Privileged Delegations

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Mila Sohoni, *The Power to Privilege*, 163 **U. Pa. L. Rev.** (forthcoming, 2015), available at SSRN.

When Associate Justice Ruth Bader Ginsburg visited Berkeley Law in 2013, she expressed surprise when students in my Civil Procedure class advocated the passage of the Open Access to Courts Act (which would have imposed the *Conley* "no set of facts" standard on Rule 12(b)(6) motions), even though she had dissented in *Twombly* and *Iqbal*. She asked: "You want Congress to change the Rules of Civil Procedure?" She would, I think, agree with Professor Mila Sohoni's skepticism of allowing executive agencies to change the Rules of Evidence. Both laud the rulemaking process through the Judicial Conference instead.

Sohoni's forthcoming article, *The Power to Privilege*, is a rare and insightful article that examines the intersection of the rules of litigation and the administrative state. The article takes a seemingly obscure and ignored provision of the Patient Protection and Affordable Care Act (ACA)—authorizing the Secretary of Labor to issue regulations that "provide[] an evidentiary privilege for, and provide[] for the confidentiality of communications between or among" a plethora of federal and state officials and organizations—and persuasively demonstrates the likely costs of such a delegation.

The ACA provision that motivates the article (Section 6607) amends the Employee Retirement Income Security Act (ERISA) to allow the Labor Secretary to define an evidentiary privilege so long as it "is appropriate for the purposes of enforcing" ERISA. It is not an ordinary statutory provision. As Sohoni writes: "Section 6607 bestows on federal regulators a power that they have never before held: the power to write rules of privilege from the ground up." Ordinarily, while agencies do claim various privileges in litigation, the common law and sometimes Congress itself establish privileges. Agencies have promulgated so-called *Touhy* regulations to limit their disclosures in the face of a subpoena but since 1958, the power of these regulations basically "ends at the courthouse doors." The case law does appear to permit Congress to delegate clearly to agencies the power to set privileges, and Congress has done that with Section 6607, which would apply to federal and state court proceedings.

After deftly explaining its uniqueness, Sohoni turns to three primary risks of Section 6607. The potential ramifications are largely negative, though she does acknowledge that such delegations can foster "efficient enforcement of the law and efficient coordination between agencies." First, delegations to establish privilege to agencies could undermine agency accountability. Agencies often want "to cloak . . . communications from external scrutiny" to "insulate themselves from accountability in courts and to the public." Sohoni nicely draws on the national security context to buttress her claims here. Second, these delegations could harm state interests by restricting access to information, mostly through preempting state public records acts. The federal entities doing the preempting by regulation "are unlikely to be attuned to state policy interests." For this point, Sohoni turns to the Securities and Exchange Commission's arguments in state courts (largely rejected) that documents provided to it by investigated parties should be privileged, and also notes the policies reflected in expansive state sunshine laws. Third, such delegations could threaten state sovereignty. In Sohoni's framing, this is a concern about commandeering. Because Section 6607 applies to "communications of state agencies and state agents" (and presumably applies to state court proceedings), any federal regulations could "undercut the accountability and credibility of states as independent political institutions" because critical information may not get disclosed to voters.

The picture Sohoni paints is grim. But as with Justice Ginsburg and the Rules of Civil Procedure, the judicial rulemaking process, an "off-the-shelf solution," is a better model. It is "transparent, apolitical, and adept at considering

constitutional values, such as federalism" and is "accessible to federal agencies, states, and the public." I am a bit nervous thinking of the courts and the judicial rulemaking process as apolitical institutions. But for Ginsburg, Sohoni, and many others, the trumpets should begin.

Sohoni provides not only a perceptive descriptive and normative account of delegating the power to privilege to the administrative state in the ACA and beyond, but also offers a causal and temporal account. The last section of Sohoni's article should be read carefully to appreciate its sophistication. In her terms, "Congress did not merely select a delegate; it swapped in a *new* delegate —a politically accountable executive agency—for an *old* delegate—politically unaccountable federal courts." Little of political science and administrative law scholarship contemplates changes in delegation over time. Sohoni posits that Congress made this switch in delegates because of partisan motivations. Specifically, in Section 6607, "Congress named as its delegate the Department of Labor, a non-independent executive agency over which Congress and the President could exert control, and thereby replaced a delegate—the federal courts—that is far more insulated from partisan political control." The ACA was enacted "during a brief interval of time where one party controlled both houses [and in the case of the Senate, could pass a cloture motion] and the Presidency."

Sohoni's party competition story could explain why Congress has not given similar authority to the SEC, despite the agency's extensive lobbying (to Congress, state courts, and the federal judicial rulemaking process), as the SEC has more independence from the White House. On the other hand, partisan dynamics are not just horizontal. With the White House all but certain to change hands at some point in the future, a Democratic Congress and White House might not want to delegate considerable authority to an executive agency. Indeed, other parts of the ACA that delegate considerable authority to the states could be seen as counterbalancing a future Republican White House. This is a minor quibble in an excellent piece, and I have no better story for the change in delegate on which Sohoni focuses.

In sum, the decision to examine why Congress might change delegates (or, I would add, change the scope of delegation or the process of agency decision-making) over time as well as the intersection of civil litigation and administrative law are both areas deeply worthy of more scholarly attention. Sohoni has set the bar high with her forthcoming article, but I very much hope others will follow suit.

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