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## Pepperdine University School of Law Legal Summaries

Analise Nuxoll

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**Pepperdine University School of Law  
Legal Summaries**

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**UNITED STATES COURTS OF APPEALS****APPALACHIAN VOICES V. STATE WATER CONTROL BOARD**  
**912 F.3d 746 (4th Cir. 2019)***Synopsis:*

After the Atlantic Coast Pipeline was approved by the Federal Energy Regulatory Commission, U.S. Army Corps of Engineers, and the Virginia State Water Control Board, environmental groups petitioned the court of appeals to review the Board's decision. Environmental groups argued that the certification given by the Virginia State Water Board to the Atlantic Coast Pipeline project was arbitrary and capricious. The Court of Appeals for the Fourth Circuit found that the Board did not issue the certification arbitrarily and capriciously and denied the petition for review.

*Facts and Analysis:*

The Atlantic Coast Pipeline (ACP) was a “proposed interstate natural gas pipeline . . . approximately 604 miles long and 42 inches in diameter . . . [and] [a]pproximately 307 miles of the ACP would traverse the Commonwealth of Virginia.”<sup>1</sup> In order to get approval for this, the Atlantic Coast Pipeline LLC (Atlantic) had to comply with several federal and state laws.<sup>2</sup>

Atlantic had to receive authorization from the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act (NGA).<sup>3</sup> After authorization, FERC then “undertakes a review of the environmental impacts of the proposed project under the National Environmental Policy Act (NEPA).<sup>4</sup> Then, FERC “coordinates the required authorizations, including Virginia’s water quality certification under the Clean Water Act (CWA).<sup>5</sup> After this, Atlantic

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<sup>1</sup> *Appalachian Voices v. State Water Control Board*, 912 F.3d 746, 750 (4th Cir. 2019).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

needed and received an authorization from the U.S. Army Corps of Engineers.<sup>6</sup> Then, Atlantic needed a Section 401 Certification through the state.<sup>7</sup> The Virginia Department of Environmental Quality (DEQ) was the issuing agency for this certification which would approve the pipeline to cross wetland, river and streams. However, a longer review was necessary for the upland impacts of the ACP.<sup>8</sup> Seven months later, the DEQ informed the Virginia State Water Control Board (Board) that it supported the approval of the Upland Certification for the ACP.<sup>9</sup>

Upon this certification, environmental groups filed two petitions arguing that the Section 401 Upland Certification was arbitrary and capricious for four reasons.<sup>10</sup> The Board first argued that the groups did not have standing but the court disagreed because “petitioners successfully establish traceability and redressability given that we could vacate the Board’s decision and determine that its decision was not based on a reasonable assurance and instead was arbitrary and capricious.”<sup>11</sup>

*Holding:*

The court of appeals had to determine whether or not the Board acted arbitrarily or capriciously in granting the section 401 Certification to the uplands.<sup>12</sup> “To survive review under the arbitrary and capricious standard, an agency decision must show that the agency examined ‘the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’”<sup>13</sup>

The first reason the environmental groups found the Board’s certification to be arbitrary and capricious is because the Board

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 751.

<sup>8</sup> *Id.* at 751–52.

<sup>9</sup> *Id.* at 752.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 752–53.

<sup>12</sup> *Id.* at 753.

<sup>13</sup> *Id.*

reopened the comment period.<sup>14</sup> However, the court does not find that to be arbitrary and capricious because the comment period was “re-opened for the Wetlands and Streams Certification and not the Upland Certification at issue in this case.”<sup>15</sup> Secondly, the environmental groups argued that the certification was arbitrary and capricious because the State did not “conduct a combined effect analysis.”<sup>16</sup> However, the amount of different certifications, approvals, and authorizations that Atlantic had to get for the pipeline means that the Board and DEQ did not “duplicate[] the efforts of other regulatory bodies.”<sup>17</sup> The third argument is that the Board and the DEQ should have conducted an antidegradation review and not “relied on existing Virginia water quality standards and regulations.”<sup>18</sup> However, here, the court cites the CWA, which states that “states have the primary role in promulgating water quality standards.”<sup>19</sup> There was no need for the Board or the DEQ to conduct a separate antidegradation review.<sup>20</sup> Lastly, the court found that “the State Agencies’ treatment of karst terrain was not arbitrary or capricious because of the conditions imposed on the Section 501 Upland Certification.”<sup>21</sup> “Karst geology refers to geological formations of soluble limestone bedrock that creates underground water flow systems where the rocks have dissolved and created sinkholes, caves and underground springs and rivers.”<sup>22</sup> When determining whether or not to grant the certification, the Board and the DEQ took these concerns about karst terrain into consideration, meaning that this does not make the issuance of the certification arbitrary or capricious.<sup>23</sup>

Ultimately, the Board and the DEQ considered the relevant factors when giving the Section 401 Upland Certification, and that is

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<sup>14</sup> *Id.* at 754.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 756.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 758.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

the Administrative Procedure Act (APA) standard for whether an agency action is arbitrary or capricious.<sup>24</sup> Therefore, the environmental groups' petition for review was denied.<sup>25</sup>

*Impact:*

The impact of *Appalachian Voices* is yet to be fully realized. The Fourth Circuit, in its holding for the Board, reiterated the standard for how an agency can survive review of a decision that is being labeled arbitrary and capricious. Here, the Board survived that attack because the agency examined the relevant data and came to an explanation for that action. If the court had found that there was no reason for the Board's findings, then the decision to give the certification to Atlantic would have been arbitrary and capricious and the court would have held in favor of the environmentalist groups.

**CITY OF NEW YORK v. UNITED STATES DEPARTMENT OF DEFENSE**  
**913 F.3d 423 (4th Cir. 2019)**

*Synopsis:*

Three municipalities, the City of New York, Philadelphia, and San Francisco, all use the National Instant Criminal Background Check System. This system helps combine information between federal agencies and state agencies. These municipalities sued the Department of Defense because the Department was not complying with the system. The district court dismissed for lack of subject matter jurisdiction and the court of appeals affirmed.

*Facts and Analysis:*

The National Instant Criminal Background Check System (NICS), is a program managed by the Federal Bureau of Investigation (FBI).<sup>26</sup> This program "facilitates information sharing

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<sup>24</sup> *Id.* at 759.

<sup>25</sup> *Id.*

<sup>26</sup> *City of New York v. United States Department of Defense*, 913 F.3d 423, 426 (4th Cir. 2019).

between federal agencies and local law enforcement officials.”<sup>27</sup> Three different municipalities sued the Department of Defense (DOD) because the DOD was not providing the amount of records required by the NICS.<sup>28</sup> The municipalities wanted more thorough compliance, but the district court dismissed the claim because the appellants did not have constitutional standing and also “failed to establish subject matter jurisdiction under the Administrative Procedure Act.”<sup>29</sup>

The issue of the DOD not reporting enough information to NICS has been an ongoing problem.<sup>30</sup> Municipal appellants argue that if the “DOD complied with its reporting obligations under the NIAA [NICS Improvement Amendments Act of 2007],” the shooting in Sutherland Springs, Texas by a former member of the military could have been prevented, because the gunman had been convicted in court-martial proceedings and should not have owned a gun.<sup>31</sup> The municipalities could not sue under the Brady Act or the NIAA, because neither “contemplated a separate cause of action to compel performance with inter-agency reporting obligations.”<sup>32</sup> However, the municipalities could sue under the Administrative Procedure Act (APA), which “allows an aggrieved party to ‘compel agency action unlawfully withheld or unreasonably delayed.’”<sup>33</sup>

On appeal, the first question the court looked at was “whether the municipal appellants have established subject matter jurisdiction under the Administrative Procedure Act (APA).”<sup>34</sup> The court ultimately found that there was “no basis in the APA’s text for such a broad incursion into internal agency management.”<sup>35</sup> The court turned to the definition of agency action which is “the whole or a part of an agency rule, order, license, sanction, relief, or the

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<sup>27</sup> *Id.* at 427.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 429.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 430.

<sup>35</sup> *Id.*

equivalent or denial thereof, or failure to act” and is “limited to those governmental acts that ‘determine rights and obligations.’”<sup>36</sup> This narrow definition is to “ensure[] that judicial review does not reach into the internal workings of the government, and is instead properly directed at the effect that agency conduct has on private parties.”<sup>37</sup> These requirements apply to all challenges of agency action.<sup>38</sup>

Here, when the municipal appellants want to compel information from the DOD to aid their own local government, the court held that they failed to establish subject matter jurisdiction.<sup>39</sup> An issue is that the municipal appellants do not “challenge a discrete agency action.”<sup>40</sup> In addition, the lack of reporting to NICS is a systemic problem that will “likely require expertise in information technology and deep knowledge of how military needs intersect with data collection. In other words, it is exactly the sort of ‘broad programmatic’ undertaking for which the APA has foreclosed judicial review.”<sup>41</sup>

*Holding:*

Even though the court decided to reaffirm the dismissal based on lack of subject matter jurisdiction, and the fact that there was no discrete action in this claim, the court agreed with the municipal appellants that “failure to carry out discrete obligations can be subject to review. Government deficiencies do not become non-reviewable simply because they are pervasive.”<sup>42</sup> It will take years for the DOD to implement reporting requirements, and “the obvious inability for a court to function in such a day-to-day managerial role over agency operations is precisely the reason why the APA limits judicial review to discrete agency actions.”<sup>43</sup> Ultimately, while the APA does not

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<sup>36</sup> *Id.* at 431.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 432.

<sup>39</sup> *Id.* at 432.

<sup>40</sup> *Id.* at 433.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 433.

<sup>43</sup> *Id.* at 434.

permit this sort of judicial supervision, the court commends the municipalities for seeking ways to keep their counties safer.<sup>44</sup> Without a discrete action, the case had to be dismissed.<sup>45</sup>

*Impact:*

The impact of *City of New York* is the reaffirmation that the judicial branch does not give direct supervision to agencies. In order to rule on an agency action, the action has to be discrete. This limitation is placed on the judicial branch because there are not enough resources to be able to supervise the many different agencies. An appellant cannot simply identify a government action that has had a negative impact on them. Like in the present case, the lack of DOD reporting to NICS about former servicemen who should not own weapons, could affect law enforcement in these municipalities. However, just because the DOD's actions affected the municipalities does not mean that the courts should get involved.

**KEELEY V. WHITAKER**  
**910 F.3d 878 (6th Cir. 2018)**

*Synopsis:*

David Keeley, a lawful permanent resident residing in Ohio, was convicted of rape. The Board of Immigration Appeals (BIA) decided that his conviction was an aggravated felony under the Immigration and Nationality Act (INA) and Keeley could be removed without possibility of relief. Keeley appealed this decision because Ohio's definition of rape includes digital penetration, which would not be considered an aggravated felony under the INA. The Sixth Circuit agreed with Keeley on the basis of statutory interpretation.

*Facts and Analysis:*

David Keeley was a legal permanent resident living in Ohio, and a citizen of the United Kingdom.<sup>46</sup> He was convicted of two counts

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<sup>44</sup> *Id.* at 436.

<sup>45</sup> *Id.*

of rape in 2011.<sup>47</sup> Because of the two convictions, “the Department of Homeland Security charged him as being convicted of an aggravated felony under the INA and sought his removal pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii).”<sup>48</sup> Due to this, Keeley could have been removed without the possibility of relief because “an aggravated felony carries the most severe immigration consequence possible.”<sup>49</sup> In August 2016, an immigration judge found that Keeley’s rape conviction in Ohio qualified as an aggravated felony.<sup>50</sup> Keeley appealed to the BIA, and argued that “his Ohio conviction is not an aggravated felony because Ohio’s definition of rape includes digital penetration, whereas the INA’s does not.”<sup>51</sup> However, the BIA argued that the INA’s definition of rape also included digital penetration, which meant that Keeley was guilty of an aggravated felony, “making him ineligible for the possibility of relief from removal.”<sup>52</sup> Keeley appealed once more.<sup>53</sup>

In order to decide whether Keeley’s rape conviction in Ohio could be considered an aggravated felony, the Sixth Circuit made three different queries.<sup>54</sup> The first was “identify[ing] the minimum conduct required for a conviction of rape under the Ohio statute.”<sup>55</sup> The second was “identify[ing] the elements of rape as it is used in the INA,” through “the resources at [their] disposal, including the common law, state statutes, and the Model Penal Code.”<sup>56</sup> Lastly, the court considered whether “the minimum conduct criminalized by the Ohio statute ‘categorically fits’ within the generic crime.”<sup>57</sup>

As to the first point, the Sixth Circuit examined the Ohio rape statute to determine the minimum conduct required for a rape

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<sup>46</sup> Keeley v. Whitaker, 910 F.3d 878, 881 (6th Cir. 2018).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 881–82.

conviction.<sup>58</sup> The Ohio rape statute “defines ‘sexual conduct’ to include the act of digital penetration. Digital penetration, therefore, is the ‘minimum conduct’ criminalized under the Ohio statute for purposes of our inquiry.”<sup>59</sup> The second inquiry is more complicated, because “Congress did not provide a definition of the term rape” so the court “must ‘give the term its ordinary meaning.’”<sup>60</sup> Because Congress “added rape to the INA as an aggravated felony in 1996,” the court analyzed the definition of rape in 1996.<sup>61</sup> After examining several tribunals’ definitions of rape, including the BIA, the common-law crime of rape, state law statutes, and Black’s Law Dictionary, the court concluded that “the generic definition of rape does not include digital penetration.”<sup>62</sup> The court articulated that BIA’s decision to change course and include digital penetration in the definition of rape “ignored the most important guiding factor to statutory interpretation—the language of the statute—which shows that Congress did not consider rape and sexual abuse to be coextensive.”<sup>63</sup> To combine digital penetration with the meaning of rape in the 1996 statute “would strip meaning from the statute’s words.”<sup>64</sup> The court does not analyze the third inquiry because it finds fault with the BIA’s interpretation of the term rape in the second inquiry.<sup>65</sup>

*Holding:*

The court relied on *Chevron* to arrive at the conclusion that Keeley’s rape conviction was not an aggravated felony under the INA.<sup>66</sup> When interpreting a federal statute, the court must discern Congress’ intent.<sup>67</sup> Here, “Congress considered rape to be a separate

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<sup>58</sup> *Id.* at 882.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 883.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 884.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

crime from sexual abuse . . . it is undisputed that the generic crime of rape in 1996—without considered sexual abuse statutes and definitions—did not include digital penetration.”<sup>68</sup>

Furthermore, the Government in the present case argued that “the BIA’s decision should stand because it avoids an absurd result.”<sup>69</sup> However, the court notes that “the canon against absurd results should not be used to create an ambiguity in the text of a statute where none exists.”<sup>70</sup> While Keeley could not be convicted of an aggravated felony pursuant to this interpretation, the court acknowledges that “he could still be subject to removal for committing a crime involving moral turpitude.”<sup>71</sup>

*Impact:*

The immediate impact of *Keeley* was the court’s refusal to categorize Keeley’s rape conviction in Ohio as an aggravated felony for the purposes of removal. The impact over time is the potential reiteration of looking to what Congress meant each word to mean at the time the statute was written. Here, for example, the INA’s aggravated felony statute was written in 1996. While modern courts would likely include digital penetration in rape statutes, in 1996, there was a separate statute for sexual abuse. The Sixth Circuit strictly interpreted the statute.

**MONTROIS V. UNITED STATES**  
**916 F.3d 1056 (D.C. Cir. 2019)**

*Synopsis:*

A group of tax-return preparers filed a class action lawsuit against the Internal Revenue Service alleging that the fee to obtain a Preparer Tax Identification Number was arbitrary and capricious. The court found that the IRS acted within its authority under the Independent

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 885.

<sup>71</sup> *Id.*

Offices Appropriations Act and that the decision to implement the fee was neither arbitrary nor capricious.

*Facts and Analysis:*

Tax-return preparers prepare tax returns for taxpayers.<sup>72</sup> The Internal Revenue Service (IRS) began requiring tax-return preparers to obtain “a unique identifying number known as a Preparer Tax Identification number, or PTIN.”<sup>73</sup> The PTIN had to be renewed annually, and the fee to obtain and renew the PTINs was “designed to recoup the costs to the agency of issuing and maintaining a database of PTINs.”<sup>74</sup> The IRS used its authority under the Independent Offices Appropriations Act to require a fee, because the Act “allows federal agencies to charge fees for services in certain conditions.”<sup>75</sup>

This group of tax-return preparers argued that the IRS did not have authority under the Independent Offices Appropriations Act to charge a fee and also that the decision to implement the fee was arbitrary and capricious. The district court agreed and ordered the IRS to stop charging the PTIN fee and also to refund the fees already paid.<sup>76</sup> The court here disagreed and argued that the IRS did have authority under the Act and that the decision to do so was neither arbitrary nor capricious.<sup>77</sup>

The reason the IRS began to implement regulations on tax-return preparers is because it felt that “many taxpayers were being ‘poorly served by some tax return preparers’ due to preparers’ inadequate education and training as well as deficiencies in the agency’s compliance regime.”<sup>78</sup> Tax-return preparers do not have to have any formal education and anyone can be a registered tax-return payer as long as they pass a “background check, pass a competency exam, and satisfy continuing education requirements.”<sup>79</sup> So, the IRS

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<sup>72</sup> *Montrois v. United States*, 916 F.3d 1056, 1058 (D.C. Cir. 2019).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1059.

<sup>79</sup> *Id.*

implemented a “credentialing and registration regime for tax-return preparers.”<sup>80</sup> The IRS also “required preparers to obtain a PTIN and renew it annually.”<sup>81</sup> Lastly, the IRS “decided it would charge tax-return preparers a fee of roughly \$50 (plus a vendor fee) to obtain and renew a PTIN.”<sup>82</sup> This fee would cover costs of the technology system, and other support needed to evaluate and enforce tax-return preparers.<sup>83</sup>

The court examines whether or not it has jurisdiction over this case and holds that it does have jurisdiction because the tax-return preparers were not required “to submit their claims to the IRS before bringing this action in federal court.”<sup>84</sup>

The tax-return preparers argue that the fee is unlawful for two reasons. First, they argued that “the Independent Offices Appropriations Act does not provide statutory authority for the fee. Second, they contend that the IRS’s decision to impose the fee was arbitrary and capricious.”<sup>85</sup>

*Holding:*

The court disagrees with both of these contentions.<sup>86</sup> To the first argument, the court counters with the fact that under the Independent Offices Appropriations Act, the “head of each agency . . . may prescribe regulations establishing the charge for a service or thing of value provided by the agency.”<sup>87</sup> To justify a fee, the agency must show that “it provides some kind of service in exchange for the fee . . . that the service yields a specific benefit, and . . . that the benefit is conferred upon identifiable individuals.”<sup>88</sup> The court holds that the IRS meets all three requirements.<sup>89</sup> The IRS provides “the service of

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1062.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1062–63.

<sup>89</sup> *Id.* at 1063.

providing tax-return preparers a PTIN.”<sup>90</sup> The IRS also provides a specific benefit—“the PTIN helps protect tax-return preparers’ identities by allowing them to list a number on returns other than their social security number.”<sup>91</sup> Lastly, the benefit is conferred upon identifiable individuals because “[t]ax-return preparers as a group qualify as identifiable recipients for purposes of justifying a fee assessed under the Independent Offices Appropriations Act.”<sup>92</sup>

The court holds that the decision to require a PTIN fee was not arbitrary and capricious.<sup>93</sup> This fee does not fall outside of the IRS’s regulatory authority because “the fee is ‘based on direct costs of the PTIN program, which include staffing and contract-related costs for activities, processes, and procedures related to the electronic and paper registration and renewal submissions.’”<sup>94</sup>

*Impact:*

The impact of *Montrois* is the importance of the three factors that justify a fee under the Independent Offices Appropriations Act. Without meeting the three requirements of providing a service that yields a specific benefit to identifiable individuals, an agency could not justify its fee. Here, the IRS did meet those requirements, and the PTIN fee was justifiable.

**ST. LAWRENCE SEAWAY PILOTS ASSOCIATION V. UNITED STATES  
COAST GUARD**

**357 F.Supp.3d 30 (D.C. Cir. 2019)**

*Synopsis:*

The St. Lawrence Seaway Pilots Association sued the United States Coast Guard after the Coast Guard promulgated a rule that excluded legal fees as reimbursable if the fees were sustained in a suit against the United States government. The pilots associations

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1066.

<sup>93</sup> *Id.* at 1067.

<sup>94</sup> *Id.*

declared that the rule was arbitrary and capricious. The court agreed, stating that the Coast Guard did not acknowledge the change during the rulemaking, nor did it offer a reasoned explanation for the change. The court granted summary judgment for the plaintiffs.

*Facts and Analysis:*

In 1960, the Great Lakes Pilotage Act required foreign-owned shipping vessels to employ “registered, experienced American or Canadian seaway pilots to navigate American portions of the St. Lawrence Seaway or the Great Lakes.”<sup>95</sup> The Secretary of Homeland Security was to set the rates, but delegated that to the Great Lakes Pilotage Office of the United States Coast Guard (Coast Guard), “which has promulgated regulations establishing the methods by which rates are set.”<sup>96</sup> The goal for the rates was to “promote safe, efficient, and reliable pilotage service on the Great Lakes, by generating for each pilotage association sufficient revenue to reimburse its necessary and reasonable operating expenses, fairly compensate trained and rested pilots, and provide an appropriate profit to use for improvements.”<sup>97</sup> Simply, the rates were to be necessary and reasonable.<sup>98</sup>

However, in 2016, the Coast Guard changed the way that the rates were set.<sup>99</sup> Similar to previous years, pilots would “detail their expenses,” which “obligates the Coast Guard to determine whether an expense is both ‘necessary’ for providing pilotage services and ‘reasonable’ in amount.”<sup>100</sup> But, “the new Rule treats legal fees incurred in litigation against the U.S. government differently than other legal fees. Under the new regulation, ‘association [legal] expenses are recognizable except for any and all expenses associated with legal action against the U.S. government or its agents.’”<sup>101</sup>

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<sup>95</sup> St. Lawrence Seaway Pilots Association v. United States Coast Guard, 357 F.Supp.3d 30, 32 (D.C. Cir. 2019).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 33.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 33–34.

When the Coast Guard “engaged in a notice-and-comment rulemaking to set rates for the 2017 shipping season,” the pilots associations requested the Coast Guard to recognize the legal expenses incurred from three years prior.<sup>102</sup> Rulemaking was always based on expenses incurred three years prior.<sup>103</sup> The Coast Guard responded that those costs were no longer covered.<sup>104</sup> The pilots associations argued that the Coast Guard promulgated that rule in an arbitrary and capricious manner.<sup>105</sup>

The court’s review of an agency action is narrow, and the Administrative Procedure Act (APA) “precludes the court from ‘substitu[ing] its judgment for that of the agency.’”<sup>106</sup> Instead, the court must “determine whether the agency ‘examine[d] the relevant data and articulate[d] a satisfactory explanation for its actions, including a rational connection between the facts found and the choice made.’”<sup>107</sup>

*Holding:*

The holding in *St. Lawrence Seaway Pilots Association* hinges on the fact that during the Notice of Proposed Rulemaking (NPRM), the Coast Guard did not acknowledge “a significant overhaul of rate-setting methodology.”<sup>108</sup> When the pilots associations commented on the new methodology, the Coast Guard still did not acknowledge it in the final rulemaking.<sup>109</sup> It responded to the pilots associations’ comments with “we disagree.”<sup>110</sup> The court states that “[a] central principle of administrative law is that, when an agency decides to depart from . . . past practices and official policies, the agency must

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<sup>102</sup> *Id.* at 34.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 35.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 36.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

at a minimum acknowledge the change and offer a reasoned explanation for it.”<sup>111</sup>

The Coast Guard did not acknowledge the change or offer an explanation.<sup>112</sup> The court highlighted that “[t]he fact that Plaintiffs were able to identify the change in policy does not absolve the Coast Guard of its obligation to engage in reasoned decision-making, which starts with acknowledging a deliberate change.”<sup>113</sup> The court also iterates that it does not rule on whether or not the policy is wise, or needed.<sup>114</sup> Instead, the way that the Coast Guard implemented the change was arbitrary and capricious.<sup>115</sup> The pilots associations’ motion for summary judgment is granted.<sup>116</sup>

*Impact:*

The impact of this case is the reiteration of the procedure behind promulgating rules, and a reaffirmation that the court does not look at the substance or wisdom of the rules promulgated, but merely the procedure behind it. The Coast Guard did not acknowledge its change in rules regarding reimbursement in the NPRM, and when the pilots associations commented regarding the lack of reimbursement for legal fees incurred against the United States, the Coast Guard stated that it disagreed. The Coast Guard should have explained the rule change. This is an example of the importance of following the procedures under the APA.

**W.G.A. v. SESSIONS**  
**900 F.3d 957 (7th Cir. 2018)**

*Synopsis:*

W.G.A. was threatened by members of an El Salvadoran gang and fled to the United States. He was caught and put into removal

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 37.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 38.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

proceedings, and then applied for asylum under Article 3 of the Convention Against Torture. The immigration judge and the Board of Immigration Appeals denied his application. The Seventh Circuit disagreed and remanded W.G.A.'s case back to the Board of Immigration Appeals on the basis that W.G.A. actually does qualify for asylum.

*Facts and Analysis:*

In 2013, the rural community where W.G.A. grew up was infiltrated by the Mara 18 gang.<sup>117</sup> The Mara 18 one of two dangerous street gangs in El Salvador.<sup>118</sup> Between Mara 18 and MS-13, these gangs “use violence to exercise an enormous degree of social control over their territories.”<sup>119</sup> Both Mara 18 and MS-13 have extorted millions, conducted labor strikes, controlled political campaigns, and are usually above the law.<sup>120</sup> In 2014, W.G.A.'s younger brother, S.R.P., did not come home from the store.<sup>121</sup> Months later, W.G.A. received a call from S.R.P.<sup>122</sup> S.R.P. was afraid that the gang was going to kill him and hung up without giving W.G.A. much information.<sup>123</sup> W.G.A. and his mother did not contact the police, “because they felt it would be useless . . . Others had disappeared after reporting crimes to the police.”<sup>124</sup> A few months later, S.R.P. was arrested, and at his court proceeding, he had a gang tattoo on his hand.<sup>125</sup> Because S.R.P. did not want to be in the gang anymore, he did “not come home for fear of what the gang would do.”<sup>126</sup> He did not tell his family where he was going.<sup>127</sup> The day after S.R.P. disappeared, W.G.A. received a phone call from a man

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<sup>117</sup> W.G.A. v. Sessions, 900 F.3d 957, 960 (7th Cir. 2018).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 961.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

who told him to “‘be careful’ and that ‘they’re looking for you.’”<sup>128</sup> The following day, “four tattooed gang members approached W.G.A. at his house.”<sup>129</sup> After throwing W.G.A. to the ground and putting a gun to his head, one of the gang members said “‘if you don’t hand over your brother, you’re going to die here.’ The men told W.G.A. that he had four days to comply or they would kill him.”<sup>130</sup> The men also threatened to kill him and his family if they contacted the police.<sup>131</sup> Two days after this incident, W.G.A. fled to the United States because he was afraid that the gang members would kill him.<sup>132</sup> The gang members continued to threaten W.G.A.’s family, and W.G.A.’s other brother went into hiding.<sup>133</sup>

Upon arriving in the United States through Texas, W.G.A. was apprehended and the Department of Homeland Security “initiated removal proceedings against him.”<sup>134</sup> W.G.A. “conceded that he was removable . . . [but] applied for asylum.”<sup>135</sup> Both the immigration judge and the Board of Immigration Appeals found that “W.G.A. did not qualify for any of his asserted grounds of relief and ordered removal.”<sup>136</sup>

This court had to determine what the scope of review was when deciding this case, which hinged on whether or not “the Board’s order is independent of or supplemented the immigration judge’s decision.”<sup>137</sup> Because the Board’s order was supplementary to the immigration judge’s decision, this court can “review the immigration judge’s findings as supplemented by the Board’s.”<sup>138</sup>

“To qualify for asylum, W.G.A. must show that he is ‘unable or unwilling to return’ to El Salvador ‘because of persecution or a well-founded fear of persecution’ . . . ‘on account of’ one of five protected

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 962.

<sup>138</sup> *Id.*

grounds: ‘race, religion, nationality, membership in a particular social group, or political opinion.’”<sup>139</sup> Here, W.G.A. has shown that Mara 18 has persecuted him in the past.<sup>140</sup> However, the issue is “whether the persecution was motivated by a reason covered by the asylum statutes.”<sup>141</sup> W.G.A. claims that he was targeted by Mara 18 because of “his membership in two particular social groups: (1) members of his nuclear family or (2) family members of tattooed former Salvadoran gang members.”<sup>142</sup> While the immigration judge and the Board did not believe that W.G.A.’s persecution was directly connected to his membership in these groups, the court here holds that W.G.A. has “identified a cognizable social group and that the record compels the conclusion that the Mara 18 persecuted him on account of his membership in it.”<sup>143</sup>

*Holding:*

The immigration judge and the Board both found that W.G.A. was a part of the cognizable social group of “members of his nuclear family.”<sup>144</sup> Because the membership element was met, the Court of Appeals for the Seventh Circuit does not “resolve the *Chevron* question regarding the family members of former gang members.”<sup>145</sup> Secondly, the court found that W.G.A.’s membership in his family was “one central reason for the persecution that both sides agree he suffered.”<sup>146</sup> The court goes on to highlight W.G.A.’s testimony as well as country reports that “corroborate this testimony and demonstrate widespread recognition that the Salvadoran gangs target nuclear family units to enforce their orders and to discourage defection.”<sup>147</sup> Specifically, a “report by the U.S. Department of State

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 962–63.

<sup>143</sup> *Id.* at 963.

<sup>144</sup> *Id.* at 965.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 966.

<sup>147</sup> *Id.*

says that ‘the families of gang members often face the same risks of being killed or disappearing as the gang members themselves.’<sup>148</sup>

Lastly, the court concluded that under Article 3 of the Convention Against Torture, W.G.A. would “not have to show that the torture relates to any protected grounds. But the torture must be ‘inflicted by or at the instigation of or with the consent or acquiescence of a public official.’”<sup>149</sup> Therefore, the court here remands W.G.A.’s claim for deferred removal pursuant to the Convention Against Torture because W.G.A. has shown that he has been tortured in the past, and it will continue in the future.<sup>150</sup> The standard does not require a public official to be directly involved, but country reports show that there is an extensive record regarding corruption within the government of El Salvador.<sup>151</sup> In conclusion, W.G.A.’s case was remanded.

*Impact:*

One of the impacts of *W.G.A.* is the idea that when the Board of Immigration issues an opinion that is supplementary to the immigration judge’s decision, the appellate court can examine not only the Board of Immigration’s holding, but also the immigration judge’s opinion. This ultimately gets decided on a case by case basis, but it expands the scope of review of the appellate court. Furthermore, a factual finding on an asylum claim can only be reversed by a Court of Appeals if “the evidence compels a different result” which was the case here in *W.G.A.*<sup>152</sup>

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 968.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 965.

UNITED STATES DISTRICT COURTS

HADWAN V. UNITED STATES DEPARTMENT OF STATE  
340 F.Supp.3d 351 (S.D.N.Y. 2018)

*Synopsis:*

The Department of State revoked Mansoor Hadwan's passport and his Consular Report of Birth Abroad. Under the Mandamus and the Administrative Procedures Act, Hadwan sought to supplement the administrative record with evidence about the State Department's proxy denaturalization program. Because the court found that the State Department did not act in bad faith, and because there was no other particularized need, Hadwan's motion was denied.

*Facts and Analysis:*

In June 2013, Mansoor Hadwan went to the United States Embassy in Sana'a, Yemen.<sup>153</sup> He was applying for immigration benefits for his family.<sup>154</sup> However, when he was there, Hadwan says that officials at the Embassy took his passport and his U.S. Consular Report of Birth Abroad (CRBA).<sup>155</sup> He alleges that "Embassy officials conditioned the return of his passport and CRBA on his completion of a number of forms."<sup>156</sup> Hadwan filled out the forms and says that he was told the documents would be sent to him.<sup>157</sup> In March 2014, Hadwan was told that his passport and CRBA were revoked because "the forms he executed included admissions that his biological father was not a U.S. citizen and that he had lied on his passport and CRBA applications."<sup>158</sup> Hadwan, who does not speak or write English, claimed that these statements were coerced and that "he did not understand what he was

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<sup>153</sup> Hadwan v. United States Department of State, 340 F.Supp.3d 351, 353 (S.D.N.Y. 2018).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 353–54.

signing.”<sup>159</sup> A few months later, in August 2014, there was a revocation hearing held by the State Department, but Hadwan could not attend because “he was denied a one-time passport to attend that hearing.”<sup>160</sup> Hadwan’s attorney argued that “Hadwan did not sign the form voluntarily” but the Government rebutted that claim with the fact that “the document stated that it ‘was read to me in Arabic and I understood the contents completely.’”<sup>161</sup> In March 2015, the State Department found that “Hadwan admitted to supplying false information in his passport and CRBA applications and affirmed their revocation.”<sup>162</sup>

Once his passport and CRBA were revoked, Hadwan sought to supplement the administrative record under the Mandamus Act and the Administrative Procedures Act (APA).<sup>163</sup> Hadwan wanted to add evidence “concerning ‘the implementation of the State Department’s proxy denaturalization program and consulate decisions . . . .’”<sup>164</sup> Hadwan believed that “the administrative record is ‘devoid of any record of how and why the Department of State decided that [he] was not who he purported to be.’”<sup>165</sup> Hadwan also believed that there were illegal coercions and interrogations by agency employees and that the Department of State was “strip[ping] passports from American citizens in Yemen.”<sup>166</sup>

The Government argued that “Hadwan has not ‘made a strong showing or demonstrated a particularized need for the extra-record discovery . . . nor has be demonstrated the existence of any of the narrow and rare circumstances under which discovery may be appropriate against the government in an APA review case.’”<sup>167</sup> Furthermore, the Government argued that “a court reviewing an

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 354.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

agency decision is confined to the administrative record compiled by that agency when it made the decision.”<sup>168</sup>

*Holding:*

The holding in *Hadwan* was based off of the premise that there are two categories in which the administrative record can be supplemented.<sup>169</sup> The first reason is “the party may seek to show that materials exist that were actually considered by the agency decision-makers but are not in the record as filed.”<sup>170</sup> The second is that a “party may seek extra-record evidence” upon a “strong showing in support of a claim of bad faith or improper behavior on the part of the agency decision makers or where the absence of formal administrative findings makes such investigation necessary . . . to determine the reasons for the . . . decision.”<sup>171</sup> Hadwan’s motion to supplement the administrative record was ultimately denied because his reasons did not fall into either of these categories.<sup>172</sup> Courts will not “ascribe . . . nefarious motives to agency action as a general matter.”<sup>173</sup> The court then discusses a couple of exceptions, one being that the administrative record can be supplemented if the “evidentiary record is inadequate, but those materials must merely be explanatory of the original record and should advance no new rationalizations.”<sup>174</sup> Also, the court holds that it will allow for background information “when confronted with complex issues or to determine whether the agency considered all relevant factors in making its decision.”<sup>175</sup> Hadwan “offer[ed] nothing more than bare assertions that the statement was coerced.”<sup>176</sup> Ultimately, the court held that there needs to be a “strong showing of bad faith to warrant

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<sup>168</sup> *Id.* at 355.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 357.

<sup>173</sup> *Id.* at 356.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

extra-record discovery or record supplementation.”<sup>177</sup> The court “will not assume an agency acted in bad faith simply because it exercised its discretion.”<sup>178</sup>

*Impact:*

The full impact of *Hadwan* is yet to be realized. However, the important conclusion from this case is that the court needs a showing that an agency is acting in bad faith. Without that showing, the court will side with the agency and defer to its discretion. Here, there was no showing that the State Department acted in bad faith, so the court denied Hadwan’s motion to supplement the administrative record.

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<sup>177</sup> *Id.* at 357.

<sup>178</sup> *Id.*

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**STATE APPELLATE COURTS****LAPERCHE V. CITY OF PEEKSKILL**  
**162 A.D.3d 665 (N.Y. App. Div. 2018)***Synopsis:*

Douglas LaPerche was a police officer in the City of Peekskill. Officer LaPerche had sustained injuries that caused him to be out of work. He applied for benefits because his absence was related to a prior injury. The Chief of Police denied the application due to procedural errors in Officer Peekskill's request. The court ruled that denying these benefits based solely on procedural grounds was an abuse of discretion.

*Facts and Analysis:*

Officer Douglas LaPerche, during his time as a police officer in the City of Peekskill, sustained injuries on September 18, 2011 and December 24, 2012.<sup>179</sup> Officer LaPerche reported both of these injuries and received benefits each time under General Municipal Law section 207-c.<sup>180</sup> However, a couple of years later, on May 23, 2015, Officer LaPerche said that he would be out of work until June 10, 2015 until he had seen his orthopedist.<sup>181</sup> He applied for benefits because "his absence was related to the prior injuries sustained on September 18, 2011, and December 24, 2012."<sup>182</sup> However, the Chief of Police of the City of Peekskill denied the application because "the petitioner failed to follow the procedures relating to the application for such benefits as outlined in the collective bargaining agreement between the petitioner's union and the respondent."<sup>183</sup> Officer LaPerche was required to submit a report within 24 hours of

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<sup>179</sup> LaPerche v. City of Peekskill, 162 A.D.3d 665, 666 (N.Y. App. Div. 2018).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

the incident which “gave rise to the disability.”<sup>184</sup> However, the incident was years before.

Judicial review of an administrative determination is “limited to the question of whether the determination was ‘made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.’”<sup>185</sup> The court also states that a “determination is arbitrary and capricious if it lacks a rational basis.”<sup>186</sup>

*Holding:*

Here, the court found that the “failure to submit an incident report within the 24-hour time limit may be excused by the respondent ‘in appropriate cases.’”<sup>187</sup> The court argued that under these circumstances, “it was arbitrary and capricious for the respondent not to offer the petitioner the opportunity to seek to excuse any technical violations of these procedures.”<sup>188</sup> It would be an abuse of discretion to deny Officer LaPerche’s application for benefits due to a procedural error alone.<sup>189</sup>

*Impact:*

The impact of *LaPerche* is the reaffirmation that an administrative determination is arbitrary and capricious if it lacks a rational basis. Here, there was no rational basis for denying Officer LaPerche’s application based on a procedural error. Furthermore, judicial review of an administrative determination is limited to whether or not the decision was based on an error of law or if there was an abuse of discretion. The judicial branch is not provided much leeway in examining administrative decisions.

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<sup>184</sup> *Id.* at 666–67.

<sup>185</sup> *Id.* at 667.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 667–68.

<sup>188</sup> *Id.* at 668.

<sup>189</sup> *Id.*