

ADMINISTRATIVE & REGULATORY LAW NEWS

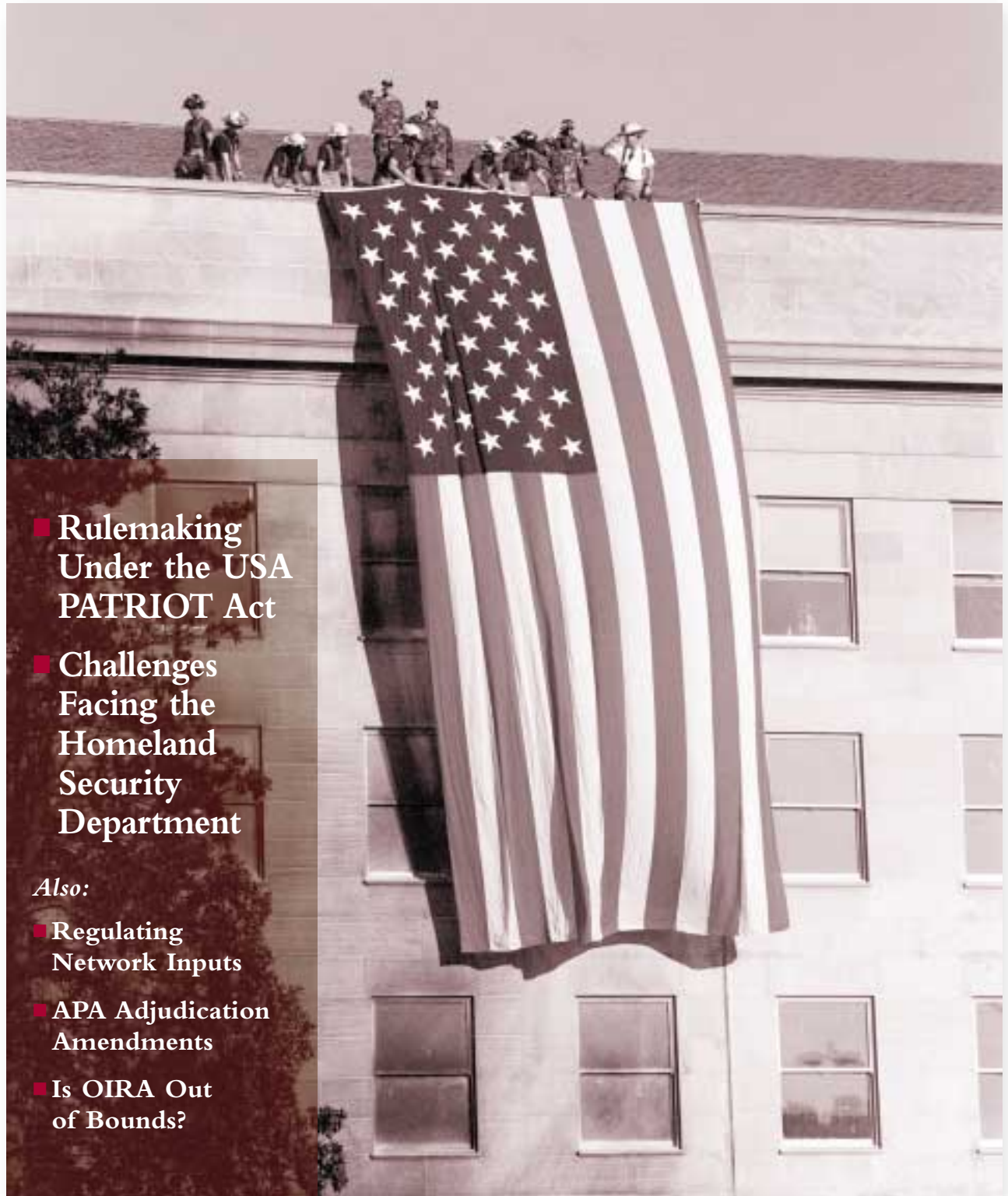


Section of Administrative Law & Regulatory Practice

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■ **Rulemaking Under the USA PATRIOT Act**

■ **Challenges Facing the Homeland Security Department**

Also:

■ **Regulating Network Inputs**

■ **APA Adjudication Amendments**

■ **Is OIRA Out of Bounds?**

2003 ANNUAL MEETING IN SAN FRANCISCO ■ AUGUST 8-10

Chair's Message



Neil Eisner

As we approach our Annual Meeting in San Francisco, we have a number of very important initiatives under way that I want to bring to the attention of our general membership. They are all, of course, intended for your benefit, and we will be looking to many of you to assist us on the projects.

The first involves our effort to develop a report on European Union administrative law. After our Section published A Blackletter Statement of Federal Administrative Law in the Winter of 2002, we recognized that a companion to this document describing EU law would also be valuable for those who work on issues involving the EU. George Bermann — the Walter Gellhorn Professor of Law, Jean Monnet Professor of European Union Law, and Director of the European Legal Studies Center at Columbia University School of Law — has agreed to be the director of at least the first phase of this project for the Section. George is a highly regarded professor who brings an outstanding background to the project.

During the first phase, we expect to (1) identify the chief reporter/ director and two assistants, (2) outline the intended structure of the report and the functional subjects appropriate for coverage, as well as the regulatory sectors (e.g., tele-communications and food safety) to be studied in background volumes, (3) collect existing materials on the EU process, (4) plan periodic symposia, and (5) start the necessary budgetary and administrative steps. We will also start to identify Brussels- and American-based experts who will, in the second phase, begin to develop the general and sector volumes. We see this as an exciting and valuable project on which we hope many members of our Section will work — along with members of other ABA sections who we expect will be joining us.

Another major project involves establishing a Federal Administrative Law Institute, a series of “basic training” CLE courses on administrative law and regulatory practice. ABA surveys and our Section’s own long-range planning initiatives have identified a need for more basic courses for lawyers. We currently offer many, excellent courses that are aimed at experts in the law. This new project will develop courses that will be valuable to recent law school graduates and young attorneys. In many cases, they will be supplemented by our publications, which continue to increase in number.

Courses we are considering adding include (1) adjudication, (2) effective oral advocacy, (3) informal rulemaking, (4) judicial review, (5) government openness requirements (FOIA, FACA, Sunshine Act, and data quality), (6) the legislative process, (7) lobbying, (8) alternative dispute resolution techniques, and (7) EU administrative law. Many of these would not only cover the legal requirements but also provide practical advice on such things as how to effectively use the process (e.g., how to effectively participate in informal rulemaking). We would also explore the possibility of offering these courses around the country; for example, we could present them during our quarterly meetings in different cities and/or make them available through audio or video tapes on the internet. Let me know your thoughts on this.

There are a number of other important projects with which the Section is involved. One is an effort by members of our Section and others to work with Congress to create an organization

similar to the former Administrative Conference of the U.S. It is envisioned that the organization would be composed of a broadly representative group of experts from inside and outside the government who would be called on to provide objective advice on how to improve the administrative process. Another project involves a resolution amending the ABA Standards for the Establishment and Operation of Ombuds Offices that we have submitted for consideration by the House of Delegates at the Annual Meeting this August. The amendments clarify the issue of notice; provide a new category of “executive ombuds;” and modify the definition of, and standards applicable to, classical ombuds to reflect the addition of an executive ombuds. We also continue to make progress on a significant set of resolutions concerning the APA adjudicatory process, and we expect to have a program on this subject at the Annual Meeting. Following up on our excellent “Great Debate” this Spring on security vs. privacy — a debate that was carried on C-Span — we are working on another one for early this summer on the *Walker vs. Cheney* case involving the GAO’s authority to obtain documents from the Vice President.

The Section also recently submitted a report in opposition to a proposed ABA resolution opposing pending legislation referred to as the “Levin-Nelson Amendment.” Two aspects of the proposed legislation are the subject of the proposed resolution. One would confer authority on the SEC to assess civil monetary penalties in administrative proceedings against any individual or company alleged to have violated (or to have caused another to violate) any federal securities law or regulation. Currently, the SEC may disqualify so-called non-regulated entities, such as lawyers and accountants, from practice before the SEC, but must pursue civil monetary penalties in federal court. In addition, the Amendment would authorize the SEC to administratively subpoena financial records without notice to the subject of the request. Under current federal law, court approval is required for the SEC to subpoena records without such notice.

We discussed this issue at the Spring Meeting and decided to submit a report in opposition to the proposed resolution. We did not agree that, as the report supporting the resolution contends, SEC’s assessment of civil monetary penalties raises “serious constitutional questions” concerning the right to trial by jury. We argued that assessing civil monetary penalties is an expansion of remedies, not authority to regulate; we said SEC should be given the tools to enforce the laws effectively, including enhanced subpoena authority. We also thought that, by taking a position opposing SEC authority to take action against lawyers and others who violate the securities laws, the ABA’s motivation could appear to be the protection of lawyers from regulations to which other professionals and members of the public are subject.

We are engaged in many other important activities, as well; space limitations only permit me to give you these few highlights. However, I would be remiss if I ended without welcoming our new Section Director, Kimberly Knight. Some would justifiably suggest this is the most important position in our Section. If the Section Director does her job well, she makes the Chair look great. Leanne, who is now the Director for the International Law Section, did a wonderful job for us, and I know Kim will also.

I hope to see you in San Francisco.

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ADMINISTRATIVE & REGULATORY LAW NEWS

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Nominations



Chair: William F. Funk. Bill is a professor of law at Lewis & Clark College in Portland, Oregon, and co-author of a widely used case-book on administrative law. He served for years as editor of the Administrative & Regulatory Law News. He also has been a Council member and chair or vice chair of several Section committees, as well as the reporter on government management for the Section's APA project.



Chair-Elect: Randolph J. May. Randy is Senior Fellow and Director of Communications Policy Studies at the Progress and Freedom Foundation in Washington, D.C. He has been a Council member, as well as chair of the Section's Publication Committee and the Ratemaking Committee.



Vice Chair: Eleanor D. Kinney. Eleanor is the Samuel R. Rosen Professor of Law and Co-director of the Center for Law and Health at Indiana University School of Law in Indianapolis. She has been a Council member as well as chair of the Section's Health and

Human Services Committee. She also has chaired the Publications Committee, and her book on Medicare coverage disputes is the most recent addition to the Section's publications program.

Council:

Myles E. Eastwood. Myles is a solo practitioner in Atlanta, Georgia. He is chair of the Section's Membership Committee and vice-chair of the Defense and National Security Committee.

Sharan L. Levine. Sharan practices at Levine & Levine in Kalamazoo, Michigan. As chair of the Section's Ombuds Committee, she worked actively to develop the Ombuds Standards that the ABA adopted in 2001.

Thomas O. Sargentich. Tom is a professor at the Washington College of Law, American University. He is co-chair of the Section's Constitutional Law and Separation of Powers Committee and chair of the faculty board that oversees the Administrative Law Review. He also was the reporter for the Section's Report to the President-Elect in the fall of 2000.

Edward W. Warren. Ed is a partner at Kirkland & Ellis in Washington, D.C., a Section member, and an appellate lawyer with a strong concentration in administrative law areas. He is a veteran of many well-known administrative law cases in the

Supreme Court and other courts. He also has taught as an adjunct professor in the law schools of Georgetown University, George Mason University, and the University of Chicago.

Secretary: Jonathan J. Rusch. Jon is Special Counsel for Fraud Prevention at the Department of Justice. In addition to serving as Secretary, he has been a Council member and chair or co-chair of several Section committees, including Antitrust, Criminal Process, and Regulatory Initiatives.

Budget Officer: David W. Roderer. David is Deputy General Counsel of the Office of Federal Housing Enterprise Oversight. In addition to serving as Budget Officer, he has been co-chair of the Banking and Financial Services Committee.

Assistant Budget Officer: Daniel Cohen. Dan is Chief Counsel for Regulation at the U.S. Department of Commerce. In addition to serving as Assistant Budget Officer, Dan has been chair of the Rulemaking Committee.

Delegate: Thomas M. Susman. Tom, a partner at Ropes & Gray in Washington, D.C., served as Section Chair from 1991-92 and has also been a member of the ABA Board of Governors. His numerous other past Section activities include chairing its committees on Government Information and Privacy and on Legislative Process and Lobbying.

The following have been recommended for appointment to special seats on the Council:

Administrative Judiciary: Hon. Ann Marshall Young. Ann is an Administrative Judge with the U.S. Nuclear Regulatory Commission in Bethesda, Maryland.

State Administrative Law: Jim Rossi. Jim is a professor of law at the University of North Carolina but will soon return to his former faculty home at Florida State University.

Scholarship Award

The Scholarship Award Subcommittee is starting its review of all scholarship relevant to the Section's activities published with a 2002 date. Recommendations may be emailed to any of the following Subcommittee members:

Jack Beermann: beermann@bu.edu
David Frederick: DFREDERICK@khhte.com
Dan Ortiz: dro@virginia.edu

Notice, Comment, and the Regulatory State: A Case Study from the USA PATRIOT Act

Mariano-Florentino Cuéllar*

Ask most administrative lawyers what characterizes the American regulatory state and they are bound to mention the notice and comment rulemaking process. In this short article I want to take a step back to consider exactly what lawyers, government officials, interest groups, and society are trying to achieve through notice-and-comment rulemaking. Although the subject has broad implications for administrative law and regulatory policy, I use a specific rulemaking proceeding — one involving the war against terrorism and illegal financial activity — as an extended case study. The case study reveals some of the problems and possibilities of notice and comment rulemaking. It also provides an opportunity to think about alternative approaches for involving the public in rulemaking proceedings.

No Subpoena Required

The statute in question is Section 314 of the USA PATRIOT Act.¹ The new law directs Treasury to encourage information exchange between financial institutions and law enforcement, and among financial institutions, for the purpose of combating terrorism and money laundering. While the statute does not mention privacy in so many words, it does restrict the power granted to law enforcement and financial institutions to share information. For example, the statute falls well short of granting law enforcement a blanket power to locate anyone's financial records across the country. Instead it authorizes regulations to encourage the sharing of records pertaining to people "reasonably suspected" upon "credible evidence" of being involved in terrorism and money laundering.

Last year Treasury's FinCEN — the bureau delegated responsibility for the regulations — issued a notice of

proposed rulemaking in the *Federal Register* and called for comments in accordance with the requirements of the Administrative Procedure Act.² The resulting final rule took the statutory mandate to "encourage" cooperation and mostly turned it into a mechanism for getting information to law enforcement.³ Among other things, the new regulations facilitate nationwide law enforcement queries to financial institutions regarding account information of people suspected of being involved in money laundering and terrorist financing.⁴ Investigators can now quickly find out where across the nation there is financial information about suspected terrorists or money launderers, and what transactions have taken place involving their accounts, *without a subpoena*. In contrast, before the Section 314 regulations, the Right to Financial Privacy Act⁵ would have required law enforcement to get a judicial subpoena which would almost always require that the subject of the records be notified. As a result, financial information requests can now become routine.

The final rule does require law enforcement authorities to certify that all persons whose account information is requested are suspected of terrorism or money laundering, but there is no obvious remedy for any violation. This means FinCEN and law enforcement agencies must police themselves when it comes to the limits of the justification for information requests because the regulations *forbid* the requested financial institution from communicating the request to the customer.⁶ In addition, the financial institution can use the information to make a number of decisions on its own, such as deciding not to bank with a customer. Financial institutions can also avail themselves of a safe harbor to share information (among themselves) regarding customers they

suspect of being involved in terrorism or money laundering, and may use that information to deny services to customers.

Lack of Public Response

In some ways the final rule showcases an agency that did well under pressure. The agency called for comments and indexed the ones it received. It issued the Section 314 regulations (and others) within the truncated time limit specified by Congress. In doing so, FinCEN created a system making it easier for law enforcement bureaucracies to get information they want. It made some adjustments to the rule reducing the administrative burden on regulated businesses that expressed concerns during the notice and comment period. All of this may reflect an attractive balance between legislative oversight, agency expertise, and competing outside interest group participation through the notice and comment process.

* Assistant Professor, Stanford Law School. This brief article reports a few preliminary results of an ongoing study I am conducting on public participation in the administrative state. Thanks to Michael Asimow for encouraging me to write this, and to the FinCEN Chief Counsel's Office for providing the public comments discussed here.

¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. 107-56, 115 Stat. 271, 307 (Oct. 26, 2001). Section 314 of the Act is an uncodified provision that appears in the Historical and Statutory Notes to 31 U.S.C. § 5311 (commonly known as the "Bank Secrecy Act").

² 67 Fed. Reg. 9,879 (Mar. 4, 2002). At the same time, FinCEN published an interim rule immediately implementing §314(b). 67 Fed. Reg. 9,873 (Mar. 4, 2002).

³ 67 Fed. Reg. 60,579 (Sept. 26, 2002).

⁴ *Id.*

⁵ 12 U.S.C. § 3401.

⁶ There is no constitutional expectation of privacy in records held by a third party. See *U.S. v. Miller*, 425 U.S. 435 (1976).

Given the rule's impact, though, it's worth taking a closer look at the comments. The first remarkable thing about the comments is how few of them came in, which may reflect what little media attention this part of the PATRIOT Act received. FinCEN only received about 180 comments, even though the rule affects just about everyone in the country who uses financial institutions or who harbors some interest in security. Contrast this with the 700,000 comments received (many from nonprofits) on the FDA's proposed regulation on selling and advertising cigarettes to minors, or the over 10,000 comments received on the regulations to administer the September 11 Victim Compensation Fund.

Another striking thing is that no privacy, civil liberties, or other "public interest" organizations commented on the rule. Perhaps this is understandable given the massive number of legal changes underway that affect civil liberties, of which Section 314 is only one. Instead, virtually all the comments taken seriously by the regulatory agency were sophisticated statements made by financial institutions and their lawyers. While over 70% of comments came from individuals concerned about privacy, the agency did not even address these in its final rule.⁷ Instead the final statement addressed the concerns mentioned by businesses and the lawyers and organizations representing them.

Part of the reason for the disparity in what FinCEN addressed may be driven by differences in the commenters' sophistication. For instance, comments from the private sector often explained exactly how FinCEN could change the regulations to reduce administrative burdens (recommendations the agency often accepted). In contrast, the comments from laypeople did not specify the myriad ways in which FinCEN could have at least partially addressed their concern about privacy, through measures such as periodic audits of federal law enforcement requests, building in sunsets to the regulation, or providing some kind of remedy for persons whose records are improperly disclosed.

Crisis and Democracy

All of this brings up at least two larger issues about notice and comment rule-making. First is the question of how the regulatory process works in times of crisis. Agencies and interest groups may be overwhelmed by legal changes. Maybe our expectations about the proper way of making regulatory policy can be met during ordinary times, when interest groups keep an eye on important regulatory developments and agencies can direct their resources toward major regulatory challenges. The agency and interest group context would affect each other: the more the agency believed that important outside interest groups were engaged in the process, the more it would be likely to allocate resources to addressing concerns that arose during the notice-and-comment process or even before it.

Things may be different in times of crisis. The public is more willing to accept that some troubling legal changes are worth making, so more of them are likely to get made. This means that some of the interest groups that would traditionally serve a watchdog function protecting privacy, civil liberties, or other allegedly public-spirited objectives may not have the resources to keep track of all important developments. Interest groups that represent disaggregated constituencies, such as people concerned about privacy or environmental protection may find that their current resources are inadequate to the full extent of the challenge. Perhaps over time groups can raise more resources and get more members, but in the short run their ability to participate in the legal and political process shaping regulatory policy will suffer. This dynamic might strengthen the incentive for advocates of particular legal changes to wait until a crisis to obtain statutory and regulatory approval. The agency itself might be overtaxed with the responsibility of promulgating a large number of important regulations by congressionally-imposed deadlines. All of this may help explain why, in the case of Section 314, FinCEN did not at least provide some discussion of

privacy issues in the Federal Register statement accompanying the final rules.⁸

The experience with Section 314 experience also brings up a second question, regarding the kind of democracy that we expect from the regulatory process even in ordinary times. The work of some political scientists and psychologists shows that lay people do not have a fixed, unchanging level of interest in regulatory issues or sophistication to understand them. Rather, the public's interest in regulation and sophistication to discuss it can increase in response to information. This means that agencies could supplement their rulemaking records by cautiously using techniques like "deliberative polls" where lay people are given balanced information about an issue and then have a facilitated discussion.⁹ Alternatively, the process could involve independent experts selected from a pre-approved group instead of lay people. These approaches could help people with low sophistication make useful contributions to the regulatory process, and improve the agency's understanding of how people would react to the issue if they had the time to think about it, information to consider, and ability to articulate their views in a way that sounds reasonable to the agency. The views from these deliberative polls could then inform the regular notice and comment process.

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⁷ This raises the question of whether the agency was able to deal with all the relevant facets of the problem before it. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973).

⁸ A discussion of privacy issues would hardly satisfy the commenters or other people concerned about civil liberties, but it may help the agency respond to a challenge in court. Then again, the agency may not be anticipating a legal challenge from a disaggregated group of unsophisticated commenters concerned about privacy.

⁹ See generally Robert C. Luskin, James S. Fishkin, and Roger Jowell, *Considered Opinions: Deliberative Polling in Britain*, 32 *British J. Poli. Sci.* 455 (2002).

The Economics of Network Access

Christopher S. Yoo¹

Recent years have witnessed a fundamental transformation in the basic approach to regulated industries. Policy makers have broken with the century-old tradition of *rate regulation* and have begun instead to embrace a new approach known as *access regulation*. Rather than controlling the terms under which *end users* purchase *outputs*, policy makers are instead regulating the terms under which *competitors* can obtain access to *inputs*. This shift has already reshaped the regulation of local telephony, natural gas, and electric power. It is also playing a central role in the ongoing debate regarding the regulation of broadband networks.

The central question lying at the heart of the access debate is whether a network owner can use the leverage provided by a monopoly over one input (the “primary market”) to gain a competitive advantage in an upstream or downstream market (the “secondary market”). For example, policy makers are currently evaluating whether local telephone and cable companies can use their control over the physical architecture needed to provide broadband service to impair competition among Internet service providers (ISPs) by favoring their own proprietary ISPs at the expense of unaffiliated ISPs. The solution envisioned by open access advocates is to require DSL and cable modem providers to allow all ISPs access to the network on reasonable and nondiscriminatory terms.

The debates about access regulation have been impeded by a number of economic misperceptions. A more

complete understanding of the economics of network access is thus essential to any attempt to evaluate the relative merits of this fundamental transformation.

The Vertical Nature of Access as a Remedy and the Structural Preconditions for “Leverage”

Perhaps the most basic economic misapprehension is that access requirements are designed to foster horizontal competition. Upon closer inspection, it becomes clear that requiring the network owner to share its monopoly does nothing to increase horizontal competition in the primary market. That market will remain highly concentrated regardless of whether access is compelled or not. Instead, access requirements are designed to protect against the economic harms resulting from allowing network owners to vertically integrate into the secondary market.

Whether a firm can use vertical integration as an anticompetitive weapon has engendered substantial controversy. Proponents of the Chicago School have asserted that such claims are inherently implausible. Because there is only one monopoly profit in any chain of production, a monopolist can extract all of the available profit without expanding into an adjacent level simply by the manner in which it prices the input it controls. Post-Chicago theorists have rebutted this claim by employing game theory and other advanced modeling techniques to identify circumstances under which vertical integration can allow the monopolist to increase its profits.

Although the scope of disagreement between these approaches remains significant, what I find most interesting is the extent to which they accord with one another. Both Chicago School and post-Chicago theorists agree that it is impossible to state a coherent leverage

claim unless certain structural preconditions are met. Specifically, the primary market must be highly concentrated, since without a dominant position in the primary market, there is nothing to leverage in the first place. In addition, the secondary market must also be concentrated and protected by barriers to entry, otherwise any attempt to raise price in the secondary market will ultimately prove futile.

Furthermore, both approaches acknowledge that vertical integration may lead to efficiencies, including the elimination of double marginalization, the rationalization of input substitution, and the elimination of certain forms of ex post opportunism (such as sunk cost opportunism, free riding, and certain moral hazards). The existence of such efficiencies indicates that vertical integration should be allowed unless the structural preconditions provide some reason to believe that it will harm competition.

Proper Definition of Geographic Markets

The analytical coherence of compelling access thus depends on whether these structural preconditions have been met. In making this determination, some scholars and policy makers have mistakenly focused on the market in which network owners provide services to end users. To use the broadband industry as an example, many have assumed that the fact that DSL and cable modem systems represent the only ways in which most households can receive broadband services necessarily implies that the primary market is sufficiently concentrated to support an argument in favor of compelled access.

As noted earlier, the problem with this argument is that access requirements do not redress the lack of horizontal competition in household delivery of broadband services. Instead, access requirements are designed to foster competition in the market in which

¹ Christopher S. Yoo is an Associate Professor at the Vanderbilt University Law School and a leading authority on telecommunications and media law. For a more complete exposition of Professor Yoo's views on access regulation, see *Vertical Integration and Media Regulation in the New Economy*, 19 YALE JOURNAL ON REGULATION 171 (2002); and *Access to Networks: Economic and Constitutional Connections*, 88 CORNELL LAW REVIEW (2003) (with Daniel F. Spulber).

ISPs contract with broadband subscribers. In this market, ISPs care more about the total number of households they can reach than they do about whether they can reach subscribers in any particular city. The amount of leverage that any particular broadband provider possesses is thus a function of the total percentage of nationwide broadband subscribers under its control rather than a function of its dominance over any metropolitan area.

Recognizing that the relevant geographic market is national rather than local greatly alleviates the concerns about vertical integration. A review of the empirical data reveals that no broadband provider controls more than 23% of the national market and that the overall concentration of the national market falls below levels sufficient to raise anticompetitive concerns. In addition, the market for ISPs is sufficiently unconcentrated and unprotected by barriers to entry as to eliminate significant anticompetitive concerns. An empirical analysis of other network industries leads to similar conclusions.

Access and Static Efficiency

The fact that access requirements do nothing to dissipate the monopoly in the primary market underscores the extent to which they represent something of a competition policy anomaly. Conventional remedies either break up monopolies or prevent them from occurring in the first place. Access remedies accomplish neither. Indeed, simply forcing a monopolist to share the input it controls with its competitors will not necessarily lead to static efficiency benefits in the form of increased output and lower prices. Absent other regulatory constraints, the monopolist will simply charge a price that is high enough to allow it to capture all of the available profit.

If compelled access is to benefit consumers, it must be accompanied by some limitations on the price that the monopolist can charge for access. It goes without saying that regulatory price setting has been plagued by complicated valuation, allocation, and second-best pricing problems that have bordered on insurmountable. Furthermore, because

the monopolist has no real desire to deal with its competitors, disputes over the non-price terms of compelled access are likely to emerge as well. Previous attempts at regulating access in other contexts do little to inspire confidence that future efforts will prove successful.

Access and Dynamic Efficiency

Compelling access has an even more profound impact on dynamic efficiency. First, requiring a network owner to share the benefits of any investments with its competitors reduces its incentives to improve its facilities. Indeed, access requirements make possible a classic form of ex post opportunism by allowing competitors to wait until after the necessary investments have been made and to seek access only to those investments that have proven profitable. That way, they can gain all of the benefits of the investments without bearing any of the risks.

ISPs care more about the total number of households they can reach than they do about whether they can reach subscribers in any particular city.

In addition, forcing a monopolist to share an input rescues other firms who need the input from having to develop alternative sources of supply. This in turn deprives companies seeking to compete directly with the established network of their natural strategic partners. Access requirements can thus have the perverse effect of entrenching the existing network monopoly that causes the anticompetitive problem in the first place.

The only circumstances under which compelling access can even plausibly constitute a viable policy alternative is if construction of an alternative network is truly infeasible. It is not sufficient that alternative facilities can only be duplicated at significant cost and in the relatively long run, since compelling access under those circumstances would forestall the best long-run solution to the basic problem. The inevitable lag in adjusting regulation also raises the risk that com-

PELLING access would survive long after the empirical justifications for the regulation have disappeared. Access would thus be particularly ill-suited for technologically dynamic industries, in which the prospects of developing new ways to provide network services are the highest and in which preserving the incentives to promote the buildout of the necessary network infrastructure is the most critical.

Access and Network Economics

Some scholars have argued that the presence of *network economic effects* justifies compelling access to networks. Network economic effects arise when the value of a network depends on the number of people using the network. This can create a form of technological inertia in which an established technology remains locked into place long after it has become obsolete. Technological lock-in can also deter competition by making it prohibitively expensive to switch to alternative platforms even when it might be economically beneficial to do so.

These arguments contain numerous analytical shortcomings that can only be sketched here. Perhaps most importantly, such arguments are singularly inapt when a market is undergoing explosive growth. The ready availability of new customers renders any dominant position over existing customers largely irrelevant. In addition, an architecture in which all service is provided by accessing a single network requires a degree of standardization that can reduce the consumer benefits and competition made possible by product diversity. Finally, the existence of large players that can internalize a significant portion of the benefits of any change in technology may mitigate or eliminate any economic problems that may ensue.

Close economic analysis thus belies the simple intuition that access requirements enhance consumer welfare. The underlying economics are considerably more complex, and it is critical that policy makers fully appreciate all aspects of the issue before embracing access as a remedy. ◆

Whither APA Adjudication?

By Michael Asimow¹

The adjudication sections of the Administrative Procedure Act (APA)² are an anomaly. The APA's provisions for rulemaking, judicial review, and government information apply across the board to virtually all federal government agencies. The adjudication sections are quite different: they apply only if a statute requires an "on the record" hearing.³

As a result, less than half of the adjudicatory hearings conducted by the federal government are governed by the protective APA provisions – and that percentage is declining steadily.⁴ Less than one third of the judges who hear federal agency adjudicatory cases are Administrative Law Judges (ALJs). When it drafted the APA, Congress imagined that the adjudication sections would apply to most federal agency adjudication, but it hasn't turned out that way. ALJs hear Social Security, Medicare and Black Lung cases, a smattering of cases in traditional regulatory agencies (FTC, FERC, NLRB, SEC, etc.) and little else.

Vast adjudicatory schemes are outside the APA – immigration, government contracting, veterans' benefits, EEOC, MSPB, and many civil penalty schemes, just to name some of the most important.⁵ These cases are heard by Administrative Judges (AJs), rather than ALJs, and the various protective provisions of the APA are inapplicable.

During the last five years or so, the ABA's Administrative Law and Regulatory Practice Section has been deeply engaged in its APA project. This has resulted in the preparation of extensive consultants' reports that restate existing law and make recommendations for changes in the law. It has also led to the adoption by the Council of "black letter" statements of administrative law. In the field of adjudication, all this research has resulted in publication of a guidebook to agency adjudication.⁶ The Section is now beginning to

consider recommendations to Congress for amending the APA.

This article will alert readers to one such recommendation that was discussed extensively at the Section's Spring Meeting in San Juan and will remain on the agenda for the next several meetings before, hopefully, being sent to the House of Delegates for approval as an ABA recommendation.

The recommendation would not change the existing scheme, which it calls "ALJ adjudication." Instead, it creates a new category called "general adjudication," which covers all evidentiary hearings required by a federal statute (other than ALJ adjudication). The recommendation then applies some of the key provisions of the existing APA to general adjudication hearings.

The provisions that will apply include the prohibition on ex parte contacts, internal separation of functions, impartiality of the judge, rights to notice, the right to present a case by oral or written evidence and engage in cross examination, the right to have the case determined on the record made at the hearing, and the right to a written decision.⁷ The recommendation also calls for adoption of a code of ethics that would govern all members of the administrative judiciary – ALJs and AJs alike – and would provide some job protection for AJs against discharge in reprisal for a particular decision.

The proposal for general adjudication recognizes that it is politically unfeasible to extend the system of ALJ adjudication to many of the areas in which it does not now apply. As a second-best measure, it seeks to apply some of the protective provisions of the APA to general adjudication. This, we hope, will arrest the balkanization of the law of administrative adjudication and bring most areas of federal adjudication under the APA umbrella.

It is our understanding that, broadly speaking, the protections guaranteed by

The recommendation... creates a new category called "general adjudication," which covers all evidentiary hearings required by a federal statute (other than ALJ adjudication).

these APA provisions already apply in general adjudication hearings. Therefore, the adoption of this proposal should not cause major disruptions in general adjudication hearing programs. However, if this proposal is adopted by Congress, there will remain many large differences between ALJ adjudication and general adjudication. Numerous APA provisions would not be applicable to general adjudication. The most important is that the provisions relating to the hiring, compensation, rotation, evaluation, and job protection accorded to ALJs would not be applied to AJs.⁸

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¹ Professor of Law Emeritus, UCLA School of Law. Comments welcome! asimow@law.ucla.edu

² 5 U.S.C. §§554, 556-558.

³ 5 U.S.C. §554(a).

⁴ See, e.g., John H. Frey III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 Admin. L. Rev. 261 (1992); Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?* 10 Admin. L. J. of American Univ. 65 (1996).

⁵ Frey counted 83 case-areas outside the APA and 2700 AJs. Frey was using 1989 data. Numerous non-APA regulatory schemes have been added since that time.

⁶ Michael Asimow, editor, *A Guide to Federal Agency Adjudication* (ABA 2003) (hereinafter *Guidebook*).

⁷ See *Guidebook* ¶¶7.04, 7.06, 7.02, 4.02, 5.07, 5.08, 7.08, and 6.02 for discussion of these APA provisions.

⁸ See *Guidebook* chapter 10 which discusses the various provisions protecting ALJ independence.

The Bush Administration's Use and Abuse of Rulemaking, Part I: The Rise of OIRA

By Robin Kundis Craig¹

The title “Office of Information and Regulatory Affairs” doesn’t immediately suggest an important or, in PR-speak, “sexy” Federal agency. OIRA, as it is better known, is an executive sub-agency within the Office of Management and Budget (OMB) created in 1980 to help implement the Paperwork Reduction Act. But its importance has increased in recent years as the focal point for presidential review of agency rulemaking. Unfortunately, under the leadership of Administrator John Graham, who was appointed to that position by President George W. Bush in July 2001, OIRA has been centralizing the process of federal rulemaking in ways that undermine individual agency expertise and arguably violate separation of powers principles between the Executive and Congress.

First Steps

Immediately after taking office, President Bush began surrounding himself with advisors who thoroughly understand the rulemaking process – and the ways in which that rulemaking process can be exploited. In that sense, John Graham’s appointment and OIRA’s increasing control of federal rulemaking since July 2001 merely represent a continuation of the regulatory agenda that President Bush and his administration made clear on their first day in office, when Andrew H. Card, President Bush’s Chief of Staff, issued 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 sent to the Federal Register – “[i]n order to ensure that the President’s appointees have the opportunity to review any new or pending regulations.”² 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.

The Card memorandum was the first attempt at regulatory centralization pursuant to a general Bush Administration plan to repeal all federal regulations – especially all Clinton-era rules – that the Administration and its supporters perceive as “unduly” burdening business. In March 2001, for example, the Bush Administration suspended enforcement of a Clinton-era rule that forbids the awarding of federal contracts to companies that have violated federal laws, especially labor, environmental, and tax laws. By the end of 2001, the rule had been entirely repealed.

In a larger sense, by elevating John Graham to the position of “Regulations Czar” – a title conferred upon him by several newspapers – the Bush Administration has raised the stakes in regulatory politics, creating serious legal questions about OIRA’s authority in the process. Under Graham’s leadership, OIRA is transforming itself from a regulatory coordination office into an office of centralized regulatory control for the 600 or so major rules subjected to its review each year.

Top-Down Management

To his credit, Administrator Graham has done much to open the OIRA review process to public scrutiny, spearheading an administration-wide effort to allow challenges to agency regulations based on unrevealed reports and revealing most of OIRA’s activities through web site postings at www.whitehouse.gov/omb/inforeg/regpol.htm. The information OIRA makes available, however, reveals an agency in quest of ever-greater centralization of federal rulemaking. For example, since July 2001, OIRA has:

- **Made unprecedented use of return letters.** In the first 6 months after John Graham’s appointment, OIRA returned 20 regulations to their implementing agencies, demanding better explanations of why the rules were needed and especially emphasizing the need for a cost-benefit analysis of their effects. By comparison, the Clinton Administration, issued a total of 12 return letters during the two terms Clinton was in office.
- **Created the so-called “prompt letter.”** OIRA has recently created, out of no recognizable legal authority, the “prompt letter” – a letter written to an administrative agency requesting that it take specific regulatory actions.
- **Targeted regulations for revision.** On December 21, 2001, OMB published a list of 77 burdensome federal regulations that it believed should be reviewed. www.whitehouse.gov/omb/inforeg/costbenefitreport.pdf. In addition, after the November 5, 2002 elections, OIRA issued 316 rulemaking recommendations for 26 agencies.
- **Encouraged rules that imposed lower costs over rules that provided increased safety.** In December 2001, OIRA rejected a rule from the National Highway Transportation Safety Administration that would have required automakers to install a direct tire pressure warning system that could have prevented 141 deaths per year, because the price – \$66.50 per vehicle – was in OIRA’s opinion too costly for the amount of lives saved. OIRA preferred an indirect mechanism that would cost only \$13.29 per vehicle but that arguably would save only 70 lives per year.

¹ Associate Professor of Law, Indiana University School of Law

² 66 Fed. Reg. 7701, 7702 (Jan. 24, 2001).

- Asserted a right to participate in agencies' rule-drafting processes. In June 2002, John Graham announced that he would work with EPA officials throughout the drafting of a rule imposing new controls on diesel emissions to ensure that the rule will meet his cost-benefit analysis standards.

Absence of Authority

As noted, Congress established OIRA as part of the Paperwork Reduction Act and placed it within the OMB – an office within the Executive Office of the President – with an administrator appointed by the President with the advice and consent of the Senate. *See* 31 U.S.C. §§ 501, 505; 44 U.S.C. § 3503. The administrator is a Level III executive position, equivalent in rank and pay to many under secretaries of federal departments. *See* 5 U.S.C. § 5314.

OIRA's explicit statutory duties and authorities are few and limited. Under the Paperwork Reduction Act, Congress ordered the Director of the OMB to "delegate to the Administrator [of OIRA] the authority to administer all functions under this subchapter, except that any such delegation shall not relieve the Director of responsibility for the administration of such functions." 44 U.S.C. § 3503(b). The Paperwork Reduction Act most prominently requires federal agencies to get a control number from OMB and OIRA before those federal agencies request information from members of the public. Otherwise, the OIRA Administrator's statutory role under that Act is to "serve as principal advisor to the Director [of OMB] on Federal information resources management policy." *Id.* Congress made no mention of comprehensive regulatory oversight in OIRA's authorizing legislation, let alone any authority to actively guide and reject the rulemaking of all federal agencies.

Indeed, one is hard pressed to find much regulatory authority for OIRA anywhere in the United States Code. Many of OIRA's statutory functions are advisory or planning roles regarding government information and information technology. For example, the

administrator of OIRA is a member of the federal Chief Information Officers Council. 44 U.S.C. § 3603(b)(3). Under the Census Address List Improvement Act of 1994, Congress directed OIRA to develop processes through which States could appeal determinations of the Bureau of the Census. Pub. L. No. 103-430, § 3, 108 Stat. 4393 (Oct. 31, 1994). With respect to statistical information, the administrator is charged with developing programs and prescribing regulations to improve the compilation, analysis, publication, and dissemination of statistical information by executive agencies. 31 U.S.C. § 1104.

The administrator of OIRA also reviews policy associated with federal acquisition of information technology, consults with the administrator for federal procurement policy on pilot programs for acquisition of information technology by executive agencies, consults on the use of electronic commerce in federal procurement, and is assisted by the Archivist "in conducting studies and developing standards relating to record retention requirements imposed on the public and on State and local governments by Federal agencies." *See* 40 U.S.C. §§ 11302(k), 11501(a)(1); 41 U.S.C. § 426(d)(3); 44 U.S.C. §§ 2905(b), 3504(h)(3). Federal statutes also require that OIRA's communications regarding collections of information be publicly available and that OIRA provide information to the Comptroller General. 44 U.S.C. §§ 3507(e)(2), 3519. Finally, OIRA works with the Office of Electronic Government "in setting strategic direction for implementing electronic government." 44 U.S.C. § 3602(d), (e).

While these are all important government functions, they do not suggest that Congress intended OIRA to be an office of centralized regulatory review. While OIRA does have functions under statutes, like the Paperwork Reduction Act, that are more directly relevant to rulemaking, those statutes do not significantly expand OIRA's regulatory review authority. OIRA plays no direct statutory role under the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601-612, which requires

federal agencies to analyze their rules for a significant economic impact on small entities. Instead, the RFA gives its limited oversight authority to the Chief Counsel for Advocacy of the Small Business Administration, while OIRA participates in agency review panels and consults on waivers. 5 U.S.C. § 609(b)(3), (e).

In other legislation, Congress delegated the OMB's authority pursuant to the Privacy Act, 5 U.S.C. § 552a, to OIRA in 1980. Pub. L. No. 96-511, § 3, 94 Stat. 2825 (Dec. 11, 1980). More impressively, under a controversial 1996 statute allowing Congress to review agency regulations, OIRA can determine what kinds of rules qualify as "major rules" subject to the Act's provisions. 5 U.S.C. § 804(2). However, this statute may be unconstitutional, and in any case it vests actual authority to *review* "major" regulations with Congress.

OMB and OIRA do play larger roles in the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. §§ 658-658g & 1501 *et. seq.*, which requires federal agencies to assess the effects of their regulations on State, local, and tribal governments and the private sector and to choose the least burdensome regulatory option whenever possible. OMB must certify agencies' compliance with UMRA to Congress and submit annual statements on agency compliance to Congress. However, UMRA gives neither OMB nor OIRA explicit authority to reject agency rules on the basis of noncompliance. Any such implied authority, moreover, would have to be very limited, because an agency can reject the least burdensome option if other laws require such a choice *or if the agency explains its choice*. Moreover, UMRA's judicial review provision states explicitly that inadequacy of compliance with UMRA "shall not be used as a basis for staying, enjoining, invalidating or otherwise affecting such agency rule." 2 U.S.C. § 1571(a)(3).

Thus, OIRA's recent assertions of centralized regulatory review authority cannot rest on its statutory authority, express or implied. Instead, the expansion of OIRA's role has come from the Presidency itself.

The Power of the Presidency

Ronald Reagan was the first President both to staff OIRA and to require Executive-level regulatory review. In Executive Order 12291, “Federal Regulation,” 1981 WL 76014 (Feb. 17, 1981), President Reagan required federal agencies to submit regulatory impact analyses of their major regulations to the Director of the OMB. Four years later, in Executive Order 12498, “Regulatory Planning Process,” 1985 WL 107011 (Jan. 4, 1985), President Reagan required federal agencies to submit plans for their current and future rulemaking activities to the OMB. Active review of federal rulemaking, however, was limited.

The shift of regulatory review from OMB to OIRA, and the seeds of OIRA’s current claims to its regulatory review authority, came (somewhat ironically) from President Clinton’s Executive Order 12866. 58 Fed. Reg. 51735 (Sept. 30, 1993). On February 26, 2002, President Bush issued Executive Order 13258, amending Executive Order 12866 by eliminating the Vice President’s role (and hence strengthening OIRA’s authority), but basically adopting Clinton’s regulatory review structure.

Executive Order 12866 increases OIRA’s role in centralized regulatory review in almost every provision. First, it explicitly identifies OIRA as the repository of expertise concerning regulatory issues, including: methodologies and procedures that affect more than one agency, the executive order itself, and the President’s regulatory policies. Second, Executive Order 12866 requires all federal agencies to prepare a unified agenda for submission to OIRA, including a regulatory plan of the most significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter. OIRA then circulates the plan within 10 days to affected federal agencies and a group of advisors to the President, and notifies the affected agencies and the advisors if the administrator believes that a planned regulatory action of an agency may be inconsistent with the President’s priorities or the principles set forth in the executive order or may

be in conflict with any policy or action taken or planned by another agency.

Third, Executive Order 12866 requires federal agencies to periodically review their regulations to make them more effective, less burdensome, or in greater alignment with the President’s priorities and the principles set forth in the Executive order, and the administrator of OIRA is to work in pursuance of those objectives. Fourth, Executive Order 12866 requires federal agencies to provide OIRA with the text of and justifications for every proposed and final significant regulatory action, including a cost-benefit assessment of the rule’s effect. The administrator of OIRA is in charge of reviewing these submissions and can return any regulation to its drafting agency if the regulation is inconsistent with applicable law, the President’s priorities, and the principles set forth in the executive order, or if the regulation conflicts with the policies or actions of another agency.

The potential for OIRA-based centralization of federal rulemaking review, therefore, has been present since 1993, but President Bush’s amendments to Executive Order 12866 do not explain the different roles OIRA has played in the two administrations. Instead, the differences between the Clinton Administration’s use of Executive Order 12866 and the Bush Administration’s use of Executive Order 12866 arise largely from those administrations’ respective attitudes toward regulation in general and the place of executive administrative agencies in federal government in particular. President Clinton’s OIRA adopted a clear policy of deference to the expertise of administrative agencies. In contrast, as the discussion above illuminates, the Bush Administration’s OIRA takes a different approach: federal agency rulemaking is to be closely monitored, directed, and second-guessed.

Separation of Powers

As a result, OIRA is almost single-handedly forcing an administrative law separation of powers issue on the Bush Administration – between the

administration and Congress. As federal courts and legal scholars have long recognized, federal administrative agency rulemaking exists in an extra-constitutional limbo between congressional and executive powers. Black letter administrative law duly reports that federal agencies are creatures of statute, empowered only to the extent that Congress supplies them with authorizing legislation and an “intelligible principle” to work with. As such, federal agencies maintain a link with, and responsiveness to, the public officials duly elected by the people to govern this country. An agency acting outside its statutory authority is acting *ultra vires*, and any regulations it issues in such capacity are void.

However, once Congress establishes statutory regimes for a particular agency, that agency develops expertise in the regulatory bases – scientific, technical, economic – of its various programs. In recognition of the expertise of particular agencies regarding their particularly delegated programs, both Congress and the U.S. Supreme Court have required deference to agencies’ implementations of their authorizing legislation.

OIRA’s increasing – and increasingly active – federal rulemaking review unconstitutionally undermines the established balance between congressional authorization, agency expertise, and presidential influence in favor of completely centralized executive control. With neither statutory authority nor clearly demonstrated expertise over any – let alone *all* – the regulatory matters subjected to OIRA review, OIRA and its newest administrator exercise veto power and agenda power over agencies whose areas of expertise range from health care to public lands to hazardous wastes to emergency procedures to workplace safety to overtime wages to passenger safety in airlines and automobiles, in pursuit of presidential priorities that may or may not comport with congressional intent for particular regulatory programs.

The most disturbing aspect of OIRA’s regulatory review, moreover, is the unreviewability of OIRA’s influence. The final regulations that a federal agency issues are, of course, subject to judicial

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Administrative, Regulatory and Organizational Challenges Facing the New Homeland Security Department

By William S. Morrow, Jr.¹

Described as the most massive reorganization of federal government since the creation of the Department of Defense in 1947 – affecting 22 agencies and some 170,000 employees – the Department of Homeland Security (DHS), came into being on January 24, 2003, pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. It is the first cabinet level department charged with the overarching mission of preventing and mitigating terrorist attacks on American soil.

The Act establishes the posts of secretary, deputy secretary and five under secretaries who, subject to Senate confirmation, oversee five directorates – Border and Transportation Security (combining the Transportation Security Administration, U.S. Customs Service, the border security functions of the Immigration and Naturalization Service, Animal & Plant Health Inspection Service, and the Federal Law Enforcement Training Center), Emergency Preparedness and Response, Science and Technology, Information Analysis and Infrastructure Protection, and Management. The Act also incorporates within DHS the U.S. Coast Guard, Secret Service, Bureau of Citizenship and Immigration Services, Office of State and Local Government Coordination, Office of Private Sector Liaison, and Office of Inspector General.

This agglomeration of agencies, each with its own set of rules and procedures and unique culture, raises a host of administrative, regulatory and governmental organization issues that likely will take years to resolve. The Section's new Homeland Security Committee wasted no time contributing to the search for solutions by holding a panel discussion at the J.W. Marriott in Washington, DC, on

March 31, 2003. The panelists included members of academe, government and private industry. Section Chair Neil Eisner and Committee Chair Lynne Zusman provided opening remarks.

Facing Broad Challenges

Ed Badolato is a retired US Marine Corps Colonel with experience heading small unit operations against terrorists in Asia, Africa, the Middle East, and Latin America. As a deputy assistant secretary of energy for Presidents Ronald Reagan and George H.W. Bush, he was the principal architect of the U.S. government's readiness and response plan for protecting the nation's critical energy infrastructure and nuclear weapons facilities against terrorist attack. Badolato sees several challenges facing DHS in the areas of organization, intelligence, and budget.

The need to quickly ramp up staffing not surprisingly has generated a lot of problems according to Badolato. He cited the Transportation Security Administration (TSA) as an example: "These are new people with no airport experience, mostly local sheriffs and the like." The backlog in criminal background checks of airport security personnel, recently announced cuts in the number of TSA passenger screeners and the desire of some airport managers to return to the use of private security forces have only added to the new department's headaches. "It has been like mixing on-the-job training with a retirement home for Coast Guard officers," he said.

As for DHS's intelligence function, he believes the department will have difficulty achieving its objectives as long as source intelligence agencies, such as the CIA and FBI, continue to resist sharing information with each other. "They

need to settle their fight," said Badolato. In the meantime he feels DHS must quickly adapt to the new practice of using domestic intelligence to prevent terrorist attacks rather than investigate crimes.

Of course, DHS's best efforts will be for naught if it does not receive adequate funding. Badolato questions whether the agency has the budget to properly carry out its mandate. "The \$38 billion appropriated for 2003 is only one-third to one-half of what is needed," he said, citing an estimate by the accounting firm of Deloitte & Touche that puts private sector spending on securing critical infrastructure at \$76 billion a year. The administration's request for \$41.3 billion to support domestic efforts against terrorism in 2004, including \$36.2 billion for DHS, is a step in the right direction but, if Badolato is right, probably a little more timid than the private sector would like to see.

Taking Care of Basics

DHS interim general counsel Lucy G. Clark assured those assembled that government attorneys have been very busy drafting the legal instruments necessary to establish the department, transfer existing agencies and parts of agencies encompassed by the Act and vest the secretary with the authority and responsibility for overseeing those agencies. See Exec. Order No. 13286, 68 Fed. Reg. 10,617 (Mar. 5, 2003); Exec. Order No. 13284, 68 Fed. Reg. 4,075 (Jan. 28, 2003); see also 68 Fed. Reg. 10,921 (Mar. 6, 2003) (regarding transfer of INS).

¹ Editor, Administrative & Regulatory Law News; Vice Chair Homeland Security Committee.

She noted that DHS had begun laying the groundwork for carrying out its mission by publishing three interim final rules regarding: (a) the protection of national security information classified under Executive Order No. 12958, 68 Fed. Reg. 4,073 (Jan. 27, 2003); (b) the production or disclosure of official information in connection with legal proceedings, 68 Fed. Reg. 4,070 (Jan. 27, 2003); and (c) Freedom of Information Act and Privacy Act procedures. 68 Fed. Reg. 4,055 (Jan. 27, 2003).

Clark informed the audience that the assimilation of agencies was being facilitated through the creation of working groups on personnel, process, procurement and ethics and that DHS would continue to build on the achievements of those groups. But Clark cautioned that ensuring homeland security would require a national, not just a federal, effort: "Facilitating a safer more secure nation cannot happen just inside the Beltway."

Al Martinez-Fonts, special assistant to Secretary Ridge for the private sector, echoed Clark's remarks: "What we mean by national is federal, state and local governments, and private sector entities working together." Martinez-Fonts's office is charged with working with all private sector companies, not just those with critical infrastructure facilities. He envisions that his office will issue guidance statements after consulting with private sector firms. Industry associations will then refine those for their members, and individual companies can use them in determining how best to protect themselves. Said Martinez-Fonts, "My job is to ensure that the concerns of the private sector are known to the secretary, to advise him on how our policies impact industry, and to come up with practices that will, at the end of the day, make America more secure."

Using Built-in Rulemaking Powers

Although agency policy statements in the form of written guidance have their place, they can become a crutch for an agency looking to sidestep the rigors of rulemaking. Committee vice chair Tom Sargentich – professor of law

and director of the LL.M. Program on Law and Government at American University Washington College of Law – urged that the secretary resist the temptation of setting policy through nonbinding statements and instead take advantage of his inherited rulemaking powers and the expertise of those in the transferred agencies who have experience in promulgating binding regulations through notice and comment rulemaking. He further cautioned against overuse of the Administrative Procedure Act's notice-&-comment exemptions for procedural rules, interpretive rules and emergencies. See 5 U.S.C. §553(b). Sargentich acknowledged that this will require some intra-department harmonization across the various directorates and divisions, but the result will be a more transparent and accountable agency.

Dan Cohen, chief counsel for regulation in the general counsel's office at the U.S. Department of Commerce sounded a similar theme, stressing the importance of "getting each agency to cooperate vertically and horizontally." Cohen oversees the legal review of all regulatory actions proposed by the various administrations, agencies and bureaus within Commerce, coordinating rulemakings proposed by the various components and making sure they reflect department policy. Cohen warned of the culture clash that is bound to result from compacting so many disparate agencies under one roof. Of course, no one said it would be easy.

Homeland Security Committee vice chair Jim O'Reilly, Visiting Professor of Law, University of Cincinnati College of Law, recommended that DHS make good use of its rulemaking powers to help preempt the inevitable challenges to its information access policies. "DHS needs to use the rulemaking vehicle to air and articulate what they aspire to do. It would be foolish economy to postpone the policy issue until the lawsuits begin."

Managing Information

Several panelists commented on the daunting task the department faces in managing information ebb and flow. As

Badolato put it, "The department must carefully think through how it will obtain and disseminate intelligence, how it will share criminal information, without unduly affecting individual liberties."

Sargentich commented that "the intelligence function will drive the department toward secrecy while the coordination function will push it toward openness." A prime example of this tension is the paradox facing Martinez-Fonts. Section 214 of the Act clearly contemplates that data and other information gathered from the private sector to carry out the department's infrastructure protection function will be kept confidential; yet, the guidance developed from that data and information must be made public if it is to have any benefit.

Section 214 of the Act exempts from disclosure under FOIA critical infrastructure information voluntarily submitted to DHS for use by the agency "regarding the security of critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, reconstitution, or other informational purpose." This new exemption (FOIA Exemption 3) is triggered if the submitter includes an express statement invoking protection. Section 214 also preempts disclosure under State and local FOIA statutes if such information is shared with a State or local agency.

DHS has published a notice of proposed rulemaking on procedures for handling critical infrastructure information that states the department will rely on the discretion of the submitter as to whether the volunteered information meets the statutory definition. 68 Fed. Reg. 18,523 (Apr. 15, 2003). O'Reilly, a former Section chair and current chair of the Government Information and Right to Privacy Committee, expressed concern about the potentially broad reach of this section of the Act. "The statute could reach thousands of types of submissions," he said.

O'Reilly also noted the coming storm under Section 312 of the Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383, 2390 (Nov. 27, 2002), which prohibits DHS and other agencies in the intelligence community from making agency

records available to foreign governments and their representatives. O'Reilly said this effectively bars law firms and others who represent companies owned by foreign governments from access to DHS records. He predicts a lot of litigation over who is a "representative" and whether internal walls within a firm might shield those who do not directly serve a foreign governmental interest.

Generally, O'Reilly advises that pre-emption of State FOIA laws be used as a last resort, that DHS seek new privacy legislation that would protect against misuse of information and data gathered by the agency from private databases and that DHS adopt alternative dispute resolution rules for resolving all but the toughest conflicts.

Federal & State Coordination

The Office for Domestic Preparedness (ODP) has led the effort in lending federal assistance to states and U.S. territories in the war on terror since 1998. Financial assistance available from ODP to the states has increased from \$12 million in 1998 to nearly \$600 million in the current fiscal year. ODP officially transferred from the Department of Justice to DHS on March 1 of this year.

DHS has pledged that assistance to state and local jurisdictions in the form of risk and needs assessments, equipment grants, training, exercise support and technical assistance will be among the

program's top priorities. Indeed, the administration's budget request for 2004 includes \$3.5 billion for OPD to train and equip first responders. But some local officials, like committee vice chair Dave Maddox, County Attorney for Culpeper County, Virginia, are unhappy with the delay in federal funding. "Individual states are developing strategies for responding to attacks involving weapons of mass destruction, but the implementation of those strategies depends on federal funding," said Maddox.

Maddox is a realist, recognizing that it will take years for the new department to iron out its organizational issues, particularly in the arena of federal/state relations. "Homeland Security personnel may have trouble shifting from a natural disaster paradigm to a terrorism paradigm," he said. At the same time, he is an optimist, pointing to the strong relationship that has developed between the states, on the one hand, and the Centers for Disease Control and Federal Emergency Management Agency (FEMA), on the other. Above all, Maddox said, the relationship between DHS and the States needs to be one of "collaboration," not "top-down" management.

Ernest Abbott, former general counsel of FEMA during the Clinton Administration, and founder and principal of FEMA Law Associates, PLLC, emphasized the responsibility the

ABA bears in assisting state and local government lawyers who must advise their clients on the parameters and constraints that attend this important exercise of police powers.

He noted that the ABA Task Force on Emergency Management and Homeland Security has put together a "Draft Checklist for State and Local Government Attorneys to Prepare for Possible Disasters," self-described as "a comprehensive checklist of the types of legal issues that attorneys normally face when dealing with preparedness, response, recovery, and the mitigation/prevention of non-natural and natural disasters." <http://www.abanet.org/adminlaw/upcoming_programs/2003/checklist.pdf>

Abbott stressed the need for legal advisers to be proactive, cautioning that the short response times when dealing with disasters do not permit spur-of-the-moment legal assessment and analysis. Abbott said this is where the checklist comes in. The Checklist advises that "before a disaster strikes, legal counsel should be prepared for the role they may be asked to play, anticipating issues, policies, and legal questions that may arise, identifying the various actors with which they may be involved, and knowing how counsel may need to relate to and advise them." Wise counsel for us all. ◆

The Bush Administration's Use and Abuse of Rulemaking, Part I: The Rise of OIRA

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review. However, the regulations that the truly expert agency would have issued but for OIRA – regulations that might well have comported more closely with congressional intent and more completely achieved congressional objectives for particular statutory

programs – disappear into the miasma of regulatory revision, largely unavailable, legally, for comparison, so long as the regulations actually issued can survive the arbitrary and capricious or Chevron standard of review. OIRA has thus assumed a unique – and dangerous –

role in administrative law, that of the unreviewable reviewer, whose influence is widely felt but never challenged. As the increasingly final voice in the implementation of Congress's statutory goals, OIRA has exceeded its – and the Executive's – constitutional limits. ◆

SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2003 ANNUAL MEETING

The Argent Hotel San Francisco • 50 Third Street • San Francisco, California 94103
Ph: 415-974-6400 • Reservations: 877-222-6699

Program Chair: Fred and Andrew Emery

Friday, August 8, 2003

Sarbanes-Oxley, Revisited One Year Later, An Update

10:00 – 12:00 p.m. • Argent Hotel • City, 3rd Level

• (CLE Credit Available - \$10 for members, \$15 for non-members)

The Sarbanes-Oxley Act has been called the most significant amendment to the federal securities laws since they were initially passed. The Act grants new powers to the SEC and imposes significant obligations on issuers, officers, directors and their professional advisors — auditors and attorneys. Since its passage numerous rules have been adopted and more are under consideration to implement various provisions of the Act.

A leading panel of experts from government and the private sector will discuss the implications of the Act and the various rules which have been adopted and proposed and the their impact on companies, officers and directors and the accountants and attorneys who advise them.

Moderator: Tom Gorman, Managing Partner and Chair of Litigation and Trial Practice, Porter Wright Morris & Arthur, Washington D.C.

Panelists:

- David Kornblau, Chief Litigation Counsel, Division of Enforcement, SEC, Washington, D.C.
- Judge Stanley Sporkin, Weil, Gotshal & Manges LLP, Washington, D.C.
- Members of SEC's Division of Enforcement (TBA)

Emergency Management and the New Federalism

2:00 – 5:00 p.m. • ABA CLE Center Moscone Convention Center South, Room 222, Mezzanine Level East • (Ticket Price \$75.00)

Current efforts to prevent, prepare for, and respond to acts of terrorism and other catastrophic events are creating new tensions in the federal relationship with state and local governments. Across a wide range of traditionally local services — police, fire, public health, emergency management — the federal government is asserting new powers to direct state and local governments to take action either to prepare for potential threats or in response to events that are catastrophic or potentially so. The panel will attack these issues from widely different perspectives: different levels of government (federal, state, and local); different types of emergencies (public health emergencies, terrorist attack, and natural disaster), and disparate type of involvement in the issues: responsible decision maker, legal representative, and academic observer.

Primary Sponsor: Section of State and Local Government Law

Co-Sponsor: Section of Administrative Law and Regulatory Practice; *Liaison:* Lynne Zusman, Lynne K. Zusman & Associates, P.C., Washington D.C.

Moderator: Ernie Abbott, FEMA Law Associates, PLLC, Washington, D.C.

Panelists:

- Gene Mathews, Chief Counsel, Centers for Disease Control, Atlanta, GA
- David Zocchetti, Attorney, California Office of Emergency Services, Sacramento, CA
- Arn Howett, Harvard University Kennedy School of Government, Cambridge, MA (Invited)
- Mike Brown, DHS Under Secretary for Emergency Preparedness and Response (Invited)
- Jeff Griffin, Regional Director of FEMA, San Francisco, CA (Invited)
- Mara Rosales, Deputy Director for Regulation and Legislation, San Francisco, CA
- Otto Hetzel, Bethesda, MD

Bioethics in a Time of War

1:00 – 4:00 p.m. • Continental Parlor 3, Ballroom Level, Hilton San Francisco

The recent war in Iraq, and the ongoing war on terrorism, have included efforts to protect against the use of biochemical weapons and other weapons of mass destruction. These efforts raise challenging questions of bioethics, including questions concerning the military's testing and potential use of biochemical weapons, the allocation of vaccines or medical assistance in emergency situations, and the extent of public disclosures about possible biological risks. This panel will explore the special application of bioethics principles in the context of war and how war, in turn, may shape the principles of bioethics.

Primary Sponsor: Special Committee on Bioethics and the Law

Co-Sponsor: Section of Administrative Law and Regulatory Practice

Panelists:

- Prof. Larry Palmer, University of Louisville
- Prof. Victoria Sutton, Texas Tech. University School of Law
- Erin D. William, Exec. Director, Foundation for genetic Medicine, Inc.

Section Reception/ Dinner

7:00 – 9:00 p.m. • Carnelian Room • Bank of America Building, 555 California St., San Francisco, CA 94104

Saturday, August 9, 2003

Membership Meeting

8:00 a.m. – 9:00 a.m. • Argent Hotel • Civic, 2nd Level

Section Continental Breakfast

8:00 – 9:00 a.m. • Argent Hotel • Metropolitan III, 2nd Level

Council Meeting

9:00 a.m. – 11:30 a.m. • Argent Hotel • Metropolitan III, 2nd Level

Publications Committee Meeting

12:00 p.m. – 1:30 p.m. • Argent Hotel • City, 3rd Level

An Insiders' Guide To Administrative Law Jobs In The Private Sector

2:00 – 4:00 p.m. • Argent Hotel • City, 3rd Level

The Section of Administrative Law and Regulatory Practice and the Young Lawyers and Law Student Divisions are jointly-sponsoring this program, the third in a series about jobs in administrative law. The panelists for this program are experienced private practitioners, who will talk about how to find jobs in the private sector, the benefits of employment, and the issues faced by attorneys who work in private practice. Information from the prior programs are available at the Section web site: www.abanet.org/adminlaw

Moderator: Jack Young, Sandler Reiff & Young, Washington D.C.

Program Chair: Neil Eisner, Section Chair, Washington D.C.

Panelists:

- Sharan Levine, Levine & Levine, Kalamazoo, MI
- David Frederick, Kellogg, Huber, Hansen, Todd & Evans, Washington D.C.
- John Cooney, Venable Baetjer Howard & Civiletti LLP, Washington D.C.

Privacy Pays: Making Privacy Part of the Corporate Culture

2:00 – 3:30 p.m. • ABA CLE Center Moscone Convention Center South • Room 300, Esplanade Level

Primary Sponsor: Section of Science and Technology Law

Co-Sponsor: Section of Administrative Law and Regulatory Practice

All companies face a breathtakingly broad range of privacy issues that could dramatically affect their operations, given the extent to which data about individuals underpins virtually everything companies do. The trend among leading companies is to adopt a reasoned and comprehensive strategy that makes

privacy part of the corporate culture. Hear a panel of distinguished experts discuss why privacy has become the new business imperative, and gain practical, timely advice on how companies can make privacy part of everything they do.

Moderator: Ruth Hill Bro, Baker & McKenzie, Chicago, IL

Panelists:

- Ann Cavoukian, Ph.D., Information and Privacy Commissioner/Ontario, Toronto, Canada
- Ivan K. Fong, General Electric Company, Fairfield, CT

President's Reception (Optional Non-Section Event)

7:00 – 10:00 p.m. • San Francisco City Hall

Chair's Reception

10:00 p.m. • Argent Hotel

Sunday, August 10, 2003

Section Continental Breakfast

8:00 – 9:00 a.m. • Argent Hotel/Metropolitan III, 2nd level

Council Meeting

9:00 a.m. – 11:00 a.m. • Argent Hotel • Metropolitan III, 2nd level

Margaret Brent Luncheon

11:30 – 1:30 p.m. • Moscone Convention Center • Esplanade Ballroom

The Ombuds: Corporate Governance, Sarbanes Oxley, One Solution

8:00 – 10:00 a.m. • Fairmont Hotel • French Room, Lobby Level

Primary Sponsor: Dispute Resolution Committee of the Business Law Section

Co-Sponsor: Administrative Law and Regulatory Practice
Ombuds offer one way to meet the Sarbanes Oxley requirements, confidentially, for those persons who would otherwise be reluctant to provide information in the corporation. This program describes the corporate governance today.

Moderator/Program Chair/Speaker: Sharan Levine, Counsel to Ombuds, Levine & Levine, Kalamazoo, MI

Panelists:

- Deborah Cardillo, Ombuds, Eastman Kodak Company, Rochester N.Y.
- Brian O'Connor, legal counsel, Eastman Kodak Company, Rochester N.Y.
- Gary Yamashita, Ombuds, ChevronTexaco Corporation, San Ramon, Ca.

Calendar of Events

Date	Event	Location
November 6-8, 2003	2003 Administrative Law Conference	The Sofitel Hotel, Washington, DC
Feb 4-10, 2004	2004 Midyear Meeting	San Antonio, Texas
May 6-9, 2004	2004 Spring Meeting	Kiawah Island Resort, Kiawah Island, SC
August 5-10, 2004	2004 ABA/Section Annual Meeting	Atlanta, GA
TBA	2004 Administrative Law Conference	The Sofitel Hotel, Washington, DC

Notice, Comment, and the Regulatory State: A Case Study from the USA PATRIOT Act

continued from page 4

Conclusion

In making these observations, I do not mean to suggest that notice and comment rulemaking is a failure. It is simple, efficient, and seems intuitively fair. If we take a straightforward but narrow view of democracy, where legislatures play the key oversight role and most laypeople are uninterested and ill-informed about regulatory policy, then the *chance* to participate is the only thing that administrative law owes the people. Notice and comment rulemaking seems to offer that in spades: anyone can comment about any regulation, regardless of whether they are on a first-name basis with a legislator. No doubt that is worth something. But how much is it worth? The question gets harder once we recognize three important things illustrated by the Section 314 case study.

First, in times of crisis it becomes especially difficult to rely on public interest groups and agency lawyers to raise the gamut of issues that society

might fairly consider “important” in a rulemaking proceeding.

Second, even if we were not in a time of crisis, it remains true that people’s ability to participate is not driven just by their desire to do so or even by the importance of the underlying concern they raise. It is affected critically by the related qualities of legal sophistication and ability to solve transaction cost problems to organize into coherent interest groups. This means that if sophisticated interest groups don’t take a particular concern seriously, neither will the agency. Notice-and-comment procedures do little if anything about this.

Third, the experience with Section 314 should serve as a reminder that there is more than one kind of administrative democracy to which we can aspire. We might want to live in a democracy where people have a chance to contribute their views to the agency with some help in case they lack sophistication, because we think it’s valuable not to leave everything in the hands of

either interest groups, elected politicians, or agency officials. Perhaps different kinds of democracy are better for some issues than for others, and in any case we might find that deliberative polling and other techniques can open up promising alternatives to supplement notice-and-comment rulemaking.

In short, the new FinCEN regulations work an important change in the law by making it a lot easier for law enforcement to locate private financial information and obtain it. Regardless of whether one believes this change to be a good idea, the larger issue is how the public should be involved in making these regulatory choices. Notice and comment rulemaking seems like a natural answer. Like the rest of the American regulatory state, the notice and comment process is a work in progress. Thinking about how to improve that process may not seem urgent, but it is important – indeed, no less so than deciding what to do about the USA PATRIOT Act itself. ◆

Section News & Events



New Section Director

Kimberly Knight has joined the ABA as director of the Section of Administrative Law and Regulatory Practice. Kim comes to the ABA with an extensive background as an association executive. Her most recent experience includes serving as Executive Director of the Women's Bar Association of D.C. and its related Foundation. Prior to that, Kim was direc-

tor of marketing and membership for the 10,000-member American Association for Higher Education, where she held responsibility for all event marketing, member services, sponsorship revenue, web development, and the sales and marketing of over 30 publications. Kim has also held management positions with the Newspaper Association of America, and with the Environmental Industry Associations. Kim received her bachelor's degree from the University of Miami, and is currently enrolled in Georgetown University's Non-Profit Management Graduate Certificate program. Kim is an active member of the National Association of Bar Executives and the American Society of Association Executives, serving on numerous councils and committees for both organizations. Kim may be reached at 202-662-1665, knightk@staff.abanet.org

Executive Committee Emergency Powers

Chair-Elect Bill Funk proposed a bylaw revision to deal with a recurring problem: the need to adopt a Section position on a matter within severe time constraints between meetings of the Council. Funk described two occasions since the last Council meeting where such a matter arose. Under the current bylaws, there is no Executive Committee unless the Council creates one, and its only function is to approve certain expenditures; there is no recognition of the use of email for voting; and it is unclear what should be done between meetings if less than a majority of the Council votes on an issue. Funk proposed an amendment that would create an Executive Committee consisting of those members of the Council who have historically been reflected as on the Executive Committee (apparently without any rule basis) and that would create a mechanism for adopting Section policy between meetings. That mechanism would involve transmitting the proposed policy to the voting members of the Council by email or other effective means of communication. The Council members would have at least 7 days in which to vote against the policy. If a majority of the Council does not vote against the policy, and a majority of the Executive Committee votes for it, the policy is adopted. Any policy so adopted would be reported to the Council at its next meeting. This amendment was discussed by the Council and with some minor word changes was adopted by acclamation. The next step is to submit the bylaw change to the entire membership at the Annual Meeting and then to the Board of Governors for approval.

Report of the Vice Chair

Randy May, Vice Chair, reported that he would like to see the Section initiate, at least in an informal fashion, a mentoring program that would encourage and facilitate the involvement in Section activities of younger and newer members. The idea would be to pair up persons who wish to participate more actively in Section projects with more experienced "old hands" who would serve as mentors. May asked for those who would be willing to serve as mentors to let him know, as well as those who would like to have a mentor.

In his capacity as Program Chair for the Fall 2003 Administrative Law Conference, May asked persons interested in putting on programs during the conference to contact him with their ideas. Because of the growing popularity of the Fall Conference and the intense interest demonstrated in past years by Section Committees in putting on a variety of programs, May reminded everyone that it is important to develop ideas and submit program plans early.

Publications Committee Report

Randy May announced that Jim O'Reilly, former chair of the Section, is the new Publications Committee Chair. May reported that Cass Sunstein's book, *The Cost-Benefit State*, has been selected as one of the "28 ABA Best Books" and will be included in a special best books promotion. A review in a recent edition of the Law Library Journal called this Section book "a well-conceived and well-executed analysis" that is "very intelligent and intelligible at the same time."



Section Vice Chair Randy May (at left) and wife Laurie with Section Chair Neil Eisner at reception in Old San Juan.

May reported that the Section's two latest books, *A Guide to Federal Agency Adjudication* edited by Michael Asimow and *A Guide to Medicare Coverage Decision-Making and Appeals* edited by Eleanor Kinney are selling

well and are both excellent new resources for administrative lawyers. He reported that the most recent annual edition of the *Developments in Administrative Law and Regulatory Practice* had again received widespread praise for its timeliness and comprehensiveness.



Homeland Security Committee Vice Chair Michael Aisenberg and wife Brandi at reception in Old San Juan.

Corporate Sponsorship Guidelines

How and under what circumstances should the Section accept funding from corporations for its programming and other projects? That is the subject of a working group of the Section chaired by University of Colorado Law Dean Hal Bruff. Under the direction of Dean Bruff, the group just finished a report setting forth some principles for consideration, and the report was presented at the Spring Council Meeting in San Juan for comment in the hope that formal standards could be developed and adopted some time thereafter.

The report makes several key points. First, because a number of Section members are government officials and employees, sponsorship opportunities should be scrutinized carefully to avoid conflicts and the appearance of impropriety. Second, in evaluating whether a sponsorship might be appropriate, there may be some value in considering how the prospective sponsor views its relationship with our members: as marketing general goods and services (e.g., online computer research tools, books, etc.); as a means of supporting robust policy discussion about legal issues; or as an opportunity to directly and consciously shape opinion and drive policy in a direction that would inure to the benefit of the company (e.g., pending legislative, rulemaking, or adjudicatory activity). Third, the duration of the sponsorship (one event versus other arrangements) and other similar details are important factors in considering how much of a relationship or tie the Section wishes to have with sponsors. In all, the report offers important insights on the need to capitalize on development opportunities and thereby expand our range of programming without compromising our independence.

The Council heard a brief presentation about the report and offered several additional observations and comments. One member suggested, for example, that there be an institutionalized sponsorships committee with staggered terms in order to ensure that there is adequate information about previous sponsorship prospecting and some continuity in activity. Another Council member cautioned that government officials are going to be constrained in terms of the kinds of fundraising they can undertake, and, therefore, a good cross-section of individuals with different professional backgrounds should be recruited to assist with sponsorship prospecting.

Further suggestions about developing the Section's sponsorship policy should be directed to Dean Hal Bruff (bruffh@stripe.colorado.edu).

OMB Guidelines on Regulatory Cost-Benefit Analysis

The council approved the submission of Section comments under blanket authority on *OMB's Draft 2003 Report to Congress on the Costs and Benefits of Federal Regulations*, 68 Fed. Reg. 5,492 (Feb. 3, 2003).

Chapter I of the OMB Draft Report presented the agency's annual estimate of the costs and benefits of federal regulations.

The Section urged OMB to explain, in the final draft, the reasons for the appearance of large discrepancies between OMB's and agencies' estimates of the costs and benefits of particular regulations.

Chapter II of the OMB Draft Report presented a number of recommendations for developing better regulation including, in Appendix C, a set of revised guidelines on the proper conduct of agency cost-benefit analysis of major regulations. The Section commented extensively on these guidelines. The Section began by urging caution in the use of so-called "Delphi methods" to elicit expert "guess-timates" about risk probability distributions that are fundamentally uncertain. The Section urged OMB to encourage agencies to identify any irreversible costs and benefits of regulation (or lack thereof) and to analyze the likely impact of regulatory flexibility mechanisms – such as waiver and variance provisions – on expected costs and benefits of individual rules.

The Section opposed the use of so-called contingent valuation methods to adduce empirical risk-to-life values, on grounds that such methods are intrinsically unreliable and other, preferable methods are available. The Section noted that efforts to adduce a statistical value of a life year (VSLY), for purposes of calibrating the value of a life by age of death, are both politically controversial and statistically unreliable at this point, and need careful vetting, with experts and the public, before being put to widespread use.

The Section generally approved of the use of labor-market wage-risk studies as a starting point for estimating the value of risk to life, but noted that such studies are only a starting point. Values derived from such studies need to be adjusted to reflect important differences between the values that labor-market studies elicit, on one hand, and the values relevant to social regulation, on the other. These include differences in: (a) individual risk tolerance, (b) voluntariness of risk, (c) real income distribution and growth, and (d) the "dread" associated with various kinds of illness and/or death. Current practice simply ignores all these required adjustments, as do the draft OMB guidelines. This is clear error. The differences cited above need to be taken into account. In some cases, the empirical literature may suggest an appropriate numerical adjustment, while in other cases heuristic policy judgments may be required. Such judgments should be based on an open and inclusive process of public participation.

The Section strongly endorsed OMB's recommendation that all monetized benefits estimates be accompanied by disclosure of the raw data – the number of lives saved and timing of benefits – so to render transparent the impact of value and discount rate assumptions on the analysis.

Finally, the Section recommended that OMB issue a guideline for itself: to disclose all OMB recommendations for changes in draft rules, upon publication of the final rule, if and to the extent that such recommendations are accepted by the agency. ◆

By William Funk¹

Constitutional Limitations on State Damage Awards

As this issue of the News goes to press, none of the high profile Supreme Court cases – affirmative action, campaign finance, gay rights – have been decided. To those in business, however, the Court's latest punitive damages case may be the last shoe dropping. Even as legislatures struggle and experiment with "tort reform," the Supreme Court has been experimenting with constitutional limits on punitive damages. Initially, the Court rejected claims that the Excessive Fines Clause in the Eighth Amendment or federal common law limited punitive damages. *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). Not long afterwards, however, the Court suggested that the Due Process Clause prescribed some limit on punitive damages, see *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), but it was not until *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), that the Court found a punitive damages award to violate due process. There the Court applied what have come to be known as the "Gore factors" and found that a manufacturer's nondisclosure of a re-paint of a new vehicle justifying \$4000 in compensatory damages could not support a \$2 million punitive damage award. In *State Farm Mutual Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003), the facts were a bit more unsettling and resulted in a \$1 million compensatory damages award and a \$145 million punitive damages award.

The Idaho court had found that State Farm had engaged in a long-term national scheme, unlawful under Idaho law, to cap payouts on claims and that State Farm went to extraordinary lengths to cover up its scheme, including document falsification and destruction. The Idaho court concluded that State Farm's policies were "callous, clandestine, fraudulent, and dishonest." In the Campbells' particular case it involved repeated bad faith rejections of settlement, dishonest reports, an initial refusal thereafter to cover the excess liability returned in the judgment, and the unwillingness to post a supersedeas bond to allow Campbell to appeal the judgment. The *Gore* factors require a court to consider the punitive damage award in light of: the degree of reprehensibility of the defendant's conduct, the disparity between the harm suffered by the plaintiff and the award, and the difference between the award and the civil penalties authorized in comparable cases.

The Supreme Court by a 6-3 margin, in an opinion by Justice Kennedy, reversed the Idaho court. Whereas the Idaho court had considered as part of the reprehensibility factor the nationwide actions of State Farm, the Supreme Court indicated that it was error for the Idaho court to punish State Farm for its activities outside of Idaho. A state does not "have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's

jurisdiction." Moreover, the Court said that much of the evidence of State Farm's nationwide policy did not directly relate to the handling of third party claims – the circumstance in the Campbells' case – but rather to its capping payouts regardless of the merits in all types of claims, including first party claims. To punish State Farm for "unrelated" bad actions was not proper. As to the second *Gore* factor – the relation between the harm suffered and the punitive damage award – the Court concluded that "[o]ur jurisprudence . . . demonstrate[s] . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." While it held open the possibility that a higher ratio might be upheld "where 'a particularly egregious act has resulted in only a small amount of economic damages,'" it said that "[t]he converse is also true." When, as here, "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." In addition, while the Idaho court had supported the ratio in this case both because State Farm would only in the rarest of cases get caught in its wrongdoing and because of its great wealth, the Supreme Court found neither of these considerations related to the harm suffered by the Campbells. Finally, the Court found the third factor – the relation between the award and possible civil penalties – did not support the \$145 million award. While the Idaho court had found that State Farm's actions could subject it to criminal penalties, as well as loss of its business license, and civil penalties of \$10,000 for each fraudulent act, the Supreme Court stated that the difference between civil and criminal penalties in terms of the procedural requirements and burdens of proof suggest that it is inappropriate to consider possible criminal penalties in the context of justifying punitive damages. Moreover, the actions that might lead to loss of its business license or multiple fraud cases did not involve the Campbells. Thus, State Farm would only have been subject to one possible \$10,000 civil penalty for the action punished here.

Justices Scalia and Thomas dissented separately, stating respectively that neither the Due Process Clause nor the Constitution generally constrain punitive damage awards. Justice Ginsburg likewise dissented on the same ground but also went on at some length to argue that even under the *Gore* factors the award in this case should have been upheld.

As Justice Ginsburg noted, this case differs from the Court's prior punitive damages cases in that it apparently rejects the presumptive validity of state court judgments in favor of a more bright-line ratio rule. Moreover, the Court's rejection of consideration of the defendant's wrongdoing in other states and of the defendant's wealth, long understood as appropriate considerations in the calculation of punitive damages, further

¹ Professor of Law, Lewis & Clark Law School; Section Chair-Elect; and Contributing Editor.

undercuts justifications for larger punitive damage awards. In *Gore* the Court tested the water of constitutionalizing punitive damage limits; in *State Farm* it has dived fully in, imposing constitutionally driven radical tort reform, a swan dive or belly flop, depending upon your point of view.

Constitutionality of State Medicaid Leveraging

State Farm suggests that the Court is not favorably inclined to legal regimes that further state regulation of national markets. This would be just the flip side of the coin from the Court's recent federalism cases in the Commerce Clause area, which stress distinguishing that which is local from that which is national, *see, e.g., Lopez v. United States*, 514 U.S. 549 (1995), so that Congress regulates only that which is national. Other cases this term reflect this same tendency to decide cases based upon the Court's view of the proper regulatory authority. For example, in *Pharmaceutical Research and Manufacturers of America v. Walsh*, 123 S.Ct. 1855 (2003), the Court faced one of a growing number of state plans to control the price of drugs in a state through its leverage over drug availability under federal Medicaid. In other words, a state wishes to regulate a local matter, local prices, through use of a national program.

In order to save costs under the Medicaid program, Congress requires drug companies who wish to participate in Medicaid to agree to pay specified rebates on outpatient Medicaid prescriptions of their drugs. If drug companies so agree, participating states must provide coverage for that drug under the state Medicaid plan, but federal law allows states to require as a condition of coverage that any prescription of a drug must have prior approval before it is dispensed. Drug companies loathe any prior approval requirement for one of its drugs, because it puts that drug at a competitive disadvantage compared to similar drugs that do not require prior approval. In *Pharmaceutical Research* Maine had established the Maine Rx program under which drug companies participating in Medicaid in Maine would have to provide the same rebates for non-Medicaid prescriptions as they provide for Medicaid prescriptions, or else Maine would require prior approval *under the Medicaid program* for prescriptions of that drug. As viewed by the drug companies, Maine was trying to extort rebates in the general market for a prescription drug by threatening imposition of a prior approval requirement on that drug in the Medicaid program. The companies, through their industry association, brought suit claiming that the Maine Rx program violated the Dormant Commerce Clause and was preempted by the federal Medicaid law. The district court granted a preliminary injunction against the Maine Rx program, but the First Circuit reversed.

The Supreme Court affirmed the First Circuit, overturning the preliminary injunction, but the decision engendered five separate opinions. The Court was unanimous that the Maine

Rx program did not violate the Dormant Commerce Clause. Justice Stevens provided the opinion for seven justices, holding that the program neither discriminated against interstate commerce nor constituted impermissible extraterritorial regulation. Justice Scalia separately reiterated his view that the Dormant Commerce Clause should never apply outside of facial discrimination against interstate commerce, and Justice Thomas separately stated his view that the Dormant Commerce Clause "has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."

The preemption issue was more difficult. Three justices (Justices O'Connor and Kennedy and Chief Justice Rehnquist) believed that the trial court had it right; Maine's imposition of the Medicaid prior approval requirements to coerce companies effectively to lower prices for non-Medicaid purposes created an obstacle to the Medicaid program and hence was preempted. Six justices disagreed. The plurality opinion authored by Justice Stevens and joined by Justices Ginsburg and Souter was careful to limit its decision to the context of a preliminary injunction, where the burden was on the companies to show that Maine Rx had no valid Medicaid-related purpose and that the program posed some meaningful obstacle to fulfilling the purposes of Medicaid. The companies had failed to carry that burden, because there were certain ways that the Maine Rx program, although directly benefitting only non-Medicaid patients, might still serve certain Medicaid purposes (e.g., by providing lower cost drugs to low income but non-Medicaid-qualified patients, the program might avoid those patients later coming onto Medicaid rolls). The plurality made clear that it was not addressing a separate issue – the extent to which the Maine Rx program was a significant modification of the state Medicaid program, thereby requiring it to be approved by HHS – but it noted that HHS has taken the position that such state programs must be submitted to HHS for approval.

Justice Breyer generally agreed with the plurality, but he wrote separately to state that the issue whether Maine Rx provided an obstacle to Medicaid or served any of its purposes was a decision best made not by courts but by the Department of Health and Human Services, the agency responsible for administering the Medicaid program. He went so far as to suggest that on remand the trial court might invoke the doctrine of primary jurisdiction to obtain the formal opinion of the Secretary of HHS, which he then said would be subject to considerable deference. Justice Scalia went further. Believing that the preemption claim was essentially a suit to enforce the requirements of the Medicaid Act, he stated that there was no private right of action to enforce such requirements other than under the Administrative Procedure Act, alleging that HHS's failure to enforce the Act was arbitrary and capricious. Justice Thomas suggested that both the plurality and the dissent failed to consider properly the role of HHS under the Act in approving state Medicaid plans. This was a case of "obstacle

preemption,” not express preemption, because the Act did not expressly provide for preemption. This necessarily meant that the statute was ambiguous on the issue, and therefore under *Chevron* the Secretary of HHS’s interpretation of whether Maine Rx stood as an obstacle to the Medicaid program should be upheld if reasonable. Justice Thomas wrote:

Congress’ delegation to the agency to perform this complex balancing task precludes federal court intervention on the basis of obstacle pre-emption — it does not bar the Secretary from performing his duty to adjudge whether Maine Rx upsets the balance the Medicaid Act contemplates and withhold approval or funding if necessary. If petitioner or respondents disagree with the Secretary’s decision, they may seek judicial review.

In short, three justices explicitly believed that the effects of the national implications of this state program should be determined by the federal agency given authority to administer that program, rather than the courts in the first instance. Moreover, the plurality, in the absence of any decision by the federal agency, was unwilling to preclude the state from acting to lower its prescription drug prices.

Ripeness Under the Contract Disputes Act

Among the more traditional administrative law cases is *National Park Hospitality Assn. v. Dept. of the Interior*, 123 S.Ct. — (2003). The National Parks Service has long maintained that its contracts with concessionaires are not subject to the Contract Disputes Act, but the Department of Interior’s Board of Contract Appeals has not bowed to this interpretation and has ruled since 1989 that the concession contracts are subject to the CDA. In 2000, purporting to implement the National Parks Omnibus Management Act of 1998 and after notice and comment, the Service adopted a regulation specifically stating that its concession contracts were not subject to the CDA. See 36 CFR § 51.3 (2002). An association representing concessionaires brought suit challenging this regulation on its face. While the Service prevailed on the merits at both the district and court of appeals level, the Supreme Court held that the issue was not ripe for decision.

Justice Thomas wrote the opinion for the Court. Justice Stevens concurred in the judgment, and Justice Breyer, with whom Justice O’Connor joined, dissented. The Court reiterated the two part test of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967): whether the issues are fit for judicial decision and whether there is hardship to the parties in withholding court consideration. Applying the hardship test first, the Court noted that the rule in question, could not be a “legislative regulation with the force of law,” because the Service has no delegated authority under the CDA. Similarly, because the Service does not administer the CDA, the Court said that the rule could not be an interpretive rule. Consequently, the Court

stated that it considered the rule “to be nothing more than a ‘general statement of policy’ designed to inform the public of NPS’ views on the proper application of the CDA.” As a result, the rule does not impose “adverse effects of a strictly legal kind,” which the Court said is what is normally required for a showing of hardship. Moreover, the rule does not require concessionaires to do anything or forbid them from doing anything; it simply does not affect their primary conduct. They “suffer no practical harm” as a result of the rule.

As to whether the issue is fit for review, the Court conceded that the rule was “final agency action” within the meaning of the APA and that the question was a purely legal question. Nevertheless, the Court believed that further factual development would aid in the resolution of the issues because it was possible that not all concession contracts were the same, so that some might be subject to the CDA and others not. Consequently, the Court vacated and remanded with instructions to dismiss the case.

There are a couple of notable points in the otherwise straightforward opinion. First, the Court began its discussion by indicating that “a regulation is not ordinarily considered a type of agency action ‘ripe’ for judicial review under the APA” until it is applied in a concrete fashion with respect to a party before the court. In other words, pre-enforcement review is disfavored. This is not a new position for the Court, but it is noteworthy that the Court chose to introduce its discussion with this reminder of an oft forgotten rule.

Second, the Court flipped the order, and apparently the importance, of the two *Abbott Labs* factors. As Justice Stevens and the dissent argue, the fitness for review normally is the principal and driving factor. Here, perhaps there was not much hardship to the plaintiffs in deferring resolution of the issue until such time as the Service somehow denied a concessionaire the procedures of the Contract Dispute Act, but it was disingenuous of the Court to suggest that consideration of a rule stating that *no* concession contract is subject to the CDA might be affected by what kind of contract was actually before the court. Justice Stevens’ concurrence in the judgment took issue with the Court that the case was not ripe, but he maintained that plaintiffs lacked standing because they were not suffering any injury from this rule. The injury would only arise when and if they were actually denied the benefits of the CDA in the context of an actual contract dispute. The dissent agreed with the Court that plaintiffs had standing, but believed that the issue was fully fit for determination and that there was at least some hardship to the plaintiffs because, in negotiating contracts with the Service, they would be disadvantaged by not knowing for certain whether potential disputes would be governed by the CDA.

Third, the Court seemed to think that there was some significance to whether the rule was an interpretive rule or a statement of policy. Why such a characterization would affect

the ripeness of the case is entirely unclear, inasmuch as neither type of rule has binding, legal effect; both are merely announcements of the agency's views. Even on the merits it is not clear what the significance of the distinction might be. The dissent disagreed with the Court that the rule was a statement of policy, believing it instead to be an interpretive rule.

Fourth, and perhaps most importantly, both the Court and the dissent agreed that the Service's rule was final agency action within the meaning of the APA. This is quite important, because recent case law governing the meaning of final agency action has usually required the action not only to be final, in the sense of being authoritative and not tentative, but also to have some legal effect on the person seeking review. See, e.g., *Franklin v. United States*, 505 U.S. 788 (1992) ("the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow'"). Here both the Court and the dissent agreed that the rule could not have legal effect, because it was either merely a statement of policy or an interpretive rule. Moreover, the Court seemed to conclude that the rule did not even have any meaningful practical consequence for plaintiffs. Consequently, this conclusion in *National Park Hospitality* that a statement of policy or interpretive rule was a final agency action is likely to be cited to lower courts in the future.

Respect and Deference Under the Social Security Act

Another traditional and even easier administrative law case is *Washington State Dept. of Social and Health Services v. Guardianship Estate of Danny Keffeler*, 123 S.Ct. 1017 (2003), which produced a unanimous opinion authored by Justice Souter. Social Security benefits generally are paid directly to the beneficiary, but the Social Security Administration may pay them to a "representative payee" on behalf of the beneficiary. Social Security regulations give a priority to a child's parent, legal guardian, or relative, but they allow social service agencies also to serve as a representative payee. Those regulations require that the representative payee must expend the funds for the use and benefit of the beneficiary, and they specify that payments made for "current maintenance" are for the use and benefit of the beneficiary. Washington State makes foster care available to certain children through the use of state funds, but it tries to recover those costs to the extent it can from the natural parents or, when available, from public benefits such as Social Security. Washington in fact would pay the foster parents according to a set schedule for the current maintenance of the child, but then it would reimburse itself from the Social Security funds received.

This practice was challenged on behalf of foster children, claiming that Washington was violating the "antiattachment" provision of the Social Security Act, which prohibits the

attachment, levy, or use of other legal process to obtain Social Security funds. The theory was that Washington was loaning its funds to the foster parents on behalf of the child and then executing on the Social Security funds to pay that debt. The plaintiffs in essence wanted the foster parents to be paid totally from state funds and the Social Security funds to be credited to the children for their ultimate benefit beyond their current maintenance. The State Supreme Court upheld this challenge.

The Supreme Court reversed. It noted that neither the Act nor the Commissioner's regulations prohibit the use of Social Security funds for the payment of current debts of the beneficiary. More importantly, however, nothing in Washington State's procedures constituted the use of attachment, levy, or other legal process within the meaning of the antiattachment provision. Noting that Washington's procedures were not even arguably attachment or levy, with their specialized legal meanings, the Court utilized the canon of *noscitur a sociis* to require the term "other legal process" to have a similar meaning. Moreover, the Court found that the Social Security Administration's Program Operations Manual System defined "legal process" in a way that would not include Washington's procedures. Justice Souter, the author of the recent *United States v. Mead Corp.* explication of *Chevron* and *Skidmore*, was careful to note that "while these administrative interpretations are not the products of formal rulemaking, they nevertheless warrant respect," citing *Skidmore* and *Mead*. Moreover, the Commissioner's regulations define "current maintenance" as the "costs incurred" for food and the like, and the Commissioner has interpreted her regulations to allow for the delayed reimbursement such as was involved here. Such an interpretation of her own regulations, the Court said, is to be given deference under *Auer v. Robbins*, 519 U.S. 452 (1997).

Given the several decisions earlier in the term that failed to make serious distinctions between *Chevron* and *Skidmore*, it is refreshing to see an opinion that carefully recognized the distinctions and used each case's deference rules appropriately.

Miscellaneous

In *Boeing Co. v. United States*, 123 S.Ct. 1099 (2003), a case too complicated for anyone other than true tax geeks, the Court rejected a challenge to an Treasury regulation governing the accounting for research and development costs attributable to domestic international sales corporations and foreign sales corporations. Boeing argued that a particular Treasury regulation was invalid because it was inconsistent with the congressional intent underlying the statutory amendment upon which the regulation was based.

In the tax field, the Court tends not to cite *Chevron* but rather has its own tax-specific precedents that mirror the *Chevron* rule. Here, Treasury had formally promulgated a regulation interpreting the ambiguous statutory language.

Accordingly, the Court said that it must treat the regulation with deference, citing *Cottage Savings Assn. v. Commissioner*, 499 U.S. 554 (1991).

Justices Thomas and Scalia dissented.

In *Connecticut Dept. of Public Safety v. Doe*, 123 S.Ct. 1160 (2003), the Supreme Court revisited the oft recurring questions when damage to reputation is a deprivation of liberty or property and what kinds of questions require a due process hearing. Doe was a convicted sex offender, information about whom was to be published on a state web site. He argued that he was denied procedural due process because he was not provided a pre-publication hearing to determine his continued dangerousness.

In an opinion by Chief Justice Rehnquist the Court first noted that the Second Circuit Court of Appeals' had concluded that the publication of Doe's registry information would implicate a liberty interest because it would stigmatize him and subject him to "extensive and onerous" registration requirements. The Court reiterated that in *Paul v. Davis*, 424 U.S. 693 (1976) (Rehnquist, J.), it had held that mere injury to reputation, even if defamatory, does not constitute the

deprivation of a liberty interest, but the Court said it was unnecessary to determine if this sufficed to reverse the Second Circuit. Rather, the Court said that its cases established that a due process hearing is only required to allow a person to prove or disprove a disputed fact. Here the disputed fact is whether the plaintiff is dangerous, but under the state's statute, the publication of a convicted sex offender's information does not depend on his continued dangerousness. Indeed, his dangerousness is simply irrelevant to the publication requirement. Accordingly, the Court restated the accepted rule: "Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme."

Justice Scalia concurred but added that whatever process the plaintiff was due was satisfied by the validly enacted statute.

Justice Souter, with whom Justice Ginsburg joined, also concurred but indicated that the Court had not decided whether the plaintiff had a valid *substantive* due process or equal protection claim, nor had it decided what degree of scrutiny would be appropriate in such a case. ◆

Whither APA Adjudication?

continued from page 7

The recommendations then take an additional step by identifying a third category of adjudication: "informal adjudication." Informal adjudication is adjudication conducted by federal agencies without a hearing required by statute. Vast areas of adjudication are covered by this proposal, including many employment, contracting, grantmaking, licensing, and land use decisions – everything down to the decision by a forest ranger about which camper gets a campsite.⁹

In the area of informal adjudication, the draft seeks to assure a civilized interaction between the government official and the private party. It calls for notice, an opportunity to submit the party's views orally or in writing, an impartial

decisionmaker, and a statement of reasons if requested. Hopefully, this lowest-common-denominator approach can improve the process of informal adjudication without creating inefficient bureaucratic obstacles to the functioning of government departments.

The draft recommendations take additional steps as well – recommending changes to the APA's definition of adjudication and its separation of functions and evidence provisions. Those interested should consult the Section's website for a current draft <http://www.abanet.org/adminlaw/apa/prescriptive_recommendations_5_07_03_revision.pdf> or contact this author by email.

The APA's adjudication provisions have remained remarkably unchanged since 1946,¹⁰ but they have become outdated as the number of programs involving non-ALJ adjudication has proliferated. An update is definitely in order. The Section hopes that its prescriptive recommendations will open the way for the profession and for Congress to consider how this venerable and valuable statute should be modernized. ◆

⁹ See Paul Verkuil, *A Study of Informal Adjudication Procedures*, 43 Univ. Chicago L. Rev. 739 (1976) for a survey and discussion of legal protections in some areas of informal adjudication.

¹⁰ The important exception was the adoption of the ex parte contact prohibition in 1976. 5 U.S.C. §557(d).

News from the Circuits

By William S. Jordan III¹

ALJ Disqualification, Duties, and Credibility Rulings

One recent decision may narrow the apparent avenues by which disgruntled counsel may attack Administrative Law Judges (ALJs), but two others emphasize ALJ duties to *pro se* claimants and intrude upon ALJ rulings about the credibility of witnesses. All three decisions highlight the requirement to follow procedures and provide complete explanations.

In *Lowry v. Barnhart*, 2003 WL 21107293 (9th Cir., May 16, 2003), a lawyer with an active Social Security practice sought a writ of mandamus to disqualify an ALJ from sitting on any of his cases. The lawyer brought this action after the agency had, for quite some time, failed to respond to his complaint. The facts present a rather unattractive picture of squabbling between Lowry and the ALJ, which prompted the Acting Chief ALJ to conclude that both had acted unprofessionally. The substantive focus, however, was on the proposition that mandamus involves the enforcement of a judicially enforceable duty. The question was whether interim bias complaint procedures, and various other asserted sources, created such a duty. Characterizing the interim procedures as an unenforceable procedural rule, the court held that none of the proffered sources created an enforceable duty.

Having prevailed on the merits, the agency nonetheless found itself sanctioned for misbehavior. After the lawyer had filed his opening brief, the agency submitted to the court what it termed “Supplement Excerpts of Record,” which was a letter purporting to resolve the lawyer’s bias complaint. In fact, the letter did not appear in either the administrative or judicial record, and the agency had not moved to supplement the record. Strongly criticizing the agency’s behavior, the court required the agency to pay the cost of the lawyer’s reply brief.

In both *He v. Ashcroft*, 328 F.3d 593 (9th Cir., 2003), and *Reefer v. Barnhart*, 326 F.3d 376 (3d Cir. 2003), the courts rejected agency rulings about the credibility of witnesses. Although such matters are strongly committed to agency (particularly ALJ) discretion, that discretion is not absolute. In *He*, an Immigration Judge had found an alien’s story implausible but stopped short of making an explicit adverse credibility determination. The Board of Immigration Appeals (BIA), however, did make an adverse credibility finding. The BIA’s decision was based upon inconsistencies in the transcript. The record demonstrated, however, that the interpreter at the hearing did not speak the particular Chinese dialect spoken by the alien, and there was much reason to believe the alien had not fully understood the questioning. Since accurate translation is a due process right, the court found a lack of substantial evidence to support the BIA’s conclusion that the alien was not credible.

In *Reefer v. Barnhart*, 326 F.3d 376 (3d Cir. 2003), the court intruded on the near sacrosanct area of ALJ judgments about witness demeanor credibility. Where the claimant sought disability benefits, the court held that the ALJ had failed to question the claimant adequately about her activities as they related to her medical records. A mere ALJ assertion of disbelief is not enough. There must be an adequate explanation for that belief, or at least a record that demonstrates the ALJ could have had an adequate basis for such a conclusion.

In *Reefer*, the court also emphasized the duty of a Social Security ALJ to a *pro se* claimant. Where the claimant had testified to having a stroke, the ALJ failed to exercise that duty by failing to obtain the relevant medical records. Moreover, the ALJ failed to provide an adequate explanation of his conclusions about hypertension in the face of conflicting evidence and of his choice of one medical report over another.

Finality and Ripeness

Three recent decisions reflect the significance of finality as an obstacle to review, either standing alone, or as an element of the ripeness doctrine.

The simplest, *Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726 (D.C. Cir. 2003), is a near retread of the classic *FTC v. Standard Oil of Cal.*, 449 U.S. 232, 243 (1980). When the Consumer Product Safety Commission (CPSC) initiated an investigation into Reliable’s showerhead and asked the company to take voluntary corrective action, Reliable sued on the ground that its showerhead was not a “consumer product” within the jurisdiction of the CPSC. Reliable argued that the Commission had made a final reviewable determination about jurisdiction. Emphasizing the need to conserve judicial resources and allow full development of the facts, the court held that the agency’s action was not yet final. Where, as here, the agency has not made a binding decision about jurisdiction, and its action does not affect legal rights and responsibilities beyond the investigation and agency proceedings themselves, a party may not preemptively challenge the agency’s jurisdiction.

In *National Parks and Conservation Ass’n v. Norton*, 324 F.3d 1229 (11th Cir. 2003), the agency avoided review by initiating a planning and decisionmaking process with respect to the matter in dispute, but the court suggested it would keep the agency on a short leash by holding it to its projected timeline. The case involved several structures on stilts in the ocean in Biscayne National Park. In 1976, the National Park Service had leased all of the structures until 1999. When the Park Service failed to evict the tenants at the end of their leases, petitioner brought an action under the APA challenging the agency’s inaction as a violation of various statutory regimes. Demonstrating the highly factual nature of finality, the court

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noted two developments as weighing against finality. First, the agency's delay had been dictated in part by a lessee-obtained court order preventing the agency from acting until 2001. Second, the agency had initiated a planning process of various steps, including preparation of a Draft Environmental Impact Statement, with final decision expected in mid-2003.

Prior to *Abbott Laboratories*, ripeness was a substantial obstacle to pre-enforcement review of agency regulations. Since then, many statutes have minimized restrictions on pre-enforcement review by providing that a rule may be challenged within a certain time after promulgation. Thus, the Resource Conservation and Recovery Act provides that "such petition shall be filed within ninety days after the date of such promulgation." 42 U.S.C. 6976(a)(1). Despite that provision, the D.C. Circuit held an Environmental Protection Agency (EPA) regulation unripe for review. In *Atlantic States Legal Foundation v. EPA*, 325 F.3d 281 (D.C. Cir. 2003), petitioners challenged an EPA regulation authorizing a pilot program under which hazardous wastes could be accumulated without a permit in certain circumstances. The court, on its own motion, denied review on ripeness grounds because the actual accumulation of wastes depended upon a decision by New York State to adopt implementing regulations of its own. The court also emphasized the need to let the facts develop concerning the frequency and amount of waste accumulation and the proximity of petitioners to any of the sites where this might occur. Since these facts could bear on both standing and the merits of the claim, the court found that it had "the classic institutional reason to postpone review: we need to wait for 'a rule to be applied [to see] what its effect will be,'" citing *Louisiana Envtl. Action Network v. Browner*, 87 F.3d 1379, 1385 (D.C. Cir. 1996).

What about the statutory requirement to file the action within ninety days of promulgation of the rule? In the *Louisiana* case, the court had resolved the apparent conflict with a similar review provision by noting that the statute also authorized review "based solely on grounds arising after such sixtieth day." Under similar language in RCRA, the developments demanded by the court in *Atlantic States* would constitute grounds for action arising after the ninety day period established in RCRA. The lesson of these and similar decisions is that ripeness may well be an obstacle to review of a regulation despite a statutory provision specifically authorizing review within a certain time.

Enforcement Guidelines as Interpretive and Procedural Rules.

In *Chao v. Rothermel*, 327 F.3d 223 (3d Cir. 2003), the Third Circuit held that mine safety inspection guidelines were either an interpretive or procedural rule exempt from notice and comment. The guidelines at issue the "set forth procedures for the MSHA inspectors to follow in determining whether there is compliance with already existing mandatory health standards,

such as dust concentration levels, drill dust controls, and ventilation plans." Noting that the guidelines would be "legislative" if they had "a substantive adverse impact on the challenging party," the court held that the guidelines did nothing more than provide a means for determining whether the mine operator had complied with the applicable standards. The guidelines merely "outline a uniform plan for the MSHA inspectors around the country to effectively inspect mines."

For reasons that are not entirely clear, the court characterized the guidelines as interpretive rules and rules of procedure. The court here seems to be mixing apples and oranges. Under Sec. 553(b)(3)(A) of the APA, both interpretive rules and rules of agency procedure are exempt from notice and comment. Perhaps the court was acting from an abundance of caution when it probably could have relied entirely on the exemption for procedural rules. In any case, it does not follow that because a rule involves agency procedure it is also an interpretive rule. It is also noteworthy that the court rejected the agency's argument that the statutory use of the term "guidelines" established that notice and comment is not required. The question is not the term used in the statute, but "whether the resulting guidelines constitute procedural or legislative rules."

We seem to see standing analysis expanding here to encompass the seemingly distinct area of the availability of a private right of action.

Standing

Two recent standing decisions suggest an expansion beyond traditional bounds of the factors to be examined in standing analysis, while two others apply the relatively lenient "injury-in-fact" analysis of the Supreme Court's decision in *Laidlaw Environmental*.

In *AFGE, AFL-CIO v. Rumsfeld*, 321 F.3d 139 (D.C. Cir. 2003), the court denied standing to a union and various employees of a military base who had sought to enforce the Occupational Safety and Health Act (OSHA) requirement that federal facilities "establish and maintain an effective and comprehensive safety and health program." The court held that their challenge failed the prudential requirement that they fall arguably within the zone of interests of the relevant statute. Although the plaintiffs sought to protect their own health and safety, a clear purpose of OSHA, they lost because OSHA does not give rise to a private right of action. Characterizing their claim as arising under Section 702 of the APA did not help. The court held that they were not "adversely affected and aggrieved within the meaning of the relevant statute" because OSHA did not authorize private rights of action.

We seem to see standing analysis expanding here to encompass the seemingly distinct area of the availability of a private right of action. Perhaps, as some commentators have suggested, we should instead uncouple the “zone of interest” test from standing and recognize that it is part of the distinct question of whether the plaintiff has a cause of action. Thus, an injured party meeting the constitutional tests should have standing to litigate the question if it also has a cause of action.

The D.C. Circuit rolled rulemaking analysis into its standing discussion in *Utility Air Regulatory Group v. EPA*, D.C. Cir. 320 F.3d 272 (D.C. Cir. 2003). A trade association challenged an EPA manual, but not the application of the manual to any particular facility. The court held that the challengers had no standing because the manual was nothing more than a statement of policy, which did not by itself require anything of anyone. Once again, we seem to have an intrusion on the merits in resolving standing. More appropriately, but almost as a mere footnote to the standing discussion, the court also held that the challenge was not ripe because the agency was in the midst of amending the rule under which the manual had been issued. The court found that review in those circumstances would be a waste of judicial resources and an inappropriate intrusion on the agency’s decisionmaking process.

One recent decision, *American Canoe Association, Inc. v. Murphy Farms, Inc.*, 326 F.3d 505 (4th Cir. 2003), is a direct descendant of *Friends of the Earth, Inc. v. Laidlaw Environmental Services*. Another, *American Society for the Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus*, 317 F.3d 334 (D.C. Cir., 2003) (ASPCA), seems to demonstrate rather directly that *Laidlaw* has loosened the stringent test of *Lujan v. Defender of Wildlife*.

In *American Canoe Association*, a hog farm was charged with violations of the Clean Water Act. The farm challenged the plaintiffs’ standing based upon the fact that the farm had had a relatively small number of discharges, and that much of the pollution in the stream came from other upstream polluters. One aspect of the court’s response may delay the resolution of standing issues, while the other should tend to reduce the number of challenges to standing. As to the first, the D.C. Circuit reprobated the district court’s grant of summary judgment on standing for the plaintiffs only three months into the lawsuit. This, it seems, was too early and had not allowed full development of the facts related to standing. Surely this is an invitation to drag out the standing phase as far as possible with discovery. Despite this action, the D.C. Circuit then decided that the record permitted it to resolve the standing dispute without remanding to the district court. In so doing, the court emphasized the *Laidlaw* principle that the question is not whether there is harm to the environment, but whether there

is harm to the plaintiff. The relatively small number of discharges or the possible contribution from other polluters did not mean there was no harm to the plaintiffs on these facts.

Finally, the ASPCA decision seems, a decade later, to answer the question left open in *Lujan v. Defenders of Wildlife*: How much contact with or interest in an animal would be enough to support standing? In ASPCA, the plaintiff brought an Endangered Species Act challenge to Ringling Bros.’ treatment of elephants. The plaintiff was a former elephant handler who had left his job at Ringling Bros. because of the company’s treatment of its elephants. Although he had no particular prospect of returning to such a position, his interest was enough to support standing because he had developed strong attachments to particular elephants used by Ringling Bros. He would also suffer aesthetic harm if he attended a Ringling Bros. circus, given what he knew of their treatment of elephants. He did not, however, have to have a ticket for a particular show at the circus.

Attorney Fees – “catalyst” theory and EAJA

Three attorney fee decisions deserve brief mention. In the first, *Sierra Club v. EPA*, 322 F.3d 718 (D.C. Cir. 2003), the court, distinguishing two Supreme Court decisions, held that the “catalyst theory” may be used to support a request for attorney fees under the “whenever . . . appropriate” language of the Clean Air Act where EPA had agreed to a settlement of the merits prior to full adjudication.

The other two decisions involve the requirement in the Equal Access to Justice Act that parties file attorney fee claims within 30 days of the final judgment. In *Scarborough v. Principi*, 319 F.3d 1346 (Fed. Cir. 2003), the Federal Circuit held that it was without jurisdiction where the original claim, filed in time, had failed to include the specific allegation that the government’s position was not “substantially justified.” The claimant’s attempt to add that allegation shortly after expiration of the 30 day time limit was unsuccessful. Distinguishing *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), which had permitted a later filing under a different statute, the court held that the EAJA specifically required the particular allegation in order to establish jurisdiction.

In *Safar Contracting, Inc. v. Secretary of Labor*, 325 F.3d 422 (3d Cir. 2003), the question was when the 30 day period begins to run. The plaintiff challenged an agency decision denying EAJA fee recovery after the plaintiff had prevailed in a proceeding within the agency. The question was whether the statute meant 30 days from the date the agency issued a final appealable order (the agency’s position), or 30 days from the point at which the final agency order became nonappealable. The court chose the latter. ◆

Due Process in Beverly Hills 90210: Separation of Functions in Local Government

By Michael Asimow¹

Local government law enforcement and hearings often violate the most fundamental norms of administrative law. Typically, local government bodies mix up the functions of legislation, law enforcement, and adjudication. Because there are no local APAs, parties can look only to due process for protection.

The very upscale city of Beverly Hills, CA, wanted to get rid of its one and only “adult entertainment” business owned by Nightlife Partners. Therefore, it refused to renew Nightlife’s permit. Assistant City Attorney Terence Boga erected every possible barrier to renewal. First, Boga refused to provide a renewal form. Then he insisted that Nightlife submit all the documents required for an initial license such as a site plan and letters of justification. Finally, Boga declared that Nightlife’s facility failed to comply with various municipal codes. Nightlife filed an administrative appeal which was heard by David Holmquist, the City’s Risk Manager. Lo and behold, seated next to Holmquist was Nightlife’s nemesis Terence Boga, serving as Holmquist’s adviser. Needless to say, Holmquist rejected the appeal.

In *Nightlife Partners Ltd. v. City of Beverly Hills*, 2003 Cal. App. LEXIS 612, the California Court of Appeal held that Boga’s participation as an adviser violated due process (even though Nightlife failed to prove that Boga had actually given any advice). This was a gross violation of separation of functions. One person cannot serve as an advocate, then turn around and advise the decisionmaker. The court ordered a new hearing, before a different hearing officer, who would not be advised by anyone who had been involved in the licensing dispute. This decision seems correct under federal due process standards and prior California decisions.

The court relied on some interesting authorities for its due process holding. It mentioned the ABA’s 2001 resolution that recommended adoption of a code of ethics for the administrative judiciary at both state and local levels. It also observed that California’s new state APA has an across-the-board provision requiring separation of functions, even though that statute isn’t applicable to local government.

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Rulemaking in the Shadow of Homeland Security

By George Beck²

Post 9/11, it appears likely that the normal requirements of administrative procedure may be challenged as government seeks to cope with terrorism. One example is the effort by the Immigration and Naturalization Service to close some of its deportation hearings to the public. Another example is a recent rulemaking case in Minnesota. In an effort to improve homeland security, the Minnesota Department of Public Safety adopted rules under an expedited exempt process. The rules contained stricter requirements for proof of identity required to obtain a driver’s license. The exempt process does not require the usual written justification for the rules or the opportunity for a public hearing.

In Minnesota, the Office of Administrative Hearings reviews all rules before they are final. An ALJ determined that DPS had not justified its use of the exempt process, but upon review, the Chief Administrative Law Judge found good cause for the use of the exempt process and approved the adoption of the rules.

On appeal the Minnesota Court of Appeals invalidated the rules. The Court found that DPS had demonstrated a serious and immediate threat due to domestic terrorism, but had not demonstrated that the normal rulemaking process was “unnecessary, impracticable or contrary to the public interest” as required by the rulemaking statute. The Court held that DPS had failed to quantify what delay would occur with normal rulemaking, or show with particularity how the delay would harm the public interest. It observed that exempt rulemaking, with its abbreviated process, is an exceptional procedure and is reserved for emergencies. *Jewish Community Action v. Commissioner of Public Safety*, 657 N.W.2d 604 (Minn. Ct. App. 2003). DPS is pursuing an appeal to the Minnesota Supreme Court. ◆

² Administrative Law Judge, Minnesota.

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Recent Articles of Interest

By Yvette M. Barksdale¹

Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control Of Presidential Records*, 88 CORNELL L. REV. 651 (2003).

Jonathan Turley addresses the legal and conceptual foundations of disputes over control of Presidential papers. The article focuses on President Bush's recent Executive Order No. 13,233 which significantly expands Presidential control of such papers to the point, the author argues, of violating constitutional and statutory limits. Turley concludes that claims for Presidential control are improperly founded in Lockean and other historical concepts of private property.

These historical private property concepts, he argues, although overshadowed by post-Nixon increased recognition of public rights in presidential papers, were revived with the Bush administration's Executive Order 13,233, which reasserts property claims of not just incumbent Presidents, but former Presidents and their heirs or transferees to control of such papers. Turley argues that instead, Presidents should have no legitimate claim to private ownership of such papers which are created by a government official's exercise of public powers. Rather, Presidential papers are "jus publicum" or inherently public property. And, he argues, the public's claim of ownership and control should extend to the papers of all past and present Presidents, including papers currently held by heirs.

Elizabeth Garrett, *Legislating Chevron*, FORTHCOMING, 101 MICH. L. REV. ____ (2003).

This article, part of a symposium on *Marbury and Judicial Review*, reexamines the *Chevron v. NRDC*, 467 U. S. 837 (1984) problem of allocating responsibility for statutory interpretation in the administrative state. The author examines the courts' difficulty in determining whether Congress has in fact allocated such interpretive authority to courts or agencies, where Congress' delegative intent is not clear. This question increases in importance after *United States v. Mead*, 533 U. S. 218 (2001), in which the Court relies upon Congress' delegation of lawmaking authority to determine whether *Chevron* governs an issue of statutory interpretation. The author advocates express Congressional allocation of statutory interpretive authority between Courts and agencies to resolve many of the courts' difficulties. She recommends, in part, that Congress internally require legislators, in authorization and appropriations bills, to expressly consider whether Courts or agencies should have ultimate statutory interpretive authority.

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Kenneth Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. LAW REVIEW 1272 (2002).

In this article, Mr. Bamberger argues for a post-Mead reconsideration of the judicial stare decisis exception to *Chevron*-deference. [*United States v. Mead*, 533 U. S. 218 (2001), *Chevron v. NRDC*, 467 U. S. 837 (1984)]. Under this stare decisis rule, preexisting judicial constructions of a statute trump subsequent administrative interpretations which otherwise would be subject to *Chevron* deference. The pre-Mead view was that the judicial stare decisis exception has little real-world practical effect for post-*Chevron* judicial interpretations, usually "step one" interpretations which bind the agency anyway.

However, post-Mead, the author argues, the judicial stare decisis rule has tremendous consequences because *Mead* substantially increased the number of administrative interpretations subject to *Skidmore* deference which authorizes courts to substitute their construction for the agency's. *Skidmore v. Swift*, 323 U. S. 134 (1944). The author asserts that fallout from the *Mead*/judicial stare decisis combo can lead, among other things, to 1) the ossification of administrative process as agencies are forced to conduct time-consuming rulemakings to lock in *Chevron*-binding administrative interpretations, 2) statutory schemes rendered incoherent by time-frozen judicial constructions which are out of step with evolving administrative interpretations and 3) an arbitrary "race to the courthouse" which occurs because *who* interprets the statute (judge or agency) depends upon *when* judicial review occurs (before or after a *Chevron*-qualifying administrative interpretation). The author cited post-Mead examples in which courts issued judicial interpretations of a statute in the midst of an ongoing administrative rulemaking on the subject.

Instead, the author argues for a model of "provisional precedent" patterned upon federal court adjudication of state law issues. Under this model, reasonable judicial constructions of ambiguous regulatory statutes have stare decisis effect only until governing agencies make binding interpretations of their own.

Dapo Akande and Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO*, 43 VA. J. INT'L L. 365 (2003).

Many international treaties contain dispute settlement clauses which allow recourse in international tribunals. The authors address whether the World Trade Organization (WTO) and other international tribunals are competent to determine the national security interests of States. A State can assert national security interests as limits on the State's obligations under both customary international law and also treaties such as GATT (General Agreement on Tariffs and Trade), NAFTA (North American Free Trade Agreement) and EC (European

Communities) treaties. The authors focus on the World Trade Organization (WTO) which has authority over GATT issues, to explore the appropriate role of these international tribunals, if any, in reviewing national security claims under international agreements.

The authors conclude that issues of the legitimacy of national security claims should be considered justiciable by international tribunals even though such tribunals are not necessarily the most appropriate forum. First, international justice tribunals such as the International Court of Justice and European Courts of Justice and Human Rights have already evaluated the legitimacy of some claims with national security implications, such as 1) the requirement of a license to import, export or license of goods used for strategic purposes, and 2) bans on gays in the armed forces. Second, they argue national security claims are capable of at least some level of international review. For GATT, they advocate a standard of review under which the international tribunal determines 1) whether the State's national security claim is made on the basis of the State's good faith genuine belief in its validity, and 2) whether there is some objective basis to conclude that the subject matter of the claim falls under the specific national security exemptions allowed under GATT.

Rebecca Bratspies, *The Illusion of Care: Regulation, Uncertainty and Genetically Modified Food Crops*, 10 N. Y. U. ENVIRONMENTAL LAW JOURNAL 297 (2002).

This article critiques the regulatory structure within the United States Department of Agriculture (USDA) and the Environmental Protection Agency (EPA) for regulation of genetically modified food crops. The author concludes that the genetically modified foods regulatory scheme is not adequately structured to permit effective regulation of biotech risks. In particular, she critiques the legislative decision to leave biotech regulation to existing regulatory frameworks within the USDA and the EPA, rather than to develop a particularized biotech regulatory structure. As a case study, the author examined a regulatory program for biotech crops that are genetically modified to resist destructive insects and other pests. The regulatory program seeks to prevent the pests from developing resistance to the crops' pest control features. Regulatory deficiencies uncovered by the author's case study include 1) regulatory gaps attributable to the statutory division of responsibility between USDA & EPA, 2) lack of adequate research early in the regulatory process leading to persistent regulation in an environment of pervasive scientific uncertainty, 3) the lack of a regulatory ethic to err on the side of precaution, and 4) ineffective government enforcement and oversight of regulatory conditions on biotech products.

Paul S. Weiland, Robert O. Vos, *Reforming Epa's Organizational Structure: Establishing An Adaptable Agency Through Eco-Regions*, 42 NAT. RESOURCES J. 91 (2002)

In this article, the authors argue for partially decentralizing the organizational structure of the Environmental Protection Agency (EPA) into an "eco-regions" model. This model would significantly shift the agency's responsibilities away from the national office towards "eco-regions" based upon 1) natural features of the land like watersheds, river basins, valleys, mountain ranges, airsheds, watersheds and floral and faunal traits, and 2) human social characteristics of the community such as economic production and cultural identification.

The authors critique the current top-down centralized organization of the EPA as aggravating several problems endemic to the tasks given to the EPA including, among others, 1) cross-boundary and externality problems which arise because environmental problems do not respect governmental and political boundary units (ex. pollution generated in State A which blithely floats into State B in complete disregard of jurisdictional limits), 2) massive scientific uncertainty concerning even basic issues such as which species are on the planet (scientists may know as few as 1%), reliable human dose/response data for synthetic chemicals and the potential harms of technologies intended to enhance environmental protection, 3) information management and other organizational problems stemming from centralized political branch control, and 4) the constraining and erratic effects on EPA policymaking of judicial involvement through litigation.

The authors argue that eco-regions could help address many of these problems by shifting the agency towards a more flexible and integrated bottom-up organizational structure, leaving the national office free to concentrate on 1) coordination problems such as transboundary and NIMBY issues, 2) centralized information gathering and dissemination, where appropriate and 3) the really tough challenges which need national firepower and political will.

The following two articles use behavioral economics concepts to critique the rationality of regulators.

a) Stephen J. Choi and Adam C. Pritchard, *Behavioral Economics and the SEC*, FORTHCOMING, 56 STAN. L. REV. ____ (2003/4).

The authors propose a model to evaluate whether government regulation to counter investor irrationality in financial markets is warranted. The model responds to some behavioral economists' arguments that individual and institutional market actors suffer from cognitive biases that undermine the rationality of their market choices, thus weakening the "rational market actor" assumptions of free market economic theory. Possible "investor biases" include overconfidence in investment skills, over-optimism that investments will yield upside returns, and "cognitive dissonance" which leads investors to rationalize bad investment decisions to maintain self-esteem.

Choi and Pritchard argue that such market actor biases, even if present, do not necessarily justify government regulation. First, the financial markets may adjust to such biases (for example, less biased thinkers may knock out more biased ones, or upside biases may counteract downside ones). Second, because regulators themselves are not immune from their own cognitive biases, the regulatory cure for investor biases may even further undermine market rationality.

The authors list several possible Securities and Exchange Commission (SEC) cognitive biases, including 1) bonded search, in which regulators fixate on one regulatory mechanism (e.g. disclosure) at the expense of other strategies, 2) framing effects such as “loss aversion” in which regulators favor the status quo over more politically risky action, and 3) use of false heuristics (knee-jerk “seat of the pants” analytical strategies), such as i) over-reliance upon easily available information, ii) over-reading patterns into random events, and iii) hindsight bias (overestimating the probability that recent events will reoccur).

The authors are generally skeptical of any government regulation to counter investor biases. Choi and Pritchard’s model strongly disfavors regulation by monopolistic regulators, such as the SEC, on the theory that there are insufficient outside controls, such as competition, to counter the regulator’s cognitive biases. (The authors are additionally skeptical that either internal organizational changes, or judicial or political oversight, will substantially reduce such agency biases.) Instead, they prefer market regulators such as the New York Stock Exchange (NYSE), who are subject to outside competition that might ameliorate regulatory biases (for example, the NYSE competes with other global exchanges for market funds.)

Choi and Pritchard also disfavor regulatory options that restrict or hinder investor choices, (such as proposals to remove certain bad investments from the market), as cognitively biased regulators may be less competent investment valuers than cognitively biased investors. Even regulatory options which merely discourage bad market choices, such as investor education options, should be undertaken cautiously, they conclude, because such regulation may further distort markets.

b) Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. PITT. L. REV. 589 (2002).

The author argues that behavioral science casts new light on the tendency of administrative agencies’ in notice and comment rulemaking to “lock in” on proposed rules, resisting change. The author cites, among other empirical studies, a 1998 case study finding only one rule from ten randomly selected agency rulemakings changed substantially from the proposed to the final rule. Such agency lock-in

threatens the ideals of public participation and democratic deliberation, the author argues.

The author attributes such agency recalcitrance to possible “cognitive consistency,” that is, a psychological “bias toward the maintenance of existing beliefs and theories.” The behavioral science literature indicates that such “cognitive consistency” leads people to 1) persevere in their beliefs despite disconfirming evidence, 2) adhere to positions that they publicly commit to, to avoid appearing indecisive or inconsistent, and 3) rationalize decisions previously taken, so as to conform their attitudes to their actions and thus avoid hypocrisy.

Current notice and comment rulemaking processes, the author argues, exacerbate this “cognitive consistency” problem by frontloading the bulk of regulatory decisionmaking to occur before the Notice of Proposed Rulemaking (NPR). The author attributes this “frontloading” to oversight mandates such as “hard-look” judicial review, information disclosure requirements, and regulatory impact statements which require the agency to invest significant resources into evaluating a proposal before issuing the NPR. This frontloading increases the likelihood that the agency will cognitively commit to the proposal and thus undervalue future public comments.

The author, examining psychological research literature, advocates various administrative rulemaking reforms to reduce premature agency commitment to proposals and to encourage both agency open-mindedness and early public participation. The proposed reforms include: 1) dividing rulemaking responsibility among different interagency groups, similar to the Environmental Protection Agency (EPA) process, with separate groups for developing, evaluating and revising proposed rules, and 2) soliciting pre-NPR public comment and participation through increased use of advance notices of proposed rulemaking (ANPR), group meetings, committees, workshops, electronic working groups and negotiated rulemaking.

The following articles summarize empirical studies of a) administrative enforcement mechanisms and b) judicial review standards.

a) Jeremy Firestone, *Enforcement of Pollution Laws and Regulations: An Analysis of Forum Choice*, 27 HARV. ENVTL. L. REV. 105 (2003).

The author describes an empirical study of how regulatory agencies decide between available administrative, civil judicial, and criminal enforcement mechanisms. The author studied a random sample of three hundred twenty five (325) Environmental Protection Agency (EPA) choices of enforcement venues between fiscal 1990 – 1997 under the i) Clean Air Act (CAA), ii) Federal Water Pollution Control Act (CWA), and iii) Solid Waste Disposal Act (RCRA). The

author constructed models of how agencies behave when making environmental enforcement venue choices. The author found that EPA enforcement choices appeared motivated by a desire to minimize environmental harm and maximize social welfare, and not a desire to maximize political benefits. However, the study also found a propensity of the EPA to target small firms for criminal sanctions, rather than larger firms.

b) Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WILLIAM & MARY LAW REVIEW 679 (2002).

The author summarizes a preliminary empirical study on the relationship between the articulated “scope of judicial review” standards and actual judicial review outcomes. The article also includes an in-depth and illuminating discussion of 1) the various scope of review standards and 2) the role and relative competence of institutional actors like Congress, the Supreme Court and the Executive Branch in using scope of review standards to influence judicial or administrative review outcomes.

The empirical study surveyed judicial reversal rates for three administrative agency adjudicative schemes of comparable size, with comparable pre-judicial review favorable/non-favorable administrative decision rates. Each program processes over two million claims annually and approves, pre-judicial review, about 50% of its claims. The programs were 1) Social Security Administration (SSA) disability claims, 2) Veterans Administration (VA) disability claims and 3) Freedom of Information Act (FOIA) claims.

The study compared the actual judicial review reversal rates for these three administrative decisions to an “expected reversal” rate based upon the level of review which ranged from de novo (FOIA), to substantial evidence (SSA) to clearly erroneous (VA). Professor Verkuil concluded that only the reversal rate data for the VA claims supported the hypothesis that standards of review predict outcomes on judicial review. The courts under a clearly erroneous standard of review reversed VA disability claim denials at a predicted 15 – 20% rate. In contrast, judicial review outcomes for the other two statutory schemes (SSA & FOIA) were unpredictable based upon the standard of review. The courts under a substantial evidence standard unpredictably reversed SSA claim denials at a high 50% rate. Even more surprisingly, under a de novo standard of review, courts reversed FOIA claim denials at an extremely low 10% rate. (In comparison, courts, under a presumably more deferential arbitrary and capricious review standard, reversed agency denials of reverse-FOIA claims, in which private parties try to prevent FOIA disclosure, at the higher rate of 20%. (Professor Verkuil also compared reversal rates for “Court to Court” review of judicial sentencing decisions under the United States sentencing guidelines.)

Professor Verkuil i) pondered possible explanations for the results of the study, ii) suggested possible Supreme Court, Congressional and Executive Branch actions to better regularize the courts’ implementation of judicial review standards and iii) recommended further empirical research.

In Brief: See also the following Symposia (and Research Compendium) of Interest.

SYMPOSIUM, JUDICIAL ACTIVISM AND CONSERVATIVE POLITICS, 73 U. Colo. L. Rev. 1139, ET SEQ. (2002), including an *Introduction* by Ernest Young, entitled *Judicial Activism and Conservative Politics* (p. 1139), and articles by i) William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism* (p. 1217), ii) Rebecca L. Brown, *Activism is not a Four-Letter Word*, (p. 1257), iii) Randy E. Barnett, *Is the Rehnquist Court an “Activist” Court? The Commerce Clause Cases* (p. 1275), iv) James R. Stoner, Jr., *Is Tradition Activist? The Common Law of the Family in the Liberal Constitutionalist World* (p. 1291), v) Neal Devins, *The Federalism-Rights Nexus: Explaining why Senate Democrats Tolerate Rehnquist Court Decisionmaking But Not the Rehnquist Court* (p. 1307), vi) Stephen F. Smith, *The Rehnquist Court and Criminal Procedure* (p. 1137), vii) Saikrishna B. Prakash, *Are the Judicial Safeguards of Federalism The Ultimate Form of Conservative Judicial Activism?* (p. 1363), viii) The Hon. J. Harvie Wilkinson III, *Is There a Distinctive Conservative Jurisprudence?* (p. 1383), and ix) The Hon. Frank H. Easterbrook, *Do liberals and Conservatives Differ in Judicial Activism?* (p. 1401).

SYMPOSIUM, PUBLIC VALUES IN AN ERA OF PRIVATIZATION, 116 Harv. L. Rev. 1211, ET SEQ. (2003), with an *Introduction* by Mark H. Moore (p. 1212), and articles by i) Martha Minow, *Public and Private Partnerships: Accounting for the New Religion* (p. 1229), ii) John J. DiIulio, Jr., *Response: Government by Proxy: A Faithful Overview* (p. 1271), iii) Jody Freeman, *Extending Public Law Norms through Privatization* (p. 1285), iv) David Saperstein, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided* (p. 1353), v) Kathleen M. Sullivan, *The New Religion and the Constitution*, (p. 1397), and Michael J. Trebilcock and Edward M. Iacobucci, vi) *Privatization and Accountability* (p. 1422). Also included are two Student Notes: i) *Privatization of Federal Indian Schools; A Legal Uncertainty* (p. 1455), and *When Hope Falls Short: HOPE VI, Accountability, and the Privatization of Public Housing* (p. 1477). ◆

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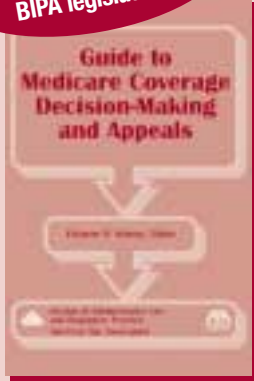
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