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

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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.” 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.”

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). 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.

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.” 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, were unstinting in their support for reviving it. Both Justices had in fact written Senate Judiciary Committee in a vain attempt to preserve ACUS in 1995, 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 Aiken and former staff lawyers Philip Harter and Gary Edles providing strong support for the revival of ACUS.

Mr. Gray, former White House Counsel in the Bush 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.”

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2 Id.

3 The bill, H.R. 4917, was passed by the House of Representatives by unanimous consent on October 8, 2004, and 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.


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 Fields, 8 ADMIN. L.J. 775 (1995).


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. Aiken 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.

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, was not repealed and remains in the U.S. Code. The reauthorizing legislation recognized this, and was designed to refund ACUS with only minimal changes to the Administrative Conference Act.

This mandate, along with the broad powers and duties already assigned to the Conference, 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.” These are all recent initiatives of Congress and OMB relating to the need for better prioritization and information and scientific consensus in regulation. Phil Harter provided numerous other ideas about ACUS’s future operational and research functions.

ACUS’s mix of research and operational/coordinate 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. 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 2007—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. 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.

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.”
11 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) (documenting 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.
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).
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 meddlesome "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, academia 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 R.J.R.-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 cooperate continued on page 10.
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 incapacity 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 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
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 inspections 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 bloodstream 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 since 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

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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 (NOx), 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 NOx 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 NOx. 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

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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. Karnel*

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

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

**Whistleblowers**


**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 gives the SEC the power to regulate the structure and duties of audit committees.

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). 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.
Learnings from the Masters

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

"A
dministrative 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 appropri-
tate 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 genera-
tions 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, guid-
ance 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 govern-
ment!" 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.

What are the features of the most successful regulators?
The best regulators really know their stuff. They are thor-
oughly grounded in FDA law, backwards and forward. When it
comes time to present their case to a court, they are unequivo-
cal, 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 thor-
ough 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 deci-
sions, 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.

*Past Section Chair and current Advisory Board Member.

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 Wilmers Cutler Pickering Hale and Dorr 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.

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

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 Kirkpatrick, 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 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 Honorableerrick 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. Langton Outstanding Government Service Award to Thomas Spahr, Chief Legal Counsel for the Child Support Division of the New Mexico Human 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:

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.
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 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 post-prandial delight of bar association audiences.” Out of respect for Landis, this postprandial speech will contain no ringing.

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.

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of the
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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

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
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 “[i]n the 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(b), 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
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 “[t]here is scant indication that Congress meant to alter the meaning” of the other damages limitations by adding clause (iii); instead, “by 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 *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, “by 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 that 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.

-2 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 (May 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 USA, 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

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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 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. The court was 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 "informational 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 Luysia Water & Sewer Comm’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

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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 *Krause 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 Procedures 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 to 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 passenger carriers.
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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.

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.

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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.
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).

The Supreme Court 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. Gedid

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 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
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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. Oakley

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 public participation 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. Jordan

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. Conwell, 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, if not applied as written, 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 his or her own fees except where

continued on page 32
By Yvette Barksdale


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


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.


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.


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.


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.


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.


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

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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.
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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.


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.


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.


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.


Empirical Studies


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.


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:


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
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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.
Bulletin from Homeland Security Committee and Defense and National Security Committee
By Lynne Zusman

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. soil 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. Eisen; new Senior Fellows: D.C. Circuit Judge Merrick B. Garland; and Victor G. Rosenbloom, 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.

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News from the States

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provided by statute. But California case law and the statute that codified it 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, 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., 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 underlying 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.

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, 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.

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.

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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 governmental remedial measure that was already ongoing when the litigation was filed. Tipton--Whittingham v. City of Los Angeles, 2004 WL 2743389.