



**AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
2005 ANNUAL MEETING**

**COUNCIL MEETING
Saturday, August 5, 2005
The Fairmont Hotel, Chicago, Illinois**

**8:00 a.m. – 9:00 a.m. Breakfast
9:00 a.m. – 12:00 p.m. Council Meeting**

AGENDA

9:00 – 9:10am	Call to Order, Introduction of Persons Present, and Approval of the 2005 Spring Council Meeting Minutes	Tab 1
9:10 – 9:25am	Report of the Chair, <i>May</i>	Tab 2A, 2B, 2C (pdf)
9:25 – 10:50am	Delegate's Report, <i>Susman, Kaleta</i>	Tab 3*
	Resolution 106A OPM and ALJ's	Tab 4 (pdf)
10:55am – 11:05am	Report of the Chair-Elect, <i>Kinney</i>	Tab 6
11:05am – 11:10am	Report of the Vice-Chair, <i>Troy</i>	
11:10am – 11:20am	Student Essay Contest, <i>Wagner</i>	Tab 7
11:20am – 11:40am	Proposed FOIA Resolution, <i>Vieux, O'Reilly</i>	Tab 8*
11:40am – 11:50am	Second Annual Institute on Admin Law, <i>Young</i>	Tab 9
11:50am – Noon	Homeland Security Committee Report, <i>Zusman</i>	
Noon	Adjourn	

* Materials will be distributed at the meeting, if not before.

COUNCIL MEETING
Sunday, August 6, 2005
The Fairmont Hotel, Chicago, Illinois

8:00 a.m. – 9:00 a.m. Breakfast
9:00 a.m. – 12:00 p.m. Council Meeting

AGENDA

9:00 – 9:10am	Call to Order, Introduction of Persons Present	
9:10am – 9:30am	Subcommittee on Lawton Award, <i>Farina</i>	Tab 10
9:30am – 9:35am	“Defining the Judge” Program Report, <i>Levine</i>	
9:35am- 9:40am	Subcommittee on Scholarship Award, <i>May</i>	Tab 11*
9:40am – 10:00am	EU Project Update, <i>Kinney, Eisner, O’Reilly, Koch</i>	Tab 12
10:00am – 10:05am	Publications Committee Report, <i>Shavers</i>	
10:05am – 10:10am	Membership Committee Report, <i>Landers</i>	Tab 13
10:10am – 10:20am	Budget Report, <i>Cohen</i>	Tab 14*
10:20am – 11:00am	Delegate’s Report continued, <i>Susman, Kaleta</i>	
11:00am – 11:10am	Report of the Nominating Committee	Tab 15
11:10am – 11:20am	Election of Section Officers and Council	
11:20am – 11:30am	New Business	
11:30am	Adjourn	

**AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
SPRING COUNCIL MEETING - SAVANNAH, GEORGIA
APRIL 30 - MAY 1, 2005**

Saturday, April 30

Call to Order, Approval of Minutes, and Introduction of Persons Present

Chair Randolph May called the meeting to order at approximately 9:05 a.m. He thanked the Meeting Chair, Steve Vieux, and Kim Knight and Nicole Emarad for their excellent work in arranging the meeting, and Jones Day, Sutherland Asbill & Brennan, Alston & Bird, and Cingular Wireless for their financial support of the meeting.

After members offered corrections, the minutes of the fall 2004 and winter 2005 meetings of the Council were approved. The introduction of persons present included Chair Randolph May, Chair-Elect Eleanor Kinney, Budget Officer Dan Cohen, Secretary Jonathan Rusch, and Council Members Paul Afonso, Michael Asimow, Selena Davis, Katy Kunzer, Sharan Levine, Christine Monte, Alan Raul, Anna Shavers, Loren Smith, Ron Smith, and Ann Young.

Chair's Report

Chair Randolph May reported that the state of the Section is good. The Section had four well-attended lunch programs in March, with 50-60 people attending each. A final lunch program for the end of this ABA year will be the Deputy General Counsel of the Food and Drug Administration in June. The Chicago meeting will be August 5-7 (see Tab 15). On the technical comment authority for submission of comments to agencies (see Tab 14), the Section had limited its request for authority to comment on OMB proposals and issues that affected rulemaking processes and impact studies. Other Sections submitted much broader requests. The ABA Board of Governors decided to do another iteration of requests. May proposed that the Section resubmit the request that it made. Section Delegate Thomas Susman requested that the Delegates have discretion to seek an amendment of the form, so that it would ask Sections to describe the Sections with which they had coordinated or discussed the issue in advance.

Chair-Elect's Report

Chair-Elect Eleanor Kinney said that the major item for the next year was the Fall Meeting (Tab 2). The meeting will have two themes: showcasing the European Union project (including a meeting of project reporters during that meeting and a program on EU law), and a program on health law. She added that they are looking for sponsors for that meeting. The Mary C. Lawton and Scholarship awards would also be present at that meeting.

Kinney reported that the Mid-Year Meeting for 2006 would be in New Orleans; Cynthia Drew will be the meeting chair. She is thinking about Bermuda for the spring 2006 meeting. Planning is moving ahead for the second Administrative Law and Regulatory Practice Institute (perhaps on the issue of lobbying) and for the 2006 Annual Meeting in Honolulu. Kinney also indicated her interest in finding Vice-Chairs for various committees and asked for Section members to make suggestions.

Report on First Annual Administrative Law and Regulatory Practice Institute

John Hardin Young, Program Chair for the first Administrative Law and Regulatory Practice Institute, reported on the Institute. He commented that the Institute, which took place on April 7-8 in Washington, D.C., was a great event, with about 275 people in attendance. The Institute started with a morning program on rulemaking, then moved to a rulemaking case study, which worked well, a reception, a distinguished lecture by former Section Chair Richard Wiley, and two panels on "lessons learned." Young stated that the Section has started to look at planning for an Institute next year, with a focus on lobbying to reach out to a different part of the Section's constituency.

Chair Randolph May stated that he expects this Institute will be an important spring activity for the Section in future years. Council Member Michael Asimow suggested that the Section could annually published materials relating to the Institute. May added that the Wiley lecture would be published in the *Administrative Law Review*. There was also a suggestion that the Section consider marketing videotapes of certain panel presentations.

Resolution on Tom Sargentich

Jeffrey Lubbers discussed the draft resolution memorializing Tom Sargentich (Tab 13), including a number of minor revisions. Chair Randolph May noted that the resolution, as revised, would be put in the *Administrative Law News* and sent to Sargentich's family. By voice vote, the Council approved the resolution and a \$1,000 contribution to the scholarship fund in his memory.

FOIA Resolution

Meeting Chair Steve Vieux, accompanied by James O'Reilly, presented the Freedom of Information Act (FOIA) resolution (Tab 3). He stated that the proposed resolution calls for (1) standardization of the definition of the term "sensitive but unclassified" designation, which has increased confusion among agencies and the public; and (2) a recent bill, the Faster FOIA Act (S. 589 and H.R. 1620). Section Delegate Thomas Susman suggested that the Committee separate the two items in the resolution. He commented that the two clauses of the resolution are different in content and direction. In addition, with respect to the second clause, the Senate bill, S. 589, may already be out of the Senate, which would make it more appropriate for the Section to send a letter stating its position on the bill soon to the House committee and subcommittee handling H.R. 1620.

With respect to the first clause, Council Member Michael Asimow recommended that the resolution on "sensitive but unclassified" tell Congress what it should do. James O'Reilly, Chair of the Committee on Government Information and Right to Privacy, said that because there are such differences between agencies on what "sensitive but unclassified" means, they thought it would be better to have Congress study the problem. Chair Randolph May stated that the two parts of the resolution should be separated. Eisner also indicated that there should be an empirical study on what the impact of this resolution would be on FOIA, and recommended putting the Administrative Conference of the United States on the Faster FOIA Commission.

Council Member Alan Raul noted that the resolution on "sensitive but unclassified" calls for legislation to be adopted, but that perhaps there does not need to be legislation. May indicated that the resolution needs to offer some principles to guide what agencies should do. Secretary Jonathan Rusch added that the resolution should say what "sensitive but unclassified" does not mean, as that term has no statutory basis and is found nowhere in the FOIA exemptions. May concluded with a comment that this resolution was a worthwhile endeavor, and expressed his hope that by the August meeting, the Council would have a more fully developed version of the resolution for consideration.

On the second clause, concerning Faster FOIA, May stated that he thinks the Section could deal with this by blanket authority. Section Delegate Judith Kaleta commented that the Section's comments might have to be limited to the timeliness issue, as there may already be an ABA policy on FOIA-related fees. May responded that if the Section has to do so, it can. Former Section Chair Ron Levin suggested that the Section recommend that the Commission include people who respond to FOIA request. May felt that it might be preferable not to request that. A letter will be prepared for the House committee.

Blanket Authority Request on S. 394, OPEN Government Act

The Council then turned to a discussion of S. 394, the OPEN Government Act (Tab 4). Budget Officer Dan Cohen noted several problems with the bill, including the draconian penalty that it would impose on agencies for missing the 20-day deadline for FOIA response and the reality that almost every agency will miss 20-day deadline. With reference to the bill provisions concerning the Administrative Conference of the United States (ACUS), Cohen commented that ACUS's role here would be very different from its historic functions, by moving it into auditing agency compliance and mediating agency disputes, and that there were resource issues for ACUS if it were to receive these functions.

Steve Vieux noted that other provisions of the bill would assign functions that were appropriate for ACUS. Council Member Loren Smith indicated that any line functions that Congress would give to ACUS would destroy its reputation and capability. Section Delegate Thomas Susman observed that the approach the bill used for these

functions was to create an office within ACUS, but that the bill could put that office in another agency. He also noted that such an office could operate within ACUS independent of the traditional collegial role of ACUS. Section member Jeffrey Lubbers stated that in the past, ACUS had done some prospective review of Government in the Sunshine regulations. Some of the functions in the bill are consistent with ACUS's mission; others might require additional budget. The Section's letter commenting on the bill would therefore need to be couched carefully to support revising ACUS generally, but to reserve judgment on some issues. May said that it did not trouble him to think that ACUS might have an auditing relationship to agencies.

Budget Report and FY05-06 Budget Planning

Budget Officer Dan Cohen reported that the Section is liquid, which usually is unheard of at this time of the year. The recent Institute left the Section \$1,000 on the positive side. He also stated that the Section would start soon to develop next year's budget; so we need to build in funds for the scholarship award. (See Tab 5.)

Program: Interstate Compacts and Judicial Review

William Morrow introduced the panel on interstate compacts and judicial review (Tab 6). This panel is the third in a series of three panels that have addressed various aspects of interstate compacts and administrative law. The panel included Jeff Litwak, Counsel for the Columbia River Gorge Commission, and Shaun Gehan, associate with Collier Shannon and former Commissioner of the Potomac River Basin Commission. Morrow indicated that the goal of the Section's interstate compact project is to develop guidelines or a model APA to guide interstate compact agencies.

Litwak began with a discussion of availability of review. He said that this issue is not something that has seemed to give courts a lot of trouble. Because interstate compact agencies are not federal agencies, they are not subject to the federal APA unless the compact itself makes them subject. Interstate compact agencies also are not state agencies for state APA purposes, so questions arise on whether such an agency is state agency at all. Another question is whether a state can impose its law on an interstate compact agency. Sometimes you find compacts that refer to a state APA.

Litwak noted that other questions relevant to interstate compact agencies involve jurisdiction and venue. With respect to primary jurisdiction, a compact entity is supposed to bring uniformity of administration, so the doctrine of primary jurisdiction might become more important in future. Some compacts specify jurisdiction, but others have provisions from which courts can infer a general grant of jurisdiction. The Columbia River Gorge Commission is the only one for which there is no federal jurisdiction. A lot of these compacts are old; more recent compacts are much more specific, so some of this change may already be occurring out of necessity.

Litwak said that venue is the most interesting issue to him. It is possible that an issue pertaining to dispute over land located only in Oregon could end up being heard in

Washington. He also observed that an interstate compact APA could allow for transfer of venue from state to state. Morro suggested the possibility of venue only in federal court. Litwak responded that that would raise Eleventh Amendment issues, and that some parties prefer to be in state court.

Gehan discussed the Atlantic States Marine Fisheries Compact (ASMFC), which he said is unique among fisheries interstate compact agencies in that Congress has taken an interest in it. The ASMFC's work involves a bifurcated process, in which ASMFC recommends rules and states adopt them. Caselaw suggests that Congress has the power to impose conditions before giving approval to a compact, but cannot amend the compact once it is approved.

Gehan indicated that there is an enormous body of caselaw in the federal fisheries area.

One issue is where judicial review is available. He thought that he could make the case that the ASMFC is a quasi-federal agency. With respect to the timing of judicial review, he noted that clarifying the issue of when injury occurs would be desirable. From the perspective of a regulated community, these battles are coming, and it would be better to have a clear set of guidelines to sort out these issues.

Morrow then addressed the scope of review. There are two kinds of compacts: those that create an agency and those that do not. This project does not cover the latter. Although the standard of review that courts are applying usually appears to be arbitrary and capricious, it is not clear how courts get to that standard. The interstate compact APA would specify that.

Morrow declared that Judge Randolph's opinion in *Old Town Trolley v. WMATC*, 129 F.3d 201 (D.C. Cir. 1997), is a tour de force in discussing the factors that courts must consider in selecting the standard of review. Judge Randolph began by determining that the review should not be de novo or substantial evidence, then adopted by reference the provisions of section 706(2)(a)-(d) of the APA. *Organic Cow v. Northeast Dairy Compact Commission*, 146 F. Supp.2d 412 (D. Vt. 2001), followed *Old Town Trolley*. In *N.Y. State Dairy Foods v. Northeast Dairy Compact Comm'n*, 198 F.3d 1 (1st Cir. 1999), the First Circuit applied de novo review to district court decision. Even though Congress approved the compact, the court in that case applied a Commerce Clause analysis. Morrow commented that courts are struggling with these issues. They are looking for a principled approach and need some help.

Lane Kneedler, a speaker at the spring meeting, asked when a compact requires congressional approval, noting that he thought we would see more that do not. Litwak suggested that a compact will require Congressional approval when it increases the power of the states vis-à-vis the federal government. Figuring out when that is is more complicated. He said that he was not aware of any cases where courts said that the agency got Congressional approval but did not need it. Former Section Chair James O'Reilly asked what law trumps an interstate compact. Gehan responded that there

would be preemption at the federal or international level (for example, in the case of Pacific salmon where there is an international treaty organization).

* * *

Sunday, May 1

Chair Randolph May called the meeting to order at approximately 9:45 a.m.

Delegates' Report

Section Delegates Judith Kaleta and Thomas Susman reported on three ABA resolutions that are potentially subject to archiving pursuant to ABA policy. The delegates recommended that Report 103, on rulemaking, and Report 115, on SSA disability appeals, not be archived because they remain valid, and that Report 104, on the U.S. Sentencing Commission, be archived because the Commission has adopted internal rules of procedure as recommended. On motion and second, the Council voted in favor of the recommended actions.

As an information item, Kaleta also talked about the new Model Standards of Conduct for Mediators that are the subject of a Dispute Resolution Section resolution. Some antitrust-related concerns have been expressed about one section because of price-setting issues. Kaleta indicated that it is premature to decide whether to cosponsor the resolution, but that this issue will come back to the Council.

On ABA governance issues, Kaleta reported that the ABA is now conducting its 10-year review on how it governs itself. One of the key issues in this process involves whether Section representation should be increased in ABA governance. On this issue, Kaleta and Susman indicated that they may be calling on people in the Section to help with contact with state delegates. The Section Officers' Conference has indicated that it may make a person-by-person call to each person in the House to seek support for increasing Section representation. May indicated that whatever way we can be helpful to our Delegates, we will do it.

Proposal: Chairman's Award

Chair Randolph May and Council Member Katy Kunzer summarized a proposal to have an annual Section award to recognize an outstanding volunteer in the Section (Tab 9). May noted that it would be at the Chair's discretion. On voice vote, the Council approved the proposal.

Proposal: Law Student Essay Contest

Chair Randolph May and Council Members Selena Davis and Loren Smith reported on the proposal to create a Section essay contests for law students (see Tab 10). Smith noted that it could help to draw additional law students into the Section. The

award, as currently proposed, would be for \$500. Davis stated that students would submit their essays by March 31, and that essays would be not more than 3,000 words to ensure that a winning essay would fit into the *Administrative Law News*. Having a set essay topic would make it easier to evaluate students' submissions.

Chair-Elect Eleanor Kinney suggested that the topic be kept broad to ensure that we get enough submissions, and that the award be made at the Fall Conference. Council Member Ron Smith proposed that, in light of other essay contests that offer substantially greater awards, this award be made at least \$1,000. Section Delegate Judith Kaleta expressed her support for the proposal. She mentioned that the Dispute Resolution Section also has an essay contest that receives a tremendous number of submissions. William Morrow supported putting the essay in the *Administrative Law News*, and suggested that the essay contest be named after Tom Sargentich.

Former Section Chair Ron Levin noted that the time commitment to read essays would probably be considerable. He indicated that the Section might need a procedure comparable to the Scholarship Committee, which has to review a large number of works each year. Section Member Jeffrey Lubbers suggested that we make explicit that the essay should be between 2,500 and 3,000 words. He saw no harm in having footnotes and endnotes in the essays. Chair Randolph May stated that he would like to see this proposal brought back at the Annual Meeting. He suggested that the Section fund the scholarship award rather than seek sponsorship from an outside source. Several Council members also discussed whether law students should be able to seek guidance from faculty in writing their essays and whether the essay should be a work that had not previously been prepared for a law school seminar.

Council Member Michael Asimow suggested that the Section consider whether the winning essay should be published in the *Administrative Law Review*. He thought that the law review's editors could be used to help review the submissions. Loren Smith thought that the *Review* would be the more appropriate place for publication. Lubbers commented that the *Administrative Law Review* is not sent out in hard copy to law student members, and that the *Review* has a rule that it will not publish works from students at other law schools. May asked that the Committee come back in August with a revised proposal.

Nominating Committee Report

Nominating Committee Chair Neil Eisner reported on the nominations for the coming year. The slate of candidates includes Michael Asimow for Vice-Chair; Judith Kaleta for Section Delegate (renominated); Dan Cohen for Budget Officer; William Morrow for Assistant Budget Officer; Jamie Conrad for Secretary; Nina Olson, Michael Herz, Richard Stoll, and Ann Young for three-year terms on the Council; and Richard Parker for a one-year term on the Council (filling the seat vacated as a result of the death of Tom Sargentich). Chair Randolph May recommended that as the Council fills vacancies on the Council, the Council vote to elevate Professor Parker now so that he can

participate in the August meeting. On a motion and second, the Council by voice vote approved Professor Parker's elevation.

European Union Project Report

Neil Eisner reported that the Section is behind schedule on the European Union project, which he said is not surprising in a project of this magnitude. The project has a deadline of September 15 for reports. He also commented on ongoing discussions of programs relating to the project. There is discussion of a summer 2006 program, perhaps in Boston, New York, or Washington, with support from a law school. The idea of a European program is also under consideration, though this could be expensive for the Section. Chair-Elect Eleanor Kinney indicated that there should be more involvement of the advisory boards in the preparation of the reports.

Publications Committee Report

Publications Committee Chair Anna Shavers reported that the John Duffy and Michael Herz book on Judicial Review of Federal Agencies is now ready, and that the lobbying book will be published soon. She expects the Sunshine monograph by June. She stated that the Committee is trying to organize a list of people to review manuscripts as they come in. She added that William Morrow is doing an excellent job on the *Administrative Law News*.

Membership Committee Report

Membership Committee Chair Renee Landers reported on the Committee, which had met yesterday afternoon. The most recent data on the Section's membership (see Tab 11) show that the Section did not have much attrition from regular members. The Committee will try in the next few weeks to send targeted letters to faculty members who are also ABA members, to persuade them to join the Section. The Committee is also sending targeted letters to government lawyers. Last year, the Committee put together a membership brochure, but there is money in the budget to do a glossy four-color brochure. The Committee is also thinking about doing two different events at the Annual Meeting: a program on how to make a career as a government lawyer; and, in cooperation with the Law Student Division, a job fair with government employers. Chair-Elect Eleanor Kinney suggested that the Committee also consider a virtual job fair, as many law students are unable to travel to a regular job fair; Landers agreed with the concept.

Section Director Kim Knight reported that at a recent SOC meeting, the ABA Membership Department head gave a PowerPoint presentation in which she indicated, in discussing target audiences to pursue, that government lawyers were "off the table" because they do not produce the results financially that the Membership Department is seeking to have. Chair Randolph May asked that the Section get the PowerPoint so people can decide how to respond. Former Section Chair Neil Eisner also suggested a call-in for law students who could not personally attend Annual Meeting programs.

New Business/Informational Reports

Chair Randolph May called attention to Tom Morgan's status report (Tab 12) on the work of the ABA Attorney-Client Privilege Task Force. Morgan reported that the issue will come up at the Annual Meeting. May asked that anyone who has views relating to the Task Force's report relay their comments to him (and to the Section Delegates) so that they can stay abreast of members' views.

The meeting adjourned at approximately 11:03 a.m.

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**Request for Technical Commenting Authority
Under Blanket Authority Procedure Adopted by the
ABA House of Delegates in August 2004**

(APPROVED AS AMENDED BY THE BOARD OF GOVERNORS ON 6/11/05)

ABA Entity Requesting Commenting Authority: Section of Administrative Law and Regulatory Practice

Date of Request____June 1, 2005

Governmental Agency or Agencies for which Commenting Authority is Requested
(Please List Here):

Office of Management and Budget

(with regard to the Administrative Procedure Act, Paperwork Reduction Act, Federal Advisory Committee Act, Information Quality Act, Regulatory Flexibility Act, Unfunded Mandates Reform Act, Congressional Review of Agency Rulemaking Act, Privacy Act, Executive Order 12291, and implementing OIRA and OMB regulations, guidance, and manuals thereunder)

Office of Information and Regulatory Affairs

(with regard to the Administrative Procedure Act, Paperwork Reduction Act, Information Quality Act, Executive Order 12291, and implementing OIRA and OMB regulations, guidance, and manuals thereunder)

Office of Federal Register

(with respect to the Administrative Procedure Act and the Federal Register Act)

All government agencies with respect to their procedures governing adjudication, rulemaking, information collection or dissemination, and use of advisory committees.

~~National Council of Commissioners on Uniform State Laws with respect to state administrative law.~~

~~National Association of Attorneys General with respect to state administrative law.~~

Please answer each of the following questions, providing as much specific detail as possible:

1. Describe specific issues involving the entity's expertise that have or are expected to arise at the governmental agency or agencies listed above.

The Section has had a practice for more than 20 years of submitting comments on administrative procedural matters within its expertise and jurisdiction to federal executive agencies, in particular to the Office of Management and Budget or to the Office of

Information and Regulatory Affairs within OMB, applying for blanket authority in each instance where ABA policy initiated by this Section did not exist.

The Office of Management and Budget and the Office of Information and Regulatory Affairs provide overall coordination of and direction to agencies with regard to the regulatory process pursuant to the statutes and executive orders mentioned above. The regulatory process, as opposed to the substantive regulations themselves, is the particular expertise of this Section.

When other agencies change the procedures governing their rulemaking, adjudication, information collection or disclosure, or advisory committees, they are involved in activities that are the heart of this Section's expertise.

~~When national associations consider making recommendations regarding state administrative law, they too are involved in an area of this Section's expertise.~~

2. List the issues with as much specificity as possible on which your entity wishes to provide technical comments.

We wish to provide technical comments where agencies have requested comments from interested persons on administrative procedures under the ~~or Congress is considering possible changes to the law regarding~~ Administrative Procedure Act, Freedom of Information Act, Privacy Act, Government in the Sunshine Act, Negotiated Rulemaking Act, Administrative Dispute Resolution Act, Regulatory Flexibility Act, Congressional Review of Agency Rulemaking Act, Lobbying Disclosure Act, Federal Advisory Committee Act, Unfunded Mandates Reform Act, Federal Register Act, Paperwork Reduction Act, Information Quality Act, Equal Access to Justice Act, Administrative Conference of the United States, Executive Order 12291, and implementing OIRA and OMB regulations, guidance, and manuals thereunder, or particular agencies' administrative procedures.

3. Describe the entity's expertise with respect to the technical commenting authority requested. (The response should include information on the entity's authorized jurisdiction.)

Developing such comments is a principal core function of the Administrative Law and Regulatory Practice Section.

OIRA and OMB procedural regulations and guidance are often the subject of Section conferences and panels that invariably include participation by officials in those agencies. They are the subject of articles published in Section publications, and they occasionally engender Section proposals to the House of Delegates.

The Section has particular committees dedicated to monitoring activities under each of the above listed laws, as well having particular committees dedicated to rulemaking, adjudication, and information collection and dissemination by agencies.

Moreover, the Section has a committee devoted to State Administrative Law.

Technical comments by the Section on the matters described above provide expert commentary from experienced scholars and practitioners that contribute to promulgation of better procedural rules and administrative procedures by both the federal government and state governments.

4. Describe the past issues for which the entity has requested authority to comment with respect to the governmental agency or agencies listed above and the dates of such requests, and indicate whether or not authority to comment was approved through the House of Delegates or Blanket Authority procedures.

Date	Topic	Agency	Blanket Authority or HOD
11/19/04	E-Rulemaking	OMB	Blanket Authority
10/28/04	Appointments Process	Congress	With GAO
11/1/04	ACUS Reauthorization	Congress	With GAO
2/05	Administrative Procedure Act Amendments	Congress	HOD
5/28/04	Peer Review	OMB	Blanket Authority
2/04	Ombuds Standards	Federal Agencies	HOD
5/04	Securities Fraud Deterrence	Congress	Input to GAO
8/04	Administrative Civil Penalties	Congress	HOD

5. Describe the review process established by the entity to ensure the quality of the technical comments before the comments are submitted.

The Section maintains a rigorous review process to assure quality control on its comments. Comments drafted by members of a committee are first reviewed by the committee's chair and vice chairs. Comments are also reviewed by other experts in the Section, identified by their particular subject areas. If time will allow for it, the comments are then submitted to the entire Council of the Section for review, comment, and approval. When the deadline for comments would preclude consideration by the entire Council, the comments are submitted to the Executive Committee of the Section (comprising the Chair, Last Retiring Chair, Chair-Elect, Vice Chair, Budget Officer, Secretary, and the two Section Delegates to the House of Delegates) for review, comment, and approval. Only upon a approval by five of the eight members of the Executive Committee are comments submitted.

HR 3277 IH

109th CONGRESS
1st Session
H. R. 3277

To provide for the establishment of the Sunset Commission to review and maximize the performance of all Federal agencies and programs.

IN THE HOUSE OF REPRESENTATIVES

July 14, 2005

Mr. BRADY of Texas (for himself, Mr. TOM DAVIS of Virginia, and Mr. PORTER) introduced the following bill; which was referred to the Committee on Government Reform, and in addition to the Committee on Rules, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To provide for the establishment of the Sunset Commission to review and maximize the performance of all Federal agencies and programs.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Federal Agency Performance Review and Sunset Act'.

SEC. 2. SUNSET COMMISSION TO REVIEW AND MAXIMIZE THE PERFORMANCE OF ALL FEDERAL AGENCIES AND PROGRAMS.

(a) Schedule for Review of Agencies and Programs- The President may submit to Congress a schedule for reviewing the performance of, and need for, executive branch agencies and programs at least once every 10 years. In considering the

schedule, Congress shall follow the expedited review procedures set forth in section 3.

(b) Sunset of Executive Branch Agencies and Programs- Each executive branch agency and program shall--

(1) be reviewed by the Sunset Commission according to the schedule enacted in a joint resolution described in section 3(a); and

(2) except as provided in subsection (h), be abolished two years after the date that the President submits to Congress the report required pursuant to subsection (i) covering the agency or program, unless the agency or program is reauthorized by law after such submission or the two-year period is extended for an additional two years by law.

(c) Establishment of Commission- There is hereby established a commission to be known as the `Sunset Commission'.

(d) Membership, Powers, and Other Matters-

(1) MEMBERSHIP-

(A) IN GENERAL- The Sunset Commission shall be comprised of seven members, who shall be appointed within 180 days after the date of enactment of this Act.

(B) APPOINTMENTS- The President shall appoint the seven members of the Sunset Commission, as follows:

(i) One in consultation with the majority leader of the Senate.

(ii) One in consultation with the minority leader of the Senate.

(iii) One in consultation with the Speaker of the House of Representatives.

(iv) One in consultation with the minority leader of the House of Representatives.

(v) Three other members.

(C) CHAIR AND VICE CHAIR- The President shall designate one member of the Sunset Commission to serve as Chair and one member as Vice Chair.

(D) LENGTH OF SERVICE- The members of the Sunset Commission shall serve at the pleasure of the President. Each member shall serve for a term not to exceed three years, unless reappointed by the President.

(E) VACANCIES- Any vacancy on the Commission shall be filled in the manner in which the original appointment was made.

(2) POWERS RELATING TO OBTAINING INFORMATION FROM FEDERAL AGENCIES-

(A) IN GENERAL- The Sunset Commission is authorized to secure directly from any executive department, bureau, agency, board, commission, office, independent establishment, or instrumentality of the United States Government, information, suggestions, estimates, and statistics for purposes of carrying out its duties. Each department, bureau, agency, board, commission,

office, independent establishment, or instrumentality shall, to the extent authorized by law, furnish such information, suggestions, estimates, and statistics directly to the Commission, upon request made by the chair or any other member designated by a majority of the Commission.

(B) RECEIPT, HANDLING, STORAGE, AND DISSEMINATION- Information shall be received, handled, stored, and disseminated only by members of the Commission and its staff consistent with all applicable statutes, regulations, and Executive orders.

(3) PUBLIC HEARINGS AND MEETINGS-

(A) PUBLIC HEARINGS- The Sunset Commission shall hold public hearings and meetings to the extent appropriate. Any such public sessions shall be conducted in a manner consistent with the protection of information provided to or developed for or by the Commission as required by any applicable statute, regulation, or Executive Order.

(B) NONAPPLICABILITY OF FEDERAL ADVISORY COMMITTEE ACT- The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Sunset Commission.

(4) INTERNAL PROCEDURES-

(A) MEETINGS- The Sunset Commission shall meet periodically at the call of the Chair. Such meetings may include public sessions as described in paragraph (3)(A).

(B) QUORUM- Four members of the Sunset Commission shall constitute a quorum but a lesser number may hold hearings.

(5) PERSONNEL MATTERS-

(A) TRAVEL EXPENSES- The members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance of services for the Commission.

(B) DIRECTOR- The Chair of the Commission may, without regard to the civil service laws and regulations, appoint and terminate a Director for the Commission. The Director shall be paid at a rate not to exceed the Level II of the Executive Schedule.

(C) STAFF- The Director may appoint and fix the compensation of additional personnel without regard to chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification of positions and General Schedule pay rates, except that the rate of pay for the Director and other personnel may not exceed Level II of the Executive Schedule.

(D) APPLICABILITY OF CERTAIN CIVIL SERVICE LAWS- The Director and any staff of the Commission shall be employees

under section 2105 of title 5, United States Code, for purposes of chapters 63, 81, 83, 84, 85, 87, 89, and 90 of that title.

(E) **DETAIL OF GOVERNMENT EMPLOYEES-** Any Federal Government employee may be detailed to the Commission without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege.

(F) **PROCUREMENT OF TEMPORARY AND INTERMITTENT SERVICES-** The chair of the Commission may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, at rates for individuals which do not exceed the daily equivalent of the annual rate of basic pay prescribed for Level II of the Executive Schedule under section 5316 of such title.

(6) **OTHER ADMINISTRATIVE MATTERS-**

(A) **POSTAL AND PRINTING SERVICES-** The Sunset Commission may use the United States mails and obtain printing and binding services in the same manner and under the same conditions as other departments and agencies of the United States.

(B) **ADMINISTRATIVE SUPPORT SERVICES-** Upon the request of the Sunset Commission, the Administrator of General Services shall provide to the Sunset Commission, on a reimbursable basis, the administrative support services necessary for the Sunset Commission to carry out its duties.

(C) **AUTHORIZATION OF APPROPRIATIONS-** Such sums as may be necessary are authorized to be appropriated for the purposes of carrying out the duties the Commission. Such funds shall remain available until expended.

(7) **SUNSET OF COMMISSION-** The Sunset Commission shall terminate on December 31, 2026, unless reauthorized by law.

(e) **Review of Efficiency and Need for Executive Branch Agencies and Programs-**

(1) **IN GENERAL-** The Sunset Commission shall review agencies and programs in accordance with the criteria described in subsection (f). The Sunset Commission shall consider recommendations made by the President to the Commission for improving the performance of the agencies or programs being considered.

(2) **USE OF EVALUATIONS AND ASSESSMENTS-** In its deliberations, the Sunset Commission may consider any publicly available agency or program evaluations and assessments, including those that the Office of Management and Budget has undertaken in consultation with the affected agencies of the Federal Government. Such Office of Management and Budget assessments shall evaluate the purpose, design, strategic plan, management, and results of the program, and such other matters as the Director of the Office of Management and Budget considers appropriate, as well as make recommendations to improve the efficiency and effectiveness of the assessed programs.

(3) REPORT TO THE PRESIDENT- The Sunset Commission shall submit to the President not later than August 1 of each year a report containing

- (A) its assessment of each agency and program reviewed during the preceding 12 months pursuant to the schedule for review (if any) approved by a joint resolution described in section 3(a); and
- (B) its recommendations on how to improve the results that each agency and program achieves and whether to abolish any agency or program.

(4) LEGISLATION- The Sunset Commission shall submit to the President with its report any legislation needed to carry out its recommendations.

(5) PROPOSALS TO ABOLISH AGENCIES OR PROGRAMS- Prior to recommending the abolition of any agency or program, the Sunset Commission should, as it considers appropriate:

- (A) conduct public hearings on the merits of retaining the agency or program;
- (B) provide an opportunity for public comment on the option of abolishing the agency or program;
- (C) offer the affected agency an opportunity to comment and to provide information supporting its views;
- (D) review the assessments described in paragraph (2) of this Act; and
- (E) consult with the Government Accountability Office, the relevant Inspectors General, and the relevant committees of Congress.

(f) Criteria for Review- The Sunset Commission shall use the following criteria to evaluate each agency or program:

- (1) Whether the agency or program as carried out by the agency is cost-effective and achieves its stated purpose or goals.
- (2) The extent to which any trends, developments, or emerging conditions affect the need to change the mission of the agency or program or the way that the mission is being carried out by the agency.
- (3) The extent to which the agency or program duplicates or conflicts with other Federal agencies, State and local government, or the private sector.
- (4) The extent to which the agency coordinates effectively with State and local governments in performing the functions of the program.
- (5) The extent to which changes in the authorizing statutes of the agency or program would improve the performance of the agency or program.
- (6) The extent to which changes in the management structure of the agency or program or its placement in the Executive Branch are needed to improve the overall efficiency, effectiveness, or accountability of executive branch operations.

(g) Agency and Program Inventory--

- (1) PREPARATION- Within 6 months after the date of the enactment of this Act, the Director of the Congressional Research Service, with the assistance of the Comptroller General, shall prepare an inventory of all

executive branch agencies and programs. Six months prior to the time that the Sunset Commission is scheduled to begin its review of an agency or program, the Director of the Congressional Research Service, with the assistance of the Comptroller General, shall update the section of the inventory pertaining to that agency or program.

(2) **PURPOSE-** The purpose of the agency and program inventory is to advise and assist the Sunset Commission, the President, and Congress in carrying out the requirements of this Act.

(3) **INVENTORY CONTENT-** The agency and program inventory shall include for each agency and program a list of citations of all authorizing statutes of the agency or program.

(h) **Exemption-**

(1) **REGULATIONS-** No regulations to protect the environment, health, safety, or civil rights shall be abolished under this Act.

(2) **ENFORCEMENT-** No program related to enforcing regulations referred to in paragraph (1) shall be abolished under this Act unless provision is made for the continued enforcement of those regulations.

(i) **Submission of Commission Report to Congress by President-** Not later than September 1 of each year, the President shall submit to Congress the report submitted to the President by the Commission pursuant to subsection (e)(3) and any legislation needed to accomplish the recommendations of the Sunset Commission.

SEC. 3. EXPEDITED CONGRESSIONAL REVIEW PROCEDURES.

(a) **Definitions-**

(1) **RESOLUTION OF APPROVAL-** For the purposes of this section, the term 'resolution' means only a joint resolution--

(A) which does not have a preamble;

(B) the title of which is as follows: 'Joint resolution approving the schedule for reviewing the performance of, and need for, executive branch agencies and programs under the Federal Agency Performance Review and Sunset Act';

(C) the matter after the resolving clause of which is as follows: 'That Congress approves the schedule for reviewing the performance of, and need for, executive branch agencies and programs on **XXXXXX** under the Federal Agency Performance Review and Sunset Act:', the blank space being filled in with the appropriate date; and

(D) the remaining text of which consists of the complete schedule for the reviews submitted under section 2(a).

(2) **LEGISLATIVE DAY-** For the purposes of this section, the term 'legislative day' refers to any day on which either House of Congress is in session.

(b) **Introduction and Reference of Resolution-**

(1) Not later than the first day of session following the day on which a resolution is submitted to Congress under section (2)(a)(1), the resolution shall be introduced (by request)--

(A) in the House of Representatives by the chairman of the Committee on Government Reform, or by a member or members of the House designated by such chairman; and

(B) in the Senate by the chairman of the Committee on Homeland Security and Governmental Affairs, or by a member or members of the Senate designated by such chairman.

(2) The resolution shall be referred to the Committee on Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate (and all resolutions with respect to the same schedule for reviews shall be referred to the same committee) by the Speaker of the House or the President of the Senate, as the case may be. The committee shall make its recommendations to the House of Representatives or the Senate, respectively, within 75 calendar days of continuous session of Congress following the date of such resolutions's introduction.

(c) Expedited Procedures Relating to Discharge of Committee Considering Resolution, Procedure After Report or Discharge of Committee, Debate, and Vote on Final Passage- Sections 911 and 912 of title 5, United States Code, shall apply to a resolution introduced pursuant to subsection (b)(1). In applying such sections-

(1) the term 'resolution' means a resolution as defined in subsection (a)(1) of this section; and

(2) the term 'reorganization plan' means a legislative proposal containing a schedule for review submitted under section 2(a).

(d) Effective Date, Publication, Effect on Other Laws, Pending Legal Proceedings, and Unexpended Appropriations- Sections 906 and 907 of title 5, United States Code, shall apply to a resolution introduced pursuant to subsection (b)(1). In applying such sections--

(1) the term 'resolution' means a resolution as defined in subsection (a)(1) of this section; and

(2) the term 'reorganization plan' means a legislative proposal containing a schedule for review submitted under section 2(a).

END

To: Council, Section of Administrative Law and Regulatory Practice

From: Judith S. Kaleta
Thomas M. Susman

Date: August 1, 2005

Subject: **DELEGATES REPORT ON RECOMMENDATIONS TO HOUSE OF DELEGATES MEETING ON AUGUST 8-9, 2005**

This report follows earlier email traffic concerning reports with recommendations that will be presented to the House of Delegates at the Annual Meeting. We are presenting the recommendations in numerical order within five categories: recommendations we have voted to co-sponsor, recommendations we have been invited to co-sponsor, other recommendations of particular interest, others, and governance. The summaries were provided by the ABA. In some instances, we have expanded upon them in a note or in our commentaries. We have also included Section member reactions to recommendations that we have been asked to co-sponsor. For recommendations we have been asked to co-sponsor, the language of the resolution is in the Appendix to our report to assist in our discussion at the Council meeting.

If you wish to review the full recommendations and supporting reports, they are available at <http://www.abanet.org/leadership/2005/annual/home.html> (click on House of Delegates).

Please let us know, in advance of the Council meeting, if feasible, whether there is any matter in the “of interest” or “others” category that should be discussed by the Council in Chicago.

RECOMMENDATIONS WE HAVE VOTED TO CO-SPONSOR

#111 TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE SECTION OF CRIMINAL JUSTICE

Supports the preservation of the attorney-client privilege and work-product doctrine, its opposition to policies, practices and procedures of governmental agencies that have the effect of eroding the attorney-client privilege and work-product doctrine, and its endorsement of policies, practices and procedures that recognize the value of those protections.

Note: Our co-sponsorship was conditioned on inclusion of congressional committees to the reference to “government agencies” in the context of recommending respect for the attorney-client privilege. The Task Force agreed to substitute a generic term like “governmental bodies” and to put this issue on their agenda for further study after the Annual Meeting.

Thanks to Jamie Conrad, Section Member and private sector liaison to the Task Force; Tom Morgan, our liaison to the Task Force; and Bill Luneburg, Chair of our Legislative Process and Lobbying Committee, for their efforts on this.

REQUESTS TO CO-SPONSOR

10A STATE BAR OF TEXAS

Reaffirms support for an independent judiciary by correcting misstatements about the legal system, judges and lawyers and commits the ABA to assist organized bar associations throughout the country in adopting and implementing programs to respond timely and effectively to unjustified criticism and inaccuracies regarding our legal system, judges and lawyers

Bill Funk: I support co-sponsoring

Eleanor D. Kinney: I support co-sponsoring as well.

JSK & TMS: While we know this will pass overwhelmingly with or without our co-sponsorship, this is a resolution that the Association should support with one loud voice.

JSK/TMS :We support co-sponsoring.

101A STANDING COMMITTEE ON ENVIRONMENTAL LAW

Encourages Congress and the President to take specific legislative, regulatory and other actions necessary to improve the structure of our country's domestic management and regulation of its marine resources in order to better protect the integrity of its marine ecosystems and to ensure ecologically sustainable use and development of its marine resources.

101B STANDING COMMITTEE ON ENVIRONMENTAL LAW

Urges Congress and the President to take specific legislative, regulatory and other actions necessary to improve the nation's domestic management and regulation of its marine resources for the benefit of present and future generations.

101C STANDING COMMITTEE ON ENVIRONMENTAL LAW

Urges Congress and the President to promote effective international efforts to protect the world's marine ecosystems and ensure the ecologically sustainable use and development of the world's marine resources.

NOTE: Comments apply to 101A, 101B, and 101C

Randy May: If this is even really appropriately within the realm of the Association's expertise, it does not seem within the Ad Law Section's. Of course, that is just my opinion. I feel the same way about the Oceans resolution. Not because I'm anti-Ocean; just because at bottom it really is not very closely related to our zone of our Section's claimed expertise. Not administrative law

Bill Funk: Having reviewed the resolution and report, I would recommend that we not co-sponsor. While personally I believe I would generally support all the various recommendations, although I remain unconvinced on the need for a fully funded, invigorated National Oceans Council in the Office of the President, there is nothing in the resolution upon which our Section has expertise. It is very much nitty-gritty environmental law. While the resolution does involve regulatory issues, and the report encourages the use of innovative regulatory methods, the resolution itself merely calls for amendments to certain laws to "require ... mandatory and federally enforceable controls." Thus, the resolution does not really address regulatory methodology.

While I support the idea that the Section can co-sponsor resolutions that are not within our particular expertise when they involve basic issues of what is legally or morally right and wrong, this is not such a resolution.

Richard Parker: I, too, have reviewed the ocean resolution and report, but I believe that on balance this is a resolution that we can and should co-sponsor, for the following reasons.

First, although Bill is right that parts of the resolution involve nitty-gritty environmental issues on which we have no special expertise, the principal -- and immediately operational parts of the resolution -- have to do with creating a body for coordinating regulatory policy (over oceans) in the White House and consolidating regulatory jurisdiction outside the White House in another regulatory agency, NOAA. Surely this sort of thing is within our purview. Moreover, the re-organization proposal makes eminently good sense and is supported by virtually all stakeholders, including the President. At the same time, it requires initiative, energy and funding and so could easily fall through the cracks if it is not helped along. ABA support could supply that extra push that helps put the proposal over the top.

Second, the recommendations include a call for the US to encourage other countries to join and comply with several important international regulatory regimes, some of which -- such as the fish stocks treaty -- are setting new precedent in the realm of international regulatory law and policy with particularly innovative compliance oversight, enforcement and dispute settlement mechanisms. While these cutting-edge regulatory systems may have been outside our traditional purview, that only means (to me at least) we should consider expanding our horizons to include them. As our EU project and upcoming program on international tribunals and other initiatives implicitly recognize, we live in a globalizing economy and international regulation is a vital part of the expanding discipline of administrative law. Our section should be at the leading, not the trailing, edge of that process. Meanwhile, it should not require close familiarity with the substance of these regimes to feel comfortable co-sponsoring a resolution which merely recommends that the United States ratify fisheries treaties we have signed (and largely shaped at the drafting stage) and encourage other countries to join treaties we have ratified.

Third, the more narrow environmental recommendations supply no reason to withhold endorsement. The reforms they call for (such as strengthening supervision of ocean dumping and non-point sources of water pollution) are virtually indisputable on the merits and have been recognized as meritorious for years by scholars and practitioners alike. The Oceans Commissions report and its aftermath offer a rare window of opportunity to get these long-overdue measures considered and possibly enacted.

Last, but certainly not least, there is the issue of reciprocity among Sections. Clearly, co-sponsorship of other Sections' proposals should not be automatic. But when our co-sponsorship is sought by another section on a proposal which falls substantially, if not completely, within our purview and is eminently commendable on policy grounds, I believe we should not be overly parsimonious with our helping hand. After all, we may want and need a hand ourselves someday.

For all these reasons, I would suggest agreeing to co-sponsor. I should add by way of disclaimer that the recommendations at issue involve an area (ocean regulatory policy) that I have researched and written about for a number of years. Whether that makes me expert, or biased, each reader can decide. But I felt I should disclose the fact.

Cynthia Drew: This would be something for Council discussion in Aug., & I would ask that we at least not oppose. I believe that there is a good argument per Rich Parker that we should support (for comity if nothing else).

JSK & TMS: *We will have a discussion on this at the Council meeting. We will await additional information before deciding whether to support co-sponsorship.*

102 STANDING COMMITTEE ON ELECTION LAW

Adopts the *Election Administration Guidelines and Commentary*, dated August 2005, to supplant *Ballot Integrity Standards Applying to Election Officials*, dated August 1989 and *Election Administration Guidelines*, dated August 2001 and recommends that all election officials ensure the integrity of the election process through the adoption, use and enforcement of these Guidelines.

NOTE: This recommendation concerns minor changes to established ABA policy and does not set forth a new standard. It is supported by our liaison to the Standing Committee, Trevor Potter; David Cardwell, liaison from State and Local and our former Council member; and Jack Young, former Section Chair and member of the Standing Committee.

JSK & TMS: *Our Section has long held a leadership role in this area. To assert our leadership and gain additional visibility based on our strong committee work, we support co-sponsorship.*

104A SECTION OF LITIGATION SECTION OF DISPUTE RESOLUTION

Adopts the Model Standards of Conduct for Mediators, dated August 2005, which are intended to guide individual mediators in their practice, provide a model for entities that establish standards of conduct for mediators and inform potential and actual participants in mediation about what they should expect in mediation.

Phil Harter: We had concerns with one provision of the Standards. The last iteration of them said that it was inappropriate for a mediator to charge a contingent fee; the reason for the prohibition is that the contingency may induce a mediator to do all sorts of inappropriate things in order to get the money. This version omits that ban. There are several references to the requirement that a mediator not do anything to earn fees and must maintain impartiality so that I think one could conclude that it is usually inappropriate for a mediator to charge a contingent fee (it may well be appropriate with sophisticated parties who can fully protect themselves); but since that prohibition was in the former standards, its omission from this version could be taken as authorizing them. We asked DisRes to insert a "should" clause to that effect, which it did.

JSK & TMS: *The Dispute Resolution Section, albeit in the face of Phil's tenacity, agreed to re-insert the sentence left out of the Standards that we had proposed be included. We now need to support co-sponsorship of this recommendation.*

104B SECTION OF LITIGATION

Urges the Congress to enact a federal shield law for journalists to protect the public's need for information and to promote the fair administration of justice incorporated by specific principles.

NOTE: *The Section of Litigation sought co-sponsorship from all sections. The Executive Committee recommended we decline co-sponsorship of this recommendation.*

**106A JUDICIAL DIVISION
NATIONAL CONFERENCE OF THE ADMINISTRATIVE LAW JUDICIARY
GOVERNMENT AND PUBLIC SECTOR LAWYER DIVISION
HEALTH LAW SECTION
TORT TRIAL AND INSURANCE PRACTICE SECTION**

Encourages Congress to establish the Administrative Law Judge Conference of the United States as an independent agency to assume the responsibility of the United States Office of Personnel Management with respect to the Administrative Law Judges, including their testing, selection, and appointment.

John Miller: The NCALJ proposal to transfer responsibilities of OPM under the APA with respect to ALJs to an Administrative Law Judge Conference of the United States assumes that OPM is not properly performing its duties and that it cannot be persuaded to resume those duties within a reasonable period of time. OPM is currently operating under an Acting Director. The Senate has yet to confirm the President's choice of a new Director.

The Section's Ad Hoc Committee to Review the Recruitment of ALJs by OPM has been studying these questions. We have met twice with the General Counsel of OPM. As we are not yet prepared to recommend the ABA give up on the OPM, we cannot recommend at this time that the Section of Administrative Law and Regulator Practice lend its support of the NCALJ proposal. We will make our report to the Council and Section at the Annual Meeting in August. At that time we expect to make specific recommendations.

Michael Asimow: I am inclined to support the recommendation to establish a new ALJ conference and to become co-sponsors of the recommendation.

I don't believe the function of appointing ALJs should remain with OPM in light of its deplorable track record and faint hopes for improvement in the future. I don't agree with the comments of John Miller's special committee that the fact that the proposed Conference would be staffed by ALJs would be viewed as creating some sort of mandarin class. In state central panels, the hiring of new ALJs is often handled by people who are already ALJs without serious difficulties.

However, I think the suggestions of John's committee at p. 9 of his report are constructive and should be acceptable to the proponents of the recommendation. These are i) the ALJ Conference should be able to transfer ALJs between agencies on a temporary or permanent basis or to lay them off in case they are not needed because of workload reductions; ii) it should provide for a detailed complaint and disciplinary process; and iii) it should be fully empowered to provide CLE for ALJs. Perhaps with these changes we could get strong support from our Council for the recommendation.

Randy, can I suggest you ask the proponents whether they'd be willing to amend their recommendation and report to include these items?

Bill Funk: Favors co-sponsoring.

JSK & TMS: We will have a discussion on this at the Council meeting. We will wait for additional information before making any recommendation on whether to co-sponsor in its current form.

108 SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES STANDING COMMITTEE ON ELECTION LAW

Supports the reauthorization of the Voting Rights Act of 1965 as amended through 1992.

NOTE: IRR requested time on our agenda to discuss this matter with our Council. The Executive Committee agreed to the request. As noted above, this is co-sponsored by the Standing Committee on Election Law which includes Trevor Potter as our liaison to the Committee, Jack Young, and David Cardwell.

JSK: The provisions up for reauthorization are remedial provisions guaranteeing language assistance for voters, authorizing federal examiners and observers to monitor elections, and requiring that states and counties with documented history of discriminatory voting practices submit planned election law changes for approval by federal officials. I support co-sponsorship of this recommendation.

TMS: I support the goals of the recommendation and intend to vote for it. I am skeptical whether this is Ad. Law – a subject on which we have special expertise – but I could be persuaded and look forward to Council discussion.

112 COMMISSION ON HOMELESSNESS AND POVERTY

Urges Congress, the U.S. Postal Service and other appropriate federal entities to ensure the prompt delivery of and adequate customer access to the U.S. mail for people experiencing homelessness.

NOTE: The Executive Committee recommended we decline co-sponsorship of this recommendation.

TMS: Having read the extensive report, I am convinced that homeless people have problems receiving mail and that general delivery is often not practical. I have no objection to the recommendation as a general matter. However, I would have liked to have seen some suggested solutions rather than simply an admonishment that mail service be expanded to serve the homeless.

113A COMMISSION ON LAW AND AGING

Support continuation of the federal Old Age, Survivors, and Disability Insurance program, commonly known as Social Security, as a national system of social insurance that guarantees income to protect older people, widows and widowers, people with disabilities, and children, from falling into poverty due to loss of income from retirement or disability, or due to the retirement, disability or death of a primary breadwinner.

Randy May: I don't think it is a matter so much of whether this--or any other--proposed resolution tracks or departs from Bush's proposal. For me, it is a question--when the issue is co-sponsorship of a resolution--of whether the proposal lies somewhat close to the zone of our expertise. Although I've only looked rather quickly, this proposal, which goes mainly (note: mainly) to the substance of a Social Security system should look like and the social values it should embody. If this is even really appropriately within the realm of the Association's expertise, it does not seem within the Ad Law Section's.

Eleanor Kinney: I think I agree with Randy on this issue. I don't like to "squander our voice of authority" on speaking on worthy matters about which we have no special expertise.

NOTE: The Executive Committee agreed to decline co-sponsorship of this resolution.

JSK & TMS This resolution also identifies certain hallmarks of the existing system by which to evaluate future restructuring proposals. We intend to vote in favor of this resolution (with TMS noting, by way of potential conflict of interest, that he is nearing that time when he might qualify for Social Security!).

114 COMMISSION ON DOMESTIC VIOLENCE

Urges federal, state, territorial and local governments to reduce domestic violence by enforcing orders of protection as required under federal, state, local and territorial law and urges state and local governments to enact appropriate remedies for failure to enforce the terms of civil and criminal protection orders.

Additional Information: Urges federal, state, territorial and local governments to ensure that law enforcement officers respond to domestic violence calls, conduct complete investigations, and prepare written reports. Also, urges state and local governments to develop law enforcement policies and procedures that will ensure enforcement of protection order laws and provide greater protection to victims of domestic violence and their children.

NOTE: The Executive Committee agreed not to recommend co-sponsorship of this resolution.

JSK & TMS: We support and will vote in favor of the resolution.

RECOMMENDATIONS OF PARTICULAR INTEREST

106B JUDICIAL DIVISION

Adopts the black letter of Sections 1.60 through 1.64 Relating to Court System Automation to amend the Standards Relating to Court Organization and replace current Sections 1.60 through 1.64, and adopts the black letter of Section 2.80 Relating to Trial Court Responsibilities for Court Automation to amend the Standards Relating to Trial Courts to replace current Sections 2.8 through 2.83.

NOTE: This resolution was sent to all Sections for support and/or co-sponsorship. Jodi Levine will discuss it at the Council meeting.

106C JUSTICE CENTER COORDINATING COUNCIL

JUDICIAL DIVISION

STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS

STANDING COMMITTEE ON JUDICIAL INDEPENDENCE

Urges Congress, the Department of Justice Judicial Security Review Group and the Department of Justice Office of Inspector General to determine whether the United States Marshals Service has corrected significant vulnerabilities to critical elements of its judicial security program that were identified by the IG in its March 2004 report entitled "Review of the United States Marshals Service Judicial Security Process."

NOTE: In addition to the vulnerability assessment, this recommendation urges enactment of legislation to permanently authorize the redaction of information on the

Federal financial disclosure statements of judges and judicial employees prior to disclosure to the public if a finding is made that revealing such information would endanger a particular judge or family member.

John Vittone, former Council member and Chair of the ABA Justice Center notes that this recommendation concerns court security and results from the tragic incidents in Atlanta and Chicago earlier this year. John requests our support and asks us to consider co-sponsorship. This recommendation was sent to all Sections for support and/or co-sponsorship.

JSK & TMS: We support this recommendation (again noting a potential conflict for TMS, whose enthusiasm for the resolution is no doubt in part because his wife is subject to the judicial security program).

113B COMMISSION ON LAW AND AGING

Opposes any structural or financial changes in the Medicaid program that would weaken the current shared legal obligation that the federal and state governments have to provide a comprehensive set of benefits to all individuals who meet eligibility criteria and supports Medicaid restructuring that adheres to several enumerated principles.

NOTE: Although we have not been asked to co-sponsor this resolution, we asked our Health Committee to review it. We have not received a response from the committee.

JSK: This resolution reaffirms several existing ABA policies. Most importantly from a Section perspective, it support restructuring that protects participants through “strong procedural due process safeguards, including impartial decisionmaking, internal and external review of decisions, meaningful notice of all major care decisions in language that is easily understood, full access to information, assistance with appeal to an impartial decision maker in a timely manner,...” I would appreciate hearing any comments/concerns of the Council.

TMS: During our Ex. Comm. call, Eleanor Kinney observed that the section recommending “strong due process safeguards” was not as precise and helpful as it should be. We should explore whether there is a role for our Section here.

177B BOARD OF GOVERNORS

Adopts revisions to the *Blanket Authority Procedure* dated August 2005, to allow ABA Sections to object to other entities’ technical comments.

JSK & TMS: This changes the historical ABA philosophy of speaking with one voice. It will only be used in limited circumstances for “technical comments” to be submitted to government agencies. As we discussed at our Council meeting last October and as confirmed by the ABA Government Affairs Office, agencies welcome comments discussing alternative approaches. This change is consistent with our Section’s recommendation.

OTHER RESOLUTIONS

8 SCOPE NOMINATING COMMITTEE

Elect Paula J. Frederick of Atlanta, Georgia to the Committee on Scope and Correlation of Work.

10B LOS ANGELES COUNTY BAR ASSOCIATION

Urges Congress, the states and territories to enact and/or adopt policies consistent with the recommendations of the national bipartisan Pew Commission on Children in Foster Care for improving the outcomes for abused and neglected children under dependency court jurisdiction.

11-1 CONSTITUTIONAL AMENDMENT

Amends §1.2 of the Constitution to include the following language as one of the purposes of the Association: “to defend the right to life of all innocent human beings, including all those conceived but not yet born.”

11-2 CONSTITUTIONAL AMENDMENT

Amends §6.4(c) of the Constitution to extend the grandfathering provision for four local bar associations in order to maintain their representation in the House of Delegates.

11-3 CONSTITUTIONAL AMENDMENT

Amends §6.2(a)(5), §6.7 and §10.1 of the Constitution to change the status of the Section of General Practice, Solo and Small Firm from a Section to a Division.

11-4 CONSTITUTIONAL AND BYLAWS AMENDMENT

Amends §6.2(a)(5) and §9.2(a) of the Constitution and §21.7(b)(2) of the Bylaws to provide for representation of a Law Student Division Delegate on the Nominating Committee and in the House of Delegates while serving on the Nominating Committee

11-5 BYLAWS AMENDMENT

Amends §31.7 of the Bylaws to revise the jurisdictional statement of the Standing Committee on Audit.

11-6 BYLAWS AMENDMENT

Amends §31.7 to eliminate the Standing Committee on Solo and Small Firm Practitioners, which has been defunded and its responsibilities undertaken by the General Practice, Solo and Small Firm Section.

11-9 HOUSE RULES OF PROCEDURE

Amends §45.7(b) of the House Rules of Procedure as a housekeeping amendment to permit alternative means for sending the executive summaries of the reports with recommendations.

100 STANDING COMMITTEE ON PARALEGALS

Grants approval, reapproval and extension of the term of approval to several paralegal education programs, and withdraws the approval of two programs at the request of the institution.

103 TORT, TRIAL AND INSURANCE PRACTICE SECTION

Recommends that federal, state, and territorial courts without any existing Case Management Order governing asbestos litigation, or with an existing Case Management Order that has proven unworkable, adopt the Model Case Management Order, with referenced exhibits, dated August 2005.

105 STANDING COMMITTEE ON SUBSTANCE ABUSE

Urges all state, territorial and local governments to repeal laws and discontinue practices that permit insurers to deny coverage in accident and sickness insurance policies for alcohol or drug related injuries or losses and supports the 2001 Amendment by the National Association of Insurance Commissioners.

107 STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS

Urges that steps be taken to fulfill the constitutional guarantee of effective assistance of counsel under the Sixth Amendment as prescribed in decisions of the United States Supreme Court.

110A SECTION OF INTERNATIONAL LAW

Supports the prompt ratification of the United Nations Convention Against Corruption by the United States, and by other members of the United Nations, subject to minimal reservations, understandings and declarations, and also supports the development of a mechanism to monitor the implementation and enforcement of the Convention.

110B SECTION OF INTERNATIONAL LAW

STANDING COMMITTEE ON LAW AND NATIONAL SECURITY

Supports fundamental reform of the United Nations human rights process and the establishment of a Human Rights Council in place of the United Nations Human Rights Commission and recommends that the Human Rights Council give priority to fulfilling its mandate to protect and promote fundamental human rights.

115A CRIMINAL JUSTICE SECTION

Urges federal, state and territorial governments to identify and attempt to eliminate the causes of erroneous convictions and urges state, territorial and local bar associations to assist in this effort.

115B CRIMINAL JUSTICE SECTION

Encourages federal, state, territorial and local governments to afford prison and jail inmates every reasonable opportunity to maintain telephonic communication with the free community and to offer telephone services in the correctional setting with an appropriate range of options at the lowest possible rates.

400 REPORT WITH RECOMMENDATION ON ARCHIVING

Recommends that certain Association policies that pertain to public issues and are 10 years old or older be archived.

GOVERNANCE

11-7 & 11-8 CONSTITUTIONAL AND BYLAWS AMENDMENTS

JSK: Governance issues remain in flux as we draw nearer to the Annual Meeting. The Board of Governors has recently taken up the issue, and Section Officer Conference (SOC) representatives will be meeting with representatives of the State bars, and the Governance Commission. The SOC supports increased Section participation in the decisions of the Association that affect their ability to provide services and products to their members. In addition, the SOC supports governance, financial, and accounting reforms. Latest updates will be provided at the Council meeting.

TMS: Where Judy leads on this, I intend to follow. She was deeply involved in the SOC governance task force, which developed a number of proposals.

**AMERICAN BAR ASSOCIATION
Section of Administrative Law and Regulatory Practice**

**Report of the Ad Hoc Committee on Review
of Recruitment of Administrative Law Judges by
the United States Office of Personnel Management**

**Regarding a proposal to establish
The Administrative Law Judge Conference of the United States**

(July 18, 2005)

The preliminary agenda of the ABA House of Delegates for the August 2005 Annual Meeting in Chicago includes a proposed Recommendation, Item 106A, relating to Administrative Law Judges (“ALJs”). It would have the ABA support the transfer of the United States Office of Personnel Management’s (“OPM”) responsibilities under the Administrative Procedure Act (APA) respecting Administrative Law Judges to a new agency, The Administrative Law Judge Conference of the United States (“ALJC). According to the supporting Report, the reason for this proposed transfer is “longstanding problems with OPM’s administration of the [ALJ] program.”

The Ad Hoc Committee’s mandate and purpose encompasses review of OPM’s performance of its ALJ functions, particularly the all-important function of recruiting and evaluating ALJ candidates. Over the past several years the Ad Hoc Committee and its predecessor have reviewed various proposals for improving the management of the ALJ program by OPM and have had discussions with OPM on issues raised by such proposals. For the reasons outlined below, this Committee cannot support the Recommendation. Accordingly, this Committee recommends that the Section not become a sponsor of the Recommendation and further recommends that the Council instruct the Section’s delegates to seek deferral of consideration of the Recommendation and, failing that, to oppose it.

I Summary of the Recommendation and Supporting Report

The Recommendation would have the ABA encourage “Congress to establish The Administrative Law Judge Conference of the United States as an independent agency to assume the responsibility of the United States Office of Personnel Management with respect to the Administrative Law Judges including their testing, selection, and appointment.”

Thus, because of the “long-standing problems” with OPM’s management of the ALJ program, the Recommendation would have the ALJC assume all duties with respect to ALJs that are currently OPM’s. These duties include recruiting ALJ candidates, testing them for their qualifications, and managing the register from which the successful candidates are selected by the agencies. The Recommendation is sponsored by the Judicial Division of the ABA and emanates from the Division’s National Conference of the Administrative Law Judiciary. The supporting Report describes the Conference’s dissatisfaction with the way OPM has carried out its ALJ responsibilities and details the deficiencies in OPM’s performance. In contrast, the Report is vague to the point of near silence on the structure of the new ALJC except to say that it would be similar to the Judicial Conference of the United States.

The Recommendation purports to be consistent with ABA policies supporting the “independence and integrity of the administrative judiciary” adopted in 1983, 1989, 1998, 2000 and 2001.

II Background to Analysis of Recommendation

A. OPM's statutory duties under the APA

In analyzing any proposal to transfer responsibility for the ALJ program away from OPM, it is important first to consider the statutory predicates to the ALJ program. The original statutory provisions with respect to hearing examiners (the original title of the position) were found in Section 11 of the Administrative Procedure Act of 1946, 60 Stat. 244, former 5 U.S.C. §1010. The five sentences of that original Section 11 were subsequently recodified and enacted into positive law in several sections of the current Title 5. As described in those sections, as amended, the role of OPM in the administration of the ALJ process is as follows:

Section 1104(a)(2) – Generally under Section 1104, the President may delegate to the Director of OPM and the Director of OPM may further delegate the responsibility for competitive exams. However, under Subsection 1104(a)(2), OPM retains the responsibility/authority over competitive exams for ALJs appointed by agencies under 5 U.S.C. §3105. This subsection also provides OPM with authority to obtain reimbursement from the agencies for the costs of such examinations.

Section 1305 gives OPM the power to investigate, establish regulations, appoint advisory committees, recommend legislation, subpoena witnesses and records, and pay witness fees. This section gives the same authority to the Merit Systems Protection Board for purposes of disciplinary actions against ALJs under 5 U.S.C. §7521.

Section 3323 provides that OPM may adopt regulations that address the assignment of retired ALJs to hearings.

Section 5372 sets forth the authority of OPM to establish the pay levels for ALJs, with three pay levels of basic pay, and grades within, and the requirements for each such level.

B. Historical Perspective

This is not the first time that critics have proposed to transfer to another agency the functions now delegated to OPM. In the 1950s the ABA went on record in support of legislation removing from the Civil Service Commission (“CSC”) its hearing examiner functions under the APA and lodging them elsewhere in the government. At that time, a candidate for appointment did not have to be a lawyer. There was dissatisfaction with the caliber of persons being appointed. The office in the CSC supervising the functions was in low repute. There was little transparency in how the system worked.

The ABA’s transfer recommendation was not adopted by Congress. Rather, as a result of reforms effected under the leadership of CSC Chairman John Macy in the early 1960s and after discussions with the president of the ABA, the ALJ process was changed by the CSC. Those changes included provisions that all candidates had to be members of the bar, and had to meet higher quality standards. The Hearing Examiner’s office was made an adjunct to the Office of the CSC’s Executive Director under the title “Office of Hearing Examiners.” The private bar was afforded an opportunity to serve on panels interviewing all candidates before they qualified for the register from which appointments were to be made.

Unfortunately, problems with the ALJ Program continued. The ABA continued to work toward improving the system. The ABA urged the CSC to change the title of the post from Hearing Examiner to Administrative Law Judge. This change was made effective by the CSC in 1972. In the late 1980’s and early 1990’s the ABA further demonstrated its continued interest in the quality of the administrative judiciary by supporting legislation that would have established an ALJ Corps which would have facilitated continuing legal education for ALJs, mobility by ALJs to areas of the law where their services were required, and a fair disciplinary system for ALJs. The ALJ Corps Bill

(never enacted) assumed the continued performance by OPM, successor to the CSC, of its historic statutory duties as to recruitment and examination of ALJ candidates under the APA.

In recent years OPM has been developing new recruitment standards and a new examination process. On the basis of the new examination process, a new register of eligible persons is to be developed to replace the existing ALJ Register.

In the Spring of 2003, OPM abolished the Office of Administrative Law Judges (successor to the office set up in the 1960s) as part of a restructuring that reflected the management style of the then Director of OPM. The result was a division of the policy and operating functions of that Office and their assignment to offices deep within OPM's table of organization.

Further, in February 2003 it was learned by us for the first time that years earlier OPM had materially changed its method of scoring ALJ candidates. As the Court of Appeals for the Federal Circuit noted in *Meeker v. James*, 319 F.3d 1368 (2003) (the culmination of litigation that under the name *Azdell* for some years paralyzed OPM in all its ALJ functions) under the new OPM scoring process any applicant who satisfied a minimum requirement of seven years of experience in administrative hearings or litigation and completed the basic application was assigned a base score of 70 points. Additional points were then added to that base score reflective of: (1) the supplemental qualification statement, (2) a written demonstration, (3) a personal interview, and (4) a personal reference inquiry. However, the base score of 70 points constituted a passing score and entitlement to listing on the ALJ Register. It was (and continues to be) the opinion of the Committee that allowing a base score of 70 points to qualify an applicant for the register from which appointments are made did not give adequate weight to important factors in the selection of ALJs or to variations among people in their ability to be judges. On learning of the deterioration in the

appointment standards, this Committee began meeting with OPM to obtain a better understanding of its new policy and to seek to improve the examination and selection process.

Most recently, this Committee has continued to meet with representatives at OPM to determine the changes to the recruitment process (including the examination and scoring) that are being proposed within OPM and to recommend improvements to the processes by which OPM manages the ALJ recruitment and selection process. However, OPM has to-date remained tight-lipped about the proposed scoring formula that it is near to finalizing.

III Current Criticisms of OPM

There is merit in some of the criticisms now being directed at OPM. There is no question that the Office of Administrative Law Judges has lost its historic high status in OPM's hierarchy. OPM has given every sign that it does not hold its ALJ functions in the high regard previously shown by Mr. Macy. As noted above, OPM is preparing a new examination system which will allow it to completely replace the current register but one can only speculate at this time as to when that will be accomplished and how the new register will function because OPM declines to provide copies of the proposed test or its rating system.

It has been easy enough for this Committee to conclude that OPM's performance of its ALJ responsibilities has been far from exemplary. Our basic criticisms relate to: (I) the way OPM has undertaken to evaluate ALJ candidates, effectively giving a passing, eligible-for-appointment, score to anyone who has the required experience and completes the application form regardless of judicial qualifications; (ii) the diffusion within OPM of its ALJ responsibilities; and, (iii) more generally, a want of responsiveness to inquiries, suggestions and complaints.

IV OPM's ALJ Functions should not be transferred to the proposed ALJC

Although the criticisms of OPM's handling of the ALJ program are serious and some of long-standing, this Committee believes that the proposed legislation would place at risk the function as well as the independence of ALJs. We further think that adoption of the Recommendation would also create a wrong perception as to the status of the ALJ in our society.

Principally, however, we have not been able to conclude that it is time to give up on OPM as the agency responsible for ALJ candidate recruitment and evaluation. There are several reasons for this conclusion:

First, and perhaps most important, is the fact that OPM is in transition. The director responsible for abolishing the old Office of ALJs resigned earlier this year and has been replaced. On June 28, 2005, Linda Springer was sworn in as the new Director of OPM. It is not yet known whether Ms. Springer will have the same management style that triggered the dissolution of the Office of ALJs, or whether she might in fact reorganize OPM to reinstate that office or something like it or otherwise to give due recognition to the importance of OPM's ALJ functions.

Second, members of this Committee and others have met with OPM's General Counsel, who has been exercising oversight of OPM's ALJ functions, a couple of times this year. Though the General Counsel has been non-committal with respect to our complaints, he has seemed to understand and appears to want to confront criticisms, and to act upon suggestions that seem wise. There is thus some, however faint, reason to think that our views relating to improvements will have some effect when the OPM transition is complete.

Finally, there remains the question whether what is proposed as a substitute will be any better than what we now have. Respectfully, this Committee believes that the Recommendation has noteworthy flaws. In particular, the Report supporting the Recommendation is, as stated above, all

but silent on the structure proposed for the new ALJC. Prior iterations of the proposed new governing agency have been explicit that the conference would be composed of judges. That this is still intended is suggested by the Report's statement that the new ALJC "would be similar to the Judicial Conference of the United States," which is made up of judges and justices. However, the Judicial Conference plays no role in the recruitment, testing and appointment of federal judges similar to that envisaged for the ALJC in respect to ALJ candidates. This Committee does not believe that the Section would wish to endorse a proposal to turn the recruitment and evaluation of candidates for new ALJ positions over to existing ALJs. Further, we are not aware of any historic precedent for a legislated structure under which the judiciary manages the recruitment, testing and ranking of candidates for the very offices the judges hold. This is not surprising. Enactment of this legislation would encourage the public to think of ALJs as some sort of self-perpetuating mandarin class.

The Report, in addition, refers to "the office of the Chief Judge" and says that it would "have the capacity to review rules of procedure, rules of evidence, peer review, and where appropriate, make suggestions to promote administrative uniformity." But there is no indication what the relationship of this office is to the Conference as a whole, how or by whom the Chief Judge (presumably, though the Report does not say so, the chief executive of the proposed new agency) would be appointed, or whence he would derive his authority to do the things said to be within the capacity of his office.

Further, however the features of the proposed ALJC sketched in the Report were fleshed out, the creation of the new agency and transfer to it of OPM's ALJ responsibilities would do nothing to advance the goals that the ABA sought in the late 1980s and early 1990s when it endorsed legislation to create a government-wide Corps of Administrative Law Judges. ABA Res. 8 (1988);

see S. 486, 104th Cong. 1st Sess. (1995). The ALJ Corps bill, which would have left OPM with the ALJ functions currently assigned to it under the APA, targeted three deficiencies in the current statutory structure, none of which is addressed by the new Recommendation:

- (a) The Corps Bill attempted to make ALJs part of a career service by simplifying the assignment and reassignment of ALJs to the departments and agencies where they are needed. At present, if any agency or department no longer needs all of the ALJs on its payroll (whether due to a change in legislation or a decline in workload under existing legislation), the surplus ALJs are let go. The new Recommendation does not appear to address this problem.
- (b) The Corps Bill would have provided a detailed complaint and disciplinary procedure that would be fair both to the complaining party and to the ALJ against whom the complaint was lodged. There is no such procedure today and no such procedure appears to be contemplated under the Recommendation; the various iterations of a proposed ALJC structure would appear to have that agency issue rules of judicial conduct, without any provision for enforcement.
- (c) The Corps Bill would provide needed continuing legal education for current ALJs. This type of CLE would improve the mobility of ALJs within the government and would provide the training needed to meet the challenges of new legislation or changes in administrative policies. Although the Report supporting the Recommendation describes the new ALJC as a “resource for continuing legal education, consistent with ABA policy,” the new agency does not appear to have a mandate for such programs; only the ability to develop such programs.

Until these deficiencies in the Recommendation are addressed, as they were in the ALJ Corps Bill, this Committee does not believe that the Recommendation should be adopted.

V Proposed Section Response to the ALJC Recommendation

The Recommendation is not the only tool for addressing ALJ issues. Specifically, this Committee believes that the Section can work to improve the ALJ Program and can make significant improvements. For example, the Section and the ABA can insist that OPM administer all of its ALJ duties through one office; an office that is high in the agency's hierarchy. Its failure to do so, we submit, is due to two factors, neither of which warrants either OPM's neglect of its historic functions or the proposed legislative reform. First, OPM has lost sight of the importance and uniqueness of the ALJ's role in the administration of justice, which warrants a high quality performance of its legislative duties. Second, the demands made on OPM's ALJ recruitment and appointment services have been so small as to make a separate office a seeming extravagance at a time when efficiency and economy in personnel matters play a transcendent role throughout OPM. In part, the latter condition has been the fruit of the paralyzing *Azdell* litigation. That situation no longer exists. A more significant cause of OPM's lack of activity, and one without an obvious solution, stems from the fact that a majority of the incumbent ALJs have found their profession so satisfying and self-fulfilling that there have been relatively few turnover appointments in recent years from the register of eligibles.

VI Conclusion

This Committee recommends that the Recommendation be deferred and that the Section so instruct its delegates to the House of Delegates. Failing that, the delegates should be instructed to oppose the Recommendation. Meanwhile, this Committee intends to continue to pursue suggestions for improvement of OPM's performance through consultations and otherwise, and seeks support from the Section and the ABA as a whole. As representative of the ABA, this Committee has served as a "stakeholder" as to ALJ issues. At some point this Committee may conclude that this effort is hopeless. We have not reached that point yet.

This Committee cannot fault those who are critical of the manner in which OPM is currently carrying out its responsibilities with respect to ALJs. We hope that they (and the Section) won't cease to urge that OPM reestablish the central office which historically handled OPM's ALJ responsibilities under the APA, and that OPM develop a register of eligibles from which only the most highly qualified candidates are appointed as ALJs. This Committee cannot at this point support the proposed Recommendation.

Respectfully submitted,

William H. Allen, Vice Chair
Edward J. Grenier, Jr., Vice Chair
Nancy J. Skancke, Vice Chair
John T. Miller, Jr., Chair

Proposal for an Annual Gellhorn-Sargentich Student Essay Contest

Ad hoc Committee: Selina Davis, Loren Smith, and Wendy Wagner

Proposal

We propose that an annual Gellhorn-Sargentich student essay competition be established. Given our Section's large student membership, establishing a student essay competition would provide the Section with a formal way of acknowledging our student members' value to the Section and to administrative law in general. The competition would take place annually and invite essays on specified topics with specific constraints regarding length and format.

The author of the winning essay would receive a \$500 award; travel and accommodation to attend the fall meeting, where s/he would be honored with a plaque at the Awards Luncheon; and the essay would be published in *Administrative Law News*. Any student member of the Section who is enrolled in an ABA-accredited law school would be eligible to enter the competition.

The Section's Fellows have agreed to oversee the competition, which includes finalizing the rules, selecting the annual topic, advertising the competition, selecting the winner, and presenting the award. To assist the Fellows in this effort, preliminary drafts of the competition rules, an implementation timeline, and a preliminary scoring sheet are attached. These are only draft suggestions and are not binding on the Fellows.

Rationale

An annual essay competition will provide our 12,000+ student members with greater opportunity to participate in the Section and will hopefully also encourage new student memberships. The essay competition would be publicized widely to law schools, relying in part on our many active members who teach administrative law, as well as web postings and notices on law professor listservs. Since membership in the Section is a prerequisite for entry, we expect a number of students will join the Section simply as a result of the competition.

By publishing the winning essay, the competition will also provide student members with greater visibility in the Section. Indeed, if topics are selected carefully, we will be able to encourage analysis on issues that are of great interest to the Section membership and provide a platform for future panel discussions or other intellectual exchanges.

By providing the award recipient with travel and accommodation costs for a Section Meeting, we will allow the winner to become acquainted with active Section members and encourage the student or recent graduate to become more actively involved in the Section.

Cost and Resource Implications

Member time: The Section will need to support the competition by assigning five or more Fellows the task of finalizing the rules for the competition and overseeing the competition on an annual basis.

Staff time: The Committee estimates that it will take 20 to 30 staff-hours overall to email the competition promotional piece to the law student membership several times; build a spreadsheet with submitters' names, email addresses, and assigned Submission Codes; label hard copies and diskettes with Submission codes; assemble and distribute preliminary review packets for the competition to Committee members; and publicize and make arrangements for the award presentation.

Financial/other: The Section will also need to commit \$500 annually for the cash award, up to \$1,000 for the winner's travel and accommodation costs, \$75 for a plaque, and save space for the winning entry in *Administrative Law News*.

ABA Section of Administrative Law and Regulatory Practice
2006 Gellhorn-Sargentich Student Essay Competition

Draft Timeline

(Subject to Change by Competition Committee)

Date(s)	Task(s)
September 2, 2005	Gellhorn-Sargentich Competition Committee formed from Section Fellows
October 1, 2005	Committee finalizes topic and any necessary alterations to timeline, rules, scoring sheet, procedures, and promotional information. Committee/staff also prepares brief application form which is downloadable from Section website.
November 1, 2005	Promotional fliers/posters sent by Section Staff to Section faculty members with request for assistance in promoting competition to their students
November 4, 2005	First promotional email sent by Section staff to Section student members
January 13, 2006	Second promotional email sent by Section staff to Section student members
March 1, 2006	Final reminder promotional email sent by Section Staff to Section student members
March 31, 2006	Entries due, must be postmarked by this date
April 5, 2006	All entries should be in possession of Section staff
April 12, 2006	Section staff notify entrants via email that their submissions have been received
April 5 – 17, 2006	Section staff assigns numerical codes (001 through number of submissions received) to essays; labels submission forms, hard copy essays and diskettes with Submission Codes
April 18, 2006	Section staff forwards diskettes to Committee Chair by this date
April 18, 2006	Section staff forwards packets containing approximately one-fifth of the submissions received, with a corresponding number of Preliminary Scoring Sheets, to each of the Committee members for preliminary review
April 19 – May 15, 2006	Committee members review and score submissions

May 15, 2006	Committee members forward completed Preliminary Scoring Sheets to Committee Chair
May 15 – June 2, 2006	Committee Chair tabulates Preliminary Scoring Sheets to determine ten top-scoring submissions
Date(s)	Task(s)
June 3, 2006	Committee Chair forwards digital copies of the ten top-scoring submissions to all Committee members via email with Final Ranking Sheet
June 3 – July 1, 2006	Committee members review and rank the top ten submissions
July 1, 2006	Committee members forward their Ranking Sheets via email to Committee Chair and a predesignated Vice Chair
July 1 – 10, 2006	Committee Chair and Vice Chair independently tabulate the ranking sheets
July 10, 2006	Committee Chair and Vice Chair exchange their tabulation results to verify
July 11, 2006	Committee Chair notifies Committee members and Section staff of winning entry (by Submission Code)
July 12, 2006	Section staff notifies Committee members of name, school year, law school, and mailing address of winning entrant
July 19, 2006	Committee Chair notifies winning entrant of results via mail
July 19, 2006	Section staff notifies other entrants of contest results via email
Date TBD in October or November, 2006	Gellhorn-Sargentich Competition winner recognized at Fall Conference Awards Luncheon

ABA Section of Administrative Law and Regulatory Practice
2006 Gellhorn-Sargentich Student Essay Competition

Draft Preliminary Ranking Sheet

(Subject to Change by Competition Committee)

Submission Code:

Reviewer:

Please identify the top 5 essays in your set and rank them, with a 1 for the best essay and a 5 for the 5th best essay. Each essay will be preliminarily reviewed and scored by three reviewers. The ten submissions earning the highest aggregate ranks will be evaluated and ranked by a subset of Committee members to determine the Competition's winner. In the event of a relevant tie, more than ten submissions may progress to the final evaluation stage.

Criteria that should be included in your evaluation are: creativity and clarity of the proposal or thesis; organization; quality of research; quality of analysis; and grammar, syntax, and form.

Author ID number	Title	Rank (1 to 5)

Return completed Scoring Sheets to Gellhorn-Sargentich Essay Competition Chair [Chair Name & Mailing Address and/or email address] by **[May 15, 2006]**.

*ABA Section of Administrative Law and Regulatory Practice
Draft Rules for 2006 Student Essay Competition
(Subject to Change by Competition Committee)*

ABA Section of Administrative Law and Regulatory Practice
2006 Gellhorn-Sargentich Student Essay Competition

TOPIC: Discuss a problem or issue arising at the intersection of constitutional and administrative law.

PRIZE: The winner will receive a \$500 cash prize and round-trip airfare and accommodation to attend the Section's Fall Conference in Washington, DC. At the discretion of the editorial board, the winning entry may be selected for publication in *Administrative Law News*, subject to editing.

ELIGIBILITY: The competition is open to currently enrolled students of ABA-accredited law schools who are also members of the Law Student Division of the ABA Section of Administrative Law and Regulatory Practice.

The essay must be the student's original, unpublished work. The paper may be prepared to satisfy a course requirement or for other academic credit. However, the essay must be the work of the submitting student without substantial editorial input from others. Co-authored papers are ineligible. Only one essay may be submitted per entrant.

FORMAT: Essays must not exceed 12 pages, including title, citations, and any footnotes. The text of the essay must be double-spaced, with twelve-point font and one-inch margins.

Entries should reflect the style of *Administrative Law News* articles rather than law review style. Entrants are encouraged to review past copies of the *News* – available at www.abanet.org/adminlaw/news/ - prior to drafting their submissions. Citations must be embedded in text or in footnote form; essays with endnotes will be disqualified. Cites must conform with the 17th Edition of *The Bluebook: A Uniform System of Citation*.

JUDGING: Entries will be judged based on the following criteria:

- * Creativity and clarity of the proposal or thesis
- * Organization
- * Quality of the analysis and research
- * Grammar, syntax and form

The entries will be judged anonymously by members of the ABA Section of Administrative Law and Regulatory Practice.

ENTRY PROCEDURE: Each submission must include three copies of the entrant's essay, a digital copy in Word format on an IBM-formatted diskette or CD-ROM, and a completed application form, which may be downloaded at

www.abanet.org/adminlaw/xxxx. Submissions must be postmarked no later than **March 31, 2006** and mailed to Section of Administrative Law and Regulatory Practice, American Bar Association, ATTN:Gellhorn-Sargentich Essay Competition, 740 15th Street NW, Suite 900, Washington, D.C. 20005

The contestant's name and other identifying markings, such as school name, may not appear on any copy of the submitted essay. Section of Administrative Law and Regulatory Practice staff will assign a random number to each entry and record this number on all copies of each essay submitted. Neither the contestant's identity nor his/her academic institution will be known to the selection committee.

By submitting an entry in this contest, the entrant grants the ABA and the ABA Section of Administrative Law and Regulatory Practice permission to edit and publish the entry in the *Administrative Law News*.

Council August 2005 -Preliminary Draft
SECOND ANNUAL
ADMINISTRATIVE LAW & REGULATORY PRACTICE
INSTITUTE

LOBBYING
Washington, D.C.
April 6 – 7, 2006

Who Should Attend:

Every aspect of our personal lives, business and government is affected by the laws passed by Congress and regulations issued by administrative agencies. This practice-oriented program will provide practitioners, industry representatives, and government relations specialists, government attorneys and program officials, with the knowledge and techniques to navigate Congress and federal agencies from the creation of an idea through enactment. The Speakers and Panelists are among the leading lobbyists, scholars and lawyers in the field.

Day 1:

- | | | |
|-------------|------|---|
| 9:00-9:10 | I. | Opening Remarks. |
| 9:10-10:30 | II | Everything You Need to Know about Lobbying the Congress—The Legal Ground Rules
{Leading Scholar- No.1} |
| 10:45-12:00 | III. | Everything You Need to Know about Lobbying the Executive Branch— The Legal Ground Rules
{Leading Scholar- No.2} |
| 12:15- 1:30 | IV. | Luncheon Speaker: Leading Practitioner
{e.g. Tommy Boggs} |
| 2:00- 5:00 | V. | Case Study: Lobbying In Action
Experienced practitioners and industry lobbyists will analyze each step in the process and will reveal the strategies developed to effectively advocate for their position. The small group discussions will focus around an ethics related lobbying case study provided to Institute participants. |

2:00-2:45 Overview of Each Step in the Lobbying Process and Evolving Lobbying Techniques.

2:45-3:45 Small Group Discussions: Practical and Ethical Considerations in the Lobbying Process based on the Case Study

4:00- 5:00 Panel: The Ethical Dilemmas Faced by Lawyers, Lobbyists & Their Clients

{ Panelist would include OGE, Congressional and “Watch Dog” representatives }

5:30- 7:00 VI. Reception

Day 2:

9:00-10:00

VII. THE FELLOWS DISTINGUISHED LECTURE

A distinguished Washington practitioner will present the second annual lecture on the administrative and regulatory process relating to lobbying. The Lecture will be newsworthy and published in the *Administrative Law Review*.

10:00-11:15

VIII. PANEL: LESSONS FROM SEASONED PRACTITIONERS AND LOBBYISTS: DEVELOPING A WINNING STRATEGY.

{ Panel members would be leading well known lobbyists, and present/former Members of Congress and the Executive }

11:15-12:30

IX. PANEL: LESSONS FROM SEASONED PRACTITIONERS: WHEN IT ALL GOES SOUTH- HOW TO MANAGE CRISIS, AVOID THE PROSECUTOR’S GAZE, INFLUENCE THE PRESS, WHILE STILL ACHIEVING YOUR GOALS

{Panel members would be from the new breed of leading crisis control lawyers/P. R. Types }

**Mary C. Lawton 2005 Outstanding Government Service Award
Report of the Subcommittee**

The Subcommittee on Outstanding Government Service of the Section's Annual Awards Committee recommends Morton Rosenberg, Specialist in American Public Law, American Law Division, Congressional Research Service, Library of Congress for the 2005 Award. This year we received two nominations; we also reviewed nominations from two years ago.

Mr. Rosenberg was nominated on June 14, 2005 by Ellen M. Lazarus, Deputy Assistant Director, American Law Division, Congressional Research Service. A copy of her letter is attached. It was accompanied by a large packet of supporting documents which is available to the Council and which is summarized below. As Ms. Lazarus's letter states, she nominated Mr. Rosenberg for this award in 2003.

In her nominating letter, Ms. Lazarus quoted from a recently published book dedicated to Mr. Rosenberg by one of his colleagues:

To his training as a lawyer he adds a love of history and a keen sense of politics. In studying past disputes over documents or testimony, I frequently came upon his detailed memos preserved in committee reports, hearings, or the Congressional Record, setting forth with great clarity the issues that need consideration. Year in, year out, Mort shows how one person can make a difference in keeping our political institutions healthy and giving life to checks and balances.

Mr. Rosenberg has been a dedicated Federal employee for 40 years, 33 of which have been with the Congressional Research Service. Over those years in addition to his day to day work in CRS Mr. Rosenberg has published a number of articles in respected Law Reviews and other publications. His expertise has also been recognized by a number of area Law Schools and other organizations (e.g., The Brookings Institution) where he has been a guest lecturer or an Adjunct Professor. One of his most recent achievements was to establish a formal mentoring program for both new and seasoned attorneys and other CRS analysts on the "governmental process."

Five of the ten supporting letters were from Members of Congress from both sides of the aisle. Excerpts from some of the letters follow:

From Chris Cannon, Chair, Subcommittee on Commercial and Administrative Law, Committee on the Judiciary:

Mr. Rosenberg epitomizes the qualifications that recipients of this Award should have, namely, outstanding contributions to the develop, implementation and improvement of administrative law and regulatory practice....Based on Mr. Rosenberg's extensive expertise in administrative law, House Judiciary

Committee Chairman F. James Sensenbrenner, Jr. and House Judiciary Committee Ranking Member John Conyers, Jr. personally requested the Congressional Research Service to have Mr. Rosenberg assist the Subcommittee on Commercial and Administrative Law...in its comprehensive ongoing study of and report on the state of administrative law, process, and procedure in our nation.

From F. James Sensenbrenner, Jr., Chairman, House Committee on the Judiciary:

As Chairman of the House Committee on the Judiciary and former Chairman of the House Committee on Science, I am well-acquainted with Mr. Rosenberg's work on behalf of the Congress. During his many years of public service, Mr. Rosenberg's has provided congressional committees with invaluable counsel on a broad range of subjects....Mr. Rosenberg is widely-regarded as the leading expert and institutional memory of Congress on the sometimes arcane laws and procedures which pertain to congressional oversight. Put simple, Congress would not be able to discharge its oversight responsibilities as effectively as it does without the assistance and commitment of Mr. Rosenberg.

From Tom Davis, Chairman, House Committee on Government Reform:

Mr. Rosenberg is very deserving of this award. His work has substantially benefited the public, for which he receives little public recognition. As a member and now Chairman of the Committee on Government Reform, I am in a unique position to be familiar with Mr. Rosenberg's qualifications for this award....The Committee's members and staff have relied upon Mr. Rosenberg for timely, complete, and accurate legal analysis to support our oversight and investigations, as well as many of our legislative imitative addressing the regulatory process.

From John D. Dingell, Ranking Member House committee on Energy and Commerce:

Mr. Rosenberg has worked with me and Committee staff for most of his career providing uniquely valuable advice and expertise....There is no one better able to speak with authority and experience on the issue of Congressional investigative powers, and Members of Congress recognize, and rely on, his talents and knowledge. Mr. Rosenberg would be a most worthy recipient of this award, and he has my highest recommendation.

Mr. Dingell also included a copy of a letter he had written to the then Director of the Congressional Research Service in 1983, a copy of which is attached to this report.

From David C. Vladeck, Associate Professor of Law, Georgetown Law Center:

It is with the deepest admiration that I write to urge the Section to support the nomination of Morton Rosenberg for the annual Mary C. Lawton Outstanding Government Service award. Mort Rosenberg is almost a mythic figure in the field of administrative law. From his position...Mort has been one of the few constants

in a field that has always been marked by change. Mort's influence on the development of administrative law is difficult to chart because it has been so far-reaching.

For the foregoing reasons, the Subcommittee unanimously recommends that the Section recognize Morton Rosenberg by awarding him the Mary C. Lawton Outstanding Government Service Award for 2005.

Jodie Bernstein
Cynthia Farina
Fred Emery

Subcommittee Co-Chairs

European Union Administrative Law Symposium I

Marriott at Metro Center
Washington, D.C.
November 18, 2005
Program Chair: Charles Koch

Friday, November 18, 2005

Noon - 1:45pm **Symposium Opening Luncheon**
Keynote Speaker: Walter van Gerven
“The European Union: A Polity of States and Peoples”

1:45 - 3:15pm **Participation in Rulemaking in the Information Age:**
Lessons from Europe for the United States

The globalization of economic activity is motivating the creation of government institutions that transcend national boundaries – and for that reason also outstrip national political traditions. These institutions must find approaches to regulation that can both satisfy divergent politics and elude the frustrating grip of those whose activities require public control. European Union’s procedures for generating regulatory norms suggest possible lessons for policymakers in both Europe and the United States. This program will discuss EU rulemaking, contrast it with the US, and draw out the lessons from both experiences.

Panelists:

Stuart Shulman, Professor, University of Pittsburgh
Francesca Bignami, Professor, Duke University School of Law
Peter L. Strauss, Betts Professor of Law, Columbia Law School

3:15 - 3:30pm **Break**

3:30 - 5:00pm **Introduction to EU Judicial Review and**
Transparency/Data Protection

Judicial Review

Both the process and substance of EU judicial review will surprise most US administrative lawyers. This program will explore the “competence” of the EU courts, the European Court of Justice and the Court of First Instance. While these courts must assure national compliance with EU law, this discussion will focus on judicial authority over the other EU institutions.

Panelists:

Ronald Levin, Henry Hitchcock Professor, Washington University School of Law

Christoph Fedderson, Cleary, Gottlieb, Steen & Hamilton, Brussels, Belgium

Beth Nolan, Crowell & Moring, Washington, D.C.

Transparency and Privacy Protection in the EU

This program will describe the basic institutional and legal structure for promoting transparency and protecting privacy rights in the EU. It will also explore the general differences between the approach of the EU and the US concerning these issues.

Panelists:

Cynthia Farina, Professor of Law and Associate Dean of Faculty, Cornell University

Sidney Shapiro, University Distinguished Chair, Wake Forest University School of Law

Thomas Susman, Partner, Ropes and Gray, Washington D.C.

6:30pm – 9:30pm **Reception and Dinner at the Cosmos Club**

Keynote Speaker: His Excellency

Introductions by The Honorable C. Boyden Gray

This Symposium is supported by a grant from
The Trade Delegation of the European Commission to the United States

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**MEMBERSHIP REPORT
2005 ANNUAL MEETING**

CHICAGO, ILLINOIS

Overall

Total section membership for the period ending June 30, 2005 stands at 20,056. When the Council last met during the late April 2005 Spring Meeting in Savannah, the Section's membership was at 18,656.

The ABA is in the middle of their annual dues renewal process at this time, and to date the Section has collected \$41,240.00 of our projected \$150,000 in Section dues for the 2005-2006 fiscal year. Last year at the same time we had only collected \$34,447.00

Recent Campaigns

In early June, the Section sent out an email letter to government attorney members of the ABA, outlining the value that the Section has to offer and encouraging them to join as part of their ABA membership renewal. A similar email letter was sent to law school faculty.

Year to Year Comparison

Type	6/30/05	6/30/04	6/30/03
Lawyer Members	6,255 (includes 1,862 new bar admits & law student transfers)	5,824 (included 1,106 new bar admits & law student transfers)	5,477 ((included 1,083 new bar admits & law student transfers)
Law Student Members	13,086	11,869	9,973
Associates Members	174	199	220
TOTALS	20,056	17,892	15,670

**ABA Section of Administrative Law and Regulatory Practice
Report of the Nominating Committee**

April 2005

Pursuant to Article IV of the Section bylaws, the 2004-05 Nominating Committee respectfully submits the following slate of candidates for election to Section offices at the 2005 Annual Meeting:

Section Chair (automatic succession per bylaws): Eleanor D. Kinney

Eleanor is the Samuel R. Rosen Professor of law and Co-director of the Center for Law and Health at Indiana University School of Law in Indianapolis. She has been a Section Council Member as well as Chair of the Section's Health and Human Services Committee. Her book on Medicare coverage disputes is a strong addition to the Section's publications program.

Section Chair-Elect (automatic succession per bylaws): Daniel Troy

Dan is a partner in the firm of Sidley Austin Brown & Wood. He is the former Chief Counsel of the Food and Drug Administration (FDA). Dan has been a co-chair of the Constitutional Law and Separation of Powers Committee and a Member of the Section's Council.

Section Vice Chair: Michael Asimow

Michael is a professor emeritus at the University of California at Los Angeles and co-author of a leading textbook on administrative law. He is a former liaison to the Section's Council for State Administrative Law and is completing a term as a Council Member. He is the editor and co-author of a new Section publication, *A Guide to Federal Agency Adjudication*; the drafter of a February 2005 ABA resolution on adjudication; a past chair of the Adjudication Committee; and a co-reporter on the EU administrative law project.

Section Delegate (renomination of incumbent for 3-year term): Judy Kaleta

Judy Kaleta is the Senior Counsel for Dispute Resolution for the U. S. Department of Transportation and the Acting Chief Counsel for the Federal Transit Administration. She is currently completing her first term as the Section's delegate. She is also a former member of the Council; has been program chair for a number of Section meetings, chair for Long Range Planning, and the Section representative to the ABA Commission on Women in the Profession; and played a major role in developing ABA resolutions.

Budget Officer (renomination of incumbent): Dan Cohen

Dan is Chief Counsel for Regulation at the U.S. Department of Commerce. In addition to serving as Assistant Budget Officer, Dan has served as chair of the Rulemaking Committee and as Program Chair for the Fall 2002 Meeting and other Section programs.

Assistant Budget Officer: William Morrow

Bill is the Executive Director and General Counsel of the Washington Metropolitan Area Transit Commission. He is currently the Editor-in-Chief of the Section's *Administrative and Regulatory Law News* as well as a co-chair of the Section's Interstate Compacts Project and a former chair of the Transportation Law Committee. He is also a Certified Public Accountant.

Secretary: James Conrad

Jamie is an Assistant General Counsel at the American Chemistry Council. He currently serves as co-chair of the Section's Regulatory Policy Committee and has organized numerous educational programs for the Section. He is also serving on the Section's ad hoc group working to get ACUS refunded.

Council Member (three-year term): Nina Olson

Nina is the National Taxpayer Advocate and serves as an advocate for taxpayers to the Internal Revenue Service and Congress. She currently serves as a co-chair of the Treasury, Revenue and Tax Committee and is about to become chair of the Ombuds Committee. Nina has also served as the chair of two committees in the ABA Tax Section.

Council Member (three-year term): Michael Herz

Michael is a Professor at the Benjamin N. Cardozo School of Law at Yeshiva University. He is currently a co-chair on the Rulemaking Committee and was vice-chair of the Section's *Blackletter Statement on U. S. Administrative Law* project. He also is co-editor of a recent addition to the Section's publication program arising out of that project, *A Guide to Judicial and Political Review of Federal Agencies*.

Council Member (three-year term): Richard G. Stoll

Dick is a partner in the Washington, D.C., office of Foley & Lardner. He is currently co-chair of the Section's Rulemaking Committee and is chair of the Sponsorship Committee. He has also served as chair and a member of the Council of the ABA Section of Environment, Energy and Resources (SEER) and has taught environmental law and policy at the University of Virginia.

Council Member (three-year term): Ann Marshall Young

Ann is an Administrative Judge with the U. S. Nuclear Regulatory Commission. Currently she serves as a liaison to the Section's Council for the Administrative Judiciary. She also co-chairs the Section's Adjudication Committee and worked closely with Michael Asimow on the recently adopted resolution on adjudication. In addition, she is an active member of the National Conference of the Administrative Law Judiciary.

Council Member (one-year term; to fill a vacancy): Richard Parker

Richard is a professor at the University of Connecticut School of Law. He is currently the co-chair of the Section's Committee on Regulatory Policy. He has also organized and/or participated in several Section programs and drafted Section comments on proposed OMB guidelines for regulatory analysis.

These nominations conclude the work of the Nominating Committee for 2004-05. The Committee thanks the many Section members who contributed suggestions and advice regarding this year's nominations.

Respectfully submitted,

John Duffy
Christine Monte
Neil Eisner, Chair

Addendum to April 2005 Report
July 2005

The 2004-05 Nominating Committee respectfully submits the following addendum to its April 2005 Report for election to Section offices at the 2005 Annual Meeting:

Council Member (one-year term; to fill a vacancy): Ken Hurwitz

Ken is currently a partner in the Washington, D.C., office of Haynes and Boone, LLP., and is a former Executive Director of the Maryland Public Service Commission. He is chair of the Section's Energy Committee and has organized educational programs for the Section.

This nomination concludes the work of the Nominating Committee for 2004-05. The Committee thanks the many Section members who contributed suggestions and advice regarding this year's nominations.

Respectfully submitted,

John Duffy
Christine Monte
Neil Eisner, Chair