

The Regulatory State's Due Process Deficits

*Nine Case Studies Highlight the Most
Common Agency Failings*

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PACIFIC LEGAL
FOUNDATION

To paraphrase Thomas Jefferson, governments exist to protect our rights to life, liberty, and the pursuit of happiness. Unfortunately, government regulators—who control vast swaths of American life—often lose sight of this basic truth.

Federal bureaucracies are designed and driven to pursue their narrow missions, be it regulating education, economic activity, or the environment. Even if well-intentioned, agencies' myopic focus on their own regulations, policies, and objectives, as well as the documented tendency of bureaucracies to expand their own power and personnel, leads them to give short shrift to the fundamental value of individual liberty—as many Pacific Legal Foundation (PLF) clients can attest.

The erosion of the Constitution's separation of powers in favor of the regulatory state may be the greatest threat to our liberty today. Rather than our elected representatives in Congress writing the laws that bind us, seemingly unlimited power to write and enforce regulations has been delegated to and is wielded by obscure and unaccountable bureaucrats. Rather than courts serving as the neutral protector of our rights when these bureaucracies question or challenge our behavior, the judiciary places a heavy thumb on the scales of justice in favor of the overreaching agencies.

The essential role of due process under a rule of law.

This report focuses on a critical aspect of the problem: the lack of constitutionally required due process in agency regulation and enforcement. Since the days of Magna

Carta, the rule of law has been understood to encompass basic procedural protections against arbitrary and abusive government power. In our Constitution, this principal is reflected in the Fifth Amendment's guarantee that no one can be deprived of life, liberty, or property "without due process of law." The Due Process Clause is a cornerstone of our Bill of Rights, the promise of which was essential to the ratification of the Constitution itself.

This Due Process Clause incorporates several protections to ensure that government power is exercised only through lawful means. Government must provide reasonable notice of what the rules are, so that citizens can know and follow them. When government seeks to punish, it must give fair notice of the charges and the evidence supporting them. Cases must be decided solely based on reliable evidence and the defendant must be given an opportunity to contest the evidence against him. The government bears the burden of proving alleged wrongdoing—the citizen must always be presumed innocent. Available punishments must be proportional to the alleged wrong, rather than arbitrarily severe to coerce defendants. Cases must be decided by an independent and neutral judge. And government power must be exercised only through means that preserve democratic accountability.

The White House’s request for information on agency due process violations.

In late January 2020, the Office of Management and Budget (OMB) requested information from the public on whether agency investigations, enforcement actions, and agency appeal procedures violate due process. OMB also sought ideas to reform regulatory enforcement and adjudication procedures to better comply with the Constitution’s due process guarantees. On March 16, 2020, PLF submitted a 46-page response to those requests.¹

The report that follows provides a brief introduction to the many ways federal administrative agencies fail to honor the nation’s most important due process principles. Through nine PLF cases, it describes how these “due process deficits” impact the lives of Americans every day. We show that agencies fail to give fair notice to enforcement targets, use unfair rules of evidence, threaten unreasonable and coercive penalties, delay or deny access to courts, and—ultimately—evade democratic accountability.

1. Lack of Fair Notice

- Agencies don’t provide notice of the scope or content of investigations.
- Agencies exercise overlapping power and make inconsistent demands on investigation subjects.

2. Unfair Rules of Evidence

- Agencies use biased and unreliable evidence.
- Agencies withhold exculpatory evidence.
- Agencies presume guilt rather than bearing the burden of proof.

3. Unreasonable and Coercive Penalties Threatened

- Agencies threaten excessive penalties to coerce people into settlements

4. Delaying and Denying Access to Courts

- Cases are tried before biased agency adjudicators rather than independent courts.

5. Evading Democratic Accountability

- Rules are issued by mere agency employees, rather than properly appointed officers overseen by the President.

¹ Pacific Legal Foundation, Improving and Reforming Regulatory Enforcement and Adjudication, Comment on FR Doc 2020-01632, available at <https://www.regulations.gov/document?D=OMB-2019-0006-1358>.

The path forward.

Recognizing the problem is only the first step, but it is a crucial one. The case studies that follow make the case that reform is desperately needed and explain the real-world consequences of regulatory agencies' failure to abide by our due process guarantees. PLF's earlier submission to OMB included a set of concrete proposals to restore due process and the separation of powers to their rightful place as constraints on government power, and we'll expand on those reforms for the public in a later report.

PLF is dedicated to protecting ordinary Americans against the arbitrary and unjust exercise of government power. While the cases that follow highlight the seriousness of the problem we face, we are optimistic. The tide is turning against the unconstitutional regulatory state, as shown by the increased frequency that courts, scholars, and the public question its underpinnings. This report is an important part of a larger effort to restore all the Constitution's guarantees for liberty.

Sackett v. EPA

Priest Lake, located in the panhandle of northern Idaho, is billed in advertising copy as the state’s “crown jewel.” The metaphor is apt—like a jewel, the lake is a thing of rare beauty. It’s the type of place, a tableau of deep blue waters and verdant evergreens surrounded by white-capped mountains and clear skies, where one could easily dream of putting down roots and never leaving.

That was certainly Mike and Chantell Sackett’s plan when they invested \$23,000 to buy a home lot in a subdivision near Priest Lake in 2005. Their desires for the half-acre residential lot were modest—a simple three-bedroom family home with a deck and windows from which they could look out toward the lake and forest. For these owners of a small contracting business, it would be the home they had long dreamed of.



Chantell and Mike Sackett on the steps of the U.S. Supreme Court

Due Process Deficits

- *Lack of Fair Notice*
- *Unreasonable and coercive penalties threatened*
- *Delaying and denying access to courts*

But plans can go astray, as happened in this case when enforcement officials from the U.S. Environmental Protection Agency (EPA) arrived on the scene in 2007. Just as the Sacketts broke ground on their dream homesite to level the ground, EPA officials ordered them to shut down the construction process before any building could even begin. They claimed the property was a federally protected wetland under federal jurisdiction and threatened the Sacketts with hefty fines if they continued to develop the property.

It’s important to explain that the Sacketts’ land was not some piece of untouched, pristine wilderness—their lot was located in a mostly developed residential subdivision, with water and sewer hook-ups at the ready and other homes already built nearby. Yet the Sacketts found themselves locked in a Kafka-esque battle with the EPA over their right to develop their lot, while neighboring houses were a stone’s throw away.

The Sacketts repeatedly requested a written explanation for the federal assertion of control over their lot and finally received it—seven months later. According to the EPA’s compliance order, the Sacketts had violated the Clean Water Act, as the officials believed their lot to be a federally regulated “navigable water” over which the agency had legal authority. The Sacketts were baffled since their lot had no identified hydrologic connection to any body of water.

The compliance order prohibited the Sacketts from building their home, demanded costly restoration for the land, and required a three-year monitoring program during which the property must be left untouched. Should they fail to comply, the Sacketts were informed, they would be liable for civil penalties of up to \$75,000 per day and possible criminal sanctions. That’s right—a single day’s fines could have been more than three times what they had paid for the property in the first place.

The Sacketts disputed the presence of wetlands on their lot. Meanwhile, the EPA provided them with no proof of any violation and no opportunity to contest its claims.

Represented by PLF, the Sacketts sued the EPA, claiming the agency had denied them their constitutional right to due process. Ultimately, their case found its way to the Supreme Court of the United States, where the justices unanimously concluded that the Sacketts had a right to contest the EPA’s jurisdictional claim in a court of law. Still the case dragged on through the courts, until recently, when the Sacketts

finally got a break in March 2020.

After more than 12 years fighting in court, the EPA withdrew its compliance order against the Sacketts, removing the threat of crushing fines—which, to be sure, by now would have run well into the hundreds of millions of dollars. However, it is unclear at this writing if their property remains subject to the EPA’s jurisdiction and if they can actually build anything on the property. PLF has asked the U.S. Court of Appeals for the Ninth Circuit to clarify this. That appeal is still pending.



One hopes justice will prevail and the Sacketts get the chance to build their dream home soon—after what federal regulators put them through, they deserve the right to some peace of mind, and a right to at last enjoy their views of the lake and mountains. They fought hard for those rights, for far too long.

Due Process Deficits

The Sacketts' case presents three due process deficits. First, agency compliance orders threaten catastrophic financial penalties and often require landowners to pursue immediate costly mitigation measures without providing notice of an investigation or an opportunity to contest the basis for such orders prior to issuance. To remedy this deficiency, PLF recently submitted a petition for rulemaking on behalf of the Sacketts, proposing that the EPA establish notice-and-hearing procedures before a compliance order may issue under Section 309(a) of the Clean Water Act.² This would ensure landowners are given an opportunity to present their side, offer evidence, and demonstrate that a compliance order is not warranted.

Second, the government sought to deny their access to an Article III court to review the EPA's claim of jurisdiction over their property, arguing that the compliance order was not a final agency action subject to review by courts. The Supreme Court resoundingly agreed with the Sacketts. Permitting swift judicial review would reduce the uncertainty and costs faced by

Americans simply trying to pursue their livelihoods and enjoy their property.

Finally, the Sacketts were subject to crushing "runaway" fines. To ensure greater transparency in penalty enforcement, agencies with the authority to issue fines should publish tables identifying classes of common de minimis violations. These tables should identify the maximum administrative penalty and under what circumstances it may be sought. This would ensure potential agency targets like the Sacketts are provided adequate notice of the penalties to which they may be subject and that arbitrary penalties aren't threatened or collected. Further, when a violation is minor and thus ineligible for criminal prosecution or harsh civil penalties, the tables should limit the imposition of daily accrued penalties for the duration of a violation. Such penalties for minor infractions should not accrue daily, especially when the citizen is contesting the validity of the agency determination and there is no concrete, additional harm from his not bending immediately to the agency's will.

² Petition for Rulemaking to Establish Notice and Hearing Procedures for Compliance Orders Issued Under Section 309(a) of the Clean Water Act (Jan. 10, 2020), <https://pacificlegal.org/wp-content/uploads/2020/05/PLF-Petition-for-Rule-Making-for-Procedures-to-Govern-CWA-Compliance-Orders.pdf>.

Johnson v. EPA

The pond that Andy Johnson and his wife set out to build for their livestock on their Wyoming property was a win-win project, designed to meet the family's needs while improving the environment. Drawing upon a stream that crossed the Johnsons' property, the project would provide fresh water for the family's cattle and horses, while creating habitat for fish and wildlife.

So naturally, it was a project that needed to be crushed, at least that's what U.S. Environmental Protection Agency (EPA) regulators appear to have reasoned. They subjected the Johnsons to heavy-handed harassment and threatened punishing fines totaling some \$20 million. Ultimately, the Johnsons won and the EPA lost—but the case stands as an object lesson in how aggressively federal regulators will pursue the smallest targets, even when it's the

Due Process Deficits

- *Unfair rules of evidence*
- *Unreasonable and coercive penalties threatened*

regulators who are in the wrong, and the unfair tactics they will employ if they aren't checked by others.

It began in 2012, when Johnson dammed a small stream on his property to build a stock pond. He had consulted with state engineers, who surveyed his land and helped him to secure a state permit for the project. Wyoming state personnel were helpful, respectful, and supportive, in stark contrast to the federal regulators who



Andy Johnson walking past his stock pond

were confrontational and bullying—suggesting that at least some regulators know how to take a constructive, collaborative approach when dealing with taxpaying property owners.

But in 2014, after the project was complete, the EPA hit Johnson with a compliance order, accusing him of violating the federal Clean Water Act, and demanding that he remove the pond and restore the property to its original state. Failure to comply, the EPA noted, would bring criminal charges and fines of \$37,500 per day.

Most property owners might have been cowed by such threats—but the Johnsons are not most property owners. They contacted elected officials, secured legal counsel, and prepared to fight back in defense of their property and their rights.

The Johnsons, represented by PLF, filed a federal suit to challenge the EPA’s compliance order in 2015. PLF’s defense of the Johnsons hinged on two arguments that were difficult for the EPA to refute. First, the Clean Water Act expressly exempts the construction of stock ponds. Second, under Supreme Court precedent, the federal government can only regulate waters with a continuous surface water connection to, or that have a “significant nexus” to, navigable waters. The stream in which Johnson constructed the stock pond drains to a man-made irrigation ditch, where the water is used for agriculture, and has no connection to any navigable water source.

An even greater embarrassment for the EPA emerged when it came to light that agency officials had not verified where the water in the Johnsons’ pond flowed. The agency turned the family’s life upside down because an enforcement official assumed the pond was connected to a navigable river several hundred miles away based on a review of Google Maps. But critical segments of the alleged connection flowed the opposite direction that the official had arbitrarily assumed. Had the Johnsons not fought back, this error might never have been discovered.

Faced with the prospect of defending the indefensible in court, and adverse publicity from the suit, the EPA agreed to settle. The Johnson family, though reasonably confident they would prevail in court, had already spent years under the cloud of this prosecution and could not bear more years of uncertainty during the litigation.

Under the settlement, the Johnsons’ pond remains in place. They didn’t pay any fines or concede any federal jurisdiction over



Andy Johnson and attorney Jonathan Wood

the pond. They agreed to further improve on the pond's environmental benefits in exchange for the government's agreement not to pursue any further enforcement actions based on the pond's construction.

As a happy coda to the story: President Donald Trump invited the Johnson family to the White House in October 2019 to witness the signing of two executive orders aimed at reining in regulatory enforcement abuses. Andy Johnson told his story at the signing ceremony, which was a tremendous honor after what his family had endured from EPA officials. But the even greater satisfaction comes from having stood up against the bureaucrats and winning—and the stock pond is still there to prove it happened.

Due Process Deficits

Andy Johnson's case demonstrates two due process deficits. First, the EPA based its compliance order on arbitrary assumptions and unreliable evidence. And it withheld this evidence from Johnson until the order was challenged in court. To avoid unfairly targeting innocent landowners and wasting agency resources, agencies should act only on the basis of reliable evidence, promptly notify people of the evidence relied on by the agency, and give enforcement targets a fair opportunity to contest that evidence.

Second, the case also demonstrates how agencies attempt to use the threat of excessive penalties to coerce people into submitting to agency demands. For constructing an environmentally beneficial livestock pond, the EPA threatened Johnson with up to \$20 million in potential

finances. Although he refused to be coerced, few would have the courage to fight the government at the risk of financial ruin. Agencies should limit penalties to amounts proportional to the alleged violation, so that Americans cannot be coerced into giving up their due process rights.

Robertson v. United States

Joe Robertson of Montana was a patriot. A disabled military veteran, he could be seen to the end of his days proudly sporting a U.S. Navy cap in tribute to the service and country he so loved—which makes the treatment the septuagenarian Robertson suffered at the hands of federal regulators in his final years all the more appalling. When he died in March 2019, he was an ex-convict, having completed an 18-month federal prison sentence just months before, and faced tens of thousands of dollars in penalties for supposed violations of the Clean Water Act—all for digging a few ponds near his home in the Montana woods. Justice for Robertson would only come after he had passed away.

Robertson lived with his wife Carri near Basin, Montana, a one-time mining camp halfway between Butte and Helena that now serves as an artists' retreat. The

Due Process Deficit

- *Unreasonable and coercive penalties threatened*

Robertsons' land was in the woods outside town, in an area prone to fires. To protect his home, Joe Robertson dug ponds in the path of a small mountain water channel, ponds that could supply the water necessary to suppress future fires.

But the U.S. Environmental Protection Agency (EPA) declared that channel a "navigable water" subject to regulation under the Clean Water Act. Never mind that the channel—through which flowed a trickle of water roughly equivalent to the volume of a couple of garden hoses—was 40 miles from the nearest navigable river. Accusing Robertson of discharging pollutants without a permit into waters



Joe Robertson

under their control, EPA officials pursued the then-77-year-old Navy veteran with a level of zeal that could only be described as vindictive and disproportionate. The government brought criminal charges against Robertson, and in 2016, a jury found him guilty. He was sent to prison for 18 months and ordered to pay \$130,000 in restitution. The U.S. Court of Appeals for the Ninth Circuit upheld the conviction.

Robertson, represented by PLF, asked the Supreme Court to overturn his conviction, arguing that the Clean Water Act's failure to adequately define "navigable waters" is unconstitutional. When Robertson passed away in March 2019, PLF asked that his widow, Carri, be allowed to stand in his shoes. She wanted to carry on the fight to overturn her late husband's unconstitutional conviction and to reverse the fine that would almost certainly mean financial ruin.

On April 15, 2019, the Supreme Court granted Robertson's petition, vacated the Ninth Circuit's ruling, and ordered the Ninth Circuit to confirm whether his estate could contest the fine. The Ninth Circuit threw out the unjust conviction and fine in July 2019, and even ordered the return of the \$1,250 in restitution to Carri Robertson. There's a bitter irony in the fact that Joe Robertson's case title at the Supreme Court—*Robertson v. United States of America*—pitted him against the country that he loved so deeply and had served so honorably in the U.S. Navy. But Joe was willing to fight to defend his constitutional rights as an American citizen, and ultimately, he received justice—even if that justice came too late for him to appreciate.

Due Process Deficit

Robertson's case demonstrates one due process deficit—that ordinary and harmless conduct should not be the basis for criminal prosecution and crushing fines. Clean Water Act prohibitions have been interpreted so broadly that ordinary and innocent activities—like Robertson's digging a few ponds—can result in the imposition of tremendous penalties and even imprisonment. This is incompatible with a system that values due process, fairness, and the rule of law. The EPA should, at a minimum, issue regulations requiring that, for large civil or criminal penalties to be sought for a Clean Water Act violation, the offending conduct must constitute a common law (public or private) nuisance. If the nuisance standard is not met, then enforcement should be strictly limited to appropriately minor administrative penalties or remedial orders.

Across the federal government, agencies should ensure that criminal prohibitions and civil penalty provisions are not employed to punish ordinary and normal conduct of otherwise law-abiding citizens. Thus, agencies should declare by regulation that, for a criminal prosecution to occur or for a civil penalty greater than \$5,000 to be threatened or imposed, the offending conduct must have been deliberate and actually directed at a specified prohibited outcome.

Hawkes v. U.S. Army Corps of Engineers

When Kevin Pierce set out to harvest peat from a 530-acre plot of Minnesota land leased by his company in 2006, he had little idea what kind of ordeal the federal government would put him through. In the years that followed, he would wrestle with a series of encounters with hostile federal regulators, questionable regulatory judgments, and a seemingly endless string of court filings and appeals. He would



Kevin Pierce

Due Process Deficits

- *Unreasonable and coercive penalties threatened*
- *Delaying and denying access to courts*

emerge victorious in 2017, but only after a favorable decision at the Supreme Court of the United States.

“We’re roughly 11 years from the time we started until we got our machinery in the field,” Pierce pointed out later, looking back on the case.

It was an awful lot for a small business owner to endure. And all Pierce wanted, really, was to continue his family-run business as it had operated for years. Before he could do so, however, he had to battle the U.S. Army Corps of Engineers (Army Corps) for his right to make his case in court. Ultimately, he got that opportunity.

But along the way, he also learned a hard lesson in how federal agencies have turned the regulatory process into a weapon to be wielded against well-meaning small businesses.

Pierce is CEO of Hawkes Co., Inc., a family-owned agricultural enterprise based in East Grand Forks, Minnesota. Hawkes is, among other things, a leading supplier of peat, a soil amendment and turf product popular among landscapers, gardeners,

and sporting facility managers (think golf courses and football fields). Peat, which is decayed organic matter harvested from wetlands, has a long history as a fuel source, with the harvested peat dried and pressed into bricks that could be burned for heat. The use of peat as a commercially distributed soil amendment and turf management solution is a relatively recent development.

Over time, peat harvesting has evolved. In the past, peat bogs were traditionally subject to poor management and overharvesting, leading to serious depletion of local wetland ecosystems. But today's peat industry leaders invest heavily in the recovery of peat sites, restoring the wetland ecosystem once the harvest is complete. That's good business, after all, since it ensures the peat is a sustainable resource, and it means the same fields can be worked again in the

future. But more importantly, it's also good stewardship that people like Kevin Pierce advocate for the long-term conservation of the lands they work.

Hawkes Co., intending to bring that same sense of stewardship to its new peat harvesting project, applied to the Minnesota Department of Natural Resources for a permit to work the property. But Pierce was surprised when the Army Corps stepped forward and asserted federal jurisdiction and control over land his company had leased.

Under the Clean Water Act, the Army Corps has regulatory authority over "waters of the United States," a classification that includes some, but not all, wetlands. Even under the expansive reading of the Clean Water Act that the federal government asserted at that time, only those wetlands with a "significant nexus" to "navigable



Hawkes Co.

waters” are subject to the Army Corps’ regulatory powers. Using that standard, the Army Corps’ district engineer made a “jurisdictional determination” that peat property had a significant nexus to navigable waters. That would mean that the company needed to acquire a federal permit, an undertaking that normally costs hundreds of thousands of dollars.

If Pierce continued his business plan but didn’t follow the onerous federal permit process to harvest the peat that he believed his company’s survival depended on, the U.S. Environmental Protection Agency could issue an order imposing bankrupting penalties of \$37,500 per day. Yet Army Corps’ personnel told Hawkes Co. employees at a very early stage of the process that it would never approve a federal permit to harvest peat at the site.

Many people might give up, but not Kevin Pierce. He recognized many flaws in that regulatory assertion of authority—the most significant being that the nearest navigable water source, the Red River of the North, was more than 120 miles from the property. So Pierce, a reasonable man who assumed the Army Corps had erred, did the reasonable thing: he filed an administrative appeal. And he was pleased when the Army Corps division engineer concluded that his subordinate’s jurisdictional determination was arbitrary and capricious.

It might have ended there. But it turned out the division engineer’s decision had no binding authority. According to Clean Water Act regulations issued by the Army Corps, the division engineer sent the decision back to the district engineer—the

same engineer who had made the original “arbitrary and capricious” call—for reconsideration. And that district engineer came back with a “revised” determination that the property did, indeed, fall under the Army Corps’ jurisdiction.

Pierce was shocked. The entire appeals process had been a sham—a costly, time-consuming sham—that had forced him to run in circles, to no useful end. By this point, it was becoming clearer and clearer that there was nothing reasonable about the regulatory process he was facing, or the officials he was dealing with.

Four years of court battles followed. All Pierce wanted was an independent judicial



Attorney Reed Hopper and Kevin Pierce

review of the Army Corps’ jurisdictional determination. He was certain that any reasonable judge would look at the facts and see the case as he did, vindicating his company’s right to work the property.

Except that didn’t happen—not without four court appearances. A federal district court initially dismissed Pierce’s suit, on

the ground that the Army Corps' jurisdictional determination was a not a final order subject to court review. Pierce's frustration mounted, until a federal appellate court and eventually the Supreme Court heard his case. In a unanimous decision in 2016, the highest court in the land ruled that Hawkes Co. was, in fact, entitled to independent judicial review of the Army Corps' jurisdictional claim. The case was sent back to a federal trial judge who, within months, agreed with Pierce, the division engineer, and basic common sense: the Army Corps had no authority to demand that Hawkes seek a federal permit to harvest peat from the property.

It was a reasonable outcome—but there was nothing reasonable about the process to which Kevin Pierce and his company were subjected over more than a decade, and as he explained at a public presentation at the Heritage Foundation, it almost destroyed his family business.³ While Kevin Pierce and his family-owned Hawkes Co. can't get back what they paid in lost time and out-of-pocket costs over that period, they can take solace in knowing their case set a precedent for independent review that will serve to protect other landowners in the future. Even so, that precedent needs to be expanded further so that others don't have to fight for a neutral judge to review their dispute with the regulatory state.

Due Process Deficits

The Hawkes case demonstrates two common due process deficits. First, by determining the leased property contained a federally regulated wetland (wrongly in this instance, as determined by the federal courts), the Army Corps triggered potential penalties of \$37,500 per day if the company moved forward with its harvesting plans. These crippling penalties held up the company's plans for more than a decade. The equally unreasonable alternative was spending hundreds of thousands of dollars trying to get a federal permit that Hawkes rightly didn't think was required and had reason to believe would not be granted, or not granted without bankrupting mitigation set-asides. Agencies should limit potential penalties to amounts proportional to the harm. Doing so can avoid drawn-out litigation like that which occurred here.

Second, the case also demonstrates how agencies try to deny an impartial and effective review of their initial enforcement decisions and how they try to delay or deny access to courts to provide a truly neutral forum for deciding the dispute. The Army Corps' internal review procedures were a sham, since they were not independent of the enforcement chain of command and any result in favor of the regulated party could be overruled by the original district official who made the initial decision. The Army Corps also spent four years trying to close the courthouse doors to Hawkes Co. to prevent independent scrutiny of the agency's actions. Instead of resisting judicial review, agencies should guarantee prompt and independent adjudication.

³ Statement of Kevin Pierce at The Heritage Foundation Panel Discussion, "Horror Stories of EPA and Corps Overreach under the Clean Water Act," March 25, 2019, available at https://youtu.be/chi5_rceS_M?t=230.

Duarte Nursery, Inc., v. U.S. Army Corps of Engineers

"The proper role of government ... is that of partner with the farmer—never his master. By every possible means we must develop and promote that partnership—to the end that agriculture may continue to be a sound, enduring foundation for our economy and that farm living may be a profitable and satisfying experience."

President Dwight D. Eisenhower, Special Message to the Congress on Agriculture, January 9, 1956



John Duarte

In Dwight Eisenhower's time, it might have been reasonable to envision a world in which the government could serve as a partner to agricultural providers. But to today's landowners—beset by hostile and

Due Process Deficits

- *Lack of fair notice to the public*
- *Unfair rules of evidence*
- *Unreasonable and coercive penalties threatened*

confrontational federal regulators—that thinking must sound like a remnant of a bygone age.

Just ask John Duarte of Tehama, California, a fourth-generation farmer and owner of a large nursery enterprise, who in 2012 found himself, his family, and his entire livelihood in the target sights of the U.S. Army Corps of Engineers (Army Corps). Duarte's "crime": pursuing normal activities of farming and planting his land.

His travails began in November 2012, when Duarte hired a contractor to plow about 450 acres of his property, where he planned to plant a winter wheat crop. His land includes vernal pools—depressions in the ground where rainwater collects in shallow pools during different periods in the winter before evaporating in the late spring. Most people recognize these pools for what they are—large puddles—but environmental regulators have imposed significant protections over them across the country.



John Duarte and his employees

John Duarte was more than willing to comply with reasonable protections, but federal regulators seemed more interested in setting an enforcement trap than assisting Duarte in protecting the environment. And the unfair investigation and enforcement proceedings the federal regulators employed highlight the most serious problems with confrontational agency enforcement policies.

An Army Corps employee observed the plowing by one of Duarte's contractors that, unbeknown to Duarte at the time, did not skirt all the vernal pools in the field as he was supposed to. And yet, the Army Corps did not try to stop the plowing and waited two weeks to notify Duarte that part of his farming activity was a threat to the vernal pools, and thus an alleged violation of the Clean Water Act. The Army Corps slapped Duarte with a cease and desist order, with a threat of hefty fines

that would grow by tens of thousands of dollars daily.

By that time, the plowing was complete. Duarte couldn't help but wonder why the Army Corps had waited so long to notify him of its claim that he was violating the law. After all, had they communicated with him two weeks earlier, when the Army Corps employee noticed the supposed violation, he could have stopped the work and the supposedly threatened vernal pools would have been protected.

Moreover, had the work stopped earlier, large fines could have been avoided. It was almost as if the Army Corps cared more about jacking up the total monetary penalties than they cared about actually protecting the environment.

And the penalties were significant—crippling even, for an independent farm operation like Duarte's. The total estimated liability could run as high as \$40

million, thereby ensuring that there would be no fifth generation of Duarte farmers.

Duarte was understandably angered at these unfair tactics—so he did what any American should do, he decided to fight. Since the Army Corps had failed to notify him of the violation on a timely basis, and had failed to give him a hearing before issuing the cease and desist order, he believed he had been denied his constitutional right to due process. He took the Army Corps to court, represented by PLF.

The government counter-sued, demanding millions of dollars in fines to restore wetlands that Duarte had allegedly damaged in plowing his land (despite evidence that the vernal pools were not permanently or significantly damaged by the errant—but shallow—plowing). This was a further abusive action on the part of the Army Corps, since it was retaliation against a citizen who was simply petitioning the government for a redress of grievances, another constitutional right.

Moreover, the government uncritically accepted its employee’s inaccurate report that an especially long plowing shank had been used that caused “deep ripping” of the vernal pools’ bottom or “pan.” The employee had no evidence of this, and an excavation by the government actually did more damage to the vernal pools than the shallow surface plowing had done.

Duarte fought the good fight, but a federal district court rejected his defenses at an early stage of the litigation. At that point, he had a hard choice to make: he could

keep fighting the Army Corps, with an eye to taking his case to the Supreme Court. A Supreme Court win would vindicate his rights and those of millions of other landowners. But were he to lose, it would mean the end of everything his family had built up over generations.

He faced an existential threat, not only to his business and his family’s financial well-being, but also to the scores of people who relied on his nursery to make a living and care for their own families. And so he made the tough call to settle with the government. That settlement cost Duarte and his company over a million dollars.

So sadly, there was no great victory for John Duarte—this was one case in which the regulators extracted their pound of flesh in the form of a punishing settlement. It hardly felt like justice, but Duarte’s decision was understandable to protect his business, his family, and his hundreds of employees.

The outcome may have spared Duarte further financial harm, but it was anything but “a profitable and satisfying experience.”



A Duarte Nursery employee

Due Process Deficits

John Duarte's case demonstrates three due process deficits. First, the Army Corps failed to give him fair notice that it believed his plowing violated the Clean Water Act by waiting to issue the cease and desist order until it was too late for Duarte to do anything. This could have been avoided if the agency promptly notified people suspected of violating regulatory edicts. And then when they did send him the notice, they denied him a reasonable opportunity to respond by concealing (and even destroying) their evidence against him.

Second, the Army Corps and the U.S. Department of Justice uncritically accepted a factually inaccurate report that Duarte's agent had plowed the property three feet deep, a falsehood that the government's own experts repudiated and the employee finally admitted under oath was wrong.

And third, the case also demonstrates how federal agencies use the threat of excessive penalties to coerce people. For merely plowing an agricultural field, the Army Corps threatened Duarte with up to \$40 million in fines. As a result, Duarte would have had to literally bet the farm to exercise his right to have the government prove its case before a neutral court. Agencies should limit penalties to amounts proportional to the alleged violation, so that Americans cannot be coerced into giving up their due process rights.

Moose Jooce v. FDA

Kimberly Manor's entrepreneurial dream emerged from a sense of personal mission. A longtime smoker who lost her husband to lung cancer, she finally kicked the cigarette habit thanks to "vaping"—using an electronic nicotine device to wean herself off smoking. The liquid vapor has no combustion-generated tar, which is the most harmful component of cigarette smoke, especially in the development of lung cancer.

Vaping has grown in popularity in recent years, and many former smokers credit the devices with helping them to end their longtime smoking addiction. To Manor, that seemed like a worthy business opportunity by which she could do some good helping others to quit smoking, just as she had. In 2013, she launched Moose Jooce, a retail store selling vaping devices and liquids, in Lake, Michigan. Over the years, she says she's helped hundreds of smokers become former smokers, thanks to vaping solutions.

But in May 2016, the U.S. Food and Drug Administration (FDA) issued a regulation that added vaping products to the list of items covered by the Tobacco Control Act of 2009, even though they contain no tobacco. This regulation, known as the "Deeming Rule," subjected the vaping industry to costly, burdensome, and ultimately unconstitutional regulations.

The new regulation required burdensome and expensive testing of vaping products,

Due Process Deficit

- *Undermining democratic accountability to the public*

and prohibited store owners like Manor from simply discussing the potential benefits of vaping with customers in clear violation of her free speech rights under the Constitution's First Amendment. As the new rule threatened her business with costly fines and federal litigation, Manor had no choice but to shutter two of her stores. It was a similar story for other vaping entrepreneurs nationwide, who found it difficult to stay afloat once the government declared a regulatory war on their industry.

There were a lot of problems with the FDA's action. But its most fundamental flaw is that the rule was finalized by a government employee who lacked the legal authority to do so. The rule was not issued or signed by either the FDA commissioner or the secretary of the Department of Health and Human Services, both officials confirmed by the Senate and thus subject to some measure of public accountability. Instead, it was issued and signed by Leslie Kux, a career bureaucrat at FDA, who had no constitutional authority to issue rules that are binding on the general public

Manor and other vaping industry leaders,

represented by PLF, filed federal lawsuits against the FDA to challenge the agency's unconstitutional regulatory attack. Those suits are still pending.

Due Process Deficit

Manor's case highlights a structural due process deficit that may exist in many government agencies: The delegation of rulemaking authority from Congress to senior agency appointees is wrongly re-delegated to unaccountable lower-level civil servants. Kux alone, in fact, issued nearly 200 rules that purport to bind the public over the last couple of decades.

Delegating rulemaking authority to someone not properly appointed as an "Officer of the United States" violates one of the most important separation-of-powers clauses in the Constitution, the Appointments Clause. That Clause requires permanent executive officials who wield significant federal power, such as rulemaking or adjudication powers, to be nominated by the President and confirmed by the Senate. This process ensures that officers may wield power *only* after being approved by high-ranking elected officials directly accountable to the people.

Had a politically and democratically accountable official been the one to consider and issue the vaping rule, he or she likely would have been more sensitive to its impact on small businesses, making appropriate adjustments.

Foster v. Vilsack

When regulators from the U.S. Department of Agriculture (USDA) needed to determine if Arlen and Cindy Foster's South Dakota farm property contained a wetland, they didn't inspect the Fosters' land to make their determination. They just looked at another parcel of land 33 miles away to conclude that, yes, the Fosters' land included a wetland, making it subject to federal regulation.

Confused? So were the Fosters—which was why they sued the federal government, with PLF's assistance, arguing that the USDA's use of a "comparison site" to assess their property violated their right to due process.

Miner County in South Dakota, where the Fosters live, is located in what's known as the "Prairie Pothole Region" of the upper Midwest United States, where the land is marked by shallow depressions that sometimes fill with water, as depressions in the ground often tend to do.

On the Fosters' land is a .8-acre depression, which officials from the USDA's National Resources Conservation Service claimed was a protected wetland. As such, the regulators told the Fosters in 2011 that they did not qualify for federal farm benefits—which most farmers depend on—if they used the purported wetland for agricultural purposes.

But they based that wetlands determination not upon facts about the Fosters' land. Instead, under unreasonable USDA rules, the regulators could look at

Due Process Deficit

- *Unfair rules of evidence*

another site in the "local area" as a proxy or comparison site. They then looked at a wetlands site 33 miles away that the agency had designated as a comparison site 16 years earlier—a pre-selection that just happened to confirm the regulators' suspicion that the Fosters' land was also a wetland.

For the Fosters, the idea that a site 33 miles away was within their "local area" was highly questionable, since there was no direct evidence the condition of the sample plot 33 miles away matched the condition of the Fosters' property. And abiding by the erroneous wetland determination would prevent the Fosters from using a large part of their farm productively. Such restrictions stress farmers like the Fosters further and make them more prone to losses during economic downturns and disruptions in food chains, like the one the nation faces today.

Accordingly, the Fosters challenged the determination in court, arguing that the use of a comparison site was arbitrary and capricious and did not meet a reasonable standard of evidence. They appealed the determination up to the U.S. Court of Appeals for the Eighth Circuit, but they were disappointed when the court wrongfully deferred to the agency's interpretation of the statute and



Arlen Foster and his grandchildren

regulation, rather than independently interpreting the legal authorities on its own. The Supreme Court declined to hear a further appeal

Due Process Deficit

The Fosters' case demonstrates the due process deficit of unfair rules of evidence. Rather than using reliable evidence to evaluate whether the Fosters' land contained a wetland, the USDA used the selection of a biased comparison site to dictate its preferred result. Agencies should make decisions based only on reliable evidence and should give people a fair opportunity to refute that evidence.

Smith Farm Enterprises v. EPA

When the Boyd family, owners of Smith Farm Enterprises, set out to dig a series of drainage ditches on their Virginia farm property in 1998, they wanted to leave nothing to chance. They contacted the U.S. Army Corps of Engineers (Army Corps) to share their proposed project and determine if there might be any problems. The Boyds were hopeful they could forestall any potential challenges if they engaged regulators on the front end, before work started.

But as the saying goes, “no good deed goes unpunished.” The Boyds soon found themselves facing charges of violating the Clean Water Act, despite their conscientious efforts at engagement. Here’s how it unfolded.

The Boyds were seeking to develop a 300-acre tract of farmland and forest in Virginia’s Tidewater area. Knowing that the watershed area is subject to environmental protections, they wanted to ensure their project conformed to applicable regulations. They knew all too well that any violation of those rules could trigger ruinous fines, criminal penalties, and other costs—even if the violation was inadvertent.

So the Boyds presented their plans to Army Corps officials, and they invited the Army Corps to inspect their site. Agency officials did so, on five separate occasions

Due Process Deficits

- *Overlapping agency power/inconsistent requests for information*
- *Unreasonable and coercive penalties threatened*

during the course of the project. Smith Farms requested that the Army Corps advise if the agency observed any problems, and they promised to cease work if any problems arose. The Army Corps raised no objections on any of these visits.

Then, in June 1999, the U.S. Environmental Protection Agency (EPA), which has overlapping enforcement authority under the Act, entered the picture, assuming lead enforcement status from the Army Corps. By the time the EPA assumed control of the investigation, the project was significantly under way, and the Army Corps had not yet raised any objection to the Boyds.

In September 1999, after the drainage project had been completed, EPA officials chose to inspect the site again, less than 48 hours after the area had experienced a major hurricane and water levels were high. Nine months later, and without warning, EPA issued a compliance order to the Boyds asserting federal jurisdiction

over large areas of the site and alleging multiple Clean Water Act violations. The EPA then brought an administrative penalty proceeding against the family.

During the hearings and communications that followed, the Boyds learned for the first time that the EPA and the Army Corps had been discussing their project while it was under way. Yet despite the Boyds' good-faith reliance on the prior lead agency's oversight (that of the Army Corps) to ensure full compliance with the law, neither agency advised the Boyds that they might be in violation of the Clean Water Act before or during their project development.

The case was ultimately settled via consent decree. Although the Boyds were able to pursue their subsequent development project, it came at an enormously high cost. The consent decree required the Boyds to pay a \$10,000 civil penalty, pay for expensive onsite restoration, and grant a 330-acre conservation easement, consisting of land from the proposed development site and other nearby tracts of land.

Due Process Deficits

The Boyds' case demonstrates two due process deficits. First, they were subject to overlapping agency authority and inconsistent demands. Where statutes provide agencies with overlapping authority, the agencies should identify a single lead agency with sole authority to make the relevant, factual determinations, with the other agency bound by these decisions. This would prevent multiple investigations with conflicting demands

and an unclear lead decision maker, as the Boyd family experienced, improving both due process and efficiency concerns. Where agencies do not have overlapping authority but their mandates and the activities they regulate do overlap, agencies beginning an investigation must notify all relevant agencies of the case. This alert would function to require those agencies to begin their investigations at the risk of waiving their claims. This would prevent successive investigations over the same conduct.

Second, despite the Army Corps' assurances that there were no problems with their project, the Boyds ultimately had to pay \$10,000 in civil penalties, pay for an expensive onsite restoration, and grant a 330-acre conservation easement on nearby properties. Such a large and expensive conservation easement (exceeding the size of the tract they sought to develop) might be good for the environment, but the federal government should not have obtained it by wrongful threats. This is incompatible with a system that values due process, fairness, and the rule of law. Any violations could have been avoided if the EPA had shared their concerns with the Boyds rather than secretly investigating them

Northern New Mexico Stockman's Association v. U.S. Fish and Wildlife Service

The New Mexico meadow jumping mouse is not a large animal – adults grow no more than 7 to 10 inches long, and half of that is tail. But this small rodent is having an outsized impact on cattle ranchers in the southwest United States.

That's thanks to a 2016 decision by the U.S. Fish and Wildlife Service (FWS) to designate a massive parcel of southwest land as critical habitat for the jumping mouse's protection under the Endangered Species Act. The designated area—stretching across some 14,000 acres of land and 170 miles of streams—is mostly in New Mexico, with portions extending into Colorado and Arizona.

Local cattle ranchers soon found the critical habitat designation was jeopardizing their way of life. They possess federal water rights for livestock grazing, but the designation would block their herds' access to the streams, literally: in places, the FWS put up electric fences to keep the cattle out. For these ranchers, most of Hispanic origin and many with family histories on the land stretching back 400 years, centuries of heritage were at risk.

Due Process Deficit

- *Unfair rules of evidence*

Moreover, the FWS's effort to protect the jumping mouse also directly targeted the ranchers' livelihoods. It was clear that the economic impact of the critical habitat designation would be devastating; the agency estimated \$20 million in added regulatory costs as a result. But the full impact was unknown—because the FWS neglected to conduct a full economic analysis, as required by law, before imposing the designation.

Under the Endangered Species Act, officials are required to calculate the economic impact of a critical habitat designation, and consider revising or limiting the designation if it's projected to impose substantial costs. In this case, officials offered the loose \$20 million estimate, but failed to conduct a comprehensive economic analysis prior to making the designation. The cattlemen believed that the true impact, had the agency followed the law, would have been shown to be much steeper. But since FWS officials skipped that step, no one knows for sure.

To the ranchers, it certainly looked as if the agency was taking extraordinary steps to avoid accountability and transparency. To defend their longstanding rights to the land and water, the Northern New Mexico Stockman's Association, a local ranchers' coalition, filed suit against the FWS in

2018. Their goal, in a case that is still ongoing, is to enforce the requirement that agency officials conduct a full and proper economic impact analysis before taking an action like designating a massive area as critical habitat.

Due Process Deficit

The ranchers' case demonstrates that those who face potentially crippling harm from unaccountable rulemaking should not bear the burden of proof of ensuring that regulatory agencies follow the rules set out by Congress. Agencies, such as FWS, should be required to conduct meaningful regulatory analyses where Congress has required them to do so. This could be achieved through the commencing of audits by agencies that are required to conduct economic analyses. These audits would look for instances in which the burden is on the government to establish whether and to what extent an agency action would impact individuals and businesses. If the agency relies on guidance, procedures, or internal documents that allow it to shift this burden of proof to a regulatory presumption of zero impact, these should be discarded in favor of a meaningful analytical tool.

Requiring federal agencies to discharge this burden would eliminate unnecessary public and private costs. Similarly, requiring FWS to measure the costs of its actions rather than assume them away would go a long way in avoiding needless litigation costs or the imposition of economic costs by the tailoring of critical habitat designations to avoid them, as Congress intended.

Conclusion: The Path Forward

As the above case studies show, agencies' failure to abide by due process guarantees and the separation of powers has had devastating real-world consequences for Americans simply trying to pursue their livelihoods or enjoy their property. But as we also noted earlier, we are optimistic that the tide has turned against the abuses of the unconstitutional administrative state, and the climate for reforming it has never been better in the last 100 years.

Based on the most common due process violations our clients have suffered, here are some basic reforms that would help restore the separation of powers and due process guarantees that constrain government power.

- To address the lack of fair notice of investigations and enforcement actions, agencies should establish procedures that provide proper notice and a fair opportunity for citizens to be heard before an enforcement action may proceed further.
- To ensure fair and clear rules of evidence, agencies should make decisions based only on reliable evidence and give people a fair opportunity to evaluate and refute that evidence.
- To prevent the threat or imposition of unreasonable and coercive penalties, agencies should take formal steps to

ensure criminal prohibitions and harsh civil penalties are not interpreted to reach unknowing, ordinary, innocent, or inadvertent conduct. They also should publish tables identifying reasonable penalties and under what circumstances they may be sought to provide adequate notice to future agency targets and to constrain lower-level staff from coercing settlements.

- Instead of resisting judicial review of their actions, agencies should guarantee prompt and independent adjudication.
- To prevent the confusion caused by inconsistent agency demands, agencies should identify a single lead agency with sole authority to make the relevant, factual determinations, with the other agency bound by these decisions.
- Finally, to ensure political and democratic accountability, agencies must comply with the requirements of the Appointments Clause and not delegate rulemaking authority to unaccountable, lower-level bureaucrats.

Since the days of Magna Carta, the rule of law and its guarantee of procedural due process has protected against arbitrary and abusive government power. The growth in the size and scope of the modern administrative state has resulted in a dramatic erosion of these time-honored due process protections. But with these reforms and others that PLF has recommended to the Office of Management and Budget this year, law-

abiding Americans will enjoy basic procedural safeguards should they find themselves in the crosshairs of the administrative state, ensuring accountability, transparency, respect for the rule of law, and a fundamental sense of fair play.

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