COMPLIANCE: PAST, PRESENT AND FUTURE

Geoffrey Parsons Miller*

I. INTRODUCTION

COMPLIANCE, once a virtually unknown topic, is coming of age as a field of legal practice, as a subject taught in law schools, and as a field of research and analysis by academics and thoughtful practitioners. Nearly every week, news headlines feature a topic related to compliance. In this article, an expansion of a speech given at the University of Toledo Law School’s compliance symposium, I celebrate the growth of compliance and discuss where the compliance enterprise is and where it is going. Along the way, I will ask some tough questions. Why do companies continue to misbehave, notwithstanding the strides we have made in improving the techniques of risk management and compliance? Are we placing too much emphasis on reforming corporate culture, an undefined and potentially undefinable concept without clear or objective metrics for analysis? Will risk management achieve the expectations set for it by its proponents—and does it perversely increase risk in some cases because the risk assessments on which it is based may be inaccurate? Has the administrative state become too powerful and have courts been inappropriately marginalized in the process? There are, as yet, no clear answers to these questions; the answers will only become apparent as the enterprise evolves. We can and should celebrate recent developments in the compliance area, but we should also be alert to the possibility that the enterprise will fail to deliver on all that it seems to promise.

II. CELEBRATING COMPLIANCE

In assessing where compliance is, it is first useful to understand where it started. Twenty years ago, compliance was a bit of a backwater, a field that, in the view of many, had little intrinsic interest and a place where people would go if their careers had not taken them where they wanted. Compliance officers tended to work in cubicles and performed a sort of glorified bookkeeping task, making sure that forms were filled out and boxes checked. But they did not play a strategic role in the management of enterprise. There were no general courses on compliance taught at leading law schools, no text books for attorneys on the

* Stuyvesant Comfort Professor of Law, New York University Law School; Faculty Director, NYU Law School Program on Corporate Compliance and Enforcement; NYU Law School Center for Civil Justice; NYU Law School Center on Financial Institutions; member of the board of directors of State Farm Bank.
topic, and little appreciation that compliance might be a topic even worthy of study, much less one possessing intrinsic interest and importance.

A. Risk-Assessment Makes Compliance Attractive

Today much of that old view has faded away. Compliance is a vibrant field for hiring and a desirable career option. Compliance officer salaries have greatly increased and compliance departments have exploded in size and importance. While there is still some of the check-the-box quality to the compliance function—and there always will be—the job of compliance has increasingly moved away from a mechanical approach to a risk-based approach.

Chief compliance officers today allocate the resources of their departments based on an assessment of the underlying compliance risks. This means they must take account of and be sensitive to the basic business pressures facing their organizations. The integration of risk assessment and risk-based strategies has radically changed the perspective and the performance of compliance departments in many industries.

At the same time, compliance officers have experienced a huge uptick in prestige and influence within organizations. In some companies, especially in the financial sector, the Chief Compliance Officer ("CCO") is given a direct report to the CEO and sometimes to a board committee, such as the Board Audit Committee, Risk Committee, or Compliance Committee. Compliance officers are also being included in strategic management decisions. Instead of coming in later and verifying that systems are complied with and boxes are checked, the compliance officer is often consulted before key strategic decisions are made.

Suppose, for example, that a company is considering entering a new market in a foreign country. Unless the company has a lot of familiarity with business practices in that part of the world, it would be wise for it to include the compliance department in the strategic planning process, both with respect to the basic decision whether to enter the market at all, and with respect to the decision of how the firm will structure its operations if it does enter.

B. Other Initiatives Make Compliance a Compelling Field of Study

Compliance is becoming a distinct legal practice area. Two years ago, the American Law Institute approved a project on "Principles of the Law, Compliance, Enforcement and Risk Management for Corporations, Nonprofits, and Other Organizations." That project is now in its second preliminary draft and is anticipated to be completed sometime next year. At the same time, academic institutions are beginning to offer courses, degrees, and programs in compliance. My school, NYU, started teaching a general compliance class three

years ago, and the class now has a firm place in the curriculum. Other schools have gone further and created specialized advanced degree programs in compliance. For example, the University of Toledo College of Law recently launched several programs, each geared toward preparing students for careers in growing compliance fields.

Along with these programs have come teaching and learning resources. I cannot resist the temptation to plug my own book, *The Law of Governance, Risk Management and Compliance*, now in its second edition, which to the best of my knowledge is the first general book on the topic for law students and lawyers who want to retool into the compliance field. Moreover, compliance is beginning to attract the interest of excellent scholars. The academic study of compliance and related fields has begun to probe into important and heretofore unexplored areas for legal research. Of these, the following are particularly notable:

- Behavioral Compliance: Professor Donald Langevoort and others are engaged in cutting edge research on how legal and private incentives can be employed to motivate people towards good behavior in effective and efficient ways.

- Risk-Management and Risk Analysis: The topic of compliance cannot be separated from that of risk management. Academic lawyers are beginning to examine the risk revolution in administration and are coming to understand how profound a change is entailed by the move to risk-based strategies of management, compliance, internal audit, external audit, supervision and regulation.

- Compliance-Related Business Governance: A new approach to governance goes past the traditional issues of the powers of the board of directors and of shareholders. Compliance-related governance looks under the hood of complex organizations and seeks to understand the processes of internal audit, risk-management, compliance, human resources, and the business line.

- External Control Over Internal Governance: Legislatures and regulators are playing an increasingly normative role in corporate governance: dictating strategies for internal control (for example, requirements for board audit or risk committees) and, through regulatory guidance, effectively acting as management consultants on steroids who promote “best practices” that are mandatory in all but name.

---


• The Real Impact of Laws and Legal Institutions on Human Behavior: Some of the most intriguing compliance research focuses on the understanding that law in action is influenced by the compliance function. The compliance department translates the rules promulgated by legislatures and regulators and embodies them in workable standards for behavior that can be understood by people with no real interest or sophistication in the law and that can be monitored and enforced within the organization. Seen from this vantage point, compliance is a sort of "black box" of the law in which normative standards are promulgated and enforced within the privacy of complex organizations. Traditionally, scholars have not had access to these internal norm-creation and norm-enforcement processes—and for that reason, among others, academic researchers did not study these forms of law-related behavior. Fortunately for researchers, that veil of privacy is being lifted as compliance operations become the subject of legal proceedings and public consent decrees.

These developments, I believe, have created a compliance revolution. They are reasons to celebrate the growth of the compliance field. But even more significant is a matter that is hard to demonstrate, but that I believe to be true. The compliance revolution has had a beneficial impact on changing norms, attitudes, and practices in firms and markets. Compliance has changed institutions for the better, resulting in reduced rule breaking, less corruption, a lower frequency of abusive behavior, and greater respect for the rule of law.

III. CAUTIONING COMPLIANCE

I now turn to a consideration of considerations that should counsel for caution amid our celebration about the compliance revolution:

• In spite the advances we have undoubtedly made, companies continue to misbehave, sometimes in egregious and dangerous ways.

• The emphasis on reforming corporate culture, much in fashion among thought leaders, may overstate the potential for this approach and perhaps lead to overconfidence that cultural change can fundamentally alter corporate behavior.

• The risk revolution in regulation and internal control, while it has many beneficial features, also poses risks of its own that should be considered when designing strategies of internal and external control.

• The administrative state, despite its many benefits, has grown so powerful as to raise troubling questions about its role in a democratic society that values autonomy and individual freedom.
A. Why Do Companies Continue to Misbehave in Highly Problematic Ways?

Even though we have made great progress in enhancing compliance and respect for the law, you can’t look at recent events without wondering whether we have made enough.

1. Wells Fargo

Many observers, myself included, were amazed and disturbed at the recent revelations that Wells Fargo employees created millions of bogus accounts for real customers. The scandal had massive consequences for the bank, resulting in management turnovers, claw-backs of senior manager compensation, loss of business, and severe damage to the reputation of an exceptionally successful and previously well-regarded institution. The Wells Fargo revelations are mind-boggling, and raise some worrisome questions:

i. What Happened to Internal Audit?

Such a vast number of bogus accounts should not have been created without the problem becoming apparent to internal audit and elevated to higher levels of the organization. These accounts often had a zero balance, and it doesn’t require a rocket scientist to know that when you have vast numbers of zero balance accounts, this is at least a yellow flag calling for further investigation.

ii. What Happened to Human Resources?

Thousands of Wells Fargo employees were fired in connection with these activities. Even though these employees were eventually let go, why did Wells Fargo’s Human Resources Department allow so many people to come on board in the first place? Human resources departments are responsible for hiring employees who, at minimum, will conduct themselves lawfully; and one might ask whether this function broke down at Wells Fargo.

iii. What Happened to Compliance?

The compliance department at Wells Fargo apparently failed to connect the dots when so many people had been caught doing the same thing over the course of years. Some of the reason for this default may have been the decentralized nature of Wells Fargo’s compliance management system and the fact that the compliance function was merged with the risk management function and


supervised by the same individual. Nevertheless, it is surprising and disturbing that a problem this pervasive apparently escaped detection and remediation by the compliance function.

iv. What Happened to External Audit?

Wells Fargo’s external auditor arguably should have noticed that something was amiss with these bogus accounts. The failure of the external auditor to identify the problem reveals a process weakness that, if it exists elsewhere, should be noted and rectified by companies seeking to operate with robust programs of internal and external control.

v. How Did all Three of the Internal Lines of Defense Fail?

Business management, compliance and risk management, and internal audit all seemed to break down at this company. As a regulated commercial bank, Wells Fargo had one of the most up-to-date and thoroughly regulated systems of internal controls of any U.S. corporation. At least one of the internal defenses should have properly identified the issue, and failure of all three indicates a problem that is more than mere mistake or oversight.

vi. Most Importantly, What Happened to the Corporate Culture?

Wells Fargo had a sterling reputation. If the internal culture at the bank matched its reputation, why did senior management tolerate thousands of employees being fired without looking into the root cause of the problem and taking vigorous and proactive measures to address the problem? Something seems to have gone terribly awry. But if a breakdown of this magnitude could happen at a company as reputable as Wells Fargo, why couldn't it happen anywhere?

2. Volkswagen

Most people are familiar with the actions undertaken by Volkswagen, the German car manufacturer. This company installed “defeat devices” on diesel automobiles sold in the United States that were intended to evade U.S. environmental regulations. This compliance breakdown at one of Europe’s best-known and most respected firms shocked and amazed many observers. The Volkswagen scandal raises troubling questions, which follow.

8. See id.
9. Id.
i. How Could a Reputable Company Engage in Such a Tawdry Scheme?

Volkswagen had a good reputation for compliance and was one of the leading automobile manufacturers in the world. Devising a concerted effort to cheat on emissions requirements placed the company’s reputation in grave jeopardy. Why would Volkswagen have risked so much for so little?

ii. Where Was the Whistle Blower?

Many people were involved in the fraud at Volkswagen, including senior management. When the number of participants in unlawful activity rises, the likelihood that one of them will function as a whistle blower increases. That no one blew the whistle is odd and shows that reliance on whistle blowers may not always be effective as a form of compliance management.

iii. What Happened to the Compliance Function?

Some in Volkswagen’s management apparently considered the emissions cheat to be a good business practice. But the company’s compliance department could and should have prevented these business considerations from trumping the company’s commitment to honesty and fair dealing. It seems that the company’s internal controls broke down. This failure of compliance is especially troubling since, as it turned out, the cheat was rather easy to discover and the reputational harm to the company if the cheat were revealed was certain to be catastrophic.

3. General Motors

Perhaps equally shocking is the General Motors (“GM”) ignition switch fiasco, in which the American automobile manufacturer sold cars with a dangerous defect even though some at the company had reason to know the seriousness of the problem. GM’s failure to act promptly to correct the defect ended up costing lives and endangering the public welfare. Here again, questions come to mind.

i. Why Didn’t Senior Managers Know about the Problem?

The automotive engineers at GM are presumably some of the best in the world. It seems obvious that successful and experienced engineers should have recognized that problems with ignition switches could disable the air bags and

11. Id.
greatly increase the risk to human life. Understanding the informational and intelligence break down is crucial to preventing such issues in the future.

ii. Why Didn’t GM Take Swift Action to Rectify the Problem?

It appears that GM could have acted sooner to resolve the issue. The company is alleged to have temporized and to have failed to implement effective corrective action for a seemingly unreasonable period of time. Why didn’t GM’s management act more promptly to address the problems that later came to light?

iii. What was Wrong with GM’s Culture?

GM management is alleged to have tolerated a culture in which problems like the ignition switch issues could be ignored or swept under the rug. Compliance programs exist to prevent ignorance of noncompliance. Understanding how the corporate culture at GM may have allowed such ignorance to persist is essential to learning how to prevent similar mistakes in the future.

B. Are We Placing Too Much Hope on Reforms to Corporate Culture?

My second set of concerns has to do with the idea—enthusiastically embraced by many thought leaders in the compliance world—that the most important key to improving compliance is to reform corporate culture. Nearly everyone agrees that there was something wrong with attitudes and behaviors in the financial services industry in the years before the crisis. Nearly everyone also endorses the proposition that inappropriate risk-taking and disdain for regulation contributed to the excesses characteristic of those years. And there’s broad consensus that a respectful attitude towards risk management and compliance can help protect against another crisis. There’s a lot of merit in these ideas.

But whenever one observes this sort of piling on, it’s useful to ask what we’re missing. The principal force shaping culture in the banking industry is neither regulation, nor bureaucratic jawboning, nor sermons from CEOs. These do have an influence. However, macroeconomic conditions are more important and are far more influential.

It was macroeconomic conditions, not corporate culture, which had the greatest influence on how people behaved during the bubble period in early part of the 21st century—and on how they have behaved since. The irresponsibility displayed by bankers and regulators during the 2000s grew out of the easy money conditions of those times, just as the market turmoil associated with the bursting of the housing bubble in 2008 fueled the current enthusiasm for probity. If this is true—that macroeconomic conditions are the most important drivers of corporate culture—then we should not be overly sanguine about the potential for regulatory self-imposed reforms of corporate culture.
Thomas Kuhn's famous study of scientific revolutions observes that researchers trained in one paradigm rarely abandon their way of thinking in the face of contrary evidence. Instead, it is the younger generation who embrace the new paradigm. The same may be true for risk and compliance in the financial world. It is not easy to teach old bankers new tricks. Durable reform of banking culture may need to await the maturation of a younger generation of bankers schooled in different ways of thinking.

Even if efforts at cultural reform are effective and durable, however, we should be cautious about the potential downsides. Corporate managers should not be clones or puppets. The energy, intelligence, and imagination displayed by those who profited from the credit bubble were good attributes, even if they were directed in the wrong way. The instruments these people invented or exploited—credit default swaps, collateralized debt obligations, structured financial transactions, and the like—didn't cause the crisis and are not intrinsically toxic. They do create risk, but, if properly controlled, they also hold promise to materially enhance consumer welfare.

It's tempting to yearn for a return to mid-twentieth century finance—a world where banks didn't fail and market volatility was low. But a consumer of today, if transported to that golden age, would not be very happy with the quality or cost of the financial services she received. Banking in those days was a government-sponsored and government-enforced cartel in which depository institutions enjoyed local monopolies and access to free money. Bankers wore regimental ties, teed off at three, and prided themselves on never doing anything for the first time. That culture gave value to probity and moderation, but it was not one we should wish to revive.

Today, banking faces existential threats on both sides of the balance sheet. Fintech firms and peer-to-peer lenders promise fast, cheap, and nimble financing. Meanwhile, block chain technologies threaten banks' traditional hegemony in payments services.

Banks must respond effectively to these challenges. Proposed reforms to banking culture would accomplish little if they created dinosaurs that cannot adapt when the next asteroid strikes the financial world. Thoughtful commentators such as Thomas Baxter of the New York Fed recognize that proposals to improve banking culture are not panaceas. Baxter and other thought leaders are careful to qualify their support of the cultural approach with recognition of its limitations.

In the drumbeat of enthusiasm for cultural reform, these grace notes of caution can easily be missed. We should proceed with efforts to improve attitudes and norms in the banking sector. But we should do so with recognition that our ability to change culture is limited, that overconfidence in actions being taken can be as dangerous as failing to act at all, and that no matter how


attractive the idea of cultural reform might appear at first, it is likely to
disappoint those who seek a universal antidote to problems of risk-taking and
misconduct in financial services firms.

C. We May be Placing Too Much Emphasis on Risk Management

Earlier, I mentioned the “risk revolution” in internal and external control. By “risk revolution,” what I mean is that, over the past few decades, we have witnessed a fundamental realignment at all levels of the basic methodology that we use to design our systems of internal and external control. The basic realignment is the move to risk based controls. We see this move to risk-based controls in business lines, most importantly in the financial services world. The Basel capital guidelines applicable to banking firms have, since 1988, been explicitly risk based.\footnote{History of the Basel Committee, BANK FOR INT’L SETTLEMENTS, http://www.bis.org/bcbs/history.htm (last updated Dec. 30, 2016).} They require banking firms to hold capital based on an assessment of the risk associated with the assets and activities in which the banks engage.\footnote{Capital Guidelines and Adequacy, BOARD OF GOVERNORS OF THE FED. RES. SYS., https://www.federalreserve.gov/supervisionreg/topics/capital.htm (last updated May 5, 2017).} Risk-based controls have also come to permeate decisions by organizations’ internal audit departments. Internal audit is now risk-based in the sense that the audit plan and audit resources are allocated based on a preliminary risk assessment that identifies areas of greatest concern to the internal audit process. The risk revolution is also evident in the move to risk-based controls in the area of compliance. Chief compliance officers now typically perform a risk assessment—one that is periodically refreshed—when determining what controls they will put in place and how much resources they will put in place to monitor different entities and processes within the organization. We see the move to risk-based controls in external audit. External audits today are almost always based on a preliminary risk assessment by the independent accounting firm that is charged with examining the company’s internal controls over financial reporting. And the move to risk-based decision-making is also evident in regulatory agencies. Regulators in many areas today perform a preliminary risk assessment to determine the scope and intensity of supervision they will devote to regulated firms, or to particular activities of regulated firms. This across-the-board adoption of risk-based is what I call the risk revolution in internal and external control.

This risk revolution is a good thing, overall: we should not be foolish, and we should focus our resources and our energies in ways that are likely to do the most good. A nation doesn’t aim its missiles at the center of the ocean where there are no enemies. Institutions of internal and external control, likewise, should not spin the wheels in meaningless make-work when there are dangerous conditions that call for their attention. At the same time, we should be cautious about putting too much faith in the risk revolution as a solution to the challenge of managing control functions in complex organizations. The biggest problem in the risk-based approach is simply this: our risk analysis can be wrong. And how
could this be, given that so many intelligent people are spending their working lives in assessing risk and incorporating the risk assessments, once made, in strategic plans for business management? The answer is that risk analyses can be wrong, even though so many people are working on getting them right.

During the 2000s, in the years leading up to the financial crisis of 2007-2009, thousands of people were looking at the risks in world financial markets. These included people at banks and securities companies who had real money at stake in terms of bonuses, promotions, and so on. They also included government officials, including central bankers who were supposed to watch out for risks to the world’s financial markets. They even included the Financial Stability Forum, a committee of regulators and central bankers based in Basel, Switzerland, whose sole responsibility was to monitor and detect threats to the stability of the world’s financial system. These people were sophisticated, highly educated, well-paid, and highly motivated. They were not corrupt, and they were not improperly influenced by any person or interest. Yet, virtually all of these people missed the profound risk to the world’s financial system posed by the housing bubble and the massive growth in subprime mortgage backed securities and related instruments. Many of you probably have seen the movie The Big Short, which provides a vibrant dramatization of the blindness that most people in the financial world displayed towards the risk of a collapse in housing prices, even though the few astute investors who really looked into the matter realized that such a collapse was inevitable. Like in the movie, the same was true in the period leading up to the financial crisis of 2007-2009.

When risk assessments are wrong, we can often be worse off than if we engage in no risk assessment at all. The reason is that we will devote our control resources to the wrong subjects. In such a case, we would be better off with the old check-the-box approach, which, despite its manifest defects, at least required the control function to look systematically across the entire range of possible threats to the organization. And the problem is worse than the mere fact risk assessments can be wrong. The problem is one of complacency: we can place so much trust that our risk assessments will guide us in the right direction that we ignore common sense measures that we would otherwise undertake to protect ourselves or our organizations.

Again, the 2007-2009 financial crisis provides an example. During the decade of the 2000s, the Basel Capital Adequacy Guidelines were regulatory superstars. The revised version of the guidelines, which came out in 2004, was the most thoroughly vetted, sophisticated, and widely lauded international regulatory initiative of all time. And under these guidelines, banks in 2006 looked to be flourishing. The banking sector as a whole was more than well capitalized, and every major international bank was in compliance with

regulatory requirements. Regulators, central bankers, commercial bankers, investors, and others relied on these results to conclude that the world’s financial system was in the bloom of health: even though house prices in some countries were rising pretty steeply, there was no cause for concern. Of course, there was a cause for concern. At that very moment, in 2006, the housing boom peaked, and the world’s financial system was poised on the brink of the most catastrophic period of loss and turmoil since the Great Depression of the 1930s. In other words, we can and do get our risk assessments wrong.

The fact that many people are working on risk assessments isn’t necessarily a protection against this problem. The issue is that there is an enormous amount of group think in risk assessments. It’s true that the various control operations in a firm are supposed to arrive at their own independent risk assessments: the risk assessment made by internal audit may not be the same as that made by compliance, and the risk assessment by compliance may not be the same as that made by the Chief Risk Officer. In practice, however, everyone knows what everyone else is doing, and companies do not operate autonomous and independent risk assessment operations. Regulators, for their part, don’t necessarily help matters. Their risk assessments are based, often, on the risk assessments they hear from their regulated firms, and, thus, they are not necessarily independent. Moreover, bank regulators inform the banks they regulate about their assessment of the bank’s risk, and banks would be well advised to take the regulator’s risk assessment into account when compiling their own assessment. In other words, there is a danger of a cycle in which internal offices at the banks coordinate with one another, the banks tell the regulators, and the regulators tell the bank. This process doesn’t necessarily lead to independent thought. It can lead, instead, to a consensus in which no one is brave enough to come forward with their own views. Group think kicks in, and we end up with the entire system making skewed or inaccurate risk assessments.

D. The Administrative State May Have Become Too Powerful in a Way That Threatens Our Fundamental Values

My fourth and final set of concerns relates to the sizeable role of the modern administrative state. The concern is that the administrative state, of which the compliance function is an integral part, may have, in some respects, become too large, too powerful, and too unchecked by countervailing power. It is commonplace today, but still remarkable, to consider the awesome powers of modern administrative agencies and prosecutors. In the modern administrative state, norms governing complex organizations are defined, adjudicated, and enforced by administrative agencies or prosecutors rather than courts. Agencies, rather than judges, declare what the law is, enforce the law so declared, and adjudicate rights of private parties in enforcement proceedings that they have brought. Judges are not absent but play a notably less important role. They defer to agency interpretations of legal norms and examine agency determinations under a standard so deferential as to make judicial review, in many cases, little more than a chimera. Judges are relegated to the margins—juridical Bob Cratchets with little to do other than blessing decisions made by others.
The growth of the administrative model has altered the balance of power between government and the private sector. Regulated firms today are cast in the role of supplicants seeking to curry favor with despotic, although often well-intentioned rulers. They can cajole, coax, and flatter, but usually cannot resist the will of their overseers. Indeed, the events of 2007-2009 only added to the power imbalance as governments leveraged their failure to predict or prevent the disaster into an argument for obtaining even greater authority over financial markets and institutions.

Many, if not most, of the key elements of the administrative model are now permanent features of our governmental landscape. Many also respond to genuine public needs and serve important public purposes: private sector actors respond to incentives, positive and negative, and some percentage of them will violate applicable norms and rules if they feel they can get away with it. Yet, for those who fear that the administrative state may have now expanded beyond its optimal level of size and influence, imposing limits on its growth could be a desirable development. At issue is a simple but fundamental question: will official discretion continue its seemingly inexorable expansion into every corner of everyday life, or will the courts devise meaningful limitations to protect the private sector and the public against inappropriate exercises of governmental power?

The outcome to this question is uncertain. Green shoots of judicial resistance are appearing, and they seem to be cropping up with increasing frequency in federal courts. Even some Justices of the Supreme Court seem to share the concern about excessive administrative power and are receptive to the idea of placing limits on its further expansion. It is not yet clear whether these tentative efforts will blossom into more significant efforts to place limits on the administrative state. If a crisis of administrative law does develop over the next decade, as appears possible, it is likely to consist of an extended conflict between those who would enhance the authority of government even further and those who seek means to hold it in check.

I will illustrate this point, and also close my article, by calling attention to a dissenting opinion by Chief Justice Roberts in a recent administrative case.20 This opinion, in part because it is a dissenting opinion, has received little attention by the press or by commentators. But I think it is one of the most significant statements by a Supreme Court justice of the past decade. The reason is that it evinces fundamental and deep-seated concern, on the part of the chief jurist of our country, about the fundamental and overwhelming growth of administrative power.

Chief Justice Roberts's dissent comes from a case was called City of Arlington v. FCC.21 The majority opinion in that case had afforded Chevron deference to an agency's interpretation of its own jurisdictional statute. In his dissent, the Chief Justice not only took issue with the Court's ruling, but also raised fundamental questions about the power and growth of the modern

21. Id.
When the Chief Justice of the United States speaks—even if in dissent, and even when the comments in question are not directly relevant to his legal analysis—Court watchers should take notice. And Roberts, perhaps emboldened by the freedom of expression afforded in a dissenting opinion, did not pull his punches.

The Chief Justice’s disquisition on the modern administrative state is worth quoting at some length because it reveals how the nation’s most important judge views the rise of administrative government:

One of the principal authors of the Constitution famously wrote that the “accumulation of all powers, legislative, executive, and judiciary, in the same hands, ... may justly be pronounced the very definition of tyranny.” Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules. The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government.

Roberts went on to tie these general concerns about the administrative state to the specific context of Chevron deference:

By design or default, Congress often fails to speak to “the precise question” before an agency. In the absence of such an answer, an agency’s interpretation has the full force and effect of law, unless it “exceeds the bounds of the permissible.” It would be a bit much to describe the result as “the very definition of tyranny,” but the danger posed by the growing power of the administrative state cannot be dismissed.

“[T]he danger posed by the growing power of the administrative state cannot be dismissed.” Coming from the Chief Justice of the United States, these are rather extraordinary words, even in a dissenting opinion. And Justice Scalia’s majority opinion did not really disagree with the assessment. Responding to the Chief’s jeremiad, Scalia remarked that “[t]he Chief Justice’s discomfort with the growth of agency power is perhaps understandable.” The difference between the majority opinion and the dissent rested in contrasting views of the scope of Chevron deference as applied to the particular facts—not a disagreement about the dangers posed by the growth of administrative power.

22. Id. at 1877-86.
23. Id. at 1877-78 (quoting THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961)).
24. Id. at 1879 (internal citation omitted).
25. Id. (emphasis added).
26. Id. at 1866.
27. Id. at 1873 n.4 (internal citation omitted).
What lesson can we draw from this, and other recent statements by Justices of the Supreme Court and by numerous lower court judges, which display deep skepticism about the growth of administrative power? My guess is the following: at least some of the Justices of the Supreme Court—the Chief Justice being one of them—are preparing to define a new agenda for the Court—an agenda that will raise the fundamental issue of whether the judicial branch can or should play a more active role in constraining the powers of administrative agencies. Whether this presages fundamental changes for the compliance function remains to be seen. Even if the Court cuts back on the powers of administrators, the modern compliance function is so firmly embedded in the deep structure of regulated companies that it is unlikely to be relegated to the margins it once occupied, regardless of changes that may occur in the broader law pertinent to regulation and enforcement. Nevertheless, the coming years may witness an uptick in judicial efforts to control the administrative state, a development with important consequences for the future of the compliance function in American industry.