clear contravention of the principle of deference.

*Weisbrod v. Sullivan*,<sup>38</sup> the only case during the survey period to apply *Chevron* correctly, did not cite the seminal case. In *Weisbrod*, the court reviewed the Secretary of Health and Human Services' interpretation of a statute concerning attorney fees chargeable in hearings before the agency.<sup>39</sup> The Secretary possesses the statutory authority to establish a reasonable fee to be collected by an attorney who successfully represents a claimant before the agency.<sup>40</sup> By reg-

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37. *Id.* at 842-43 (footnotes omitted). For recent treatment of the *Chevron* standard, see *Pension Benefit Corp. v. LTV Corp.*, \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 2668, 110 L. Ed. 2d 579 (1990); *Sullivan v. Everhart*, \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 960, 108 L. Ed. 2d 72 (1990); *Sullivan v. Zebley*, \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 885, 101 L. Ed. 2d 967 (1990). *But see* *Dole v. United Steelworkers*, \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 929, 108 L. Ed. 2d 23 (1990) (Court held that clear congressional intent in enacting the Paperwork Reduction Act did not grant the Office of Management and Budget veto authority over certain Labor Department Regulations.). The dissent argued that deference should have been accorded the agency because of the lack of clear congressional intent. *Id.* at \_\_\_\_, 110 S. Ct. at 939, 108 L. Ed. 2d at 38. "How clear is clear? It is here . . . that the future battles over acceptance of agency interpretation of law will be fought." Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 520-21.

38. 875 F.2d 526 (5th Cir. June 1989).

39. *See id.* at 527.

40. *See* 42 U.S.C. § 406(a) (1988). The statute provides:

Whenever the Secretary, in any claim before him for benefits under this title . . . makes a determination favorable to the claimant, he shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with

ulation, the Secretary enunciated seven factors to be considered in determining a "reasonable fee."<sup>41</sup> Absent from the seven factors was a review of prevailing market rates.<sup>42</sup>

The plaintiff contended that to be "reasonable" under the statute, the attorney fees "must be based on prevailing market rates."<sup>43</sup> Intuiting a *Chevron* analysis, the court concluded that Congress had not addressed the precise issue. In *Weisbrod*, the court suggested that Congress addressed the attorney fee issue by broadly delegating to the Secretary the authority to establish attorney fee regulations.<sup>44</sup> As to the second prong of the *Chevron* test, the court concluded that the agency's interpretation of the term "reasonable" was permissible.<sup>45</sup> The Secretary's regulation, which takes into account the attorney's fee request, permissibly balances competing interests by ensuring "that an attorney receives a fair fee for the work he or she performs while at the same time not unduly dissipating the claimant's benefits."<sup>46</sup> Although in *Weisbrod* the court failed to articulate the *Chevron* test, the principles underlying the test were served. By contrast, in both *MCorp Financial, Inc. v. Board of Governors Federal Reserve System of the United States*<sup>47</sup> and *Central Freight Lines v. ICC*,<sup>48</sup> the court articulated the *Chevron* standard and then ignored it.

*MCorp* involved the validity of a Federal Reserve Board ("Board") policy for aiding troubled financial institutions by requiring bank holding companies to infuse capital into the institutions.<sup>49</sup> The Fifth Circuit concluded that the Board exceeded its authority in requiring the infusions.<sup>50</sup> Part of the Board's Regulation Y provided:

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the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim.

*Id.*

41. See 20 C.F.R. § 404.1725(b) (1990).

42. See *id.*

43. *Weisbrod v. Sullivan*, 875 F.2d 526, 528 (5th Cir. June 1989).

44. *Id.* at 529.

45. See *id.* at 528-29.

46. *Id.* at 528.

47. 900 F.2d 852 (5th Cir. May 1990), *cert. granted*, \_\_\_\_ U.S. \_\_\_\_, 111 S. Ct. 1101, 113 L. Ed. 2d 212 (1991).

48. 899 F.2d 413 (5th Cir. May 1991).

49. 900 F.2d at 859.

50. See *id.* at 863.

*“Bank holding company policy and operations.* (1) A bank holding company shall serve as a source of financial and managerial strength to its subsidiary banks and shall not conduct [sic] its operations in an unsafe or unsound manner.”<sup>51</sup> In elaboration on the meaning of the source of strength regulation, the Board issued a policy, which provides in part:

[A] bank holding company should stand ready to use available resources to provide adequate capital funds to its subsidiary banks during periods of financial stress or adversity.

. . . .

A bank holding company's failure to meet its obligation to serve as a source of strength to its subsidiary bank(s) . . . will generally be considered an unsafe and unsound banking practice or a violation of Regulation Y, or both . . . .<sup>52</sup>

The Board, the primary regulators of bank holding companies,<sup>53</sup> charged MCorp, a bank holding company, with unsafe and unsound banking practices because MCorp failed to act as a source of strength for its subsidiary banks by not injecting capital into these institutions.<sup>54</sup> The question for the court was “whether the Board [had statutory] authority to order a holding company to transfer its funds to its troubled subsidiary banks.”<sup>55</sup> *Chevron* prescribes a two prong test for this analysis: 1) has Congress addressed the issue directly; 2) if not, is the agency's resolution “based on a permissible construction of the statute.”<sup>56</sup>

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51. 12 C.F.R. § 225.4(a)(1) (1990) (emphasis in original).

52. Policy Statement, 52 Fed. Reg. 15,707, 15,708 (1987).

53. Several federal agencies regulate the financial institution industry. For example, the Federal Reserve Board is the primary regulator of bank holding companies and state chartered banks that maintain membership in the Federal Reserve System. See generally 12 U.S.C. § 248(a) (1988) (Board's power with respect to member banks); *id.* §§ 1841-1850 (Board's power with respect to bank holding companies). Nationally chartered banks are regulated primarily by the Comptroller of the Currency. See generally *id.* §§ 21, 161 (requiring that national banks file articles of association and periodic reports with the Comptroller). And, federally insured state banks that are not members of the Federal Reserve system are regulated primarily by the Federal Deposit Insurance Corporation. See generally *id.* § 1815(a) (providing the procedure for insuring state nonmember banks).

54. MCorp Fin., Inc. v. Board of Governors Fed. Reserve Sys. of the United States, 900 F.2d 852, 853 (5th Cir. May 1990), *cert. granted*, \_\_\_\_ U.S. \_\_\_\_, 111 S. Ct. 1101, 113 L. Ed. 2d 212 (1991).

55. *Id.* at 859.

56. *Chevron*, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

Two possible statutory bases for the Board's "source of strength" doctrine were examined: the Bank Holding Company Act of 1956 ("BHCA");<sup>57</sup> and the Financial Institutions Supervisory Act of 1966 ("Section 1818").<sup>58</sup> Both of the statutes supply a permissible basis for the Board's "source of strength" doctrine.

Inexplicably, in *MCorp*, the court's *Chevron* analysis applied only to the latter statute; under a vague standard, the court held that the former statute did not authorize the Board's source of strength policy.<sup>59</sup> The court recognized that the BHCA "grants the Board supervisory control over the formation, structure and *operation* of bank holding companies and their nonbank subsidiaries."<sup>60</sup> In attempting to analyze two Supreme Court decisions<sup>61</sup> construing the Board's authority, the panel concluded "that the primary purposes of the BHCA are to prevent the concentration of control of banking resources, and to separate banking from nonbanking enterprises" and that the statute "does not grant the Board authority to consider the financial and managerial soundness of the subsidiary banks after it approves the application."<sup>62</sup> Therefore, the court concluded that the Board lacked "authority under the BHCA to require MBank [sic] to transfer its funds to its troubled subsidiary bank."<sup>63</sup>

In addition to ignoring the standards established in *Chevron*, the court's analysis of the Board's authority under the BHCA was nondeferentially superficial. The court's concern that the Board impermissibly meddled in the day-to-day affairs of the subsidiary bank was misplaced. The Office of the Comptroller of the Currency ("OCC"), not the Board, involves itself in the ongoing supervision

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57. 12 U.S.C. §§ 1841-1850 (1988).

58. 12 U.S.C.A. § 1818 (West 1989 & Supp. 1990).

59. *MCorp Fin., Inc. v. Board of Governors Fed. Reserve Sys. of the United States*, 900 F.2d 852, 860 (5th Cir. May 1990), *cert. granted*, \_\_\_\_ U.S. \_\_\_\_, 111 S. Ct. 1101, 113 L. Ed. 2d 212 (1991).

60. *Id.* (emphasis added).

61. *See generally* Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361 (1986) (Board had no authority to regulate "nonbank banks."); Board of Governors of the Fed. Reserve Sys. v. First Lincolnwood Corp., 439 U.S. 234 (1978) (Board possessed the authority to disapprove a proposed bank holding company relationship solely on the ground of the bank's lack of financial soundness.).

62. 900 F.2d at 861.

63. *Id.* at 862 (footnote omitted).

of national banks, including those that are subsidiaries of bank holding companies. Presumably, and the court's opinion failed to indicate otherwise, the OCC and not the Board had made the determination that MCorp's subsidiary banks were troubled institutions. After a determination by the OCC, the Board, in its supervision of the *holding company*, not the bank, required the *holding company* to transfer funds to its banking subsidiary.

Through the BHCA, Congress delegated broad authority to the Board to regulate bank holding companies.<sup>64</sup> As the Fifth Circuit noted, two problems addressed by the BHCA were the unhealthy concentration of commercial banking and the blending of banking and nonbanking activities.<sup>65</sup> The legislative history reveals an even more basic purpose for the BHCA. "In general, the philosophy of this bill is that bank holding companies ought to confine their activities to the management and control of banks and that such activities should be conducted in a manner consistent with the public interest."<sup>66</sup>

The overriding question is whether, given the broad authority to regulate the operation of bank holding companies "consistent with the public interest," the Board can, pursuant to this authority, require bank holding companies to transfer assets to a troubled banking subsidiary. Under *Chevron*, the first inquiry is whether Congress has specifically addressed the issue.<sup>67</sup> The answer is clearly no; Congress has not addressed the precise question. The court, in *MCorp*, admitted as much.<sup>68</sup> In reviewing the BHCA, the court observed, "Congress set forth detailed limits on transactions considered unsound between subsidiary banks and holding companies, *without mentioning the infusion of capital by holding companies into subsidiaries*."<sup>69</sup>

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64. 474 U.S. at 365.

65. See S. REP. NO. 1095, 84th Cong., 2d Sess. 2, reprinted in 1956 U.S. CODE CONG. & ADMIN. NEWS 2482, 2483 (from testimony of William McChesney Martin, Jr., Chairman, Board of Governors of the Federal Reserve System).

66. *Id.* at 2482.

67. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

68. See *MCorp Fin., Inc. v. Board of Governors Fed. Reserve Sys. of the United States*, 900 F.2d 852, 863 (5th Cir. May 1990), cert. granted, \_\_\_\_ U.S. \_\_\_\_, 111 S. Ct. 1101, 113 L. Ed. 2d 212 (1991).

69. *Id.* (emphasis added).

The second inquiry is whether the Board's "source of strength" doctrine reflects a permissible construction of the BHCA. Where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."<sup>70</sup> Congress left the Board many gaps to fill, authorizing the Board to issue regulations to further the BHCA's purposes.<sup>71</sup> There can be no doubt that the "source of strength" doctrine is based upon a reasonable interpretation of the BHCA. As stated above, the legislative history of the BHCA reveals a legislative desire to regulate bank holding companies so that the companies "confine their activities to the management and control of banks . . . in a manner consistent with the public interest."<sup>72</sup>

The legislative history provides additional support for the Board's interpretation of the BHCA. The Senate Report noted that the BHCA generally prohibits "upstream" lending, when a subsidiary bank lends money to its parent.<sup>73</sup> The reverse, "downstream" lending, is not prohibited:

The bill does not prohibit the borrowing of funds by any subsidiary in the system from the parent holding company. *Such downstream financing is one of the beneficial advantages . . . in the use of the holding company technique. Downstream financing enables the bank holding company to draw on the equity capital of its shareholders and its own operating funds in order to strengthen the financial condition of any one or more of its subsidiaries.* In the past, this has operated not only to the advantage of the bank holding company system itself, but also to the advantage of shareholders and depositors of the subsidiary bank so assisted and the public served by the subsidiary bank.<sup>74</sup>

The broad delegation to the Board to regulate bank holding companies in "the public interest" coupled with Congress' express recognition that "downstream" financing can be employed beneficially as a source of strength for the subsidiary bank should have

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70. 467 U.S. at 843, 844. Implicit delegations carry the same force as explicit delegations. *See id.* at 844.

71. *See* Bank Holding Company Act of 1956, 12 U.S.C. § 1844(b) (1988).

72. S. REP. NO. 1095, 84th Cong., 2d Sess. 2, *reprinted in* 1956 U.S. CODE CONG. & ADMIN. NEWS 2482.

73. *See id.* at 2496. The prohibition was designed to protect against the danger that the parent company would bleed the resources of the subsidiary. *Id.*

74. *Id.* (emphasis added). H. Earl Cook, Chair of the Federal Deposit Insurance Corporation, advocated a ban on both "upstream" and "downstream" dealing, and Congress accommodated him only partially by limiting "upstream" lending. *See id.* at 2486, 2496.

led the court to the conclusion that the Board's policy reflected a reasonable interpretation of the BHCA. It is irrelevant that other permissible constructions of the statute might exist or that the court might have reached a different conclusion if the issue had first presented itself in a judicial proceeding.<sup>75</sup>

Independently of its powers under the BHCA, the Board contended that it had the authority to require the holding company to transfer assets to its subsidiary under authority delegated to the Board pursuant to Section 1818.<sup>76</sup> In analyzing the Board's authority under the statute, the Fifth Circuit purportedly employed the *Chevron* rationale but failed in the task, relying heavily on and misapplying a pre-*Chevron* Fifth Circuit case to support its conclusion that the Board had no Section 1818 authority to require asset transfers to strengthen banking subsidiaries.<sup>77</sup>

The court quickly and correctly dispensed with the first prong of the *Chevron* test, concluding that Congress had not clearly defined unsafe and unsound practices, leaving to the federal financial regulatory institutions the task of more precisely defining the standard.<sup>78</sup>

The court's conclusion that the Board's source of strength doctrine was an unreasonable and impermissible interpretation of the phrase "unsafe and unsound" rested on two grounds. First, relying inappropriately on Fifth Circuit precedent, the court concluded that the failure of a holding company to follow the source of strength regulation could not be considered "unsafe or unsound" because the required transfer "can hardly be considered a 'generally accepted standard[] of prudent operation.' Such a transfer of funds . . . would

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75. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.11 (1984).

76. *MCorp Fin., Inc. v. Board of Governors Fed. Reserve Sys. of the United States*, 900 F.2d 852, 862 (5th Cir. May 1990), *cert. granted*, \_\_\_\_ U.S. \_\_\_\_, 111 S. Ct. 1101, 113 L. Ed. 2d 212 (1991). 12 U.S.C.A. § 1818(b) (1989), which was at issue in the case, provided:

(1) If, in the opinion of the appropriate Federal banking agency, any insured depository institution, . . . or any institution-affiliated party is engaging or has engaged, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to engage, in an *unsafe or unsound practice* in conducting the business of such depository institution . . . the agency may issue and serve upon . . . such party a notice of charges in respect thereof. . . . The agency may issue and serve upon the depository institution or the institution-affiliated party an order to cease and desist from any such violation or practice.

12 U.S.C.A. § 1818(b)(1) (West 1989) (amended subsequently in West Supp. 1990); see 900 F.2d at 859 n.2.

77. See 900 F.2d at 862-64.

78. See *id.* at 862.

amount to a wasting of the holding company's assets in violation of its duty to its shareholders."<sup>79</sup> Second, the court concluded that congressional failure specifically to require capital infusions as part of the statutory safeguards present in the BHCA, which contains other legislative pronouncements defining a transaction as unsound, "strongly supports MCorp's argument that Congress never intended" to grant the authority to the Board.<sup>80</sup>

Faulty reasoning pervades both rationales. Congress clearly has committed the "progressive definition and eradication of [unsafe and unsound] practices to the expertise of the appropriate regulatory agencies."<sup>81</sup> With such broad parameters, the question remains: is it reasonable to construe the phrase "unsafe and unsound" to include the failure to transfer assets to a subsidiary bank?

In *MCorp*, the court relied heavily on *Gulf Federal Savings & Loan Association v. Federal Home Loan Bank Board*.<sup>82</sup> In *Gulf Federal*, the court held that the Federal Home Loan Bank Board ("FHLBB") exceeded its authority in concluding that "unsafe and unsound" practices included charging interest rates contrary to loan contracts.<sup>83</sup> However, the current value of the holding is suspect due to the fact that it preceded *Chevron* and pointedly refused deference to agency interpretation.<sup>84</sup>

*Gulf Federal* is also distinguishable on its facts. The factual rationale for finding the FHLBB's interpretation of "unsafe and unsound" unreasonable rested on the remoteness of the calculation of the interest rate in a manner inconsistent with contract terms to the institution's financial health.<sup>85</sup> The court stated:

The breadth of the "unsafe or unsound practice" formula is restricted by its limitation to practices with a reasonably direct effect on an association's financial soundness. As Representative Patman pointed out during the House debate, "[o]f course, it should be clear to all that the cease-and-desist powers and man-

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79. *Id.* at 863.

80. *Id.*

81. *Groos Nat'l Bank v. Comptroller of Currency*, 573 F.2d 889, 897 (5th Cir. 1978).

82. 651 F.2d 259 (5th Cir. Nov. 1981), *cert. denied*, 458 U.S. 1121 (1982).

83. See *id.* at 264-65.

84. See *id.* at 263. The court, in *Gulf Federal*, decided that it should "define the boundaries of the Board's cease and desist authority. Defining the limits of such powers requires judicial, not administrative, expertise. For this reason, the Board's call for deference to agency expertise is misplaced." *Id.*

85. See *id.* at 264.



agement removal powers are aimed specifically at actions impairing the safety or soundness of our insured financial institutions. *These new flexible tools relate strictly to the insurance risk* and to assure [sic] the public sound banking facilities.”<sup>86</sup>

In *Gulf Federal*, the court concluded that charging interest rates inconsistently with contract terms only minimally affected the insurance risk.<sup>87</sup> The same does not hold true with the “source of strength” regulation, which emanates directly from a concern for the overall financial health of the subsidiary bank and its direct relationship to the insurance risk. According to the legislative history of the BHCA, acting as a financial source of strength for an ailing subsidiary is a prudent course for a holding company to take.<sup>88</sup>

Congressional inaction also fails as a justification for the court’s result. Congress, while not specifically requiring capital infusions by holding companies, has delegated to the Board the broad authority to determine what practices may be labeled “unsafe and unsound” because they decrease the financial well-being of financial institutions, increasing the insurance risk. The conclusion that Congressional silence “strongly supports MCorp’s argument that Congress never intended to grant” the authority to the Board is a non sequitur.<sup>89</sup>

Judicial ineptitude cannot explain the decision. Rather, I suspect that the court, while feigning allegiance to the *Chevron* test, quietly substituted its own will for that of the agency. Under *Chevron*, this is impermissible. The court should have done what former Texas Supreme Court Chief Justice John Hill did in another context and concluded: “If I were a [Board member] I would have [adopted a different policy], but as a member of the judiciary it is not within my sphere of duties to substitute my judgment on this subject for that of the [agency].”<sup>90</sup>

In *Central Freight Lines v. ICC*,<sup>91</sup> the Fifth Circuit again subtly substituted its will for that of the agency. The question was whether certain transportation was interstate commerce under the jurisdiction

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86. *Id.* (emphasis added) (quoting 112 CONG. REC. 24,984 (1966)).

87. *See id.* at 264.

88. *See supra* text accompanying notes 64-75.

89. *See* MCorp Fin., Inc. v. Board of Governors Fed. Reserve Sys. of the United States, 900 F.2d 852, 863 (5th Cir. May 1990), *cert. granted*, \_\_\_\_ U.S. \_\_\_\_, 111 S. Ct. 1101, 113 L. Ed. 2d 212 (1991).

90. *Whitworth v. Bynum*, 699 S.W.2d 194, 199 (Tex. 1985) (Hill, C.J., dissenting).

91. 899 F.2d 413 (5th Cir. May 1990).

of the Interstate Commerce Commission ("ICC").<sup>92</sup> Arcadian Corporation ("Arcadian"), a fertilizer manufacturer, shipped fertilizer from two points out of state to Texas, where it was temporarily held in storage before being shipped to its final destination.<sup>93</sup> Victoria Terminal Enterprises ("VTE") obtained a certificate of authority from the ICC to ship Arcadian's fertilizer from the Texas storage terminals to other points in Texas.<sup>94</sup> The Texas Railroad Commission ("TRC") threatened to investigate VTE's operations, contending that VTE was operating in *intrastate* as opposed to *interstate* commerce without the required approval of the TRC.<sup>95</sup> In response to the threat, VTE sought a declaratory order from the ICC concerning the interstate nature of its activities.<sup>96</sup> The ICC instituted a proceeding, the State of Texas and several shippers intervened, and the ICC concluded that Arcadian's shipments constituted a continuous interstate shipment, giving VTE's shipments an *interstate* character.<sup>97</sup>

On appeal, the Fifth Circuit held that the threat of state prosecution gave the ICC jurisdiction to issue a declaratory order.<sup>98</sup> The court also concluded that the ICC's characterization of VTE's shipments as part of a continuous interstate shipment was not arbitrary and capricious but, rather, was reasonable under the circumstances.<sup>99</sup>

One aspect of the opinion involved the agency's interpretation of its statutory authority. Some of Arcadian's shipments to the Texas terminals were by barge from Louisiana.<sup>100</sup> The barge shipments were exempt from ICC jurisdiction by statute.<sup>101</sup> In a previous ICC ruling, the agency had said that it lacked statutory authority to regulate single-state shipments following exempt barge shipments.<sup>102</sup> The result of the *Behnken* ruling was that some single-state shipments went unregulated, the ICC disclaimed jurisdiction, and the state had no

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92. See *id.* at 414.

93. *Id.* at 415.

94. *Id.*

95. See *id.*

96. *Id.*

97. See *id.* at 415-16.

98. *Id.* at 417-18.

99. See *id.* at 422-23.

100. *Id.* at 416.

101. 49 U.S.C. § 10542(a)(1) (1988).

102. See *Behnken Truck Serv., Inc.*, 103 M.C.C. 787, 797 (ICC 1967).

jurisdiction because of the interstate character of the movements.<sup>103</sup> The ICC overruled *Behnken* in its administrative determination of the present case, claiming that it had jurisdiction to regulate the Texas portion of the interstate transportation even though the preceding part of the transportation was exempt from regulation.<sup>104</sup> The question before the court was whether the change of position reflected a permissible statutory construction of the ICC's authority.<sup>105</sup>

The court never addressed the first prong of the *Chevron* test, apparently assuming that Congress did not directly address the issue of jurisdiction following ex-barge movements.<sup>106</sup> In addressing the permissibility of the ICC's new interpretation of its jurisdiction, the court found the ICC's reasoning unpersuasive.<sup>107</sup> The ICC based its *Behnken* rationale on a Supreme Court case that had held that single-state rail shipments of coal following private rail carriage were not part of interstate transportation.<sup>108</sup> In the agency's final ruling in this case,<sup>109</sup> the ICC distinguished *Pennsylvania Railroad Co. v. Public Utility Commission*<sup>110</sup> "because of a difference in the statutory language of the original Interstate Commerce Act between rail and motor carrier jurisdiction."<sup>111</sup> The Fifth Circuit agreed that *Pennsylvania* was distinguishable, but for other "more persuasive" reasons, concluding that "the *Pennsylvania* holding is limited to single-state movements preceded or followed by transportation by *private* carriage."<sup>112</sup>

The court, in substituting its "more persuasive" reasoning for that of the ICC, usurped the ICC's authority to interpret its statutory mandate. The reasonableness of the agency's interpretation must be judged by the justification it provides and if the reasons lack the requisite reasonableness the agency construction must fail.<sup>113</sup> Here, by substituting its reasoning for that of the ICC, the court has

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103. See *Central Freight Lines v. ICC*, 899 F.2d 413, 423 (5th Cir. May 1990).

104. See *id.*

105. See *id.* at 423.

106. See *id.* at 425.

107. See *id.*

108. See *Pennsylvania R.R. v. Public Util. Comm'n*, 298 U.S. 170, 175-77 (1936).

109. See *Victoria Terminal Enters., Inc.*, No. MC-C-30002 (ICC Jan. 27, 1989).

110. 298 U.S. 170 (1936).

111. *Central Freight Lines v. ICC*, 899 F.2d 413, 425 (5th Cir. May 1990).

112. *Id.* (emphasis in original).

113. See *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

hindered the ICC's policy choices. As a result of the court's reasoning, the ICC apparently is precluded from formulating distinctions between single-state rail and motor carrier shipments following exchange movements—a result that does not reflect the policy choices made by the ICC.

*Chevron* stands for the proposition that the political branches and their delegates, because they are politically accountable, possess the policymaking authority. The judiciary, removed from political accountability, has a different role. It ensures that those who exercise delegated authority do so within the parameters of the delegation. The Fifth Circuit, during the survey period, stepped out of its judicial role and into a policymaking role in both *MCorp* and *Central Freight*.

### B. Freedom of Information Act

The Founding Fathers envisioned a government accessible by the people.<sup>114</sup> Addressing the subject of open government, James Madison said:

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.<sup>115</sup>

To aid "the people" in their knowledge of government activity, Congress, in 1966, passed the Freedom of Information Act ("FOIA").<sup>116</sup> Under FOIA, an agency, "upon any request for records . . . shall make the records promptly available to any person."<sup>117</sup> This requirement deserves broad construction because FOIA represents "a general philosophy of full agency disclosure."<sup>118</sup> "The generation that made the nation" also recognized the need for secrecy in certain limited situations. The Constitutional Convention of 1787,

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114. See Commager, *The Defeat of America*, N.Y. REV. OF BOOKS, Oct. 5, 1972, at 7, quoted in *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73 (1989). "The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to." *Id.*

115. Letter to W.T. Barry (Aug. 4, 1822), reprinted in 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910). Thomas Jefferson wrote: "The people are the only censors of their governors . . ." Letter to Edward Carrington (Jan. 16, 1787), reprinted in WRITINGS OF THOMAS JEFFERSON 879, 880 (Library of Am. ed. 1984).

116. 5 U.S.C. § 552 (1988).

117. *Id.* § 552(a)(3).

118. See S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965).

from which emerged the framework of our government, was shrouded in secrecy.<sup>119</sup> FOIA contains nine specific exemptions from disclosure to cover situations where a public policy is served by nondisclosure, but, in keeping with the general public policy of broad disclosure, the exemptions must receive narrow construction.<sup>120</sup>

Although the Fifth Circuit broke no significant new ground in its interpretation of this important statute, FOIA is revisited<sup>121</sup> in the survey because the Fifth Circuit decided a case construing a 1986 amendment to FOIA. In *Halloran v. Veterans Administration*,<sup>122</sup> the court examined the parameters of Exemption (7), which exempts from disclosure certain "records or information compiled for law enforcement purposes."<sup>123</sup> Exemption (7) serves multiple purposes relating to law enforcement information and records, including the protection of documents the release of which would undermine ongoing law enforcement proceedings,<sup>124</sup> impair a person's trial rights,<sup>125</sup> compromise confidential sources<sup>126</sup> or law enforcement techniques,<sup>127</sup> or contribute to the endangerment of an individual's safety.<sup>128</sup>

Exemption (7) also exempts from disclosure any information and records that "could reasonably be expected to constitute an unwarranted invasion of personal privacy."<sup>129</sup> In this respect, Exemption

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119. See R. RUTLAND, JAMES MADISON, THE FOUNDING FATHER 15 (1987). Another commentator stated: "[I]t is difficult to see how a Constitution could have evolved had the Convention been open to abuse and suggestion from the public." C. BOWEN, MIRACLE AT PHILADELPHIA 22 (1966).

120. See *John Doe Agency v. John Doe Corp.*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_, 110 S. Ct. 471, 475, 107 L. Ed. 2d 462, 467 (1989).

121. See Walker, *Survey of Administrative Law and Procedure*, 14 TEX. TECH L. REV. 55, 59 (1983) (for previous treatment of FOIA in the survey series).

122. 874 F.2d 315 (5th Cir. June 1989).

123. 5 U.S.C. § 552(b)(7) (1988).

124. *Id.* § 552(b)(7)(A).

125. *Id.* § 552(b)(7)(B).

126. *Id.* § 552(b)(7)(D).

127. *Id.* § 552(b)(7)(E).

128. *Id.* § 552(b)(7)(F).

129. *Id.* § 552(b)(7)(C). The full text of Exemption (7) is as follows:

(b) This section [requiring disclosure] does not apply to matters that are—

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(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could

(7) shares a conjunctive relationship with its narrower sibling, Exemption (6).<sup>130</sup>

*Halloran* involved a FOIA request by an attorney representing All Professional Services ("APS"), who desired the requested documents to aid in the development of a civil lawsuit against Santa Fe Engineers ("Santa Fe").<sup>131</sup> APS sued Santa Fe for monies allegedly due APS for asbestos removal work that APS performed as a subcontractor for Santa Fe pursuant to Santa Fe's contract with the Veterans Administration to renovate two medical facilities.<sup>132</sup>

The documents requested were compiled by the Veterans Administration's Office of Inspector General during an investigation into APS's allegations that Santa Fe was illegally proposing to overcharge the Veterans Administration.<sup>133</sup> During the course of the investigation, the Inspector General's office secretly recorded several conversations with Santa Fe employees.<sup>134</sup> Halloran sought the full transcripts of the conversations.<sup>135</sup>

The Veterans Administration produced redacted versions of the transcripts, deleting medical information of a third party and information that might identify the suspects and third parties discussed in the relevant conversations.<sup>136</sup> Halloran argued that the redactions

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reasonably be expected to disclose the identify of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

*Id.*

130. Exemption (6) exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

*Id.* § 552(b)(6).

131. *Halloran v. Veterans Admin.*, 874 F.2d 315, 317-18 (5th Cir. June 1989).

132. *Id.* at 317.

133. *Id.*

134. *Id.*

135. *Id.* at 317-18.

136. *Id.* at 318. The Veterans Administration

deleted the names of, and other identifying information relating to, forty-two individuals, i.e., the three unindicted suspects of the investigation, other persons participating in the conversations, and third parties mentioned in the conversa-

were not permissible under any exemption to FOIA, while the Veterans Administration contended that Exemptions (6) and (7)(C) justified the redactions.<sup>137</sup> The Fifth Circuit concluded that the redactions were proper under Exemption (7)(C).<sup>138</sup>

To determine whether a document can be withheld under a FOIA exemption, the courts employ a balancing test, balancing the "public's general interest in disclosure" against the interest sought to be served by the particular exemption.<sup>139</sup> With respect to Exemption (7)(C), the interest militating against disclosure is "the desire to protect individuals' privacy interests."<sup>140</sup> "Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."<sup>141</sup>

A comparative reading of the current text of Exemption (7), with its prior mutations and with the variations in the language of the other exemptions, guided the court in its attempt to balance the competing interests.<sup>142</sup> The textual exegesis led the court to two conclusions concerning the breadth of Exemption (7).

First, the court, taking guidance from the United States Supreme Court's opinion in *United States Department of Justice v. Reporters Committee for Freedom of the Press*,<sup>143</sup> viewed a 1986 amendment to FOIA as broadening the scope of Exemption (7)(C).<sup>144</sup> Prior to 1986, an agency could withhold documents under the exemption if disclosure "would constitute" an invasion of privacy.<sup>145</sup> The phrase "would constitute" was changed to "could reasonably be expected to constitute" by amendment in 1986.<sup>146</sup> The textual change was

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tions. . . . The VA did not delete from the transcripts the names of APS employees mentioned in Halloran's FOIA request or the federal special agents who worked with APS during the investigation.

*Id.*

137. *See id.*

138. *See id.* The court did not reach the question of whether the nondisclosure of the identifying information would have been proper under Exemption (6). *Id.*

139. *See id.* at 318-19.

140. *Id.* at 318.

141. *Id.* at 319 (quoting S. REP. No. 813, 89th Cong., 1st Sess. 3 (1965)).

142. *See id.*

143. 489 U.S. 749 (1989).

144. *See Halloran v. Veterans Admin.*, 874 F.2d 315, 319 (5th Cir. June 1989).

145. *Id.*

146. Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1801, 100 Stat. 3207-48, 3207-48 (1986) (codified at 5 U.S.C. § 552(b)(7) (1988)). Exemption (6), which was the Veterans Administration's alternative basis for nondisclosure retains the stricter standard

"intended to broaden the reach of [Exemption 7] and to ease considerably a federal law enforcement agency's burden in invoking it."<sup>147</sup> In *Reporters Committee*, the United States Supreme Court stated that

in determining the impact on personal privacy from disclosure of law enforcement records or information, the stricter standard of whether such disclosure "would" constitute an unwarranted invasion of such privacy gives way to the more flexible standard of whether such disclosure "could reasonably be expected to" constitute such an invasion.<sup>148</sup>

Second, the court examined a 1974 amendment to Exemption (7)(C) that seemed to broaden the scope of the exemption.<sup>149</sup> Exemption (6) protects certain files if disclosure "would constitute a *clearly unwarranted* invasion of personal privacy."<sup>150</sup> But "exemption (7)(C) omits the adverb 'clearly,' requiring only that the invasion of privacy be 'unwarranted.'"<sup>151</sup> The court concluded that by the intentional omission Congress intended for a broader evaluation of the privacy interests threatened by a potential disclosure.<sup>152</sup>

The court found that the privacy interests at stake were substantial.<sup>153</sup> The three unindicted suspects of the Veterans Administration's investigation clearly had a substantial privacy interest in the nondisclosure of information which, if disclosed, would have destroyed their reputations.<sup>154</sup> The nonsuspects have a similar privacy

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of whether the disclosure "would" constitute an unwarranted invasion of privacy. See 5 U.S.C. § 552(b)(6) (1988).

147. 132 CONG. REC. S16,504 (daily ed. Oct. 15, 1986) (statement of Sen. Orrin Hatch).

148. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 n.9 (1989).

149. See 874 F.2d at 319.

150. 5 U.S.C. § 552(b)(6) (1988) (emphasis added).

151. 874 F.2d at 319.

152. *Id.*

153. *Id.* at 320.

154. See *id.* at 320-21. Other circuits similarly have recognized that the disclosure of the identity of a person who is the subject of a criminal investigation implicates substantial privacy interests. See, e.g., *Senate of Puerto Rico v. Department of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987); *Antonelli v. FBI*, 721 F.2d 615, 618 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984). Cf. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762-63 (1989) (holding that a person has a privacy interest in past criminal history contained in a computerized "rap sheet"); *Department of Air Force v. Rose*, 425 U.S. 352, 380-81 (1976) (holding that the access to information that might identify Air Force Academy cadets subject to disciplinary action was prohibited under Exemption (6)).



interest in shielding their identities from the burning rays of public disclosure.<sup>155</sup> The court articulated two privacy interests adhering to the individuals identified in the transcripts who were not the subjects of the investigation: 1) "in not having their thoughts, comments, and views regarding their work, their job performance, and their co-workers, clients, and friends released to the public," and 2) in preventing the "embarrassment and difficulties" arising from their association with a criminal investigation.<sup>156</sup>

The court rejected the district court's rationale that no privacy interest existed because the redacted information had been previously known by some portion of the public, specifically APS employees who aided the Veterans Administration in the investigation.<sup>157</sup> Relying on *Reporters Committee*, the court held that partial publication years ago "does not destroy any specific individual's privacy interest in having specific comments unambiguously attributed to them by government-released records."<sup>158</sup>

Shifting its focus to the other side of the equation, the court found no significant public interest that would be fostered by the disclosure of the names of the individuals identified in the tran-

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155. See *Halloran v. Veterans Admin.*, 874 F.2d 315, 321 (5th Cir. June 1989). Here, the court relied on its own precedent: *McCorstin v. Department of Labor*, 630 F.2d 242, 245 (5th Cir. 1980), *cert. denied*, 450 U.S. 999 (1981).

156. 874 F.2d at 321. See also *Cleary v. FBI*, 811 F.2d 421, 424 (8th Cir. 1987) (The court held that the identity of the persons interviewed and the information obtained in the interviews was exempt from disclosure under the privacy and confidential source exemptions.); *Miller v. Bell*, 661 F.2d 623, 628 (7th Cir. 1981) (The court determined that sufficient privacy interests existed in the potential for harassment of interviewers and investigating FBI agents to outweigh the public interest in disclosure), *cert. denied*, 456 U.S. 960 (1982).

157. See 874 F.2d at 322.

158. *Id.* The court summarily rejected the district court's two alternative bases for concluding that no privacy right existed. First, the district court determined that Exemption (7)(C) was inapplicable because the transcripts concerned business activities not implicating personal privacy interests. *Id.* at 320. The Fifth Circuit held that the concept of a person's privacy must be broadly defined to encompass more than merely the "personal or intimate details of his or her life." *Id.* at 321. Second, the court rejected as "overly simplistic" the district court's conclusion that "first names are not 'intimate' information" implicating privacy interests. *Id.* The Fifth Circuit's analysis here is itself overly simplistic. First names evince privacy interests only when the aggregate of the first names and the other information contained in the documents to be disclosed might "reasonably be expected" to reveal the identity of the person whose privacy interest is at stake. No harm results from the shallow analysis by the court because there exists no identifiable public interest in obtaining the first names; therefore, on balance, the threat, no matter how slight, that the disclosure of first names might tread on an individual's privacy interests outweighs the nonexistent public interest in knowing the first names.

script.<sup>159</sup> Following the norm in FOIA cases, the court disregarded Halloran's motives for seeking disclosure.<sup>160</sup> Recognizing that the public has an identifiable interest in "obtaining information regarding the government's interaction with federal contractors," including an agency's investigation of a contractor, the court concluded that the release of the redacted transcripts met the public interest.<sup>161</sup> On balance, the release of a redacted transcript allows the public to assess the government's role in the matter while preserving the privacy interest of the individuals mentioned in the transcript.<sup>162</sup>

The court's analysis represented an exercise of fair and equitable balancing of the conflicting interests involved in the FOIA request. Although the court ultimately denied the request, the denial does not, in any way, weaken the foundational principles of FOIA which require full agency disclosure unless one of the "narrowly construed"<sup>163</sup> exemptions applies. In *Halloran*, full agency disclosure, ensuring the people's "right to know what their government is up to" was achieved while protecting the vital privacy interests involved.

If the foundation upon which full agency disclosure was built is cracking, the structural damage is evident, not at the Fifth Circuit, but at a higher level. Contrary to its patronizing language in *John Doe Agency v. John Doe Corp.*,<sup>164</sup> the United States Supreme Court construed Exemption (7)'s phrase "compiled for law enforcement

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159. 874 F.2d at 324.

160. See *id.* at 323. The court recognized that if there existed a general public interest in the information warranting disclosure, disclosure was required even though the person requesting the information seeks it for "less-than-lofty purposes." *Id.* But see *John Doe Agency v. John Doe Corp.*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_, 110 S. Ct. 471, 475, 107 L. Ed. 2d 462, 472 (1989) ("In deciding whether Exemption 7 applies, moreover, a court must be mindful of this Court's observation that the FOIA was not intended to supplement or displace rules of discovery."); *United States Dep't of Justice v. Julian*, 486 U.S. 1, 14 (1988) (A prisoner, using a FOIA request, can gain access to the presentence report even though other requesters would be denied the same report.). Recognizing that the Court had departed "from the general principle of the Freedom of Information Act that individuating characteristics of the particular requester are not to be considered," Justice Scalia, in a dissenting opinion in *Julian*, said: "The reasoning of the cases, like the reasoning of the scholars and the language of the statute, recognizes no such thing as a 'third party requester,' since it affirms that *all* FOIA requesters have equivalent status, and equivalent right to the *public documents* that the FOIA identifies." 486 U.S. at 21 (Scalia, J., dissenting) (emphasis in original).

161. *Halloran v. Veterans Admin.*, 874 F.2d 315, 323 (5th Cir. June 1989).

162. See *id.* at 324.

163. "Exemptions must be narrowly construed." *John Doe Agency v. John Doe Corp.*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_, 110 S. Ct. 471, 475, 107 L. Ed. 2d 462, 471 (1989).

164. \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_, 110 S. Ct. 471, 107 L. Ed. 2d 462 (1989).

purposes" in the broadest possible fashion.<sup>165</sup> In the case, the Court concluded that documents amassed by the Defense Contract Audit Agency pursuant to a non-law enforcement audit could be categorized as "compiled for law enforcement purposes" when, seven years after the agency compiled the documents for a non-law enforcement purpose, the documents were transferred to the FBI pursuant to criminal investigation.<sup>166</sup> With an air of premonition, Justice Scalia, joined by Justice Marshall, stated in dissent: "I find today's decision most impractical, because it leaves the lower courts to guess whether they must follow what we say (exemptions are to be 'narrowly construed') or what we do (exemptions are to be construed to produce a 'workable balance')." <sup>167</sup>

One can only hope that the Fifth Circuit will continue to follow the former instruction, as it did in *Halloran*, even as the Supreme Court indicates a willingness to twist the language of FOIA in a way that broadens the scope of the enumerated exemptions. Until the uncertainty is cleared away at the highest level and the extent of the structural damage is made clear, the Fifth Circuit should treat FOIA as if its integrity has not been breached.

#### IV. CONCLUSION

In canvassing the decisions of the Fifth Circuit during the survey period, this article provides, I trust, a cross reference to the cases, providing an additional tool in the practitioner's research arsenal. The article critically analyzes the workings of the court by focusing more closely on developments in two areas of administrative law. While the court's treatment of FOIA was fair and consistent with the purposes of the act, the court's method of reviewing an agency's statutory interpretation generally failed to follow the mandate of deference set forth in *Chevron*. Two years ago, the author of that year's Survey of Administrative Law observed a "continued trend in favor of granting more and more deference to agency decisionmaking and determinations."<sup>168</sup> That trend took a respite this year.

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165. 5 U.S.C. § 552(b)(7) (1988).

166. — U.S. at —, 110 S. Ct. at 477-78, 107 L. Ed. 2d at 474-75.

167. *Id.* at —, 110 S. Ct. at 482, 107 L. Ed. 2d at 479.

168. Shannon, *Survey of Administrative Law*, 20 TEX. TECH L. REV. 267, 301 (1989).

