

The Battle for Portland, Maine

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I. INTRODUCTION

Portland, Maine, sits serenely on the banks of Casco Bay. It suffers few of the typical problems of large metropolitan areas. The city is clean; the traffic is manageable; there is no apparent crime problem; and people generally know one another. In 1985, however, the FCC began the competitive process of deciding who would be licensed to provide cellular telephone service to Portland, and chaos and irony reigned. Thirteen years later, after a bitter legal battle among local telephone companies, a provider was finally selected. At one point or another, all three branches of government became involved: Congress, the U.S. Supreme Court, the U.S. Court of Appeals for the District of Columbia Circuit, a federal district court in Maine, the Solicitor General's Office, the Office of Legal Counsel and Civil Division (OLC) within the Department of Justice, as well as the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). The license itself changed hands three times during the case and, in essence, three different telephone systems were constructed. The FCC observed that "the litigiousness of the parties in this proceeding [was] staggering."¹

1. The full recitation of all decisions in the case follows: *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25 (D.C. Cir.), *cert. denied sub nom.*, *Northeast Cellular Tel. Co. v. FCC*, 119 S. Ct. 47 (1998), (U.S. Oct. 5, 1998) (No. 97-1838); *Portland Cellular Partnership v. FCC*, No. 94-1653, 1994 U.S. App. LEXIS 34385 (D.C. Cir. Oct. 18, 1994); *Saco River Cellular, Inc. v. FCC*, No. 91-1248, 94-1500, 1994 U.S. App. LEXIS 28169 (D.C. Cir. Sept. 16, 1994); *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *Applications of Portland Cellular Partnership & Northeast Cellular Tel. Co., L.P., Order*, 11 F.C.C.R. 19,997, 5 Comm. Reg.2d (P & F) 540 (1996) [hereinafter *Portland Cellular Order*]; *Applications of Portland Cellular Partnership & Northeast Cellular Tel. Co., L.P., Memorandum Opinion and Order*, 9 F.C.C.R. 3291, 75 Rad. Reg.2d (P & F) 743 (1994); *Applications of Portland Cellular Partnership & Northeast Cellular Tel. Co., L.P., Memorandum Opinion and Order*, 8 F.C.C.R. 4146, 73 Rad. Reg.2d (P & F) 175 (1993); *Application of Portland Cellular Partnership, Memorandum Opinion and Order*, 6 F.C.C.R. 2283, 69 Rad. Reg.2d (P & F) 214 (1991); *Application of Lewiston-Auburn Cellular, Inc. & Portland Cellular Partnership, Memorandum Opinion and Order*, 4 F.C.C.R. 2514 (1989); *Application of Portland Cellular Partnership & Lewiston-Auburn Cellular, Inc., Memorandum Opinion and Order*, 4 F.C.C.R. 2292 (1989); *Lewiston-Auburn Cellular, Inc., Memorandum Opinion and Order*, 3 F.C.C.R. 5115, 65 Rad. Reg.2d (P & F) 145 (1988); *Application of Portland Cellular Partnership, Memorandum Opinion and Order*, 2 F.C.C.R. 5586, 5 Comm. Reg. (P & F) 540 (1987); *Application of Lewiston-Auburn Cellular, Inc.,*

At times, the case appeared to come straight out of *Alice in Wonderland*. For instance, the originally licensed entity, PortCell, was stripped of its operating authority for failing to make a sufficient showing that it could finance and build the Portland system even though it had already successfully financed, built, and operated the system. Moreover, the financing on which PortCell relied came from a NYNEX-owned company. NYNEX encountered no particular difficulty in financing and building much larger, more complex cellular systems in New York and Boston; yet, apparently, Portland was just too much.

Ultimately, the case was decided not on the basis of whether PortCell complied with the financial showing regulation, but whether the FCC itself complied with a preexisting federal law, the Paperwork Reduction Act (PRA), in adopting the regulation in the first place. That law, unlike many other statutes, tolerates no violations. Noncompliance simply renders the regulation at issue unenforceable *notwithstanding any other law*. Despite this override, it still took an act of Congress to clarify how and when the public protection provision could be used.

The Washington Post wrote a half-page story about the case.² This Article attempts to tell the whole story from one lawyer's viewpoint and to piece together how the judicial branch, Congress, and administrative agencies function when there is an intervening change in law during an actively litigated case.

II. BACKGROUND

A. *The 1980 Paperwork Reduction Act*

In 1942, Congress enacted the Federal Reports Act (FRA)³ to control the growing amount of federal paperwork created by administrative agencies. From the beginning, the FRA provided that federal agencies could not “conduct or sponsor the collection of information . . . from ten or more persons” unless the “pertinent regulations” were first submitted for review to what was then the Bureau of the Budget.⁴ There were no

Memorandum Opinion and Order, 2 F.C.C.R. 5546 (1987); Application of Saco River Tel. Co., *Memorandum Opinion and Order*, 2 F.C.C.R. 2009, 62 Rad. Reg.2d (P & F) 999 (1987); see also *Portland Cellular Partnership v. United States*, No. 94-61-P-H (D. Me. 1994) (dismissing private right of action collaterally attacking FCC Order under the 1980 PRA) (on file with the District Court of Maine).

2. See Bill McAllister, *How a Wired Lobbyist Disconnected a Cell Phone Franchise*, WASHINGTON POST, Sept. 28, 1998, at A23.

3. See Pub. L. No. 77-831, 56 Stat. 1078 (1942) (repealed 1980).

4. *Id.* § 5.

penalties imposed on agencies for violating the FRA, and it was honored in the breach. In the 1970s, concern over this enforcement problem and the increasing time and expense of complying with federal agency paperwork requests led to the establishment of the Commission on Federal Paperwork (Commission).⁵ As a result of the Commission's recommendations,⁶ the Paperwork Reduction Act of 1980 (1980 PRA)⁷ was enacted as a successor to the FRA. The Act combined a paperwork clearance process with a comprehensive, government-wide paperwork management framework managed by the OMB through its OIRA. The heart of the statute, section 3507, provided that:

- (a) An agency shall not conduct or sponsor the collection of information unless in advance of the adoption or revision of the request for collection of such information—
 - (1) the agency has (C) submitted to the Director [of OMB] the certification required under section 3506(c)(3), the proposed collection of information, copies of pertinent statutory authority, regulations, and other related materials as the Director may specify;
 -
 - (3) the agency has obtained from the Director a control number⁸ to be displayed upon the collection of information.

This Act continued the general approach of the FRA, requiring clearance of federal paperwork requirements. The 1980 PRA added teeth to the OMB clearance requirement. There was, however, no remedy for agency violations of the FRA. Section 3512, the public protection provision, barred enforcement of agency paperwork requirements that did not have the required OMB control number:

- (a) *Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this chapter if—*
 - (1) the collection of information does not display a valid control number⁹ assigned by the Director in accordance with this chapter.

5. See S. REP. NO. 96-930, at 4 (1980), reprinted in 1980 U.S.C.C.A.N. 6241, 6244.

6. See *Efforts to Reduce Federal Paperwork Burdens: Hearings Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs*, 95th Cong. 40-41 (1978).

7. Pub. L. No. 96-511, 94 Stat. 2812-2826 (current version at 44 U.S.C. §§ 3501-3520).

8. 44 U.S.C. § 3507(a)(1)-(3) (Supp. II 1996). In addition, 44 U.S.C. § 3507(f) allows independent agencies such as the FCC to override the OMB, which is part of the executive branch, in the event clearance is refused, thus avoiding constitutional problems under the Separation of Powers clause.

9. 44 U.S.C. § 3512 (Supp. I 1995) (emphasis added).

Thus, the Act provided that no penalty could be levied where an agency has not obtained the required clearance. The legislative history emphasizes that a regulation without the required control number is a “bootleg” request that can be ignored with impunity.¹⁰

B. *The FCC’s Cellular Financial Rule*

While the FCC generally complied with the 1980 PRA, there were occasional lapses that generally went unnoticed. One such lapse came in December 1985, when the FCC tightened its financial qualification rules for companies applying for cellular licenses. Until 1985, section 22.917(a) provided that applications “shall demonstrate the applicant’s financial ability to meet the realistic and prudent [expenses]” in a manner that shows with “reasonable assurance” that the funds needed to construct a proposed system and operate it for one year would be available.¹¹ The amendment resulted in a more strict financial showing standard requiring applicants to obtain and submit a “firm financial commitment” letter in support of their applications.¹² The rule at issue, section 22.917(b), reads as follows:

The tentative selectee chosen in a random selection process . . . shall within [thirty] days of the [p]ublic [n]otice announcing such status, obtain a firm financial commitment for the financing necessary to construct and operate for one year its proposed cellular system and shall amend its application to so demonstrate.¹³

The firm financial commitment rule was published in the *Federal Register*. Despite the fact that the rule clearly required a collection of information from a lending institution, *the Commission made no application to the OMB for assignment of the required control number.*

C. *The Portland Licensing Case Begins*

In 1986, five local telephone company affiliates filed applications for the wireline cellular license in Portland.¹⁴ Because they did not reach a full

10. S. REP. NO. 96-930, at 17, 52 (1980), reprinted in 1980 U.S.C.C.A.N. 6241, 6257, 6292.

11. 47 C.F.R. § 22.917(a) (1985); see also Application of Advanced Mobile Phone Serv., Inc., 91 F.C.C.2d 512, paras. 7-12, 52 Rad. Reg.2d (P & F) 735 (1982).

12. Amendment of the Comm’n’s Rules to Allow the Selection from Mutually Exclusive Competing Cellular App’ns Using Random Selection or Lotteries Instead of Comparative Hearings, *Memorandum Opinion and Order on Further Reconsideration*, 59 Rad. Reg.2d (P & F) 407, 412-13 (1985).

13. 47 C.F.R. § 22.917(b)(1)(i) (1986). The FCC also adopted a requirement that the firm financial commitment be from “a recognized bank or other financial institution and shall evidence the lender’s determination that it has assessed the creditworthiness of the loan applicant and that it is committed to providing the necessary financing . . .” *Id.*

14. Under the rules, only those local landline carrier affiliates with certificates were

settlement, the FCC held a lottery to select a winner.¹⁵ Using the same plexiglass drum that the Selective Service used for the Vietnam War draft lotteries, the FCC drew numbers and ranked the five applicants as follows:

1. Seacoast Cellular, Inc.
2. Saco River Cellular, Inc.
3. Community Service Telephone Company (later renamed Lewiston-Auburn)
4. Northeast Cellular Telephone Company, LP
5. NYNEX Mobile Communications Company

Three of the companies—Seacoast, Community, and NYNEX—were eligible local telephone company affiliates that, before the lottery, entered into a partial settlement combining their interests into PortCell, as the FCC's rules then permitted. Thus, Seacoast's first-ranked status made PortCell the lottery winner, and the Seacoast application was amended to substitute PortCell. In response to the FCC's financial rule, PortCell submitted a loan commitment obtained from NYNEX Credit Corporation, an affiliate of NYNEX Mobile, which lacked certain required terms.

In 1987, the FCC staff found the NYNEX credit letter to be sufficient and awarded PortCell the license, overruling Northeast's objection to the financial showing.¹⁶ The Portland system was built and began operation in June 1988.¹⁷ Northeast appealed the decision to the FCC. On review, the FCC found that PortCell had not strictly complied with section 22.917(b), but waived the rule given its experience with NYNEX's ability to build and finance telephone systems.¹⁸

D. The First Court of Appeals Decision

Northeast then appealed the waiver grant to the D.C. Circuit. After a contentious oral argument, during which the court specifically discounted the fact that PortCell had already successfully financed the building of the system, the court held that the FCC's waiver was "arbitrary and capricious

eligible for this block of frequencies. *See* 47 C.F.R. § 22.901 (1986).

15. At that time, the FCC was obliged to use lotteries for resolving certain types of license contests instead of the traditional comparative hearings. *See* 47 U.S.C. § 309(i) (1994 & Supp. III 1997). Since that time, lotteries have been replaced by auctions. *See* 47 U.S.C. § 309(j) (1994 & Supp. III 1997).

16. *See* Application of Portland Cellular Partnership, *Memorandum Opinion and Order*, 2 F.C.C.R. 5586, 5 Comm. Reg. (P & F) 540 (1987).

17. In March 1989, the FCC approved the merger of the PortCell's Portland system and the system owned by one of the PortCell partners in the adjacent Lewiston-Auburn market. This resulted in combined service to the Portland/Lewiston-Auburn markets.

18. *See* Application of Portland Cellular Partnership, *Memorandum Opinion and Order*, 4 F.C.C.R. 2050, 2051, 66 Rad. Reg.2d (P & F) 94, 96 (1989).

because it was not based on any rational waiver policy.”¹⁹ In a strongly worded opinion, the court added, “given the record in this case, we cannot imagine any standard that would have justified a waiver.”²⁰ The court indicated that “[b]igness and national reputation are not reasonable standards for a waiver policy It follows that this waiver reflects an outrageous, unpredictable, and unworkable policy that is susceptible to discriminatory application.”²¹ It thus vacated the order and remanded the case to the FCC, stating in the conclusion to its opinion:

At a minimum, the FCC needed to indicate what information it had about NYNEX Credit’s uncommitted assets, NYNEX Credit’s practices in evaluating the creditworthiness of loan applicants, the terms it would imply into NYNEX Credit’s loan letter based upon its prior experience, and its basis for concluding that NYNEX Credit would commit funds regardless of whether NYNEX Mobile abandoned the partnership. *Absent a finding that this information was considered and used in formulating an articulatable standard at the time the waiver was granted, the FCC must disqualify Port Cell’s application.*²²

The FCC’s compliance with the 1980 PRA was not addressed by any party or the court.

E. Remand and Further Appeals

On remand in 1991, the FCC followed suit and found that PortCell’s showing failed to set forth the terms of the loan commitment and did not evidence the lender’s assessment of the creditworthiness of the loan applicant.²³ The FCC thus rescinded PortCell’s license based on a violation of the firm financial commitment rule.²⁴ It also dismissed the application of the first runner-up in the lottery, Saco River, for violation of certain technical rules concerning radio signal coverage.²⁵ The FCC refused to consider the next-ranked runner-up, Community, which was one of the PortCell partners. The 1991 order granted PortCell interim operating authority until the objections to Northeast’s application, the (fourth-in-line) could be resolved.²⁶ Northeast was eventually found qualified in a separate

19. *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1161, 1167 (D.C. Cir. 1990).

20. *Id.* at 1165.

21. *Id.* at 1167.

22. *Id.* (emphasis added).

23. *See Application of Portland Cellular Partnership, Memorandum Opinion and Order*, 6 F.C.C.R. 2283, para. 5, 69 Rad. Reg.2d (P & F) 214 (1991).

24. *See id.* at para. 9.

25. *See id.* at para. 10.

26. *See id.* at para. 11.

order and awarded the license.²⁷

PortCell, Saco River, and Community appealed the FCC's decision to the D.C. Circuit.²⁸ Community, a partner in PortCell and a separate applicant in its own right, timely petitioned the FCC for reconsideration taking issue with the dismissal of PortCell's application.²⁹ Community argued that its merger into PortCell was contingent on a grant of the PortCell application.³⁰ Because of the pendency of Community's reconsideration petition, the court of appeals held the PortCell and Saco River appeals in abeyance, as is its usual practice.³¹

While the Community petition was pending before the agency, the FCC issued a series of decisions in other cases regarding cellular applicants who violated various aspects of the firm financial commitment rule and thus were denied licenses.³² The FCC, based on the OMB opinion letters that section 22.917 was subject to the 1980 PRA, found, on reconsideration, that it consequently had not obtained the required OMB control number for the financial showing. The Commission thus concluded that under the public protection provision of the 1980 PRA, it could not lawfully enforce the rule and ultimately reinstated the applications.³³

Shortly thereafter, a check of the OMB files revealed that section 22.917(b) had not been cleared—neither the requirement to obtain a firm financial commitment from a bank nor the requirement to submit the letter to the agency of such a commitment were met. PortCell spent the next three years trying to get the FCC to address the fact that it had not complied with

27. See Applications of Portland Cellular Partnership & Northeast Cellular Tel. Co., L.P., *Memorandum Opinion and Order*, 8 F.C.C.R. 4146, 73 Rad. Reg.2d (P & F) 175 (1993).

28. See *Saco River Cellular, Inc. v. FCC*, No. 91-1248, 94-1500, 1994 U.S. App. LEXIS 28169 (D.C. Cir. Sept. 16, 1994).

29. See Applications of Portland Cellular Partnership & Northeast Cellular Tel. Co., L.P., *supra* note 27, at para. 1.

30. See *id.* at para. 5.

31. See *Saco River Cellular, Inc.*, 1994 U.S. App. LEXIS 28169, at *2.

32. See Dana Comm., Ltd., *Memorandum Opinion and Order*, 7 F.C.C.R. 1878, 70 Rad. Reg.2d (P & F) 891 (1992); Applications of Foster, Fair Oaks Cellular Partnership, Progressive Cellular III B-2, & Pacific Nat'l Cellular, *Memorandum Opinion and Order*, 7 F.C.C.R. 7971, 71 Rad. Reg.2d (P & F) 1284 (1992). In one case, the FCC held that the 1980 PRA required reinstatement even though the applicants had not raised the PRA issue in their reconsideration petitions. See Applications of Asset Management Corp., Carale Cellular Partners, Cetercom Comm. Co., Chase, McDonald, & Elleron Cellular Corp., *Memorandum Opinion and Order*, 6 F.C.C.R. 6538 (1991). None of these cases, however, had reached the judicial review stage.

33. See Dana Comm., Ltd., *Memorandum Opinion and Order*, 6 F.C.C.R. 5382, 69 Rad. Reg.2d (P & F) 1178 (1991); Applications for Review & Petitions for Reconsideration of Rural Service Area Cellular App'n, 6 F.C.C.R. 5378, 69 Rad. Reg.2d 1117 (1991).

the 1980 PRA and thus had no authority to enforce section 22.917(b) against it.

Utilizing the fact that the Community petition remained pending and that the 1980 PRA itself overrode all other laws, PortCell again filed a petition for reconsideration on April 29, 1992—nearly a year after the thirty-day statutory deadline set out in section 405.³⁴ The petition relied on extensive case law recognizing that: (1) as long as a timely-filed petition remained pending, the Commission had the discretion to consider a late-filed reconsideration petition, and (2) the only reasonable exercise of that discretion would be to vacate action that was contrary to the 1980 PRA given the Act's express override and withdrawal of agency authority to enforce the rule.³⁵ On June 4, 1993, obviously not anxious to go back to the D.C. Circuit with a license grant to PortCell, the FCC released a *Memorandum Opinion and Order* stating that it had no authority to consider PortCell's late-filed reconsideration petition under the statute.³⁶ The *Memorandum Opinion and Order* did not mention the override provision in the 1980 PRA.³⁷

PortCell then filed separate timely petitions for reconsideration of both the dismissal of PortCell's petition and the grant of the Northeast application. On June 29, 1994, the FCC ruled on the former but not the latter.³⁸ The FCC noted that the other petition dealing with Northeast's wireline qualifications would be dealt with in an upcoming order.³⁹ The FCC agreed that under prevailing case law, section 405 did not bar consideration of the 1980 PRA claim given the pendency of the Community petition. It nevertheless found no public interest reason to exercise its discretion given the resources already expended on the case.⁴⁰ The FCC noted that consideration of the 1980 PRA issue at this late stage "might conflict with the Court's instructions."⁴¹ No case law or statute was cited for ignoring the 1980 PRA.

When PortCell appealed and asked for a stay of the FCC Order, the

34. See 47 U.S.C. § 405(a) (1994).

35. See, e.g., *Meredith Corp. v. FCC*, 809 F.2d 863, 869 (D.C. Cir. 1987); *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976).

36. See *Applications of Portland Cellular Partnership & Northeast Cellular Tel. Co., L.P.*, 8 F.C.C.R. 4146, 4146 n.4, 73 Rad. Reg.2d (P & F) 175, 176 n.6 (1993).

37. See *id.*

38. See *Applications of Portland Cellular Partnership & Northeast Cellular Tel. Co., L.P., Memorandum Opinion and Order*, 9 F.C.C.R. 3291, 75 Rad. Reg.2d (P & F) 743 (1994).

39. See *id.* at 3291 n.2.

40. See *id.* at 3292.

41. *Id.* at 3292 n.3.

court unexpectedly dismissed it as “incurably premature” because action on reconsideration of *both* applications had not been completed.⁴² The court analogized to cases involving mixed rulemaking and adjudicatory rulings where a party had appealed one action, but asked for agency reconsideration of the other and was thrown out of court.⁴³ It thus found FCC action on the PortCell application “nonfinal and unappealable” because the successor’s—Northeast—qualifications had not been finally resolved by the agency.⁴⁴ Because no appeal was validly on file, the court considered the stay under the higher *mandamus* standard and summarily denied it.⁴⁵

PortCell went off the air in November 1994. Not only was PortCell out of business, but it had little immediate prospect for obtaining judicial review. The effect of the court’s ruling was to hold hostage PortCell’s ability to appeal the FCC’s resolution of the petition for reconsideration of the Northeast grant. At the time, the court had not resolved the consequences of voluntarily withdrawing such a petition and whether it would render a subsequent appeal untimely or restart the appeal period.⁴⁶

F. *The 1995 Paperwork Reduction Act*

1. Legislative History

During this static period in the case, Congress by happenstance decided to revisit the 1980 PRA in its entirety. In 1990, the Supreme Court had ruled in *Dole v. United Steelworkers of America*⁴⁷ that the OIRA’s authority to review agency information collection activities under the 1980 PRA governed information collected by or for an agency, but did not extend to third-party information disclosure requirements (e.g., the requirement an employer maintain certain information for employee

42. *Saco River Cellular, Inc. v. FCC*, No. 91-1248, 94-1500, 1994 U.S. App. LEXIS 28169, *1 (D.C. Cir. Sept. 16, 1994).

43. *See Saco River Cellular, Inc.*, 1994 U.S. App. LEXIS, at *2; *see also* *BellSouth Corp. v. FCC*, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994).

44. *Saco River Cellular, Inc.*, 1994 U.S. App. LEXIS, at *3.

45. The court relied on *GTE Service Corp.*, 762 F.2d 1024, 1026 (D.C. Cir. 1985), which construed a motion for stay as petition for writ of mandamus because no appeal had been filed giving the court jurisdiction under All Writs Act jurisdiction. *See Saco River Cellular, Inc.*, 1994 U.S. App. LEXIS, at *2. A petition for mandamus must prove a “clear and indisputable” right to such extraordinary relief. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988).

46. *See Los Angeles SMSA, L.P. v. FCC*, 70 F.3d 1358 (D.C. Cir. 1995); *accord* *Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997) (resolving when the appeal period tolls).

47. 494 U.S. 26 (1990).

review).⁴⁸ Because of the *Dole* case and numerous violations of the Act by the EPA and IRS, the need to amend the 1980 PRA became a bipartisan issue. It began as part of “The Contract with America” legislation and ultimately was one of the only initiatives which actually became law.

On February 7, 1995, Representative Crapo (R-Idaho) testified before a Subcommittee of the Committee on Government Reform and Oversight in support of a strengthened public protection provision which was designed to protect citizens from penalties if an agency violated or threatened to violate the PRA—the original intent of the 1980 PRA.⁴⁹ On February 22, 1995, he read his earlier-prepared statement to his colleagues and specifically referred to the Portland situation as illustrative of the problem:

Unfortunately, it has come to my attention that a great deal of confusion exists among the regulatory agencies and the courts regarding what Congress intended in exacting this important legislation, which has allowed some agencies to blatantly disregard the [p]ublic [p]rotection provisions of [s]ection 3512. In at least one case I know of, a [f]ederal agency did not clear a rule with OMB and did not obtain an OMB control number, and then penalized the company for not complying with the invalid regulation. So far, the agency has refused to even respond to the threshold question of whether it complied with the PRA or not.⁵⁰

In the same month, Representative Crapo formally offered his own amendment to the public protection provision on the House floor.⁵¹ New subsection (a) of 3512 largely repeated from the 1980 Act that “notwithstanding any other . . . law, . . . no . . . penalty” may be levied for violation of a rule not having the required OMB control number (e.g., a complete defense).⁵² New subsection (b), however, was added to make crystal clear what “no penalty” protection meant and when it was available (e.g., at any time during a pending case). Congressman Crapo began by recognizing that “we have heard a lot about the important need for the [PRA] in the legislation we are considering” and “[t]his amendment will give that legislation . . . some teeth to truly protect . . . citizens.”⁵³ He added

48. *See id.* at 32.

49. *See* 141 CONG. REC. H5480-81 (1995) (statement of Rep. Crapo).

50. *H.R. 830, Paperwork Reduction Act and Risk Assessment and Cost/Benefit Analysis for New Regulations: Hearings on H.R. 830 Before the Subcomm. on National Economic Growth, Natural Resources, and Regulatory Affairs of the House Comm. on Government Reform and Oversight*, 108th Cong. 8 (1995) (statement of Rep. Crapo); *see also* 141 CONG. REC. H2028 (1995) (statement of Rep. Crapo).

51. *See* 141 CONG. REC. H2028 (1995) (statement of Rep. Crapo).

52. 44 U.S.C. § 3512(a) (1994).

53. 141 CONG. REC. H2028 (1995) (statement of Rep. Crapo).

that it “will make it clear to the agencies, the regulators[,] and the courts in this country, that we must start taking this [A]ct seriously” and further explained that “[t]he purpose of this amendment is to clarify that when an agency does not comply with the provisions of this [A]ct that its failure to comply is a complete defense to the enforcement of the regulations that violate the act.”⁵⁴ The amendment was unopposed (418-0).

The Paperwork Reduction Act of 1995 (1995 PRA)⁵⁵ passed both houses of Congress unanimously on April 6, 1995, with Congressman Crapo’s amendment essentially intact. Just prior to passage, Representative Clinger, the House Conference Manager and Chairman of the House Government Reform and Oversight Committee, introduced the 1995 PRA for vote and observed:

Fourth, Mr. Speaker, and most importantly, the conference bill protects the public by providing citizens with a complete legal defense if agencies refuse to participate in a clearance process involving public notice and comment, public protection, and OIRA review. This provision is based on the very excellent amendment which was offered on the House floor by our colleague, the gentleman from Idaho, Mr. Mike Crapo.⁵⁶

Representative Crapo then engaged in a colloquy on the House floor with Representative Clinger. Congressman Crapo observed that section 3512(b) “provides for the enforcement mechanism implicit in section 3512 as it was originally enacted by Congress in 1980” and “should end any confusion . . . about how section 3512 was originally intended to work.”⁵⁷ Representative Clinger agreed and then the following exchange regarding the applicability of the new law to pending cases took place:

Mr. Clinger. The conference report is intended to clarify that it is the intent of Congress that section 3512 requires agency information collection requests . . . to be submitted to OMB and receive a valid control number. If not, the public need not respond, no[r] may it be subjected to any penalty for failing to comply with such an unenforceable collection of information.

Mr. Crapo. [I]s it the chairman’s understanding that section 3512 will become effective as of October 1, 1995, and will apply to all cases then pending before the [f]ederal agencies or the courts?

Mr. Clinger. [T]he gentleman is absolutely correct. As of October 1, 1995, the defense provided in section 3512 is available at any time in an ongoing dispute.⁵⁸

54. *Id.*

55. Pub. L. No. 104-13, 109 Stat. 163-185 (codified as amended at 44 U.S.C. §§ 3501-3520).

56. 141 CONG. REC. H4374 (1995) (statement of Rep. Clinger).

57. 141 CONG. REC. H4376 (1995) (statement of Rep. Crapo).

58. 141 CONG. REC. H4376 (1995) (statements of Rep. Clinger & Rep. Crapo).

No contrary views were expressed and the bill passed the House 423-0 immediately thereafter.

On the Senate side, Senator Roth, Chairman of the Senate Governmental Affairs Committee and the Senate Conference Manager, introduced the final bill on the Senate floor and observed:

Mr. President, the topic that captured more time in conference discussion than any other was that of redrafting section 3512, which provides public protection against agency noncompliance with the [PRA]. Since 1980, the [A]ct has provided a fundamental protection to every citizen that he or she need not comply with, or respond to, a collection of information if such collection does not display a valid control number given by OMB as evidence that the collection was reviewed and approved by OIRA. And if the collection does not display a valid control number, the agency may not impose any penalty on the citizen who fails to comply or respond.

In order to strengthen and underscore congressional desire to protect the public, the conferees included a definition of penalty at the end of section 3502 to make clear that the term not only applies to the payment of a fine but also to the denial of a benefit. What this means is that if an agency does not . . . act on a citizen's request for a [g]overnment benefit because the citizen did not complete a form that fails to display a valid OMB clearance number, it is the agency—not the citizen—that stands in violation of law. Once this is determined, the agency would not only owe the citizen the benefits due but also perhaps interest as well.

. . . .

. . . [The Act] now requires the agency to inform the person who is to respond to the collection of information . . . unless it displays a valid control number.

. . . .

Moreover, in section 3512(b) the conferees made clear that the protections of section 3512 may be raised at any time during the life of the matter. *The protections cannot be waived.* Failure to raise them at any early stage does not preclude later assertion of rights under this section, regardless of any agency or judicial rules to the contrary.

. . . .

Neither the House nor the Senate sought to change the policy of the 1980 Act that all agencies, including independent agencies, have their information collections, even those by regulation, subjected to OMB review and approval.⁵⁹

No contrary views were expressed and the legislation passed unanimously. The joint statement issued by the conferees as part of the conference report stated that “[t]o the extent the legislation is a restatement

59. 141 CONG. REC. S5274-75 (1995) (statement of Sen. Roth) (emphasis added).

of the 1980 Act, as amended in 1988, the scope, underlying purposes, basic requirements, and legislative history of the law are unchanged.”⁶⁰

It described the amendments to the public protection provision as follows:

The House amendment contains a provision which clarifies and strengthens the Act’s current “public protection” provision by enabling a person to assert this protection at any time during an agency administrative process or any subsequent judicial review of an agency action involving a penalty.

The Senate recedes with an amendment. The conference agreement clarifies and strengthens the Act’s “public protection” provision by explicitly providing that the protection provided by the section may be asserted or raised by a person in the form of a complete defense, bar, or other manner, at any time during a[n] agency administrative process or any subsequent judicial review. The protection provided by the section applies if the agency fails to display a valid control number⁶¹

2. Relevant Changes to the Act

The 1995 Act recodified certain portions of the original 1980 Act and amended other sections. Section 3507 continues to read, “[a]n agency shall not conduct or sponsor the collection of information” unless it applies to the OMB and obtains the required control number.⁶² The override and no penalty language of the public protection provision was repeated. New section 3512(a) included one clarification:

- (a) Notwithstanding any other provision of law, no person shall be subject to any penalty for *failing to comply* with a collection of information that is subject to this chapter if—
 - (1) the collection of information does not display a valid control number assigned by the Director in accordance with this chapter; or
 - (2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.⁶³

There is no mention of this change in the legislative history. The

60. H.R. CONF. REP. NO. 104-99, at 28 (1995), *reprinted in* 1995 U.S.C.C.A.N. 239, 240; *see* S. REP. NO. 96-930 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6241.

61. H.R. CONF. REP. NO. 104-99, at 36 (1995), *reprinted in* 1995 U.S.C.C.A.N. 239, 248; *see* S. REP. NO. 96-930 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6241.

62. 47 U.S.C. § 3507 (Supp. II 1996).

63. 44 U.S.C. § 3512(a) (Supp. I 1995) (emphasis added). The language “failing to comply” was substituted for “failing to maintain or provide.” No explanation is offered in the legislative history. The new language is more comprehensive and keeps with the original concept that an uncleared collection is a “bootleg” request with which no one has to comply.

previous section protected a failure to “maintain or provide” the information required by an agency.⁶⁴ The new phrase was simply an attempt to ensure the broadest possible protection from an uncleared collection requirement.

New section 3512(b) spelled out in the broadest possible terms how and when the protection afforded by the no penalty clause could be utilized by members of the public where an unclear rule was involved. Section 3512(b) now states: “The protection provided by this section may be raised in the form of a *complete defense, bar, or otherwise at any time* during the agency administrative process or judicial action applicable thereto.”⁶⁵

The “or otherwise” phrase was meant to capture anticipatory actions, such as injunctive relief, filed by a member of the public before an agency levied an unlawful penalty or began an enforcement proceeding. The 1995 statute also adopted a broad definition of the term “penalty” to include “the imposition by an agency or *court* of a . . . revocation, suspension, reduction, or denial of a *license, privilege, right, grant, or benefit.*”⁶⁶ The conference report indicated that “this was merely a codification of the definition of ‘penalty’ found in the Act’s implementing regulations, at 5 C.F.R. 1320.7(m).”⁶⁷

The 1995 PRA was signed into law May 22, 1995, and became effective generally October 1, 1995. In the meantime, PortCell’s petition for reconsideration remained pending. No ruling was ever needed. On October 11, 1995, ten days after the 1995 PRA became effective, PortCell filed a motion to reinstate PortCell’s application *Nunc Pro Tunc* and an amendment showing that the applicant was fully capable of building a new system.⁶⁸ The motion asserted that the Commission failed to obtain the required OMB control number for section 22.917(b) prior to PortCell making its showing under the rule and thus invoked the complete defense provided by section 3512(b).⁶⁹

64. 44 U.S.C. § 3512(a) (1994).

65. 44 U.S.C. § 3512(b) (Supp. I 1995) (emphasis added).

66. 44 U.S.C.A. § 3502(14) (West Supp. 1999) (emphasis added).

67. H.R. CONF. REP. NO. 104-99, at 37, *reprinted in* 1995 U.S.C.C.A.N. 239, 249. The OMB issued regulations implementing the 1995 PRA on August 29, 1995. Paperwork Reduction Act, 60 Fed. Reg. 44,978, 44,986 (1995). The operative language tracks closely the text of section 3512, as modified by the 1995 PRA.

68. *See* Appellant’s Motion to Reinstatement PortCell’s Application *Nunc Pro Tunc*, Grant the Application as Amended, and Set Aside the Northeast Grant, *Portland Cellular Order*, 11 F.C.C.R. 19,997, 5 Comm. Reg.2d (P & F) 540 (1996). PortCell also attached the actual loan documents used to finance the building of its original system. *See id.* at attachment E.

69. *See id.* at 10, 12.

G. *The Final FCC Decision on Remand*

The Commission's first response was to ask the OLC for advice on how the 1995 Act applied to this pending case. The OLC wrote back stating that they would only address the matter if the FCC agreed to be bound by whatever opinion it issued on the new statute.⁷⁰ Ultimately, however, the OLC declined to intervene because of its policy and practice of not getting involved in actively litigated cases.⁷¹

Thereafter, on November 21, 1996, the FCC found that while previously there was some doubt about the interplay between the 1980 PRA's public protection provision and the requirement to file petitions for reconsideration within thirty days, new section 3512(b) "simply trumps [s]ection 405(a)"⁷² The FCC ruled that under the terms of the new statute and Congress's plain intentions, PortCell was entitled to raise the agency's failure to comply with the 1995 PRA as a complete defense at any time during the agency administrative process.⁷³ Relying on *Landgraf v. USI Film Products*,⁷⁴ the FCC also found that its recognition of the new statutory remedy was not impermissibly retroactive because the statute operated prospectively.⁷⁵

On the merits of PortCell's 1995 PRA argument, the FCC concluded that the financial showing requirement of section 22.917(b) was subject to the 1995 PRA because it involved a collection of information by the government and that it had not been cleared with OMB.⁷⁶ Consistent with OMB regulations,⁷⁷ the FCC accepted PortCell's proffered financial showing, noting the lack of any substantive objection, and granted the application. Because Northeast's right to operate was premised on the

70. See Letter from Richard L. Shiffrin, Deputy Assistant Attorney General, *Office of Legal Counsel*, to William E. Kennard, General Counsel, *Federal Communications Commission* (May 15, 1996) (on file with the *Federal Communications Law Journal*). This proposal raised a number of real constitutional concerns since Congress delegated to the FCC, not an executive department agency, exclusive authority to resolve radio licensing matters.

71. OLC essentially functions as a group of legal advisors to the President and typically issue opinions on pure questions of law, including interpretation of new statutes.

72. *Portland Cellular Order*, 11 F.C.C.R. 19,997, para. 15, 5 Comm. Reg.2d (P & F) 540 (1996).

73. *Id.* at paras. 12-14.

74. 511 U.S. 244, 275 (1994).

75. *Id.* at 275.

76. *Portland Cellular Order*, 11 F.C.C.R. 19,997, paras. 25-27, 5 Comm. Reg.2d (P & F) 540 (1996).

77. See 5 C.F.R. § 1320.6 (1999) (stating that if an information collection requirement lacks the required OMB approval, agencies must permit the applicant to provide or satisfy the legal conditions "in [a] reasonable manner").

outcome of the PortCell litigation, the Commission rescinded the grant to Northeast, but allowed it to continue as an interim operator. The FCC never resolved Northeast's wireline eligibility and instead dismissed as moot the PortCell petition for reconsideration.⁷⁸

H. *The Second Court of Appeals Decision*

Thereafter, Northeast appealed the Commission's order to the D.C. Circuit. Despite the fact that "penalty" in the 1995 PRA is defined to include equitable relief levied by a court, the FCC's *Order* was stayed pending judicial review. Ultimately, however, the court unanimously affirmed the FCC's reinstatement and grant of PortCell's application.⁷⁹ It agreed with the FCC that section 3512 trumps any inconsistent procedural (or substantive) law because "notwithstanding any other . . . law" means what it says. Rejecting the argument that the application of section 3512(b) would have an impermissible retroactive effect, the court explained, because "[section] 3512(b) governs only the conduct of litigation after the effective date of the statute and does nothing to reopen matters litigated before that date, it does not offend any norm against retroactive lawmaking."⁸⁰ The court also observed that "[b]y permitting parties to raise the [PRA] issue 'at any time' in ongoing proceedings, the statute does not 'impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'"⁸¹

The court of appeals also rejected petitioner's argument that application of section 3512(b) in this proceeding would be unconstitutional under *Plaut v. Spendthrift Farm, Inc.*,⁸² because it would nullify the court's previous decision in the case. The court reasoned that application of the

78. See *Portland Cellular Order*, 11 F.C.C.R. 19,997, paras. 48, 5 Comm. Reg.2d (P & F) 540 (1996).

79. See *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25 (D.C. Cir. 1998).

80. *Id.* at 31.

81. *Id.* Since the court of appeals' decision in *Saco River Cellular, Inc.*, no other opinion directly addressed the "at any time" language of the 1995 PRA. However, at least one attempt has been made, albeit unsuccessfully, to raise the PRA issue for the first time in support of a petition for rehearing of a denial of certiorari before the Supreme Court. See *Electronic Eng'g Co. v. FCC*, 140 F.3d 1045 (D.C. Cir.), *cert. denied* 119 S. Ct. 343 (1998), *reh'g denied* 119 S. Ct. 583 (1998) (presenting the question does "the [1995 PRA] require[s] the Supreme Court to entertain Petitioner's argument which is raised for the first time in a petition for rehearing"). The Supreme Court turned down the invitation to address the 1995 PRA. It should be noted that the "at any time" language cannot be invoked unless a court decides to take jurisdiction. Thus, the "at any time" language does not override the certiorari process under which the Supreme Court has complete discretion whether to review a case. SUP. CT. R. 10.

82. 514 U.S. 211 (1995).

1995 PRA did not unconstitutionally nullify a final judgment, both “because no party . . . raised, and we did not purport to resolve, the PRA issue,” and because the *Northeast* court did not in any event “render a final judgment terminating the case,” but instead “remanded it to the [FCC] for further proceedings.”⁸³ The court’s opinion also dissolved the stay on the FCC *Order*. Mandate, however, was stayed pending Supreme Court review of *Northeast*’s petition for certiorari. This delayed the effectiveness of the FCC’s decision to reinstate PortCell’s license until October 5, 1998, when the Supreme Court denied certiorari.⁸⁴ Almost immediately thereafter, the court of appeals issued its mandate and the FCC awarded PortCell a license on October 16, 1998.

III. THE CONSTITUTION REQUIRED THE FCC TO APPLY THE “LAW IN EFFECT AT THE TIME OF ITS DECISION”

A. *The Law in Effect Principle and Its Limitations Where There Is Judicial Finality*

Throughout this proceeding, some argued that the changes made in the 1995 PRA could not constitutionally be applied to this case. The Constitution, however, actually compelled the FCC to give effect to the intervening amendments by Congress. In gross terms, Article I⁸⁵ of the Constitution vests all legislative power in Congress, while Article III⁸⁶ entrusts interpretation of those laws to the judicial branch. This conceptually neat scheme fits together well until Congress changes the law after the judiciary has already become involved in a case.

In 1801, the Supreme Court confronted this problem in what has become the seminal case on the intersection of legislative and judicial powers during an active case. In *United States v. Schooner Peggy*,⁸⁷ a French schooner named Peggy was captured within U.S. waters and condemned. While an appeal was pending, a treaty was signed restoring property “not yet *definitively* condemned.”⁸⁸ The Court held that because the case was on appeal, it was not final and therefore the property at issue could not be considered definitively condemned. The Court announced the following constitutionally compelled principle under the Separation of

83. *Saco River Cellular, Inc.*, 133 F.3d at 31.

84. *See Saco River Cellular, Inc. v. FCC*, 133 F.3d 25 (D.C. Cir.), *cert. denied sub nom.*, *Northeast Cellular Tel. Co. v. FCC*, 119 S. Ct. 47 (1998).

85. U.S. CONST. art. I.

86. U.S. CONST. art. III.

87. 5 U.S. (1 Cranch) 103 (1801).

88. *Id.* at 107.

Powers doctrine: “the [C]ourt must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.”⁸⁹ Thus, the Court announced the principle that the Constitution compels the judicial branch to apply the law in effect at the time of the decision, which compelled return of the property.⁹⁰

Almost 195 years later, the Court reiterated the vitality of *Schooner Peggy*, while reminding Congress that its power is not without limit, in *Plaut v. Spendthrift Farm, Inc.*⁹¹ In *Plaut*, Congress passed legislation to allow parties to reopen cases finally dismissed as time barred. The time for filing appeals of the dismissals had expired when Congress acted. The Court ruled that Congress violated the Separation of Powers doctrine by interfering with the final judgment of the judicial branch.⁹² Where a final judgment has been rendered, the “judicial decision becomes the last word . . . and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.”⁹³ Equally important, however, the Court also observed that unless a case is truly final in the sense that “all appeals have been foregone or completed . . . [i]t is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress’s latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must ‘decide according to existing laws.’”⁹⁴

Where a case has been remanded to an agency for further proceedings, the Supreme Court has ruled explicitly that there is no final judgment in the *Plaut* sense, thus Congress may change the decisional criteria during the case.⁹⁵ The Court stated in *Ford Motor Co. v. NLRB*,⁹⁶ that remand “means simply that the case is returned to the administrative

89. *Id.* at 110.

90. *See* *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) (concluding that Congress may alter the prospective effect of injunctions entered by Article III courts because such continuing relief renders the case nonfinal); *System Fed’n No. 91 v. Wright*, 364 U.S. 642, 649-52 (1961).

91. 514 U.S. 211 (1995).

92. *See id.* at 240.

93. *Id.* at 227 (emphasis omitted).

94. *Id.*

95. *See* *Ford Motor Co. v. NLRB*, 305 U.S. 364 (1939); *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 440 (1992) (holding that that Congress may directly “affect[] the adjudication” of cases by administrative agencies “by effectively modifying the provisions at issue in those cases” even after there have been judicial rulings); *Women’s Equity Action League v. Cavazos*, 906 F.2d 742, 751-52 n.14 (D.C. Cir. 1990); *Morrow v. Dillard*, 580 F.2d 1284, 1297 (5th Cir. 1978).

96. 305 U.S. 364 (1939).

body in order that it may take further action in accordance with the applicable law.”⁹⁷ Congress, therefore, can change the law applicable to a case on remand without implicating separation of powers concerns. “Such a remand does not dismiss or terminate the administrative proceeding Whatever findings or order may subsequently be made will be subject to challenge.”⁹⁸

B. Impermissible Retroactivity Must Be Avoided by the Judiciary Unless Overridden by Congress

By changing the law during an active case, however, Congress’s actions may raise other concerns about impermissible retroactivity. In *Landgraf v. USI Film Products*,⁹⁹ the seminal case on retroactivity, the Supreme Court tried to spell out with more precision the interplay between the law in effect at the time of the decision and the presumption against retroactive application of new law during a case. In that case, a former employee of USI Film Products brought an action alleging sexual harassment under Title VII of the Civil Rights Act of 1964.¹⁰⁰ The Court held that provisions of the Civil Rights Act of 1991, creating a right to recover damages for violations of Title VII, did not apply to a Title VII case pending on appeal when the statute was enacted.¹⁰¹ The Court found that Congress had not been clear enough to subject employers to damage awards retroactively.¹⁰²

The *Landgraf* Court observed that the threshold test is whether Congress clearly indicates that a new law is to operate retroactively. If so,

97. *Id.* at 374.

98. *Id.* At the intermediate court level, there may be a difference between a final case and a final ruling on an issue in the case which the agency has opted not to challenge. In *Saco River Cellular, Inc., v. FCC*, 133 F.3d 25 (D.C. Cir. 1998), however, the Solicitor General’s office took the position that until the opportunity for certiorari has passed in the case, any issues, including those disposed of by the initial reviewing court, are nonfinal. See Brief for the FCC in Opposition at 10-12, *Northeast Cellular Tel. Co. v. FCC*, 119 S. Ct. 47 (1998) (No. 97-1838). This so-called “reach back” theory relies on Supreme Court rules allowing the Court to delve into any issue in the case whenever the case is before it. SUP. CT. R. 10. In a decision, however, the D.C. Circuit held that a remand, which included tightly worded instructions to the agency susceptible of only one result, was tantamount to a final judgment because the agency did not challenge the ruling and the proceeding was discrete. See *Qualcomm Inc. v. FCC*, No. 98-1246, 1999 WL 518838 (D.C. Cir. July 23, 1999) (concluding that the Pioneer Preference award docket in *Qualcomm* was separate and apart from the licensing proceeding which would follow if a preference was granted).

99. 511 U.S. 244 (1994).

100. See *id.* at 247-48; 42 U.S.C. §§ 2000e (1)-2000e (14) (1994).

101. See *Landgraf*, 511 U.S. at 286.

102. See *id.*

that is the end of the issue.¹⁰³ The law in effect at the time must be applied by the courts, assuming no other constitutional defects (e.g., ex post facto, etc.). The Court observed that in *Schooner Peggy*, the Court's "application of the 'law in effect' at the time of [its] decision . . . was simply a response to the language of the statute."¹⁰⁴ The hard cases, of course, are where Congress has been less than clear. The inquiry then revolves around judicial default rules regarding whether application of the new law to the pending case causes an impermissibly retroactive result.

The *Landgraf* Court described the threshold test as whether Congress made its *intention clear*. At another point, however, the Court put more emphasis on the words of the statute: "the court's first task is to determine whether Congress has *expressly prescribed* the statute's proper reach."¹⁰⁵ Moreover, the Court's actual analysis of congressional intent went far beyond the actual words of the statute and delved into its legislative history. Subsequently, in *Lindh v. Murphy*,¹⁰⁶ the Supreme Court described *Landgraf's* initial test as one involving "normal rules of construction" to determine congressional intent.¹⁰⁷ Thus, the prevailing test appears to be that courts must determine whether Congress's made its intentions clear.¹⁰⁸ Such an interpretation would seem to mirror the evolution of the first step of the *Chevron U.S.A., Inc. v. NRDC*¹⁰⁹ analysis in which a court looks to "the particular statutory language at issue, as well as the language and design of the statute as a whole," in determining the plain meaning of Congress, assuming there is one.¹¹⁰ Although unstated in case law, as a practical matter, it would appear that the more clearly retroactive a new statute's application would be, the more express the statute itself may have to be.¹¹¹

Therefore, a lot hinges on the definition of retroactivity and how it is applied in a given case. On this issue, *Landgraf* has much to say. The Court

103. *See id.* at 264.

104. *Id.* at 273.

105. *Id.* at 280 (emphasis added); *see also* *Martin v. Hadix*, 119 S. Ct. 1998, 2004 (1999) (noting that the statute's language fell short of "clear congressional intent" and "'the unambiguous directive' or 'express command' that the statute is to be applied retroactively").

106. 521 U.S. 320 (1997).

107. *Id.* at 326.

108. *See id.*; *but see* *Qualcomm Inc. v. FCC*, No. 98-1246, 1999 WL 518838 (D.C. Cir. July 23, 1999).

109. 467 U.S. 837 (1984).

110. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *see Chevron U.S.A., Inc.*, 467 U.S. at 845-51; *Landgraf*, 511 U.S. at 270.

111. *See, e.g., Qualcomm Inc.*, 1999 WL 518838 (finding clear retroactivity and a need for express language in the statute to override such consequences).

observed that it “must ask whether the new provision attaches new legal consequences to events completed before [the statute’s] enactment.”¹¹² It added that “[a] statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment (citations omitted) or upsets expectations based in prior law.”¹¹³ The Court noted “[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.”¹¹⁴ The Court also recognized that “[b]ecause rules of procedure regulate secondary rather than primary conduct,” new procedural rules “may often be applied in suits arising before their enactment without raising concerns about retroactivity.”¹¹⁵ The Court noted, as a matter of common sense, that new procedural rules sometimes should not be applied to pending cases.¹¹⁶ It gave two examples of such cases, explaining that “[a] new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial.”¹¹⁷

The Court, however, did not suggest that new procedural rules generally should not be applied in any case in which a tribunal had already reached a ruling based on a different procedural rule. To the contrary, the Court cited *Collins v. Youngblood*¹¹⁸ as an example of the proper application of intervening procedural changes in pending cases.¹¹⁹ In *Collins*, a new statute allowing the reformation of an improper jury verdict was applied even though a lower court had concluded before the statute’s adoption that the only remedy for the improper jury verdict was a new trial.¹²⁰ In sum, where a change in law is procedural, it generally must be applied by the courts during an ongoing case unless the application is decisional with regard to the merits of the case. Even then, a case’s nonfinality may still compel application of the new procedural law, but the burden to justify such a result will be greater.

In the final analysis, the Court agreed that any particular test would leave room for disagreement in hard cases and found that “the conclusion

112. *Landgraf*, 511 U.S. at 269-70.

113. *Id.* at 269.

114. *Id.* at 273.

115. *Id.* at 275; see also *Lindh v. Murphy*, 521 U.S. 320, 327 (1997) (noting “the natural expectation” for “merely procedural” rules to “apply to pending cases”).

116. See *Landgraf*, 511 U.S. at 275 n.29.

117. *Id.*

118. 497 U.S. 37 (1990).

119. See *Landgraf*, 511 U.S. at 275 n.28.

120. See *id.*

that a particular rule operates ‘retroactively’ comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.”¹²¹

In a regulated industry, impermissible retroactivity is much harder to prove than a typical civil controversy because cases tend to go on much longer before becoming final; and the agency’s relationship to the reviewing court is different from a lower court in that it has its own congressionally created public interest charter, which can be changed by Congress at any time. Put another way, it is difficult to make a vested rights argument in a licensing context. Such authorizations by their very nature are limited in time and subject to changes in regulatory policy by the agency granting them.¹²²

For example, in *Multi-State Communications, Inc. v. FCC*,¹²³ the court affirmed the FCC’s implementation of Senator Bradley’s bill, which was enacted into the Communications Act,¹²⁴ following a remand. The legislation had the effect of ending a long-pending case if applied, although it did not speak directly to its availability in pending cases. Multi-State filed a mutually exclusive application against RKO General’s renewal for WOR-TV in New York. The FCC disqualified RKO on character grounds in three markets including New York. The court affirmed the Boston license denial, but remanded the WOR case for evaluation of the station’s record.¹²⁵ While on remand, Congress passed legislation granting a free and clear license renewal “notwithstanding any other provision of law” to *any* existing broadcaster willing and technically able to move to states without a VHF television station (New Jersey or Delaware).¹²⁶ RKO applied under the new law to move WOR to New Jersey. RKO merely moved its main studio across the river to Seacaucus, New Jersey, because its transmitter was already on the World Trade Center and served large portions of New Jersey. Complying with the new law, the FCC granted RKO a license for a full term despite the remand, dismissed Multi-State’s long-pending application, and terminated the proceeding.

In affirming the Commission’s application of the intervening statute, the court found the new law “permissible regulation of future action,” even

121. *Id.* at 270; accord *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 947 (1997).

122. *See* 47 U.S.C. § 304 (1994).

123. 728 F.2d 1519 (D.C. Cir. 1984).

124. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections 47 U.S.C.).

125. *See* *RKO Gen., Inc. v. FCC*, 670 F.2d 215, 236 (D.C. Cir. 1981).

126. 47 U.S.C. § 309 (1994 & Supp. II 1996 & Supp. III 1997)

though its operation terminated Multi-State's long-standing *Ashbacker Radio Corp. v. FCC*¹²⁷ hearing rights.¹²⁸ The court pointed out that:

We note licensees of broadcasting stations acquire no prescriptive right against the subsequent exercise of congressional power under the commerce clause to delete their station to achieve fair geographical distribution of broadcast service. (citation omitted) *A fortiori*, the mere expectations of a license applicant cannot bar the legitimate exercise of such congressional power. As the Supreme Court has advised: "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."¹²⁹

The court added that Congress may redefine the public interest and apply it in pending cases: "Congress elevated the goal of providing unserved states with an operational VHF commercial television station. The Commission merely effected Congressional intent. The fact that the Commission's action frustrated Multi-State's expectations is no basis for finding that the Commission committed constitutional error."¹³⁰

C. Because the Portland Case Was Not Final and the Intervening Legislation Was Clear and Nonretroactive, the 1995 Amendments Had to Be Applied

Applying these principles to the Portland case demonstrates that: (1) Congress clearly indicated that the changes to the public protection provision were meant to apply to pending cases as well as override all other laws, and (2) the 1995 amendments to the PRA neither operate nor were applied retroactively by the FCC. Thus, the FCC was compelled to apply the law in effect at the time of its decision. Congress clearly intended to make section 3512(b) applicable to pending cases. Section 3512(b) became effective on October 1, 1995,¹³¹ and from that day forward, by the terms of the statute, complete relief from penalties based on rules not complying with the 1995 PRA was made explicitly available at any time during an ongoing case—whether it was before an agency or the courts.

Representative Crapo, the sponsor of the bill, and Conference

127. 326 U.S. 327 (1945).

128. *Multi-State Comm., Inc.*, 728 F.2d at 1526; *see also Ashbacker Radio Corp.*, 326 U.S. at 329-30.

129. *Id.* at 1526 n.12; *but see* *Qualcomm Inc. v. FCC*, No. 98-1246, 1999 WL 518838 (D.C. Cir. July 23, 1999).

130. *Multi-State Comm., Inc.*, 728 F.2d at 1526 (citations omitted); *accord* *Hispanic Inf. & Telecomms. Network v. FCC*, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989).

131. *See* Pub. L. No. 104-13, § 4(a), 109 Stat. 185 (1995). There was a specific carve-out for existing regulations which already had an OMB control number as of September 30, 1995. *See id.* at § 4(c).

Manager and Committee Chairman Clinger stated expressly in a colloquy just before unanimous passage that complete relief from 1995 PRA violations was meant to be available in pending cases:

Mr. Crapo. If the gentleman would respond to one more question, I would like to ask, is it the chairman's understanding that section 3512 will become effective as of October 1, 1995, and will apply to all cases then pending before the Federal agencies or the courts?

Mr. Clinger: Mr. Speaker, the gentleman is absolutely correct. As of October 1, 1995, the defense provided in section 3512 is available at any time in an ongoing dispute.¹³²

There was no objection and the House thereafter immediately passed the legislation unanimously.

Both the recodified public protection clause (now section 3512(a)) and the new section 3512(b), which implemented how and when relief can be obtained, are drafted in the broadest possible terms:

Section 3512(a)

Notwithstanding any other provision of law, *no person* shall be subject to *any penalty* for *failing to comply with*" an uncleared "collection of information"

Section 3512(b)

The protection provided by this section may be raised in the form of a *complete defense, bar, or otherwise* at *any time* during the agency *administrative process* or judicial action applicable thereto.¹³³

Similarly, the term "penalty" was defined expansively to include any adverse action by an agency relating to the uncleared rule, including adverse licensing matters. The reuse of the phrase "notwithstanding any other . . . law" from the old Act reemphasized the PRA's availability.¹³⁴ The "at any time" phrase uses similarly broad language and interprets the protection afforded by the notwithstanding provision. There is a well-established canon of construction that statutory provisions are to be construed in light of the company they keep.¹³⁵

132. 141 CONG. REC. H4376 (1995) (statements of Rep. Crapo & Rep. Clinger).

133. 44 U.S.C. § 3512(a)-(b) (Supp. I 1995) (emphasis added).

134. *See, e.g.*, United States v. Gonzales, 520 U.S. 1, 4-5 (1997) (concluding that "any person" means any, whether one or a number); Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18 (1993) (emphasizing that "notwithstanding" is as clear as it gets in terms of legislative drafting and means all other laws are overridden); Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U.S. 282, 287 (1902) (reasoning that a statute allowing court to dismiss suit for lack of jurisdiction "at any time" after it is brought means what it says); Cvelbar v. CBI Ill., Inc., 106 F.3d 1368, 1373 (7th Cir. 1997) (holding that a challenge to subject matter jurisdiction can be raised literally at any time during the case).

135. *See* Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961) (referring to this canon as the principle of *maxim noscitur a sociis*, which means "a word is known by the company

Moreover, the purpose behind adding section 3512(b) was to ensure the public was broadly and clearly protected. Congress created a *complete defense, bar, or otherwise* to protect the public against any imaginable problem which could develop as a result of an uncleared rule.¹³⁶ Representative Clinger emphasized: “most importantly, the conference bill protects the public by providing citizens with a complete legal defense.”¹³⁷ Senator Roth observed that “the topic that captured more time in conference discussion than any other was that of redrafting section 3512, which provides public protection against agency noncompliance with the [PRA].”¹³⁸ He also indicated that the public protection provision was intended to provide unwaivable relief as long as a case is still ongoing:

Since 1980, the act has provided a fundamental protection to every citizen that he or she need not comply with, or respond to, a collection of information if such collection does not display a valid control number given by OMB.

. . . .

Moreover, in section 3512(b) the conferees made clear that the protections of section 3512 may be raised at any time during the life of the matter. The protections cannot be waived. Failure to raise them at any early stage does not preclude later assertion of rights under this section, regardless of any agency or judicial rules to the contrary.¹³⁹

There is no legislative history to support the contention that Congress intended to limit the availability of section 3512(b) relief where a member of the public was the victim of a PRA violation. There simply is no support that Congress intended to limit the availability of section 3512(b) only to cases that began after the October 1, 1995, effective date and not one day before. By section 3512(b)'s plain meaning in context, Congress intended the changes to the public protection provision to apply to pending cases.

Even if it could be argued that Congress's intent was unclear, the FCC's application of new section 3512(b) did not involve genuine retroactivity, and thus the law in effect must be applied. Section 3512(b) does not establish any new standard of conduct. The preexisting statute already deprived the government of authority to render a penalty. The new statute merely clarified that relief is available if the government violated the preexisting OMB clearance requirement. Relief is only available in

it keeps”); *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (concluding that when “in expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy” (citations omitted)).

136. 44 U.S.C. § 3512(a)-(b) (emphasis added).

137. 141 CONG. REC. H4374 (1995) (statement of Rep. Clinger).

138. 141 CONG. REC. S5274 (1995) (statement of Sen. Roth).

139. 141 CONG. REC. S5274-75 (1995) (statement of Sen. Roth).

ongoing cases and, therefore, was properly applied prospectively to eliminate a penalty which had not become final. The statute operates only against the government and not against the previous conduct of other competing parties. Thus, section 3512(b) did nothing to increase the successor licensee's liability for past conduct or to impose on it new duties with respect to past actions. Put another way, the successor's loss of the license was not traceable to application of the statute to its conduct.

It was also contended that even if the rule in question was not primarily retroactive, it was nonetheless secondarily retroactive and therefore invalid. In other words, but for the new statute, the license would not have been lost, even if the statute did not directly apply. The D.C. Circuit, quoting its opinion in *DIRECTV, Inc. v. FCC*,¹⁴⁰ responded:

“Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment or spent his life learning to count cards.”

. . . But we have never treated that sort of “retroactivity” as necessarily violating a separate legal standard. A rule that upsets expectations, as we held in *Bell Atlantic Telephone Co. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996), may be sustained “if it is reasonable,” i.e., if it is not “arbitrary” or “capricious.”¹⁴¹

New section 3512(b) operated prospectively only and did not impair any vested rights. Northeast's grant was not final when Congress amended the 1980 PRA and in fact was predicated on the outcome of PortCell's litigation. Moreover, all applicants signed a waiver of “any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.”¹⁴²

Finally, the change in law here, while outcome determinative, was really nothing more than a clarification of a preexisting statute. The 1980 PRA overrode all other contrary laws in granting no penalty protection to the public. While the new language (e.g., “at any time”) is more specific, it is also consistent in terms of scope. Just before the House unanimously passed the statute, Representative Crapo, the author of section 3512(b), said it was meant to “end any confusion which may exist in the courts and Federal agencies about how section 3512 was originally intended to

140. 110 F.3d 816 (D.C. Cir. 1997).

141. *Id.* at 826 (citations omitted).

142. 47 U.S.C. § 304 (1994).

work.”¹⁴³ He noted the original Act “had always provided the public with the right to petition the agencies or courts for complete relief at any time during the agency or court review process to eliminate the effects of any penalty.”¹⁴⁴ Similarly, the House Report on the 1995 legislation states: “the intended scope, purposes, and requirements of section 3512’s current provisions on public enforcement of the Act’s information collection clearance requirements are *unchanged*. The section is amended, however, for purposes of consistency and clarification.”¹⁴⁵

The D.C. Circuit relied heavily on the override clause, which appears in both the 1980 and 1995 Acts, in its decision. Thus, the only effect of the 1995 statute here is that it made explicit what was always implicit in the 1980 PRA—that the statutory bar on imposing such penalties overrides any legal obstacle to raising the PRA defense in a pending case. Thus, if the court of appeals had the opportunity to review the FCC’s refusal to review PortCell’s PRA claim under the 1980 Act, the Commission’s refusal to confront its PRA violation may very well have been reversed. The intervening amendment merely mooted the need to look back and interpret whether notwithstanding any other law overrode all conflicting laws—substantive and procedural. But, given the broad protective purpose of the original public protection provision as recognized in *Dole v. United Steel Workers*,¹⁴⁶ a court should have interpreted the override as complete even if the 1980 PRA had not been amended.

D. Section 402(h) Was Not an Impediment to Implementing the 1995 PRA

In the instant case, the court was not troubled by Congress’s interjection of a new issue on remand despite section 402(h) of the Communications Act, which provides: “[i]t shall be the duty of the Commission . . . to forthwith give effect [to the court’s judgment], and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.”¹⁴⁷ Section 402(h) was no impediment because the old and new PRA overrode all other laws. Both the court and the FCC agreed that section 402(h) had been trumped by the notwithstanding clause.¹⁴⁸

143. 141 CONG. REC. H4376 (1995) (statement of Rep. Crapo).

144. *Id.*

145. H.R. CONF. REP. NO. 104-99, at 27-28 (1995) (emphasis added).

146. 494 U.S. 26 (1990).

147. 47 U.S.C. § 402(h) (1994 & Supp. II 1996).

148. In the recent *Qualcomm Inc.* case, the court utilized section 402(h) to insulate the case from application of the intervening statute. *Qualcomm Inc. v. FCC*, No. 98-1246, 1999 WL 518838 (D.C. Cir. July 23, 1999). The statute involved, however, had no override

Moreover, nothing in the court's judgment required the agency to revoke PortCell's license and ignore a congressional directive to review a matter never passed on by the court. The court held "that the FCC's waiver decision was arbitrary and capricious because it was not based on any rational waiver policy as required by our decision in *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). . . . Accordingly, we vacate the waiver and remand the case to the agency."¹⁴⁹

The court presumed the legality of the rule and thus assumed that the issue before the Commission on remand would revolve around whether a new waiver of the financial showing would be appropriate. Thus, the court's disqualification language was dicta and merely a warning to the Commission not to come back to the court with another unjustified waiver. The court did not intend to deprive the FCC of authority to comply with an intervening act of Congress that forced it to address the legality of the rule itself under a preexisting statute—a matter never addressed by the court. For example, had it been discovered on remand that the Commission lacked subject matter jurisdiction over the case, the court surely would not have intended for the Commission to ignore that fact.

The discussion at oral argument concerning the scope of the court's earlier opinion and the agency's obligation to follow a congressional enactment was instructive:

The Court: We had never decided this [PRA] issue.

Counsel: No, you did not decide this issue, but under 402(h) of the Communications Act, your instructions to the Commission were required to be decided by the Commission on the pre-existing [sic] record.

The Court: Well, when the Court directed the FCC to resolve the one issue, and on that basis award the license, that was the only issue [i]n the case, and that's the context in which the Court addressed that.

But you are saying that it's somehow impermissible for the Congress to pass a law that creates another issue because the Court has said when there is only one issue, dispose of the case on this basis?

Counsel: Well, Your Honor, it's not—

The Court: Could . . . Congress have abolished the FCC or would that be a violation of our mandate because they hadn't yet resolved this question?¹⁵⁰

Thus, the Commission's decision to comply with an act of Congress did not require the Commission to disregard the judgment of the court. In

proviso. *See id.*

149. *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1165 (D.C. Cir. 1990).

150. Transcript of Proceedings at 7-9, *Saco River, Inc. v. FCC*, 133 F.3d 25 (D.C. Cir. 1998) (No. 91-1248).

fact, the FCC carried out the court's directive by reviewing the information and deciding not to rewaive the rule. The intervening Act commanded the agency, notwithstanding any other law, to address an assumption underlying the court's ruling—the enforceability of the rule in question. The ultimate result may not have been what the court contemplated on remand, but it conformed to the law in effect at the time the FCC finally decided the case.

In reality, it is not at all clear how much section 402(h) confines the FCC during a remand proceeding where the court directs the agency to take certain actions and the intervening statute has no override provision (or is otherwise unclear as to its impact on pending cases). The enactment of section 402(h) was in reaction to an FCC decision allowing new applicants to file for a broadcast station after a limited remand, even though they had missed the original cutoff period and a Supreme Court affirmance. The FCC's decision was made after the court merely reversed an earlier FCC decision denying the application of a timely filed applicant, Pottsville Broadcasting Company, for a broadcast station. On review again, the D.C. Circuit struck down the FCC action stating:

When . . . the [FCC] decision . . . is reversed and the cause remanded for proceedings in accordance with our opinion order, it is the duty of the Commission to comply with that order and, unless for some exceptional reason it obtains leave of this court to reopen the case, to reconsider the matter on the record and in light of this court's opinion.¹⁵¹

The Supreme Court, however, reversed.¹⁵² It recognized that the lower court had applied the long-standing doctrine that lower courts are bound to respect the mandate of an appellate court to an administrative agency. Herein lies the problem. The Supreme Court viewed the FCC not as an inferior court, but as an organization outside the judicial branch governed by a broader charter (the public interest) than the lower courts. It reasoned that under the Radio Act of 1927¹⁵³, the court of appeals was authorized to "alter or revise the [Radio Commission's] decision appealed from and enter such judgment as it may seem just."¹⁵⁴ The Communications Act of 1934, however, took away the court of appeals' authority as "a superior and revising agency" and limited the court to a purely judicial review function.¹⁵⁵ Thus, courts may correct errors of law and, on remand, the FCC

151. Pottsville Brdcast. Co. v. FCC, 105 F.2d 36, 40-41 (D.C. Cir. 1939).

152. See FCC v. Pottsville Brdcast. Co., 309 U.S. 134 (1940).

153. Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927) (repealed 1934 & 1966).

154. *Id.* at 144.

155. 47 U.S.C. § 402 (1994 & Supp. II 1996). The adoption of the Administrative Procedure Act also limited the scope of the court's review. See 5 U.S.C. § 706 (1994).

is bound to act on the correction.¹⁵⁶ However, “an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.”¹⁵⁷ The court found, therefore, that once the Commission dealt with the improvident dismissal, it was free to allow others to file and be comparatively heard.

In 1952, responding to the unfairness of the comparative hearing result in *Pottsville*, Congress enacted section 402(h), which closely resembles the mandate rule enunciated by the lower court.¹⁵⁸ The Senate Report stated that “[s]ubsection (h) contains provisions which are intended to confer upon the appellate court a measure of control commensurate with the dignity and responsibility of that tribunal, requiring the Commission to give effect to the judgment of the court in the absence of proceeding to review.”¹⁵⁹

The Federal Communications Bar Association stated that the “amendment . . . is to cure the situation which arose out of *Pottsville*.”¹⁶⁰ The Chairman of the FCC testified that the Commission was “disturbed by a provision of subsection (h) that “would repeal the rule of the Supreme Court in . . . *Pottsville*” because “it would deprive the Commission of the power to make a new determination in a proceeding, after a reversal upon appeal,” that, “while still adhering to the judgment of the court, would . . . better serve the public interest than a decision based solely upon the cold record of the earlier Commission proceeding.”¹⁶¹

Despite the enactment of section 402(h), in *Greater Boston Television Corp. v. FCC*,¹⁶² the court expressly followed the Supreme Court’s analysis in *Pottsville* of the relationship between the Court and the FCC: “Under *Pottsville* . . . it is our function as an appellate court—exercising both supervisory power and responsibility of restraint—to consider what lies within the agency’s jurisdiction, and to avoid interference with the public

156. See *Qualcomm Inc. v. FCC*, No. 98-1246, 1999 WL 518838 (D.C. Cir. July 23, 1999).

157. *Pottsville Brdcast. Co.*, 309 U.S. at 145.

158. See 47 U.S.C. § 402(h) (1994 & Supp. II 1996).

159. S. REP. NO. 44, at 12 (1951).

160. *To Amend the Communications Act of 1934: Hearings of S. 1333 Before the Subcomm. on Interstate and Forcing Commerce*, 80th Cong. 87 (1947).

161. *House Commerce Committee: Hearings on S. 658*, 82nd Cong. 103 (1951). Ironically, *Pottsville* is still widely cited today to demonstrate the great procedural latitude of the Commission under the public interest standard.

162. 462 F.2d 268 (D.C. Cir. 1971).

interest as defined by Congress.”¹⁶³ Moreover, despite the language of section 402(h), in *Eastern Carolinas Broadcasting Co. v. FCC*,¹⁶⁴ the court reversed the FCC’s refusal to update the record, even though the FCC based their refusal on section 402(h).¹⁶⁵ Again, however, in the recent *Qualcomm* case, the court utilized section 402(h) to confine agency discretion in the face of a tightly worded remand and reversed the FCC’s implementation of the intervening statute.¹⁶⁶

To be sure, the agency must follow the court’s ruling under section 402(h) and the mandate rule.¹⁶⁷ In fact, had the FCC petitioned the court to follow the 1995 PRA amendments on remand, the court would have been forced to grant the petition. Section 402(h) does not require blind adherence in the face of a dispositive change in law overriding all other laws and interjecting a new issue never ruled on by the court. Even if the FCC’s relationship with a reviewing court were coequal with that of a lower court, the result would be the same. Lower courts are, of course, bound by law to follow the reversal and remand by a higher court, unless there is an intervening decisional change in law by Congress or higher courts.

E. Once It Was Clear the FCC Had to Decide Whether It Had Complied with the PRA, the Outcome Was Foreordained

Consistent with the OMB opinion letters filed with the FCC in other cases involving financial showing requirements, the Commission found here that: (1) the requirement to obtain and submit a firm financial commitment letter involved an agency request for a collection of information and thus was subject to OMB clearance under the 1995 PRA; (2) at the time PortCell was required to make the showing under the rule, the Commission had not obtained the required OMB control number; and (3) therefore, the Commission had no authority to penalize PortCell for noncompliance.

163. *Id.* at 281, 291.

164. 762 F.2d 95 (D.C. Cir. 1985).

165. *See id.* at 99, 101.

166. *See Qualcomm Inc. v. FCC*, No. 98-1246, 1999 WL 518838 (D.C. Cir. July 23, 1999).

167. *See City of Cleveland v. Federal Power Comm’n*, 561 F.2d 344, 346 (D.C. Cir. 1977) (subjecting administrative agencies to the mandate rule). Section 402(h) may very well have been a response by Congress to subject the FCC to the mandate rule, which governs the action of lower courts on remand, but even the mandate rule has its exceptions. *See Banco de Cuba v. Farr*, 383 F.2d 166, 183 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968) (upholding the lower court’s action based on Congress’s authority to change the decisional criteria, even though the lower court’s decision to apply a new law passed by Congress conflicted with a prior Supreme Court ruling in the case).

On the issue of PRA compliance, the FCC's determination was due some deference, but the court never had to reach that point. Although the PRA is not within the agency's usual expertise, the OMB, the organization charged with implementation of the PRA, designated the FCC as the one agency with demonstrated capabilities in the area of PRA compliance. Moreover, the Commission's determination that section 22.917(b) was subject to the 1995 PRA clearance was in part based on OMB's determination in preceding cases that analogous financial showing requirements were subject to the 1995 PRA.

Northeast argued that the 1995 PRA has no application here because PortCell was not really penalized for failing to comply with the collection of information required by section 22.917(b). Rather, by actually attempting to comply with the rule, it was argued that PortCell demonstrated that it was financially unqualified separate and apart from its violation of the rule. In other words, the 1995 PRA only insulates a party from a violation of the rule requiring the collection of information, but the information filed can be used to prosecute for collateral misconduct—fraud, misrepresentation, etc. Indeed, one court has noted that “[section] 3512 certainly protects against nonfeasance and may even protect against misfeasance. It does not, however, protect against malfeasance.”¹⁶⁸

This argument failed to recognize, however, that the substantive and procedural requirements of section 22.917(b) are conceptually indistinguishable.¹⁶⁹ Under section 22.917(b), the FCC merged the substantive financial commitment and the procedural information requirement. It reduced the financial qualification issue to whether an applicant had obtained a firm financial commitment—a clear collection of information subject to PRA clearance. Without question, the FCC has discretion to reduce financial qualifications to such a “go-no go” test rather than hold hearings or require other types of proof. In section 308(b) of the Communications Act of 1934, the FCC may adopt whatever rules it deems necessary with regard to the financial qualifications of an applicant.¹⁷⁰ The court held that this discretion is absolute and would even allow the agency

168. *United States v. Matsumoto*, 756 F. Supp. 1361, 1365 (D. Haw. 1991); *see also* *United States v. Sasser*, 974 F.2d 1544 (10th Cir. 1992) (denying section 3512 protection to a defendant who had knowingly filed false information); *United States v. Weiss*, 914 F.2d 1514, 1522 (2d Cir. 1990) (holding that “it is no defense to a charge of filing false statements that the government document that prescribed the details of filing had not been approved by the Director of the [OMB]”).

169. *See* Final Brief for Northeast Cellular Tel. Co., L.P., *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25 (D.C. Cir. 1998) (No. 91-1248).

170. *See* 47 U.S.C. § 308(b) (1994).

to adopt no financial or other requirements.¹⁷¹

Nonetheless, it was argued that the no penalty protection of the 1995 PRA was limited to PortCell's failure to demonstrate that it had a firm financial commitment and not to its failure to substantially obtain the commitment. To demonstrate, the following analogy was offered:

[S]uppose that an FCC rule, which was not cleared with OMB, required that cellular licensees both build eight-foot fences around their transmitters and (without OMB clearance) submit as-built drawings showing compliance, and suppose that PortCell filed drawings showing that it had built a two-foot fence. The FCC would clearly be entitled to enforce the substantive rule.¹⁷²

Under this "fence analogy," two separate regulatory requirements are at issue: (1) the actual drawings of the fence and (2) the requirement to build the fence. Here, however, there was only one unified requirement—to obtain a firm financial commitment letter and submit it. Section 22.917(b) is a unitary requirement in which an applicant must obtain and demonstrate the fact that it has obtained by submitting the commitment letter.¹⁷³ The fence analogy fits well in the fraud-feasor context,¹⁷⁴ but fails in the context of section 22.917(b). A more apt analogy might be to a rule which lacks OMB clearance, but requires applicants to submit a supply contract prior to building a fence. If the applicant fails to obtain the contract but builds the fence, the 1995 PRA would prevent the agency from enforcing the rule. The rule falls squarely within the scope of the 1995 PRA because the procedural and substantive information requirements are merged.

Even if obtaining and submitting were separate requirements, however, they would both constitute collections of information subject to the 1995 PRA. The 1995 PRA covers both "direct" collections of information—those that must be sent to an agency—and "indirect" collections of information—those that "do not require records to be sent to the agency [and] require only that records be kept on hand for possible examination as part of a compliance review."¹⁷⁵

171. See *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 645 (D.C. Cir.), *cert. denied*, 425 U.S. 922 (1976).

172. Final Brief for Northeast Cellular Tel. Co., L.P. at 30-31, *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25 (D.C. Cir. 1998) (No. 91-1248).

173. See *Action Alliance of Senior Citizens v. Sullivan*, 930 F.2d 77, 80 (D.C. Cir. 1991). An interesting question is raised as to the breadth of 1980 PRA protection where someone knowingly files false information pursuant to an invalid collection. For instance, can someone engage in tax fraud pursuant to an uncleared tax form? The issue may very well revolve around whether the collateral liability merges in the invalid collection requirement or can be separated therefrom.

174. See, e.g., *United States v. Sasser*, 974 F.2d 1544 (1992); *United States v. Matsumoto*, 756 F. Supp. 1361 (1991); *United States v. Weiss*, 914 F.2d 1514 (1990).

175. *Dole v. Steelworkers*, 494 U.S. 26, 33 n.4 (1990).

It was also argued that the section 22.917(b) showing was in essence imposed by statute and thus exempt from OMB clearance under the OMB rules and case law. Again, section 308(b), however, is permissive by its terms and provides open-ended authority to develop rules according to whatever the FCC decides is in the public interest. The section states that: “the Commission by regulation *may* prescribe as to the . . . financial . . . qualifications of the applicant to operate the station.”¹⁷⁶ The Commission is thus given discretion to decide whether and how an applicant will demonstrate its financial qualification. To underscore the point, in *National Association of Regulatory Utility Commissioners v. FCC*,¹⁷⁷ the court found that section 308(b):

[L]eaves it within the discretion of the Commission to decide which facts relating to such factors it wished to have set forth in applications. Since this leaves the Commission free to have no facts set forth on any of these matters, if it finds such action appropriate, it follows necessarily that the Commission is not required to consider financial fitness if it deems it irrelevant to its regulatory scheme.¹⁷⁸

In any event, statutorily compelled information requirements, which are reduced to regulations, must be submitted to OMB prior to enforcement.¹⁷⁹

IV. CONCLUSION

In sum, while the facts of this case are tortured, the result was constitutionally compelled. When Congress has legislated clearly and there are no impermissible retroactive consequences, the courts must apply the law in effect at the time of their decision. Within this framework, the agency had no discretion but to give effect to the 1995 PRA amendments. Congress clearly indicated the intervening law applied to pending cases and overrode all other laws. In any event, the 1995 PRA operated prospectively in the context in which it was applied because the case was not final.

The Supreme Court’s approach to deciding whether to implement legislative changes can be summarized as follows:

1. Has there been a *final judgment* by the courts? In other words, have all appeals and judicial proceedings that could affect the result in the case been exhausted or foregone when the legislation went into effect?

176. 47 U.S.C. § 308(b) (1994) (emphasis added).

177. 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 922 (1976).

178. *Id.* at 645.

179. *See* 5 C.F.R. § 1320.5(e)(1) (1999) (stating that OMB will clear all regulations implementing statutorily required collections).

If *yes*, the Separation of Powers doctrine prevents Congress from legislating a change to the judgment.

If *no*, Congress may change the law to be applied at the time of decision.

2. Where there is an intervening legislative change in an active case, the threshold issue is whether Congress *clearly indicated the temporal reach* of the statute.

If *yes*, the statute must be applied by the Courts—even if application has retroactive consequences.

If *no*, the following judicial default principles apply.

3. Although not the exclusive test, would application of the new statute have *retroactive effect* by attaching new legal consequences to events completed before its enactment, *i.e.* would the statute *impair rights* a party possessed when he acted, *increase a party's liability* for past conduct, or impose new duties with respect to transactions already completed?

If *yes*, the traditional presumption against retroactive application of law applies.

If *no*, the statute's application is not impermissibly retroactive.

Recent opinions appear to demonstrate that where a new statute's application to an ongoing case would result in impermissible retroactivity, courts are more likely to require the words of the statute to reflect Congress's retroactive intent before applying the intervening law.