Solving the SSA Backlog CRISIS

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SEC vs. DC Circuit
21st Century U.S. Code
2012 Gellhorn-Sargentich Winning Essay
9th Annual Administrative Law Institute:
Critical Issues in Regulation
The Capital Hilton, Washington, DC

Wednesday • April 3, 2013
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1:30 p.m. – 3:00 p.m.  The Rulemaking Process
3:00 p.m. – 3:30 p.m.  Break
3:30 p.m. – 5:00 p.m.  Judicial Review of Rules

Thursday • April 4, 2013
The Institute — Presidential Ballroom, Capital Hilton
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9:00 a.m. – 9:15 a.m.  Welcoming Remarks
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A lot has happened in three months. But much remains to be done.

Let's start with the 2012 Administrative Law Conference held at the Capital Hilton in Washington, D.C., October 25–26 2012. [See Otto Hetzel's coverage in Section News and Events of this issue]. It is very difficult to say what the best part of the conference was:

- Over 550 people, including about 100 presenters, participated in dozens of panels, on as many as five simultaneous tracks. Panels ranged from the theoretical to the highly practical and were anchored by the Annual Developments panel. Audience evaluations were extraordinarily positive, even by fall conference standards.
- Our dinner cruise on the Potomac was a huge hit among the roughly 60 attendees, none of whom left early. I think it may well become a regular part of the event.
- Norm Ornstein gave an entertaining but also rousing speech on the importance of taking action to correct the growing dysfunctionality of our federal government.
- We made Cass Sunstein a Senior Fellow and gave the Mary Lawton Award to FTC Deputy Executive Director Mary Beth Richards, the Scholarship Award to Harvard Law School professor John Manning, and the Gellhorn/Sargentich Award to Daniel Kazhdan.

I might give a slight edge to the awards luncheon:

- It was clear that all the recipients felt genuinely honored to have been chosen, a gratifying reflection on the respect the Section has earned.
- Half of the eight living Senior Fellows attended (on short notice) to honor Cass.
- Mary Beth Richards offered inspiring and moving remarks, which we liked so much we are reprinting them elsewhere in this edition of the Administrative & Regulatory Law News.

In explaining our thought process in making Cass a Senior Fellow rather than giving him the Mary C. Lawton Award (for which he had been nominated by a impressive group of senior government lawyers), I made two points:

- First, he deserved no less, given his unique record of academic accomplishment and government service.
- Second, while most of our career paths diverged irrevocably from Cass’s while we were still in our teens or twenties (if not in utero), most of you who are government lawyers should theoretically be able to win the Mary Lawton Award someday, if you do the kind of work, and set the kind of example, that Mary Beth Richards has.

Policy Initiatives. We have made great progress on the long list of projects that I described in my first column:

- In November, we submitted to the House of Delegates’ Rules and Calendar Committee two proposed resolutions and reports, one on equalizing the disclosure requirements applicable to political contributions to entities, regardless of their tax status, and another on improving the ethics requirements applicable to government contractors. Both had been pulled from the Annual Meeting to address the concerns of other sections. We believe we have done so and will work to see that both get adopted by the House at the Mid-Year Meeting in February.
- On December 4, we sent to the leaders of the relevant congressional committees a letter calling for repeal of the STOCK Act to the extent that it applies to career federal employees. We recruited as cosigners or supporters the Government & Public Sector Lawyers Division, the Sections of Public Contract Law and International Law, and the National Conference of the Administrative Law Judiciary. The next day, the House approved an extension until April 15 of the Act’s thus-far-deferred requirement that covered employees’ financial disclosure forms be posted on the Internet. Correlation is not causation, but we were told that our letter generated attention right away.

Also in early December, we sent:

- To House and Senate committee leaders a pair of letters supporting enactment of bills to require that regulations be written in plain English, as all other federal government documents are required to be; and
- To the Acting Administrator of OIRA a letter calling for prompt publication of the Spring and Fall 2012 unified regulatory agendas, neither of which had yet been published. (The Section of Public Utility, Communications, and Transportation also joined this letter.) He wrote back that he was “grateful to you and your colleagues for your thoughtful and constructive letter,” and we have since initiated discussions with OIRA about the feasibility of a government-wide, evergreen website that would contain the same information as the agendas so that this information would be made publicly available on a continuing basis, rather than (as now) becoming as much as a year out of date.1

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1 EPA and DOT already have websites along these lines, available respectively at http://yosemite.epa.gov/opei/RuleGate.nsf/ and http://www.dot.gov/regulations/report-on-significant-rulemakings.
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Thinking Outside The APA Box: A New Social Security Tribunal

By Michael Asimow & Jeffrey S. Wolfe*

The Social Security Administration’s (SSA’s) disability adjudication process is in crisis. At the close of the 2010 fiscal year, 705,367 appeals remained to be heard before the Office of Disability Adjudication and Review. This represents a current backlog of some 240,000 appeals, as the Government Accountability Office indicates that the existing system is designed to handle only 466,000 cases per year. Despite SSA’s efforts the backlog persists and will likely increase as the result of demographic and economic trends.1

As a result of the backlog, desperately ill and impoverished persons sometimes wait as long as two years for administrative law judges (ALJs) to hear and decide their appeals. Meanwhile, as the backlog has grown, SSA and its ALJs have been locked in a longstanding and sometimes rancorous debate over how best to resolve the problem. SSA seeks to enhance the productivity of its 1300 ALJs, while the judges seek preservation of their statutory independence under the Administrative Procedure Act (APA).

In this brief article we propose thinking outside of the “APA box” to find a creative resolution of the Social Security appeals crisis. We propose creation of a separate tribunal to handle the adjudication of disability appeals. The tribunal, headed by a Social Security Chief Judge (SSCJ) would be independent of SSA and able to appoint new “Social Security Judges” (SSJs) without need to comply with the complex requirements of the APA’s appointments process.

The simple fact is that there are not enough ALJs to resolve the backlog. The existing system was designed to hear and decide some 466,000 cases a year but must now hear and decide nearly twice this number. Yet, adding new ALJs is not a simple process.

Under the APA, new ALJs are appointed through the Office of Personnel Management (OPM), not by individual agencies. The appointments process is a multi-step undertaking that considers a variety of factors, including professional experience and veteran status, among other things. Applicants must demonstrate seven years of litigation experience and undergo multiple interviews. Once appointed, ALJs assume their positions without any probationary period, essentially a life-tenured posting but with limited prospects for advancement. An ALJ is not subject to agency performance evaluations and can be discharged only for good cause following a hearing before the Merit Systems Protection Board. Few ALJs are ever removed in this fashion.

It can be said that the present APA adjudicatory system was designed for an earlier age in which adjudication rather than rulemaking was the usual vehicle for making agency policy. In agencies like the Federal Energy Regulatory Commission (FERC) or the Securities and Exchange Commission (SEC), ALJs decided then, as they do now, highly technical precedent-setting cases with significant economic issues at stake after conducting sometimes lengthy adversarial trials.

The Social Security adjudicatory system is quite different. The term “mass justice” is often used to describe what some have called the world’s largest administrative adjudicatory system. Most SSA claims are for disability benefits and involve often complex medical and vocational issues, set out in a legal decision based on governing case law and regulation. As these hearings are de novo appeals, the question before the ALJ is the same as it was before the State Disability Determination Service: Is the claimant “disabled” under governing law and regulation?

The Supreme Court has described SSA hearings as “informal” and “inquisitorial,” rather than adversarial, giving rise to a duty of inquiry by the judge to ensure that he or she “looks fully” into the evidence—both for and against the claimant.2 As the government does not appear, the hearings are relatively brief and ALJs hear multiple cases on a given docket. Decisions are frequently written by staff attorneys and paralegals at the judge’s direction. Against this backdrop, the disability backlog continues to grow.

We suggest a new tribunal independent of SSA, thus moving away from the struggles of the past—with the immediate goal of reducing the disability backlog. The tribunal would be composed of both ALJs and SSJs. The chief judge would appoint SSJs. SSJs would not require the same level of experience as is currently expected of ALJs and would not run the gauntlet of OPM appointment procedures. Thus, SSJs could be appointed relatively quickly. SSJs would receive lower compensation than ALJs, complete a probationary period, and would

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1 See Jeffrey S. Wolfe, Civil Service Reform in Social Security Adjudications, 64 Admin. L. Rev. 379 (2012).

be subject to training, mentorship, and evaluation. Such judges could be appointed for a discrete period, subject to periodic review, rather than for life. SSJs could be part- as well as full-time and could be retired judges or lawyers.

The model for this proposal is found in the U.K. and Australia, both of which have a long tradition of separate adjudicatory tribunals. These countries do not employ a system of combined functions typical of the U.S.—that is, the same agency does not investigate and prosecute the case, then adjudicate it. Adjudication of administrative appeals (including Social Security and other benefit programs) is handled by tribunals separate from the agency. These tribunal systems are widely accepted and function well in both the U.K. and Australia.3

In the U.K., the adjudication of Social Security cases is handled by the First Tier Tribunal (FTT), which is independent of the agencies making the initial decisions. The FTT is organized into “chambers” that specialize in different administrative areas. The “Social Security and Child Support Chamber” decides approximately 400,000 cases per year, about half of SSA’s current caseload.4 Thus, the Social Security Chamber of the FTT works on a scale that is arguably comparable to the U.S. system. Notably it decides these cases in an average of 22 weeks5 as opposed to average “processing times” of 353 days in the U.S. system. Importantly, it has the ability to retain as many judges as needed, including part-time judges who may be retired lawyers, volunteer lawyers, and even lay persons. The tribunal judges often sit in panels of two or three. U.K. law also provides an Upper Tribunal to hear appeals from FTT decisions.

How could the U.K. tribunal system be applied to U.S. Social Security adjudication? Congress could create a new “Social Security Tribunal” (SST), independent of SSA. The SST would be empowered to adopt procedural regulations that enable it to solve many of the problems that beset the existing system. For example, the regulations might close the record at the conclusion of the hearing and give judges much greater case management authority than they have now.

In addition to appointing SSJs, the chief judge would select ALJs, much as SSA does today. Judges would be appointed as needed to handle the ongoing caseload. The goals of the legislation creating SST would be to eliminate the backlog and thereafter reduce the processing time for appeals to six months. Unlike in the present system, SSJs would not necessarily have a civil service guarantee but could be parties to multi-year contracts, much like non-tenure-track law school faculty. Thus SSJs, unlike ALJs, would not be subject to APA protections, nor would they be appointed under the APA. Appointment of ALJs would, of course, remain subject to the APA appointments process, and all of the existing Social Security ALJs would transfer to the SST as APA-appointed judges.

The new U.S. system, like its U.K. counterpart, would be multi-tiered. The “trial tier” would be composed largely of SSJs, hearing cases on appeal from the underlying administrative denial, as ALJs now do (although ALJs could also be assigned to trial tier hearings in particularly difficult cases or for reasons of caseload management). Trial tier hearings will proceed as they do now, with no government representative present. To minimize potential bias, the SST’s regulations might call for SSJs to hear cases in panels of two or three as occurs in the U.K. and Australia.

ALJs would sit in an “Upper Tier” that would review decisions of the trial tier on issues of fact and law, much as federal district court judges today review SSA decisions. Both SSA and the claimant could appeal a trial-tier decision to the Upper Tier and SSA could elect to have a lawyer or other representative present to argue its position. Upper Tier decisions would be published and citable as precedents, as occurs in the U.K., to enhance uniformity of trial tier decisions. SSA would continue to issue regulations and policy statements binding on both tiers. ALJs in the Upper Tier could also serve in panels, much as ALJs did when serving as members of the recently concluded pilot program known as the “Decision Review Board (DRB).” The Upper Tier would replace the existing Social Security Appeals Council, now staffed by Administrative Appeals Judges (AAJs), which does not provide a generally applicable appellate remedy to applicants or to SSA. Upper Tier decisions by ALJs might even replace the current appeal of Social Security cases to the federal district courts. Congress might decide to make Upper Tier decisions subject to judicial review only by a federal court of appeals, perhaps limited to issues of law rather than fact, as occurs in the U.K.

An SST could be a viable way forward for Social Security disability adjudications—a way to meaningfully and finally resolve the current disability backlog. If the SST model works, it could be adapted for deciding black-lung cases and veterans’ benefit appeals, as well. There are, of course, innumerable details that cannot be discussed here and would likely be the subject of political negotiations. One thing, however, is clear. There remains an ongoing need for concerted action to resolve the Social Security backlog. We begin the process here by introducing the idea of a separate tribunal staffed by front-line trial judges who are not selected under the APA, preserving the function of the current ALJs primarily in an appellate role.

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3 See generally Michael Asimow & Jeffrey S. Lubbers, The Merits of “Merits Review”: A Comparative Look at the Australian Administrative Appeals Tribunal, 28 Windsor Yearbook of Access to Justice 261 (2010); http://www.ssat.gov.au/. “Tribunals” are not foreign to U.S. administrative law. At the federal level, the Tax Court, Occupational Safety and Health Review Commission, and Federal Mine Safety and Health Review Commission are independent tribunals. Benefit tribunals are quite common at the state level where they are typically employed for deciding workers’ compensation and unemployment appeal cases.  
5 Id., p. 8.
6 The DRB paired sitting ALJs with sitting Appeals Council AAJs to decide appeals which would otherwise have been before the Appeals Council. See 20 C.F.R. §405.405. The regulations creating the DRB were sunsetted in June 2011. 20 C.F.R. § 405.240.
Should Congress Create a Special Category of SSA ALJs?

By Jeffrey S. Lubbers*

The growth of the Social Security Administration (SSA) disability adjudication program has been phenomenal. In 1973, the President of the Association of Administrative Law Judges (ALJs) told a Civil Service Commission Advisory Committee that “Administrative Law Judges . . . have experienced a dramatic increase in the number of disability proceedings reaching the hearing level. There were 27,972 proceedings in 1969, 34,901 in 1970, 40,712 in 1971, and by fiscal year 1972 the total had jumped to an unbelievable 56,346.” A July 30, 1974 report of the Civil Service Commission indicated that the SSA employed 430 ALJs at the time, and that the per-judge disposition rate had fluctuated between 114.1 and 143.6 cases per year between 1969 and 1973.

Today those numbers seem miniscule. The SSA Commissioner has testified that he expects the caseload to reach 832,000 in fiscal year 2012 with about 1400 ALJs.1 One obvious by-product of this huge influx of cases is that the per-judge disposition rate has more than quadrupled from 114 per year in 1969, to 288 per year in 1976, to 594 per year in 2012. There is no end in sight to the rapidly expanding caseload and its attendant backlogs.

Commissioner Michael Astrue has made some progress in reducing the backlogs from their December 2008 highs, and the average processing time for hearing decisions has decreased to 442 days, down from a high of 514 days at the end of fiscal year 2008, but this was largely because SSA hired 147 ALJs and over 1,000 support staff in FY 2009. Nevertheless, in September 2011, according to a Syracuse University analysis: “The number of disability cases awaiting a hearing and decision by [SSA] continued to climb during the most recent quarter, from July 1 to September 30, 2011. Pending cases rose to 771,318 at the end of this period, up 9.3 percent from 705,367 one year ago.”

Another, perhaps related, problem is that there have been widely reported decisional inconsistencies in the SSA disability adjudication system. As the SSA Inspector General reported in February, among the 1,256 ALJs with 200 or more dispositions in FY 2010, the average decisional allowance rate was about 67 percent, but the 12 ALJs with the highest allowance rates averaged between 96.3 and 99.7 percent, and the 12 ALJs with the lowest allowance rates averaged between 8.55 and 25.1 percent.2

SSA is aware of the inconsistency problem and has commissioned the Administrative Conference of the U.S. (ACUS) to study the fairness, efficiency, and accountability issues raised by these inconsistencies; the study is ongoing and I hope that it will ultimately be useful to SSA and the Congress when it is completed. I am not going to prejudge the ACUS study, but Professor Richard Pierce makes a good point when he points to perverse incentives that make it easier and less of a “hassle” for ALJs to grant cases than to deny them.3 But even so, that does not account for the rather extreme tails of the bell curve among individual decisionmakers, some of which appear to be based on the location of the hearing office.

Possible New Approaches

In the mid 2000s, SSA attempted some short-lived disability adjudication procedural reforms that I supported.4 But, since the reason for abandoning many of them was that the apparently long-term and growing caseload problem makes it impossible to devote enough resources to test them properly, it would seem that the fundamental caseload problem needs to be addressed first.

A number of approaches deserve consideration, including: (1) more rulemaking by SSA to reduce the number of issues that must be heard in individual adjudications; (2) expanding and enhancing video teleconferencing technology; (3) modifying the role of the Appeals Council; (4) introducing government attorneys and adversarial hearings in a limited number of case categories; and (5) considering the establishment of a Social Security Court or tribunal. But one additional possibility is to consider whether SSA ALJs should become a special “breed”—especially since they make up approximately 85% of all ALJs.

Applicability of the Administrative Procedure Act (APA) to SSA Adjudication

An oft-debated threshold issue is whether the formal adjudication provisions of the APA are applicable to SSA disability adjudications. While this is an interesting legal and historical

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question, I think it is somewhat beside the point because ultimately the issue of the APA’s applicability is up to Congress. I personally think that a close look at the legislative history indicates that, in the 1970s, Congress clearly ratified SSA’s longstanding position favoring the use of ALJs in disability adjudication. Whether that might change if SSA changes its position is an open question. But, as a legal matter, the APA certainly would permit such a re-evaluation. APA Section 556, after providing for the use of ALJs in formal adjudications, states: “This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute.”

Thus, if Congress became persuaded that circumstances require that the long-standing use of standard-model ALJs in SSA proceedings is no longer tenable, it could “specially provide for or designate” another type of adjudicator, even as it maintains the APA procedures. Congress has done this occasionally. One example was when it allowed SSA to use temporary “SSI judges” for a time in the 1970s. Another example is the special authority given to the Nuclear Regulatory Commission (NRC) to establish three-member atomic safety and licensing boards (ASLBs) using lawyers and scientists.5

In the case of the NRC, Congress wished to provide the agency with the flexibility to not only use law-trained judges to hear licensing cases but also scientists. While there might be some basis to open up the SSA adjudicator roster to medical experts, I think the general consensus among commentators is that it is preferable to have legally trained judges in such cases.6 However, the well-documented problems with the government-wide ALJ program,7 along with the systemic backlogs, might lead Congress to introduce more flexibility into the process of hiring SSA judges in the future. (Of course, any change would almost certainly require the grandfathering of current ALJs.)

Perhaps the biggest frustration for agencies with the ALJ program is the inflexibility in hiring ALJs. While designed as a merit selection program, dissatisfaction with the Office of Personnel Management (OPM) process for assembling the register of eligible applicants, including statutory restrictions on how agencies can hire judges off the register, has led most agencies to hire existing ALJs laterally from other agencies, most often “cherry-picking” from SSA, which employs approximately 85% of the overall ALJ corps. SSA, for its part, has also experienced frustrations in hiring the large number of ALJs it needs.8

5 See 42 U.S.C. § 2241. There are also numerous non-APA hearing provisions (such as those for immigration cases, public employee disciplinary cases, and government contract appeals) where Congress has specially designated the use of non-ALJ adjudicators. See Jeffrey S. Lubbers, APA-Adjudication: Is the Quest for Uniformity Failing?, 10 ADMIN. L. J. AM. U. 65, 70–71 (1996) (regarding use of non-APA judges).


8 See the position paper of Ronald Bernoski, President, Ass’n of Administrative Law Judges, “Recommendations on the Social Security Case Backlog” at p. 30 (January 2008) (on file with author) (suggesting that “OPM has shown that it is incapable of providing the American public with the ‘best qualified’ administrative law judge’). Judge Bernoski’s proposed solution is to remove the government-wide ALJ program from OPM and give it to a separate ALJ-run conference. I would prefer a more limited approach that deals specifically with the SSA ALJ corps.

I have supported some government-wide changes to the ALJ selection process, but given the predominance of SSA in the overall program, I would also support tailoring a special selection process for SSA ALJs. This could be done in two ways—either by a mandate to OPM to provide for specialized hiring of SSA ALJs, or by legislatively designating them as “Social Security Judges” and allowing SSA to fashion its own hiring process that uses the OPM process as a model. This latter suggestion is essentially what has happened with the NRC ASLB members. For example when NRC hires a lawyer member for an ASLB, it posts a notice of an opening and conducts its own OPM-like hiring process.9 The two Boards of Contract Appeals also conduct a tailored OPM-like hiring process when they hire their Administrative Judges.10 Such a process could allow SSA to hire more judges with Social Security experience.

Creating a specially designated category of Social Security Judges would not necessarily require but could allow for consideration of specifically germane attributes for these judges. For example, given the high degree of importance of caseload management in this huge program, Congress could consider departing from the extant prohibition of performance ratings for ALJs. While I know there are legitimate arguments on the other side of this

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The SEC vs. the Court: How the Battle Over Cost-Benefit Analyses Might Transform the Agency

By Frank G. Zarb, Jr.*

The Securities and Exchange Commission is wrestling with the most fundamental threat it has ever faced to the way in which it makes policy and promulgates rules. A string of unfavorable rulings from the D.C. Circuit have imposed on the agency the duty to conduct a thorough cost-benefit analysis based on empirical data each time it adopts or amends a rule. Further, the rulings are increasingly accompanied by scathing judicial criticism that threatens to undermine the small agency’s historic credibility, with one court decision going so far as to describe the agency’s analysis as “unutterably mindless.”

The string of defeats in court could not have come at a worse time for the agency, as the SEC remains responsible for formulating 95 rules on the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), as well as many other rules under the Jumpstart our Business Startup Act of 2011 (JOBS Act).

This article discusses the key D.C. Circuit decisions, why they are being rendered now, and why the SEC has not prevailed. This article also explains why these decisions are pushing the SEC to reinvent how it makes policy.

The SEC’s Obligation to Conduct Cost-Benefit Analyses

The SEC has accompanied its rule proposals with cost-benefit analyses for about 30 years. Initially, the agency provided the analyses on a largely voluntary basis. Since at least the 1980s, SEC chairmen have made commitments to Congress to conduct such analyses. Further, Section 23(a)(2) of the Securities Exchange Act of 1934 (Exchange Act), added by amendment in 1975, provides that the agency “shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].” Of course, the language of Section 23(a)(2) does not in specific terms call for a cost-benefit analysis, but rather an analysis of the effect of a rule on competition among businesses.

The SEC’s obligation to conduct cost-benefit analyses crystallized into a formal, court-enforceable obligation when new language was added to Section 3(f) of the Exchange Act by the National Securities Markets Improvement Act of 1996. This new language provided that “[w]henever pursuant to this title the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.” Section 2(b) of the Securities Act of 1933, as amended (Securities Act) includes nearly identical language. The Gramm-Leach-Bliley Act of 1999 added the language identical to that in the Securities Act to Section 3(c) of the Investment Company Act of 1940 and Section 202(c) of the Investment Advisors Act of 1940.

Although the above language about promoting efficiency, competition, and capital formation does not specifically require a “cost-benefit analysis,” courts have read such a requirement into the statutes. In a 2005 decision ruling on the validity of new SEC requirements for independent mutual fund boards, for instance, the D.C. Circuit cited the language of Section 3(c) of the Investment Company Act when considering the proposition that the SEC has a “statutory obligation to determine as best it can the economic implications of the rule.”

The SEC itself has largely acquiesced in its obligation to conduct a formal cost-benefit analysis, as reflected in its own internal procedures manuals dating back to at least 1998, and in a 2012 report that the SEC’s Office of Inspector General prepared at the request Members of Congress, who were concerned about how the agency would approach new rules required under the Dodd-Frank Act. The agency’s acquiescence was likely encouraged by two executive orders issued during the Clinton and Obama Administrations directing federal agencies to conduct cost-benefit analyses, even though, as an independent agency, the SEC was not directly subject to those orders.

While the SEC and the judiciary appear to agree on the agency’s fundamental obligation to conduct cost-benefit analyses, they have fundamentally disagreed on the required rigor and depth of these analyses. In the past, the agency has rarely relied on the quantitative analysis of data to support its rule proposals, but has instead relied on its own legal or logical analyses, sometimes coupled with data submitted by third parties along with letters commenting on proposed rules. To be sure, in some instances the SEC does not have direct

* Mr. Zarb is a partner in the corporate department of Proskauer Rose LLP in Washington, D.C., and a former member of the SEC staff. He acknowledges the invaluable assistance of Elizabeth Crimer Walsh, an associate in the firm’s corporate department, in the preparation of this article.

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access to data that is in the domain of private industry. However, others have pointed out that the SEC is an agency that is largely populated by lawyers, and lawyers tend to favor legal analysis, often while shying away from analyzing empirical data, likely due to lack of training in understanding and evaluating this type of information. As explained further below, the courts expect the SEC to at least conduct a more rigorous expert analysis and independently develop relevant data against which to test new rules and their likely impact.

The Court Decisions

The series of cases overturning the SEC’s rules in the D.C. Circuit began in 2005 with its decision in Chamber of Commerce v. SEC, which invalidated a rule requiring mutual fund boards to have independent chairmen.1 In 2010, the court in American Equity Investment Life Insurance Co. v. SEC vacated a rule on fixed indexed annuity products.2 In 2011, a new SEC “proxy access” rule that imposed a procedure through which shareholders could nominate candidates for the board of directors on public companies met the same fate in Business Roundtable & Chamber of Commerce v. SEC.3

In at least one case the court reviewed a NYSE rule approved by the SEC and found the agency’s analysis—which was not strictly a cost-benefit analysis—to be deficient on grounds that were consistent with those in the “cost-benefit” cases.4 In its 2010 decision in NetCoalition v. SEC, the D.C. Circuit invalidated rules originally proposed by the NYSE, which set fees for specialized data services.5 The court’s decision focused on the SEC’s determination that the fees were “fair and reasonable” and subject to appropriate competitive forces.

The court’s most recent decision vacating the SEC’s “proxy access” rule is illustrative. As noted above, this decision relates to an SEC rule that would have required all public companies to permit shareholders to nominate candidates to their boards of directors, following federally mandated procedures. The court’s rejection of the SEC’s analysis appears focused on two separate rationales. First, the court appeared to conclude that the analysis was driven by a desired result, rather than the reverse. It emphasized that the SEC discounted the potential costs to companies, while highlighting (rather than scrutinizing) the benefits that would result from the rule. For example, in the court’s view, the SEC assumed that many issuers will simply accept nominees by shareholders without mounting costly counter-measures, despite strong evidence submitted by commentators that boards do, in fact, consistently contest such nominees if compelled to do so by fiduciary duties. Along the same lines, the court also highlighted the agency’s decision to rely on one academic study that supported its rule, while dismissing other studies that did not, without much explanation.

The second rationale for the court’s decision is probably more important because it relates more directly to the standard process that the agency follows each time it proposes a new rule. Although the SEC historically has considered primary data (if any) submitted by parties that comment on proposed rules in conducting cost-benefit analyses, the court’s latest holding, as a practical matter, requires that the agency develop its own data on relevant points. Many of the deficiencies that the court has identified can only be cured if the agency develops data independently through trained staff. For example, the court stated in the “proxy access” case that “[a]lthough the Commission acknowledged that companies may expend resources to oppose shareholder nominees . . . it did nothing to estimate and quantify the costs it expected companies to incur; nor did it claim estimating those costs was not possible, for empirical evidence about expenditures in traditional proxy contests was readily available.”

These challenges are just beginning to impact the SEC’s rulemaking under the Dodd-Frank Act. Just this past October, industry groups filed petitions with the court challenging the cost-benefit analyses performed by the agency in connection with new rules mandated by Dodd-Frank. The rules in question require public companies to disclose their use of specified minerals—so-called “conflict minerals”—that derive from the Republic of the Congo and surrounding countries. The same month, industry groups challenged another set of rules mandated by Dodd-Frank, which require disclosure of payments to foreign governments relating to oil, gas, and mining projects.

Are Politics Driving the Court’s Decisions?

Some commentators have criticized the court’s rulings as examples of “judicial activism,” implying that the legal standard might change again after more judges appointed by Democratic administrations populate the D.C. Circuit. A column in the New York Times reflected this point of view, for example, when he stated the following when discussing the court’s rulings against the SEC on the validity of its cost-benefit analyses: “The flurry of litigation will play out on friendly political turf for Wall Street. Noted for its conservative credentials and harmonious culture, the appeals court is stacked with judges who enjoy rock-star status in Republican circles.”

Contrary to this critique, however, the first adverse court decision in the line of cases noted above, the 2005 case involving an independent mutual fund board chairman, was handed down by a panel in which two of the three judges were appointed by President Clinton, a Democrat, against an SEC with a Republican chairman and a majority of Republican commissioners.

1 Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005).
2 Am. Equity Investment Life Ins. Co. v. SEC, 613 F.3d 166 (D.C. Cir. 2010).
4 NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).
Further, the panels that handed down the four major rulings in question included equal numbers of judges appointed by Republican and Democratic Presidents. Out of eight D.C. Circuit judges who presided over the cases mentioned above, four were appointed by Democrats and four were appointed by Republicans, as reflected in the chart below:

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<th>Case</th>
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<td>Merrick B. Garland</td>
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<td>Harry T. Edwards</td>
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<td>Janice Rogers Brown</td>
<td>George W. Bush</td>
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It may be that the judicial standards the court has applied in these cases have evolved over time and have effectively “raised the bar” on the SEC’s procedures for adopting or amending new rules. If so, one reason may be that the federal securities laws were amended only relatively recently (in the late 1990s) to require that the agency make an “efficiency, competition, and capital formation” determination, as noted above. Regardless of their political ideology, these judges may genuinely believe that rules driven by actual data and thorough analysis are more likely to achieve Congress’s intent in promulgating the language on “efficiency, competition, and capital formation.”

There is some basis for such a belief, given recent market failures that have highlighted the difficulty regulators have in understanding and predicting market behavior in the face of new and increasingly complex technologies and rapidly evolving trading platforms and markets. The unintended consequences of securities and banking rules have been blamed (fairly or unfairly) for contributing to the market disruptions of the last decade. Regulators in the United States and the EU have been debating for years how to regulate short sales and the consequences of such regulations. It would not be surprising if the judges of the D.C. Circuit have come to genuinely believe that regulators cannot fully understand the likely impact of their rules on the markets without first at least generating and analyzing data.

**What This Means**

What appears to be a dispute over how to carry out a technical regulatory requirement to conduct cost-benefit analyses may, in hindsight, prompt a fundamental shift in the way the SEC makes policy and writes new rules. The court decisions on cost-benefit analyses are clearly pressuring the SEC to make policy decisions in a more scientific manner, based on actual data that, in many cases, it will have to generate and analyze on its own. Congressional pressure is increasing as well, as pending legislation would require the SEC to conduct a data-based analysis at an even earlier stage when the agency seeks to understand a regulatory problem and to consider whether or not new rules are warranted.

The SEC has already begun to respond to this pressure from the courts and from other constituencies by forming units such as the Division of Risk, Strategy, and Financial Innovation, which “was created in September 2009 to integrate financial economics and rigorous data analytics into the core mission of the SEC.” In the view of some observers, further changes are warranted, and it remains to be seen whether this marks the beginning of a more fundamental transformation of a venerable government agency.

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The United States Code: Its Accuracy, Accessibility, and Currency

By Peter G. LeFevre*

As I was watching the debate about the Obama Administration’s landmark healthcare legislation a few years ago, I got a big laugh out of one incident I saw. A Member of Congress made the mistake of admitting in public that he had not read the whole bill, and people jumped all over him. How could he vote for a bill he hadn’t even read? After that it seemed like every Member had read the bill—all 2,700 pages of it.

Take out a copy of the Patient Protection and Affordable Care Act (Pub. L. No. 111-148) and try to read it. Let’s see, here’s something interesting on page 283: “Title XXVII of the Public Health Service Act . . . is amended in section 2704 . . . as so redesignated by section 1201(2)-(A) in subsection (c)-(i) in paragraph (2), by striking ‘group health plan’ each place that such term appears and inserting ‘group or individual health plan.’” Or what about this on page 283: “Section 1920(e) of such Act . . . as added by section 2001(a)(4)(B) and amended by section 2001(e)(2)(C), is amended by inserting ‘(IX),’ after ‘(VIII).’” The Affordable Care Act made sense once it is up-to-date by incorporating amendments and new provisions into the text.

While there is little disagreement about the necessity of the Code, there has been some justifiable criticism of its usability. As a former director of the office that is responsible for the Code, let me discuss where the Code is now and where it is going in terms of three qualities that matter a great deal to users—accuracy, accessibility, and currency.

Accuracy

The Code is the responsibility of the Office of the Law Revision Counsel (OLRC). During my many years at the OLRC, the accuracy of the Code was always the highest priority of the Office. It’s not hard to see why. By law, the printed Code is evidence of the laws it contains in every federal and state court and public office. Lawyers, judges, agencies, and the public ultimately have to rely on it as the authoritative source for much of the federal law.

But making sure the Code is accurate is not easy; it takes a good system and a well-trained staff and it does take time. The updating process involves classifying new laws to the Code, revising the Code to incorporate amendments and new provisions, and preparing editorial material that explains and documents each change in the Code.

On average, between 5,000 and 7,500 pages of new law is enacted during a two-year Congress. Each of these laws is carefully read by a team of lawyers at the OLRC. For each provision of the bill, the OLRC must decide whether it should go into the Code (general and permanent provisions only), and if so, where. This is the process of “classifying” a law and results in a law’s Code classifications. Once the classifications are finalized, the OLRC begins actual text editing and preparation of editorial material that provides information about the source of Code sections, their arrangement, the references they contain, and their history. The integration of new law into the Code can be very time consuming. Much of it is amendatory, and Congress, unlike many state legislatures, tends to favor the use of “cut and bite” amendments. Rather than replacing an old section with a new one, these amendments make changes by specific word and phrase substitutions—and there can be a lot of these. For example, my favorite section in the Code, 42 U.S.C. § 1395ww, was amended over 90 times by 19 different sections of the Affordable Care Act.

The rest of that Act made similar types of amendments to hundreds of other sections in the Code. Each of these amendments had to be properly executed and accurately documented in the source credits and with appropriate editorial notes.

The OLRC has an outstanding staff, but even the best editors will make mistakes in working through tens of thousands of changes in the Code. To ensure that these mistakes are caught and corrected before publication, the OLRC uses a multi-level review system to thoroughly check all the work done in the Office. Every update to the Code is rechecked at least once, and any change affecting the text of a law is checked even more thoroughly. This system has worked well over the years to ensure that the Code is very accurate.

Accessibility

While the accuracy of the Code is excellent, accessibility has not always been the best, but it is getting much better. By accessibility, I mean convenience of use. The Code has been available in print since 1926, but the print version is expensive to buy and is no longer available in many libraries. Moreover, finding something in the

printed Code often means relying on an index and piecing together a section from both the main edition and a supplement. The printed version is often useful for browsing through certain laws and is the best version for authenticating the law, but for most purposes the online Code is the preferred choice.

Since the 1990s, the OLRC has maintained an online version of the Code on the House of Representative’s server at http://uscode.house.gov/ (“uscode website”). The uscode website combines the latest main edition with the latest supplement to make a virtual main edition that can be browsed and searched. Unfortunately, the site uses an outdated search engine and features a display and navigation tools that are rather poor. Recognizing the need for a more accessible online Code, the OLRC recently launched a new website in beta which will eventually replace the old uscode website.

The beta website, located at http://uscodebeta.house.gov/, was developed and designed to meet the particular needs of the OLRC, legislative drafters, and legal researchers. The core of the website is an open source, customized Apache Lucene™ search engine with a Solr™ search platform. There is a simple search facility for quickly accessing specific Code sections or performing simple word or phrase searches and an advanced search facility for sophisticated searching of Code content using delimiters such as field or Code hierarchy restrictions, Boolean logic, proximity criteria, and case-sensitive specifications. The presentation of search results is greatly improved compared to the uscode website and allows for easy movement through the search results, to other parts of the Code, and within a Code section. The new site also includes the ability to browse and drill down using the Code hierarchy of titles, chapters, subchapters, etc.

In addition, the beta website includes several specialized tools for accessing Code tables—such as the Popular Name Table and Table III—and Cite Checker, a tool for quickly verifying the accuracy of cross references. At the top of each Code section displayed on the screen is a currency date which indicates whether the section is affected by any new laws not yet in the Code. Full currency information for the entire Code is clearly spelled out on a special Currency and Updating page. Additional webpages are included to explain the content of the Code and website.

The beta website was recently upgraded to include better printing options, embedded links to cross-referenced Code sections, links from the Code classification tables to Statutes at Large pages, and other features. Most significantly, the upgraded beta website was given the capability to search and browse prior versions of the Code, the latest finalized virtual main edition, and a new more current version of the Code. The more current version of the Code, described in more detail below, is now the default choice for searching and browsing the Code. Further enhancements are under development, including a better cross-reference searching tool and links from Act citations in the Code to the Statutes at Large, and should be brought online once all technical issues are resolved. When all these improvements are fully implemented, the beta site will offer some excellent tools that will make researching the Code much easier.

Currency

Around 2005, the currency of the Code hit a nadir. That was when the publication of supplement II to the 2000 edition was not completed until almost two-and-a-half years after the end of the congressional session it covered. Since then the timeliness of the Code has steadily improved. Most recently, all 51 titles of the latest supplement (supplement V to the 2006 edition) were published online within four months after the end of the covered session. This was a new speed record for the Code, but for people waiting for a law enacted at the beginning of the session that affects a title at the end of the Code the lag time may still seem excessive. Users may wonder why it takes so long to update the Code and what can be done about it?

There are three basic reasons why updating the Code has been so slow in the past. The first reason is that it takes time to make sure the Code is accurate. As discussed above, updating the Code is much more involved than simply pulling out modules and replacing them with new modules. The nature and complexity of federal legislation, coupled with the fact that over 70% of the Code consists of Acts that are editorially arranged into Code titles, makes the updating process take a lot longer than it does for many state codes. There are so many changes necessitated by congressional legislation that updating the Code with near 100% reliability simply takes a lot of time to complete. The Code has over 50,000 pages, and changes in one area of the Code often affect other areas, too.

The second reason for delay is the uneven flow of legislation through Congress. A substantial majority of the laws enacted during a session are enacted during the last three months of the year. This generates a flood of work for the OLRC at the beginning of the next year, especially following a second session. The cycle of legislation makes it very difficult to stay current throughout the year. The OLRC works year round on the Code, but it cannot start working on a law until it is enacted. The enactment of many large laws at the same time will inevitably produce a backlog of work at the OLRC and cause the updating of the Code to fall behind.

The third reason for delay is that historically, the updating of titles of the Code has been tied to the statutory requirements for publication of the print editions. A new main edition is published every six years, and a cumulative supplement is published each year in between. Each edition or supplement must incorporate the laws enacted during one session of Congress and be current through the last law enacted in that session. By law, the main edition and supplements are printed by the Government Printing Office, and it is these printed editions and supplements that are considered evidence of the continued on next page
laws they contain in all state and federal courts and public offices.

In the 1990s, the uscode website was created as an OLRC tool for maintaining and updating the printed Code. Publication of the Code online has never been required by law, and the online Code does not have the same evidentiary status as the printed Code. So from the beginning, the schedule for updating titles online has been driven by the requirements for the print edition. That meant that a title of the online Code was updated only once a year after all the laws of the covered session had been enacted and after all the editorial work on that title and any lower-numbered titles had been completed. As a result, even if the OLRC could finish its work in just a couple of months, laws enacted early in a session that affected titles at the end of the Code would not appear in the Code until over a year after their enactment.

The OLRC recognized the need for a significantly more current Code, but a large backlog of work in the Office stood in the way. It made no sense to try to keep current with new laws when some older laws were not yet in the Code. By 2010, however, the OLRC had caught up enough to allow the introduction of a new, more current online version of the Code which the Office named the USCprelim.

The USCprelim version is maintained by taking the database that was used to print the latest main edition or supplement and updating the Code titles in that database as laws affecting those titles are enacted, rather than waiting until the end of the congressional session. The updated titles are then posted online throughout the year. When the session is over and all of the laws from that session are integrated into the database, it is finalized and used for both the permanent online edition and the printed edition or supplement for that session. It is also used as the starting point for next year's USCprelim version. During the past year, the preparation and review done for the USCprelim version has become the default version of the Code on that site and is now referred to as the “Current version”. All of the searching, browsing, and navigation features of the upgraded beta website now work for the Current version, the latest finalized version, and all prior versions of the Code going back to 1994.

As of November 7, 2012, the Current (USCprelim) version was completely current, including all laws enacted as of that date. By eliminating one of the main causes of delay in updating the Code, the Current version reduces by many months the time it takes for a new law to be incorporated into the Code. However, the other two causes of delay (i.e., the time-consuming nature of the work and the uneven flow of legislation) will continue to affect the timeliness of the Code including the Current version.

What’s Ahead

In the future, I expect that most people will prefer to use the Current version of the Code. In producing that version, the OLRC will be balancing three competing interests—speed, accuracy, and efficiency. If speed were the only consideration, the Current version could be as current as any privately published Code. Unfortunately, rushing things too much would result in errors, both in legal text and in editorial notes. Most of these errors might later be corrected before the final edition is released, but experience has taught that rushing the work and then coming back later to revise it is not the most efficient use of resources. Yet a process that is optimal for accuracy and efficiency is too slow to meet the needs of many Code users. The current Law Revision Counsel, Ralph Seep, is committed to providing as current a Code as possible while maintaining high-quality standards. I am sure he will be using all the resources available to him to accomplish that.

Further down the road, better technology should help the OLRC provide a better Code product. The OLRC has been working on a long-term project to convert the Code data into XML and to develop and implement an XML-based Code production system. The goals of the project include building a faster and more efficient Code updating system, adding more features to the online Code, and making it easier for third parties to republish and add value to the Code. Improving the Code will be an ongoing process for many years to come.

MAKE YOUR OPINION COUNT

The Section values the input of all its members. Make your opinion count. Contact us at anne.kiefer@americanbar.org. Also, please let us know how we can help you get more involved with Section activities.
Inadequate Labels: Brand-Name and Generic Drugs

The Supreme Court has recently complicated tort litigation over inadequate drug labels. In Wyeth v. Levine the Court held consumers may sue brand-name drug manufacturers under state law for inadequately labeling a drug, even though the label was approved by the FDA.1 In PLIVA v. Mensing, the Court limited Wyeth’s reach to brand-name manufacturers.2 Generic manufacturers may not be sued for inadequate labeling.

The Court’s distinction between brand-name and generic drugs in this instance reflects a broader legal difference between the two. Under the Hatch-Waxman Act, manufacturers are permitted to produce a generic version of a brand-name drug by showing that the active ingredient of the generic is bioequivalent of the brand-name drug.3 Rather than having to prove that the drug is safe, generic manufacturers may rely on the brand-name manufacturer’s proof.4 Given that generic drug manufacturers are not required to show that a drug is safe, the result in PLIVA is reasonable. Tort suits are predicated on the existence of a duty.5 Since generics do not have a duty to ensure that the underlying active ingredient is safe, generics should be immune from tort suits claiming the drug is unsafe. Moreover, the FDA does not permit generic drug companies to unilaterally change their labels.6 Thus, as the law stands, if generics did perform safety tests and discover that the underlying drug was unsafe, they still could not change the label on their own.

But from the consumer’s perspective, as PLIVA itself notes, the distinction between brand-name and generic drugs “makes little sense.”7 If there is an adverse effect from a drug, consumers are harmed equally whether it resulted from a brand-name or generic. Further complicating matters, some state laws require in certain circumstances that prescriptions for brand-name drugs be filled with generics. Currently, then, the vagaries of how the prescription is filled determine the patient’s right to sue.

The question then becomes how to ensure that patients who take brand-name drugs and generic drugs have the same protections. There are a few solutions. First, though this runs contrary to the spirit of the Hatch-Waxman Act, generic drug manufacturers could be required to ensure that the underlying drug is safe. In other words, PLIVA can be overruled or abrogated. The Supreme Court and Congress have the authority to do so.8 Interestingly, PLIVA implies that the FDA—by changing its regulations and allowing generics to unilaterally change their labels—could also save state tort lawsuits against generic manufacturers.9

Another possibility is for states to remedy the disparity. Since PLIVA relies on federal preemption, states cannot allow patients to sue generic manufacturers. The states can, however, allow people harmed by generic drugs to sue the brand-name manufacturer that set the label for the drug. The logic is simple. Had the brand-name used the proper label, the generics would also have a proper label and the plaintiff would not have been harmed. Therefore, the ultimate fault for the plaintiff’s injury lies with the brand-name manufacturers.

However, until now, most courts have not allowed such lawsuits.10 Courts, as a matter of state tort law, almost uniformly require that a plaintiff be injured by ingesting the defendant’s drug. Importantly, a number of the courts that ruled in favor of the brand-name manufacturers in such cases reasoned that consumers should just sue the generic drug company.11 Given that PLIVA forecloses this option, perhaps states will permit suits against brand-name drug companies for harm from their generic equivalents.

It may generally be fair to allow plaintiffs to trace their harm from inadequately labeled generics to...
the brand-name manufacturer that originally determined the label fair. Sometimes, however, once generics enter a market the brand-name leaves. In such cases continuing to permit suits against the brand-name manufacturer, based on information that may have come to light after they have left the market, seems unfair.

Finally, perhaps all drug manufacturers should be immune to suit. This could be accomplished by the Court by overruling Wyeth or by Congress explicitly preempting tort lawsuits against brand-name manufacturers. In concurrence in Wyeth, Justice Breyer suggests that the FDA too, using proper procedures, could cause the Court to reconsider Wyeth.

Of course, as Wyeth notes, the major problem with preemption suits against brand-name manufacturers is that such suits “uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly.” This is exacerbated by the FDA’s “limited resources to monitor the 11,000 drugs on the market.” But this problem can be, and is being, mitigated.

Since 2008, the FDA has begun more carefully monitoring drugs once they have entered the marketplace through its Sentinel program. Though the program is in its nascent phase, it is at least possible that it will become thorough enough that state tort lawsuits will be redundant. Should that happen, Wyeth’s usefulness will be far more limited.

Until then there is no perfect solution. The patient relied on the FDA and the manufacturers to provide a safe drug, but the system failed him. The generics relied on the brand-name’s safety information, which turned out to be faulty. And in some cases the brand-name is not even in the market when the data showing that the drug is unsafe comes to light. Ultimately, no one wins in cases of unsafe drugs.

12 See PLIVA, 131 S. Ct. at 2592-93 (Sotomayor, J., dissenting) (citing sources).
15 See id. at 581-82 (Breyer, J., concurring). It is unclear whether a majority of the Court agrees with Justice Breyer. In Wyeth, the Court did not defer to the FDA’s statement in the preamble to one of its regulations that FDA approval preempted state tort lawsuits for three reasons: First, the FDA did not use notice-and-comment rulemaking, second preemption was “at odds with what evidence we have of Congress’s purposes,” and third, the FDA’s position “reverse[d] the FDA’s own longstanding position without providing a reasoned explanation.” Id. at 577. The first and third of the Court’s critiques are within the FDA’s power to fix: the FDA could use notice-and-comment rulemaking and it could explain in detail why it thinks suits against brand-name drug companies should be preempted. The FDA cannot, however, do anything about the Court’s understanding of Congress’s purposes. Thus, depending on the weight the Court assigns to the three factors, it is possible that the FDA could convince the Court to overrule Wyeth. The FDA’s ability to cause the Court to reassess its decision is further complicated because Wyeth’s decision that state tort suits were not preempted was based on its interpretation of a congressional statute. At least according to Justice Scalia, the Supreme Court’s decision in this matter itself prevents the FDA from now changing the law. See United States v. Home Concrete & Supply, 132 S. Ct. 1836, 1846-47 (2012) (Scalia, J., concurring). However, the four-justice plurality in that case, written by Justice Breyer, explicitly disagreed. Id. at 1844. Four justices explicitly avoided the issue. Id. at 1851-52 (Kennedy, J., concurring).
16 Id. at 578 (citing studies showing that the FDA simply does not have the staff to effectively monitor drugs).
17 Wyeth, 555 U.S. at 579.
18 Id. at 578.
The sledding was not so smooth for our blanket authority letter in support of S. 3468 (to confirm the President’s authority to extend OMB review to major rules issued by independent regulatory agencies). Both the Business Law and Labor & Employment Law Sections objected out of concern about the effect of OIRA review on agencies like the SEC or NLRB that are headed by multi-member commissions or boards. We are working with both sections to see if we can come up with a version they can support—and expect also to collaborate with Business Law on a project that would encourage the SEC to conduct a rulemaking to interpret its statutory requirements for cost-benefit analysis (rather than letting the courts do it for them).

Notice & Comment Blog. Many of you responded to my earlier column with expressions of interest in working on the Section’s blog, Notice and Comment (http://regulatorypractice.blogspot.com/). Lynn White, a co-chair of our Labor & Employment Law Committee, is now also leading a new ad hoc committee to revamp the blog as more of an intra-Section tool, to allow Section members to communicate among themselves about issues and, potentially, to have a members-only functionality for posting things like job openings. If you are interested in helping, contact Lynn at White.Lynn@dol.gov.

Redistricting. One of the reforms that Norm Ornstein urged at the fall conference is for states to use independent commissions to redistrict, so that voters once again can choose their elected representatives instead of the other way around. As explained in my last column, my primary personal goal this year is to inspire and assist Section members to promote adoption, by their home states, of statutes or constitutional amendments that would implement the ABA’s 2008 resolution calling for use of such independent commissions (and to defend those few that have been adopted). A few folks have volunteered, but we could certainly use more. Plans are still shaping up, but it looks like the most fertile targets of opportunity in the 2013 state legislative sessions will be Virginia, New York, and Pennsylvania.

ALCOUNCILPLUS. As I mentioned before, the Section has an “ALCOUNCILPLUS” email list that includes the Section Council and almost a hundred committee chairs and vice chairs, and that has two functions: It serves as a sounding board for the Council and it allows participants to learn what the Council is considering and to speak up or get more involved. We have opened it up to any interested Section members, and roughly 60 of you have signed up. If you have not but would like to, contact Anne Kiefer at anne.kiefer@americanbar.org.

If you have other questions or comments, or if you think there is some other way the Section might be helpful to you, just let me know.2

2 jamie@conradcounsel.com.

Should Congress Create a Special Category of SSA ALJs? continued from page 6

issue,11 I have advocated for this in the past for all ALJs,12 and the Administrative Conference has formally recommended that Chief ALJs be given the authority to design case-processing guidelines, implement performance reviews based on relevant factors, and recommend that disciplinary actions against ALJs be brought by the employing agency at the Merit Systems Protection Board (MSPB) based on such performance reviews.13 At the SSA, it would be appropriate for the Chief ALJ and the Hearing Office Chief ALJs to undertake this role.

Finally, and perhaps even more controversially, we think that it might be appropriate to establish special standards for what constitutes the sort of “good cause” that is necessary for SSA to show before the MSPB can discipline or remove a Social Security Judge. Given the relative fungibility of SSA cases, at least over time, “good cause” should encompass unjustifiably low productivity and, for that matter, repeated failures to follow authoritative agency rules or precedential decisions.

In conclusion, we think that the SSA adjudication program’s size, backlog, and perhaps the character of its cases, requires some special treatment, and, given the informality and non-adversarial nature of the cases, there is ample reason to rethink the role and attributes of the adjudicators—at least going forward.14

14 This would not be unprecedented. Until the early 1980s, OPM maintained a distinction between GS–15 and GS–16 ALJs with two separate hiring registers. SSA ALJs were in the GS–15 category. I also note that a member of the Social Security Advisory Board has advocated limiting SSA ALJs’ terms to 15 years “to ensure turnover.” Mark J. Warshawsky, Administrative Problems With Social Security Disability Programs: Some Solutions at 2, BLOOMBERG BNA PENSIONS AND BENEFITS DAILY (Apr. 2, 2012).
The U.S. Supreme Court has already decided two cases this Term of interest to administrative law practitioners and has scheduled oral argument for several more. This edition of the Supreme Court News summarizes those two decisions and then provides an overview of upcoming cases.

Federal Sovereign Immunity and the Fair Credit Reporting Act

The Little Tucker Act (LTA), 28 U.S.C. § 1346(a)(2), waives federal sovereign immunity for certain kinds of lawsuits. Specifically, the LTA provides that “[t]he district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . . any . . . civil action or claim against the United States, not exceeding $10,000 in amount, founded upon . . . any Act of Congress.” Id. The question for the Court in United States v. Bormes, — U.S. —, — S. Ct. —, 2012 WL 5475774 (Nov. 13, 2012), was whether the LTA waives sovereign immunity for damages actions brought for violations of the Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681, et seq. In a unanimous opinion authored by Justice Scalia, the Court concluded that the LTA did not provide the requisite waiver.

The FCRA’s goal is to protect consumer privacy, such as by restricting how many digits of consumers’ credit card numbers any “person”—broadly defined to include any government or government agency—can print or display. Bormes, 2012 WL 5475774, at *1. The Act also creates civil liability for willful or negligent noncompliance with its provisions and provides that “[a]n action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction” within the earlier of “2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability” or “5 years after the date on which the violation that is the basis for such liability occurs.” 15 U.S.C. § 1681p.

James Bormes, an attorney, filed a class action lawsuit in the U.S. District Court for the Northern District of Illinois seeking damages against the United States under the FCRA on the ground that receipts for electronic payments of federal court filing fees violated the FCRA’s requirements. He based jurisdiction on both the LTA and the FCRA’s jurisdictional provision. The district court dismissed the suit on the ground that the FCRA did not waive the federal government’s sovereign immunity for a damages suit. The Court of Appeals for the Federal Circuit vacated the decision, finding that the LTA provided the requisite waiver of sovereign immunity.

The Court reversed. Although “[t]he Little Tucker Act is one statute that unequivocally provides the federal government’s consent to suit for certain money-damages claims,” Bormes, 2012 WL 5475774, at *4, the question was whether a damages claim under the FCRA falls within the LTA’s scope. Id. As a general rule, the Court announced, “[w]here, as in FCRA, a statute contains its own self-executing remedial scheme, we look only to that statute to determine whether Congress intended to subject the United States to damages liability.” Id.

The Court traced the history of the Tucker Act and LTA to point out that they are gap-filling statutes. Id. As a result, The Tucker Act is displaced . . . when a law assertedly imposing monetary liability on the United States contains its own judicial remedies. In that event, the specific remedial scheme establishes the exclusive framework for the liability Congress created under the statute. Because a “precisely drawn, detailed statute pre-empts more general remedies,” Hinck v. United States, 550 U.S. 501, 506, 127 S. Ct. 2011, 167 L. Ed. 2d 888 (2007) (quoting EC Term of Years Trust v. United States, 550 U.S. 429, 434, 127 S. Ct. 1763, 167 L. Ed. 2d 729 (2007); internal quotation marks omitted), FCRA’s self-executing remedial scheme supersedes the gap-filling role of the Tucker Act.

Id. at *5.

The Court did not decide whether the FCRA itself waives federal sovereign immunity for damages suits. Instead, it vacated the Federal Circuit’s decision and remanded with orders that the appeal be transferred to the Court of Appeals for the Seventh Circuit. Id. at *7.

Attorney Fee Awards

In a unanimous, per curiam opinion, the Court deemed an abortion protestor a “prevailing party” entitled to attorney fees under the Civil Rights Attorney’s Fee Awards Act, 42 U.S.C. § 1988, reversing the Court of Appeals for the Fourth Circuit. Lefemine v. Wideman, — U.S. —, — S. Ct. —, 2012 WL 5381602, at *1 (Nov. 5, 2012). In the underlying lawsuit, Steven Lefemine and Columbia Christians for Life sued Dan Wideman, the sheriff of Greenwood County, South Carolina, pursuant to 42 U.S.C. § 1983, for violation of their First Amendment rights after county police officers repeatedly threatened to ticket Lefemine and his fellow abortion protestors for breach of the peace. The district court found that the county had violated the protestors’ First Amendment rights and ordered a permanent injunction to stop the threats, but it refused to assess damages (on qualified immunity grounds) or order the payment of attorney fees.
on the ground that the totality of the factual circumstances did not warrant an attorney fee award. The Fourth Circuit affirmed, concluding that Lefemine was not a “prevailing party” because all Lefemine received was an injunction ordering Wideman and the county to comply with the law.

The Court, however, ruled that damages are not required for a party to be a “prevailing party” for attorney fee purposes under the Civil Rights Attorney’s Fee Awards Act. According to the Court, “A plaintiff ‘prevails[ ]’ . . . when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.’” And we have repeatedly held that an injunction or declaratory judgment, like a damages award, will usually satisfy that test.” Lefemine, 2012 WL 5381602, at *2 (quoting Farrar v. Hobby, 506 U.S. 103, 111-12 (1992), and citing Rhodes v. Steward, 488 U.S. 1, 4 (1988) (per curiam)).

Under this standard, according to the Court, Lefemine was clearly a “prevailing party”:

Lefemine desired to conduct demonstrations in Greenwood County with signs that the defendant police officers had told him he could not carry. He brought this suit in part to secure an injunction to protect himself from the defendants’ standing threat of sanctions. And he succeeded in removing that threat. The District Court held that the defendants had violated Lefemine’s rights and enjoined them from engaging in similar conduct in the future. Contrary to the Fourth Circuit’s view, that ruling worked the requisite material alteration in the parties’ relationship. Before the ruling, the police intended to stop Lefemine from protesting with his signs; after the ruling, the police could not prevent him from demonstrating in that manner.

Id. As a result, Lefemine “should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.” Id. (quoting Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (internal quotation marks omitted)). Because neither court below had assessed whether special circumstances existed or the amount of attorney fees that would be appropriate, the Court remanded. Id.

Leftover from Previous Term—Availability of Judicial Review

When federal employees are fired for failure to register for the Selective Service, how can they challenge the constitutionality of their terminations? This was the issue that the Court addressed in Elgin v. Department of the Treasury, 132 S. Ct. 2126 (June 11, 2012), the Military Selective Service Act, 50 U.S.C. App. § 453, requires males between the ages of 18 and 26 to register for the Selective Service. Another federal statute, 5 U.S.C. § 3328, prohibits executive agencies from employing any person who has knowingly and willfully failed to register. After various federal agencies fired the plaintiffs in Elgin, they challenged their terminations on the grounds that the Military Selective Service Act was unconstitutional. Elgin pursued the remedies created in the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 1101, et seq.: a hearing before the Merit Systems Protection Board (MSPB), followed by review in the Court of Appeals for the Federal Circuit, which has “exclusive jurisdiction” over appeals from the MSPB. However, the administrative law judge in Elgin’s case dismissed it for lack of jurisdiction, at which point Elgin joined the other plaintiffs suing in the District Court for the District of Massachusetts. The district court denied the constitutional claims on the merits, but the Court of Appeals for the First Circuit vacated the judgment and remanded with orders to dismiss for lack of subject matter jurisdiction.

In a 6-3 decision authored by Justice Thomas, the Court affirmed the First Circuit and held that the CSRA provided the exclusive avenue of judicial review. First, the Court refused to apply the “heightened showing” standard from Webster v. Doe, 486 U.S. 492, 503 (1988), holding that that standard of review applies only when statutory schemes threaten to eliminate all judicial review of constitutional claims. Elgin, 132 S. Ct. at 2132. Instead, when the issue is simply whether a statutory scheme such as the CSRA has displaced the federal district courts’ general grant of subject matter jurisdiction in 28 U.S.C. § 1331, the Court asks merely “whether it is ‘fairly discernible’ from the CSRA that Congress intended covered employees appealing covered agency actions to proceed exclusively through the statutory review scheme, even in cases in which the employees raise constitutional challenges to federal statutes.” Id. at 2132-33.

Second, the Court answered the “fairly discernible” question by “examining[ ] the CSRA’s text, structure, and purpose.” Id. at 2133. Relying on precedent, the Court emphasized that the CSRA is a “comprehensive” statute with an “elaborate framework” that gives detailed attention to federal employees’ rights and remedies. Id. at 2133-34. The plaintiffs and their firings were both covered by the CSRA, and they conceded that the MSPB routinely adjudicates constitutional claims. Id. at 2134. Moreover, the CSRA explicitly exempted one type of discrimination claim from its structure, indicating that Congress knew how to create such exemptions when it wanted to, but there was no such exemption for facial constitutional claims. Id. at 2134-35. Finally, the CSRA’s purpose of creating an integrated scheme of administrative and judicial review for aggrieved federal employees would be severely compromised if the district courts had concurrent jurisdiction. Id. at 2035-36. As a result, jurisdiction over the plaintiffs’ claims in the

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MSPB under the CSRA was exclusive, precluding jurisdiction in the federal district courts. Id. at 2040.

Justice Alito dissented, joined by Justices Ginsburg and Kagan. According to the dissenters, “[t]he problem with the majority’s reasoning is that petitioners’ constitutional claims are a far cry from the type of claim that Congress intended to channel through the Board. The Board’s mission is to adjudicate fact-specific employment disputes within the existing statutory framework. By contrast, petitioners argue that one key provision of that framework is facially unconstitutional.” Id. at 2041 (Alito, J., dissenting). According to the dissenters, “[a]dministrative agencies typically do not adjudicate facial constitutional challenges to the laws that they administer.” Id. at 2044. As a result, they would have short-circuited the CSRA’s convoluted path to judicial review of the plaintiffs’ constitutional claims—which would essentially have deferred the constitutional issues until review in the Federal Circuit—in favor of normal federal district court jurisdiction. Id. at 2146–47.

Preview of Coming Decisions

The Court will be deciding several cases this term raising issues of standing, mootness, and other challenges to federal court jurisdiction. For example, on October 29, 2012, the Court heard oral argument in Clapper v. Amnesty International U.S.A, a case that raises the issue of plaintiffs’ Article III standing in the context of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1881a. Specifically, Section 1881a allows the Attorney General and Director of National Intelligence to authorize the “targeting of [non-United States] persons reasonably believed to be located outside the United States” to acquire “foreign intelligence information,” normally with the FISA Court’s prior approval of targeting and other procedures. Plaintiffs filed this case on the day that this statutory provision was enacted to challenge its constitutionality. However, according to the government, they are persons who may not be targeted under the Act. As a result, the issue is whether the plaintiffs have Article III standing to bring their lawsuit—specifically, whether they have an injury or imminent threat of injury.

Mootness, in turn, was before the Court on December 3, 2012, when it heard oral argument in Genesis Healthcare Corp. v. Symczyk. The case presents the Court with the issue of whether a case becomes moot, and thus beyond the judicial power of Article III, when a lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff’s claims.

On the same day, the Court also heard oral argument in Decker v. Northwest Environmental Defense Center, which raises issues regarding the federal courts’ jurisdiction to review the Environmental Protection Agency’s (EPA’s) rulemakings under the federal Clean Water Act, 33 U.S.C. §§ 1251–1384. The Clean Water Act contains a general citizen suit provi-

sion, 33 U.S.C. § 1365, which, inter alia, allows private citizens to sue the EPA for violations of the Act and for failure to perform nondiscretionary duties under the Act in the federal district courts. In contrast, Congress has more specifically authorized challenges to the EPA’s rules implementing the Clean Water Act’s National Pollutant Discharge Elimination System (NPDES) permitting program in the courts of appeals. See 33 U.S.C. § 1369(b). Moreover, Section 1369 also specifies that those rules cannot be challenged in any other civil or criminal enforcement proceeding. Multiple federal courts of appeals have held that if a rule is reviewable under 33 U.S.C. § 1369, it is exclusively reviewable under that statute and cannot be challenged in another proceeding. However, the Court of Appeals for the Ninth Circuit allowed citizens to use Section 1365 instead of Section 1369 to challenge an EPA NPDES rulemaking, requiring the Court to decide the exclusivity of Section 1369 and resolve the circuit split.

Deference to federal administrative agencies will be before the Court at least twice this Term. On December 3, 2012, the Court heard oral argument in Georgia-Pacific West v. Northwest Environmental Defense Center, which reviews the Ninth Circuit’s interpretation of the Clean Water Act. The Ninth Circuit held that runoff of rain from forest roads is subject to the Clean Water Act’s NPDES permit requirement as discharges of pollutants from point sources. The defendants in this case (Georgia-Pacific and others) are arguing that the Ninth Circuit contradicted the EPA’s longstanding interpretation of the Clean Water Act and that the EPA’s interpretation is entitled to deference. As a result, the Court’s decision is likely to involve both significant statutory interpretation and a Chevron/Mead deference analysis.

And as of this writing, the Court is scheduled to hear oral argument on January 16, 2013, in the consolidated cases of Arlington, Texas v. Federal Communications Commission and Cable, Telecommunications, & Technology v. FCC, two cases calling on the Court to evaluate the appropriateness of Chevron deference in the face of substantial federalism considerations. The cases involve challenges to the FCC’s jurisdiction to implement § 332(c)(7) of the Communications Act of 1934, titled “Preservation of Local Zoning Authority.”

This statutory provision limits state and local zoning authority over the placement of wireless service facilities, but it also states that no other provision “in this Act” may “limit” local zoning authority. The FCC determined that it had jurisdiction to adopt national zoning standards. The Court of Appeals for the Fifth Circuit applied Chevron deference to uphold the FCC’s decision, creating a circuit split, and the Court granted certiorari to decide whether federal courts should apply Chevron to review an agency’s determination of its own jurisdiction.
The Court will be deciding a number of statutory issues involving federal agencies this Term. In addition to those already described, the Clean Water Act made another appearance before the Court on December 4, 2012, when the Court heard oral argument in Los Angeles County Flood Control v. Natural Resources Defense Council, Inc. The case raises the issue of whether the Clean Water Act applies to Los Angeles County’s handling of flood water and storm water through the channelized and completely human-controlled portions of the Los Angeles River, and hence, the opinion will likely focus on statutory interpretation and the term “navigable waters.” However, like many of the Court’s other recent cases on the Clean Water Act’s “navigable waters,” this case also raises significant federalism considerations.

In addition, the Court will decide at least one federal preemption issue this Term. At this writing, oral argument is scheduled for January 8, 2013, in Delia v. E.M.A., a case that examines the preemptive effect of the Medicaid Act. Specifically, the Medicaid Act requires participating states to seek reimbursement from third-party tortfeasors for health-care expenditures made to Medicaid recipients who are tort victims. 42 U.S.C. §§ 1396a(a)(25), 1396k(a) (2006). To enforce that requirement when the recipient and a third party resolve their tort dispute through judgment or settlement, North Carolina law provides that the State has a subrogation right to, and may assert a lien upon, the lesser settlement, North Carolina law provides that the State has a subrogation right to, and may assert a lien upon, the lesser settlement, North Carolina law provides that the State has a subrogation right to, and may assert a lien upon, the lesser settlement, North Carolina law provides that the State has a subrogation right to, and may assert a lien upon, the lesser settlement. The question for the Court is whether the Medicaid Act’s anti-lien provision, as construed in Health & Human Services v. Ahlborn, 547 U.S. 268 (2006), preempts the North Carolina law.

The Court will also be reviewing two other monetary issues with regard to litigation with the federal government or the federal government’s claim first accrue for purposes of applying the five-year limitation period under 28 U.S.C. § 2462 when the claims first accrued.” 28 U.S.C. § 2462. The Supreme Court has explained in prior cases that “[i]n common parlance a right accrues when it comes into existence.” United States v. Lindsay, 346 U.S. 568, 569 (1954). Gabelli presents the Court with the following question: Where Congress has not enacted a separate controlling provision, does the government claim first accrue for purposes of applying the five-year limitations period under 28 U.S.C. § 2462 when the government can first bring an action for a penalty?

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News from the Circuits

By William S. Jordan III*

D.C. Circuit Panel Splits on Art. III and Prudential Standing

In *Grocery Manufacturers Association v. EPA*, 693 F.3d 169 (D.C. Cir. 2012), three major interest groups challenged an EPA decision authorizing an increase in the percentage of ethanol in gasoline, only to be stymied by a lack of prudential standing. The panel opinions reflect contrasting approaches to Article III standing, with Judge Sentelle emphasizing obstacles but Judge Kavanaugh willing to accept projections of harm from likely market developments. Judges Kavanaugh and Tatel found Article III standing for one of the interest groups (the “Food Group”), but Judge Sentelle would have denied prudential standing as to that group. Because EPA did not contest prudential standing, Judge Tatel might have joined Judge Kavanaugh in allowing the litigation to proceed, but Judge Tatel felt bound by D.C. Circuit precedent holding that prudential standing is jurisdictional and cannot be waived.

The underlying agency action involved provisions of the Clean Air Act related to the increased use of renewable fuels. The Renewable Fuel Standard (RFS) requires refiners and importers of gasoline or diesel fuel to output annually increasing volumes of renewable fuels. The primary approach to meeting that standard had been to blend ethanol (made largely from corn) into gasoline at a ratio of 10% ethanol (E10). To meet the demand of the Renewable Fuel Standard, Growth Energy sought to introduce a 15% ethanol blend (E15). This required a waiver because E15 was not considered similar to previously certified additives. EPA duly granted the waiver based on the required determination that use of E15 would not hinder the operation of equipment required to achieve compliance with applicable pollution control standards.

Three interest groups challenged the waiver. The first, the engine-products group, argued that it would be harmed because notwithstanding that its products were not certified for use with fuels above E10, consumers would use E15, which might harm their engines and result in successful warranty- and safety-related claims. This argument failed because a showing of a single test finding “potential vehicle damage” was not enough to establish a “substantial probability” of harm—and the harm would arise from “misfueling,” which depended upon the actions of third parties. The theoretical possibility of misfueling followed by successful lawsuits was not enough, particularly because there was no reason to think the lawsuits would succeed.

The petroleum group—producers, refiners, and downstream handlers of petroleum products—argued that the waiver would effectively require them to introduce E15, which would involve substantial costs and various liability risks. Judge Sentelle held that these harms were not traceable to the waiver but to the underlying RFS requirements, and that the costs to downstream handlers were self-imposed by their choice to participate in the business. Judge Kavanaugh would have found Article III standing on a straightforward causation analysis: the waiver, which permitted the use of E15, caused costs to rise. The decision to continue participating in the industry did not create self-imposed harm. The waiver could not be considered in “some kind of isolation chamber.” It was part of the renewable fuel mandate system, which effectively required the use of E15.

As to the food group (producers of products requiring corn, the cost of which would rise with the demand for corn created by the use of E15), Judge Sentelle treated prudential standing as jurisdictional and held that the fuel-waiver provision at issue (concerned with protecting pollution control equipment) did not extend to the group’s interests and that there was no “integral relationship” between that provision and the Renewable Fuel Standard.

Judges Kavanaugh and Tatel would have found Article III standing for the food group, again in a simple causation analysis. Judge Kavanaugh relied on Supreme Court precedent to conclude that prudential standing is not jurisdictional and can be waived. He also would have found prudential standing based upon the “integral relationship” among the various provisions of the Clean Air Act and upon classic competitor standing. Judge Tatel apparently would have found a waiver of prudential standing, but, as noted, he considered himself bound by D.C. Circuit precedent, which is nearly alone among circuits in holding that prudential standing is jurisdictional. As of this writing, a petition for rehearing en banc is pending in the D.C. Circuit.

D.C. Circuit Denies Standing for Lack of Redressability

In a decision that contrasts somewhat with his willingness to find standing in *Grocery Manufacturers Ass’n*, above, Judge Kavanaugh joined in *National Chicken Council v. EPA*, 687 F.3d 393 (D.C. Cir. 2012), which refused to find redressability in another ethanol-related dispute. The relevant statutes generally require that ethanol production facilities built after 2007 comply with a requirement to produce fuels that achieve at least a 20% reduction in greenhouse gas emissions as compared to fossil fuels. These facilities sell Renewable Identification Numbers (RINs) for each gallon of renewable fuels. EPA requires refiners and importers of

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transportation fuels to purchase RINs in order to comply with their statutory obligations.

The Energy Independence and Security Act of 2007 (EISA) provides that “[f]or calendar years 2008 and 2009, any ethanol plant that is fired with natural gas, biomass, or any combination thereof is deemed to be in compliance” with the 20% reduction requirement. This provision effectively grandfathered the affected plants such that they would not need to demonstrate compliance with the 20% reduction requirement.

This extensive use of ethanol, including the statutory grandfathering, aggrieved the National Chicken Council and other poultry and meat producers, which rely on corn to feed their stocks. They complained that the increased use of corn in ethanol drives up their costs of production. To make matters worse for them, EPA interpreted the grandfathering provision to mean that ethanol plants entering production in 2008 and 2009 were grandfathered indefinitely, such that they would never need to demonstrate compliance with the 20% reduction requirement. The food producers asserted that the grandfathering was limited to the two years in question.

As to standing, the food producers argued that: (1) indefinite grandfathering would result in greater ethanol production than would otherwise be the case; (2) the increased production would result in an increased demand for corn; and (3) the increased demand would result in increased prices for corn. They argued that if the grandfathering were limited, the plants would produce less ethanol, less corn would be required, and the demand for and price of corn would decrease.

Despite the seeming logic of this argument, the court held that the challengers had failed to show that a favorable ruling would redress the harm caused by increased ethanol production at the plants in question. The essential problem was that the statute explicitly grandfathered all pre-2008 ethanol plants, leaving much of the industry still in operation. The dispute involved only “ethanol plants fired with natural gas and/or biomass that commenced construction in 2008 or 2009.” These new plants, with the latest technology, would most likely be able to comply with the 20% reduction requirement if EPA’s position were struck down. The theoretical (and apparently unlikely) possibility that some of these new plants might be forced to close or reduce production was not enough to establish a substantial probability of a reduced demand for corn or reduced corn prices as a result of a judicial ruling against EPA’s decision.

**6th Circuit Splits Over Approach to Agency Interpretation of Own Regulation**

*Auer* deference (the principle that “an agency’s interpretation of its own ambiguous regulation [is] ‘controlling’ unless that interpretation is ‘plainly erroneous or inconsistent with the regulation’”) has taken something of a beating of late, with *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), raising questions about its continuing viability. Rather than rejecting *Auer* deference, a 6th Circuit panel majority recently avoided it with a strong plain-meaning interpretation of an EPA regulation, while the dissent vigorously defended the principle and refused to find the regulatory clarity necessary to avoid deferring to the agency. The opinions reflect sharply contrasting attitudes toward the regulatory state.

*Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012), involved Clean Air Act provisions under which various permitting and other requirements apply to a “stationary source” annually emitting 100 tons or more of regulated pollutants. EPA regulations provide that multiple pollution sources are considered to be a “stationary source” if they: (1) are under common control; (2) “are located on one or more contiguous or adjacent properties”; and (3) belong to the same major industrial grouping. Summit Petroleum owned a natural gas sweetening plant, which extracts foul-smelling ingredients of natural gas, and some 100 sour gas wells, all on separate parcels spread over 43 square miles. All of the wells were connected to the sweetening plant by pipelines. The arrangement met the first and third test of the EPA regulation. With all of the wells and the sweetening plant separated by other properties (and therefore not contiguous), the question was whether the various facilities were “adjacent” such that all could be considered as a single stationary source. If the plant and at least one well were adjacent, they would meet the 100-ton threshold. If not, the permit provision and other requirements would not apply. EPA considered the plant and the connected wells to be adjacent and therefore subject to the requirements. EPA relied upon the “functional inter-relationship,” particularly the fact that they worked together as a single unit and produced a single product.

The majority disagreed, finding the regulatory term “adjacent” unambiguous. Relying upon many dictionary definitions and the etymology of the term, the majority found that it unambiguously addresses the “physical and geographical nature” of the relationship. The majority considered “the purpose for which the two activities exist” to be irrelevant to whether they are adjacent to each other. The majority’s finding of unambiguous meaning defeated any deference to EPA’s interpretation and the interpretation itself. The majority also rejected EPA’s reliance on the longstanding nature of its position, noting that “the agency has rarely, if ever, considered physical proximity the *sine qua non* of two pollutant-emitting activities being ‘adjacent’ to one another.” To the majority, a longstanding error was still an error. Assuming ambiguity, the majority found EPA’s position inconsistent with the regulatory history and with its continued on next page
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own guidance documents, cautioning against consideration of supplemental and unexpected factors that could render the regulatory environment unpredictable.

Judge Moore dissented, emphasizing that “judicial deference to an agency’s interpretation of regulations is premised on the relative institutional expertise and political accountability of an agency as compared to a court,” and that “an agency’s authority to interpret its own regulations implementing a statute is incident to the authority to interpret that statute.” She found ambiguity in the term “adjacent” sufficient to allow consideration of “functional interrelatedness,” emphasizing that each well was physically connected to the sweetening plant by a “dedicated pipeline.” Arguing that the majority ignored the air quality-protection purpose of the adjacency determination, she expressed concern that the ruling freed “the oil and gas industry to gerrymander its way out of” the regulatory program in question.

9th Circuit Upholds Agency Rule Based Upon Agency Experience Administering Statute

Section 706 of the APA provides that courts reviewing agency action “shall review the whole record” in determining whether the action survives the applicable standard of review. When an agency relies on its experience to justify an action, how is that experience part of the record? Peck v. Thomas, 697 F.3d 767 (9th Cir. 2012), raises that question without quite answering it.

Peck v. Thomas involved the Residential Drug Abuse Treatment Program (RDATP) implemented by the Bureau of Prisons. As an incentive to undergo drug abuse treatment, the RDATP provides for early release for inmates who successfully complete its requirements. However, the Bureau issued two regulations excluding inmates from the program if they had been convicted of an offense involving possession of a firearm or of “homicide, forcible rape, robbery, aggravated assault, arson, kidnapping, or child sexual abuse.”

Responding to earlier challenges, the 9th Circuit had struck down the regulations because the Bureau had “failed to set forth a rationale for its decision” and had issued “a regulation without articulating a supporting rationale.” The Bureau then reissued the regulations, explaining that both categories of offenses indicated “a readiness to endanger” the public. The Bureau added: “Further, in the correctional experience of the Bureau, the offense conduct of both armed offenders and certain recidivists suggests that they pose a particular risk to the public. There is a significant potential for violence from criminals who carry, possess or use firearms.” (emphasis added).

The 9th Circuit held that the agency had “minimally” but adequately explained its action, noting that “[a]s we and the Supreme Court have found, this reasoning is permissible and based on common sense.”

Challenging the agency’s reliance on “experience,” the inmates argued that the regulation was invalid because the Bureau had failed to consider the “read[y] availab[ility]” of relevant “empirical data or studies,” which the Bureau had failed to collect. Addressing a prior case in which it had accepted experience where data had been unavailable, the court held that the Bureau was “entitled to invoke its experience as a justification for the present rule” despite the alleged availability of years of statistics derived from the agency’s “past efforts to exclude certain prisoners from the early release incentive.”

The lingering question is how far an agency can push reliance on experience without supporting data or other information in the record. The Bureau of Prisons seems to have a fairly free hand in predicting the behavior of inmates convicted of certain crimes, but it may be that the court’s mention of “common sense” indicates the boundary of judicial willingness to accept unsupported assertions of experience.

6th Circuit Upholds ALJ Reliance on Regulatory Preamble Not in Adjudicatory Record

In Ae&E Coal Co. v. Adams, 694 F.3d 798 (6th Cir. 2012), a coal company challenged a Department of Labor award of benefits because the Administrative Law Judge had relied upon a regulatory preamble in evaluating the testimony of competing expert witnesses. Adams spent seventeen years in the coal mines while also smoking heavily for many years. When he filed a claim in 2007, a chest x-ray showed no measurable coal dust, but the physician witnesses reached different conclusions about his condition. The applicable regulations clarified that a miner could have pneumoconiosis for purposes of the Act even in the absence of a positive X-ray and that “[n]o claim for benefits shall be denied solely on the basis of a negative chest X-ray.”

The agency physician found that Adams had various lung conditions that had probably been caused by both coal dust and smoking. The company physician diagnosed fewer conditions but said that certain tests indicated they had been caused by smoking, not coal dust.

The ALJ awarded benefits, relying on a regulatory preamble in which the agency had said: “The considerable body of literature documenting coal dust exposure’s causal effect on [COPD] . . . constitutes a clear and substantial basis for this aspect of the revised definition of pneumoconiosis.” The ALJ credited the testimony of the agency’s physician as “very well-documented because it [wa]s consistent with medical opinions acknowledged to be well documented in the December 2000 preamble to the applicable regulations.” The ALJ also discredited the testimony of the company’s physician because the physician had relied on studies that had “specifically been discredited in the regulations.”

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Rethinking the Costs of International Delegations

Daniel Abebe, Rethinking the Costs of International Delegations, available on SSRN: papers.ssrn.com/sol3/papers.cfm?abstract_id=2120676. A prominent criticism of U.S. delegations to international institutions—or international delegations—focuses on agency costs. The criticism begins by drawing a stark contrast between international delegations and domestic delegations. For domestic delegations to agencies, U.S. congressional, executive, and judicial oversight mechanisms are present to help maintain the agency’s democratic accountability. Because the agency is democratically accountable, the agency costs are low. For international delegations of binding authority to international institutions, however, the conventional wisdom is that oversight mechanisms are absent and the U.S. cannot monitor the international institution to ensure it acts within its delegated authority. In the international context, agency costs are high. The fear of high agency costs through the loss of democratic accountability, so the argument goes, justifies constitutionally inspired limits on international delegations. This article challenges the conventional wisdom. It argues that the agency costs claim rests on weak foundations as agency costs will likely vary depending on the type, scope, and nature of the delegation; that the U.S. has actually implemented many of the domestic oversight tools in the international context, ensuring a surprisingly high level of accountability to American interests; and that the potential costs and benefits of international delegations are not meaningfully different from those in domestic delegations. In other words, there is little systematic difference between domestic and international delegations with respect to the efficacy of oversight mechanisms or the balance of costs and benefits. The article concludes that constitutionally inspired limits on binding international delegations are probably unnecessary because they would increase the costs for the U.S. to participate in potentially beneficial international cooperation.

Assessing the Proposed REINS Act

Jonathan H. Adler, Placing “REINS” on Regulations: Assessing the Proposed REINS Act, N.Y.U. J. of Legis. & Pub. Pol’y (forthcoming), available on SSRN: papers.ssrn.com/sol3/papers.cfm?abstract_id=2167074. Over the past several decades, the scope, reach, and cost of federal regulations have increased dramatically, prompting bipartisan calls for regulatory reform. One such proposed reform is the Regulations of the Executive in Need of Scrutiny Act (REINS Act). This proposal aims to restore political accountability to federal regulatory policy decisions by requiring both Houses of Congress to approve any proposed “major rule.” In effect, the REINS Act would limit the delegation of regulatory authority to federal agencies, and restore legislative control and accountability to Congress. This article seeks to assess the REINS Act and its likely effects on regulatory policy. It explains why constitutional objections to the proposal are unfounded and many policy objections overstate the REINS Act’s likely impact on the growth of federal regulation. The REINS Act is not likely to be the deregulatory blunderbuss feared by its opponents and longed for by some of its proponents. The REINS Act should be seen more as a measure to enhance accountability than one to combat regulatory activity.

Placing “REINS” on Regulations:

Kent H. Barnett, Structural Improvements to Formal Executive Adjudication, 66 Vand. L. Rev. — (forthcoming), available on SSRN: papers.ssrn.com/sol3/papers.cfm?abstract_id=2144217. Three competing constitutional and practical concerns surround federal administrative law judges (ALJs), who preside over all formal adjudications within the executive branch. First, if ALJs are “inferior Officers” (not mere employees), as five current Supreme Court justices have suggested, the current method of selecting many ALJs likely violates the Appointments Clause. Second, a recent Supreme Court decision reserved the question of whether the statutory protections that prevent ALJs from being fired at will impermissibly impinge upon the President’s supervisory power under Article II. Third, these same protections from removal may, on the other hand, be too limited to satisfy impartiality concerns imposed under the Due Process Clause. Proposed reforms to the structure of administrative adjudication have failed to identify and address the three competing concerns. For instance, granting ALJs more job protection may improve their independence but further impede the President’s removal power. An elegant solution, however, has hidden itself in plain sight within the Appointments Clause: Permit the D.C. Circuit to appoint and discipline ALJs upon the request of agencies and interested parties. An interbranch appointment (i.e., one branch’s appointment of officers for another branch) resolves the three concerns identified here without offending the separation of powers. In particular, this mode of appointment would provide ALJs additional independence without offending the President’s removal power or undermining the D.C. Circuit’s judicial function. In proposing this solution, the author offers a clarified analytical framework for Congress’s largely unexplored interbranch-appointment power, an under-utilized tool for resolving difficult separation-of-powers problems.

Midnight Rules: A Reform Agenda

Jack Michael Beermann, Midnight Rules: A Reform Agenda, Mich. J. of Envtl. & Admin. L. (forthcoming), available on SSRN: papers.ssrn.com/sol3/papers.cfm?abstract_id=2121796. There is a documented increase in the volume of regulatory activity during the last 90 days of presidential administrations. The phenomenon of late-term regulatory activity has been called “Midnight Regulation.” This Report, continued on next page
prepared for the Administrative Conference of the United States (ACUS), looks closely at Midnight Rules promulgated in the last 90 days of an administration. The Report examines the phenomenon and concludes with recommendations adopted by (ACUS). The Report describes and analyzes the legality of methods incoming administrations have used to deal with the Midnight Rules of the prior administration. The Report concludes that the problem of Midnight Rulemaking is less serious than popular discussion of the issue might lead one to believe, mainly because the vast majority of rules, even those adopted during the “midnight” period, are routine and necessary to keep the government moving forward. Nonetheless, some moderate reforms would be desirable, mainly enhancing the power of incoming administrations to deal with the prior administration’s midnight rules. Reform would resolve legal uncertainties regarding incoming administrations’ power to deal with Midnight Rules and ameliorate some of the negative public perceptions of the phenomenon.


This chapter provides an overview of comparative administrative law, with particular attention to European jurisdictions and the United States. The underlying similarity that serves to organize the comparative analysis is the characteristic common to these systems of public administration that is both capable and expert, on the one hand, and accountable to a variety of liberal democratic actors, on the other hand. The chapter first discusses what historically was the principal legal tool for achieving neutrality and expertise—the legal guarantees of civil service employment—together with national variations in the professionalization of administration. It then turns to three important types of accountability and the different institutions, rules, and procedures used to achieve these forms of accountability in the legal systems under consideration: the contestation of administrative action before the courts; the involvement of organized interests in administrative policymaking; and informal accountability to the general public through parliamentary ombudsmen and transparency guarantees.

Kirti Datla and Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 Cornell L. Rev. (forthcoming), available on SSRN: papers.ssrn.com/sol3/papers.cfm?abstract_id=2125194. This article systematically surveys the administrative agencies for a broad set of indicia of independence—removal protection, multi-member structure, partisan balance requirements, budget and congressional communication authority, litigation authority, and adjudication authority—to answer the question: What features make an agency “independent” as opposed to “executive”? It also examines the functional differences between independent and executive agencies. As it turns out, there is no single feature, structural or functional, that every agency commonly thought of as independent shares, not even the for-cause removal provision commonly associated with independence. The authors therefore reject the binary distinction between independent and executive agencies. Instead all agencies should be regarded as executive and seen as falling on a spectrum from more independent to less independent. From this new understanding of administrative agencies flows a new and simpler theory of presidential control of agencies: A president can take an action with respect to an agency (assuming it is within his Article II powers) unless Congress has prohibited that action by statute. There is no tenable argument to justify any additional constitutional barrier to presidential interaction with agencies, and the dicta in *Humphrey's Executor* suggesting otherwise is incorrect and should be abandoned.


Conventional wisdom holds that Congress has limited ex post means of controlling the administrative state. This article examines the efficacy of oversight hearings—a relatively understudied potential mechanism for congressional control—to determine the extent to which these hearings can alter agency activity. It then examines the specific conditions under which oversight is likely to occur. Leveraging original data on agency behavior, it finds that agency “infractions” that are subject to congressional oversight are approximately 22% less likely to reoccur, compared to similar actions that do not receive oversight attention. The article then examines how structural features of the administrative and congressional environments are associated with oversight activity and suggests that these institutions may be designed with an eye to altering congressional involvement in administration. These findings indicate that oversight hearings offer a significant means of congressional control over administration under specific circumstances.

David A. Hyman and William E. Kovacic, *Government Organization/Reorganization: Why Who Does What Matters*, available on SSRN: papers.ssrn.com/sol3/papers.cfm?abstract_id=2110351. How should the federal government be organized, and who (i.e., which departments, agencies, bureaus, and commissions) should do what? On numerous occasions during the past century, virtually every part of the federal government has been reorganized and reconfigured. In the process, entire departments, agencies, bureaus and commissions have been created, moved, consolidated, divided, turned upside down and inside out, and infrequently eliminated entirely. Inter-agency working groups, coordinators, and “czars”
have come and gone, along with multiple shifts in responsibility for particular firms, industries, and areas of law. Why all this fuss over organization? Simply stated, what an agency is assigned to do and where it is located matters. Drawing on examples from across the administrative state, the article analyzes the relationship between agency design and agency performance. It illuminates the dynamics that influence the assignment of regulatory duties to an agency, how those dynamics (and the allocation of responsibilities) can change over time, and how the specific combination of regulatory functions and purposes can affect agency performance. The analysis provides a start on the factual and analytical foundation necessary to develop a theory of public agency design. The focus is on the organization of the federal government, but the analysis has obvious implications for agency design at other governmental levels (i.e., both trans-national and sub-national) and to the design of public and private universities, and other nonprofit entities.

Stephen M. Johnson, *Beyond the Usual Suspects: ACUS, Rulemaking 2.0 and a Vision for Broader, More Informed and More Transparent Rulemaking*, Admin. L. Rev. (forthcoming), available on SSRN: papers.ssrn.com/sol3/papers.cfm?abstract_id=2152020. In an ideal world, administrative agencies would develop regulations in an informal rulemaking process that is transparent, efficient, and includes broad input from the public, or an entity advocating for the public, as well as the regulated community. Instead, critics assert that the informal rulemaking process is opaque and is dominated by regulated entities and industry groups, rather than public interest groups. The process does not encourage a dialogue among the commenters or between the commenters and agency. Although the Administrative Procedure Act imposes only minimal public participation requirements on the informal rulemaking process, broader, more informed, and more transparent public participation in rulemaking could provide significant benefits to agencies, as well as the public. Such participation is not, however, costless. Reforms are likely to make the rulemaking process more expensive and less efficient for agencies. This article examines two avenues of rulemaking reform that could yield broader, more informed, and more transparent rulemaking. First, the article focuses on “e-rulemaking” efforts and the migration of the informal rulemaking process to the Internet. So far, those efforts have been slow and have provided marginal improvements in public participation. The next generation e-rulemaking proposals (Rulemaking 2.0), such as the Regulation Room Project developed by the Cornell eRulemaking Initiative with the Department of Transportation, are more ambitious, but may result in significant costs and delays in the rulemaking process if implemented on a wide scale. At the same time that agencies are implementing technological changes in the rulemaking process, a resurrected Administrative Conference of the United States (ACUS) has issued recommendations for structural changes to the informal rulemaking process.

ACUS has also issued recommendations regarding e-rulemaking that are designed to reduce resource demands on agencies when adopting rules through electronic means. ACUS does not recommend any changes to the APA, though, and, on the whole, the Conference’s recommendations are modest. It is likely, therefore, that the benefits that they produce will be similarly modest. More significant reforms are necessary to achieve broader, more informed and more transparent public participation, so this article also focuses on some of the other reforms that have been suggested by academics and policymakers.

R. Craig Kitchen, *Negative Lawmaking Delegations: Discretionary Executive Authority to Amend, Waive, and Cancel Statutory Text*, Hastings Const. L.Q. (forthcoming), available on SSRN: papers.ssrn.com/sol3/papers.cfm?abstract_id=2144885. Over a decade ago, the Supreme Court invalidated the Line Item Veto Act by invoking Article I, Section 7. This article shows that this holding has had limited, if any, impact on judicial review of lawmaking delegations. In analyzing the limited impact of the Court’s holding, this article proposes an analytical framework for lawmaking delegations based on the effect that the delegated power has on statutory text. The framework categorizes lawmaking delegations as either positive or negative. Positive lawmaking delegations involve the Executive’s delegated power to create rules or standards binding with the force of law. Negative lawmaking delegations involve the Executive’s delegated power to negate the legal force or effect of statutory text. Four distinct types of negative lawmaking delegations exist in the modern administrative state: (1) contingent legislation, which conditions the negative power on the Executive’s finding of a condition or fact; (2) amendment, which allows an executive agent to modify the legal force or effect of statutory text; (3) waiver, which negates the legal force or effect of statutory text for specific persons, projects, or categories of activities; and (4) cancellation, which allows the Executive to rescind statutory text entirely. Finding the limitations imposed upon lawmaking delegations by the nondelegation doctrine and Vesting Clauses wanting, this article analyzes the background history and purposes animating the Take Care Clause and the Bicameralism and Presentment Clauses and finds that, in light of this analysis, many negative lawmaking delegations in the modern administrative state are unconstitutional. Given this analysis, courts evaluating lawmaking delegations should examine whether the challenged delegation allows the negation, in whole or in part, of the legal force or effect of duly enacted text, thereby undoing the legislative compromises necessary to enact that text as law. When a delegation does so, this article concludes that it violates Article I, Section 7 by undermining its minority-protective function.

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uses the regulation of equal employment opportunity as an alternative or complement to judicial review. It theorizes, based on insights from the administrative law and procedural justice literatures, that administrative process design can do much to advance legitimacy without the need to rely on judicial review to check administrative decisionmaking. Next, the article connects the theoretical conceptions of legitimacy to administrative behavior by offering metrics for testing intrinsic legitimacy. To demonstrate how these metrics might be applied, the article presents an empirical study of an innovative administrative fire-alarm process that enables interested parties to petition EPA to withdraw states’ authorization to administer the major environmental statutes. While this process may trigger a variety of responses by EPA, there is generally little recourse to the courts for citizens dissatisfied with the process or its outcomes. The findings suggest that, even without external checks, EPA engages in numerous behaviors indicative of intrinsic legitimacy. Armed with these findings, the article concludes with an assessment of institutional design features that may contribute to inside-out legitimacy and offer a series of recommendations in considering how best to organize ourselves horizontally, vertically, and inclusively.

Marcia L. McCormick, Federal Regulation and the Problem of Adjudication, 56 St. Louis U. L.J. 39 (2011). After decades of deregulation, the United States seems to be entering a period of re-regulation. This article seeks to explore one piece of the solution, a piece not usually thought of as regulatory—adjudication. Adjudication is often part of a broader regulatory web and is used both to deter harmful behavior and to remedy harmful behavior engaged in. This article uses the regulation of equal employment opportunity as a case study. It analyzes the limits that Article III may place on the structure of adjudicating agencies and ways those limits might be overcome. It then explains the weaknesses of the current system to enforce the antidiscrimination laws and outlines a proposal for what an adjudicative agency designed to maximize the benefits from an agency perspective might look like.

Sidney A. Shapiro, Elizabeth C. Fisher, and Wendy Wagner, The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy, 47 Wake Forest L. Rev. 463 (2012). The discourse over the legitimacy of unelected administration has produced two paradigms. Administrative law scholarship has focused almost exclusively on a rational-instrumental paradigm that seeks to legitimate from the inside in, relying on political oversight, judicial review, and scientific and social methodologies to squeeze the discretion out of public administration. By comparison, public administration scholarship has focused on a deliberative-constitutive paradigm that seeks to legitimate from the inside out, relying on administrative expertise, deliberation, and reason giving in order to ensure reasonable decision-making. This paradigm accepts administrative discretion both as unavoidable and as necessary. Besides failing at its own goal of eliminating discretion, the rational-instrumental paradigm has produced rulemaking ossification, bureaucracy bashing, a misunderstanding of the role of science in administration, and a failure to build a comprehensive theory of administrative accountability, one that can take into account both paradigms. Despite these defects, contemporary administrative law scholarship and practice is so deeply enmeshed in rational-instrumental accountability that it is difficult for administrative lawyers to imagine that there is a complementary approach to legitimacy. Yet, the history of administrative law in this and other jurisdictions highlights the significance of the deliberative-constitutive paradigm. In light of the demise of interest group pluralism in rulemaking, and the scholarly dead end in which we find ourselves, it is time to recognize and develop the deliberative-instrumental paradigm.

Michael E. Solimine, The Solicitor General Unbound: Amicus Curiae Activism and Deference in the Supreme Court, available on SSRN: papers.ssrn.com/sol3/papers.cfm?abstract_id=2129768. This article addresses the confluence of two phenomena characterizing litigation in the United States Supreme Court. The Solicitor General represents the United States in the Court, and the SG has been extraordinarily successful as a litigant and in supporting other successful litigants through the filing of amicus curiae briefs. Likewise, many interest groups, and the United States and state governments, have increasingly filed amicus briefs in Court cases. The SG participates as a party or an amicus in well over half of the cases decided on the merits by the Court. Given the high quality of the SG’s work in general, and the apparent helpfulness of the SG’s amicus briefs, many observers seem to approve of the status quo, and applaud the SG filing numerous amicus briefs, and their influence on the Court. This article challenges the conventional wisdom with a jurisprudential critique of the current practices of the SG and the Court, focusing on the SG’s filing of amicus
b briefs in cases where the interests of the United States are attenuated, and on the Court’s inconsistent deference to these briefs. The article argues that the SG should file amicus briefs only in cases where the interests of the United States, and particularly of the executive branch, are directly affected, as opposed to cases concerning the broader policy agenda of an administration. The article next examines the deference sometimes given the SG’s amicus briefs in Supreme Court opinions. The Court has not been a model of consistency regarding this deference in certain categories of cases. In other cases, it seems to treat the SG amicus brief as entitled to no greater deference than the amicus brief of any other interest group. Using as examples SG amicus briefs filed in the 2010 and 2011 Terms, the article proposes and applies criteria to constrain the SG in filing such briefs, and to guide the Court in giving appropriate deference to such briefs. Under these criteria the SG would still play a significant role in Supreme Court litigation, but that role would be limited to the particular interests of the executive branch.

Kevin M. Stack, *Interpreting Regulations*, 111 Mich. L. Rev. — (forthcoming), available on SSRN: papers.ssrn.com/sol3/papers.cfm?abstract_id=2172954. The age of statutes has given way to an era of regulations, but our jurisprudence has fallen behind. Despite the centrality of regulations to law, courts have no intelligible approach to regulatory interpretation. The neglect of regulatory interpretation is not only a shortcoming in interpretive theory but also a practical problem for administrative law. Canonical doctrines of administrative law—Chevron, Seminole Rock/Auer, and Aeti—involve interpreting regulations, and yet courts lack a consistent approach. This article develops a method for interpreting regulations and, more generally, situates regulatory interpretation within debates over legal interpretation. It argues that a purposive approach, not a textualist one, best suits the distinctive legal character of regulations. Administrative law requires agencies to produce detailed explanations of the grounds for their regulations, called statements of basis and purpose. Courts routinely use these statements to assess the validity of regulations. This article argues that these statements should guide judicial interpretation of regulations as well. By relying on these statements as privileged sources for interpretation, courts not only grant deference to agencies but also treat these statements as creating commitments with respect to a regulation’s meaning. This approach justifies a framework for interpreting regulations under Chevron, Seminole Rock/Auer, and Aeti that is consistent with the deferential grounding of these doctrines, and it provides more notice to those regulated than does relying on the regulation’s text alone. This article also shows how regulatory purposivism constitutes a new foothold for Henry Hart and Albert Sacks’s classic legal process account of purposivism. Hart and Sacks’s theory is vulnerable to the criticism that discerning statutory purpose is elusive because statutes do not often include enacted statements of purpose. Regulatory purposivism, however, avoids this concern because statements of basis and purpose offer a consistent and reliable source for discerning a regulation’s purpose. From this perspective, the best days for Hart and Sack’s legal process theory may be ahead.

Jeffrey D. Stein, *Delineating Discretion: How Judulang Limits Executive Immigration Policy-Making Authority and Opens Channels for Future Challenges*, 27 Geo. Immigr. L.J. (forthcoming), available on SSRN: papers.ssrn.com/sol3/papers.cfm?abstract_id=2103903. This article argues that Judulang v. Holder, 132 S. Ct. 476 (2011), moved beyond prior doctrine by demonstrating that courts could subject immigration policies to a rigorous “arbitrary and capricious” review under the Administrative Procedure Act and Chevron analysis, even where those policies did not conflict with, or depart from, existing laws, regulations, or policies. In other words, it applied a thicker standard of review than ever before, meaningfully evaluating the merits of an agency’s policy against an independent “arbitrary and capricious” metric, rather than simply asking whether the policy’s formation abided by proper process, did not conflict with controlling law, or met some inescapably low threshold. In exposing the merits of a Board of Immigration Appeals policy to “arbitrary and capricious” attack, Judulang pushed back against a (perceived) history of special deference to the executive branch on immigration matters, and thus supports a reading of the executive’s role in immigration law as different from its role in ordinary domestic jurisprudence. The article concludes that Court’s use of the APA (or, alternatively, Chevron) to substantively circumscribe executive policy-making discretion gives rise to a number of potential challenges to other BIA policies and decisions that may prove vulnerable to Judulang’s coin-flipping litmus.

Rena I. Steinzor and Michael Patoka, *Evaluating Rules and How We Measure Their Effects*, 29 Envtl. F. 35 (2012). The Center for Progressive Reform (CPR) undertook an empirical study of the Office of Information of Regulatory Affairs (OIRA). The study assembled an unprecedented portrait of its behavior during the decade from October 16, 2001, when notices of meetings with outside parties were first available on the Internet, until June 1, 2011. OIRA conducted 6,194 separate reviews of regulatory submissions, holding 1,080 meetings that involved 5,759 appearances by outside participants. Both the final report and the database are available on the CPR website. OIRA has adopted...
perhaps the most extreme open-door policy in Washington with respect to rulemaking proposals. Equal access to OIRA does not produce balanced participation. Over the last decade, 65 percent of the people who met with OIRA represented industry interests—about five times the number appearing on behalf of public interest groups. President Obama’s OIRA did only somewhat better than President George W. Bush’s, with a 62 percent industry participation rate to Bush’s 68 percent, and a 16 percent public interest group participation level to Bush’s 10 percent. OIRA’s early interference in the formulation of regulatory policy is especially troubling. Forty-three percent of these meetings took place before the agency’s proposal was even released to the public. The percentage of meetings that occurred at this pre-proposal stage has actually been greater during the Obama administration (47 percent) than it was during the Bush II administration (39 percent). This article argues that early interference frustrates transparency and maintenance of a level playing field because the public sees the agency’s proposal only after it has been reshaped by lobbyists and OIRA economists. It also exposes agencies to White House political pressure before they have even had the opportunity to seek public comment on more stringent proposals.

Cass R. Sunstein, *Impersonal Default Rules vs. Active Choices vs. Personalized Default Rules: A Triptych*, available on SSRN: papers.ssrn.com/sol3/papers.cfm?abstract_id=2171343. Impersonal default rules, chosen by private or public institutions, establish settings and starting points for countless goods and activities—cell phones, rental car agreements, computers, savings plans, health insurance, websites, privacy, and much more. Some of these rules do a great deal of good, but others might be poorly chosen, perhaps because those who select them are insufficiently informed, perhaps because they are self-interested, perhaps because one size does not fit all. The existence of heterogeneity argues against impersonal default rules. The obvious alternative to impersonal default rules, of particular interest when individual situations are diverse, is active choosing, by which people are required to make decisions on their own. The choice between impersonal default rules and active choosing depends largely on the costs of decisions and the costs of errors. In complex and unfamiliar areas, impersonal default rules have significant advantages, but where people prefer to choose, and where learning is both feasible and important, active choosing might be best, especially if people’s situations are relevantly dissimilar. At the same time, it is increasingly possible for private and public institutions to produce highly personalized default rules, which reduce the problems with one-size-fits-all defaults. In theory, personalized default rules could be designed for every individual in the relevant population. Collection of the information that would allow accurate personalization might be burdensome and expensive, and might also raise questions about privacy. But at least when choice architects can be trusted, personalized default rules offer almost all of the advantages of active choosing without the disadvantages.

Jeff VanDam, *The Kill Switch: The New Battle Over Recess Appointments*, 107 Nw. U. L. Rev. (forthcoming), available on SSRN: papers.ssrn.com/sol3/papers.cfm?abstract_id=2138872. Presidential recess appointments have strained relations between Congress and the executive branch since the administration of George Washington. But in 2007, Congress began using a procedure to prevent such appointments from happening at all. By sending one Member to stand in front of an empty chamber while the rest of the Senate took vacation, Congress claimed it was in “pro forma” session, not at recess, and that the President could therefore not make recess appointments. While Presidents Bush and Obama acquiesced to this tactic and declined to make appointments during such “pro forma” sessions, Obama changed course in early 2012. This comment argues that Obama’s change of course rests on solid constitutional footing. Not only did the pro-forma-sessions strategy seek to deactivate an enumerated power of the President, but it did so by explicitly involving the House of Representatives in the appointments process, an event the Framers specifically sought to guard against. Indeed, by putting an end to “recesses” (and thus recess appointments), Congress defied a procedural assumption of the Framers written into the Constitution and practiced by legislatures for millennia. From a policy standpoint, blocking presidential appointments perpetuated a harmful glut of unfilled offices, but was in some cases self-defeating. The President, through the Appointments Act, has the power to fill certain positions with acting heads who carry out his policy goals.

Louis J. Virelli, *Science, Politics, and Administrative Legitimacy*, Mo. L. Rev. (forthcoming), available on SSRN: papers.ssrn.com/sol3/papers.cfm?abstract_id=2153821. Science and politics often interact successfully in administrative law. Potential problems arise, however, when agencies make “counter-scientific” policy decisions—those that overlook otherwise uncontroversial scientific evidence in favor of political rationales. This short essay draws new attention to these counter-scientific policy determinations by asking if and under what circumstances they may be considered illegitimate in a constitutional democracy. More specifically, it asks how counter-scientific decisions impact three of the animating principles of administrative legitimacy—agency expertise, accountability and transparency, and efficiency—and identifies some additional
variables that are useful to that analysis. Part II offers recent examples of three different forms of counter-scientific policy decisions. Part III outlines the three principles of legitimacy to be applied to those decisions. Part IV then evaluates counter-scientific policy decisions in light of each of those three principles, arguing that variables such as the scope of a particular agency’s expertise, the nature of that agency and its role in government, and the agency’s own claims as to how it is exercising its policymaking authority are critical to understanding the democratic viability of counter-scientific policy decisions. This insight is valuable not only in its own right, but also as a useful starting point in a more rigorous evaluation of counter-scientific agency decisions that could have powerful implications for policymaking as well as for administrative legitimacy in general.

Melissa F. Wasserman, The Changing Guard of Patent Law: Chevron Deference for the PTO, 54 Wm. & Mary L. Rev. (forthcoming), available on SSRN: papers.ssrn.com/sol3/papers.cfm?abstract_id=2166560. While Congress has increasingly turned to administrative agencies to regulate technically complex areas, the patent system has remarkably remained an outlier. In the patent arena, the judiciary—not a federal agency—is perceived to be the most important expositor of substantive legal standards. Criticism of the patent system has grown and calls for institutional reform of this unusual power dynamic culminated in late 2011 with the enactment of the historic Leahy-Smith America Invents Act (AIA). While scholars have recognized that the AIA bestows upon the Patent and Trademark Office (PTO) a glut of new powers, commentators have failed to recognize the extent to which the AIA alters the fundamental power dynamics between the judiciary and the PTO. This article contends that the AIA rejects over two hundred years of court dominance in patent policy by anointing the PTO as the primary interpreter of the core patentability standards through its new formal adjudicatory authority. Although the patent system traditionally has suffered from a lack of serious engagement with administrative law, an application of administrative law principles to the AIA not only has tremendous implications for the roles of patent institutions but also, as this article argues, results in a normatively desirable outcome. Making the PTO the primary expositor of the core provisions of the Patent Act ushers the patent system into the modern administrative era, which has long recognized the deficiencies associated with judge-driven policy. Moreover, the incorporation of administrative law principles into the patent system has substantial implications for administrative law. This article concludes by exploring some of the implications of granting the PTO the ability to speak with the force of law only by case-by-case adjudication. More specifically, the PTO’s new authority is implemented asymmetrically: Deference will more often be due to PTO interpretations that uphold patent validity than to those that deny patentability, resulting in an expansionary pressure on substantive patent law. This article thus also explores policy proposals to eliminate this asymmetry.

William F. West and Connor Raso, Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control, J. of Pub. Admin. Res. & Theory (forthcoming), available on SSRN: papers.ssrn.com/sol3/papers.cfm?abstract_id=2147510. Although scholars have recently shown a good deal of interest in rulemaking, they have ignored a critical question about the process: What kinds of stakeholders and what institutional actors influence the rulemaking agenda? The following analysis examines a original data set of 276 rules as an initial effort to fill this void. It adds to our understanding of rulemaking and of broader issues of bureaucratic responsiveness and institutional control, which have long been of interest to students of government and administration. The article finds that agency decisions to initiate rulemaking are heavily grounded in the implementation of ongoing programs and subgovernmental relationships in which economic interests tend to be predominant. Yet it also concludes that Congress plays a prominent role in establishing the rulemaking agenda, both in an absolute sense and in relation to the president and the courts.

Collections

Remarks of Mary Beth Richards Upon Receiving the 2012 Mary C. Lawton Outstanding Government Service Award (Excerpted)

It is truly an honor and privilege to receive this award from the ABA Section of Administrative Law & Regulatory Practice, and I am very grateful.

I know it has been sport of late to disparage government workers and the work we do, but I am proud of my service and the honor of having served with and known many extraordinary public servants (two of whom are past recipients of this award: Daniel “Mac” Armstrong while at the FCC and Jodie Bernstein while at the FTC).

I have received great satisfaction out of every job I have had in the government—and there have been many. Starting at the Patent and Trademark Office in 1983 as a trademark attorney, then at the Federal Communications Commission for about 20 years, then at the Federal Trade Commission, then back to the FCC, and now again at the FTC. I have enjoyed every one of the jobs I have had at all three agencies. I have had a chance to work with top-notch professionals who care deeply about public service.

Each day over the past 30 years or so, I have tried to follow a handful of rules: help consumers, be a role model to my colleagues, treat people with respect, including those who practice before the agency, and, of course, make my bosses look good. I have tried to learn from those ahead of me and to be a mentor to those behind me. And I have tried to serve the American taxpayer and earn my pay every day.

Government service can make for a great career. It affords an opportunity for an incredible amount of responsibility early on. No law firm, to my knowledge, gives that kind of responsibility to its starting attorneys.

You have a very clear mission, at least in the agencies where I have worked. At my current agency, the FTC, we have a mission to protect consumers from unfair and deceptive trade practices and promote competition. We take actions that help consumers, save them money, and protect them. I feel really good about the work we are doing at the FTC because it has a real world impact on people across the country.

The hours have been long and the pay probably not as generous as my private sector counterparts received, but the job has given me the opportunity to work with Congress to change laws and work to change rules that benefit consumers and competition.

One of my fondest accomplishments came when I was head of the Enforcement Division at the FCC with responsibility for consumer complaints about telephone issues. Our biggest area of complaint at the time was pay-per-call charges. People were running up telephone bills in the hundreds and thousands of dollars and having their phone service cut off because someone in the household was calling dial-a-joke or dial-a-porn or dial-the-Easter Bunny at an incredibly high per-call rate. After working with Congress to change the law to require those calls to be billed in advance to a credit card, the complaints virtually disappeared—they went from the very top of our complaint list to the very bottom as soon as the rules implementing the law went into effect. We fixed the problem, and I felt good about that.

If I sound like a recruiter for Government service, I am. Come join us.

I am retiring at the end of next month, so this award is especially meaningful to me. My upcoming retirement has led me to reflect back on my government career. In sifting through the past 30 years, it seems clear to me that my favorite part of government service, what I have most loved, is the chance to mentor people. I take great pride in watching the people whom I have hired, mentored, counseled, and promoted go on to do great things. Treating people with respect and giving them the tools to succeed has always been important to me.

Maya Angelou said: “I’ve learned that people will forget what you said, people will forget what you did, but people will never forget how you made them feel.” I hope people look back favorably not only on my accomplishments but also on how I made them feel.

Thank you again for this wonderful honor.

The 2012 Administrative Law Conference

By Otto J. Hetzel*

With sequestration and the Fiscal Cliff, recess appointments to administrative agencies, the STOCK Act, White House review of rulemaking, the law of counterterrorism,
voter ID laws, administrative law case processing in an Electronic Age, oversight of agency cost-benefit analysis, and the Section’s signature three-hour review of annual developments in administrative law moderated by Professor Jeffrey Lubbers all on the program, there was something to attract most any lawyer involved in administrative law and regulatory practice to the 2012 Administrative Law Conference held at the Capital Hilton in Washington, D.C., October 25–26 2012.

Program Chairs Neil Eisner, Richard Murphy, and Carol Ann Siciliano, and Section Chair James W. Conrad, Jr. are to be congratulated for an outstanding conference. The conference was sponsored by the American University Washington College of Law, George Washington University Law School, Cardozo School of Law, Greenberg Traurig LLP, Kirkland and Ellis LLP, Lexis Nexis, and Proskauer Rose LLP.

Fully 585 persons attended the conference featuring 28 panels and an insightful presentation at the Thursday luncheon by Norm Ornstein of the American Enterprise Institute on reforming our dysfunctional political process. Thursday evening, William S. Morrow, Jr., Executive Director/General Counsel of the Washington Metropolitan Area Transit Commission, received the Section’s 2012 Volunteer of the Year award aboard the National Elite Yacht during the Section’s dinner cruise on the Potomac River.

On Friday, an awards luncheon celebrated the achievements of four persons who have made significant contributions to the field of administrative law: Professor Cass Sunstein, who recently returned to Harvard Law School after stepping down from OIRA, was named a Senior Fellow of the Section; Mary Beth Richards, Deputy Executive Director of the Federal Trade Commission, was given the Mary C. Lawton Award for Outstanding Government Service; Harvard Law School Professor John Manning received the Annual Award for Scholarship in Administrative Law for his 2011 Harvard Law Review article, Separation of Powers as Ordinary Interpretation; and Daniel Kazhdan received the Gellhorn-Sargentich Law Student Essay Award for Wyeth and PLIVA: The Law of Inadequate Drug Labeling, submitted when he was a 3L at Boalt Hall School of Law, U.C. Berkeley.

Included in the conference was a panel on Chinese administrative law featuring presentations by six Chinese professors. They discussed pending legislation pertaining to China’s proposed administrative procedure law, somewhat akin to our Administrative Procedure Act. Modern administrative law concepts such as transparency, public participation, judicial review, cost-benefit analysis, and risk-based analysis were discussed along with comparisons of administrative agency decision-making procedures, approaches to regulation, and external oversight in Chinese administrative law practice. Section members later mingled with the Chinese scholars on the Potomac River cruise and at a reception for them held the next day.

Over all, the conference presented a rich array of 28 panels. All were well attended, including:

**NFIB v. Sabelius, Who Won,** addressing the Supreme Court decision on the Affordable Care Act and debating the conundrums in the decision and their aftereffects as a result of the Chief Justice’s opinion, which upheld the individual mandate on Taxing Power grounds instead of the Commerce Clause and found the Medicaid expansion provisions unduly coercive on the states and thus beyond Congress’s Spending Power. Participating were moderator Timothy Aspinwall and panelists James Blumstein, Gregory Katsas, and Christopher Wright.

**Cost-Benefit Analysis: Knowing Quality When You See It,** focusing on the debate over the scope and quality of regulatory analysis prepared to support regulatory policy development, OMB’s guidance on preparation of the analysis, and agency preparations for such analyses in practice. Economists contributed their perspectives and practical experience with respect to what was “quality” analysis. Participants were moderator David Rostker and panelists Reeve Bull, Robert Burt, Amanda Lee, and Al McGarland.

continued on next page
Understanding Prosecutorial Discretion in Immigration Law, providing insights into the importance of discretion in enforcing immigration laws, the humanitarian and economic reasons for such discretion, and the potential problems raised when individuals benefiting from the exercise of discretion commit subsequent offenses. Participants were moderator Shoba Wadhia and panelists Lenni Benson and Juan Osuna.

Recess Appointments: Legal Challenges to Appointments to the Consumer Financial Protection Bureau and the National Labor Relations Board, examining the legal issues raised by challenges now pending in the D.C. Circuit, the Seventh Circuit, and the D.C. District Court to President Obama’s January 2012 recess appointments to these regulatory agencies, which exercise controversial powers over corporate interests, unions, and consumers. What constitutes a “recess” for the Senate, as a predicate to the exercise of such powers, is a key element in the controversy that could portend further litigation over the validity of decisions taken in the interim. Michael Stern served as moderator. Panelists included the Hon. C. Boyden Gray.

Privacy, Politics, and the People in Administrative Law, examining the perspectives the panelists had developed from their observations of the impact of privacy law both in the U.S. and in other countries and its effect on the politics relating to decision-making bodies in administrative agencies. Participants were moderator Francesca Bignami, panel organizer Kathleen Stoughton, and panelists David Arkush, Ken Bamberger, and Mark Seidenfeld.

White House Review of Rulemaking, mainly focusing on Rena Steinzor’s forthcoming article suggesting that OIRA’s centralized review of rule-making should be abolished and how effective OIRA had been in its role during the Obama Administration. Participants were moderator Jennifer A. Smith, panel organizer Sid Shapiro, and panelists Rena Steinzor and Louis Virelli, III.

The JOBS Act: The Real Impact on Financings, SEC Rulemaking, and the SEC Itself, examining the SEC role with regard to general solicitations for traditional financing transactions raising capital, including the new rules the SEC will need to promulgate and how rigorous cost-benefit analyses should be performed. Participants were moderator Frank Zarb, panel organizer James Gerkis, and panelists Harvey Pitt, Lona Nallengara, and Thomas Quaadman.

International Regulatory Cooperation and its New Executive Order, exploring the President’s new executive order promoting cooperation between U.S. and foreign regulators with regard to financial regulation, consumer safety, and leveling playing fields in trade cases. Participants were moderator Robert Ahdieh, panel organizer David Zaring, and panelists Michael Fitzpatrick and Alex Hunt.

Insider Trading on Government Information: Issues in Enforcement and Interpretation of the STOCK Act of 2012, addressing control of potentially “market-moving” government information and the potential effects of its extension of restrictions on communication and receipt of “material, non-public information” in the government arena. The issue of insider trading and restrictions on it are generating major concerns about the Act’s coverage and impacts, as is the Internet posting of financial disclosure forms of career federal employees. Participants were moderator Robert L. Walker and panelists Joseph Brenner, Don W. Fox, Donna Nagy, and John Sassaman.

Cost-Benefit Analysis: How it Could Be Better, examining the impact of Business Roundtable v. SEC (D.C. Cir. 2011) on the quality of cost-benefit analyses required to support agency rule-making and how the regulatory analysis can affect the legal adequacy of the rule-making and policy judgments inherent in them. Participants were moderator David Rostker and panelists Art Fraas, Heidi King, Bruce Kraus, and Randy Lutter.

The Law of Counterterrorism, which was composed of contributing authors to the Section publication of that title and discussed developments regarding the law of war, military responsibilities, intelligence requirements, and surveillance actions currently affecting U.S. counterterrorism efforts. Participants were moderator Lynne Zusman and panelists John Altenburg, Jr., Michael J. Davison, Dick Jackson, Jamil Jaffer, and W. George Jameson.
Banking on B Corporations, exploring the benefit (“B”) corporation movement now authorized under laws of ten states, their economic and social purpose rationale, basic legal structure, certification process, and GIIRS rating system for impact investing. Three certified B corporations, reflecting examples of this new form of corporate entity, were examined. Participants were moderator Christine C. Franklin and panelists Bart Houlahan and Teri Lovelace.

Administrative Law Case Processing in an Electronic Age: From Filing to Hearing, considering basic technical concerns and legal considerations when agencies begin processing their matters in an electronic environment. The panel explored due process considerations when handling such technical issues such as the appropriate electronic platforms, protection of personally identifiable information, appropriate digital hearing formats, and accessibility of exhibits during hearings. Participants were moderator the Hon. James Gilbert, panel organizer the Hon. Nancy Griswold and panelists Bruce Goldin, Martin Gruen, the Hon. Kathleen Scully-Hayes, and the Hon. Erin Wirth.

The Regulatory Policy of the Two Major Political Parties, examining the regulatory policies of the two parties as perceived four days before the Presidential election. Participants were moderator Jack M. Beermann and panelists Michael Fitzpatrick and James L. Gattuso.

Building Successful SBREFA Panels, exploring the functions and selection process of panels involved in Small Business Advocacy Review required by the Small Business Regulatory Enforcement Fairness Act of 1996, which as a result of the Dodd-Frank Act are now applicable to the Consumer Financial Protection Bureau (CFPB) as well as to EPA and OSHA. These panels are to be created for proposed rules that will have significant economic impact on a substantial number of small entities such as small businesses, small non-profits, and small governmental jurisdictions. OIRA, the SBA Office of Advocacy, and the convening agency are to be represented on the panels and assisted by a select group of small-entity representatives from affected industries, who will review proposed materials and advise the panel on how to minimize the negative impacts on small entities. Participants were moderator Bruce Lundegren, panel organizer Kevin Bromberg, and panelists Robert Burt, Jeffrey Longsworth, and Lanelle Wiggins.

So There Is a 6-Inch, Remote-Controlled Helicopter with a Camera Outside your Bedroom Window, delving into the privacy issues that arise with new technologies such as the use of unmanned aircraft as capabilities to utilize such technologies advance. The panel explored topics such as governmental obligations to balance mission objectives and requirements under the Privacy Act of 1974, the FTC’s responsibilities to protect consumer privacy, and what oversight roles the courts should take. Participants were moderator Anne Bechdolt and panelists Christopher Calabrese, Mark Eichorn, Claire McKenna, and Alan Raul.

Sequestration and the Fiscal Cliff, tracing the various forces at work in the upcoming Lame Duck Congress that must try to resolve by year end alternative legislation to override specified draconian sequestration reductions of military and domestic budgets, all the while trying to deal with the need for another increase in debt limits and a number of tax issues that will affect many taxpayers, not just the top one percent. Tax issues included: potential new marginal taxes, increasing the income subject to the alternative minimum tax, continuing expiring veterans benefits, and providing homeowner relief when short sales result in forgiven mortgage obligations that would be subject to tax. Participants were moderator Susan Irving and panelists John Bowman and John F. Cooney.

Administrative Law Judges and Judicial Ethics, addressing several ethical questions pertaining to administrative proceedings, including which ethical standards apply to administrative law judges who are unquestionably bound by standards of ethical conduct for employees of the executive branch, given that recently several agencies have indicated they also intend to follow ABA guidance as to the Code of Judicial Conduct. Another focus was the growth of social media (and the availability of the Internet) that may be used as an investigatory tool in proceedings or might provide a source of potential bias. The Hon. Nancy Griswold served as moderator. The panelists were continued on next page
John C. Condray, Seth H. Jaffe, the Hon. Robert Lesnick, and Alan D. Sibarium.

**Developments in Administrative Law, Parts I and II**, providing presentations by experts on developments during the past 12 months. Participants were moderator Jeffrey S. Lubbers and panelists William Funk on Constitutional Law, William S. Jordan III on Rulemaking, Jackie Solivan on eRulemaking, Michael Asimow on Adjudication, Kathryn A. Watts on Judicial Review (Scope of Review), and Richard Murphy on Judicial Review (Access to the Courts).

**Ethical “Red Flags” for Public Lawyers: Responsibilities, Conflicts, and More**, providing a variety of short, entertaining, hypothetical role-playing scenarios representing ethical issues government lawyers are likely to confront, along with opportunities to discuss the stimulating interactions presented. Participants were moderator Sharon Pandak and panelists Carlos Acosta, Joseph N. Bowman, Judy Kaleta, and Cynthia Rapp.

**Rulemaking 101**, which was an introductory/refresher course on the procedural steps, legal requirements, and practical constraints involved in issuing agency rules and challenging or defending them in subsequent judicial proceedings. Participants were moderator Daniel Cohen and panelists H. Thomas Byron III, Andrew Emery, Jane Luxton, and Carol Ann Siciliano.

**21st Century Administrative Law Research Tools**, discussing improved methods of research applicable to administrative law and regulations, including use of the Federal Register and House of Representatives sources to obtain easier and more effective results. Participants were moderator Cynthia R. Farina and panelists Robert Sukol, John Wagner, and Michael White.

**Role of Administrative Agencies in the Political Process: A Preview of Potential Election Day Issues—Voter ID**, focusing on the current controversy over Voter ID laws in four states—Virginia, Wisconsin, Florida, and Pennsylvania—that certainly had the potential of voter (and election board member) confusion, increasing numbers of provisional ballots, and turning away qualified voters. The Virginia requirements became the primary vehicle for illustrating the laws and requirements that were likely to create controversy in the upcoming Presidential election, four days hence. Participants were moderator John H. Young, panel organizer Elizabeth Howard, and panelists Stephen C. Cobb, Rebecca Green, and Myron D. McClees.

**Insights Into CFPB Supervision, Enforcement, and Advocacy**, providing various perspectives on the newly operational CFPB created by the Dodd-Frank Act, the first federal agency devoted to consumer financial protection, which has jurisdiction over both bank and non-bank institutions providing consumer financial products and services. The supervision program that the CFPB has designed for these institutions was discussed along with the anticipated effect that judicial deference to the agency’s interpretation of consumer financial laws might have. An amicus program to assist the courts in interpreting such laws was also considered. An amicus program to assist the courts in interpreting such laws as well as the likely role of amicus activity by the ABA and the Administrative Law and Regulatory Practice Section were also considered. Participants were moderator Christine C. Franklin and panelists April Breslaw, Michael W. Briggs, John Coleman, and To-Quyen Truong.

**Negotiated Rulemaking**, examining the experiences with “negotiated rulemaking” or “neg-reg” at several agencies pursuant to 1990 legislation by Congress to bring interested parties into the rule-drafting process. How this alternative approach can lead to better, more acceptable rules resulting from a clearer understanding by agencies and affected parties of the potential impact of proposed rules was discussed. Participants were moderator Dan Cohen and panelists Daniel Alpert, John F. Caskey, Elizabeth A. McFadden, and Richard Parker.

**D.C. Circuit Judges Panel**, providing a forum for two D.C. Circuit judges to offer suggestions for improving client representation before the Circuit, along with a greater understanding of how the court functions. Panelists were the Hon. Brett Kavanaugh and the Hon. Stephen Williams.
The coal company challenged the decision because the preamble had not been subjected to notice and comment and had not been part of the adjudicatory record. The court disagreed, noting that the ALJ had not treated the preamble as binding, but had looked to the preamble to assess the credibility of the witnesses. The ALJ had determined that the company physician’s testimony was inconsistent with the regulations, as explained in the preamble, and credited the agency physician’s testimony because it was “consistent with the medical and scientific premises underlying the amended regulations, as expressed in the preamble.” Thus, the preamble itself was not binding, but it provided an explanation of why the regulation had been amended. The ALJ was entitled to rely upon that explanation. Finally, the court noted that “public law documents, like the Act, the regulations, and the preamble,” need not be made part of the administrative record.

**News from the Circuits continued from page 22**

The concept of homeland security has evolved from a mostly academic military proposal to the biggest reorganization of the federal government since the creation of a Defense Department in 1947. Homeland Security: Legal and Policy Issues draws upon the expertise of leading practitioners in the emerging and expanding field of homeland security. This comprehensive resource looks at homeland security as a critical area of legal practice affecting both the public and private sectors. It also serves as an important compilation of policy and practice-oriented information pertaining to the Homeland Security Act. The book begins with an evaluation of the policy shifts and outcomes to date and looks ahead to the challenges that exist for the Obama Administration. It then seeks to familiarize you with 14 key and essential areas in the Homeland Security legal discipline such as state and federal emergency powers, the USA Patriot Act, information security, CFIUS and foreign investment and so much more. The expert authors have included easy references to additional authorities and information sites, making this publication a useful tool and lasting legal education sourcebook. Order your copy today.

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**Thursday April 11, 2013**
*Arrivals at your leisure*
6:00 pm – 7:00 pm
Hospitality
7:30 pm
Dinner on your own

**Friday April 12, 2013**
*Breakfast & Morning at Leisure*
8:00 am – 12:30 pm
Time available for in-person committee meetings
1:00 pm – 2:30 pm
Alcohol Regulations and Airlines: A Regulatory Quandary, presented by the Beverage Alcohol Committee, CLE
2:45 pm – 4:00 pm
The Future of NAFTA, presented by the International Trade Committee

**Saturday April 13, 2013**
8:00 am – 12:00 pm
Council Meeting with breakfast
12:30 pm – 5:30 pm
Jamie Conrad organized activity
6:00 pm – 7:30 pm
Section-sponsored reception
7:30 pm
Dine-around options

**Sunday April 14, 2013**
8:00 am – 12:00 pm
Council Meeting with breakfast
Meeting Concludes
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By Jeffrey S. Lubbers

Given the extensive use of rulemaking in federal agencies, it is important that agency rulemak-
ers have available the clearest guidance possible. As procedures governing the rulemaking process have proliferated since the Administrative Procedure Act (APA) was enacted, the potential procedural pitfalls have multiplied. This fifth edition continues the tradition of demystifying the rulemaking process and brings the Guide up to date with respect to recent cases and changes introduced during the second term of the Bush II Administration, and the first three years of the Obama Administration.

This Fifth Edition retains the basic four-part organization of the previous four editions: Part I is an overview of federal agency rulemaking and describes the major institutional “players” and historical development of rulemaking. Part II describes the statutory structure of rulemaking, including the relevant sections of the APA and other statutes that have an impact on present-day rulemaking. Part III contains a step-by-step description of the informal rulemaking process, from preliminary considerations to the final rule. Part IV discusses judicial review of rulemaking. Appendices include some key rulemaking documents.

This edition explores the dramatic rise of “e-rulemaking” since 2006 and the many ramifications it has wrought that were not present in the era of “paper” rulemaking. This edition also examines court decisions concerning rulemaking procedure and the judicial review of rules.

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