Reviving and Refining a Pragmatic Approach to Finality

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William Funk, *Final Agency Action after* Hawkes, 11 **N.Y.U. J.L. & Liberty** (forthcoming 2017), available at SSRN.

Whenever I hear the phrase "force of law" in administrative law, I am inclined to reach for my wallet. Agency statutory interpretations with the "force of law" net *Chevron* deference; those lacking such force are stuck with *Skidmore* respect. Legislative rules have the "force of law," but interpretive rules and general statements of policy (a/k/a guidance documents) do not. And then there is the second prong of the *Bennett* test for the finality of agency action, which checks whether an action has determined legal rights or obligations or otherwise has legal consequences. In other words, this prong checks whether the agency action has the "force of law." It is not a coincidence that each of these corners of administrative law is something of a mess. The concept of "force of law" limits application of *Chevron,* requirements for notice and comment, and the availability of judicial review. But, often enough, courts encounter situations in which this approach seems under-inclusive. For instance, they confront agency interpretive rules that have such large practical impacts that they seem like they should be subject to judicial review—even though, technically lacking the "force of law," they arguably should be regarded as non-final under *Bennett.* To accommodate such cases, courts sometimes stretch and tear the "force of law" concept, leaving doctrine confused and confusing.

Fortunately for us, Professor Bill Funk has written a concise and excellent essay, *Final Agency Action after* Hawkes, that offers a great deal of insight on how to clean up one of these messes. His jumping off point is the Supreme Court's recent decision in *United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), which held that "jurisdictional determinations" (JDs) issued by the United States Army Corps of Engineers stating whether land contains "waters of the United States" constitute final agency actions subject to review under the APA. This opinion strongly highlights but does not resolve the tension between formalism and pragmatism that has plagued the doctrine of finality. Professor Funk's essay diagnoses this tension, carefully traces its roots, and offers several thoughtful suggestions for resolving it.

Hawkes Co. ("Hawkes") wants to mine peat on some land that it owns, but this land is damp enough that it might contain "waters of the United States" within the meaning of the Clean Water Act. A landowner that discharges pollutants into "waters of the United States" without a permit from the Corps faces severe civil and criminal penalties. Regrettably, the process for obtaining such a permit can be long and expensive. Hoping to avoid this burden, Hawkes sought a JD from the Corps, which responded with a "positive JD" declaring that Hawkes was indeed the lucky owner of jurisdictional waters.

Unhappy at the news, Hawkes sought judicial review of the JD pursuant to the APA. The government responded that this suit did not satisfy *Bennett*'s test for finality because JDs do not actually have legal consequences. Hawkes' obligations under the CWA turn on whether its land happens to contain "waters of the United States." This condition either exists or doesn't exist regardless of what the Corps might say in a JD. Before the *Hawkes* litigation, the Corps had used this type of argument with great success to block review of JDs as nonfinal.

It did not succeed at the Supreme Court, however, which managed, but not without strain, to find a

formal "legal" consequence sufficient to satisfy *Bennett*. The Chief Justice's opinion for the majority noted that under a memorandum of agreement between the Corps and EPA, issuance of a "negative JD" blocks these agencies from bringing enforcement actions for five years, creating a safe harbor for the landowner and altering the legal landscape. And a positive JD creates a legal consequence by *denying* this safe harbor. (As the Corps reads this memo, it should not apply to cases like *Hawkes,* but that did not bother the Court overmuch.)

Now we get to the interesting part. Rather than stop its analysis after finding or manufacturing a formal legal consequence, the majority opinion instead veered into a short discussion of the Court's "pragmatic" approach to finality, hearkening back to cases such as *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967), and *Frozen Food Express v. United States,* 351 U.S. 40 (1956). Most notably, the Court observed that, in *Frozen Food,* it had ruled that an ICC order interpreting the scope of certain statutory exemptions from regulation was final and reviewable. This order did not change the law but instead merely stated the agency's reading of the law. Still, the order had substantial practical impact given that it warned carriers that violated its terms that they risked the danger that the agency would initiate enforcement actions that could lead to criminal penalties. Likewise, even though a JD itself does not change anyone's legal obligations, a positive JD warns a landowner that, if it discharges pollutants on its property without a permit from the Corps, it risks "significant criminal and civil penalties."

This discussion prompted an interesting split among the justices. One might characterize Chief Justice Roberts' majority opinion as attempting to infuse *Bennett*'s formalistic, force-of-law approach to finality with *Frozen Food*'s pragmatic focus on practical impacts and coercion. Justice Ginsburg wrote a one-paragraph concurrence that went considerably further. She would junk *Bennett* and, relying on *Abbott Labs* and *Frozen Food,* regard agency action as final so long as it is "definitive" and has "an immediate and practical impact." And Justice Kagan, writing another a one-paragraph concurrence, made the opposite point that the Court should stick to *Bennett*'s focus on legal consequences.

Professor Funk's essay traces the case law roots of these competing formalist and pragmatic approaches to finality. Spoiler alert: It turns out that *Bennett*'s formalist roots do not run deep. Professor Funk observes, among other interesting points, that *Bennett*'s rewrite of finality doctrine never bothered to cite *Abbott Labs*, which had been the leading case on the subject for thirty years, or even to "indicate[] any awareness that it was stating the question differently" than *Abbott Labs* had. It is also interesting to learn that "none of the authority cited by *Bennett* for its test for finality involved suits under the APA." If Justice Ginsburg ever wants to aim serious fire at *Bennett,* Professor Funk has supplied doctrinal ammo.

More importantly, however, he also suggests sensible ways to alter doctrine to reflect the real concerns that animate both the formalist and pragmatic approaches. The formalist, "force of law" approach responds to the concern that we do not want agencies sued every time they say what they think a statute means or express future policy intentions. Such omnipresent judicial review would discourage agencies from providing valuable information to regulated parties and the broader public. On the other hand, agency actions, even though they do not technically change anyone's legal obligations, may exercise great coercive force on regulated parties. There were very good reasons for Hawkes to be distressed by the Corps' positive JD declaring that its peat mine site contained jurisdictional waters. The pragmatic approach responds to this danger of coercion (or extortion).

The key, then, is to find a way of defining finality that opens the door to judicial review of agency actions with genuinely coercive effects while still blocking judicial review of agency actions that lack such effects. Professor Funk offers several. For instance, courts might strike a better balance by focusing on the APA's limitation that final agency action is reviewable only where there is "no other adequate remedy in a court." He notes that, "where enforcement proceedings would have no other

effect than to require the person to comply with the agency's interpretation or policy, waiting for such proceedings would often provide an adequate alternative to pre-enforcement review." By contrast, where an agency action notifies a regulated party that it risks severe penalties if it engages in certain conduct, the coercive effect justifies immediate, pre-enforcement review.

Final Agency Action After Hawkes is concise, careful, thoughtful, and informative. Thanks to these qualities, it also strikes me as one of those relatively rare pieces of legal scholarship that has a chance to be effective. It is easy to imagine a court seizing upon one or more of Professor Funk's sensible prescriptions to clarify a needlessly confusing corner of administrative law. (Calling Justice Ginsburg!)

A quick afterword: Professor Funk's essay makes a nice companion piece to Professor Cass Sunstein's recent essay, *"Practically Binding": General Policy Statements and Notice-and-Comment Rulemaking*, 68 Admin. L. Rev. 491 (2016). Sunstein's essay addresses the notoriously awful problem of determining when a purported policy statement issued by an agency is really an improperly promulgated legislative rule that should have gone through notice and comment. As noted at the top of this post, this is another context in which administrative law turns to the "force of law" to draw the line but then has trouble dealing with rules that lack this force but have great practical impact. Professor Funk makes an able argument that courts should apply finality doctrine in a manner that allows judicial review of agency actions based on practical impacts. Professor Sunstein, by contrast, ably argues that courts should not, as a matter of law, require agencies to conduct notice and comment based on practical impacts. Seems to me that they are both right, which in turn suggests the importance of being careful whenever administrative law tosses around the phrase, "force of law."

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