



## U.S. ADMINISTRATIVE LAW eJOURNAL

Vol. 11, No. 64: Nov 16, 2022

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## U.S. ADMINISTRATIVE LAW eJOURNAL

### "The Common Law Initiative: Congressional Review of Judge-Made Law - A Progress Report"

**JIM J. TOZZI**, Center for Regulatory Effectiveness

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Over the past fifty years considerable progress has been made in developing a process whereby the President could review the actions of the regulatory agencies. Recognizing a lack of comparable progress dealing with Congressional oversight of the courts, the Common Law Initiative is a formative step to fill this void. This report is a summary of the multiyear and ongoing program of the Center for Regulatory Effectiveness to implement the Common Law Initiative. Public comments: <https://www.thecre.com/forum8/?p=7644>

### "The Foreign Affairs Function and the APA"

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Federal agency rulemaking is governed by the requirements of the Administrative Procedure Act (APA), which mainly requires public notice-and-comment and a delayed effective date. Sometimes that can be a fast process; other times it can take months or even years. However, a longstanding exception to those APA requirements called the "foreign affairs function"

allows qualifying regulations to be immediately issued and effective. But as agencies have increasingly used this exception, its use has been increasingly challenged by litigants. Between these growing disputes, and with little history and context to guide them, courts have been confused as to what qualifies under the exception. And an intra- and inter-circuit split is slowly emerging over the meaning of "foreign affairs." But history and context for this exception does exist. This article uniquely traces its previously unknown origins over a ten-year history to illuminate its source, development, and contemporaneous understandings.

## "Regime Change"

*Harvard Law Review, Vol. 135, No. 1, p. 1, 2021*

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In this Foreword, I take October Term 2020 — a Term of transition — as an occasion to explore both the processes and the promise of what I will call regime change, or the replacement within the executive branch of one set of constitutional, interpretive, philosophical, and policy commitments with another. Given the occasion, I focus on the role of law, legal argument, and the courts in enabling or thwarting regime change and the democratic evolution it represents. Indeed, our current political transition confronts us with a central tension of our legal order, between a judicial and legal culture that valorizes stability and custom using language and concepts that sound in rule of law, and the democratic imperative that our institutions help effectuate rather than impede the political will reflected in election results.

My basic claim will be that we ought not rush to treat disruption and change as shocks or aberrations that must be rigorously explained. Shifts in legal argument should not be met with skepticism, and they often should be credited as legitimate reinterpretations of law that, in turn, will help give rise to a new political regime. More generally, we should regard rapid evolution in legal interpretation and corresponding policy development as things to be valued, enabled, and pursued. Valuing and pursuing these forms of change are justified, ultimately, because they help to sustain a connection between government and democratic politics. This connection should lead us to identify and then think twice about legal doctrines, institutional features, and modes of argument that slow transitions and transformations down, either intentionally or in service of objectives laudable on their face. We should be wary of the turn to legalisms that purport to advance the rule of law but that in fact inhibit the evolution of our political order. Moments of transition, such as the one through which we are living, can help to reveal how the concept of the rule of law forms part of an agonistic struggle perpetuated not just by courts, but also by political actors. The concept provides a ready-made vocabulary, well rooted in our legal culture, that serves important values but that can also be employed to stifle democratic development.

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Editor: **William F. Funk**, *Lewis & Clark Law School*

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