The Power of the Watchful Eye

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Rory Van Loo, *Regulatory Monitors*, __ **Colum. L. Rev.** __ (forthcoming 2019), available at SSRN.

One basic tension in administrative law is the combination in one entity of the various functions in government otherwise thought better divided: making laws, prosecuting suspected violations of those laws, and adjudicating whether the violations occurred. This mixed-function design leads to heightened concerns about accountability and oversight of agencies' exercise of delegated authority. Various administrative law responses to these concerns are familiar. For example, for formal agency proceedings, Congress limited agency personnel communications and conflicts in the Administrative Procedure Act (APA) so as to ensure the "separation of functions" within an agency. More generally, public participation, transparency, and judicial review are mechanisms thought to constrain agencies from overreach.

But in his forthcoming article, *Regulatory Monitors*, Professor Rory Van Loo paints a striking picture of an underexamined group of agency actors who can de facto exercise all three kinds of agency power all while largely being exempted from APA constraints. His account of these regulatory monitors is made all the more fascinating by the methodology of his research, which captured the results of agency data, examination of public records, and interviews across nineteen large regulatory agencies. This sort of on-the-ground, trans-substantive look at the work agencies actually do is an exciting trend in administrative law scholarship (and one that I myself have found fruitful in examining how businesses and individuals seeking records about themselves invoke agency FOIA processes). This example is no exception: Van Loo's account of regulatory monitors is powerful precisely because it complicates our understanding of agency power and suggests accountability gaps worth further exploration.

As for their tripartite power, monitors, who Van Loo defines as those "whose core power is to regularly obtain non-public information from businesses outside of the legal investigatory process," are routinely empowered to engage in actions that go far beyond information gathering. On the prosecutorial and adjudication side, they can make decisions that result in a less formal agency sanction such as issuing a "noncompliance" notification or "warning letter." In a majority of large regulatory agencies, they can block or suspend certain business activity. At some agencies they can investigate suspected violations of the law and even set fines or negotiate settlements. These are particularly significant exercises of power when you realize that the vast majority of suspected regulatory violations are resolved through these less formal processes. In this way, Van Loo's piece resonates with valuable recent studies, such as Nick Parillo's excellent research on behalf of ACUS, exploring how and why regulated parties comply even with informal or technically nonbinding agency action.

Maybe the most interesting finding to me was Van Loo's portrait of regulatory monitors' lawmaking function. Among other mechanisms, Van Loo describes monitors' creation of agency common law through the precedent and patterns evidenced in inspection reports, warning letters, and other types of monitoring documentation. In the context of USDA inspections of entities regulated under the Animal Welfare Act, I am litigating a case *pro bono* in which I argue, among other things, that inspection reports are agency "orders" required to be proactively disclosed under FOIA's reading room provision for exactly this reason: they form precedent on which the agency and private parties rely, and have real consequences for regulated entities. Van Loo's government-wide look at the practice confirmed my own view that these records are of much greater importance than we often acknowledge.

One of the article's other immensely fascinating aspects is the intersection of monitoring and government transparency. Van Loo compellingly argues that given the scope of power that regulatory monitors hold, we should be

thinking distinctly about the kinds of accountability mechanisms that would best watch the watchdogs, to use a familiar phrase. Transparency is his very first and, I think, most powerful suggestion. While recognizing competing interests for which any increased transparency requirements should account, Van Loo argues that greater transparency over individual monitoring activities—such as routine disclosure of the results of inspections—would improve accountability and understanding of these important agency functions. Moreover, increased transparency over violations found through monitoring can itself be a soft form of inducing increased compliance with the law—Van Loo separately notes the "shaming" function that monitoring can provide.

While these are my favorite aspects of the article, there is a lot more to learn from Van Loo's very rich inquiry. I suspect that regulatory monitors will become a larger part of the administrative law conversation as a result of his terrific piece.

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