

ADMINISTRATIVE & REGULATORY LAW NEWS



Section of Administrative Law & Regulatory Practice

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- **OMB's New Peer Review Requirements**

- **Manipulating the Federal Register**

Also:

- **Electronic Rulemaking**

- **R_x by Email**

- **Kenneth Culp Davis**

Chair's Message



William Funk

Over the past several years, our Section has grown and improved.

Our membership is up: over 5700 lawyer members, up more than 400 from the same time last year, and over 9700 student members, up more than 3500 from the same time last year. And we are continuing to hold the line on our dues level, so that our Section remains one of the least expensive section memberships available in the ABA.

At the same time, we are providing a rich variety of Section benefits in the form of valuable information and resources. We have expanded the News to offer more articles, while keeping the timely reporting of administrative law developments in the courts and elsewhere. THE ADMINISTRATIVE LAW REVIEW, published in cooperation with the American University School of Law, maintains the strong tradition of legal scholarship associated with the Section. In addition, this year will mark the fifth annual publication of our Developments in Administrative Law and Regulatory Practice volume, provided free to our members but sold to the public for \$99.95. Beginning last year our collaboration with the West LegalEd Center has provided Section member discounts to online CLE produced by the Section.

The Section continues its aggressive book publication program. This past year saw the publication of our book on MEDICARE COVERAGE DECISION-MAKING AND APPEALS and our GUIDE TO FEDERAL AGENCY ADJUDICATION, that grew out of our continuing APA Project and is a companion to our GUIDE TO FEDERAL AGENCY RULEMAKING. This upcoming year should see a new edition of this latter book as well as a new edition of our LOBBYING MANUAL. In addition, the Section will be putting out an updated guide to the Sunshine Act and the last of our publications arising out of the APA Project – A GUIDE TO JUDICIAL AND POLITICAL OVERSIGHT OF FEDERAL AGENCIES. All of these books are available to Section members at substantial discounts from the list price.

Our now annual Fall Administrative Law Conference in Washington, DC, continues to grow. This year's conference, organized by Chair-Elect Randy May, will feature major programs on homeland security, our European Union initiative, and our panel of outstanding experts on recent developments in federal administrative and regulatory law. In addition, there will be a number of other programs on a host of timely topics as well

as several social events, the details of which can be found elsewhere in this edition of the News. Again, Section members can attend these programs at cut-rate prices, far below what comparable events would cost.

Our Section is not just about benefits, however. It is also about service to the profession. In that regard, our Section undertook its APA Project several years ago that resulted in A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW, as well as guides to federal adjudication, rulemaking, and, soon, judicial and political oversight of agencies. This descriptive portion of the Project is now all but completed, we are well underway on the next stage – recommendations for change. The Adjudication Committee has been working diligently on proposing recommended amendments to the APA's adjudication provisions. We have had programs in both San Juan and San Francisco on the proposals, and at the Fall Council Meeting the Council will have its first opportunity to consider adopting these proposals as recommendations to the House of Delegates. Then, it will be rulemaking's turn.

Just as the APA Project was a multi-year project, the Section has also undertaken a new multi-year project – the European Union project, described by Neil Eisner in the last issue of the News. The results of this project should provide a substantial service to American lawyers in general by making the European Union's administrative process more transparent.

The Section is also undertaking a project on Interstate Compacts as a service to both Congress and the various interstate compact commissions, which are subject neither to the federal APA nor state APAs. Anyone interested in participating should contact one of the co-chairs – Bill Morrow (wmatc@erols.com) or Kent Bishop (KBISHOP@utah.gov). In addition, the Section hopes to publish a guide to interstate compact law.

Our various committees have their own projects and programs or can start them if there is a member interested in doing the work. The committee chairs and their contact information is available at our website. Don't be shy about contacting them. Or, for that matter, about contacting me (funk@LCLARK.EDU).

I hope to see you in DC in November! ○

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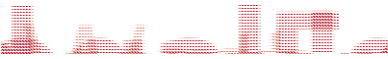
Visit the Section's Website at www.abanet.org/adminlaw and click on ONLINE CLE for access to Section programs at 

Table of Contents

In Memoriam: Kenneth Culp Davis	2
OMB to Require Peer Review for Regulatory Science Documents	3
The Bush Administration's Use and Abuse of Rulemaking, Part II: Manipulating the Federal Register	5
An Update on the E-Government Act And Electronic Rulemaking	7
R _x by Email—Bad Medicine for a Chronic Rulemaking Illness	10
Section of Administrative Law and Regulatory Practice 2003 Administrative Law Conference	12
Supreme Court News	16
News from the Circuits	19
Recent Articles of Interest	22
News from the States	25
Section News and Events	27

ADMINISTRATIVE & REGULATORY LAW NEWS

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In Memoriam



Kenneth Culp Davis

The Section mourns the passing of Kenneth Culp Davis, one of the founding fathers of administrative law in the United States, Distinguished Professor of Law Emeritus at the University of San Diego School of Law, and former Section council member.

Davis's crowning achievement, his life's work, was of course his ADMINISTRATIVE LAW TREATISE, first published in 1958. No law library would be complete without at least one copy on the shelf. It is easily the single most cited reference book on the subject and remains in print forty-five years and several editions later under the stewardship of Richard J. Pierce, Jr.

Davis's nearly seventy years of teachings and writings helped transform administrative process at all levels of government – quite literally altering the means by which we govern ourselves in the most fundamental, day-to-day sense. Everyone who comes in contact with a federal, state or local agency feels his influence. Everyone.

Davis entered private practice with the Cleveland firm of Tolles, Hogsett & Ginn after receiving his LL.B. in 1934 from Harvard, where he was Case Editor for the Harvard Law Review. He shifted to teaching in 1935 as assistant and associate professor at West Virginia University School of Law. Then in 1939, he joined the staff of the Attorney General's Committee on Administrative Procedure, which produced the 1941 report that led to the adoption of the Administrative Procedure Act, and emerged as one of the profession's leading talents.

He left the Committee in 1940 to accept a professorship at the University of Texas School of Law, where he lectured until 1948. He wrote extensively during this period, including his groundbreaking article, *An Approach to Problems of Evidence in the Administrative Process*, published in Harvard Law Review in 1942, in which Davis introduced and explained the distinction between legislative and adjudicative facts – a distinction central to the evolution of modern administrative law.

He accepted successive professorships at Harvard University School of Law, (1948–50), University of Minnesota School of Law, (1950–61), and University of Chicago School of Law, (1961–76). These were among his most productive years. His 1951 book, ADMINISTRATIVE LAW, brought the field together, integrating its parts into a coherent whole and explaining the central role of administrative law in modern government, laying the foundation for his treatise. He helped establish the Administrative

Conference of the United States in 1968 (and served for the entire period of the Conference's existence until 1995). In 1969, he published DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY, his much heralded study of discretion and its abuse. Davis's treatment of this complicated subject surpassed all others in its subtlety, depth, and breadth.

Accolades for Davis's achievements abound, but Judge Henry J. Friendly's review of the second edition of Davis's treatise, printed at 8 HOFSTRA L. REV. 471, 471–72 (1980), captures the essence of Davis's deep seated humanity:

Since the publication of the first edition of his ADMINISTRATIVE LAW TREATISE in 1958, properly characterized by a contemporary reviewer [Earl Kintner] as "one of the truly monumental events of this generation of legal writing," the unquestioned leader of this flashing group of [administrative law] scholars has been Kenneth Culp Davis. For the last twenty years he has been spurring, urging, flogging, praising, and blaming in an untiring effort to maximize fairness and effectiveness in dealings between the state and its citizens. If Professor Davis were to succeed in achieving a new Administrative Procedure Act that met his every desire of the moment, I predict he would awaken the next morning with a half-dozen ideas for improvement. Such is this man's passion for justice within a framework that is feasible as well as fair!

Scholars of administrative law regularly encountered Davis's deep, even fierce involvement with his chosen field. Throughout its existence, the deliberations of the Administrative Conference regularly drew his passionate and persuasive engagement. Authors of administrative law scholarship promptly found evidence of his appreciation for their work, and ceaseless wish to teach and engage, in lengthy letters that would arrive in the mail, praising or taking issue; to continue the debate was a deep pleasure. As a scholar, his own work reflected a uniquely personal style and perspective. Where he stood was never shrouded in abstract or passive prose. It was always the product of a powerful, piercing and original intellect.

Of course, creating a blueprint for good government not only requires a powerful intellect, but an inspired vision, as well. Bringing it to fruition takes hard work, determination and an unselfish commitment to the common welfare. Kenneth Culp Davis possessed all of these qualities, all of these traits, and used them to help shape a fledgling fourth branch and nurture it into becoming a model for the 20th century and beyond. For that, we and future generations of Americans owe him our respect and everlasting gratitude. ○

OMB to Require Peer Review for Regulatory Science Documents

By Jeffrey S. Lubbers*

In a proposed "Bulletin," issued August 29, 2003,¹ the Office of Management and Budget (OMB) signaled its intention to mandate a major new set of requirements for agency rulemaking and for the development of scientific and technical information relevant to regulatory policies. The 14-page document requires administrative agencies to conduct "an appropriate and scientifically-rigorous peer review" on all "significant regulatory information that the agency intends to disseminate."

In the cover page to the proposed Bulletin, the Administrator of OMB's Office of Information and Regulatory Affairs (OIRA), Dr. John Graham, stated:

Peer review is an effective way to further engage the scientific community in the regulatory process. A more uniform peer review policy promises to make regulatory science more competent and credible, thereby advancing the Administration's "smart-regulation" agenda. The goal is fewer lawsuits and a more consistent regulatory environment, which is good for consumers and businesses.

However, the proposal drew immediate criticism from advocates of stronger regulation. As reported in the *Washington Post*, one critic stated: "Our fear is, in the worst-case scenario, important public protections dealing with the environment, health, safety and civil rights regulations get stopped in their tracks because [peer review] becomes a hurdle you cannot get over."²

OMB is seeking comments on the proposal by October 28, 2003,³ and indicated it hoped the new policy would be in effect by February 2004.

Background

Executive Order 12,866, issued in 1993 by President Clinton, and maintained by

President Bush, does not require the use of peer review although it does provide in § 1(b)(7) that "[e]ach agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, or other information concerning the need for, and consequences of, the intended regulation." Subsequent "regulatory reform" bills introduced in Congress would have required various forms of peer review in rulemaking and other regulatory decisionmaking. The most recent such bill, S. 746, the "Regulatory Improvement Act of 1999," would have required agencies to conduct peer reviews of risk assessments and cost-benefit analyses. None of these bills was enacted. However, in 2000, the Data Quality Act,⁴ enacted as an insertion into an appropriations bill, specified that OMB should issue guidelines that "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." Treasury and General Government Appropriations Act for Fiscal Year 2001. Pub. L. No. 106-554, § 515(a). See, Jim O'Reilly, *Biting The Data Quality Bullet: Burdens On Federal Data Managers Under New Section 515*, 27 ADMIN. & REG. LAW NEWS 2 (2002). Thus, OMB has asserted the authority to issue this Bulletin under both E.O. 12,866 and the Data Quality Act (as well as the Paperwork Reduction Act). OIRA has also pledged to consult with the White House Office of Science and Technology Policy (OSTP) in implementing this Bulletin.

The Proposed New Peer Review Requirements

Coverage. At the outset, one should note that this Bulletin applies to "agencies," as defined in the Paperwork

Reduction Act, 44 U.S.C. § 3502(1), which encompasses "any executive department, military department, Government corporation, Government-controlled corporation or other establishment in the executive branch (including the Executive Office of the President) or any independent regulatory agency [except the Federal Election Commission]." This clearly represents a broadening of White House management of the regulatory policies of independent regulatory boards and commissions (and of government corporations for that matter). While Executive Order 12,866 does require independent agencies to submit annual regulatory plans and to participate in the annual regulatory agenda, it specifically exempted their rules from the overall OIRA review process—as did all previous such White House Orders.⁵

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¹ Executive Office of the President, Office of Management and Budget, Release 2003-34, "OMB Proposes Draft Peer Review Standards for Regulatory Science" (Aug. 29, 2003), available at <http://www.whitehouse.gov/omb/pubpress/2003-34.pdf>.

² Statement of Gary D. Bass, executive director of OMB Watch, quoted in Shankar Vedantam, *Bush Would Add Review Layer for Rules*, WASH. POST (Aug. 30, 2003) at A10.

³ In a sign of the times, OMB warned that "Due to potential delays in OMB's receipt and processing of mail, respondents are strongly encouraged to submit comments electronically to ensure timely receipt."

⁴ This Bulletin refers to the Act as the "Information Quality Act."

⁵ The Data Quality Act required OMB to write guidelines for "Federal agencies" without defining the term. However, that Act did cross-reference the Paperwork Reduction Act (PRA), so it is arguable that the DQA also incorporated the PRA's broad definition of "agency." In fact, independent agencies did comply with the OMB directives under the DQA. On the other hand, the PRA also includes a provision authorizing independent

Reporting The Bulletin adds a new requirement for agencies to report annually to OIRA on the significant regulatory science documents the agency anticipates issuing in the coming year. This includes “studies” and “scientific, engineering and economic analyses,” and must include a short statement of the agency’s peer review plan for each such document. (Note that “study” is also broadly defined to include “any research report, data, finding, or other analysis.”) OIRA, in collaboration with the OSTP, will “consult with agencies on the adequacy of these plans.”

Peer Review Standards. For “significant regulatory information” the proposed Bulletin establishes uniform government-wide standards for the peer reviews and requires disclosure of the makeup and backgrounds of the peer review panels. The standards focus on the content of peer review reports, public participation, and the agency’s responsibilities to respond to the reports. “Peer review” is defined as a “scientifically rigorous review and critique of a study’s methods, results, and findings by others in the field with requisite training and expertise.”

“Significant regulatory information” is described as

information that the agency intends to disseminate in support of a major regulatory action, that could have a clear and substantial impact on important public policies or important private sector decisions with a possible impact of more than \$100 million in any year, or that the Administrator of OIRA determines to be of significant interagency interest or relevant to an Administration policy priority.”⁶

For such significant information, agencies are instructed to “take care to select external peer reviewers who possess the requisite experience and independence from the agency.”

The Bulletin bows to the reality of “scarce agency resources” by authorizing agencies to tailor the intensity of the peer review to the importance of the study. In addition if the information has already been subject to adequate peer review (e.g., by a respected scientific journal), that is (rebuttably) presumed to

suffice. Depending on “the novelty and complexity of the science to be reviewed, the benefit and cost implications, and any controversy regarding the science,” “appropriate peer review mechanisms for significant regulatory information can range from review by qualified specialists within an agency (if they reside in a separate agency program) to formal review by an independent body of experts outside the agency.”

Moreover, agencies need not conduct peer reviews on significant regulatory information that relates to national defense or foreign affairs, or that is disseminated in the course of an agency adjudication.

Selection of Peer Reviewers. While OMB does not rule out agency use of their own staff (from a separate program in the agency), the Bulletin primarily anticipates the use of qualified external experts who “are capable of approaching the subject matter in an open-minded and unbiased manner.” The Bulletin elaborates:

Factors relevant to whether an individual satisfies these criteria include whether the individual: (i) has any financial interests in the matter at issue; (ii) has, in recent years, advocated a position on the *specific* matter at issue; (iii) is currently receiving or seeking substantial funding from the agency through a contract or research grant (either directly or indirectly through another entity, such as a university); or (iv) has conducted multiple peer reviews for the same agency in recent years, or has conducted a peer review for the same agency on the same *specific* matter in recent years. If it is necessary to select a reviewer who is or appears to be biased in order to obtain a panel with appropriate expertise, the agency shall ensure that another reviewer with a contrary bias is appointed to balance the panel. (Emphasis in original.)

The Bulletin also provides that OMB may seek interagency review of peer reviews, information quality correction requests, or major regulatory actions, and that such a review may in some circumstances comprise the peer review required by this Bulletin.

OMB also specifically seeks comment on whether agencies should be permitted to select their own peer reviewers

for regulatory information or whether a centralized governmental body should be assigned that role. But the proposal also permits the reviewers to be selected by the agency “or an outside group.”

The Peer Reviewers’ Role. The agency is directed to provide the peer reviewers with an explicit, written “charge statement” describing the purpose and scope of the review. The charge “should generally frame specific questions about information quality, assumptions, hypotheses, methods, analytic results, and conclusions in the agency’s work product.” Peer reviewers are supposed to be asked to review scientific and technical matters, not policy determinations, which are left for the agency. Peer reviewers are to be given sufficient information to enable them to undertake their assigned responsibility.

Opportunity for Public Comment. The agency is required to provide an opportunity for other interested agencies and persons to submit comments, although the notice requirements, and the timing and length of the comment period are not specified. In practice, though, the comment period would need to begin early in the process, because the Bulletin provides that the agency must provide any comments to the peer reviewers “with ample time for consideration before they conclude their review and prepare their report.”

Peer Review Reports. The peer reviewers are supposed to issue a final report—“individually or often as a

continued on page 9

agencies to override by majority vote an OMB disapproval of the agency’s proposed information collection requirement. 44 U.S.C. § 3507(f)(1).

⁶ This description of this key term comes from the explanatory preamble to the Bulletin, pages 6–7. The definition section (§ 1), states that it “means regulatory information that satisfies the ‘influential’ test in OMB’s Information-Quality Guidelines.” Those guidelines state that “‘Influential,’ when used in the phrase ‘influential scientific, financial, or statistical information,’ refers to disseminated information that OMB determines will have a clear and substantial impact on important public policies or important private sector decisions.” Office of Management and Budget, Information Quality Guidelines, § IV (October 1, 2002), available at http://www.whitehouse.gov/omb/inforeg/iqg_oct2002.pdf.

The Bush Administration's Use and Abuse of Rulemaking, Part II: Manipulating the Federal Register

by Robin Kundis Craig*

As I noted in my previous essay, *The Bush Administration's Use and Abuse of Rulemaking, Part I: The Rise of OIRA*, 28 ADMIN. & REG. LAW NEWS, SUMMER 2003, AT 8, President George W. Bush has surrounded himself with advisors who thoroughly understand the rulemaking process – and the ways in which that rulemaking process can be exploited. I argued that the Bush Administration has elevated the Office of Information and Regulatory Affairs (OIRA) to the position of the unreviewable reviewer of all federal regulations, undermining the system of agency accountability and expertise upon which federal administrative law has come to justify itself and raising constitutional separation of powers issues in the process.

The expansion of OIRA is not the Bush Administration's only manipulation of the federal rulemaking process, however. This administration has been manipulating the role of the Federal Register in rulemaking since President Bush's first day in office.

The legal basis of the Federal Register is rarely explored in administrative law, but it, like federal administrative agencies themselves, is a creation of federal statute.¹ Moreover, under the statutes governing the Federal Register – and unlike in the federal Administrative Procedure Act (APA) – the president of the United States is a federal agency, subject to the statutory requirements.²

The Federal Register statutes charge the archivist of the United States, acting through the Office of the Federal Register, “with the prompt and uniform printing and distribution of the documents required or authorized to be published” by statute in the Federal Register.³ Moreover, the language of the Federal Register statutes is entirely com-

manding. “The original and two duplicate originals or certified copies of a document required or authorized to be published by section 1505 of this title shall be filed with the Office of the Federal Register . . .”⁴ “Upon filing, at least one copy shall be immediately available for public inspection . . .”⁵ “Every Federal agency shall cause to be transmitted for filing the original and the duplicate originals or certified copies of all such documents issued, prescribed, or promulgated by the agency.”⁶ “Documents required or authorized to be published by section 1505 of this title shall be printed and distributed immediately by the Government Printing Office in a serial publication designated the ‘Federal Register.’”⁷ “There shall be published in the Federal Register . . . documents or classes of documents that may be required so to be published by Act of Congress.”⁸

Against this background of clear congressional intent to publish all federal regulations and proposed federal regulations as soon as they are filed, Andrew H. Card, President Bush's Chief of Staff, issued on January 20, 2001 – the Bush Administration's first day in office – a memorandum to all of the heads and acting heads of Executive departments and agencies, asking them to withhold pending rules from publication in the Federal Register – and to retrieve rules already filed with the Federal Register – “[i]n order to ensure that the President's appointees have the opportunity to review any new or pending regulations.”⁹ If regulations had already appeared in the Federal Register, moreover, agencies were asked to “temporarily postpone the effective date of the regulations for 60 days . . .”¹⁰

Card's memorandum acknowledges, of course, the importance of Federal

Register publication to federal agency rulemaking. Under the federal APA, agencies must publish notice of proposed and final regulations in the Federal Register, whether the agency proceeds through formal or informal adjudication. Even when the APA's requirements do not govern a particular rulemaking, moreover, Congress almost invariably includes this publication requirement. By recalling all rules from the Federal Register, therefore, Card and the Bush Administration effectively stymied all of the Clinton Administration's last regulations.

But was the memorandum legal? As noted, the commanding language of the Federal Register statutes applies to the president as well as to lesser federal agencies. Moreover, while it is true that the critical trigger of those statutes is the actual *filing* of rules with the Office of the Federal Register, suggesting that those agencies and the president retain full authority to determine when such filing is appropriate, the statutes also indicate that the president's ability to interfere with the quick publication of filed documents is limited: the president explicitly can suspend the Federal

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¹ See 44 U.S.C. §§ 1501-1507.

² 44 U.S.C. § 1501.

³ *Id.* § 1502.

⁴ *Id.* § 1503.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* § 1504.

⁸ *Id.* § 1505(a)(3).

⁹ Andrew H. Card, Jr., Assistant to the President and Chief of Staff, Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7,702 (Jan. 20, 2001).

¹⁰ *Id.*

¹¹ 44 U.S.C. § 1505(c).

Register's publication only "[i]n the event of an attack or threatened attack upon the continental United States" Under normal principles of statutory interpretation, the specificity of this single exception strongly suggests that, otherwise, the president is not to interfere in the Federal Register's workings.

Nevertheless, the Card memorandum did just that. By most counts, Card's memorandum applied to 371 sets of federal agency rules, ranging from regulations controlling deadly microorganisms in food to rules establishing the Best Available Retrofit Technology (BART) under the Clean Air Act to Medicare regulations to rules governing forest roads. The Government Accounting Office (GAO) reported in April 2002 that the Card memorandum had delayed effective dates for at least 90 of these rules, although the number may be higher because the GAO apparently could not find any Federal Register announcements regarding some of the affected regulations. Moreover, because publication in the Federal Register is generally a necessary last step before final agency regulations can become effective, Card's memorandum also effectively stalled those agency regulations awaiting publication in the Federal Register.

The fates of these last-minute Clinton Administration regulations have varied. Some have yet to re-emerge into public debate. For example, one set of regulations withdrawn from the Federal Register's office before final publication were the EPA's new rules establishing ocean discharge criteria under the Clean Water Act. Ocean discharge criteria are the primary standards for protecting ocean and coastal water quality. These standards have not been amended since 1980, despite increased awareness of ocean water quality degradation, and the Clinton Administration's regulations, while not perfect, would have significantly changed the protections accorded to ocean waters. In light of the Card memorandum, however, EPA withdrew these rules from the Office of the Federal Register. According to EPA's most recent regulatory agenda, it planned to re-issue proposed rules in

July 2003, with final rules not becoming effective until April 2004, but the rules have not yet reappeared.

Other stalled regulations *have* re-emerged, but in altered form. For example, although the Bush Administration ultimately allowed last-minute Clinton Administration rules regarding health care privacy to go forward, the proposed rules that finally emerged in March 2002 significantly relaxed the previously proposed privacy protections for patients. Similarly, in May 2002, the Department of Energy reduced the energy efficiency requirements for new central air conditioning units from the 30% increase in efficiency that the Clinton Administration called for to a 20% increase by 2006. In addition, near Thanksgiving and on Christmas Eve, 2002, the Bush Administration announced new regulations to repeal last-minute Clinton Administration regulations to protect forests and wilderness areas from increased logging and roadbuilding.

These last two re-emerged rules, moreover, are also examples of the Bush Administration's willingness to manipulate the *timing* of Federal Register publication to avoid extensive public scrutiny of controversial regulations. For example, Westlaw searches reveal that while federal agencies issued approximately the same number of rulemaking notices in each of the first two years of the Bush Administration – 3,771 Federal Register notices in 2001 as opposed to 3,985 in 2002 – the Administration more actively used timing in 2002 to mitigate public attention to its regulatory policies. In an average week in 2001, agencies issued between 80 and 150 sets of proposed and final regulations. Thus, when federal agencies issued approximately 170 proposed and final rules between December 23, 2001, and January 3, 2002, very few of which were controversial to begin with, the slight increase in publication could legitimately be attributed to a year-end crunch and not to active manipulation. Indeed, the Clinton Administration experienced similar 10- to 15-percent increases in Federal Register rulemaking publications during the last week of the year throughout its years in office.

In contrast, while average weeks for the Bush Administration climbed to about 120 to 160 proposed and final regulations per week in 2002, federal agencies issued over 280 proposed and final regulations between December 23, 2002 and January 3, 2003 – a percentage increase that significantly exceeds the expected end-of-the-year push, and an absolute total that exceeds even the Clinton Administration's last minute attempts in December 2000 through January 2001 to force federal regulations through the publishing process.

More important than sheer numbers, however, is the *content* of these 2002 "holiday" regulations, which included revised arsenic standards for drinking water, regulations governing National Emissions Standards for Hazardous Air Pollutants, and several rules related to Clean Water Act permitting. In one glaring specific example of an attempt to dodge public scrutiny, on Christmas Eve, 2002, the Bush Administration announced a new rule that repealed Clinton-era protections against roadbuilding and allowed claimants to use an 1866 mining-related statute to open up new roads in federal protected areas.

However, it was New Year's Eve 2002 that was the banner regulation day for the Bush Administration. Not only did the administration repeal the Clinton-era government contracting rules on that day, but it also issued:

- Direct final rules on the quality assurance requirements for the particulate matter National Ambient Air Quality Standards, reducing the percentage of air quality monitors that must be collocated;
- New proposed rules under the Clean Air Act regarding the categories of activities that qualify as routine maintenance, repair, and replacement, which in turn defines when existing sources of air pollution have to comply with more stringent air quality requirements;
- Revisions to Medicare payment rules that update the physician fee schedule, set pricing for PET scans, and set the Medicare qualifications for clinical

continued on page 15

An Update on the E-Government Act And Electronic Rulemaking

By Barbara H. Brandon¹

President Bush signed the E-Government Act of 2002, P.L.107-347, 116 Stat 2915, on December 17, 2002. This statute creates an Office of Electronic Government in the Office of Management and Budget (OMB) and mandates the use of new Internet-based technologies to enhance citizen access to government information and services. Of particular import to members of this section are the provisions of section 206 that direct federal agencies both to upgrade their Web sites and to install electronic rulemaking dockets.

Many of the provisions supplement earlier Congressional efforts like various provisions in the Paperwork Reduction Act, E-FOIA, and the Information Technology Management Reform Act.² And as the legislative history reflects, Congress unanimously desires that agencies expand their use of the Internet as a vehicle to republish and deliver information to the general public.

Core Provisions

As section 206(a) states, Congress intended that the new law “increase access, accountability, and transparency” and “enhance public participation ... by electronic means.” Therefore, the section imposes two types of mandates. First, subsection (b) stipulates that agencies should ensure that their Web sites contain all the information that governmental bodies must publish in the Federal Register under section 552(a)(1) of the Freedom of Information Act (FOIA) including: (1) descriptions of its central and field organizations, contact information and methods to request information or make submittals; (2) statements that explain its functions and formal and informal procedures; (3) rules of procedures, places where forms may be obtained and instructions as to the scope and content of reporting

requirements; (4) substantive rules, statements of general policy and generally applicable interpretations; and (5) any amendments, revisions or repeals. Similarly, section 206 (b) recapitulates the duties imposed on agencies by section 552 (a) (2) of FOIA to make documents available for inspection and copying.

The second major provision is section 206 (d). Here, Congress directs each agency to build publicly accessible Web sites that contain all the comments submitted to a rulemaking docket. These dockets must contain all submissions made under section 553(c) of the Administrative Procedure Act (APA) and other materials by “agency rule or practice” that are included in a rulemaking docket. Hopefully, this latter requirement will be interpreted broadly so that agencies provide all the types of analytical materials that a best practices approach would suggest.

Both of these provisions require consultation with OMB and implementation “to the extent practicable.” Under subsection (e) the OMB director will set the timetable for implementation when he submits his first annual report to Congress under 44 U.S.C. § 3606. While this lack of specificity suggests that all federal agencies may not speedily opt into the program, e-rulemaking appears to be a high priority item in the President’s 2003 E-Government Strategy. Cost savings are a key factor here. An April 2003 OMB report entitled “*Implementing the President’s Management Agenda for E-Government*” predicts that the federal government could save over \$90 million a year through this conversion.

Regulations.gov

This past January, the Bush Administration established a regulatory portal, www.regulations.gov, as part of its E-Government initiatives. The

Department of Transportation (DOT) had initially been chosen as the lead agency in this effort, but OMB subsequently tapped the Environmental Protection Agency (EPA) to perform this role.

This is a first generation attempt to develop a comprehensive Internet access site where the public can both determine what regulations are open for comment and submit electronic comments. The software incorporates two noteworthy features. First, it allows Internet users to search by keyword across all government agencies to find proposals of interest, rather than asking citizens to guess which agency is proposing a particular rule. Secondly, the site automatically generates a comment form tailored to each agency’s procedures. However, the site does not yet allow for public viewing of other submissions as required under section 206(d).

A January 23rd *Washington Post* article reports that the system can presently handle 2,000 users or 16,000 comments per hour at up to 4,000 characters per comment (plus attachments); comments entered in the system are sent electronically to the relevant agency where they can be posted in an electronic docket or entered into the paper docket. As of this past April, OMB stated that the site had 2.6 million visitors.

¹ Barbara H. Brandon is a law librarian at the University of Miami School of Law. She has a J.D. from the University of Pittsburgh School of Law, an L.L.M. from the Harvard Law School and a MLS from the University of Pittsburgh. Last year she was the lead author of a law review article on this topic, Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Our Civic Infrastructure*, 54 Admin. L. Rev. 1421 (2002).

² Respectively, Pub. L. No. 104-13, 44 U.S.C. § 3501 et seq. (2000); Pub. L. No. 104-231, 110 Stat. 3048; and Pub. L. No. 104-106, 110 Stat. 679.

Some observers predict this system will allow well organized interest groups to maintain their dominance of a non-robust democratic process. Others hope that it will level the playing field for those outside the Washington Beltway. The same *Washington Post* article reported that the National Association of Manufacturers has already developed a template for its members. But Neil Eisner, the Assistant General Counsel for Regulation and Enforcement at DOT, says DOT has seen “no evidence of interest groups stuffing the regulatory comment box” even while commentary has grown dramatically from 3,102 comments on 155 rules in 1997 to 62,944 comments on 119 rules in 2000 DOT.

Improvements at DOT and a Problem with the EPA Site

DOT, a longtime forerunner in this area, has continued to innovate. It has installed a listserv feature that automatically notifies the subscriber to a particular docket of all documents as they are filed; the e-mail then provides a link to the document in the particular docket.³

In addition, DOT has greatly increased the overall transparency of its rulemaking process by letting the public learn where a particular rule is in the process. On the Department’s home page there is a hot link entitled “DOT Significant Rulemakings.” This takes the public to a report that summarizes the status of all significant regulations on a monthly basis. The report is color-coded to allow the public to determine whether or not a matter is on track or delayed. If it is the latter, the report indicates where the rule sits in the process. The report then offers an explanation for the delay.

In contrast, a policy judgment that factored into EPA’s initial site design makes that site most cumbersome to use. EPA’s general counsel’s office prohibited the agency from creating a publicly visible index of commenters that would identify submitters by name and organization. Unlike the DOT, FCC and FDA dockets, the public can-

not browse submittals by either name or organization.

This limitation greatly hampers access to materials on the site, especially if the docket is large. I recently examined the closed docket for EPA’s proposal to weaken the Clean Air Act’s new source review program. The docket, No. OAR–2002–0068, contains a total of 2051 documents. Its sheer size precludes browsing. A citizen interested in finding out about this controversy could not easily access the commentary unless he or she already knows the precise identity of the players. However a field on the advanced search screen labeled “company/ group/association” does allow a user to retrieve some organizational comments by name although it fails to locate NRDC’s comments in this docket. Unsophisticated searchers are therefore left to click through page after page of screens that state public comment coupled to oblique identifiers in the hopes that he or she will recognize the appropriate submittal. This failure in user-friendliness also defeats the potential of online rulemaking – interaction among commenters. If stakeholder B can’t find stakeholder A’s comments, no worthwhile exchanges can develop and the agency loses the benefit of a fuller dialogue on its proposal.

The Observations of Political Scientists

Online dockets do make it much easier for citizens to offer comments and for agencies to lower their costs in distributing information to organizations and the public. But as Professor Coglianese has observed, the effort to date “seems to be focused on digitizing the existing rulemaking process,” rather than using information technology to transform the procedure.⁴

Now is a good time to assess what has been accomplished. Both Thomas Beierle and Stuart Shulman have individually evaluated a variety of dockets to assess what impact electronic dockets have had on the substantive discourse in particular rulemakings. Beierle looked at DOT⁵ and Shulman has studied the massive public commentary submitted during the rulemakings on the National

Organic Program and the Forest Service’s roadless area rule.⁶ Both found the efforts they studied to be praiseworthy attempts to lower structural barriers to participation, but both found a lack of reciprocity or deliberativeness in the quality of the exchanges.

Federal agencies have experimented with other online approaches to expand input into the policy development process. DOT has tried chat rooms and EPA has twice used asynchronous discussions. These methods have tried to encourage greater interchanges between the public and the agency. Beierle studied one EPA asynchronous discussion at length,⁷ and Beth Simone Noveck examined several experiments in a recent article.⁸

³ <http://dms.dot.gov/emailNotification/index.cfm>.

⁴ Cary Coglianese, *The Internet and Public Participation in Rulemaking*, Regulatory Policy Program Working Paper RPP–2003–05, 7 (2003), available at <http://www.ksg.harvard.edu/cbg/research/rpp/RPP–2003–05.pdf>, infra note 5, at 6.

⁵ Thomas C. Beierle, *Discussing the Rules: Electronic Rulemaking and Democratic Deliberation*, RFF Discussion Paper 03–22, available at http://www.rff.org/disc_papers/PDF_files/0322.pdf.

⁶ Stuart W. Shulman, *An Experiment in Digital Government at the United States National Organic Program*, 20 Agriculture and Human Values (forthcoming 2003), available at <http://www.drake.edu/artsci/faculty/sshulman/Papers/AgHumValMS.pdf>.

⁷ Thomas C. Beierle, *Democracy On-line: An Evaluation of the National Dialogue on Public Involvement in EPA Decisions*, (2002) available at http://www.rff.org/reports/PDF_files/democracynonline.pdf; Thomas C. Beierle, *Engaging the Public through Online Policy Dialogues*, (submitted to the Prospects for Electronic Democracy Conference at Carnegie Mellon University, September 20–21, 2002 (on file with the author)); Brandon, supra note 1, at 1462–1471.

⁸ Beth Simone Noveck, *Designing Deliberative Democracy in Cyberspace: The Role of the Cyber-Lawyer*, 9 B.U. J. SCI & TECH. L. J. 3 (2003). See also Brandon, supra note 1, at 1462–1471; Pauline Poland, *Online Consultation in GOL Countries: Initiatives to Foster E-democracy*, available at <http://www.governments-online.org/documents/e-consultation.pdf>; Micheal Froomkin, *Habermas@Discourse.Net: Toward a Critical Theory of Cyberspace*, 116 Harv. L. Rev. 749 (2003); and <http://www.weblab.org/about.html>.

Professor Coglianesi has suggested that before rushing to adopt new technologies that early adopters ask themselves whether a particular application will lead to better or more responsive regulatory policies. In a similar vein, Shulman and several of his colleagues have sketched out a social science research agenda in this area.⁹

Finally, Coglianesi has suggested some possible new digital add-ons as a thought experiment. These include: (1) regulatory polling; (2) commenting via simulation; (3) virtual juries; (4) digitization of draft rules and (5) digitization of *ex parte* comments. However, he cautions that these types of proposals need to be analyzed carefully to determine their possible impacts. ○

⁹ Stuart W. Shulman, David Schlosberg, Steve Zavestoski and David Courard-Hauri, *Electronic Rulemaking: A Public Participation Research Agenda for the Social Sciences*, 21 SOCIAL SCIENCE COMPUTER REVIEW (forthcoming 2003), available at <http://www.drake.edu/artsci/faculty/sshulman/Papers/AgHumValMS.pdf>.

OMB's New Peer Review Requirements: An Introductory Look

continued from page 4

group” detailing the nature of their review and their findings and conclusions. The peer review report shall also “disclose the names, organizational affiliations, and qualifications of all peer reviewers, as well as any current or previous involvement by a peer reviewer with the agency or issue under peer review consideration,” and any dissenting statements.

The agency is then required to prepare a rather comprehensive response:

The agency must then provide a written response to the peer review report(s) explaining: the agency's agreement or disagreement with the report(s), including any recommendations expressed therein; the basis for that agreement or disagreement; any actions the agency has undertaken or proposed to undertake in response to the report(s); and (if applicable) the reasons the agency believes those actions satisfy any concerns or recommendations expressed by the report(s). The agency shall disseminate the final peer review report(s) and the agency's written statement of response in the same manner that it disseminates the work product that was reviewed. All of these written materials should be included in the administrative record for any related rulemakings.

In addition, if an agency relies on significant regulatory information covered by this Bulletin in support of a major

regulatory action, it shall include in the administrative record for that action a certification explaining how the agency has complied with the requirements of this Bulletin and the Data Quality Act.

Preliminary Consultations with the White House. Prior to undertaking a peer review, agencies must consult with OIRA and OSTP concerning the sufficiency of their planned peer review policies.

New Data Quality Act Requirements. Agencies are directed to amend their own information quality guidelines to incorporate the requirements of the (final) Bulletin, and such amendments should include guidance on conflict of interests, confidentiality, and disclosure of information about the peer reviewers.

In addition, in a separate section of the Bulletin (§7), OMB adds new reporting and clearance requirements to the Data Quality Act. Agencies are directed to provide OIRA with a copy of each non-frivolous information quality correction request, or to post such a request on its Internet website, within seven days of receipt. OIRA then may ask the agency to provide a copy of its draft response to any such information quality correction request or appeal at least seven days prior to its intended issuance, and to consult with OIRA before issuing its response.

Conclusion

The proposed Peer Review Bulletin has the potential to effect a dramatic change in the way regulatory agencies make science-based rules and other significant regulatory policy decisions. Not only will it require all regulatory agencies to inform and consult with OIRA prior to developing such information, it will require a new layer of outside reviewers, of such agency decisions. Reports generated by such outside reviewers will obviously take time to write as will the comprehensive agency responses to such reports. And the effect of having this material in the administrative records for judicial review is hard to predict. What is easy to predict, however, is the rapid growth of a new cottage industry of peer reviewers inside and around the Beltway.

This Bulletin represents the logical next step in the centralization of OMB review of agency rules (this time clearly encompassing the independent agencies), and continues the proliferation of rigorous analyses that must accompany significant rules. OMB is to be commended for allowing public comment on the proposal. However, whether its benefits will outweigh its obvious costs will likely be the key question raised by commenters in the next few months and possibly for years to come. ○

R_x by Email—Bad Medicine for a Chronic Rulemaking Illness

By Marsha N. Cohen¹

I hate to be wrong. It's particularly embarrassing when you are supposed to be an expert in the field. One consolation, of course, is that an academic like me who is wrong is *merely* embarrassed; practitioners must worry about malpractice. But I am way ahead of my story – of my cautionary tale about (did you guess?) rulemaking ossification.

As co-author of the only text on California pharmacy law, I periodically address pharmacists about changes in what is a complex regulatory scheme. Preparing last fall for such a lecture, I surfed the web site of the state regulators, the California State Board of Pharmacy, looking for any nuggets I might have missed. I found a document called "Electronic Signatures Compliance Guidelines," and its very first line struck me as, well, entirely incorrect. "California pharmacies can accept computer to fax prescriptions for controlled substances (except for Schedule II prescriptions)," it then and now declares. On p. 137 of my own book, we had carefully explained to our mostly non-lawyer audience that while California law allows prescriptions for controlled substances (drugs subject to abuse) to be transmitted in an electronic fashion, either by fax or by data transmission (i.e., e-mail), federal regulations allow faxes under certain conditions, but do not allow electronic data transmission – and the federal rules are controlling. The applicable rules (21 C.F.R. §§ 1306.11, 1306.21) of the federal Drug Enforcement Administration (DEA) are not taxing to interpret, so we confidently concluded, "Federal regulations referring to faxes clearly mean an image transmission of the original

signed prescription, not an electronically generated order received by the pharmacy in fax form, even one with an electronically generated 'signature.'"

The Board's web-posted statement also exuded confidence. As a result, my co-author, Bill Marcus, and I spent the weekend searching through web sites and electronic databases, but found nothing to demonstrate any change we had missed in DEA's rules. We had long been assured by contacts in DEA that the agency was working on bringing its rules in line with the technological revolution, and in line with state rules. But nothing had actually happened. Thus I called the Pharmacy Board early Monday morning to report the error on the Board's web site. But, an administrator assured me, it is now legal to transmit controlled substance prescriptions electronically. How so? "We have a letter."

A letter? The letter, which soon arrived by fax at my desk, is undated (although it bears an earlier fax date of February 5, 2002, on the top). It was written by a DEA official, on DEA stationery, to a private company in Illinois, and refers to earlier conversations and letters. "[C]urrent DEA regulations," it proclaims, "allow for Schedule III, IV, or V controlled substance prescriptions that are electronically created and transmitted, either directly to a computer or via a facsimile machine, to be treated as oral prescriptions." I almost fell out of my chair.

An oral prescription, by long tradition as well as by the logic inherent in the word "oral," involves one person talking to another – generally the physician's staff member speaking to the pharmacist. When fax machines were developed, it took awhile for regulatory change at the state and federal levels to accept as a legal prescription the transmission of a facsimile of the actual

written and signed prescription from the prescriber to the pharmacy. There was never any move to consider faxes legitimate as a form of "oral" transmission. Electronic data transmission has now eclipsed the fax as a preferred method of communicating, and many states have modified their pharmacy law to recognize this fact. But DEA has not yet changed its rules. Only by the kind of logic celebrated in *Alice in Wonderland* could one conclude that an e-mail transmission is the same as an oral transmission, and thus covered by existing law. What's going on?

The answer, surely, is a classic case of the need to circumvent regulatory ossification. The pharmacy profession has urged DEA to change its rules to catch up to the states in regard to this technology. After all, before long, doctors everywhere will be "writing" prescriptions on their PDAs and zapping them electronically to pharmacies, a development encouraged by those working to improve the rate of errors in prescription transcription. DEA's published agenda of federal regulatory actions notes that it has "initiated a project to propose regulations to provide an electronic alternative to the present paper-based system of distributing and dispensing Schedule II, III, IV, and V controlled substances. These rulemakings will permit DEA registrants to transmit controlled substances orders and prescriptions electronically using digital signature technology." In May 2002 (after the fax stamp date on the law-changing letter?), DEA held a meeting of its Pharmacists' Working Group on the subject of Electronic Prescriptions for Controlled Substances (EPCS) at which it discussed, according to its web-posted minutes, the "EPCS project [which] will allow the electronic transmission of controlled substances prescriptions, which is currently prohib-

¹ Professor of Law, Hastings College of the Law, University of California, cohenm@uchastings.edu.

ited under the DEA's regulations." To the eye of an administrative lawyer, *nothing has happened*. The regulations are unchanged; my book is correct; the advice I ought to give to inquiring pharmacists, all unchanged. But state regulators, and the profession, seem to be convinced the law has changed. All because of "the letter."

Because I think DEA ought to change its regulations and allow electronic transmission of controlled substance prescriptions, I'm not terribly upset by the substantive change that has resulted. But suppose I were a practicing lawyer? I understand that the company that was the original recipient of "the letter" (and which undoubtedly is responsible at least in part for its widespread dissemination) makes a product, a prescription-dispensing machine intended for physicians's offices, whose usefulness requires the electronic transmission of prescription information. Perhaps it was not the first or only company with the same idea. Suppose you were the lawyer to whom a client proposed such a machine. Your advice would have been: the DEA is working on making this legal, but at the moment it would not be legal to transmit controlled substance prescriptions electronically. Would such advice have been . . . wrong? Or right? (What would a jury think?) That this "change" has escaped attention – in fact, cannot be "found" by the usual research methods – was underscored for me when I recently came across an article entitled, "Pharmacy, Facsimile, and Cyberspace: An Examination of Legal Frameworks for Electronic Prescribing," published in the ALBANY LAW JOURNAL OF SCIENCE

& TECHNOLOGY. Its authors, two RAND Health scholars, were entirely unaware of "the letter," and thus proceeded on the assumption that electronic transmission of controlled substance prescriptions was illegal. How could they possibly know otherwise?

At least since Professor McGarity's 1992 article in the Duke Law Journal, crediting a former EPA general counsel with the phrase, "regulatory ossification" has been decried as a phenomenon that would, among other things, prevent agencies from implementing new scientific and technological discoveries in their rules and drive them to the increasing use of informal guidance documents and other statements of policy outside the notice and comment rulemaking process – not to mention to "secret law." I think we're definitely there – and I can conceive of no argument, from either side of the political spectrum, that this is a good thing.

Nor is it just lawyers who are frustrated by the inability of government to modify, with dispatch, existing regulations to meet the demands of new science and technology. Scientists express the same concerns. A committee of scientists (on which I was the sole lawyer), brought together by the Institute of Medicine of the National Research Council to review, among other things, the scientific basis for existing performance standards for safe food, included among its findings "that the current process to modify existing food safety criteria is too rigid to allow appropriate and timely updating of these regulations to keep up with the fast pace of scientific and technological progress."

In its report, entitled "Scientific Criteria to Ensure Safe Food," the committee urged Congress to "give the regulatory agencies the flexibility needed within the administrative process to update food safety criteria, including performance standards, so that new scientific knowledge and technological innovation can be incorporated into these regulations in a timely manner."

What can be done? I'm not so foolish as to believe that Congress, the executive branch, and the courts will all see the light and undo the decades of requirements, real and perceived, that have added layers of complexity to the brilliant simplicity of informal rulemaking as it was originally conceived. But perhaps all those actors could be convinced – by my story and no doubt the hundreds of others that you readers could tell – that a distinction could be drawn between issuance of new regulations and the modification of regulations in response to a change in the facts upon which those regulations were based. A simplified rulemaking process that would allow agencies to respond agilely to new scientific discoveries and technological developments would improve the working of our government, and favor neither the forces that applaud nor those that oppose regulation as one of their principles of political faith. Not to mention that it would help me avoid being wrong. ○

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Section of Administrative Law and Regulatory Practice

2003 Administrative Law Conference

Section Chair: William Funk ■ Conference Chair: Randolph J. May
November 6-8, 2003 ■ The New Washington Convention Center ■ Washington, DC

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Thursday, November 6, 2003

9:00am – 9:30am

Keynote Address by The Honorable John D. Graham, Administrator, Office of Information and Regulatory Affairs, OMB, “Smarter Regulation: Progress and Unfinished Business”

9:45am – 11:45am

Federal Preemption of State Laws – Repercussions for the Banking Industry

Federal preemption of state laws in the areas of predatory lending, privacy, securities law enforcement, and insurance and its relationship with state enforcement of laws continues to generate controversy and new rulemaking. This session will examine preemption and what it means for consumers and regulated entities in different substantive areas and how the states are responding.

Program chair: Charlotte Bahin, Senior Vice President - Regulatory Affairs, America's Community Bankers

Panelists:

- Julie Williams, Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency
- Carolyn Buck, Chief Counsel, Office of Thrift Supervision
- Arthur Wilmarth, Professor, George Washington University School of Law
- Cantwell Muckenfuss, Partner, Gibson, Dunn & Crutcher
- Michael Roster, Executive Vice President and General Counsel, Golden West Financial

9:45am – 10:45am

Pro Bono Representation for Veterans Claims

This session will provide a history of the federally funded Veterans Consortium Pro Bono Program, which began in 1992. Services provided by the consortium include books, training, case screening, mentoring and monitoring. Significant features of the program include the opportunity for oral argument before the Court of Appeals for Veterans Claims and EAJA fees for a successful appeal.

Program Chair: Ron Smith, Chief Appellate Counsel, Disabled American Veterans

Presenters:

- David Meyers, The Veterans Consortium Pro Bono Program
- Brian Robertson, Director of Case Evaluation & Screening, The Veterans Consortium Pro Bono Program
- Bart Stichman, National Veterans Legal Services Program

10:45am – Noon

Veterans Affairs – The Treating Physician Rule

An expert panel will discuss the advantages and disadvantages of possible “treating physician rules” in the adjudication of claims for VA benefits. The Social Security treating physician rule provides that the opinion of a physician who treats a patient is entitled to greater weight than the opinion of a physician who merely examines the patient or who offers an opinion based solely on a review of medical records. The panel will consider how the Social Security rule is applied, its shortcomings and advantages, the justifications for adopting a similar

rule for VA claims adjudication, and why such a rule might be unnecessary or ill-advised.

Program Chair: Ron Smith, Chief Appellate Counsel, Disabled American Veterans

10:45am – 12:15pm

**A New Frontier in Regulatory Policy:
Cost-Benefit Analysis and National Security**

The rhetoric and practice of cost-benefit analysis has had a major impact on almost every area of economic and industrial regulation. Lawyers and policymakers must now consider the role of cost-benefit analysis in shaping national security policy. The application of a cost-benefit paradigm to national security policy raises pressing questions. How does cost-benefit analysis currently play a role in homeland security or foreign policy decisions? How should costs and benefits be defined in national security policy? How should government measure these costs and benefits? How should cost-benefit analysis play a role in decisions where the executive branch has considerable discretion? The panel offers perspectives from government, practice, and academia on these timely questions.

Program Chair: Tino Cuellar, Professor, Stanford Law School

12:30pm – 2:00pm

Annual Awards Luncheon

**Keynote Address by The Honorable Kathleen Q. Abernathy,
Commissioner, Federal Communications Commission,
“Public Service and Scholarship in the Pursuit of Sound
Regulation”**

2:15pm – 3:30pm

**Congress and Rulemaking: Reactions and Interactions
Affecting Agency Policymaking**

Program Chair:

- Michael Herz, Professor, Cardoza School of Law

Panelists

- Richard Wiley, Partner, Wiley, Rein & Fielding, and former FCC Chairman
- Howard Waltzman, Counsel, House Committee on Energy & Commerce

2:15pm – 3:30pm

Blackout! The Aftermath for Energy Regulators

Program Chair: Sheila Slocum Hollis, Partner, Duane Morris

2:15pm – 3:45pm

Alternative Dispute Resolution and Confidentiality

Experts from the public and private sectors describe the progress made in developing formal written Confidentiality Guidance under the auspices of the ABA's Section of Administrative Law and the Federal Sector's Interagency Working Group Committee on Confidentiality. This program will bring full circle an initiative sparked four years ago by a discussion at the Section's Administrative Law Conference on the subject of: "Is Government ADR Really Confidential?"

This year's program will focus on guidance documents that have recently been developed collaboratively recommending good practices for avoiding (or dealing with) confidentiality challenges facing public and private sector neutrals, parties, and program administrators in federal ADR.

Program Chair: Charles Pou, Mediator/Dispute Resolution Consultant

3:30pm – 5:15pm

Calculating the Value of Life

Program Chair: Richard Parker, Professor, University of Connecticut School of Law

3:45pm – 5:15pm

Administrative Procedure and Interstate Compacts

Interstate compacts are an effective tool for structuring interstate relationships, regulating private activity that transcends state lines and furnishing government services on a regional basis. They offer an alternative to federal involvement and are particularly apt for matters traditionally addressed by states, such as law enforcement and public health, safety and welfare. Some 190 interstate agreements are currently in place. Interstate compact agencies generally are not considered federal agencies within the scope of the federal Administrative Procedure Act (APA), are not generally subject to state APAs, and in some states are expressly excluded from the scope of the state's APA. Some recent compacts have incorporated APA-like provisions, but the practice is hardly uniform. The panel will discuss compact law and rulemaking guidelines recently developed for application to the new Interstate Compact on Adult Offender Supervision, and a project to draft an "Interstate Compact APA".

Program Chairs: Kent Bishop, Rules Analyst, Utah Governor's Office of Planning & Budget, and William S. Morrow, Jr., General Counsel, Washington Metro Area Transit Commission

Panelists:

- Rick Masters, Special Counsel, The Council of State Governments
- Ron Levin, Henry Hitchcock Professor of Law, Washington University School of Law
- Mike Buenger, State Court Administrator, Missouri Office of State Courts Administrator (representing National Center for State Courts)
- Bill Morrow, General Counsel, Washington Metropolitan Area Transit Commission

3:45pm – 5:15pm

6th Annual Update for Labor Law Attorneys

Panelists will highlight significant regulatory developments affecting labor and employment practices and will discuss the anticipated focus and direction of the Department of Labor, EEOC, and other agencies.

Program Chair: Nancy Shallow, Principal, William E. Mercer, Inc.

3:45pm – 5:15pm

Money & Medicine: The Impact of Cost on FDA Regulation of Pharmaceuticals

Drug costs are soaring. According to one study, prices for the 50 drugs most prescribed for the elderly rose last year more than three times the rate of inflation. These costs have inspired much legislative activity. This program will survey the extent to which pharmaceutical costs are impacting policy and regulation, from regulation of prescription drug importation across borders to the current status of Medicare RX plans on the Hill, and also probe related ethical and policy considerations.

Program Co-Chairs:

- Lori A. Hardaway, Ph.D., Associate, Pennie & Edmonds LLP
- Christine M. Meis, Associate, Quarles & Brady Streich Lang LLP

Panelists:

- Dan Troy, Chief Counsel, Food and Drug Administration
- Bruce Kuhlik, Vice President and General Counsel, PhRMA
- James Czaban, Shareholder, Heller Ehrman
- Prof. Gregg Bloche, Kennedy Institute of Ethics and Georgetown University Law Center

5:45pm – 7:15pm

Reception

United States Court of Federal Claims –
Howard T. Markey National Courts Building
717 Madison Place, N.W., Washington, D.C.

Friday, November 7th

8:00am – 9:00am

Administrative Law & Regulatory News Editor's Meeting

8:00am – 9:00am

Homeland Security Committee Meeting

9:00am – 9:30am

Keynote Address by The Honorable Orson Swindle, Commissioner, Federal Trade Commission: "A Regulator's Perspective on Protecting Consumers and Competitive Marketplaces: Developments at the FTC"

9:30am - Noon

Annual Developments in Administrative Law

Noon – 1:30pm

Lunch on your own

1:45pm – 4:00pm

Significant Administrative Law Issues in Homeland and National Security

This program will address the following issues: administrative process concerning executive branch designation of an organization as a "foreign terrorist organization" and then using this as the basis for prosecuting individuals who provide material

support to such organizations; history and current controversy over closed detention proceedings and other immigration problems post-9/11; administrative law and the Transportation Security Administration's current responsibilities; consequences of the widespread use of interim rulemaking and the unfunded mandates of Homeland Security's approach to the APA; administrative law issues concerning nuclear power regulations; and a review of several published notices since March 2002, pertaining to military commissions and the likelihood of their use as the War on Terrorism increases.

Program Chair:

- Lynne K. Zusman, Lynne K. Zusman & Associates

Panelists:

- Norman Abrams, Professor, University of California at Los Angeles School of Law
- Steve Legomsky, Professor, Washington University Law School
- Francine Kerner, Chief Counsel, Transportation Security Administration
- Sally Katzen, Professor, The University of Michigan Law School
- Robert Horn, Partner, Patton Boggs LLP
- Peter Raven-Hansen, Professor, George Washington University Law School

Moderators:

- Thomas Bolling, Counsel, Crowell and Moring LLP
- Michael Fitzpatrick, Counsel, Akin Gump Strauss Hauer & Feld LLP

2:30pm – 4:30pm

Understanding the E.U. Regulatory Process

As US firms increasingly feel the impact of EU regulation, and US agencies deal ever more directly with their Commission counterparts, understanding the EU regulatory process is becoming ever more essential to American administrative law practice. This session represents the launch of the Section's new, full-scale study of that process — a project that will ultimately yield, among other things, a comprehensive handbook of EU regulation, not unlike the Section's earlier Blackletter Statement of Federal Administrative Law. Session speakers will feature, in addition to the EU Ambassador to the US, experienced Brussels- and Washington-based practitioners, US agency counsel, and the Commission's regulatory representative in Washington.

Program Chair:

- George A. Bermann, Walter Gellhorn Professor of Law and Jean Monnet Professor of European Union Law, Columbia University School of Law School

Panelists:

- Ambassador Guenter Burghardt, European Union Ambassador to the US
- Boyden Gray, Partner, Wilmer, Cutler & Pickering
- Ted Kassinger, General Counsel, Department of Commerce
- Petros Sourmelis, Head, Trade Section, EU Delegation to the US

6:30pm – 9:30pm

**Gala Section Reception and Dinner
DAR Memorial Continental Hall**

- Remarks by The Honorable Guenter Burghardt, Ambassador to the US, European Union

Saturday, November 8, 2003

**All Saturday events will be held at the
St. Regis Hotel, 16th & K Streets, NW**

8:00am – 9:00am

Membership Committee Meeting

8:00am – 9:00am

Continental Breakfast

9:00am – Noon

Section Council Meeting

12:15pm – 2:00pm

Publications Committee Meeting

The Section has negotiated a special rate at The St. Regis Hotel for conference attendees of \$199 single or double. A limited number of government rate rooms are available at \$150 single or double. To make a reservation please call The St. Regis Hotel at 202-638-2626 and mention the ABA Administrative Law Conference. The rate will be in effect for reservations made prior to October 9, 2003. The St. Regis Hotel is located at 923 16th Street, NW, Washington, D.C., just steps from the White House.

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The Bush Administration's Use and Abuse of Rulemaking, Part II: Manipulating the Federal Register

continued from page 6

- the Medicare qualifications for clinical nurse specialists;
 - An announcement that the National Marine Fisheries Service would review the status of endangered and threatened species of salmon along the West Coast, especially the Snake River Sockeye Salmon and the Southern California Steelhead, to determine whether they will remain listed for protection under the Endangered Species Act;
 - An extension of the comment period on regulations governing the analytical methods for *E. coli* contamination in drinking water;
 - Regulations establishing fishing quotas for Atlantic surfclams, ocean quahogs, and Maine mahogany ocean quahogs;
 - Final suspensions of communities from Federal Emergency Management Act eligibility because of failure to comply with the National Flood Insurance Program;
 - The granting of Tokusen USA's petition to delist dewatered treated sludge from electroplating operations as a hazardous waste under the Resource Conservation and Recovery Act (RCRA); and
 - The Nuclear Regulatory Commission's final rule exempting certain activities from the requirements of the Federal Advisory Committee Act (FACA).
- Nor is the December/January holiday season the only evidence of such deliberate timing of controversial regulations. The week before Thanksgiving in 2002, the Bush Administration announced new regulations regarding new source review under the Clean Air Act, which affect which older industrial plants have to comply with more stringent air pollution control requirements. More blatantly, on the Wednesday before Thanksgiving, the Administration issued the new land use regulations for national forests, which will give local managers the power to approve commercial exploitation in 155 national forests and other federally-protected public areas. Finally, most recently, the Bush Administration issued its long-awaited new source review (NSR) rules for the Clean Air Act just before the long Labor Day weekend, 2003.

Why does this manipulation matter? Most importantly, it signals that the current administration prefers to avoid public scrutiny of and debate over its regulatory policies. Its own controversial

regulations are hidden in massive Federal Register publications immediately before and after major holidays, when public attention is diverted. Moreover, rather than allow the administrative process to proceed as normal at the beginning of his administration, president Bush and Andrew Card purposely disrupted that process, effectively preventing public debate and public amendment on scores of regulations in favor of centralized and often silent destruction, evisceration, and delay of those rules. As such, in both kinds of Federal Register manipulation, the Administration has sought to undermine the very principles of open and public debate that are the heart not only of contemporary administrative law but also the American democratic process more generally. When combined with the increased powers that this administration has given to OIRA, moreover, the Bush Administration's manipulation of the Federal Register can be seen as one facet of an agenda of increasingly centralized control over federal agency rulemaking that will, if pursued to its logical ends, undermine the proper and legal balance of power and policy control that should exist between the president, Congress, and the American people. ○

Supreme Court News

By William Funk¹

The end of the 2002 Term of the Court was marked by signal cases involving affirmative action and gay rights. Had there been any administrative law cases they would have been lost in the tumult, but there weren't any, and the regulatory practice cases would not have made headlines even with no competition.

The few regulatory practice cases did, however, have an interesting slant. In each, federal interests were held to trump the state regulatory system. Although many commentators have suggested that the Rehnquist Court's most notable achievement has been in the area of federalism, these cases suggest that the Court is not about to embrace state regulation in place of federal regulation.

Energy

For example, in *Entergy Louisiana Inc. v. Louisiana Public Service Comm'n*, 123 S.Ct. 2050 (2003), a unanimous Court extended the Federal Energy Regulatory Commission's power to trump state electricity regulation. In the late 1980s, the Court established that FERC-approved cost allocations between affiliated energy companies could not be subjected to reevaluation in state ratemaking proceedings. Otherwise, if a state disallowed certain costs, they would not be able to be recovered, "trapping" costs that FERC had approved for recovery. In *Entergy*, however, FERC had not approved a particular cost allocation; rather, it had delegated to Entergy's operating committee some decisions as to the treatment of certain equipment, the effect of which would result in the equipment's cost being allocated in specific ways. Louisiana thought that because FERC had never approved either the operating committee's decisions or any particular cost allocation, it was still possible for Louisiana to second-guess the operating committee's decision. The Supreme Court said no, "[i]t matters not whether FERC has spoken to the precise classification of the [equipment in question], but only whether the FERC tariff dictates how and by whom that classification should be made." Complaints as to the classification might be raised with FERC, but the matter was no longer subject to state jurisdiction.

Insurance

In one of the more interesting line-ups of the Term, Justice Souter wrote the majority opinion on behalf of himself and Justices O'Connor, Kennedy, Breyer, and Chief Justice Rehnquist, in *American Insurance Ass'n v. Garamendi*, 123 S.Ct. 2374 (2003). Justice Ginsburg wrote a dissent in which Justices Stevens, Scalia, and Thomas joined. The issue was whether California's Holocaust Victim Insurance Relief Act of 1999 interfered with American foreign policy and therefore was preempted. The Nazi government, among other things,

confiscated the life insurance policies of Jews in Germany. After the war, even if a policy escaped confiscation, it usually was not honored because the premiums had not been paid or for some other reason. These matters became part of the general subject of reparations and restitution of the defeated Germany. While the West German Federal Republic had paid more than 200 billion deutsch marks by 2000, many claims had not been satisfied, and the end of East Germany both opened the way for additional claims and was interpreted by German courts as lifting the stay on private causes of action that had been adopted in 1953 by the occupying powers. As a result Germany and the United States entered an agreement in 2000 whereby Germany and the German companies would fund the establishment of an entity called the German Foundation, which working through a voluntary organization formed by several European insurance companies, the International Commission on Holocaust Era Insurance Claims, would be responsible for paying claims. In return, the United States agreed to submit a statement in any United States court in which a suit was brought that it was in the foreign policy interests of the United States for all claims to be made with the ICHEIC, rather than in court. The United States also agreed to use its "best efforts" to get state and local governments to respect the ICHEIC as the exclusive mechanism for settlement of insurance claims.

While this international effort was going on, California independently passed legislation directing its insurance department to play an independent role in representing the interests of Holocaust survivors, including investigating unpaid insurance claims. This was followed the next year with a law allowing state residents to sue in state courts on Holocaust insurance claims and requiring insurance companies doing business in the state to disclose the details of any policies issued by them or any related company in Europe between 1920 and 1945. The state insurance department immediately issued subpoenas against several subsidiaries of European insurance companies. The Deputy Secretary of the Treasury wrote to the department and the Governor of California, in essence asking them to stop because their actions were interfering with the work of the ICHEIC. At the same time, affected insurance companies sued to enjoin operation of the California law.

Had there been a treaty or statute barring such state laws the case would have been easy. Clearly, they would have preempted the state law. Here, however, there was only an executive agreement. Nevertheless, at least since *United States v. Belmont*, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), the Court has recognized that executive agreements creating claims commissions can preempt state law. The relatively unique aspect of this case, however, was that the agreement did not by its terms or necessary implication attempt to preempt state law. Indeed, the language relating to

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statements the United States government would make in state courts seemed to concede that the agreement would not preempt state law. Nonetheless, the Court, relying on a controversial 1968 decision, *Zschernig v. Miller*, 389 U.S. 429 (1968), held that when a state law has “more than an incidental effect in conflict with express foreign policy of the National Government” requires preemption of the state law. Here, while nothing in the California law would directly thwart the ICHEIC’s processes, it clearly was inconsistent with “the foreign policy of the United States” as articulated and negotiated by the Clinton administration.

The dissent took issue with the Court’s reliance on *Zschernig* and what the dissent characterized as “dormant foreign affairs preemption” – preemption by judicial inference rather than by express statement.

Agriculture

State programs assisting local dairy industries have been a staple of dormant commerce clause jurisprudence. In *Hillside Dairy Inc. v. Lyons*, 123 S.Ct. 2142 (2003), California, which is not covered by the federal milk marketing program, had amended its milk marketing program to require for the first time that certain out-of-state purchases by milk processors would require payments into the pool from which the state pays producers to maintain fair and reasonable prices. Out-of-state producers challenged this amendment, saying it discriminated against them in violation of the dormant commerce clause and the Privileges and Immunities Clause of Article IV. The lower courts had dismissed the case. The lower courts had found that a federal statute, exempting California regulation of the composition or labeling of milk from any federal law, immunized the California law from the dormant commerce clause claim, and that the California law did not violate the Privileges and Immunities Clause because the law did not on its face create classifications based upon state residency or citizenship. The Supreme Court, in an opinion by Justice Stevens, reversed and remanded.

Because the federal statute governed only the composition and labeling of milk, not its pricing, it did not address the issue in the case. While Congress may exempt state statutes that discriminate against out-of-state products from commerce clause scrutiny, it must do so expressly; the Court will not infer such an exemption. As to the Privileges and Immunities Clause claim, the Court said that states can violate the clause without expressly identifying out-of-state citizenship or residence as a basis for disparate treatment. Whether the clause goes further than applying to classifications that “are but proxies for differential treatment against out-of-state residents” and reaches “any classification with the practical effect of discriminating against such residents,” the Court said it need not decide at this point. The Court explicitly stated that it was not making

any conclusion on the merits but was remanding for the lower courts to hear the cases on the merits.

Justice Thomas filed his usual dissent to the dormant commerce clause analysis, saying that the “negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.”

Tax

If anyone had thought that the Court’s equal protection activism in some areas would spill over to economic regulation, the Court seems to have provided a definitive answer. In *Fitzgerald v. Racing Ass’n of Central Iowa*, 123 S.Ct. 2156 (2003), a unanimous Court overturned an Iowa Supreme Court decision that had found a differential Iowa tax a violation of the Equal Protection Clause. Iowa had a maximum tax of 36% on slot machines at race tracks, but the maximum rate of its tax on slot machines on riverboats was only 20%. Although the history behind the two different rates suggests a lack of consideration of the differential issue, the Court was happy to speculate as to what possibly could justify such a differential rate. Because it was able to hypothesize one or more reasonable explanations, the Court concluded that “there is ‘a plausible policy reason for the classification,’ that the legislature ‘rationally may have . . . considered . . . true’ the related justifying ‘legislative facts,’ and that the ‘relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.’” Close enough for government work.

Upcoming Cases

Although the first Monday in October will likely bring more, at the time the News goes to press there is a handful of administrative law or regulatory practice cases awaiting argument this term.

Favish v. Office of Independent Counsel, 37 Fed. Appx. 863 (9th Cir. 2002), is a Freedom of Information Act case in which the government denied a request for copies of photographs of Vincent Foster’s dead body at the scene of his suicide on the grounds that the release of these records compiled for law enforcement purposes “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552 (b)(7)(C). The Ninth Circuit upheld the release of certain photographs and denied the release of others. The government sought certiorari and asserts that the interest of the requester, a person who believes in a massive government conspiracy, does not outweigh the privacy interests of Foster’s family members.

Plennig v. Household Credit Services, Inc., 295 F.3d 522 (6th Cir. 2002), poses a *Chevron* question, in that the Ninth Circuit refused to defer to the Federal Reserve Board’s interpretation of the Truth in Lending Act’s term, “finance charges,” contained in its Regulation Z. Regulation Z excludes from “finance

charges” charges made for exceeding a credit limit. The Ninth Circuit said that the Act is a remedial statute that is to be construed liberally in favor of consumers and that the language of the Act is clear, referring to “all charges.”

Thomas v. Commissioner of Social Security, 294 F.3d 568 (3d Cir. 2002), would appeal to Kafka. A person qualifies for Social Security Disability if the person is as a result of his or her disability “not only unable to do his previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy.” Pauline Thomas worked as an elevator operator until her job was eliminated. She applied for Social Security Disability because of medical problems, but she was determined to be able to perform her previous work as an elevator operator. Unfortunately, this job no longer exists in the national economy. According to the Social Security Administration, that does not matter. The statute is clear; one must be unable to do his previous work. It matters not that such work no longer exists. An en banc Third Circuit disagreed; the reference to “any *other* kind of substantial gainful work which exists in the national economy” suggests that the previous work should also exist in the national economy. The court found that, even if the Social Security regulation implementing the statute more clearly excludes consideration of the continued existence of the previous work, the regulation would have to yield to the statute.

Missouri Municipal League v. FCC, 299 F.3d 949 (8th Cir. 2003), presents a split in the circuits (see *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999)) over a preemption provision in the Telecommunications Act of 1996. That act bars states and localities from prohibiting the ability of “any entity” to provide telecommunications services. There is, however, an exemption for state or local competitively neutral regulations necessary to achieve certain named welfare goals. Enforcement of the provision is left to the FCC, which determines after notice and an opportunity for public comment, whether a regulation violates the bar, and, if so, the extent to which it should be preempted to correct the violation. A Missouri statute prohibits state political subdivisions from providing telecommunications services. The FCC, believing itself to be bound by a D.C. Circuit decision holding that the term “any entity” did not include political subdivisions of a state, found no violation. The Eighth Circuit read “any entity” to include political subdivisions.

The Privacy Act authorizes persons to sue for damages against the United States when an agency violates the Act either intentionally or willfully. The Act specifies that the United States is liable for the “actual damages sustained by the individual . . . , but in no case shall a person entitled to recovery receive less than the sum of \$1000.” In *Doe v. Chao*, 306 F.3d

170 (4th Cir. 2003), the government had wrongly publicized the social security numbers of persons who had filed for black lung benefits, and some of these persons sued for damages caused by the emotional distress from this publication. The *Doe* court denied recovery, holding that proof of actual damages is a precondition to any recovery and that a general allegation of emotional distress, without proof of specific, particularized symptoms or effects, would not satisfy the requirement for actual damages.

Last term in *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 537 U.S. 99 (2002) (affirmed by an equally divided court), the Court took up but did not decide the meaning of “any addition of any pollutant,” the statutory definition of a discharge of a pollutant under the Clean Water Act. This term the Court has accepted another case on the same subject. In *Micosukee Tribe of Indians of Florida v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002), the South Florida Water Management District pumps water from a canal into a water conservation district in order to keep western Broward County from flooding. The water in the canal contains phosphorus at higher levels than exist in the water conservation district. The question issue is whether, when someone takes water from one natural water body and introduces it into another without adding anything to the water, this can constitute the addition of a pollutant to a water of the United States because the original water is itself polluted. Consistent with every court to have considered the issue, the Eleventh Circuit held that this pumping required a permit under the Clean Water Act.

In *Alaska Department of Environmental Conservation v. U.S. E.P.A.*, 298 F.3d 814 (9th Cir. 2002), the issue is the division of responsibility between the states and EPA under the Clean Air Act. Here Alaska, as a state whose program has been approved by EPA to administer the CAA, had issued a permit to a zinc mine under the Prevention of Significant Deterioration program of the CAA. The PSD program requires persons constructing new sources to use Best Applicable Control Technology, and the permit required the mine to use what Alaska determined to be BCAT. EPA, however, disagreed with Alaska that what the permit required was BCAT, and it issued an order to Alaska withhold issuance of the permit. The question posed by the case is whether Section 113(a)(5) of the CAA, authorizing EPA to issue an order prohibiting the construction of a new source whenever it finds that a state is not acting in compliance with the PSD program relating to new construction, allows it to second-guess a state’s determination as to what constitutes BCAT. The Ninth Circuit upheld EPA’s authority. ○

By William S. Jordan III¹

Of Carts and Horses: Eleventh Circuit finds EPA administrative orders unreviewable by holding them unconstitutional

The Eleventh Circuit recently accomplished the remarkable feat of holding an EPA administrative order unreviewable, while nonetheless rendering it invalid. Section 113(a)(1)(A) of the Clean Air Act, 42 U.S.C. 7413(a)(1)(A), provides that when EPA, “on the basis of any information available to the Administrator,” finds that a person has violated various applicable requirements, EPA may “issue an order requiring such person to comply” with those requirements. EPA may issue such an order only after providing the target of the order with “an opportunity to confer with the Administrator.” The Act authorizes EPA to seek civil or criminal penalties for violations of such administrative orders. The Act does not require or otherwise make mention of an administrative hearing to be held prior to issuance of an administrative order.

In *TVA v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), EPA had issued such an order against the Tennessee Valley Authority. Believing it could not sue TVA in court because TVA is another federal agency, EPA instead created an ad hoc adjudicatory process before the Environmental Appeals Board. After a hearing, the Board upheld the Administrative Compliance Order (ACO). TVA petitioned for review of the Board’s decision as “final action of the Administrator” under Sec. 307(b)(1) of the Clean Air Act, 42 U.S.C. 7607(b)(1).

There are three major elements to the court’s opinion. First, after discussing a variety of reasons, including the views of other circuits, that Congress might not have intended ACOs to constitute final action, the court held that the statutory language dictates that an ACO may itself be the basis for civil or criminal penalties. Thus, the statute dictates that an ACO is final action.

Second, the court holds that the statutory scheme governing ACOs is unconstitutional. It violates due process and constitutes an invalid delegation of judicial authority. As the Eleventh Circuit reads the Act, EPA may seek civil or criminal penalties against someone who violates an ACO without the alleged violator having an adequate opportunity to dispute the basis for issuance of the ACO. EPA may issue an ACO without any adjudicatory process. The ACO is then “an injunction-like order which, upon noncompliance, leads to a host of severe penalties.” Thus, upon enforcement of the ACO, EPA need prove in District Court only that it has issued the ACO on the basis of “any information available” and that the enforcement target has violated the ACO. The target of the ACO would not be able to contest in District Court the

alleged regulatory violations that formed the basis for the ACO. The lack of opportunity to dispute the charges constitutes a violation of due process.

Relying upon the same logic, the court holds that the scheme for enforcing administrative orders constitutes an unconstitutional delegation of judicial authority to an agency of the executive branch. Usually, the delegation of adjudicatory authority to an agency is constitutional because the agency’s findings are subject to judicial review. Under the court’s reading, however, the agency’s findings are immune from review. The District Court would address only whether the ACO had been violated, not whether the findings embodied in the ACO could withstand scrutiny.

Having concluded that it would be unconstitutional to treat ACOs as having the status of law, the court held that “ACOs are legally inconsequential and do not constitute final agency action.” Thus, the court denied TVA’s petition for review and wrote that TVA may ignore the ACO until EPA proves in District Court the existence of the CAA violations that are the basis for the ACO.

The court’s approach is peculiar, to say the least. It takes jurisdiction of the petition for review long enough to conclude that the statutory provisions governing ACOs are unconstitutional. Having done so, it decides the ACO must not be final action, so it must deny the petition for review. This is inconsistent with the usual practice, which is to determine whether what an agency has done would constitute final action if allowed to stand, and then to review the various relevant legal issues, including whether statute or action is unconstitutional.

Chevron’s relationship to First Amendment, criminal statutes, and timing of interpretations.

The circuits continue to massage *Chevron* deference. Three decisions in the last quarter address *Chevron*’s relationship to the First Amendment, criminal statutes, and the timing of an agency’s interpretation. As to the First Amendment, the D.C. Circuit ruled in *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003), that “we do not accord the Commission deference when its regulations create “serious constitutional difficulties.” The case involved a challenge to a Federal Election Commission rule requiring the release of investigatory files once cases have been closed. In the course of an investigation, the AFL-CIO and the Democratic National Committee had submitted extensive information concerning their internal operations and deliberations. They argued that release of this information would harm their operations and threaten their freedom of expression. The majority found the underlying statute ambiguous, noting that “We evaluate the statute’s clarity ourselves, giving no deference to the agency’s interpretation.” Thus, the majority proceeded to judge the reasonableness of the agency’s interpretation under *Chevron* Step 2. Interestingly, a concurring opinion would have relied upon the First

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Amendment to hold against the agency under *Chevron* Step 1. The majority rejected this approach because it believed that the agency could have reached a constitutional interpretation of the statute under Step 2. When the majority reached Step 2, First Amendment concerns rendered the agency's interpretation unreasonable.

In an *en banc* decision, the Tenth Circuit granted *Chevron* deference to the NLRB's interpretation of a criminal statute, section 302 of the Labor Management Reporting Act prohibits employers from paying anything of value to unions. Violations give rise to criminal penalties. There is, however, an exception for payment of "membership dues," which employers may deduct from paychecks and send directly to the union. *NLRB v. Oklahoma Fixture Company*, 332 F.3d 1284 (10th Cir. 2003) (*en banc*), involved "permit fees," which probationary employees were required to pay during the period before they were required to become members of the union. When the employer, on advice of counsel, stopped paying permit fees directly to the union, the union charged the employer with an unfair labor practice. The NLRB agreed. The interpretive question is whether mandatory "permit fees" paid by employees who are not yet union members qualify as "membership dues" under the criminal statute. Contrary to the views of both concurring and dissenting judges, the majority granted *Chevron* deference to the NLRB's interpretation of the criminal statute. Noting the split in scholarly opinion on the subject, the majority deferred to the NLRB because "there is a need for a uniform national understanding of the meaning of the statute in question from a labor law standpoint, and the Board has special expertise regarding the labor law implications of the statute."

Finally, as to timing, *Public Citizen v. Department of Health and Human Services*, 332 F.3d 654 (D.C. Cir. 2003), involved the agency's response to complaints of poor services under the Medicare program. The Peer Review Improvement Act requires the Professional Review Organizations to "inform the individual ... of the organization's final disposition of the complaint." Despite that language, the PROs were directed to respond in very vague terms, essentially to the effect that the agency would take whatever action was appropriate under the circumstances, without identifying the practitioners in question. This directive was derived from a regulation issued prior to enactment of the statutory provision in question and from an agency manual. The court held that it could not grant *Chevron* deference to a regulatory interpretation issued before enactment of the relevant statute. It also could not, after *U.S. v. Mead*, defer to a mere manual. The court rejected an argument that the manual somehow achieved the "force of law" by being referred to in contracts with the PROs. It is worth noting that the court also rejected an argument that congressional inaction effectively ratified the agency's interpretation. The opinion provides a brief useful dissertation on that subject.

Interpretive Rules and Statements of Policy – When do they constitute legislative rules?

A virus that first appeared in the D.C. Circuit continues to mutate doctrinally and expand geographically. Although the Administrative Procedure Act permits agencies to issue interpretive rules and statements of policy without going through notice and comment, the progeny of cases such as *Community Nutrition Institute v. Young*, 818 F.2d 943 (D.C. Cir. 1987) and *Alaska Professional Hunters Association, Inc. v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999), continue to narrow those exceptions.

With respect to interpretive rules, the Ninth Circuit appears to have adopted the principle that an interpretive rule is procedurally invalid if it is an incorrect interpretation of a previously issued legislative rule. *Hemp Industries Association v. Drug Enforcement Administration*, (9th Cir. 2003) involved a DEA rule banning the sale of consumable products containing hemp oil, cake, or seed. Characterizing the rule as interpretive, the agency issued it without notice and comment. The issuance purported to interpret both the underlying statute and a previously issued regulation.

Applying the third prong of the test in *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1109 (D.C. Cir. 1993), the court asked whether "the rule effectively amends a prior legislative rule." In this case, the prior legislative rule clearly banned only synthetically produced THC (the active ingredient in marijuana). It is possible to ban naturally occurring THC under a listing procedure, but the agency had not done so. The underlying statute exempted both hemp oil and cake (which contain small amounts of THC) from the marijuana prohibition. The new interpretation purported to ban all consumable products containing naturally occurring THC, including hemp oil, cake, and seed. The court characterizes this as an attempt "to evade the time-consuming procedures of the APA" and strikes down the rule as a legislative rule issued without notice and comment.

The only basis for the court's decision is the fact that the purportedly interpretive rule is an inaccurate interpretation of the existing statute and legislative rule. While the court accuses the agency of avoiding troublesome requirements, the court itself seems to avoid principles of deference to agency substantive interpretations by characterizing its own action as upholding procedural requirements, rather than as striking down an agency interpretation.

The D.C. Circuit seemed particularly eager to reach out and strike down an agency policy statement in *Croplife America v. EPA*, 329 F.3d 876 (D.C. Cir., 2003). EPA had issued a statement saying that it would no longer consider third-party human studies in evaluating the safety of pesticides. This represented the agency's second change of position in recent years. Until the late 1990s, EPA had consistently considered third-party human studies in evaluating pesticides. EPA then began considering such studies only on a case-by-case basis, making

that position clear to the public in October 2001. After further criticism of its position, EPA announced in December 2001 that it would not consider or rely upon such studies in its regulatory decisionmaking.

Petitioners challenged this statement, which EPA had issued without going through notice and comment. The challenge is not related to any particular proceeding in which such human studies might play a role. Three aspects of the decision deserve attention. First, the court dismissed any concern about ripeness on the ground that the dispute involved a purely legal question. In so doing, the court ignored the "hardship" prong of the ripeness test of *Abbott Laboratories*. By contrast, denying review of this statement would cause no hardship. Any party wishing third party human studies to be considered by EPA could either submit or offer to submit such studies in a pesticide approval proceeding. If that party were dissatisfied with the outcome of the proceeding, it could then challenge EPA's refusal to consider these studies. Attention to ripeness principles might well avoid the need for judicial involvement.

Second, the court treats EPA's statement as "binding" despite the fact that the statement itself, even if strictly enforced, would have no substantive impact. *Community Nutrition Institute* involved a policy position that would have the substantive effect of permitting certain levels of aflatoxin in food. As noted above, EPA might well approve a pesticide despite refusing to consider third-party human studies submitted in support of its approval. The court has expanded the reach of the term "binding" to encompass statements that merely have procedural effects and that may not change substantive outcomes. Indeed, EPA's statement is very likely a procedural rule and should be exempt from notice and comment for that reason.

Third, the court briefly notes that administrative law judges may not accept third-party human studies because ALJs are bound EPA's policy statement. This is a useful reminder that ALJs may not rule contrary to established agency policy, regardless of how that policy has been adopted. The agency head may change the policy, but an ALJ may not.

Finally, the Eighth Circuit expanded on the logic of *Community Nutrition Institute* in what seems to be an entirely new way. The Corps of Engineers is responsible for managing the Missouri River, which flows through seven states. The Corps implements that responsibility in large part by having its various offices follow what has become known as the Master Manual. The Master Manual was developed internally and has not been subjected to notice and comment.

When drought prompted plans to reduce the level of a reservoir in South Dakota, the state obtained an injunction preventing the reduction. As other reductions were proposed, other states followed suit in obtaining similar injunctions. Nebraska then took the other side by obtaining an injunction requiring the Corps to maintain water levels in that downstream state.

In response to these challenges, the Corps argued, *inter alia*, that management of the Missouri River is so fully committed to the Corps' discretion that it is excluded from judicial review by Section 701(a)(2) of the APA. In that context, the Corps asserted that the Master Manual was merely a statement of policy that did not provide "law to apply" to support judicial review. In rejecting that argument, the court could simply have relied upon the Flood Control Act, which makes it clear that flood control and navigation interests are to be given priority over the recreational interests of concern to the upstream states. Thus, the Act provided sufficient "law to apply" to support judicial review.

The court went further, however, to hold that the Master Manual constituted "law to apply" despite the fact that it had not been issued through notice and comment. Importing the logic of *Community Nutrition Institute* line of cases, the court held that the Master Manual was binding on the agency largely because the Manual was couched in mandatory language and because the Manual was created through a process of public comment and was then made available to the public. Although the court is not entirely clear on the point, it appears to hold that Manual provides law to apply because it is effectively a substantive rule.

The court's outcome may be correct, but its importation of *CNI* logic is troubling because it is unnecessary and inappropriate in this distinctly different context. Generally, an agency must follow its own policies. Thus, its stated policies might well provide a basis for judicial review. An agency may rely upon an informal issuance to change a policy that has not been embodied in a legislative rule (as here), but it may well have to justify that change under the arbitrary and capricious standard of review. Thus, there is no need to characterize the Manual as "binding" in the same way as a legislative rule in order to conclude that the Manual supports review. Moreover, disputes about the status of a policy statement typically involve arguments that they are invalid for failure to pursue notice and comment. Ironically, in this case the court seems to have accepted the argument that the Manual is effectively a substantive rule and to have enforced the Manual at the behest of Nebraska despite the fact that the Manual was not subjected to notice and comment.

As written, *South Dakota* can be used to support arguments that almost any internal government manual written in mandatory language is a substantive rule. Correctly understood, however, the decision supports only the proposition that an agency policy statement that has not been disavowed by the agency can provide a basis for judicial review of the agency's action.

continued on page 27

Recent Articles of Interest

By Yvette M. Barksdale¹

Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. _____ (2003) (FORTHCOMING); (Draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=412584)

In this article, Edward Rubin argues for a wholesale revision of the Administrative Procedure Act (APA), concluding that the APA is almost entirely unsuited to the modern administrative state. Rather, the APA is grounded in a “pre-administrative” judicial model of government in which laws are incrementally discovered rather than invented. The APA envisions only two types of administrative decisionmaking: “legislation” and “adjudication” and relies almost solely on a due-process model of mostly adversarial, reactive, and private “public participation” as the primary constraint on administrative decisionmaking. This judicial model of governance ignores political branch and hierarchical intra-agency constraints that are characteristic of administrative decisionmaking. The model also ignores most of the broad range of administrative functions including “priority setting, resource allocation, research, planning, targeting, guidance and strategic enforcement.”

Rubin critiques the specific requirements of the APA in substantial detail. For example, he concludes that three of the four APA procedural models (all except formal adjudication), are ill-suited to the realities of administrative decision making. The APA informal “notice and comment” rulemaking requirements are redolent of adjudicatory notice and participation rights which are inapt for an administrative process which primarily allocates benefits and burdens across society rather than determines individual rights. At the same time, the APA imposes almost no procedural constraints on the vast range of administrative action encompassed within the category of “informal adjudication, which includes the bulk of administrative decision making, such as goal setting, resource allocation, establishing enforcement priorities, etc. Rubin also critiques the APA’s exclusive reliance upon judicial review as the primary institutional constraint on administration because it improperly ignores political branch and intra-agency controls on administration. This disconnect between the APA and the administrative state, Rubin argues, accomplishes the neat trick of both imposing too many and too few requirements on administrative agencies.

Instead Rubin, relying upon Max Weber’s instrumental model of administration as expert professionals rationally pursuing defined ends within legally constrained hierarchical organizations, advocates an APA based upon a dominant prin-

ciple of instrumental rationality in which agencies are obligated to obey political branch “value-rational” choices, but to pursue those ends in an instrumentally rational way. Such an APA would primarily require agencies to clearly and publicly articulate detailed administrative goals, and then rely upon political branch and hierarchical intra-agency supervision as the primary checks on administrative authority. Although Rubin does not draft a model substitute APA, he discusses in detail considerations relevant to drafting one.

Ronald Levin, “*Vacation*” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L. J. _____ (2003) (FORTHCOMING) (Draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=404220)

In this article, Ronald Levin examines the validity of ‘remand without vacation’ orders in which a court remands an agency action for further work but allows the action to remain in place during the remand proceedings. These kinds of orders have become more frequent in recent years as federal appellate panels, in particular the D. C. Circuit, have used them to minimize disruption of an ongoing administrative program or to protect private reliance interests. Noting that scholars have rarely examined the remedial issues that federal courts may face when they find that an administrative agency has acted unlawfully, Levin presents a broad survey of that topic in the context of the “remand without vacation” issue.

Levin ultimately disagrees with those who argue that such orders are prohibited by § 706 of the APA which provides that a reviewing court “shall ... set aside” agency action which violates the § 706 requirements. Rather, Levin argues, § 706 should be read in light of a longstanding canon of statutory construction that disfavors interpretations that would displace the equitable remedial discretion of the federal courts. Levin recognizes that the tradition of remedial discretion is not without limits. For example, the Supreme Court in recent cases (and in some of the Court’s internal working papers) has signaled doubts about remand without vacation, preferring instead bright-line rules over equitable balancing. Also, there are practical objections that the practice relaxes pressure on agencies to “get it right the first time” and discourages private citizens from seeking judicial review.

However, Levin ultimately concludes, a cautious remand without vacation practice is a legitimate exercise of judicial discretion because the practical worries have not materialized to date, and the practice involves relatively simple judgments which are not drastically different from determinations that courts have often made in the past. Levin also suggests standards to guide the courts’ exercise of discretion, relying in part upon guidelines endorsed by the American Bar Association.

¹ Associate Professor of Law, The John Marshall Law School; Vice-Chair, Constitutional Law and Separation of Powers Committee; Contributing Editor. These abstracts are drawn substantially (sometimes primarily) from the authors’ article abstracts and introductions.

Robert W. Hahn, Sheila M. Olmstead and Robert N. Stavins, *Environmental Regulation in the 1990s: A Retrospective Analysis*, 27 HARV. ENVTL. L. REV. 377 (2003).

This article addresses the influence of economics on environmental and resource policy-making during the 1990s, focusing on the Clinton administration. The article highlights important trends and changes in the impact on governmental policy of economic concepts such as efficiency, cost-effectiveness and distributional equity. The authors do not seek to establish a causal relationship between Clinton Administration policies and improvements in environmental quality, as such causal analyses are difficult if not impossible to perform. Rather, the authors evaluate how Clinton-era policies adhere to the economic criteria of "efficiency, cost-effectiveness and distributional equity."

The authors note that efficiency as a criterion for assessing environmental and natural resource regulation was very controversial in the Clinton administration, but emerged as a central goal of the regulatory reform movement in Congress. Although economic analyses became more prevalent after the 1980s, both executive branch and congressional politicians tended to endorse such efficiency considerations only when they favored policies which coincided with their own ideological agenda. Thus Republican Congresses favored more efficient pollution controls which lightened regulatory burdens on industry, but disfavored efficiency controls on natural resource management which would have reduced subsidies to Western communities dependent on resource extraction. Similarly, Clintonians promoted the efficiency-based reduction of natural resource extraction subsidies, but not efficiency-based benefit-cost analysis of pollution control regulation.

The authors discuss in fair detail 1) how efficiency considerations fared within the Clinton administration and within the range of general and specific regulatory reform proposals considered by the 103rd through the 106th Congresses; 2) how cost-effectiveness was embraced by both the Administration and Congress in the 1990s as a criterion for adopting specific policy instruments with both branches strongly advocating achieving least cost allocation of pollution reduction burdens (for example, across-the-board environmental standards may impose wildly different marginal costs of compliance between industries (e.g., a \$13 per ton cost of abating lead emissions in non-metal products sectors vs. \$56,000 per ton in the food sector)); and 3) how and why the 1990s witnessed an increasing role for equity concerns, such as environmental justice, as a consideration in environmental policy making.

Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 TEX. INT'L L. J. 763 (2003).

The author discusses the South African experience in the constitutional adjudication of social welfare rights as a case study in examining how one might formulate a jurisprudence for the

protection of substantive social, economic and cultural rights claims. Such jurisprudence would be opposed to classical liberal negative/positive rights discourse which, argues the author, inhibits the conceptualization of social rights. The author proposes human need as a more comprehensive framework for theorizing social rights claims than the Universal Declaration of Human Rights, on the basis that such claims are inherently global collective claims to community produced resources, rather than individual claims asserted against a repressive machinery of the state.

In particular, the article discusses the South African Constitutional Court's struggle to preserve government discretion in allocating scarce resources such as health care and housing while enforcing the constitutionally protected rights of individuals to such health care and housing. The author contrasts two cases in which South African Supreme Court 1) rejected a claim by a kidney patient with an incurable condition to dialysis treatment that would prolong his life but not cure him against government rationing of the extremely scarce dialysis resources but 2) upheld a claim to housing by extremely poor homeless squatters, the court termed "in desperate need" who had been evicted from land earmarked for public housing. The author also discusses the South African Constitutional Court's analysis of the health care rights in the context of the availability of retroviral AIDS drugs. The author argues that these decisions illustrate that courts are not necessarily incapable of enforcing positive social rights in spite of the analytical challenges of undertaking a role in distributing scarce societal resources.

Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307 (2003).

This article argues that the Department of Justice has an improper conflict of interest between its trust relationship with Native American tribes and its duties of representing federal agencies or non-Native American parties against suits by Native American tribes. The author disagrees with the Department of Justice theory that there is no conflict and critiques its analysis of relevant trust principles and Supreme Court precedent. The author does not think that breach of trust litigation would be helpful, but instead advocates the adoption of special preclusion rules and the establishment of a separate "litigating agency" outside the Department of Justice and Interior for litigation by the Department of Justice as trustee.

continued on next page

Adrian Vermeule, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003)

In this forward to the George Washington Law Review's annual survey of recent decisions of the United States Court of Appeals for the District of Columbia Circuit, Adrian Vermeule addresses the problems faced by the D. C. Circuit in implementing the Supreme Court's *United States v. Mead*, 533 U.S. 218 (2001) decision. Reviewing several recent decisions of the D. C. Circuit, he concludes that these problems are caused by *Mead's* over-ambitiousness and unnecessary complexity and uncertainty which impose excessive analytical costs on implementing courts and leads to these courts' avoidable mistakes and errors. For example, a lot of energy is wasted in determining whether *Skidmore v. Swift*, 323 U. S. 134 (1944) or *Chevron v. NRDC*, 467 U. S. 837 (1984) deference applies, even when the choice will not affect the outcome.

Vermeule describes the Court's *Mead* framework as a classic "rules vs. standards" problems of uncertainty, error and decisions costs, and argues that the Supreme Court should revisit the uncertainty engendered by *Mead* and develop more "bright-line" standards for determining when *Skidmore* or *Chevron* deference applies. He also critiques the *Mead* analytical framework as 1) a problem of an excessive lawyerly belief in the power of "Word", i.e. the decisional determinacy of linguistic distinctions such as "*Skidmore*" vs. "*Chevron*" deference, and 2) an "externalities" problem in which most of the costs of the *Mead* framework will be born by lower courts, instead of the Supreme Court.

Recent Symposia of Interest

1. THE FEDERALIST SOCIETY 2002 SYMPOSIUM ON LAW AND TRUTH, 26 HARV. J.L. & PUB. POL'Y 1, ET SEQ. (2003). **Articles include:** David McIntosh, *Introduction* (p. ix); Jack M. Balkin, *The Proliferation Of Legal Truth* (p. 5); Susan Haack, *Truth, Truths, "Truth," And "Truths" In The Law* (p. 17); Michael S. Moore, *The Plain Truth About Legal Truth* (p. 23); Dennis Patterson, *From Postmodernism To Law And Truth* (p. 49); Rebecca L. Brown, *History For The Non-Originalist* (p. 69); John Harrison, *Forms Of Originalism And The Study Of History* (p.83); Larry Kramer, *On Finding (And Losing) Our Origins* (p. 95); Guido Calabresi, *The Exclusionary Rule* (p.111); Yale Kamisar, *In Defense Of The Search And Seizure Exclusionary Rule* (p.119); Shari Seidman Diamond, *Truth, Justice, And The Jury* (p. 143); Thomas Weigend, *Is The Criminal Process About Truth?: A German Perspective* (p. 157); Gerald Walpin, *America's Adversarial And Jury Systems: More Likely To Do Justice* (p. 175); Albert W. Alshuler, *Lawyers And Truth-Telling* (p. 189) Susan P. Koniak, *Corporate Fraud: See, Lawyers* (p. 195); John O. McGinnis, *Lawyers As The Enemies*

Of Truth (p. 231); William Otis, *A Tale Of Truth In Modern America* (p. 235); David Schoenbrod, *Politics And The Principle That Elected Legislators Should Make The Laws* (p. 239); Lino A. Graglia, *The Myth Of A Conservative Supreme Court: The October 2000 Term* (p. 281).

2. SYMPOSIUM, EMPIRICAL LEGAL REALISM: A NEW SOCIAL SCIENTIFIC ASSESSMENT OF LAW AND HUMAN BEHAVIOR, 97 NW. U. L. REV. 1075, ET SEQ. (2003) **Articles Include:** Editor's Note (p. 1075); *In Memoriam Amos Tversky (1937-1996)* (p. 1077); Paul Brest, *Preface: How This Symposium Came About* (p. 1079); Lee Ross And Donna Shestowsky, *Contemporary Psychology's Challenges To Legal Theory And Practice* (p. 1081); Chris Guthrie, *Prospect Theory, Risk Preference, And The Law* (p. 1115); Jeffrey J. Rachlinski, *The Uncertain Psychological Case For Paternalism* (p. 1165); Russell Korobkin, *The Endowment Effect And Legal Analysis* (p. 1227); Cass R. Sunstein, *What's Available? Social Influences And Behavioral Economics* (p. 1295); David A. Dana, *A Behavioral Economic Defense Of The Precautionary Principle* (p. 1315); Mark Kelman, *Law And Behavioral Science: Conceptual Overviews* (p. 1347).
3. SYMPOSIUM, PREFERENCES AND RATIONAL CHOICE: NEW PERSPECTIVES AND LEGAL IMPLICATIONS, 151 U. PA. L. REV. 707, ET SEQ., (2003) **Articles Include:** Matthew D. Adler, Claire Finkelstein, Peter H. Huang, *Introduction* (p. 707); Lewis A. Kornhauser, *The Domain Of Preference* (p. 717); Jason Scott Johnston, *Paradoxes Of The Safe Society: A Rational Actor Approach To The Reconceptualization Of Risk And The Reformation Of Risk Regulation* (p. 747, Appendix, p. 785); Michael L. Wachter, *Takeover Defense When Financial Markets Are (Only) Relatively Efficient* (p. 787); George Ainslie and John Monterosso, *Will As Intertemporal Bargaining: Implications For Rationality* (p. 825); Leo Katz, *Before And After: Temporal Anomalies In Legal Doctrine* (p. 863); Joe Mintoff, *Can Utilitarianism Justify Legal Rights With Moral Force?* (p. 887); Edward F. McClennen, *Prudence And Constitutional Rights* (p. 917); Claire Finkelstein, *Is Risk A Harm?* (p. 963); Cass R. Sunstein, *Beyond The Precautionary Principle* (p. 1003); Peter H. Huang, *Trust, Guilt, And Securities Regulation* (p. 1059); Eric A. Posner, *The Jurisprudence Of Greed* (p. 1097); Jonathan Baron, *Value Analysis Of Political Behavior — Self-Interested: Moralistic :: Altruistic: Moral* (p. 1135); Bruce Chapman, *Rational Choice And Categorical Reason* (p. 1169); Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O'Donoghue and Matthew Rabin, *Regulation For Conservatives: Behavioral Economics And The Case For "Asymmetric Paternalism"* (p. 1211); Matthew D. Adler, *The Puzzle Of "Ex Ante Efficiency": Does Rational Approvability Have Moral Weight?* (p. 1255).

continued on page 26

Local Due Process Can Be the Pits

By Michael Asimow¹

How pleasant to contemplate the neat separation of powers between the legislative, executive, and judicial branches of government. And how comforting to be able to count on the sheltering provisions of state and federal APAs. Except when we get to local government, where there are no APAs and often no separation of powers at all. Only due process remains, and sometimes that ain't much.

Southern California Underground Contractors, Inc. (Socal) v. City of San Diego, 133 Cal.Rptr.2d 527 (Calif. Ct. of App. 2003) is a good example. Socal specialized in underground construction work and so was accustomed to working in pits. It was accused of serious wrongdoing on San Diego construction projects. When the City decided to permanently debar Socal from contracting, the company really found itself in the pits.

All concede that debarment from contracting invades a serious liberty interest and thus entitles the contractor to due process. But, as always, the question is—what process is due? Since the hearing was conducted before the City Council of San Diego en banc, the answer is—well, not much. The Council just doesn't have time to sit around and listen to witnesses being questioned and cross examined. Such niceties aren't feasible when the legislative, judicial, and executive functions are all mixed up in a very busy and all-powerful entity. Instead, the court upheld a hearing consisting only of written submissions and oral argument.

The court misapplied such administrative law stalwarts as *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Mathews v. Eldridge*, 424 U.S. 319 (1976), both of which concern the elements of a pre-termination hearing. Neither case suggested that it was possible to dispense with confrontation even *after* the ax falls. In the *Socal* case, no cross examination was permitted. Socal was permitted to take the *depositions* of adverse witnesses before the hearing and introduce the transcripts in its oral argument before the Council. The court thought this was an adequate substitute for cross-examination.

However, this conclusion seems dubious. The case involves extremely serious economic harm (economic capital punishment for a firm specializing in government contracting) and serious risk of error. The dispute presented significant questions of adjudicatory fact and witness credibility conflicts. In such circumstances, the ability to introduce lengthy deposition transcripts (to busy Council members who probably never looked at them) hardly seems an adequate substitute for pointed live questioning of critical adverse witnesses.

Moreover, the court completely overlooked the line of cases that interpret the due process clause in the *California* constitu-

tion; these decisions accord much broader procedural protection than is provided under federal due process. Thus the court's *Socal* decision seems to be as deep in the pits as did the San Diego City Council's decision.

Let the punishment fit the crime— in licensing cases

By George Beck²

A familiar rule of administrative law is that a reviewing court will defer to an agency's fact-finding through the application of the substantial evidence test. Generally, however, in reviewing an agency decision on a legal issue, the court is not bound by the agency's determination. But what of judicial review of a sanction or discipline imposed by a licensing agency? In Minnesota, as in most states, a reviewing court must defer to an agency's choice of sanction, absent a clear abuse of discretion. See *In re Licenses of Kane*, 473 N.W.2d 869, 877 (Minn. Ct. App. 1991).

In a recent decision the Minnesota Court of Appeals shed some light on what constitutes an abuse of discretion and what an agency must to avoid that conclusion. *In re Revocation of Family Child Care License of Burke*, C4-02-1886, ___ N.W.2d ___ (Minn. Ct. App. 2003). The Commissioner of Human Services revoked a childcare license due mainly to a failure to properly supervise a child. An allegation of a failure to report a SIDS death at the childcare home was found to be inaccurate. The Commissioner adopted the findings of fact of the administrative law judge who conducted the hearing, but not his recommendation that the license be suspended for two days and made conditional for 18 months. Instead, the Commissioner revoked the license.

The court noted that the Commissioner was obligated by statute to consider the nature, chronicity and severity of the violation before imposing a sanction but that the Commissioner's decision was silent as to the favorable testimony of parents and other mitigating factors offered to explain the circumstances surrounding the violations. The Court of Appeals stated that the severity of a sanction must reflect the seriousness of the violation. In this case revocation was found to be too severe and not supported by the record. The Court remanded to the agency and directed it to provide an explanation or analysis of any negative sanction that it imposed. The analysis must consider the nature of the conduct and explain the agency's choice among the sanctions available to it. The requirement that an agency explain how it chose a discretionary penalty could be of great importance in administrative law.

¹ Professor of Law Emeritus, UCLA Law School; Council Member; and Contributing Editor.

² Administrative Law Judge, Minnesota.

Reliance on State Agency Interpretation of Applicable Law?

By Lois F. Oakley³

Administrative law judges (ALJs) routinely rely on an agency's interpretation of governing statutes. However, as illustrated below, not all agency interpretations are correct. Therefore, ALJs should not rely exclusively on the agency's interpretation of the law.

In *Georgia Department of Community Health v. Freels*, 576 S.E.2d 2 (2002), the Georgia Court of Appeals reversed an ALJ's decision that upheld the Department's refusal to reimburse Freels under Medicaid for his hyperbaric oxygen therapy (HBOT). The ALJ relied on the Department's policies and procedures manual that only permitted reimbursement of services that were "medically necessary" and within "accepted professional standards." In reversing the ALJ, the Georgia Court of Appeals held that the ALJ applied the wrong legal standard by basing the decision on the Department's manual. Instead, the ALJ should have followed the governing federal statute (42 USC § 1396d (r)(5)) which requires only that the treatment be necessary "to correct or ameliorate a physical or mental defect or condition."

Not-Quite Ad Law: The Rule of Law Takes Another Hit

Dale D. Goble⁴

When the Idaho legislature enacted a new Administrative Procedure Act (IDAPA) in 1992, it imposed standardized procedures on nearly the full range of agency actions. Since then, however, the legislature has repeatedly backtracked from its commitment to a uniform administrative law by exempting specific agencies and actions from coverage. The most recent example is the legislative response to *ASARCO, Inc. v. State*, 69 P.3d 139 (Idaho 2003). This time it did so in the face of an Idaho Supreme Court decision upholding IDAPA's rule-of-law position.

ASARCO arose out of the establishment by the Department of Environmental Quality (DEQ) of Total Maximum Daily Loads (TMDL) for three pollutants in the Coeur d'Alene River Basin. A TMDL specifies the maximum amount of a pollutant that can be added to a water body from all sources. In establishing the TMDLs, DEQ "provided some notice to interested parties and took some testimony" but did not follow the IDAPA procedures necessary to promulgate a rule. Three mining companies challenged the legality of the TMDLs,

³ Chief State Administrative Law Judge, Georgia Office of State Administrative Hearings.

⁴ Margaret Wilson Schimke Distinguished Professor of Law, University of Idaho College of Law.

contending that they were "rules" and hence invalid for want of the statutory procedure.

DEQ argued that TMDLs were not "rules." Rather, they were "an unenforceable planning tool analogous to a comprehensive plan." The Idaho Supreme Court rejected this approach. It held that the TMDL was a rule and, therefore, must be promulgated in accordance with IDAPA.

First, the TMDLs changed the legal status of the mining companies by modifying the amount of pollutants that they were permitted to discharge; thus they were obviously "enforceable." Second the agency action fell within the statutory definition of "rule" in I.C. § 67-5201(19). The TMDLs were statements of "general applicability" (so they were not adjudicatory) and they "implement, interpret, or prescribe ... law or policy" by prescribing "quantitative legal standards" not contained in the applicable statutes. This was a clear application of standard administrative law: an agency can prospectively change the legal status of entities only by promulgating rules after notice and an opportunity for comment.

The legislative response was swift. H.R. 458 was quickly introduced, specifying that the rulemaking provisions of IDAPA "shall not apply to TMDLs." The Governor signed the bill on May 7 — less than two weeks after the decision in *ASARCO*. 2003 Idaho Sess. Laws 938. While the legislature undid the decision in *ASARCO*, it did not undermine the court's recognition of the importance of consistent procedural safeguards. ○

Recent Articles of Interest

continued from page 24

4. SYMPOSIUM, THE ENDANGERED SPECIES ACT: THIRTY YEARS OF POLITICS, MONEY, AND SCIENCE, 16 TUL. ENVTL. L.J. 257, ET SEQ. (2003), **Articles Include:** Jason M. Patlis, *Riders On The Storm, Or Navigating The Crosswinds Of Appropriations And Administration Of The Endangered Species Act: A Play In Five Acts* (p. 257); John D. Echeverria and Julie Lurman, "Perfectly Astounding" *Public Rights: Wildlife Protection And The Takings Clause* (p. 331); Michael J. Brennan, David E. Roth, Murray D. Feldman, Andrew Robert Greene, *Square Pegs And Round Holes: Application Of The "Best Scientific Data Available" Standard In The Endangered Species Act* (p. 387); Dustin J. Edwards, *Wetland Mitigation Banking: Is The Current System Beyond Repair?* (p. 445); Mustafa P. Ostrander, *Suing Dissolved Corporations Under Cercla: Does State Or Federal Capacity Law Apply?* (p. 471); *Recent Developments In Environmental Law* (p. 491). ○

Section News & Events

Judicial Appointment

Section member **Susan Braden** has been confirmed by the U.S. Senate to serve on the United States Court of Federal Claims for a term of fifteen years. At the time of her appointment she was counsel at Baker & McKenzie.

She was an Antitrust Division trial attorney in the Cleveland office of the Department of Justice from 1973–78 and a senior trial attorney in the Washington, D.C. office of Justice from 1978–80. At the Federal Trade Commission, she was a senior attorney advisor from 1980–83 and senior counsel & special assistant to the chairman from 1983–85.

For the past 18 years, she has had a distinguished career in the private sector, specializing in federal litigation, antitrust, international trade practices, and intellectual property. Her work on international trade gave her the opportunity to accompany a delegation led by Justices O'Connor, Kennedy, Ginsburg, and Breyer on an official visit to several European courts in 1998.

In July 2001, she accompanied a delegation organized by the National American Indian Court Judges' Association's Supreme Court Project to help Justice O'Connor and Justice Breyer learn more about the Indian tribal courts, visiting tribal courts on the Spokane Reservation of the Navajo Nation and meeting with tribal court judges at the National Judicial College.

She earned her B.A. and J.D. from Case Western Reserve University in 1970 and 1973, respectively, and is the wife of Section Delegate Tom Susman.

Outstanding Government Service Award

Michael F. Messitte, Settlement and Compliance Director of the National Labor Relations Board's (NLRB's) Appellate Court Branch, has been selected to receive the Mary C. Lawton 2003 Outstanding Government Service Award. Mr. Messitte has been a dedicated employee of the NLRB for over 40 years, and for more than half of that period he has devoted himself to resolving cases through settlement and mediation and to developing an effective appellate level settlement program that has been recognized and praised by both management and labor practitioners.

2002 Scholarship Award

Thomas W. Merrill and **Kathryn Tongue Watts** have been selected to receive the 2002 Scholarship Award for their article, *Agency Rules With the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002). The article begins with a discussion of *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court's recent pronouncement on when agency rules have the force of law. The article then examines Congress's practice during the Progressive and New Deal eras of signaling when an ambiguous rulemaking grant was intended to produce rules with the force of law by imposing sanctions on those who violated them. The authors contend that although the DC and Second circuits have adopted a presumption that facially ambiguous grants always authorize the agency to issue rules with the force of law, *Mead* leaves the door open to return to the original convention, which they argue is more consistent with congressional intent and the nondelegation doctrine but the return to which must be weighed against upsetting reliance interests. ○

News from the Circuits

continued from page 21

Mandamus denied – Vice President must respond to discovery and assert executive privilege as to FACA dispute over National Energy Policy Development Group

Shortly after taking office, the Bush Administration created the National Energy Policy Development Group, chaired by the Vice President, to develop a comprehensive energy policy. The Administration was soon deluged with requests for information about this group. One such request came in the form of an assertion that the Group constituted an advisory committee, which must comply with the openness provisions of the Federal Advisory Committee Act. The District Court ordered the Vice President to respond to discovery related to these claims.

The Vice President initiated a two-pronged attack on this order. First, he sought a writ of mandamus from the court of appeals ordering the District Court to forgo discovery, rule on the basis of the administrative record, and dismiss the Vice President as a party. Second, he sought an interlocutory appeal of the District Court's decision. By a split vote, the D.C. Circuit ruled against him on all counts. *In re Cheney*, 334 F.3d 1096 (D.C. Cir. 2003)

Emphasizing the limited nature of mandamus, the D.C. Circuit asked whether there was "some 'harm' flowing from the district court's challenged rulings that cannot be remedied either in the district court or on appeal following final judgment." The court found no such harm because the District Court could rule on any particular assertions of executive privilege. The Vice President could not simply rely upon separation of powers to avoid discovery, but must assert executive privilege. For essentially the same reason, the Vice President was not entitled to pursue an interlocutory appeal. ○

A Complete List of Titles from the ABA Section of Administrative Law and Regulatory Practice

Developments in Administrative Law and Regulatory Practice 2001-2002

By Jeffrey S. Lubbers

Provides a comprehensive ready reference for private practitioners, government counsel, judges, and academics concerning the past year's significant developments in administrative law and regulatory practice.

2003, 556 pages, 6 x 9, paperback

Product code: 5010036

\$64.95 Administrative Law and Regulatory Practice section member price

\$99.95 Regular price

A Guide to Federal Agency Adjudication

By Michael Asimow

Assists government and private counsel engaged in administrative adjudication under the federal Administrative Procedure Act (APA).

2002, 246 pages, 6 x 9, paperback

Product code: 5010034

\$34.95 Administrative Law and Regulatory Practice section member price

\$54.95 Regular price

Guide to Medicare Coverage Decision-Making and Appeals

By Eleanor D. Kinney

Describes the Medicare coverage policy-making and appeals process, including the changes in these processes enacted in the Benefits Improvement and Protection Act of 2000.

2002, 220 pages, 6 x 9, paperback

Product code: 5010033

\$49.95 Administrative Law and Regulatory Practice section member price

\$69.95 Regular price

The Cost-Benefit State: The Future of Regulatory Protection

By Cass R. Sunstein

Examines new trends in Cost-Benefit Analysis and how courts are responding in contested cases. The book analyzes the legality of actions taken by the EPA, OSHA, CPSC, and other agencies.

2002, 200 pages, 6 x 9, paperback

Product code: 5010031

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Developments in Administrative Law and Regulatory Practice 2000-2001

By Jeffrey S. Lubbers

Provides a comprehensive ready reference for private practitioners, government counsel, judges, and academics concerning the past year's significant developments in administrative law and regulatory practice.

2002, 515 pages, 6 x 9, paperback

Product code: 5010032

\$64.95 Administrative Law and Regulatory Practice section member price

\$89.95 Regular price

Federal Administrative Dispute Resolution Deskbook

By Marshall J. Breger, Deborah Schick Laufer, Gerald S. Schatz

Describes the breadth of alternative dispute resolution processes within the federal government and demonstrates the ways in which agencies have approached alternative dispute resolution.

2001, 763 pages, 6 x 9, paperback

Product code: 5010030

\$89.95 Administrative Law and Regulatory Practice section member price

\$109.95 Regular price

Federal Administrative Procedure Sourcebook, Third Edition

By William F. Funk, Jeffrey S. Lubbers, Charles Pou Jr.

Contains all the significant statutes, Executive Orders, memoranda, and other materials relating to the major aspects of administrative law and regulatory practice. Includes pertinent legislative history, numerous citations to related sources, and the editors' insightful commentary on each of the source documents.

2000, 1012 pages, 6 x 9, paperback

Product code: 5010024

\$49.95 Administrative Law and Regulatory Practice section member price

\$79.95 Regular price

The Realists' Guide to Redistricting - Avoiding the Legal Pitfalls

By J. Gerald Hebert, Donald B. Verrilli Jr., Paul M. Smith, Sam Hirsch

Designed to warn the reader of legal pitfalls related to redistricting. Includes: the "one person, one vote" standard, Sections 2 and 5 of the Voting Rights Act, and the constitutional limits on racial and partisan gerrymandering that flow from the Equal Protection Clause of the Fourteenth Amendment.

2000, 68 pages, 6 x 9, paperback

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\$19.95 Administrative Law and Regulatory Practice section member price

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A Guide to Federal Agency Rulemaking, Third Edition

By Jeffrey S. Lubbers

This third edition brings you the most up-to-date information on case law, and the legislation affecting the rulemaking process.

1998, 443 pages, 6 x 9, paperback

Product code: 5400001

\$54.95 Admin. Law & Regulatory Practice/Government Public Sector Lawyers section member price

\$84.95 Regular price

The Lobbying Manual: A Compliance Guide for Lawyers and Lobbyists, Second Edition

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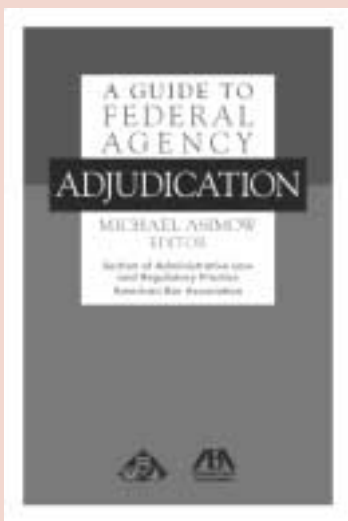
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