

American University Washington College of Law

From the Selected Works of Jeffrey Lubbers

Winter 2005

Consensus-Building in Administrative Law: The Revival of the Administrative Conference of the U.S.

Jeffrey Lubbers, *American University Washington College of Law*



Available at: <https://works.bepress.com/jeffrey-lubbers/4/>

Consensus-Building in Administrative Law: The Revival of the Administrative Conference of the U.S.

By Jeffrey S. Lubbers*

In President Bush's first press conference after the bitter 2004 election, he remarked: "With the campaign over, Americans are expecting a bipartisan effort and results."¹ He also commented that, "[O]ne of the disappointments of being here in Washington is how bitter this town can become and how divisive. I'm not blaming one party or the other. It's just the reality of Washington, D.C. ... It also makes it difficult to govern at times."²

The President actually took a first step to promoting bipartisanship and reducing bitterness in Washington a few days before the election on October 30, 2004, by signing into law Public Law 108-401, the Federal Regulatory Improvement Act of 2004, a bill to reauthorize the Administrative Conference of the U.S. (ACUS).³

As regular readers of the *News* know, ACUS was closed in October 1995 after

almost 30 years of making recommendations to the government on improving the fairness and efficiency of administrative procedures because congressional appropriators, determined that ACUS had "fully accomplished its mission," and so appropriated no funds.⁴

In my own post mortem to ACUS written in 1998, I optimistically concluded that, "[I]t is only a matter of time before Congress and the President recognize this country's need for objective, non-partisan expertise on the crucial, but not always politically 'sexy,' issues of administrative procedure implementation and reform."⁵ I am pleased to

say that time has now come thanks to the efforts of Representative Chris Cannon (R. UT), Chairman of the House Judiciary Committee's Subcommittee on Commercial and Administrative Law, who this summer held two hearings on "Reauthorization of the Administrative Conference of the United States," and then in July introduced (along with 33 co-sponsors) H.R. 4917.

The two hearings conducted by the House Subcommittee amply demonstrated broad support for ACUS's revival. The first hearing provided the perhaps unprecedented spectacle of two Justices of the Supreme Court discussing the operations of an executive branch agency before a committee of Congress. Both Antonin Scalia and Stephen Breyer, each of whom had served in ACUS earlier in their careers,⁶ were unstinting in their support for reviving it.⁷ Both Justices had in fact written Senate Judiciary Committee in a vain attempt to preserve ACUS in 1995,⁸ and their continuing commitment to ACUS speaks volumes.

The second hearing was also a bipartisan event with former ACUS members C. Boyden Gray and Sallyanne Payton⁹ and former staff lawyers Philip Harter and Gary Edles¹⁰ providing strong support for the revival of ACUS.

Mr. Gray, former White House Counsel in the Bush I Administration, spoke on behalf of this Section of the ABA and the ABA itself. He stressed the bipartisan support for the Conference and concluded that: "Through the years, the Conference was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist."¹¹

* Section Fellow, and Fellow in Law and Government, Washington College of Law, American University; former Research Director of the Administrative Conference from 1982-1995.

¹ Transcript, George W. Bush, Presidential Press Conference, Nov. 4, 2004, available at <http://www.whitehouse.gov/news/releases/2004/11/20041104-5.html>.

² *Id.*

³ The bill, H.R. 4917, was passed by the House of Representatives by unanimous consent on October 8, 2004, and then three days later, the House bill was passed by the Senate, also by unanimous consent. It was signed into law by President, on October 30, Pub. L. No. 108-401, 118 Stat. 2255.

⁴ See H. Rep. No. 103-127 (1993) (Treasury, Postal Service, and General Government Appropriations Bill, 1994) at p. 76. For the definitive account of this period, see Toni Fine, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 ARIZ. ST. L.J. 19 (1998).

⁵ Jeffrey S. Lubbers, "If It Didn't Exist, It Would Have To Be Invented"—Reviving The Administrative Conference, 30 ARIZ. ST. L.J. 147, 161 (1998).

⁶ Justice Scalia was Chairman of ACUS from 1972-74, and Justice Breyer was a liaison representative of the Judicial Conference from 1981-95. For a description of Justice (then-Judge) Breyer's activities as a member of ACUS, see Jeffrey S. Lubbers, *Justice Stephen Breyer: Purveyor of Common Sense in Many Forums*, 8 ADMIN. L.J. AM. U. 775 (1995).

⁷ See Statement of Antonin Scalia, before the House Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, Hearing on the Reauthorization of the Administrative Conference of the United States (May 20, 2004), available at <http://www.house.gov/judiciary/scalia052004.htm>, and Statement of Stephen Breyer, *id.*, available at <http://www.house.gov/judiciary/breyer052004.htm>.

⁸ The two letters are reprinted as an appendix to Lubbers, *supra* note 5, at 162-67.

⁹ Mr. Gray was a member of the Presidentially appointed Council of ACUS from 1993-95, and Ms. Payton was a public member from 1980-88.

¹⁰ Mr. Harter was Senior Staff Attorney at the Conference in the late 1970s and subsequently a consultant on several major research projects. Mr. Edles was the Conference's General Counsel from 1987-95.

¹¹ Testimony of C. Boyden Gray, before the House Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, Hearing on the Reauthorization of the Administrative Conference of the United States (June 24, 2004), available at <http://www.house.gov/judiciary/gray062404.htm>


As a drafting matter, the legislative revival was relatively simple. One of the interesting things about the Congressional action to defund ACUS in 1995 was that ACUS's authorizing statute, the Administrative Conference Act,¹² was not repealed and remains in the U.S. Code. The reauthorizing legislation recognized this, and was designed to re-fund ACUS with only minimal changes to the Administrative Conference Act.¹³

This mandate, along with the broad powers and duties already assigned to the Conference,¹⁴ provides ample authority for tackling the important problems of the day. For example, Boyden Gray pointed to the need for "some empirical research on the innovation of the OMB 'prompt' letter, matters relating to data quality and peer review issues."¹⁵ These are all recent initiatives of Congress and OMB relating to the need for better prioritization and information and scientific consensus in regulation.¹⁶ Phil Harter provided numerous other ideas

about ACUS's future operational and research functions.

ACUS's mix of research and operational/coordinative functions is what made it valuable in the past and it is what ACUS needs to do in the future. After all, procedural improvements can produce large savings to the government.¹⁷ But there are also the intangible, but real, benefits of simply promoting consensus and dialogue—two resources in short supply in Washington these days. The Conference was a true public-private partnership, where partisan politics were checked at the door. Experts from opposite ends of the Washington political spectrum, such as James Miller of Citizens for a Sound Economy and Alan Morrison of the Public Citizen Litigation Group, could and did have cordial and productive discussions of administrative reform. Government officials and private experts could reach understandings that often eluded otherwise adversary relationships. This can happen again once ACUS reopens its doors.

But the resurrection is not yet complete. The authorized funds must still be appropriated. Public Law 108-401 authorizes the appropriations of not more than \$3 million, for fiscal year 2005, \$3.1 million for fiscal year 2006, and \$3.2 million for fiscal year 2007¹⁸—providing a lean but reasonable budget, since the Conference's highest budget was just over \$2 million in the early 1990s.

The ABA strongly urged the Senate Appropriations Committee to provide the authorized \$3 million for FY 2005 during the brief post-election session.¹⁹ Unfortunately this did not happen, so the effort must be renewed in the next Congress. But once the Congress does provide the appropriations, and if President Bush appoints a respected and non-partisan Chair who can command respect among all sectors of the legal community, in and outside of Washington, a renewed era of consensus and bipartisanship, at least in the sometimes obscure but crucial world of administrative law, will begin. 

¹² Pub. L. No. 88-499, as amended, codified at 5 U.S.C. §§ 591-96.

¹³ The new law only adds four new paragraphs (2-5) to the "Purposes" section of the Administrative Conference Act, 5 U.S.C. § 591.

¹⁴ See 5 U.S.C. § 594. Its central statutory mission is to: "study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs."

¹⁵ Gray testimony, *supra* note 11.

¹⁶ For more information on these initiatives, see the website of the Office of Information and Regulatory Affairs in OMB. For prompt letters see, http://www.whitehouse.gov/omb/inforeg/prompt_letter.html; for data quality and peer review issues, see <http://www.whitehouse.gov/omb/inforeg/infopoltech.html>.

¹⁷ Some such savings can be quantified. For example, a simple change devised by the Conference in 1980 to end the once notorious "race-to-the courthouse" procedure has probably saved over a million dollars since. See ACUS Recommendation 80-5, "Eliminating or Simplifying the 'Race-to-the Courthouse' in Appeals from Agency Action," 45 Fed. Reg. 84,954 (Dec. 24, 1980). The recommendation was implemented in 1988 by Pub. L. No. 100-236, Selection of Court for Multiple Appeals, 101 Stat. 1731. It was estimated that each such race produced \$100,000 in unnecessary litigation costs. Alternative dispute resolution processes recommended and furthered by the Conference in the last 15 years of its existence also saved millions. See Administrative Conference of the U.S., *Toward Improved Agency Dispute Resolution: Implementing the ADR Act* (Feb. 1995) (docu-

menting savings). Streamlined civil penalty procedures resulting from an ACUS recommendation made in 1972 under then-Chairman Scalia have produced tens of millions of additional dollars for the U.S. Treasury since then. See ACUS Recommendation 72-6, "Civil Money Penalties as a Sanction," available at <http://www.law.fsu.edu/library/admin/acus/305726.html>. Later statistics, published in Colin Diver, The Assessment and Mitigation of Civil Money Penalties, 79 COLUM. L. REV. 1435 (1979), showed a dramatic increase in receipts to the U.S. Treasury.

¹⁸ Pub. L. No. 108-401 § 3.

¹⁹ See letter from Robert D. Evans, Director ABA Governmental Affairs Office to Hon. Ted Stevens, Chairman, and Hon. Robert Byrd, Ranking Member, Committee on Appropriations, U.S. Senate, (Nov. 12, 2004).

**IS YOUR
LIBRARY
COMPLETE?** Check the list of Section
publications at the back of
this issue to be sure.

A Remarkable Chairman

By Ernie Gellhorn*

The President's recess appointment of Deborah Majoras to succeed Timothy J. Muris as chairman of the Federal Trade Commission signals an appropriate time to appraise the Muris Commission and to consider why it has been so successful. Under Muris, the FTC became one of Washington's more interesting agencies, praised by Congress and the professional bar as well as both liberals and conservatives. This is a dramatic change from the late 1970's when the Commission was derisively labeled a meddling "national nanny" because of the FTC's clumsy effort to regulate advertising on children's television programs.

Muris' leadership was distinctive. He emphasized the need for new initiatives based on rigorous empirical studies and analysis showing that regulatory benefits outweighed their costs. He insisted that the enforcement agenda be limited to truly significant matters where FTC intervention could make a difference in removing restraints on competition or protecting consumer welfare. The Muris FTC directed significant resources to challenging mergers and anticompetitive restraints in the health care and pharmaceutical industries where competition often was not open. Industry-wide practices that inhibited competition were its primary targets. Its public advocacy, particularly its amicus briefs addressing important FDA and patent policy questions raised in private litigation, expanded the FTC's influence. Perhaps most obvious to consumers was the Muris Commission's success in creating a "Do Not Call" registry that has sharply reduced unwanted phone solicitations for over 60 million households.

The Commission used its complementary consumer protection and antitrust powers to challenge conduct

that misused market power or injured vulnerable consumers. Its emphasis on fraud directed at Spanish-speaking consumers extended consumer protection enforcement to a neglected community. The FTC's enforcement efforts also recognized the limits of the Commission's power. For example, despite the success of its crackdown on unsolicited telephone calls, Muris opposed legislative proposals by Senator Charles Schumer to create a similar "Do Not Spam" registry because the Commission practicably could not enforce action against the primary malefactors, disreputable fly-by-night and foreign operators.

Muris' leadership succeeded because he was knowledgeable and experienced and had skills that permitted him to survive in Washington's turbulent waters. Muris was well served by his academic and political experience.

Like his highly regarded Democratic predecessor, Robert Pitofsky, Muris was already recognized as an authority on antitrust and consumer protection when he took office, having honed his ideas as a scholar and having grounded them in experience as a former director of both the FTC's competition and consumer protection bureaus. He was prepared to act from his first day as chairman with a clear agenda and ideas for implementing it.

A savvy politician and bureaucrat in the best sense of those terms, Muris built public, congressional and White House support for his programs. He explained them through innumerable speeches, interviews and reports. Building on the Pitofsky Commission's revival of public workshops, the Muris FTC held workshops on consumer protection issues from spam to spyware and on competition issues from basic patent policies to marketing practices in the health care

industry. Its generic drug patent report resulted in major legislation.

Unlike many agency chairmen, Muris willingly expended his political capital to challenge unsound policy proposals or investigations. For example, he harshly rejected as "fundamentally flawed" a GAO study popular in Congress that faulted the FTC's oversight of oil company mergers because that report ignored obvious other causes of price increases such as OPEC generated price hikes, domestic and foreign supply disruptions, and a surging world economy.

Knowing that he could not do it alone, Muris also took care to develop a close rapport with fellow commissioners by listening to their views and by investing them as partners in implementing specific programs. He recruited a creative and qualified staff from the practicing bar, academe and think tanks. Thus, despite a distinctive antitrust and consumer protection agenda, he was never in a minority during his 38 months as chairman, an unusual achievement in Washington's partisan atmosphere.

This does not mean that Muris (or the FTC) was always successful or right. His sensible agreement with the Antitrust Division allocating merger review assignments died in committee. And the FTC's approval of the RJR-Brown & Williamson merger creating a duopoly in the cigarette industry, even though prices more than doubled in recent years in the face of dramatically declining demand and far more limited cost increases, seems contrary to sound economics and consumer welfare.

The FTC's new chairman faces the continuing challenge of refreshing and refining antitrust and consumer protection policies. For example, the line between desirable lawful aggressive competition and impermissible refusals to

continued on page 10

*Past Section Chair and Delegate; Section Fellow; Co-Reporter for Judicial Review: APA Project; and Professor, George Mason University School of Law.

Some Reflections on OPM's Administration of Its APA ALJ Functions

By John T. Miller, Jr. ★

I have been involved in the bar's oversight of the recruitment of candidates for appointment as federal Administrative Law Judges for over forty years. This article reflects on the recruitment process — past, present and future.

In the 1950s the United States Civil Service Commission's performance of its duties as to the appointment of what were then called "Hearing Examiners" under Section 11 of the Administrative Procedure Act was so deficient that the American Bar Association concluded that the function should be taken away from the agency. In the early 1960s, under the leadership of Chairman John Macy, the Commission proposed several reforms which would enforce more rigorous qualification and examination standards intended to result in the certification of the highest caliber lawyers. I was then Chair of the Hearing Examiners Committee of the Administrative Law Section. In that capacity I had the privilege of attending a meeting between the President of the ABA and Mr. Macy in which the Association agreed to support the new program in light of its proposed reforms. I was particularly impressed by the fact that there was to be an upgrade in the qualifications that applicants must meet; every candidate was to be examined by a panel of three of which one would be a member of the private bar; and the office established to administer the new program would be under the Commission's Executive Director who would be in a position to notify the Commission's Chairman immediately as to anything that went

wrong. We soon found that deficiencies remained. But most were remedied when brought to the Commission's attention; albeit after some delay.

The ABA had helped spread news of the new recruitment program nationwide. Almost immediately we sensed that something was wrong. The requirement that each applicant have two years of administrative law experience excluded most of the bar in the United States from any consideration. The Commission helped us identify the problem by communicating with interested lawyers who failed to follow-up on their initial inquiries. The solution was a decision to accept two years of trial experience as a qualification allowing a candidate's application to be processed. This broadened the pool of talented lawyers able to attain the register of eligibles from which Hearing Examiners were appointed.

It took us a few years to realize that getting on the register proved to be a barren accomplishment for most applicants.

It took us a few years to realize that getting on the register proved to be a barren accomplishment for most applicants. To that extent, the efforts of the bar to improve the quality of appointments fell short of our expectations. When lawyers high on the register realized that they were being passed over by agencies appointing Hearing Examiners, they complained to the ABA. My investigations revealed that many of the most capable candidates on the general register simply had little or no hope of appointment as Hearing Examiners. We had failed to appreciate the pernicious effect

of arrangements made by the Civil Service Commission with several agencies which provided for the creation of separate registers which listed only those lawyers with two years of specialized experience; a practice called "selective certification." This enabled agencies to appoint most Hearing Examiners from their own staffs. While we recognized that specialized experience might provide a candidate a temporary advantage in terms of getting the agency's cases heard, we concluded that it did not warrant passing over more able lawyers capable of acquiring the specialized knowledge and serving more ably in a life-time judicial position. It took us several years to persuade the Commission to abandon selection certification which, we believed, fostered cronyism and debased the merit system.

As we learned more about how the new system was working from members of the bar serving on the interview panels, we began to consider other ways of improving the system. As a consequence, the Administrative Law Section urged the Civil Service Commission to change the title of the post from "Hearing Examiner" to "Judge." We hoped, thereby, to accomplish two objectives. First, higher caliber lawyers would seek appointment. Second, incumbents would be encouraged to perform their duties in the best traditions of the judiciary. The change of title was made effective by the Commission in 1972.

There was one change we were not able to effect; that was the elimination of veterans preference, a modification of the scoring system which many veterans, like myself, thought inappropriate in the evaluation of judicial candidates.

The structure of the Administrative Law Section performing the ABA's oversight functions in the 1960s has since changed. I can't remember when the Hearing Examiners Committee was

★Past Section Chair and current Chair of Ad-Hoc Committee on Review of Recruitment of ALJs by OPM. This presentation was made as a member of the panel on "Administration and Independence: OPM, ALJs, and the APA," at the 2004 Administrative Law Conference, Washington, DC on October 21, 2004.

abolished. It was succeeded in recent years by the four-member Ad Hoc Committee which I currently chair. This Committee now consists of three former Chairs of the Section and a prominent woman lawyer, all of whom have had considerable administrative trial experience.

In the 1980's and early 1990's, the ABA demonstrated its continued interest in the quality of administrative judicial proceedings by supporting legislation which would have established an ALJ Corps. I testified several times before Congressional committees in support of the proposal. I believed it worthwhile for three basic reasons. It would create an organization which could better-assure newly-appointed ALJs that they could look forward to a life-time career not dependent on the continued existence of a particular executive agency or a narrow legislative program. It assured provision of continuing legal education that would help judges perform their duties more efficiently and would facilitate their mobility to areas of the law where their services were required. The proposed legislation would also establish a fair disciplinary system for the ALJs. What is noteworthy in terms of my remarks today is the fact that this legislation assumed, indeed depended on, the continued performance by OPM of its historic statutory duties in the recruitment and examination of ALJ candidates under the APA.

In 2004, some forty years after I first became involved, the bar is once more called upon to examine how the United States Office of Personnel Management, the successor of the Civil Service Commission, is carrying out its APA functions as to ALJs. That study is not complete. Therefore, I cannot share with you any conclusions of the Ad Hoc Committee. However, I can note some developments which warrant our close attention.

In the Spring of 2003, OPM abolished the Office of Administrative Law Judges which Mr. Macy had set up in the 1960s as part of the agency's commitment which elicited the support of the ABA. I might observe that although that office lost its high status in

the Commission over the years, it continued to be the principle vehicle through which we expressed our concerns as to the ALJ program.

We are now in the process of determining how OPM's successor organizational structure is carrying out the agency's statutory obligations. To that end, I requested of OPM in August that it detail the offices and officials to which its ALJ statutory functions have been assigned. We await a response which, I hope, can be a basis for follow-up discussions.


In February, 2003 I learned for the first time, from the decision of the United States Court of Appeals for the Federal Circuit in the *Azdell* case, then identified as *Meeker v. James*, 319 F.3d 1368 (Fed. Cir. 2003), that OPM materially changed its method of scoring ALJ candidates in 1996. According to the Court, when OPM learned in that year that approximately 80 percent of the applicants had failed to attain the minimum score of 70 then required under the agency's 1993 formula to qualify for the register of eligibles, OPM decided to modify the scoring formula. The Court of Appeals described the new procedure in these terms: "applicants who satisfied a minimum requirement of seven years' experience as an attorney involved in administrative hearings or litigation and completed the remaining parts of the examination were assigned a base score of 70 points." The Court noted that additional points were then added for the four graded portions of the examination, namely, (1) the supplemental qualification statement, (2) the written demonstration, (3) the personal interview, and (4) the personal reference inquiry. The Court concluded: "the 1996 formula guaranteed that any applicant who met the work experience prerequisite and completed the four graded portions of the examination would receive a passing score and be placed on the register, regardless of the applicant's score on the four graded portions." This appears to me to mean that even if OPM was advised through the graded portion of the exam that an applicant was an impatient bully, or was a poor legal draftsman, or lacked judicial demeanor,

the applicant was certified as eligible for appointment as an ALJ so long as the candidate had the requisite seven years of experience and had done all the paper work. It seems to me that this development raises serious questions.

The authors of the 1992 study of the Federal Administrative Judiciary for the Administrative Conference of the United States observed: "In the view of the Attorney General's Committee and the Congress that enacted the APA, it was desirable to ensure that hearing examiners possessed superior qualifications." (pp 33-34). I am not aware of any subsequent legislation that warrants a different conclusion today.

I spent several years with other lawyers and judges in the American Inns of Court movement to help remedy a widespread perception that there is a great deal of incivility in the practice of law today. One does not need to practice law for fifty years to conclude that there are in the legal community lawyers with seven years of administrative or trial law experience, who are adept at filling out application forms, but who ought never be appointed judges.

The months ahead will provide several oversight challenges. Is it possible to form some judgment at this point in time as to the effect of the employment of the 1996 formula on the quality of the lawyers subsequently appointed as ALJs? I await a response to a request for data from OPM which might help initiate such an analysis.

Further ahead is another area of inquiry: OPM has been working on new recruitment standards and a new examination process which might be noticed next year and on the basis of which a new register of eligibles will be prepared which will replace the current register. Some questions have come to my mind: Is the new program designed and intended to produce the highest quality candidates for appointment as Administrative Law Judges? Or will it be shaped in a material way by a desire to have a program that will survive judicial review by reducing the number of applicants who will be disappointed in their efforts to attain the register from which appointments are made? 

Mercury and the Bush Administration

by Lisa Heinzerling and Rena Steinzor*

In December 2003, after ten years of study and bureaucratic hand-wringing, the EPA issued a final rule for mercury from chlor-alkali facilities, and it began the lengthy process of writing a rule to control mercury emissions from power plants. For chlor-alkali facilities that use mercury as an input to production, the EPA decided to forego any binding numerical limits on emissions, even though such plants “lose” as much as 65 tons of mercury annually — many tons more than the mercury released by all of the power plants in the country. For power plants, the EPA is pushing a system that would allow electric utilities to trade rights to emit this toxic substance, rather than requiring each plant to install equipment that would actually reduce its emissions. EPA’s preferred approach would delay until 2026 any significant reductions of mercury due to the mercury rule. In sum, in a gift to the two industrial sectors that together produce the lion’s share of mercury now poisoning fish across the country, the EPA simply refused to impose meaningful controls.

EPA’s decisions are all the more remarkable when one considers how

very clearly the basic building blocks of modern environmental policy — law, science, and economics — pointed in favor of swift and stringent controls on mercury emissions. We begin with the law.

In addressing mercury emissions from power plants and chlor-alkali plants, EPA faced a legally straightforward task. Section 112 of the Clean Air Act lists mercury as a hazardous air pollutant subject to regulation, and EPA had previously concluded that both power plants and chlor-alkali plants should be regulated as sources of mercury emissions. Under the clear language of section 112, listing of mercury and of these categories of sources led to an obligation on the part of EPA to regulate mercury emissions by prescribing the “maximum achievable control technology” (MACT) and requiring its installation. A MACT directive would have required each individual source to reduce its emissions to the level achieved by the best performers in its source category. By many accounts, this would have meant reducing mercury emissions by as much as 90 percent, within the three-year deadline provided by section 112.

But in the ninth inning, after years of cogitating on the appropriate MACT, things went terribly wrong. With respect to power plants, sometime in the months before the agency was set to issue its proposal to regulate mercury, Jeffrey Holmstead, the head of EPA’s air office, got the idea that it would be better to reduce mercury by allowing industry-wide emissions trading instead of plant-specific pollution controls. This about-face was such a drastic departure from the course the Agency had been on since 1990 that EPA officials did not have the courage to take it to its logical extreme and announce trading as the only approach EPA would pursue. Instead, the agency’s Federal Register notice soliciting comments on Holmstead’s ideas preserved the possibility that

EPA might still pursue MACT controls. As a result, EPA’s preamble reads like an early white paper on the various policy alternatives to reduce mercury emissions from power plants, not like the formal agency proposal it purports to be. The Agency ties itself in knots trying to explain how the law allows it to promulgate either of these diametrically opposed options.

EPA’s various proposals for regulating mercury from power plants suffer from numerous legal flaws. Indeed, the sheer numerosness of EPA’s suggestions seems to us to belie a deep insecurity on the Agency’s part about the legality of its actions. In several places, the Agency simply throws out a statutory section that might — just might! — provide a legal basis for its proposals, and asks for public comment on whether the section flies as a statutory grounding for the agency’s ideas. Especially in a post-*Chevron* world, in which judicial deference to agencies’ statutory interpretation is premised in part on agencies’ expertise regarding the statutes they administer, this hunt-and-peck method of statutory interpretation is highly dubious.

In any event, even EPA’s full-scale statutory discussions fall flat. Focusing only on EPA’s attempt to evade section 112’s MACT requirements and to embrace instead a trading program under either section 111 (pertaining to new source performance standards) or section 112 of the Act, the following are, in brief, the fundamental problems with EPA’s proposal, from a legal perspective:

- EPA has not justified deleting power plants from the section 112 list of regulated sources.
- Because EPA has not done so, it must regulate mercury from power plants under section 112 of the Act.
- Section 112 does not authorize EPA to create a trading program in toxic pollutants.
- Even if a court could be persuaded to allow EPA to sidestep section 112, the

* Lisa Heinzerling is a professor at the Georgetown Law Center. She is the author, with economist Frank Ackerman, of *Priceless: On Knowing the Price of Everything and the Value of Nothing* (The New Press, Feb. 2004). She thanks Trevor Wiessmann for excellent research assistance. Rena Steinzor is a professor at the University of Maryland School of Law. She is working on a longer analysis of the policies that underlie failures to control toxics, including mercury, that harm children. She thanks Raymond Schlee for excellent research support. Heinzerling and Steinzor are both member scholars of the Center for Progressive Regulation, <http://www.progressiveregulation.org>. This article draws upon two articles Heinzerling and Steinzor have written on the mercury rules: Lisa Heinzerling & Rena Steinzor, *A Perfect Storm: Mercury and the Bush Administration, Part I*, 34 *Env’t. L. Rep.* 10297 (April 2004), and Lisa Heinzerling & Rena Steinzor, *A Perfect Storm: Mercury and the Bush Administration, Part II*, 34 *Env’t. L. Rep.* 10485 (June 2004).

Agency is not authorized to employ trading under section 111.

So deep are the legal flaws in EPA's alternatives that there is virtually no hope that its final rule will survive judicial review. One thing is guaranteed, however: it will take years before these issues are resolved and, in the meantime, mercury emissions from power plants will remain uncontrolled or inadequately controlled. One need not be a hopeless cynic to wonder whether this Administration, foe of environmental regulation and friend of the energy industry, thinks this legal uncertainty, with its attendant delay, is just fine.

For mercury cell chlor-alkali plants, the legal problems took a different form. In that instance, EPA did not root around outside section 112 for legal authority to avoid strict regulation. Instead, it simply undermined section 112 itself by so narrowly classifying the categories subject to regulation that the agency could, in effect, grandfather the most antiquated chlor-alkali plants in the country.

The nine facilities in question are so outmoded that a new one has not been built in 30 years. Together, these facilities "lose" approximately 65 tons of mercury per year — more than the amount emitted by all U.S. power plants combined. Thirty-two of the approximately 43 facilities that manufacture chlorine and caustic soda use diaphragm or membrane cells, which are significantly more energy efficient, do not use or emit mercury, and manage to produce 88 percent of the nation's chlorine. In fact, some of the companies that own the nine antiquated plants have the newer, cleaner technologies operating right next door. Yet rather than conceding that manufacturing chlorine and caustic soda using mercury is not exactly in the avant garde of pollution control, and is certainly not MACT, EPA simply put the antiquated mercury cell plants in a category of their own and announced that they could continue to operate indefinitely under a system of almost laughably lenient "work practices," which have as their centerpiece visual inspections of the cell room to see if workers can see whether any mercury has fallen on the ground. EPA itself is unable to estimate whether such inspec-

tions will produce any reductions in mercury releases.

In proposing a cap-and-trade system for mercury (and an exceedingly lenient one at that), and in grandfathering the most antiquated chlor-alkali facilities in the country, EPA acted outside the bounds of the law. In doing so, as we discuss next, EPA also effectively dismissed the strong scientific evidence showing mercury's serious threats to human health.

Mercury is a heavy metal that occurs naturally in the earth's crust and is also produced by "anthropomorphic" (manmade) activities. Because mercury is very "persistent," meaning that it does not break down easily, it circulates and re-circulates from air to water to soil and back again without losing its toxic characteristics, producing what scientists call the "global mercury cycle." Methylmercury (MeHg), the form of the metal that is most toxic to people, results from the interaction between elemental mercury and microorganisms in soil and water. A very small amount of mercury goes a very long way: as little as a teaspoonful can contaminate a 20-acre lake.

The first step in the EPA's attempts to reduce industrial mercury emissions was the establishment of a "reference dose" for methylmercury of 0.1 µg/kg (microgram per kilogram) body weight per day, or 5.8 parts per billion in the blood. A reference dose means the level below which we would not expect to see any adverse health effects. Conversely, above that level, we can expect to see problems begin.

The EPA's low number sparked such a vigorous challenge by industry scientists that Congress directed the nation's premier scientific organization to conduct an extensive review of the EPA's interpretation of all the available science. However, the NAS panel upheld the EPA reference dose:

The population at highest risk is the children of women who consumed large amounts of fish and seafood during pregnancy. The committee concludes that the risk to that population is likely to be sufficient to result in an increase in the number of children who have to struggle to keep up in

school and who might require remedial classes or special education. ... *On the basis of its evaluation, the committee's consensus is that the value of EPA's [reference dose] is a scientifically justifiable level for the protection of public health.*

In June 2003, a panel of experts from the United Nation's Food and Agriculture Organization (FAO) and the World Health Organization (WHO) followed the NAS and the EPA lead, voting to cut the worldwide Provisional Tolerable Weekly Intake (PTWI) of methylmercury in food roughly in half, to 1.6 micrograms per kilogram.

Thus, two of the world's most eminent scientific bodies have considered the question of methylmercury exposure on public health, and both have concluded that the EPA's reference dose is correct. Moreover, the Centers for Disease Control (CDC) have assembled statistics showing that, primarily as a result of this consumption, eight percent of American women of child-bearing age have levels of mercury in their bloodstreams that could harm their unborn children. On the basis of these results, EPA scientists have estimated that some 630,000 American babies out of the four million born each year have dangerously elevated blood mercury levels. In addition, the number of states issuing warnings to the public about the danger of ingesting fish caught from local rivers, lakes and streams has risen steadily from 27 in 1993 to 45 in 2002, an increase of 138 percent. Fish advisories for mercury now cover 12,069,319 lake acres, or close to a third of all American lakes, and 473,186 river miles, or close to 13 percent of all American river miles.

In this case, scientific research has recently brought reassuring news along with the bad. A study done in Florida showed that cleaning up local sources — in this case municipal and medical waste incinerators, subjected to strong controls relatively recently — resulted in immediate improvement in the amount of mercury in large mouth bass, one of the species most affected by contamination. This outcome means that we could

continued on next page

Mercury and the Bush Administration

continued from previous page

make significant progress by cutting future mercury emissions.

In the story so far, therefore, we have a substance that EPA is required by law to regulate strictly and swiftly by requiring the best available pollution controls for individual plants, and one that scientific research has shown poses a grave threat to human health. At this point, readers might begin to suspect that the Bush Administration's exceedingly lax approach to mercury regulation must have been the result of an unfavorable economic analysis of more stringent rules. But they would be wrong.

EPA's own analysis of its mercury proposals documented *net* benefits (benefits *minus* costs) of \$13 billion from the regulation of power plants — *even without any calculation of the independent benefits of reducing the adverse health effects caused by mercury exposure (e.g., neurological injury to babies and children)*. The benefits that were quantified and monetized were a regulatory windfall: they were the “co-benefits” associated with reducing sulfur dioxide (SO₂) and nitrogen oxide (NO_x), two air pollutants that are otherwise regulated under new EPA rules issued around the same time as the mercury proposal. EPA claimed these co-benefits in the context of its mercury rule proposals because reducing SO₂ and NO_x under those other rules will also result in reductions — as yet unquantified — of mercury emissions. EPA's calculations tend to obscure the single most remarkable fact about its mercury proposals: none of the alternatives EPA

suggests with respect to mercury require utilities to do anything more to control mercury than they are doing already to control SO₂ and NO_x. Only in 2018 — at the earliest — will mercury-specific control requirements kick in, at which time, under EPA's proposed trading alternative, total allowable emissions are reduced further.

Thirteen billion dollars is, as these things go, a whopper of a net benefit. Yet the public record reveals that no one — neither EPA officials nor the supposedly cost-benefit-minded economists at the Office of Management and Budget (OMB) — asked whether we might get an even more wonderful cost-benefit profile if we regulated mercury more stringently. Indeed, EPA officials ordered career personnel at the Agency not to perform the kind of scientific and economic analysis usually performed for this kind of rule. And the dominant concern of the “efficiency” hawks at OMB appears to have been to make the risks of mercury appear as low as possible.

Revelations in the press about the deliberate under-analysis of the mercury proposal have prompted EPA Administrator Mike Leavitt to order new analyses to be undertaken by EPA staff. Leavitt has stated that the analyses will be made available to the public for another round of comments. Yet even as Leavitt was promising these new analyses, Jeffrey Holmstead was telling the press that EPA was devoted to the proposal for trading mercury emissions.

Allowing trading in mercury would be a large mistake. In offering its proposal to allow commercial trading in mercury emissions, EPA violated several of the most basic principles for designing an effective and enforceable trading regime. Permitting trading in a toxic substance makes practically inevitable the creation of dangerous hot spots that threaten the health of neighborhoods around the plants. Compounding this overriding problem, the “cap” EPA proposes to set on total emissions is exceedingly generous, requiring no new, mercury-specific controls until 2018 at the very earliest. By allowing unlimited banking of emissions credits, the Agency has shot holes through what it calls its “certain, fixed” (albeit overly generous) cap, with the embarrassing result that under the Agency's own modeling, it may be 2026 until mercury emissions are reduced to half as much as they are now. The weakness of the Agency's trading proposal was cast in sharp relief by the findings of a recently released analysis by EPA's Office of Research and Development showing that technologies capable of achieving 70–90% reductions will be available as early as 2010. The trading regime EPA proposes to create is, quite simply, a disaster waiting to happen.

EPA's proposal cannot be fixed with tinkering. EPA should withdraw the proposal and start where it left off a year ago, when it was still committed to the legally correct and environmentally preferable MACT regime for mercury. ○

A Remarkable Chairman

continued from page 5

deal or price packaging by dominant firms is particularly murky — and vigorous competition by firms with monopoly power is inhibited as a consequence. The regulation of increasing and increasingly obnoxious e-mail spam, computer viruses and similar invasions of consumer privacy

seriously undermine usage of the Internet. The FTC should take the lead in crafting workable solutions.

On balance, however, the record is clear. When the history of the first century of the FTC is written ten years from now, Timothy J. Muris will be

ranked among its top commissioners. His successor, Ms. Majoras, has inherited the leading antitrust agency in the U.S. Her job will be to maintain that role by building on Muris' legacy. ○

The Federalization of Corporate Governance

By Roberta S. Karmel*

The Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley")¹ was passed in response to the bursting of the stock market bubble of the late 1990s and the uncovering of widespread financial fraud at large public companies which had been high fliers during the boom in technology stocks. Without inquiring too deeply into the reasons for the bubble and its collapse, or why accounting irregularities at public companies had become so pervasive, Congress passed Sarbanes-Oxley to restore investor confidence. The statute is based primarily on recommendations from the SEC, and in the process, the SEC acquired power to regulate corporate governance at large public companies to a much greater extent than was previously the case. As a result, a significant amount of authority for regulating corporate governance in public corporations passed from state law and state courts to the SEC. In addition, the new law is designed to create a set of adversarial relationships among the corporate governance players, a possibly counter-productive development. The most important of these corporate governance provisions are set forth below.²

*Professor of Law and Chair of the Steering Committee for the Center for the Study of International Business Law at Brooklyn Law School.

¹Public Company Accounting Reform and Investor Protection Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C.).

²The SEC's new regulatory authority over auditors and attorneys will not be discussed.

³These provisions have been implemented by rules 13a-14, 13a-15, 17 C.F.R. §§ 240.13a-14, 13a-15. See *Certification of Disclosure in Companies' Quarterly and Annual Reports*, Securities Act Release No. 8124, 67 Fed. Reg. 57,276 (Sept. 9, 2002).

⁴See *Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports*, Exchange Act Release No. 47,986, 68 Fed. Reg. 36,636 (June 2003).

⁵Previously, the SEC could only obtain such bars by way of a court order.

⁶Item 406 of Regulation S-K, 17 C.F.R. § 229.406. See *Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002*, Securities Act Release No. 8177, 68 Fed. Reg. 5110 (Jan. 31, 2003).

Certifications

Sarbanes-Oxley requires the SEC to adopt rules requiring the principle executive and financial officers of SEC registered issuers to certify annual and quarterly reports filed with the SEC. The signing officers must certify that he or she has reviewed the report; it does not contain untrue or misleading statements; it fairly presents in all material respects the financial condition and results of operations of the issuer; and the signing officers are responsible for establishing and maintaining internal controls, have designed such controls to ensure that material information is made known to such officers and others and have evaluated such controls. Sarbanes-Oxley, § 302, codified at 15 U.S.C. § 7241 (2002).³ Further, there are criminal penalties provided for false certifications. Sarbanes-Oxley, § 906, 18 U.S.C. § 1350 (2002). A related mandated disclosure is that companies include in their annual reports an explanation and evaluation of their internal controls. Sarbanes-Oxley, § 404, 15 U.S.C. § 7241 (2002). Further, the issuer's auditor must attest to management's assessment of internal controls.⁴

The certification provision gives the SEC direct regulatory authority over corporate officers of all public companies. Further, the SEC now has the power to bar executives from serving as corporate officers in administrative proceedings, without the need to go to court. Sarbanes-Oxley § 1105, 15 U.S.C. § 78u-3 (2002).⁵ The SEC could well use this new authority to regulate corporate officers in ways not contemplated by the Congress which passed Sarbanes-Oxley.

Executive Compensation

Although Congress did not try to limit executive compensation directly, four provisions of Sarbanes-Oxley are directed at specific management compensation abuses. SEC rulemaking was not required to implement these provisions which are self-executing. If an issuer is required to

prepare an accounting restatement due to material noncompliance, as a result of misconduct, with any financial reporting requirement under the securities laws, the CEO and CFO must reimburse the issuer for any bonus or other incentive based or equity based compensation and any profits from the sale of securities of the issuer during the 12 month period following the publication of the financial statement required to be restated. Sarbanes-Oxley § 304, 15 U.S.C. § 7243 (2002). To give some teeth to this provision, the SEC has been given the authority to obtain asset freezes to prevent an issuer from paying bonuses to executives in cases involving financial fraud. Sarbanes-Oxley, § 1103, 15 U.S.C. § 78u-3 (2002). In addition, directors and executive officers of issuers are prohibited from trading in any equity securities of the issuer during any black out period when employees are so prohibited. Sarbanes-Oxley § 306, 15 U.S.C. § 7244 (2002).

Codes of Ethics

Sarbanes-Oxley requires the SEC to issue rules to require issuers to disclose whether or not they have codes of ethics applicable to senior financial officers. Sarbanes-Oxley, § 406, 15 U.S.C. § 7264 (2002). The implementing rules require issuers to disclose whether a code of ethics has been adopted in their annual reports and to file any code with the SEC.⁶ The way in which the SEC defined the term "code of ethics" is quite broad.

The rules do not specify the exact details that must be included in a code, or any specific language that must be used, and some of the matters that should be touched upon have been included in stock exchange or other self-regulatory organization ("SRO") proposed rules. The open ended nature of the Sarbanes-Oxley provisions on codes of ethics and the SEC rules give considerable scope to the SEC to insert its views concerning corporate governance into the workings

continued on next page

The Federalization of Corporate Governance

continued from previous page

of public corporations, either through future enforcement actions or otherwise.

Whistleblowers

Sarbanes-Oxley creates a new civil cause of action that protects employees of publicly traded companies who lawfully provide evidence or otherwise assist in the investigation of conduct that the employee "reasonably believes constitutes" violations of the federal anti-fraud statutes, or SEC regulations. Sarbanes-Oxley, § 806, 18 U.S.C. § 1514A (2002). Another provision establishes criminal liability for whistleblower retaliation. Sarbanes-Oxley, § 1107, 18 U.S.C. § 1513 (2002). Finally, audit committees of public companies are required to establish procedures for receiving and dealing with complaints regarding accounting, auditing or internal accounting controls. Sarbanes-Oxley, § 301, 15 U.S.C. § 78j-1 (2002).

Audit Committees

Sarbanes-Oxley gives the SEC the authority it has long wanted to restructure corporate audit committees, but it does so primarily by authorizing the SEC to direct SROs to change their listing rules to meet certain standards. Sarbanes-Oxley, § 301, 15 U.S.C. § 78j-1 (2002). Also, a public company must disclose whether its audit committee includes at least one "financial expert." Sarbanes-Oxley, § 407, 15 U.S.C. § 7265 (2002). Sarbanes-Oxley takes considerable authority for financial reporting away from management and places it with the audit committee. Further, it makes the audit committee a potential critic and antagonist of the CEO and CFO. The specific grant of authority to the SEC to regulate the structure and duties of audit committees is a significant

departure from previous legal theories regarding the divide between federal and state law.

Each member of the audit committee of a listed issuer must be "independent," and this term is defined to mean that an audit committee member may not, other than in his or her capacity as a board member, accept any consulting, advisory, or other fee compensation from the issuer, or be an affiliated person of the issuer or any subsidiary. Sarbanes-Oxley, § 301, 15 U.S.C. § 78j-1 (2002).⁷ The audit committee must become directly responsible for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by the issuer. As already mentioned, audit committees must establish procedures for receiving and treating complaints regarding accounting, internal controls or auditing matters. The audit committee must have the authority to engage independent counsel and other advisers and be adequately funded. Although all of these requirements are to be implemented by SROs rather than SEC rules, the SROs only have authority to go beyond, not to derogate from, these minimum standards.

Taken as a whole, these rules undercut the long standing principle of state law that the board of directors as a whole is responsible for directing the management and supervising the affairs of a corporation. The audit committee is set up as an executive committee for certain purposes and the "financial expert" is set up as a super committee member. Further, an adversarial model of governance is substituted for the traditional collegial model of board governance. The implications of these changes, in terms of director liability and board practice, will probably take some time to be felt and understood.

The Independent Director Model

The keystone of the SEC's corporate governance policy is the independent director. The author has long felt that this model is flawed. Independent directors are part time participants in a corporation's affairs. By definition they are outsiders.

However intelligent, hardworking or strong minded they may be they do not have the time or the mandate to challenge management's judgements except as to a discrete number of issues. If they spend all of their time trying to audit the auditors and assure that executive compensation is reasonable, they will have no time for focusing on important business and strategy matters. If they become essentially full time directors they will no longer be independent. If they repeatedly challenge the judgments of a CEO, the CEO will lose his authority and be forced to resign. Corporations are essentially hierarchical and need a strong leader. Some of the most highly regarded U.S. corporations have had authoritarian CEOs who have rewarded shareholders over a long period of time.⁸ This does not mean that independent directors are a bad idea, but corporations should have greater freedom to experiment with board structures than they now have under Sarbanes-Oxley. Further, since the independent director board simply cannot carry the freight the SEC has placed upon it, it is bound to disappoint and cause investor and public dissatisfaction and loss of confidence. The collegial board has its flaws and there are times when management deserves to be challenged and even thrown out of office, but the prevailing model has actually served the U.S. economy well over a long period of time. The consequences of changing it, and giving control of board structure to a federal government agency are unknown.

Sarbanes-Oxley has given the SEC extensive authority over CFOs and outside auditors and attorneys. In the SEC's view, different players on the corporate team should be watching one another suspiciously to assure compliance with the federal securities laws, and should be prepared to blow the whistle on any errant CEO. Although such checks on the power of a bad CEO may be salutary, such checks on the power of a good CEO may undermine his or her leadership to the point of diminishing the competitiveness of a business corporation. ○

⁷ This is more stringent than prior definitions of independence utilized for listed company audit committees.

⁸ The corporations run by Warren Buffet (Bershire Hathaway), Jack Welch (General Electric), Bill Gates (Microsoft), and Hank Greenberg (AIG) come to mind as examples. See Helen Stock, *Buffet Admonishes Fund Directors*, WASHINGTON POST, Mar. 7, 2004, at A15.

Learnings from the Masters

George Burditt

*As interviewed by Prof. Jim O'Reilly**

“Administrative law, particularly in the food and drug field, is just fascinating to me. I am 82 years old but I love every minute of what I do, and there are all kinds of challenges in it, physical, intellectual, psychological, all kinds. I can say to a young person entering our field, I have never had a dull ten seconds in my life in this field.”

George M. Burditt of Bell, Boyd in Chicago epitomizes the class and enthusiasm that separate exceptional players from the average administrative law practitioner. “Players” is an appropriate term, because his lanky 6’3” frame for the Harvard basketball team earned him a pro basketball tryout, before succumbing to law’s call to Harvard Law School. George taught two generations of FDA lawyers and many private sector lawyers as he earned and shared the mastery of this important field of practice.

Is administrative law a good field for law students to enter?

Definitely, it is a growth field; people will always need guides through the maze. There were so few FDA rules when I entered the field that they could fit comfortably in one small binder; now there are tens of thousands of pages of rules, guidance documents, policy manuals, etc. It is infinitely more complex today and good lawyers are very valuable.

What advice do you give younger lawyers about agency practice?

It can be an absolutely fascinating field. There are many challenges but it’s never dull.

What was your most memorable success against an administrative agency?

When a federal judge dismissed an FDA criminal case and then shook his finger at the government’s lawyers: “Your case was so bad it warranted criminal prosecution of the government!” Outside the courtroom, the government’s lawyer retorted that “In the 16th Century they would have condemned Burditt as a witch!”

How has judicial deference affected the field of FDA law?

Courts have always deferred to FDA; I see no real difference compared to the prior years of acceptance of what the FDA puts before the court.

*Past Section Chair and current Advisory Board Member.

What are the features of the most successful regulators?

The best regulators really know their stuff. They are thoroughly grounded in FDA law, backwards and forward. When it comes time to present their case to a court, they are unequivocal, clear, have good factual presentation and great witnesses. These skills are the same needed for litigating and rulemaking, just in a different setting.

What marks a regulator who is likely to NOT succeed?

The person who takes shortcuts, shoots from the hip, and does not have courage to stand up for a well reasoned position is likely to fail. The person who takes a wrong position and refuses to consider how others might have a better understanding won’t succeed. To be effective a regulator has to be committed to reaching reliable results.

What makes for an effective or ineffective agency counsel?

Fairness is critical. The effective agency counsel has a thorough grasp of the facts and of the law before the case begins. If the agency makes a mistake, counsel should acknowledge its mistake and take the appropriate action. In one case, the agency’s sampling error caused them to reach a mistaken impression, and later caused them to lose a long and expensive trial. When I called the agency counsel’s office to inquire about their Equal Access to Justice Act compensation procedures, they said, “Is this about the case we screwed up in Minnesota?”

What learnings from dealing with FDA have you applied to other litigation?

Realize that the other lawyer is also trying to do a good job. Civility is so very important; treat the other side with respect and dignity even while you are making a forceful presentation. It’s unfortunate that today, litigators are unhappy because there is such un-civil behavior.

What changes have been most significant?

Three things: more rulemaking in place of adjudicatory decisions, and that has reduced the number of hearings before the agency. Second, there is much more attention to new penalties and sanctions that were not considered before. And third, the most significant has been much more attention to politics. If you can’t understand why the agency won’t discuss a settlement or an alternative, why they can’t talk about it, there is often a political pressure driving that decision, where politics had in the past not been visible. ○

Comments and suggestions on the style and content of this publication should be sent to KnightK@staff.abanet.org.

The 2004 Administrative Law Conference

By John F. Duffy*

The Section's 2004 Administrative Law Conference was a tremendous success. The conference broke the record from last year's conference for the most attendees ever at a Section event. The 2004 conference attracted nearly 700 attendees, including 100 individuals who purchased passports to all events at the conference. The conference was attractive to so many precisely because the panels organized by our Section members bring together some of the best thinkers in government, private practice and academia to discuss and debate the important issues currently generating controversy in the field of administrative law and regulatory policy. These panels are the heart and soul of the conference, and the conference's success pays a fitting tribute to the panel chairs and other section members who had a role in organizing them.

The conference also included a number of very popular special events, including an opening address by FTC Chairman Deborah Majoras, the annual awards luncheon with remarks by Judge Merrick Garland, an evening reception at the U.S. Botanical Gardens, and a special introduction to the year's developments panel by Judge Raymond Randolph. The conference was capped off with an evening at the Supreme Court, which began with a panel of four former solicitors general discussing advocacy on behalf of the United States and concluded with an elegant dinner held in the Great Hall of the Court and hosted by Justice Sandra Day O'Connor.

The conference would not be possible without the hard work and support of many individuals and firms. Section Chair Randy May, who served as chair of last year's Conference, lined up the marquee events and speakers that helped guarantee the success of the Conference

this year, and many thanks are due the members of the section who organized panels for the conference; they bore the lion's share of responsibility in making the conference an invaluable event for administrative practitioners and scholars. Kimberly Knight and Nicole Emard worked tirelessly to ensure that the conference was flawless in its operations, and they succeeded.

Finally, the Section owes a special debt of gratitude to the following conference sponsors: Baker & Hostetler LLP; Balch & Bingham LLP; Crowell & Moring LLP; Foley & Lardner LLP; Gibson, Dunn & Crutcher LLP; Haynes & Boone LLP; Hunton & Williams LLP; Jenner & Block LLP; Kirkland & Ellis LLP; Kelley Drye & Warren LLP; Latham & Watkins LLP; Paul, Hastings, Janofsky & Walker LLP; Porter Wright Morris & Arthur LLP; Proskauer Rose LLP; Ropes & Gray LLP; Sidley Austin Brown & Wood LLP; Wiley Rein & Fielding LLP; and Wilmer Cutler Pickering Hale and Orr LLP.

Though it would be impossible to give a full sense of the conference in this newsletter, below is a sampling of some excerpts from the principal addresses at the conference. Finally, don't forget to attend next year's Fall Conference.



Chairman Majoras

The Honorable Deborah Platt Majoras, Chairman, Federal Trade Commission, opened the conference with an address about administrative revitalization at the FTC:



Section Chair May, Justice O'Connor, President Grey and President-Elect Greco at the Supreme Court.

I had the good fortune to come to the FTC shortly before the late September celebration of the 90th Anniversary of the signing of the FTC Act. Current Commission members and employees — joined by FTC alumni, practitioners, and scholars — marked this anniversary with a two-day symposium examining the agency's history, its failures, and its triumphs. Even the most casual student of the FTC and its past would have been struck by the atmosphere of the celebration — the pride in recent successes and the satisfaction in overcoming past shortcomings, both wisely tempered by a keen commitment to improve to meet the inevitable new challenges. This morning I want to use the occasion of the recent Symposium and the reflection it prompted to discuss the lessons that experience has taught about the ingredients of good administrative practice. The FTC transformed itself from an object of ridicule in the late 1960s to a place of respect among public institutions (not to mention a place of heroism among members of the public whose dinners no longer are interrupted by irritating telemarketing calls). The transformation bears most directly on the formulation of competition and consumer protection policy, but I suggest that it offers lessons for the administrative process generally.

*Conference Chair; Past Council Member; and Professor, George Washington University Law School.

The literature on the first half-century of the FTC presents a narrative of many failures interrupted by some intervals of accomplishment. Critical commentary reached a peak in the late 1960s. In 1969, President Nixon, spurred by a scathing report by Nader's Raiders, asked the American Bar Association ("ABA") to appraise the FTC's performance. The Nader Report said, "Misguided leadership is the malignant cancer that has already assumed control of the Commission, that has been silently destroying it, and that has spread its contagion on the growing crisis of the American consumer." With greater reserve, the President said the Commission "may have failed to discharge [its] obligations satisfactorily."

The ABA assembled a 16-member, blue-ribbon panel. Fifteen members of the panel, which, led by Miles Kirk-

dedication, and with wise direction from committees such as these, the Commission, in their view, can still be redeemed for socially productive activities. I am not so sanguine.

Given this history, you may wonder what we had to celebrate on the FTC's 90th Anniversary. How did we get from the dark days of failure and frustration to the FTC that I joined two months ago with its effective competition and consumer protection programs? I suggest three fundamental improvements. First, the Commission clarified its mission in both the competition and consumer protection agendas and accordingly deployed its resources to stop the most egregious consumer harm. Second, the Commission began to use its unique capabilities to better understand the marketplace and the efficacy of its

actions. And, finally, the Commission began to cooperate with other agencies to more effectively advance its goals.

* * *

The agency I have just joined at its 90th Anniversary is strong, effective, and innovative. In fact,

we even had the confidence to invite Judge Posner to be the featured speaker at our celebratory dinner last month. While he recognized that the FTC had transformed itself — and joked about being invited to eat crow with us — he also offered some cautions for the future. We welcome his thoughtful cautions and suggestions and any others. Celebration of what a talented staff has achieved through hard work is permitted; stuck-in-place, self-satisfaction is not.

The Honorable Merrick B. Garland, Circuit Judge for the U.S. Court of Appeals for the D.C. Circuit, delivered an Address at the Section's Awards Luncheon, which presented the Section's annual Award for Scholarship to Professor Steven Croley of the

University of Michigan Law School, and the Section's Mary C. Lawton Outstanding Government Service Award to Thomas Spahr, Chief Legal Counsel for the Child Support Division of the New Mexico Human



Judge Garland

Services Department. Judge Garland's address was entitled "Scholars and Public Servants at the Founding (of the APA)" and began with a history of the Section's role in pressing for enactment of an administrative procedure reform statute:

Judging from the warm reception that Mr. Spahr and Professor Croley have received here this afternoon, one might well conclude that administrative law is a collegial, noncontroversial field. Indeed, you may recall that when Justice Breyer — the first recipient of this Section's Scholarship Award — was nominated to the Supreme Court, his confirmation hearings were described as "dull" seminars in administrative law: It was a topic, one reporter said, "known to make [the] eyes glaze over."

But things were not always so. In fact, the debate that led to the adoption of the Administrative Procedure Act in 1946 was anything but collegial and noncontroversial. To the contrary, the founding of the APA, like the founding of our nation itself, was marked by sharp conflict, energetic discussion, and some good old fashioned name-calling. As Professor George Shepherd — another winner of this Section's Scholarship Award — reminded us in his excellent article on the history of the APA, both sides in that conflict saw themselves as fighting a "pitched political battle for the life of the New Deal." Drawing on Professor Shepherd's work and other sources, I thought I might take this opportunity to put our current era of good feeling in historical perspective.

Right at the heart of the pitched battle of the 1930s was this very organization, the Administrative Law Section of the ABA. First established in 1933, it was known then as the Special Committee on Administrative Law.

continued on next page



Section Chair May with former Solicitors General Waxman, Dellinger and Olson at the Supreme Court.

patrick, came to be known as the Kirkpatrick Commission, joined in a report that was quite critical of the FTC and made strong recommendations for fundamental change. Richard Posner, as you know now a judge on the United States Court of Appeals for the Seventh Circuit, served on the Kirkpatrick Commission as the 16th member and did not join in the report's recommendations. Said Judge Posner at the time:

My colleagues of the majority, while fully conscious of the Commission's deficient performance of more than 50 years, maintain a resolute air of optimism. With better leadership and better staff, with greater appropriations, with a renewed sense of

The 2004 Administrative Law Conference

continued from previous page



Section Chair Randy May, Subcommittee Co-Chair Cynthia Farina, Scholarship Award recipient Prof. Steven Croley, Outstanding Government Service Award recipient Thomas Spahr, and Subcommittee Co-Chair David Frederick at annual awards luncheon.

Early on, the Committee's chief concern was that the New Deal agencies were wielding an inappropriate combination of legislative and judicial power. In the first of many apocalyptic predictions, the Committee's 1934 Report warned that "the judicial branch of the federal government is being rapidly and seriously undermined" by administrative tribunals, and is "in danger of meeting a measure of the fate of the Merovingian kings." A dire warning, to be sure, but perhaps too obscure a reference to the 8th Century Franks to have had much impact back in the days before Google searches.

To control the agencies, the 1934 Report proposed the "establishment of a [single] federal administrative court" that would take over all agency adjudications. The recommendation of the Committee's 1935 Report was less sweeping, but still insisted that "[w]e should *not* have some 73 midget courts in Washington, most of them exercising legislative and executive as well as judicial powers." Widening its historical references and ratcheting up its rhetoric, the ABA Committee compared administrative agencies to the Star Chamber of Tudor England and to the policies of the Roman Emperor Caligula.

Notwithstanding the Committee's colorful invective, Round One went to the midget courts. The ABA's effort to pass a bill creating a federal administrative court died in Congress. So in 1937, the ABA changed tactics. Instead of lobbying

for a new overarching tribunal, the Ad Law Committee proposed sweeping procedural reforms....

The ABA soon handed responsibility for managing its new game plan to Roscoe Pound, a giant of the legal profession who had just completed

a 20-year tenure as Dean of Harvard Law School. The ABA brought Pound in to chair the Administrative Law Committee for just one year, but in that year he "transformed the debate." As Walter Gellhorn later put it, when Pound entered the conversation, "the decibel count rose markedly." Erwin Griswold, no shrinking violet himself, described Pound as an "intense," "sometimes irascible" man. According to Griswold, Pound "never wore a coat, no matter how cold the weather." The ABA certainly knew how to pick a tough champion.

Plunging into the thick of the battle, Pound authored the Ad Law Committee's 1938 Report, which embellished on the Committee's previous references to the Star Chamber and Caligula. The New Deal agencies, the Report thundered, were engaged in "administrative absolutism," a "Marxian idea." The Report warned that: "In the fascist countries executive government is freed of popular review by reference crudely to principles of leadership[;] ... in other countries more subtly by reference to the importance of the expert in solving complex problems."...

Now, as you might imagine, supporters of the agencies did not appreciate the ABA's attack. One of those supporters was James Landis, who had succeeded Roscoe Pound as Dean of Harvard Law School. Landis was one of the principal authors of the Securities and Exchange

Act of 1934, and had served as an original member and then Chairman of the SEC.

In an article in the *Harvard Law Review*, Landis wondered how "epithets and encomiums" could have come to "play such a part" in the debate over administrative law. Landis complained that, although "the rise of the administrative process is by all odds the most significant development in legal history in the last century[,] its implications ... are handled by scholars as if these issues were political in nature." Implicitly chiding the dean who preceded him, Landis wrote that scholarly study of the administrative process should "offer no opportunity for ringing speeches against the rise of arbitrary power for the postprandial delight of bar association audiences." Out of respect for Landis, this postprandial speech will contain no ringing....



Judge Randolph

The Honorable A. Raymond Randolph delivered opening remarks at the Conference's Friday morning panel on Developments in Administrative Law. Judge Randolph's address offered a reply to an article in the November, 2003, edition of the Duke Law Journal

entitled "Vacation' at Sea: Judicial Remedies and Equitable Discretion in Administrative Law" by Professor Ronald Levin of the Washington University in St. Louis. Judge Randolph's address was entitled "Judicial Remedies for Unlawful Agency Action"; the excerpt below is from the beginning:

Randy asked me to speak about an unresolved issue in our court. The issue is whether a court, after finding agency action arbitrary and capricious or otherwise unlawful under the APA, has the option of just remanding the case to the agency without vacating the illegal rule or order. Ron Levin, in an outstanding piece of scholarship, has analyzed the

subject in great depth. Ron's article, which is about 100 pages long with more than 400 footnotes, comes to a conclusion different than mine. Randy has given me 15 minutes to reply.

When I say the remand-only issue is unresolved, I do not mean that our court has never simply remanded agency cases without vacating. Far from it. There have been a fair number of such cases and the number is on the rise. Before 1993, I think remanding without vacating was done without much thought and, perhaps, inadvertently — that is, the court intended to vacate also but said only “remanded.” We traditionally sign off our opinions with “so ordered” or “affirmed” or “dismissed” and even occasionally “reversed,” always in italics, flush right. I suspect not much attention was paid to the large difference between “remanded” and “vacated and remanded.” It was as if we were ending a letter with “sincerely” instead of “sincerely yours,” without paying much attention to the choice.

Things changed, but only for awhile, after *Checkosky v. SEC* came down in the spring of 1993. The case was quite complicated. The SEC had suspended two CPA's for engaging in “improper professional conduct” when they conducted audits of a major corporation.

Although the parties argued about many difficult issues, the question of relief was not one of them. I thought then, and think today, that under the APA, courts must vacate illegal agency action — which is what I wrote in my opinion. For reasons that are still a mystery to me, my colleague on the panel wanted just to remand the case to the SEC. His separate opinion never attempted to parse the language of § 706 of the APA. The third member of the panel, a visiting district judge, voted to uphold the SEC, which left remand only as the least common denominator.

The relevant language in APA section 706(2)(a) is this:

a reviewing court, faced with arbitrary, capricious or otherwise illegal agency

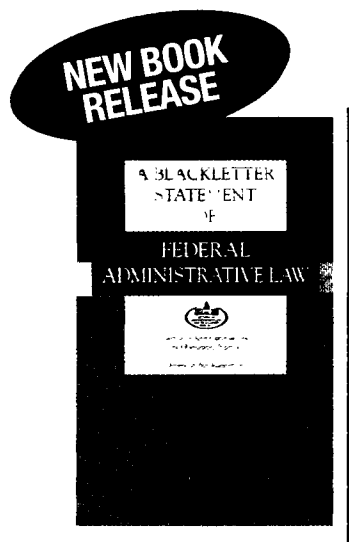
action, “shall hold unlawful and set aside” the agency action.

Set aside means to vacate, according to the dictionaries and common understanding. And “shall” means “must.” I see no play in the joints. The rule is hard and fast. No opinion for our court has ever confronted the language of § 706. Remanding without vacating is just done. My colleague in *Checkosky* thought this made it right. It does not. His position reminded me of a line from *A Tale of Two Cities*: “whatever is, is right, which involves the troubling proposition that nothing that ever was, was wrong.”

In contrast, Professor Levin — and this section in a 1997 resolution — marshaled some arguments against my interpretation of § 706. I do not find them persuasive. I will deal with them briefly and then explain why I believe that just remanding is not only a violation of the APA, but also bad policy. ○

A Blackletter Statement of Federal Administrative Law

from the ABA Section of Administrative Law and Regulatory Practice



Distilling more than half a century of federal administrative case law into 75 pages.

If your client is regulated by the federal government, or you work on behalf of the federal government, you need this book! The Blackletter is a handy desk reference covering:

- Adjudication
- Scope of Judicial Review
- FOIA, Sunshine, Advisory Committees
- Government Management of the Administrative Process
- Informal Rulemaking
- Availability of Judicial Review

Only \$9.95 plus \$3 shipping

Bulk orders of 10 or more are just \$7 each plus shipping.

Order it now at www.abanet.org/adminlaw/BLSorderform.pdf

Review the Table of Contents at www.abanet.org/adminlaw/BlklettSt/TOC.pdf

www.abanet.org/adminlaw

Midyear Meeting

of the
Administrative Law
and Regulatory Practice Section

February 11–13, 2005
Little America Hotel
Salt Lake City, Utah



Programs

- Clean Air Initiatives in the 109th Congress
- Brussels Sprouts! The New Wave of Regulation and Administrative Law in the European Union
- Rulemaking vs. Guidance: Practical Implications for Agencies, Regulated Parties, and the Public
- The Utah Administrative Procedures Act: What Hath the Courts and the Legislature Subsequently Wrought?
- The Insider's Guide to Federal Agency Hiring
- Pathways to Success for Women and Minorities in the Public Sector
- Informal Notice and Comment Rulemaking Under Interstate Compacts

Special Events

- Friday Evening Joint Reception with the Section of International Law with special guest The Honorable Mark Shurtleff, Utah State Attorney General
- Saturday Evening Dinner with guest speaker The Honorable Christine Durham, Chief Justice, Utah Supreme Court
- Spouse/Guest Excursion to Park City



*Hon. Mark
Shurtleff*



*Hon. Christine
Durham*

Make plans now to attend. Visit www.abanet.org/adminlaw for complete meeting details and registration information, or contact the Section office at (202) 662-1528.

**Section Chair: Randolph J. May
Meeting Co-Chairs: Kent Bishop and Gary Thorup**

by Robin Kundis Craig*

The administrative law-related interest of the Supreme Court's work this quarter comes primarily from the Court's statutory interpretation. The Court again signaled this quarter that it is, perhaps, returning to a broader and more inclusive statutory interpretation methodology.

In October, the Court decided *Leocal v. Ashcroft*, — U.S. —, 125 S. Ct. 377 (Oct. 12, 2004), which reviewed the Eleventh Circuit's affirmance of the Board of Immigration Appeals' order to deport Josue Leocal because of Leocal's 2000 Florida conviction for driving under the influence of alcohol and causing serious bodily injury. The issue for the Supreme Court was whether that drunk driving conviction qualified as a "crime of violence" under 18 U.S.C. § 16, and hence as an "aggravated felony" under section 237(a) of the Immigration and Nationality Act (INA). 8 U.S.C. § 1227(a)(2)(A)(iii).

INA section 237(a) provides that "[a]ny alien who is convicted of an aggravated felony ... is deportable" at the order of the Attorney General. *Id.* Under the INA, an "aggravated felony" includes "a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). Section 16 of Title 18, in turn, defines "crime of violence" to be:

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16. The Supreme Court granted *certiorari* to resolve a circuit split "on the question whether state DUI offenses similar to the one in Florida, which either do not have a *mens rea* component or require only a showing of negligence in the operation of a vehicle, qualify as a crime of violence." 125 S. Ct. at 380. In a unanimous opinion authored by Chief Justice Rehnquist, the Court concluded that they do not.

The Court began its process of statutory interpretation by noting that section 16 "directs our focus to the 'offense' of conviction," requiring the Justices "to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to the petitioner's crime." *Id.* at 381. Noting that the Florida statute required proof of causation of injury but not of mental state, the Court then emphasized that "[t]he plain text of § 16(a) states that an offense, to qualify as a

crime of violence, must have 'as an element the use, attempted use, or threatened use of physical force against the person or property of another.'" *Id.* at 382. Rejecting the government's narrow focus on the dictionary, legislative, and case law meanings of "use" and its argument that the "use" of force does not necessarily imply a *mens rea* component, the Court determined instead that "the parties' primary focus on that word is too narrow. Particularly when interpreting a statute that features as elastic a word as 'use,' we construe language in its context and in light of the terms surrounding it." *Id.* (quoting *Smith v. United States*, 208 U.S. 223, 229 (1993); *Bailey v. United States*, 516 U.S. 137, 143 (1995)). As a result, for purposes of interpretation, "[t]he critical aspect of § 16(a) is that a crime of violence is one involving the 'use ... of physical force *against the person or property of another*'" — a context in which "'use' requires active employment." *Id.* "When interpreting a statute," the Court declared, "we must give words their 'ordinary or natural' meaning," and in context the emphasized phrase "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* As a result, the DUI conviction was not a "crime of violence" under section 16(a).

Similar logic lead the Court to conclude that the DUI conviction did not fit within section 16(b), either. While "[s]ection 16(b) sweeps more broadly than § 16(a)," it "does not thereby encompass all negligent misconduct, such as the negligent operation of a vehicle." *Id.* at 382–83. Because section 16(b), like section 16(a), involves the use of physical force against the person or property of another, "we must give the language in § 16(b) an identical construction, requiring a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense." *Id.* Unlike in burglaries, for example, "[i]n no 'ordinary or natural' sense can it be said that a person risks having to 'use' physical force against another person in the course of operating a vehicle while intoxicated and causing injury." *Id.*

More general considerations reinforced the Supreme Court's interpretation. Thus, with respect to congressional intent, "[i]nterpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Id.* at 384. Similarly, other provisions in the INA also suggested that Congress sought to distinguish DUIs from violent crimes, especially section 101(h), which explicitly distinguishes crimes "of violence" under section 16 from "any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances..." *Id.* (quoting 8 U.S.C. § 1182(a)(2)(E)). As a result, the fact of a national drunk driving problem "does not warrant our shoehorning [drunk driving] into statutory sections where it does not fit." *Id.*

In November, the Supreme Court issued another context-based interpretive opinion in *Koons Buick Pontiac GMC, Inc.*

continued on next page

*Associate Professor of Law, Indiana University School of Law, Indianapolis; and Contributing Editor.

continued from previous page

v. Nigh, — U.S. —, — S. Ct. —, 2004 WL 2707418 (Nov. 30, 2004). Prior to 1995, it was clear that the Truth in Lending Act's (TILA's) civil liability provision, 15 U.S.C. § 1640(a)(2)(A), imposed a \$1,000 cap on statutory damages for both actions related to loans secured by personal property (clause (i)) and actions related to consumer loans (clause (ii)). In 1995, however, Congress amended TILA to impose a \$2,000 cap on statutory damages in actions related to credit transactions secured by real property (clause (iii)), leaving the \$1,000 cap's continued reference to clause (i) ambiguous. The Eastern District of Virginia held that the \$1,000 cap no longer applied to clause (i) actions, and the Fourth Circuit affirmed.

In an 8-1 decision authored by Justice Ginsburg (Justice Scalia dissented), the Supreme Court reversed the Fourth Circuit, holding that the \$1,000 cap for actions "under this subparagraph" applies to both clause (i) and clause (ii). The majority noted that "[l]ess-than-meticulous drafting of the 1995 amendment created an ambiguity" in the subparagraph's references, *id.* at *3, and it approached this ambiguity by emphasizing that "[s]tatutory construction is a 'holistic endeavor.'" *Id.* at *7 (citations omitted). Relying on the overall statutory structure, Congress's normal hierarchical scheme in structuring, and the history of TILA's amendment, including its legislative history, the majority concluded that "[t]here is scant indication that Congress meant to alter the meaning" of the other damages limitations by adding clause (iii); instead, "[b]y adding clause (iii), Congress sought to provide *increased recovery* when a TILA violation occurs in the context of a loan secured by real property." *Id.* at *8. "Had Congress simultaneously meant to repeal the longstanding \$100/\$1,000 limitation on § 1640(2)(A)(i), thereby confining the \$100/\$1,000 limitation solely to clause (ii), Congress likely would have flagged that substantial change." *Id.*

Justice Stevens and Justice Scalia both wrote individual opinions to comment on the Court's statutory interpretation methodology. In concurrence, Justice Stevens praised the majority's "common sense" use of legislative history to avoid an absurd plain meaning reading, noting that "[c]ommon sense is often more reliable than rote repetition of canons of statutory construction. It is unfortunate that wooden reliance on those canons has led to unjust results from time to time. Fortunately, today the Court has provided us with a lucid opinion that reflects the sound application of common sense." *Id.* at *9 (J. Stevens, concurring). Justice Scalia, in contrast, criticized the Court's departure from a strict textualist approach:

I hardly think it "scant indication" of intent to alter that Congress *amended the text of the statute* by moving the exception from the end of the list to the middle, making it impossible, without doing violence to the text, to read the exception as applying to the entire list. Needless to say, I also

disagree with the Court's reliance on things that the sponsors and floor managers of the 1995 amendment *failed* to say. I have often criticized the Court's use of legislative history because it lends itself to a kind of ventriloquism. The Congressional Record or committee reports are used to make words appear to come from Congress's mouth which were spoken or written by others (individual Members of Congress, congressional aides, or even enterprising lobbyists). The Canon of Canine Silence that the Court invokes today introduces a reverse — and at least equally dangerous — phenomenon, under which courts may refuse to believe Congress's *own* words unless they can see the lips of others moving in unison.

Id. at *13.

These differences in statutory interpretation approach will likely continue to play into the Supreme Court's opinions this term, because this quarter the Court heard oral argument in two other cases where statutory interpretation will be critical to its decisions. On October 6, the Court heard argument in **Cooper Industries, Inc. v. Aviall Services, Inc.**, 312 F.3d 677 (5th Cir. 2002), *cert. granted*, 124 S. Ct. 981 (Jan. 9, 2004), *oral argument transcript*, 2004 WL 2290642 (Oct. 6, 2004), which involves the issue of whether "a private party who has not been the subject of an underlying civil action for environmental cleanup costs pursuant to CERCLA [the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675] [may] bring a CERCLA action seeking contribution, to recover costs spent voluntarily to clean up properties contaminated by hazardous substances..." 2004 WL 2290642, at *1. CERCLA allows the federal and state governments, pursuant to sections 9606 and 9607, to require statutorily designated "responsible parties" to clean up polluted properties or to reimburse the governments' cleanup efforts. Parties who have paid for such cleanups under government order are then clearly allowed to seek contribution for those costs against other responsible parties, so long as those other parties have not already settled their liability with the government. *See* 42 U.S.C. § 9613(f). CERCLA is decidedly ambiguous, however, regarding the ability of responsible parties not under government order to voluntarily clean up the property and then seek contribution:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, *during or following any civil action under section 9606 of this title or under section 9607(a) of this title*. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. *Nothing in this subsection shall diminish the right of any person to bring an action for*

contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f). The Fifth Circuit construed this section to allow contribution actions, regardless of whether a government order had issued. The Supreme Court's resolution of this question could significantly illuminate some of its principles of statutory interpretation, given the blatant ambiguity in section 9613(f)(1), the lack of strong agency interpretation, and CERCLA's longstanding reputation as being one of Congress's most poorly drafted statutes.

On November 3, the Court heard argument on the issue of whether disparate impact claims are cognizable under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 et seq., in *Smith v. City of Jackson, Mississippi*, 351 F.3d 183 (5th Cir. 2003), *cert. granted*, 124 S. Ct. 1724 (March 29, 2004), *oral argument transcript*, 2004 WL 2607536 (Nov. 3, 2004). In a case of first impression, the Fifth Circuit concluded that the ADEA did *not* support disparate impact age discrimination cases, although disparate treatment cases were cognizable. One of the more interesting discussions in oral argument centered

on the level of deference to be accorded to the interpretations of the Equal Employment Opportunity Commission (EEOC) — *Chevron* deference, *Skidmore* deference, or no deference at all.

Outside of the realm of statutory interpretation, in October the Supreme Court granted *certiorari* to the case of *Lingle v. Chevron USA, Inc.*, 125 S. Ct. 314 (Oct. 12, 2004), on appeal from the Ninth Circuit. *Chevron U.S.A. Inc. v. Bronster*, 363 F.3d 846 (9th Cir. 2004). This case involves the relationship among substantive due process, Fifth Amendment regulatory "takings," and deference to state legislative decisions that economic regulation will substantially advance legitimate state interests. The case focuses on Hawaii's Act 257, which regulates the maximum rent that oil companies can charge dealers who lease service stations from those oil companies. The Ninth Circuit affirmed the district court in holding that the statute constituted an unconstitutional regulatory taking because it did not substantially advance Hawaii's interest in lowering consumer gasoline prices, over Hawaii's arguments that: (1) the statute was an economic regulation that should be evaluated under the

continued on page 24



ANNOUNCING THE FIRST Institute for Administrative Law and Regulatory Practice "Making Agency Law Through Rulemaking"

April 7-8, 2005 ■ Washington, D.C.

This intensely practice-oriented program will provide practitioners, government officials, and industry representatives with the knowledge and techniques necessary to navigate the agency rulemaking process from the creation of an idea for agency action through considerations of court review. The faculty members are among the leading scholars and lawyers with expertise and experience in the practice of agency rulemaking.

Subjects covered include:

- Application of the APA to Administrative Agencies
- Agency's Legislative Power and Authority to Adopt Substantive Rules of Law
- Agency Exercise of Rulemaking Authority
- Differences between Formal, Hybrid, and Informal Rulemaking
- Differences between Rulemaking and Agency Adjudication
- The Right to Participate and Respond
- Procedural Requirements for Rulemaking
- Approaches to Agency Participation and Getting a Favorable Agency Rule
- Challenging a Rule: Judicial Review as it Informs the Process of Rulemaking
- Agency Law Making In Action: The Process from Beginning to End
- Lessons on Developing a Winning Rulemaking Strategy
- Rulemaking and Politics: The Intersection of Power, Politics, and Rulemaking

The program will be held at the Renaissance Washington, D.C. Hotel. For complete program details, visit www.abanet.org/adminlaw/institute. You may also contact the Administrative Law Section at (202) 662-1528 or emardn@staff.abanet.org

News from the Circuits

By William S. Jordan III*

Standing: Critters lose (but the door's still open), while organizations may have a new opening in "informational standing."

In two notable recent standing decisions, the 9th Circuit denied standing to animals as plaintiffs, but the 6th Circuit recognized a form of "informational standing" that would expand the right of environmental organizations to sue on their own behalf, rather than on behalf of affected members. In the first case, *Cetacean Community v. Bush*, 386 F.3d 1169 (9th Cir. 2004), the plaintiff was said to be the "Cetacean Community" of the world's whales, dolphins, and porpoises. The Cetacean Community challenged the U.S. Navy's reliance upon certain sonar devices for the purpose of detecting silent submarines. The Cetaceans brought the action pursuant to the Endangered Species Act, the Marine Mammal Protection Act, the National Environmental Protection Act, and the Administrative Procedure Act.

Decades after Justice Douglas lost the argument that trees should have standing, *Sierra Club v. Morton*, 402 U.S. 727, 742 (1972) (Douglas, J., dissenting), it may come as a surprise that an attorney would seek standing for animals in their own right. It turns out, however, that the 9th Circuit had practically invited such an argument. In *Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106, 1107 (9th Cir. 1988), the court had written that the endangered Hawaiian Palila bird, "has legal status and wings its way into federal court as a plaintiff in its own right," and that the *Palila* had "earned the right to be capitalized since it is a party to these proceedings." The court made quick work of counsel's reliance upon the *Palila* language. The language was dicta because there were other parties acknowledged to have standing. The broad assertions, it said, were "little more than rhetorical flourishes."

Neither story nor doctrine ends there, however. Indeed, the Cetacean Community came surprisingly close. The 9th Circuit held that the Community could meet the constitutional test of "injury in fact." Just as Article III does not preclude standing for artificial entities such as corporations or for incompetent people, it does not preclude animals from functioning as plaintiffs. Thus, the question is whether Congress, in the relevant statutes, has authorized lawsuits on behalf of animals. The court held it had not. The Endangered Species Act provides a cause of action for any "person," a term that is defined so as to exclude animals. Actions under the other statutes would depend upon Section 702 of the APA, which refers to a "person" adversely affected or aggrieved by agency action. The court was not prepared to read that use of the term "person" broadly enough to include animals in the absence of clear congressional guid-

ance to that effect. Finally, the court refused to recognize associational standing, both because the individual animal "members" could not have standing and because there was no real association for this purpose. Still, the court has signaled the way to attempt to create standing for animals or trees in the future. The right language in a future enactment may have counsel arguing directly on behalf of dolphins, whales, or even trees.

At first blush, *American Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Com'n*, 2004 WL 2423536 (6th Cir. 2004) is an even simpler case. In large part, it is merely *Laidlaw* redux. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, (2000). In *American Canoe*, An environmental organization (the Sierra Club) had standing to challenge violations of the Clean Water Act based upon its member's affidavit demonstrating use of the river in question. Apparently seeking to avoid *Laidlaw's* stringent mootness test, the defendant argued that the plaintiffs could not meet the redressability prong of the standing test because by the time of the remand the defendant would have eliminated the violations. The court would have none of it. Applying *Laidlaw*, the court held that the record did not support a conclusion that it was "absolutely clear" that the violations would not recur.

The case goes beyond *Laidlaw*, however, in recognizing that both the Sierra Club and the American Canoe Association had "informational standing" to bring the action on their own behalf. Since the Association had not sought representational standing, this was the only basis on which it could be heard. The groups alleged that "the defendants' monitoring and reporting violations affected its efforts to 'research the compliance status of Kentucky dischargers . . . and to report the results of that research to [its] members; to propose legislation . . . and to bring litigation to prevent violation of the discharge limitations in the permit and thereby protect the waters affected by the facility's discharge.'" The central issue was whether this allegation was merely a "generalized grievance" that could not support prudential standing. Struggling to find guidance from *FEC v. Akins* and *Public Citizen v. U.S. Department of Justice*, the 6th Circuit said, "the injury alleged is not that the defendants are merely failing to obey the law, it is that they are disobeying the law in failing to provide information that the plaintiffs desire and allegedly need. This is all that plaintiffs should have to allege to demonstrate informational standing where Congress has provided a broad right of action to vindicate that informational right." The key to this holding appears to be the proposition that without the information in question, "American Canoe's and Sierra Club's daily operations are stymied to the extent that they can no longer honor their own monitoring and reporting obligations to their members."

Judge Kennedy dissented as to "informational standing" unrelated to harm to one of an organization's members. Arguing that this outcome eliminated the constraints of *Sierra Club v. Morton*, Judge Kennedy found that the American Canoe

*C. Blake McDowell Professor of Law, The University of Akron School of Law; Vice Chair Judicial Review Committee; and Contributing Editor.

Association had established nothing more than a “special interest,” which was insufficient to support standing. Judge Kennedy distinguished *Akins* and *Public Citizen* on the ground that those cases involved statutes specifically designed to provide information. The information was the benefit of the statute, so lack of information was the harm. By contrast, the Clean Water Act does not create a “specific right to information.” Thus, the Association had established nothing more than an interest in enforcing an environmental statute, a generalized grievance. Moreover, Judge Kennedy argued that the Association had not suffered injury at all because, despite the reporting violations, the plaintiffs had been able to identify several hundred discharge violations, more than enough information to permit them to pursue the legislative and other interests that they had alleged were harmed by the reporting violations.

Second Circuit uses *Barnhart* multi-factor analysis to apply *Chevron* deference to an agency policy statement.

In *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49 (2d Cir. 2004), the Second Circuit explicitly applied the multi-factor test suggested in *Barnhart v. Walton*, 535 U.S. 212 (2002), to hold that a HUD policy statement was entitled to *Chevron* deference. The substantive question in the case was whether certain overcharges or markups for settlement services violated the Real Estate Settlement Procedure Act’s prohibition on charges for which services were not actually provided. The court first held that the statutory language clearly and unambiguously did not extend to overcharges, thus resolving the first issue at *Chevron* Step 1. The more interesting aspect of the case is the analysis of the statute’s application to “markups,” as to which the statute was ambiguous.

HUD had published in the Federal Register a Policy Statement to the effect that markups violated the statute. The Second Circuit, citing *Mead*, acknowledged that *Chevron* deference is due only where Congress has delegated to the agency the authority to issue an interpretation with the force of law and where the agency has acted pursuant to that authority. HUD had issued the interpretation without any public comment or other public process. The court said, however, that “notice-and-comment rulemaking is not a *sine qua non* of *Chevron* deference.” Rather, quoting *Barnhart v. Walton*, the court held that *Chevron* deference depends on “to what extent the underlying statute suffers from exposed gaps in policies, especially if the statute itself is very complex, as well as on the agency’s expertise in making such policy decisions, the importance of the agency’s decisions to the administration of the statute, and the degree of consideration the agency has given the relevant issues over time.”

Applying these criteria, the court held that the informal Policy Statement was entitled to *Chevron* deference. First, the

court noted that the statute granted the Secretary the authority “to prescribe such rules and regulations, [and] to make such interpretations ... as may be necessary to achieve the purposes of” the statute. Since HUD had explicitly invoked this authority in publishing the Policy Statement in the Federal Register and had explicitly distinguished it from other informal statements of lesser stature, the court held that HUD effectively implemented the necessary delegation of “force of law” authority. Second, disagreeing with the Seventh Circuit, the court noted the agency’s history of detailed consideration of the issue and rejected the proposition that this was merely a “set of off-the-cuff remarks.” Third, the court noted HUD’s extensive substantive expertise in the area, and fourth it noted that other circuits had deferred with respect to a different interpretation addressed in the Policy Statement.

Where does this leave us with respect to determining whether an agency statement is entitled to *Chevron* deference? Most agencies should be able to demonstrate significant internal deliberation with respect to significant interpretations, and most should be able to demonstrate substantial expertise with respect to the substantive area in question. Thus, in the Second Circuit, at least, the explicit authority to issue interpretations appears to be the linchpin, even if that authority is exercised without any public process. As long as the agency issues such an interpretation in the Federal Register or in some comparably significant form, it will have a strong argument for *Chevron* deference.

D.C. Circuit Upholds DOT Rule Despite Inadequate *Chevron* Step 2 Explanation and Notice-and-Comment Challenge

The September 11, 2001, terrorist attack halted all US commercial flights, which hurt the airline industry financially. In response, Congress enacted the Air Transportation Safety and System Stabilization Act, under which the industry could receive some compensation for those losses. To implement the Act, the Department of Transportation pursued what turned out to be a four-step rulemaking process. DOT promptly issued what it called the First Final Rule. Relying upon the “good cause” exception, DOT issued the rule without notice and comment. In so doing, DOT sought comment on the rule it had just issued. DOT responded to those comments in the Second Final Rule, which it made immediately effective. Again, the agency sought post-hoc public comment. Some months later, DOT issued the Third Final Rule, again without a new round of notice and comment, and again with an invitation to submit public comments. Finally, DOT issued, without additional notice and comment, the Fourth Final Rule, which is the object of this challenge.

In the months following 9/11, DOT learned that cargo carriers were not harmed financially in the same way as passen-

continued on next page

continued from previous page

ger carriers. To the contrary, the demand for military shipments and the reduction in cargo space on passenger flights combined to improve the finances of some cargo carriers. As a result, in the Third Final Rule DOT introduced the "offset" concept, under which statutory compensation for the period when flights were halted would be offset by the extent to which later earnings exceeded previous forecasts. The rule included various presumptions that would govern resolution of offset disputes.

The air cargo industry challenged the rule on three grounds. First, they argued that the offset violated the statute. Second, they challenged the presumptions and other implementation procedures. Third, they argued that the Third and Fourth Final Rules were invalid because DOT had failed to provide for notice and comment. DOT prevailed on all points.

The statutory ruling is unusual in that the court upheld the agency's *Chevron* Step 2 position despite the agency's failure to provide a valid explanation of its interpretation. According to the D.C. Circuit, the agency's explanation was flawed because it effectively rendered some statutory language superfluous. The court nonetheless upheld the agency's position because the court itself was able to articulate an acceptable justification, seemingly a violation of the principles of *SEC v. Chenery*, 332 U.S. 194 (1947).

The court justified its action by noting that "DOT has already chosen between competing meanings and made its policy choice." Thus, the case was distinct from one in which the agency had believed its interpretation had been compelled by the statute. In the latter situation, there must be a remand for

the agency to make the policy choice. In this circumstance, however, "No principle of administrative law or common sense requires us to remand a case in quest of a perfect opinion unless there is reason to believe that the remand might lead to a different result." Thus, it appears that a court may substitute its own reasoning to uphold a *Chevron* Step 2 policy choice. The court does not explain how this situation differs from one in which a court perceives an alternative explanation that would allow a rule to survive arbitrary and capricious review. In such a case, the court must remand for the agency itself to articulate a rational basis for its action (or adopt an explanation suggested by the court).

As to the presumptions and other procedures, the court held they were not ripe for review because they might not result in any loss to the carriers. The court did, however, warn DOT against unduly limiting the evidence that could be presented in an effort to overcome the presumptions.

Finally, the court rejected the procedural challenge to the Third and Fourth Final Rules. Noting that, "perhaps DOT should not have labeled the First through Third rules as 'final,'" the court said that the agency had made a "compelling showing" that it has provided the necessary opportunity to comment before the Fourth Final Rule. Indeed, there had ultimately been three opportunities to comment during the development of the rule. The mere fact that the agency had labeled the third rule as "Final" did not preclude the agency from seeking additional comment and making the revisions that became the Fourth Final Rule. Since the agency had sought comments with an open mind, it had satisfied the requirements of the APA. ○

Supreme Court News

continued from page 21

Due Process Clause rather than the Takings Clause; (2) the statute should have been evaluated under the deferential "rational basis" test rather than the "reasonable relationship" test; and (3) the Hawaii District Court gave too little deference to the state government's findings regarding the relationship between rent regulation and the legitimate state interests that it sought to promote. In its petition for *certiorari*, the State of Hawaii framed two issues for the Supreme Court:

- (1) Whether the Just Compensation Clause authorizes a court to invalidate state economic legislation on its face and enjoin enforcement of the law on the basis that the legislation does not substantially advance a legitimate state interest, without regard to whether the challenged law diminishes the economic value or usefulness of any property.

- (2) Whether a court, in determining under the Just Compensation Clause whether state economic legislation substantially advances a legitimate state interest, should apply a deferential standard of review equivalent to that traditionally applied to economic legislation under the Due Process and Equal Protection Clauses, or may instead substitute its judgment for that of the legislature by determining *de novo*, by a preponderance of the evidence at trial, whether the legislation will be effective in achieving its goals.

Petition for Writ of Certiorari, 2004 WL 1745842, at *1 (July 30, 2004). So framed, therefore, *Lingle* invites the Court not only to discuss the relationship between substantive due process and Fifth Amendment takings but also to expound on the federalism-related respect that federal courts owe to state legislatures. ○

Edited by Michael Asimow*

The High Stakes in Primary Jurisdiction

By Michael Asimow

The "primary jurisdiction" rule applies to cases that fall within the original jurisdiction of a court but which must be transferred by the court to an administrative agency with specialized expertise in the subject matter of the case. A particularly complex application of primary jurisdiction occurs when the referral to the agency concerns only some of the issues in a case. When that happens the agency resolves the issues transferred to it, then refers the case back to the court to handle the remaining issues. The rationale for primary jurisdiction is compelling, but the cost can be enormous delay and mushrooming legal fees.

In *Jonathan Neil & Associates v. Jones*, 16 Cal.Rptr. 3d 849 (CA Supreme Ct. 2004), the underlying dispute concerned whether an insurance company had overbilled a small trucking company for retroactive premiums. The \$51,000 bill drove the trucker out of business. It sued for breach of the implied covenant of good faith in the insurance contract, a claim which carries the potential for very large damages.

The insurer claimed that the case should have been transferred to the Insurance Commissioner because it involved highly technical questions of insurance law. (The trucker was part of the assigned risk pool and the dispute concerned the appropriate premiums on the trucker's use of subcontractors). The trial court refused to transfer the case and there followed a months-long trial consisting of a training course for the jury on assigned risk underwriting. The jury returned a verdict for about \$13.5 million which the trial court reduced to about \$6.2 million (rather large amounts for a dispute over a \$51,000 premium).

The Supreme Court decided that the trial court should have transferred the insurance part of the dispute to the Insurance Commissioner for adjudication under the assigned risk procedures. In the event that the Commissioner determines that the insurer overbilled the trucker, the case would return to court for consideration of damages (the Supreme Court also determined that punitive damages could not be awarded in a dispute over the amount of insurance premiums).

This decision seems correct since the Neal case presents a paradigm example of the application of the doctrine of primary jurisdiction. Yet it illustrates the unbelievable complexity of the actual operation of primary jurisdiction, particularly where a months-long trial has already occurred. The whole dispute concerned a \$51,000 premium, yet the attorneys' fees must already be in the millions of dollars and the litigation will not

be concluded for many years (presumably the trucker will run out of gas and settle the case soon). Perhaps this is a case in which some short-cut could have been used instead of a full-fledged transfer. For example, the court might have asked the Insurance Commissioner to file an amicus brief in the court case rather than to suspend the court case for a full referral to the Commissioner followed by a retransfer to the court.

Judicial Review of Pennsylvania Veteran's Preference: Looking for Law in All the Wrong Places

By John L. Gedid¹

In *Merrell v. Chartiers Valley School District*, 855 A.2d 713 (Pa. 2004), claimant applied for a position as a social studies teacher with the school district. After reaching the fourth step of a five step hiring process, he was eliminated from the hiring process by letter. He argued that he should have received the position because of a preference to which he was entitled under the Pennsylvania veteran's preference statute. The school district argued that the letter was an "adjudication," and, since claimant exceeded the 30-day appeal filing deadline by several months, his action was barred.

The Pennsylvania Supreme Court explained that the threshold issue was whether the letter was an "adjudication." The Pennsylvania definition of adjudication is similar to the contested case definition of the 1961 Model State Administrative Procedure Act: any final determination or ruling by an agency that affects "personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties."

In defining "adjudication" for purposes of the timing provision, the Court looked in the wrong place. It used the familiar *Roth* analysis to determine that an applicant for a teaching position, who seeks to rely on a discretionary and ill-defined veteran's preference, has not been deprived of "property." Hence, the letter was not an "adjudication." As a result, the applicant was not bound by the 30-day provision, and, hence, his appeal was timely.

However, the *Roth* analysis should be used *only* to determine whether a party has a right to a due process hearing at the agency level. There are a vast number of "adjudications" rendered by government agencies in cases in which due process doesn't apply. Consequently, it appears to be a mismatch to excuse an applicant from the statute of limitations on seeking judicial review of an agency decision just because the applicant had no due process right to a hearing at the agency level. Instead, the term "adjudication" in the judicial review statute should apply to any final agency ruling in a case that determines an individual's *legal position*. A letter denying him a teaching position despite the veteran's preference certainly qualifies as an "adjudication" and the 30-day judicial review statute should have been applicable. The Pennsylvania courts have not adopted

continued on next page

*Professor of Law Emeritus, UCLA Law School; Council Member; Advisory Board Chair; and Contributing Editor.

¹ Professor of Law, Widener University School of Law.

continued from previous page

that approach. Instead, a stream of cases has applied the *Roth* analysis to determine if there was an adjudication for purposes of determining if there is a right to review, or, as in this case, when the clock begins to run for appeal purposes.

There is yet another problem with the court's approach in this case. If the applicant reached the fourth step in the application process, it would appear that he was qualified, but the school district believed that another candidate was more qualified. If the legislature's intent as expressed in the veteran's preference statute is to have any meaning—it is after all the role of the courts to give effect to that meaning or policy—then a qualified veteran applicant should be treated as having some sort of property right in the job. The court's approach in *Merrell* appears to strip a qualified veteran applicant of any tangible benefit from the preference statute.

A New Standard for Notice and Public Comment in Georgia

By Lois F. Oakley²

In deciding a challenge to the issuance of a pollutant discharge permit, the Georgia Supreme Court has issued an opinion with a significant discussion of the role of public participation in an agency's issuance of permits. Agency actions that require public notice and comment may be subjected to renewed public notice and comment in certain circumstances. When an agency makes significant changes to a proposed permit following public comment, the agency is required to engage in renewed public notice and comment. Citing precedent from the D.C. Circuit Court of Appeals, Georgia's highest court explained that an agency's adoption of "a completely different approach" after public notice and comment subjects the amended permit to a renewed comment requirement. A process devoid of this renewed opportunity for comment would impermissibly preclude the public from "a meaningful opportunity to participate in the comment process." *Hughey v. Gwinnett County*, 2004 Ga. LEXIS 1045 (November 23, 2004), citing *Natural Resource Defense Council, Inc. v. EPA*, 859 F.2d 156, 175 (D.C. Cir. 1988).

Due Process Unleashed: Ohio Law Goes to the Dogs

By William S. Jordan³

Relying on a faulty premise, the Supreme Court of Ohio recently invited a wave of due process litigation against animal wardens, police, and others who warn members of the public that they are violating the law. In *State v. Cowan*, 103 Ohio St.3d 144,

814 N.E.2d 846 (2004), the defendant's neighbors complained to a dog warden, who warned the defendant that her dogs were "vicious dogs" under the applicable statute. He explained that an owner of vicious dogs must comply with certain statutory requirements. Sometime later, the deputy found the dogs to be in conditions that did not comply with the statute. Again, he advised the owner of her responsibilities. The third time, the deputy filed charges for violation of the vicious dog statute. At trial, the jury convicted the dog owner on all charges.

On appeal, the Supreme Court reversed the convictions, holding that the vicious dog statute was unconstitutional because a dog owner has no right to be heard prior to a warden's determination that her dogs are vicious. According to the majority, it is "inherently unfair that a dog owner must defy the statutory regulations and become a criminal defendant, thereby risking going to jail and losing her property, in order to challenge a dog warden's unilateral decision to classify her property." The Court also held that even if the statute were constitutional, due process was denied on the particular facts because the deputy warden in this case had effectively made an administrative determination that the dogs were vicious. As the Court read the transcript, this determination was binding on the jury, such that the dog owner never had a right to be heard on the question of whether her dogs were vicious.

Chief Justice Moyer's dissent demolishes the majority's reasoning. As to the facial constitutionality of the statute, he points out that the statute itself defines the category of vicious dogs and directly imposes obligations on the owners of such dogs. The warden's role is solely to enforce the existing obligation. Although the warden may express an opinion as to whether the dogs are vicious, that opinion does not constitute a legally significant administrative determination. As to the particular facts, the dissent concludes that the dog owner "had a full opportunity at trial to contest charges that she owned vicious dogs."

The majority's opinion threatens severe rigidity in law enforcement. Interpreted in light of the statutory provisions, it creates a strong incentive for law enforcement personnel to proceed directly to arrest, without providing warnings or seeking to educate apparent offenders about the requirements of the applicable statutes. The only apparent escape from this dilemma is to interpret the decision as applying only to circumstances in which legal obligations are triggered by an administrative determination, in which case due process should apply. This interpretation is consistent with the language and logic of the opinion, but inconsistent with the underlying statute or facts.

Fee Shifting: California Goes Its Own Way—Again

By Michael Asimow

California administrative law often differs sharply from federal law and a prime example is the question of attorney fee shifting. Under federal law, each party pays its own fees except where

continued on page 32

² Chief State Administrative Law Judge, Georgia Office of State Administrative Hearings.

³ C. Blake McDowell Professor of Law, The University of Akron School of Law; Vice Chair Judicial Review Committee; and Contributing Editor.

Recent Articles of Interest

By Yvette Barksdale¹

1. Ronald M. Levin, *Forthcoming*, THE ADMINISTRATIVE LAW LEGACY OF KENNETH CULP DAVIS, 42 San Diego L. Rev. ____ (2005).

An analysis of and homage to the late Professor Kenneth Culp Davis' intellectual contributions to Administrative Law.

2. Steven L. Schooner, CONTRACTOR ATROCITIES AT ABU GHRAIB: COMPROMISED ACCOUNTABILITY IN A STREAM-LINED, OUTSOURCED GOVERNMENT, *Forthcoming*, 16 Stan. L. & Pol'y Rev. ____ (2005).

A critique of current government "outsourcing" practices, highlighted by the Abu Ghraib Prison scandal. The author argues the government's vastly increased reliance on private contractors for government work has created serious administrative and managerial problems in government contracting, including, 1) grossly insufficient personnel and resources for adequate contract oversight, 2) reliance upon previously discouraged "personal services contracts" which place private, often poorly trained, workers next to government employees without supervisory training, 3) awarding of umbrella group contracts for "work to be named later", reducing head to head contractor competition for specific projects, and 4) agency "farming out" of contract procurement to other agencies whose primary contract stake is generated fees, not work quality. The author advocates a return to government contracting fundamentals — competition, oversight, transparency, and review.

3. Daniel Halberstam, OF POWER AND RESPONSIBILITY: THE POLITICAL MORALITY OF FEDERAL SYSTEMS, 90 Va. L. Rev. 731 (2004).

A comparative law analysis of European (Germany and the European Union) and American federalism structures. Author contrasts the "entitlement" approach of American federalism doctrine (each unit — federal government or states, have allocated authority which they are entitled to exercise as a matter of right), with the "fidelity" approach of European federalism in which each entity owes "fidelity" to the proper functioning of the system as a whole, and thus has judicially enforceable moral obligations to exercise its authority to promote the well-being of the entire federal system.

¹ Associate Professor of Law, The John Marshall Law School, Chicago, IL; Vice-Chair, Constitutional Law and Separation of Powers Committee; and Contributing Editor. These abstracts are drawn primarily from the authors' introductions to their articles. To avoid duplication, the abstracts do not include articles from the Administrative Law Review which Administrative Law Section Members already receive.

4. Dan M. Kahan, LOGIC OF RECIPROCITY: TRUST, COLLECTIVE ACTION, AND LAW, 102 Mich. L. Rev. 71 (2003).

This article disputes the traditional theory of collective action, rooted in Mancur Olson's "Logic of Collective Action," which posits that individuals in groups will under-contribute to the group if they can get away with "free riding" on others' efforts. Kahan argues this "free rider" theory of group behaviour is undercut by intervening empirical research. This research shows that people in groups are more "emotionally nuanced" — altruistically cooperating when they think others are, but shirking when they perceive others not reciprocating. He argues this "logic of reciprocity" suggests an alternative program for avoiding collective action problems by using law to promote trust.

5. Robert W. Hahn, THE ECONOMIC ANALYSIS OF REGULATION: A RESPONSE TO THE CRITICS, 71 U. Chi. L. Rev. 1021 (2004).

Robert Hahn summarizes and responds to criticisms of regulatory scorecards and other quantitative regulatory analysis methods. He concludes 1) quantitative measures have improved understanding of the regulatory process, 2) some critics' suggestions are legitimate, others are not, 3) refinements to scorecards would address many criticisms, 4) scorecards should be improved, not abandoned.

6. Eric A. Posner and Cass R. Sunstein, DOLLARS AND DEATH, *Forthcoming* ____ U. of Chi. L. Rev. ____ (200__).

Analytical comparison of how regulatory law and tort law assign dollar values to life. The authors argue that both approaches are flawed but can learn from each other.

7. Michael Abramowicz, INFORMATION MARKETS, ADMINISTRATIVE DECISIONMAKING, AND PREDICTIVE COST-BENEFIT ANALYSIS, 71 U. Chi. L. Rev. 933 (2004).

Article addresses whether information markets, such as the FutureMap program, proposed by the Defense Advanced Research Projects Agency (DARPA), can improve the quality of agency predictions. These markets are created to aggregate predictive information about future facts. He concludes information markets can improve agency predictions, but only if designed to overcome problems, such as potential manipulation. One benefit is these markets' objectivity, which decrease might reduce interest group manipulation of bureaucrats, and the like.

8. Richard J. Pierce, Jr., REALIZING THE PROMISE OF RESTRUCTURING THE ELECTRICITY MARKET, *Forthcoming*, ____ Wake Forest L. Rev. ____ (2005).

The author, an early advocate of deregulation of electricity markets, does an in-depth post-mortem review of the several

continued on next page

Recent Articles of Interest

continued from previous page

decade-old electricity deregulation project, describing successes (the Mid-Atlantic region), failures (California), and the lessons learned. The author discusses anticipated and unanticipated economic, legal and political obstacles to full realization of deregulation's benefits. Convinced the project is essential, the author offers suggestions for future success.

9. Thomas O. McGarity, MTBE: A PRECAUTIONARY TALE, 28 Harv. Envtl. L. Rev. 281 (2004).

This article describes how MTBE, a widely used gasoline lead-replacement additive which severely contaminates groundwater, became the poster child for regulatory failure. The author discusses federal environmental regulation's impact on the crisis, including five crisis-avoidance decisions EPA or Congress could have made, but didn't. After discussing how well eight analytical models of regulatory failure explain the MBTE crisis, the author advocates a precautionary regulatory approach, including 1) a broader "multi-media view," 2) broader participation by affected interests, and 3) less deference to regulated interests' narrow economic concerns.

10. Catherine T. Struve, THE FDA AND THE TORT SYSTEM: POST-MARKETING SURVEILLANCE, COMPENSATION, AND THE ROLE OF LITIGATION, *Forthcoming*, ____ Yale J. of Health Pol'y, L. & Ethics ____ (Summer 2005).

The author argues for a joint FDA/private litigation system to protect medical product safety. To avoid potential Seventh Amendment problems, the author proposes a "novel process" in which a federal court would refer product safety and causation issues to an FDA advisory panel, subject to final review by the FDA. These findings would be conclusive. Most damages would finance a compensation fund for persons harmed by the product.

11. Jim Rossi, DUAL CONSTITUTIONS AND CONSTITUTIONAL DUELS: SEPARATION OF POWERS AND STATE IMPLEMENTATION OF FEDERALLY-INSPIRED REGULATORY PROGRAMS AND STANDARDS, *Forthcoming*, ____ Wm. & Mary L. Rev. ____.

This Article examines the problem of federal/state conflicts in state implementation of federal regulatory programs, particularly conflicts with state constitutions. The author argues that broad federal preemption is not the only solution. Better interpretation of state constitutions can resolve these problems.

12. Bruce P. Frohnen, LAW'S CULTURE: CONSERVATISM AND THE AMERICAN CONSTITUTIONAL ORDER, 27 Harv. J.L. & Pub. Pol'y 459 (2004).

An intellectual history of American conservatism, discussing, among other things, its origins and roots, differences between conservatism and neoconservatism, and conservatism's relationship to American constitutional and political thought. The article stresses conservatism's grounding in historical and traditional culture as a source of norms.

13. POINT-COUNTERPOINT: PREEMPTION (PARTS I & II): 23 Ann. Rev. Banking & Fin. L. 225, et seq. (2004).

These two articles debate the legality of recent (January 2004) Office of the Comptroller of the Currency (OCC) rules which preempt almost all state regulation of national banks. *Arthur E. Wilmarth, Jr., The OCC's Preemption Rules Exceed The Agency's Authority and Present A Serious Threat to The Dual Banking System and Consumer Protection (Part I, p. 225);, Howard N. Cayne, Nancy L. Perkins, Point-Counterpoint: National Bank Act Preemption: The OCC's New Rules Do Not Pose a Threat to Consumer Protection or The Dual Banking System (Part II, p. 365).*

Empirical Studies

1. Kiki Caruson and J. Michael Bitzer, AT THE CROSSROADS OF POLICYMAKING: EXECUTIVE POLITICS, ADMINISTRATIVE ACTION, AND JUDICIAL DEFERENCE BY THE DC CIRCUIT COURT OF APPEALS (1985-1996), 26 L. & Pol'y 347 (2004).

An empirical study of judicial deference to administrative agencies in the DC Circuit from 1985-1996. Authors found the standard of review was not a statistically significant factor in predicting the level of deference. Instead, judges deferred more to agency decisions that aligned with the judges' policy preferences.

2. Kristi M. Smith, WHO'S SUING WHOM?: A COMPARISON OF GOVERNMENT AND CITIZEN SUIT ENVIRONMENTAL ENFORCEMENT ACTIONS BROUGHT UNDER EPA-ADMINISTERED STATUTES, 1995-2000, 29 Colum. J. Envtl. L. 359 (2004).

This article compares environmental enforcement actions initiated by citizens with those initiated by government. The author found some changes from a major 1980 ELI study. Large environmental organizations no longer dominate the citizen suit arena, citizens bring approximately one third of their actions against public defendants, and both citizen and government enforcement actions seem to have benefited from the use of an expanded range of remedies. The authors advocate more

research to fully understand the effects of citizen enforcement on federal environmental regulation.

Recent Symposia of Interest:

1. *The Constitution In Times Of Emergency*, 113 *Yale L. J.* 1751, et. seq. (2004). (Symposia Articles are Responses to Bruce Ackerman, *The Emergency Constitution*, 113 *Yale L.J.* 1029 (2004).)

Includes Articles By: i) John Manning, *Editor's Note*, p. 1751, ii) David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, p. 1753, iii) Laurence H. Tribe, Patrick O. Gudridge, Essay, *The Anti-Emergency Constitution*, p. 1801, and iv) Bruce Ackerman, *Response, This Is Not A War*, p. 1871.

2. *The Changing Laws of War: Do We Need a New Legal Regime after September 11?*, 79 *Notre Dame L. Rev.* 1183, et. seq. (2004).

Includes Articles By: i) John Yoo, *Transferring Terrorists*, p. 1183, ii) Neal Katyal, *Sunsetting Judicial Opinions*, p. 1237, iii) Michael Stokes Paulsen, *The Constitution of Necessity*, p. 1257, iv) Saikrishna Prakash, *The Constitution As Suicide Pact*, p. 1299, v) Patrick Baude, *An Essay on the Spirit of Liberty in the Fog of War*, p. 1321, vi) Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, p. 1335, vii) William C. Bradford, *'The Duty to Defend Them': A Natural Law Justification for the Bush Doctrine of Preventive War*, p. 1365, viii) Derek Jinks, *Protective Parity and the Laws of War*, p. 1493, and ix) Michael D. Ramsey, *Reinventing the Security Council: The U.N. as a Lockean System*, p. 1529.

3. *We've Only Just Begun: The Impact of Remand Orders from Higher to Lower Courts on American Jurisprudence*, 36 *Ariz. St. L. J.* 493, et. seq. (2004).

Includes Articles By: i) Michael A. Berch, *We've Only Just Begun: The Impact Of Remand Orders From Higher To Lower Courts On American Jurisprudence, Preliminary Remarks*, p. 493, ii) Erwin Chemerinsky and Ned Miltenberg, *The Need To Clarify The Meaning Of U.S. Supreme Court Remands: The Lessons Of Punitive Damages' Cases*, p. 513, iii) Tracy Friddle and Jon M. Sands, *"Don't Think Twice, It's All Right": Remands, Federal Sentencing Guidelines & The Protect Act—A Radical "Departure"?*, p. 527, iv) Shaun P. Martin, *Gaming The GTR*, p. 551, v) Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, p. 599, and vi) John Cary Sims, *Compliance Without Remands: The Experience Under The European Convention On Human Rights*, p. 639.

4. *Science for Judges II: The Practice of Epidemiology and Administrative Agency Created Science*, 12 *J. L. & Pol'y* 485, et. seq. (2004).

Includes Articles By: i) Margaret A. Berger, *Introduction*, p. 485, ii) John Concato, M.D., *Overview Of Research Design In Epidemiology*, p. 489, iii) John P.A. Ioannidis, M.D. & Joseph Lau, M.D., *Systematic Review Of Medical Evidence*, p. 509, iv) James Robins, *Should Compensation Schemes Be Based on the Probability of Causation or Expected Years of Life Lost?*, p. 537, v) Richard Merrill, *FDA Regulatory Requirements As Tort Standards*, p. 549, vi) Michael A. Friedman, M.D., *What Is The Value Of An FDA Approval In A Judicial Matter?*, p. 559, vii) Robert M. Sussman, *Science and EPA Decision-Making*, p. 573, viii) Wendy E. Wagner, *Importing Daubert to Administrative Agencies Through The Information Quality Act*, p. 589, and ix) Sheila Jasanoff and Dogan Perese, *Welfare State Or Welfare Court: Asbestos Litigation In Comparative Perspective*, p. 619.

5. *Up the Ladder and Beyond: The New Professional Standards for Lawyers Under the Sarbanes-Oxley Act*, 49 *Vill. L. Rev.* 725, et. seq., (2004).

Includes Articles By: i) Roger C. Cramton, George M. Cohen and Susan P. Koniak, *Legal And Ethical Duties Of Lawyers After Sarbanes-Oxley*, p. 725, ii) M. Peter Moser and Stanley Keller, *Sarbanes-Oxley 307: Trusted Counselors Or Informers?*, p. 833, iii) Michael A. Perino, *SEC Enforcement Of Attorney Up-The-Ladder Reporting Rules: An Analysis Of Institutional Constraints, Norms And Biases*, p. 851, and iv) Mark A. Sargent, *Lawyers In The Moral Maze*, p. 867.

6. *The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age*, 3 *J. Telecomm. & High Tech. L.* 5, et. seq. (2004).

Includes Articles By: i) Michael K. Powell, *Preserving Internet Freedom: Guiding Principles For The Industry*, p. 5, ii) Christopher S. Yoo, *Would Mandating Broadband Network Neutrality Help Or Hurt Competition? A Comment On The End-To-End Debate*, p. 23, iii) Tim Wu, *The Broadband Debate, A User's Guide*, p. 69, iv) Howard A. Shelanski, *Competition Policy For Mobile Broadband Networks*, p. 97, v) J. Scott Marcus, *Evolving Core Capabilities of the Internet*, p. 121, vi) Peter P. Swire, *A Model For When Disclosure Helps Security: What Is Different About Computer And Network Security?*, p. 163.

7. *Meeting Human Needs: Examining The Social Safety Net For Working America*, 44 *Santa Clara L. Rev.* 961, et. seq. (2004).

Includes Articles By: i) Stephanie M. Wildman, *Foreword*, p. 961, ii) John A. Powell, *The Needs Of Members In A Legitimate Democ-*

continued on next page

Recent Articles of Interest

continued from previous page

ratic State, p. 969, iii) Frank Munger, *Beyond Welfare Reform: Can We Build A Local Welfare State?*, p. 999, iv) Dorothy E. Roberts, *Welfare Reform And Economic Freedom: Low-Income Mothers' Decisions About Work At Home And In The Market*, p. 1029, v) Jean Braucher, *Consumer Bankruptcy As Part Of The Social Safety Net: Fresh Start Or Treadmill?*, p. 1065, vi) Karen Syma Czapanskiy, *Unemployment Insurance Reform For Mom*, p. 1093, vii) David L. Gregory, *19th Century Local Unemployment Compensation Insurance Law In The 21st Century Global Economy*, p. 1113, viii) Deborah Maranville, *Unemployment Insurance Meets Globalization And The Modern Workforce*, p. 1129, and ix) William P. Quigley, *Prison Work, Wages, And Catholic Social Thought: Justice Demands Decent Work For Decent Wages, Even For Prisoners*, p. 1159.

8. *The Environment, the Public Health, and the Next Generation of Protection*, 30 *Am. J. L. & Med.* 115, et. seq. (2004),

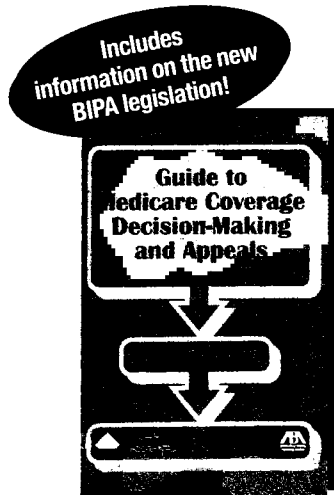
Includes Articles By: i) Carol Browner, *Foreword: Environmental Policy: Principles For The Next Generation Of Protection*, p. 115, ii) Wendy Wagner and David Michaels, *Equal Treatment For Regulatory Science: Extending The Controls, Governing The Quality Of Public Research To Private Research*, p. 119, iii) Jay D. Wexler, *Parks As Gyms? Recreational Paradigms And Public Health In The National Parks*, p. 155, iv) Richard W. Clapp and David Ozonoff, *Environment And Health: Vital Intersection Or Contested Territory?*,

p. 189, v) Victoria Sutton, *Environment And Public Health In A Time Of Plague*, p. 217, vi) Gale Norton and Michael Suk, *America's Public Lands And Waters: The Gateway To Better Health?*, p. 237, vii) Pamela D. Harvey and C. Mark Smith, *The Mercury's Falling: The Massachusetts Approach To Reducing Mercury In The Environment*, p. 245, viii) Sumudu Atapattu, *The Public Health Impact Of Global Environmental Problems And The Role Of International Law, Past And Present*, p. 283, ix) Devra Lee Davis and Carrie Forrester, *Environmental Health Challenges In Southwestern Pennsylvania: Some Comments On The Right To A Clean Environment*, p. 305, and x) Robert R. Kuehn, *Suppression Of Environmental Science*, p. 333.

9. *Transnationalism As A Social Movement Strategy: Institutions, Actors And International Labor Standards*, 10 *U.C. Davis J. Int'l L. & Pol'y* 1, et. seq. (2003).

Includes Articles By: i) Ruben J. Garcia, *Introduction*, p. 1, ii) Sandra Polaski, *Protecting Labor Rights Through Trade Agreements: An Analytical Guide*, p. 13, iii) Katie Quan, *Strategies For Garment Worker Empowerment In The Global Economy*, p. 27, iv) Stephen F. Diamond, *The "Race To The Bottom" Returns: China's Challenge To The International Labor Movement*, p. 39, v) Frank Emmert, *Labor, Environmental Standards And World Trade Law*, p. 75, vi) Ivy C. Lee and Mie Lewis, *Human Trafficking From A Legal Advocate's Perspective: History, Legal Framework And Current Anti-Trafficking Efforts*, p. 169. ○

www.ababooks.org



Regular price \$69.95.
Discount available for members.
Source code: ARLNW103
Product code: 5010033
©2002, 6 x 9, 220 pages, paperback

AN ESSENTIAL RESOURCE TO KEEP YOU CURRENT ON THIS EVER-CHANGING PROCESS from the ABA Section of Administrative Law and Regulatory Practice

Guide to Medicare Coverage Decision-Making and Appeals is a step-by-step walk through the intricacies of this ever-changing and often controversial process. The book provides you with an introduction and thorough overview of the latest law and policy on Medicare coverage decision-making issues including coverage of new medical treatments, technologies and devices. Written by national experts on Medicare, the book includes targeted analyses of the decision-making and appeals processes from the unique perspectives of:

- Medicare beneficiaries
- Providers
- Manufacturers
- Centers for Medicare and Medicaid Services

To give you an added advantage in understanding current Medicare decision-making procedures, the book includes citations to related cases and other materials. An appendix contains relevant sections of the Medicare, Medicaid and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA), and the current HCFA *Federal Register* notice outlining the procedures for making national coverage decisions.

Section News & Events

Bulletin from Homeland Security Committee and Defense and National Security Committee

By Lynne Zusman¹

Intelligence Reform. Congress passed the historic re-structure of Intelligence function during its last week in session to establish a DNI (Director of National Intelligence), i.e., a supra- Intelligence Czar in the USA, for the first time, to bang the heads of the highly competitive existing components of the current government bureaucracy. The legislation also created a national counter-terrorism center, which is theoretically going to be more effective than the numerous counter-terrorism centers in operation at a myriad of important agencies already.

DHS General Counsel. General Counsel, the Honorable Joe D. Whitley of the Department of Homeland Security (DHS) on December 6 delivered a riveting speech on the operations and outlook of the DHS at an Adlaw Section lunch program. A highlight of Mr. Whitley's speech was the observation that rule-making and regulatory processes of the agencies are the lifeline of the government's ability to implement Congress' intentions accurately, effectively, and promptly.

UN Role in War on Terror. Various messes at the United Nations have distracted onlookers from scrutinizing what, if any role, the UN plays in the War on Terror. Conceptually, one would have thought that this International Organization would lead the fight. After all, is not the *Security Council* conceptually the Mother of all World Security Movements. Not so, as described by Nicholas Rostow, on December 14 at a breakfast program of the ABA Standing Committee on Law and National Security, a sister operation in the ABA. Rostow,

General Counsel of the U.S. Mission to the United Nations and Senior Policy Adviser to the U.S. Permanent Representative to the United Nations since Oct. 3, 2001, told the gathering that "norm development" has been the preoccupation historically of this body over the last several decades; although some progress is apparent in that the next configuration of the Security Council will *for the first time* NOT include a country universally recognized as harboring terrorists. Additionally, Mr. Rostow noted, neither the EU, the IMF, nor the World Bank recognized themselves as having any function, role, or responsibility, in the global fight against terror, until recent dialogues on the issue. Finally, Mr. Rostow noted that historically the United Nations has approached terrorism as a social disease rather than the political instrument that it is.

And indeed, it is one of the most effective political instruments in history. According to the speaker, one interpretation of the "shelf life" of the 9/11 murders on U.S. soil² is the two month period immediately following 9/11 when debates were conducted on whether 9/11 was terrorist activity or not, by UN definition.



Former Section Chair Bill Funk inducts U.S. Court of Federal Claims Judge Susan G. Braden as new Section Fellow. Also inducted but not shown here: new Section Fellow and former Section Chair Neil R. Eisner; new Senior Fellows: D.C. Circuit Judge Merrick B. Garland; and Victor G. Rosenblum, Nathaniel L. Nathanson Professor of Law Emeritus at Northwestern University School of Law.

Interstate Compact APA Project

Project co-chairs Bill Morrow and Jeffrey Litwak provided an update on the now one-year-old State Administrative Law Committee project to develop an APA for application to agencies created by interstate compact. Morrow & Litwak explained that the need for such an APA was driven by the general inapplicability of the federal APA and state APAs to such agencies.

Litwak mentioned that the previous day's panel on compact agency adjudication had produced a number of fine papers on the topic and was marked by an engaging discussion on that and related topics involving audience members as well as the panelists themselves.

Morrow and Litwak also noted that the upcoming midyear meeting in Salt Lake City would feature a panel on compact agency rulemaking and that the spring meeting would feature a panel on judicial review of compact agency action.

¹ Chair, Homeland Security Committee; Co-chair, Defense and National Security Committee; Section Liaison to the Standing Committee on Law and National Security; Section Representative to ABA Homeland Security Task Force; Former Council Member.

² "Murders on U.S. soil" is the characterization of the author, not the speaker.

continued on next page

continued from previous page

Morrow and Litwak also announced they had been appointed to the Advisory Group of the National Center for Interstate Compacts.

Nominating Committee

Former Section Chair Neil Eisner delivered the Nominating Committee report. The committee is seeking nominations for vice chair. Traditionally, this would be filled with someone from outside D.C. this year. The committee is seeking nominations for four council positions, as well. Finally, the committee is seeking nominations for assistant secretary and assistant budget officer.

9/11 Taskforce

Ron Smith, co-chair of the Section's 9/11 Taskforce, reported that the taskforce met September 30, 2004, and reached a consensus on how the committee would proceed in the future. The taskforce members agreed in substantial part to: (1) monitor legislative developments and report relevant developments to Section Chair Randy May and the Section Council; (2) meet again if there are any such developments; (3) monitor proposed regulations implementing legislation resulting from the 9/11 Commission Report; (4) seek the Council's approval to refer any such proposed regulations to the appropriate Section committee; and (5) be prepared to consider any proposals made by other organizations or ABA entities and make recommendations to the Council with respect to those proposals. **O**

News from the States

continued from page 26

provided by statute.⁴ But California case law⁵ and the statute that codified it⁶ permit a "successful party" to recover attorney's fees from its opponent if the action resulted in the "enforcement of an important right affecting the public interest."

In *Buckhannon*,⁷ the U.S. Supreme Court rejected the "catalyst theory," meaning that the plaintiff must obtain relief through a judgment or consent decree, not through a settlement catalyzed by the lawsuit. In *Graham v. DaimlerChrysler Corp.*,⁸ California resoundingly rejected *Buckhannon*, allowing a plaintiff whose lawsuit was a catalyst for settlement to recover its reasonable attorney's fees under the public interest statute. The *Graham* decision pointed out the perverse effects of *Buckhannon*: it encourages defendants to litigate fiercely and, just before losing the case, settle it in order to avoid fee liability. By the same token, *Buckhannon* encourages plaintiffs to refuse to settle a case just to keep its claim for attorney's fees alive.

The *Graham* case imposed some new restrictions on catalyst cases: to award fees, the court must determine that the underly-

ing lawsuit had merit and that settlement was not compelled by a mere nuisance suit or threat of expenses. This determination may require a mini-trial if the settlement comes early in the lawsuit before the facts have been developed. In addition, the plaintiff must establish that it sought to settle the matter short of litigation.⁹

Parties can recover the costs incurred in recovering attorney's fees—so-called fee-on-fee litigation. Sometimes the fees incurred in obtaining fees can exceed the fees incurred in the underlying lawsuit. Here the Court imposed a new restriction. Unlike federal courts,¹⁰ California routinely increases the lodestar (reasonable hours times reasonable hourly rate) in the underlying litigation for such factors as the contingent nature of the fee and the plaintiff's skill. However, enhancement of the lodestar should apply to a much lesser degree in determining reasonable fees for fighting about fees (as opposed to reasonable fees incurred in the underlying litigation).

Under the actual facts of *Graham*, the plaintiff's claim for public interest attorney's fees was extraordinarily weak. The lawsuit was for breach of warranty on the sale of a Dakota truck which hauled only 2,000 pounds instead of the promised 6,400. By the time plaintiff brought its class action, Chrysler had already set up a remedial scheme for buyers and the California Attorney General and a local District Attorney had threatened legal action. The case was settled not long after plaintiff filed and before plaintiff had done any significant work on his case. Under the new restrictions on catalyst recoveries adopted in *Graham*, the plaintiff may well be barred from recovering fees because he brought a nuisance suit or because he failed to attempt settlement before filing his lawsuit. **O**

⁴ *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

⁵ *Serrano v. Priest*, 141 Cal.Rptr. 315 (1977).

⁶ Code of Civil Procedure §1021.5.

⁷ *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598 (2001) (the decision was 4-3).

⁸ 2004 WL 2739179.

⁹ The same day, the Court imposed an additional restriction in the case of governmental defendants: the plaintiff cannot recover if the effect of a settlement was merely to accelerate the issuance of a regulation or other government remedial measure that was already ongoing when the litigation was filed. *Tipton-Whittingham v. City of Los Angeles*, 2004 WL 2743389.

¹⁰ *Pierce v. Underwood*, 487 U.S. 552 (1988).