Interview with
Former HHS Secretary
Donna Shalala

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One of my priorities as Chair of your Section is to enhance our profile in the area of pro bono service. Rule 6.1 of the ABA’s Model Rules of Professional Conduct sets an aspirational level of 50 hours of pro bono service per year. All lawyers (both in practice or in academia) should strive to meet and exceed that noble goal. The demand for legal services by people who can’t afford to pay lawyers is immense, yet the federally funded Legal Service Corporation (and its many affiliated local agencies) cannot satisfy even a small fraction of that demand. And the unfortunate reality is that few lawyers actually meet the 50-hour standard.

How can the Administrative Law and Regulatory Practice Section help its members meet the pro bono standard? This is kind of a stumper. The members of our Section specialize in such a vast array of different areas, and are so geographically dispersed, that no single program would be relevant to most of them. For practical economic reasons, we couldn’t open our own administrative law clinic, even if it specialized only in a single area such as immigration.

The Chair of our Pro Bono committee, Section Vice Chair Bill Luneburg, came up with the idea that our Section website should contain a page devoted to pro bono opportunities for administrative and regulatory lawyers. We’d try to collect volunteer opportunities in a range of different subject areas and make it easy for you to contact one in your geographic region and relevant to your particular interests and experience. So we are now collecting information for that web page.

For that we need YOU. Can you let me or Bill know about pro bono administrative law opportunities in your own communities? Is there a program you know of that supplies free legal services to welfare recipients, veterans, victims of disability discrimination, or persons seeking amnesty? Please let us know so we can post this information. My email is asimow@law.ucla.edu and Bill’s is wvl@law.pitt.edu.

Meanwhile, we’ve come up with a few possibilities and we’re trying to create some additional opportunities. The Disabled American Veterans provides training to lawyers at three DC-area law firms in pro bono representation of veterans before the Military Physical Disability Evaluation Boards. In addition, the Veterans Consortium, which consists of DAV and three other veterans’ service organizations, have an ongoing program to provide pro bono attorneys for veterans with cases before the U.S. Court of Appeals for Veterans’ Claims. The Legal Services Corp. is funding this effort. More volunteers would be welcome in either program. Contact Section members Ron Smith or Landon Overby at the DAV for more information.

In addition, the ABA is forming a Veterans’ Advocacy Pro Bono project which is especially geared to emeritus attorneys. This project is part of the ABA’s effort to tap the vast and underused resource of retired attorneys. The pilot program will be launched soon in states that permit retired or inactive attorneys to render part-time pro bono services. Malpractice insurance will be provided. Our Section has committed itself to assist with the training of the attorneys who sign up for this program and our very active Veterans’ Committee will spearhead that effort.

The ABA’s Standing Committee on Legal Assistance to Military Personnel (LAMP) is setting up a program to organize pro bono services to active-duty military personnel. We hope that LAMP’s program will provide opportunities to our members to take part.

Finally, at its winter meeting, the ABA House of Delegates approved resolution 102B, sponsored by our Section, to encourage all state, local and tribal bar associations to establish pro bono programs to assist the victims of identity theft. Jon Rusch did the heavy lifting on this resolution. The FTC is currently drafting desk book materials for volunteers working to protect identity theft victims. Bill and Jon hope to involve our members to serve as reviewers of the FTC materials. As opportunities to work in the identity theft area open up, we’ll let you know on the webpage.

But there is so much more that needs to be done. Won’t you help us uncover and publicize existing programs involving federal, state, or local administrative agencies in which our members can furnish pro bono services?

Meanwhile, I hope you’re making your plans to be with us for the Section’s Spring meeting in Las Vegas, April 11-13. There will be some timely CLE programs. We’re working on a panel on Yucca Mountain and the disposal of nuclear waste, as well one on regulatory problems of policing the gambling industry. Of course, we’ll have fun social events and a golf outing as well. The spring weather in Vegas is beautiful and it’s easy to get there from just about anyplace. We’ll be headquartered at the Paris Hotel, which is almost as nice as (and much cheaper than) the real Paris. Besides, as the saying goes, what happens in Vegas stays in Vegas. See you there!

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Visit the Section’s Website at [www.abanet.org/adminlaw](http://www.abanet.org/adminlaw) and click on ONLINE CLE for access to Section programs at [WestLegalEd.com](http://WestLegalEd.com).
Lessons From the SEC’s Efforts to Regulate Hedge Funds

By Christopher M. Wells*

In June 2006, the U.S. Court of Appeals for the D.C. Circuit in Goldstein v. U.S. Securities and Exchange Commission, 451 F.3d 873 (D.C. Cir. 2006), struck down rules adopted by the Securities and Exchange Commission requiring most hedge fund managers to register with the SEC under the Investment Advisers Act of 1940. The court characterized the definition of “client” that was central to the hedge fund rule (Rule 203(b)(3) of the Investment Advisers Act), as “violating the plain language of the statute,” and concluded that “the Commission’s interpretation falls outside the bounds of reasonableness.”

How did the SEC go so wrong in its efforts to regulate hedge funds? The SEC, in adopting the hedge fund rule, attempted to redefine the “private adviser” exemption under Section Rule 203(b)(3) of the Investment Advisers Act, which exempts an investment adviser from registration under the Act if the adviser has less than 15 clients. Before the adoption of the hedge fund rule, a manager of a hedge fund was not required to “look through” the hedge fund and count its investors in order to determine whether or not the manager had 15 clients for this purpose, and instead the manager just counted the hedge fund itself as a single client. Under the hedge fund rule, the term “client” was interpreted to require a hedge fund manager to look through any “private investment fund” and count the fund’s investors toward the 15 client limit. A “private investment fund” was defined for this purpose as a privately offered investment fund that did not permit redemptions within two years.

The Goldstein decision focused on the definition of client in the rule, concluding that only the hedge fund, and not its investors, was a client of the hedge fund manager, and that the rule was therefore arbitrary and unreasonable. But a broader analysis of the rule leads to the conclusion that the SEC failed on several levels. The SEC fundamentally did not design the rule to address the needs identified by the SEC that the rule was intended to address; and the rule imposed burdens on hedge fund managers that were not adequately related to or commensurate with the intended benefits.

The members and staff of the SEC repeatedly identified two primary objectives of the hedge fund rule. First, the rule was intended to give the Commission staff greater access to and information about hedge funds in order to permit the SEC better to monitor the activity of hedge funds, given their dramatic growth and increased impact on the markets in recent years. A second objective was to limit access to hedge funds by less sophisticated investors who are less capable of evaluating the greater risks of investing in hedge funds.

If these were the primary objectives, then the SEC never adequately demonstrated why requiring registration under the Investment Advisers Act was the most appropriate action to address these needs. The fundamental objective of better monitoring the industry could have been achieved by adopting a simpler form of notification, similar perhaps to a Form D (although hopefully better designed) or a notice of exemption filed with the Commodity Futures Trading Commission under its Rule 4.13, requiring a hedge fund manager claiming an exemption from registration to report certain basic information about the manager and the funds that it managed. Instead, the SEC chose to require hedge fund managers to register with the SEC, even though many of the rules applicable to registered advisers are designed to protect less sophisticated retail investors, rather than the more sophisticated investors in hedge funds who make a conscious and rational choice to accept higher risks in exchange for higher potential rewards.

The fundamental objective to prevent or discourage less sophisticated retail investors from gaining access to hedge funds could have been better addressed by either requiring hedge fund managers to make added disclosures to investors, alerting them to the greater potential risks of investing in hedge funds, or to change the eligibility requirements to invest in hedge funds, a step that the SEC is currently considering under proposed amendments to the private placement rules under Regulation D.

The hedge fund rule was also defectively designed. A key element of the “private investment fund” definition was fundamentally irrational. It exempted any hedge fund manager from registration if the hedge fund adopted a “lock-up” restricting redemptions by investors for at least two years. Many large hedge fund managers did just that, frequently over the objections of their investors. The SEC therefore found itself in the unpopular position of having effectively encouraged hedge fund managers to adopt a practice contrary to the desires of their investors, without any adequate explanation of what policy objective this served.

The two year limit first appeared in anti-money laundering rules proposed by the Treasury Department under the USA Patriot Act, which used the two year rule as a way to distinguish closed-end funds, such as private equity funds, that were not considered to be appropriate vehicles for money laundering activities, from more liquid open-end hedge fund vehicles. But whereas that distinction made some sense in the context of anti-money laundering, it did not bear any relationship to the stated objectives of the hedge fund rule, and instead resulted in many of the largest hedge fund managers, those the SEC should have wanted most

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to regulate and monitor, falling outside the new rule.

The SEC should take some lessons from its experience as it contemplates the next steps in its efforts to regulate the hedge fund industry, or any other sector of the financial markets. Regulators have a responsibility to the public and to the industry being regulated to consider the costs and benefits of any regulatory approach, especially before attempting to force a rapidly evolving industry to comply with sometimes outdated rules.

The SEC, stung by the Goldstein decision and criticism of other recent perceived failures, increasingly seems to be adopting rules containing broader general mandates that are then left for individual investment advisers and regulators to interpret and enforce. While this approach can be appropriate when a rule seeks to deter conduct clearly known and understood to be improper, such as the recent anti-fraud rule adopted as Rule 206(4)-8 under the Investment Advisers Act, it can produce unfortunate and even unfair results when a rule neither clearly defines the activity that the rules seek to discourage, nor adequately defines the affirmative conduct that the rules seek to promote. Examples of excessively broad rules arguably include Rules 206(4)-7 and 204A-1 recently adopted under the Investment Advisers Act requiring investment advisers to adopt and implement compliance procedures and codes of ethics. The rules recite only that advisers must adopt procedures designed to protect against violations of law, without specifying what those procedures should provide. As a result, instead of clear rules and guidelines, the industry increasingly finds itself subject to regulation by way of unwritten rules and interpretations communicated by rumor and enforced by individual SEC staff examiners as they visit and review the practices of individual hedge fund managers.

An illustration of this is the current form of document request list being used by SEC examiners in their inspections of hedge fund managers. One question that emerged on the list a couple years ago, and was then removed after some criticism, but has recently again appeared on some lists, asks the manager to provide a “written summary of any proposed transaction, scheme, deal, side deal, arrangement, or similar matter that, during the inspection period, the manager was asked to consider but rejected because the proposal was deemed inadvisable, inappropriate, unethical or possibly illegal”. This question is absurdly vague (should one list all bad business proposals received), lacks any sense of materiality (do unsolicited emails count), and yet would seemingly require investment managers to incur real costs to refer all inquiries of any sort, no matter how ridiculous or immaterial, to their lawyers, and to maintain records of the disposition of each matter, even if the manager’s employees appropriately rejected all such proposals.

The Department of the Treasury recently requested public comment on the U.S. financial regulatory structure, as part of an initiative to strengthen the ability of U.S. financial markets to compete globally. Among the questions on which Treasury asked for public comment were the costs and benefits of overlapping state and federal regulation and the strengths and weaknesses of having multiple regulators of the financial markets. (It can be as simple as the SEC using the term “adviser,” as in the Investment Advisers Act, while the CFTC uses the term “advisor,” as in commodity trading advisor; but it can also be more substantive, as demonstrated by the CFTC adopting amendments to its Rule 4.14, confirming that there is no need to look through private funds when counting clients for purposes of the 15 client exemption under the Commodity Exchange Act, at approximately the same time as the SEC adopted the hedge fund rule dictating exactly the opposite result. Other examples of conflicts under the rules are a strong bias reflected in CFTC rules toward requiring managers to disclose all past investment performance, as contrasted with a strong bias in SEC and FINRA rules and interpretations against the disclosure of past performance; and the seemingly countless different definitions of “U.S. person” and different tests of investor eligibility, each with their own set of subsidiary definitions, that apply for seemingly similar purposes under different SEC and CFTC rules.)

The Treasury Department release also asked the question whether U.S. regulators should move to a more “principles based” regulation, as has been notably championed by the Financial Services Authority in the United Kingdom. While it is good that Treasury is asking these types of questions, principles based regulation should not be viewed as an objective in and of itself. Principles based regulation can lead to even greater uncertainty and confusion if the principles are not clearly and adequately defined, and can have even worse consequences if the broader principles are not uniformly interpreted or enforced, or if industry insiders with established relationships with regulators gain an unfair advantage over industry newcomers without such relationships.

A useful distinction might be made between proscribed activity and prescribed activity. Where regulators want an industry to take affirmative action, the regulators have an obligation to specify clearly and in reasonable detail what they want the industry to do. On the other hand, where the regulators want to prohibit improper action, a simpler rule can often be written with adequate precision.

A classic example is insider trading. The SEC has historically been reluctant to propose a clear and concise definition of insider trading, on the reasonable premise that most industry participants know when they see it and know not to engage in it. On the other hand, SEC staff members have recently suggested in public forums that managers should do more to monitor communications among industry participants in an effort to prevent insider trading. Given that the free flow of information is essential to the operation of the financial markets, and given the impracticality (and in our culture undesirability) of monitoring individual conversations, it is very unclear what steps managers can or should take in this regard, or whether the potential benefits of any such actions would outweigh their costs.

Hedge funds will likely continue to grow and evolve, and so should the regulatory response. But the regulatory response should be tailored to the objectives that it is trying to accomplish, and sensitive to the costs that it imposes on managers.
Congress Enacts CFIUS Reform Legislation

By Thomas E. Crocker and Joe D. Whitley*

On July 26, 2007, President Bush signed into law the Foreign Investment and National Security Act of 2007 (the “Act”). The Act was the culmination of a long-awaited effort by Congress to reform the procedures for national security reviews of foreign direct investment in the United States conducted by the interagency Committee on Foreign Investment in the United States (“CFIUS”). As enacted, the legislation is essentially based on a bill previously approved by the House of Representatives. It does not contain provisions in an earlier Senate version that U.S. industry found objectionable. Most importantly, it maintains the confidentiality of the CFIUS review process and involves Congress in that process only in an oversight role, with after-the-fact reports. It thus minimizes the potential for politicization of the CFIUS review process.

Deputy Secretary of the Treasury Robert M. Kimmitt characterized the Act as “well balanced.” He stated that the bill updated CFIUS, while appropriately striking the balance between national security and the administration’s policy of promoting open investment. Indeed, many of the changes made by the Act had already been implemented in practice by CFIUS in the wake of the DP World controversy. For example, CFIUS has already in practice interpreted “homeland security” and “critical infrastructure” to be relevant components of “national security” subject to CFIUS review. Moreover, high political-level departmental officials have involved themselves more directly in CFIUS reviews, and Treasury has stepped up its efforts to provide Congress with timely information on completed reviews.

Nonetheless, the Act makes a number of subtle but potentially important modifications to the CFIUS process. Highlights of the legislation include the following points:

The Department of the Treasury remains the chair of CFIUS and, under the Act, has a newly created Assistant Secretary specifically responsible for CFIUS reviews.

In a change to current CFIUS procedures, the Act requires the designation of a “lead agency” or agencies for each transaction that, in addition to the Department of the Treasury, would negotiate any mitigation agreement or conditions and be responsible for following up on compliance with the terms of any such agreement after the transaction has been approved by CFIUS.

While maintaining the current CFIUS 90-day timeline for full reviews, investigations and decisions, the Act requires a mandatory 45-day full investigation when, among other things, a foreign government or entity controlled by a foreign government is the acquiring company or if the transaction would result in foreign control of “critical infrastructure” and “could impair national security.” The Act thus mandates implementation by CFIUS of the Byrd Amendment, which was enacted in 1993 and intended to require full investigations in the case of foreign government acquisitions but which successive Democratic and Republican administrations had skirted implementing.

However, the Act provides an exemption to the above requirement if the secretary or deputy secretary of the Treasury and the equivalent level official in the “lead agency” determine that national security will not be impaired by the transaction. The Act thus provides an escape valve that can be exercised only by the highest political levels of the core agencies involved in the CFIUS review.

The Act formally expands the concept of “national security” to include “issues relating to homeland security,” including its application to critical infrastructure.” The Act additionally defines “critical infrastructure” to include “systems and assets, whether physical or virtual, so vital to the United States” that their “incapacity or loss” would have a “debilitating impact on national security.” As a result, broader categories of acquisitions are likely to require CFIUS review and full investigation than previously was the case. Examples might include anything from roadways to telecommunications to power plants to banking and finance — all “critical infrastructure.” The breadth and vagueness of these concepts will, as has already been the case, likely increase the need for informal pre-filing consultations with CFIUS to determine whether or not a particular acquisition implicates “critical infrastructure.” The Act requires assessment of a country’s compliance with U.S. and multilateral counter-terrorism, nonproliferation and export control regimes for acquisitions by state-owned companies in the investigation stage. Thus, a country’s record of diverting U.S. technology or goods or of not cooperating with U.S. counterproliferation efforts could impact CFIUS reviews and necessitate mitigation measures to address such concerns or even disapprovals of acquisitions. If CFIUS approves acquisitions without dealing with these issues it will almost certainly open itself to congressional criticism once again.

In a move that could open the door to Congressional opposition to transactions by Middle Eastern acquirors, the Act requires an annual study on foreign direct investment in the United States, especially in “critical infrastructure,” by foreign governments or persons in foreign countries that comply with any boycott of Israel or that do not ban organizations designated by the Secretary of State as foreign terrorist organizations.

The Act enhances the role of the Director of National Intelligence continued on next page

* Partners, Alston & Bird. For further information on this topic, contact the authors at their Washington, DC offices.
thorough analysis of the transaction with requiring the Director to undertake a ex-officio member of CFIUS and (“DNI”) by making that person an national security implications and report such findings to CFIUS within 20 days of the commencement of the CFIUS review.

Importantly, the Act provides for written notice to Congress at the conclusion of the CFIUS process for both reviews and investigations. The notice would provide details about the transaction and any mitigation agreements or written assurances. The Act does not require notification to Congress of pending cases.

The Act also requires detailed annual reports to Congress on CFIUS’s activities, including information concerning transactions that have been reviewed or investigated during the previous 12 months.

The Act requires the tracking of any withdrawn transactions to prevent potential risks that might have been identified.

The Act provides for monitoring of mitigation agreements, whereby CFIUS or the president may reopen a case if a party to a mitigation agreement intentionally commits a material breach of that agreement. (CFIUS’s use of mitigation agreements has increased significantly in recent years.) The reopened review could result in additional mitigation requirements or the unwinding of the transaction. Previously CFIUS could reopen a review only if there were a material omission or misstatement by one of the parties during the review period. Now, the obligation to comply with mitigation agreements is ongoing (so-called “evergreen” agreements, a practice that CFIUS has incorporated in a number of mitigation agreements in practice during the past year).

The Act requires CFIUS to publish regulations within 180 days that would impose civil penalties for violations of mitigation agreements or other conditions imposed as part of a CFIUS approval.

The net effect of the Act is to codify what has become standard CFIUS practice in the wake of the DP World issue. It therefore should not dramatically change the process or climate for reviews of foreign investments from the way they are currently conducted. However, its inclusion of a broad concept of “critical infrastructure,” as well as its requirement of a mandatory full investigation in the case of foreign government acquisitions, will ensure that CFIUS will be examining more transactions, and those transactions more thoroughly, in the future.

The larger question is whether the Act will allay the need for potential acquirors to continue to vet their individual transactions directly with potentially concerned members of Congress in advance of filing with CFIUS, a trend that has increased dramatically in the wake of DP World. If individual members of Congress are willing to disengage on these issues and allow the Act to work in practice, the Act could serve a salutary function in depoliticizing the CFIUS process as it currently exists.

However, it is not clear that that will be the case. Notwithstanding passage of the Act, various members of Congress and senior Congressional staff have already voiced concerns about foreign government influence over security-related sectors of the U.S. economy, citing as particular concerns state-run investment pools known as “sovereign wealth funds” and individual transactions, such as Dubai International Capital’s recent acquisition of a stake in the large European defense firm EADS, which has investments in the United States, and Kazakhstan’s acquisition of a 10 percent share in Westinghouse Electric.

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Spoiled Food or Broken China?  
FDA Committee Examines  
Food Safety Crises

By Jim O’Reilly*

If you’re concerned about issues of safety of the U.S. food supply, it’s not enough to be just concerned about exports of food from China. No, it’s the virtual atrophy of our national system of screening and supervision of food imports that should really draw public concern. The U.S. Food & Drug Administration’s ability to detect and mitigate the problems of fraud and unsafe ingredients in imported food has been compromised by a decade of fiscal neglect, and needs substantial federal investments.

The dialogue within the ABA and other organizations concerned about the regulatory environment has sharpened in recent years as budget decisions have reduced what had been a vigorous safety protection system. Our national infrastructure to defend consumer food safety has been allowed to decline, as the federal capacity to inspect incoming food shipments and the availability of government testing laboratories to perform safety testing has been allowed to diminish. Perhaps this mattered less when industry was paying to do more. The food processing and marketing companies have squeezed their cost structures so much, that the gaps in public funding for food safety have not been adequately replaced by sufficient private safety protections. The belief that “Surely somebody’s watching out for us…” and other public expectations that food safety was being assured by someone in the system have collided with this budget reality during major publicity about human and pet food recalls in summer 2007. The disappointments about certain imported food ingredients, and media spotlights on domestic food safety surveillance gaps, drew major publicity and a little belated attention from the Congressional appropriators at the end of the 2007 session.

These were the principal observations from a standing room only panel presentation at the Fall 2007 Administrative Law Conference. The Section’s Committee on Food & Drug Law brought together subject matter experts and leaders on import safety, and found lively audience participants willing to interact vigorously for the benefit of our live and teleconference attendees. Food sustains life, and food safety issues draw a large audience.

FDA Assistant Commissioner David Acheson provided the perspective of the regulatory agency most responsible for import safety. He explained the outages in the system were not solely China’s problems and that FDA hoped for greater cooperation as the new FDAAA legislation rolls into effect. (The new FD&C Act §417 imposing stronger food recall powers takes effect in October 2008.) Dr. Acheson was followed by Nancy Bryson, former General Counsel of the U.S. Department of Agriculture and now a leading food industry advisor at Bryson Law Group. Ms. Bryson explained the systems USDA has utilized to deal with domestic and imported food safety concerns. Both perspectives emphasized that the flow of imports has grown well beyond the staffing and laboratory capacity of current federal agencies, and their current levels of appropriations. Fully funding the import scrutiny needed will require substantial food industry support and lobbying efforts addressing the needs of the FDA.

The 2007 problems with some Chinese food ingredient sources are just a small symptom of problems associated with the worldwide dispersal of U.S. food sourcing. State and local regulators, who perform 80% of the nation’s food inspections, have a vital role. North Carolina’s chief food safety expert, Joe Reardon, provided panel members with the perspective of state officials, urging that the Congress must share additional support for the food safety functions and especially for laboratory capacity.

Food industry responsibility was addressed by Steve Gruler of Global Quality Consultants, a Michigan food safety consultancy. There are fewer than 8% of food companies that carry product recall insurance, according to current statistics, so the huge liabilities that come with recalls based on contamination may overwhelm a company’s ability to survive. Collapse of the nation’s largest hamburger maker in 2007, the now-bankrupt Topps Meats, served as a somber warning to the food industry. Senator Sherrod Brown’s proposal to make product recall insurance mandatory would have some significant impacts on food and consumer goods importers.

Audience participants from nongovernmental organizations pressed FDA for more action. Food consumer organizations have been cautious about accepting the Bush administration responses, urging Congress to improve norms for food import requirements and asking for the appropriation of more funding for the FDA border inspection and laboratory functions. (The legislation passed subsequent to the Fall Meeting strengthened FDA enforcement options and the HHS annual appropriation bill was expanded by Congress to allocate more spending on border inspections of incoming food.)

* Chair, FDA Committee; Professor, University of Cincinnati College of Law.
Donna Shalala on Presidential Transitions In Agencies

By Cynthia A. Drew*

Nomination as Secretary

Drew – How did President Clinton come to select you as his Health and Human Services (HHS) Secretary?

Shalala – It was funny. The President never mentioned the job — he interviewed me the first time without saying what job he had in mind.

I think he thought he was going to talk me into being Secretary of Education or Secretary of Housing and Urban Development (HUD). But I knew Henry Cisneros wanted HUD, and I knew there were lots of Governors who wanted Education. I really didn’t want to go down to DC for Education. Neither HUD nor Education were big players in Washington. I wasn’t anxious to go to Washington just to be a Cabinet officer. So he didn’t offer HHS until I went back — and they were ready for the press conference announcing it.

Essentially, I came back for a second interview and the President finally mentioned HHS, explaining that he hadn’t before because he hadn’t yet talked with Jocelyn Elders — he was going to make her the Surgeon General. But I said, we had a Surgeon General [Antonia Novella]. (I remember this conversation well.) He said what do you mean? I said we already have one, I think she has a term, and you better go check. Well, she did. She had a term. She had two more years. So I had to call her up and ask her to step down. She was very gracious, and we later became friends.

Staffing Health and Human Services

Drew – How did you negotiate management of your Department with President Clinton? Did you tell him you wanted to hire your own people?

Shalala – Well, we did have a conversation about management. And he wanted us to hire up pretty quickly. But I also knew the people he knew, and I thought if I could get David Ellwood and Mary Jo Bain from Harvard and some others we both knew, it would be fine. So I rounded up the usual Democratic suspects, plus others who were new names.

Drew – Because you knew they’d be acceptable?

Shalala – Yes, and I knew if I picked a Chief of Staff out of the campaign, that person could handle the politics of hiring people from the campaign. I told him what my strategy was: to hire everybody under 30.

Drew – Did you share that strategy with President Clinton?

Shalala – No, I didn’t tell the President because I knew the President wasn’t going to follow up on which people I hired from the campaign. But some of his people were. So by the time we told them we had taken a dozen people initially from the campaign and we were going to take another dozen, they didn’t have any time to push people on us because we were already rolling.

* © 2008 Cynthia A. Drew, Ph.D., J.D. Professor Drew is an environmental attorney, certified Florida circuit civil court mediator, and associate professor of law at the University of Miami School of Law.
Specifics of HHS Transition

**Drew** - How did you and the committee handle the specifics of President Clinton's and your transitions – not only in staffing up, but also in getting right down to work?

**Shalala** - What happens in a transition is that all sorts of Democrats or Republicans in the states get appointed to help with the transition. It's a way in which candidates can reward their supporters. It's a big thing to be named to a transition committee for a President – often it's people who have served before in a previous administration. Usually, the President-elect will staff people, some lawyers, and what they are really supposed to do is to lay out for the new President what are the first things s/he wants to do and what the big issues are — and often also prioritize the issues.

For example, some of the analysis I got was on abortion. We wanted to roll back a whole series of executive orders. We were also caught up with the fact the Family Medical Leave Act was about to pass. The President had to push it. So there were a series of initiatives that we could reverse by executive order which the HHS general counsel, the attorney general's office, and the counselor to the President wanted to get right to — so the President had that series of initiatives he had promised. The transition committee identified all that.

The committee also made recommendations on structure. But on those they knew less than I did, and the last thing I wanted to do was follow those recommendations. Almost all the recommendations I got about how you can get control of the Department suggested adding an extra political layer.

I simply said No — in my Department I refused to take pure political appointees with no experience in the substance areas for the appointments. So the first thing I did was to scamper to an old friend of mine who was then a professional head hunter and who had been in the White House personnel office in the Carter Administration, Tom Goodwin. Actually, Tom had gone from being my executive assistant when I was assistant secretary at HUD in the Carter administration to the Administration's personnel office. But, as soon as President Clinton nominated me for HHS, Tom actually got his staff to take over his private job and came over for two weeks, and we just interviewed people. Then I went to the President and the Vice-President with my list — long before there was a White House personnel office — and got their sign off.

**Drew** - So in your list you named your desired staff for a wide range of positions?

**Shalala** - These were assistant secretaries, under-secretaries, heads of agencies. For instance, Al Gore and I had talked about keeping David Kessler at Food and Drug Administration (FDA), and it appeared in the paper long before Gore had a chance to talk to Clinton. But I knew that Kessler was a friend of Gore's, and I wanted to keep Kessler. First, he was a Democrat, and, second, he was very good at what he did. At the Centers for Disease Control (CDC), I had a pretty good sense I wanted David Satcher. I knew I wanted a couple of people from Harvard, Mary Jo Bain and her colleague David Ellwood. Mary Jo came over to be the assistant secretary for families and children, which meant that she was going to run Headstart, childcare, welfare, etc. David was to be assistant secretary for planning and evaluation, the policy job.

I wanted either Jim Tallon or Bruce Vladeck to run Medicare/Medicaid. Jim Tallon had been my classmate at Syracuse, a state senator in New York and chairman of the health committee – a long-time expert in health. But he didn't want to move because he was thinking of running for governor. So Bruce Vladeck came – another major expert, head of the New York hospital association. He had been deputy commissioner of health in New Jersey, and was a major figure in Medicare/Medicaid policy.

Then Phil Lee, who had been assistant secretary for health in two previous administrations [Presidents Johnson’s and Carter’s] came from California to help me staff up on the public health side. I had actually wanted Jo Ivy Bufford, who had been head of the New York City health and hospital corporation, to take that job. But she wanted the deputy's job, the chief operating officer for public health — she did not want to bother with confirmation. So I said take whatever job you want. She's one of the most skillful public health managers I know, and is now head of the New York Academy of Medicine. Phil Lee was a very distinguished public health leader, an M.D. So thankfully he agreed to stay.

By then Jocelyn Elders was coming up for confirmation as Surgeon General, and we scampered again to get her a whole set of people with various experiences. A couple of people like Olivia Golden came over from the children's defense fund. The deputy secretary, Walter Broadnax, was an African-American public administration expert. The chief of staff, Kevin Thurm, a Rhodes scholar, came out of the campaign. I did not know him before, but Harold Ickes recommended him. He was extraordinary.

**Drew** - How long did this process of identifying your key staff take you?

**Shalala** - My deputies all had to be confirmed, of course, but I got them cleared with the President and the Vice-President very fast. So then we got their files organized, sent up to the Hill. Senator Pat Moynihan held up a couple of them (not because of credentials, but because of a beef with the White House), but most of them went through right

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Approach to the Hill

**Drew** - How was your relationship with the Hill during your early days as Secretary?

**Shalala** - It was always very good from the first moment I arrived in Washington. The first assistant secretary for legislation, Jerry Klepner, took me to the Hill on the day everybody was sworn in up there. We just went from office to office, Republicans and Democrats — saw the Members who sat on our committees. We focused on our committees.

So it was just a big hit for us to go around, and every two years we would do that. Jerry was succeeded by Rich Tarplin, who had a similar strategy. We would be on the spot. We would spend hours. But we took care of our own committee Members — the appropriations committees more than anything else. Those were the committees of concern to us. We got to know them pretty well, and that made a big difference.

Well, you know a newly elected Member of Congress has family there, and then a Cabinet officer walks in. It's a big thing. I mean I took a lot of pictures with people. Members of Congress appreciated the fact that I stopped by to congratulate them and to meet their constituency and their family members.

**Initial Challenges**

**Drew** - Once you and your key staff were in place, what did you do first?

**Shalala** - We had a lot of challenges on regulatory matters. They were just rolling out, one after another. Mostly we had a lot of health care reform stuff to do, and we wanted to do some initial reversals — obviously on abortion. Family planning was at that time a whole area we needed to straighten out. The decision had recently come down, so we had a whole bunch of things like the gag rules that we wanted to clean up. We did that very fast. I just sat there for weeks just signing, reversing things. Some had to be done by executive order of the President, but we dug all of that and did it very quickly. The women's groups, especially, were all very helpful on these issues. They were ready to go. So we had some rule changes we had to put in place fast.

**Collegial Relationship with other Cabinet Departments**

**Drew** - How did you work with President Clinton's Federal Emergency Management Director, Jamie Lee Witt — then a fellow Cabinet officer?

**Shalala** - He was great. We all worked for him. He was a very tough guy. But I had great admiration for him, and my staff came to admire him. He had a lot of crises. He taught me a lot about crisis management. But it was very collegial. That administration was very collegial. Very rarely would you see an agency fighting with another agency. We just didn't do turf stuff. We worked together on children’s issues, we tried to find things we could work together on.

Cabinet officers had very good relationships with each other. Many of us had known each other for years.

There was more tension on the international side, as you would expect. But even on that side most of them had known each other for years.

**Upcoming Presidential Transition**

**Drew** - Finally, whether we soon have a President Clinton again or a President Obama or a President McCain or even a President Huckabee, would you have any different advice for our next new President on how to handle the 2009 Presidential transition?

**Shalala** - No, I'd give the same kind of advice to any of them, that they’ve got to attract people to government who know what they are doing. They have to have a set of principles that they follow that includes transparency. If you don’t have transparency, you don’t have a sense of fairness in the agencies. The fundamental rule I think that agency heads have to follow is that we serve the President and we are passionate about the President’s policies, but we are confirmed and put in office to serve the American people and, at the end of the day, they are not Republicans or Democrats. So agency heads have to just try to do good and be extremely careful to be fair. So, when you write a rule, it cannot be for one group. It's got to be for everybody, and that means you have to consult with everybody — if necessary, to stand up to the political people to do that.

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“Mathews or Matthews?”

I’ve been struck by my students’ persistent substitution of “Matthews” in the case name of the famous 1976 procedural due process case, *Mathews v. Eldridge*. But they are not alone. In doing a Westlaw search on February 11, 2008 of “all federal cases,” I discovered that 7.6% of the cases made the same mistake (369 out of a total of 4830 cases).

Alas, law journal writers were even worse, with 15.8% of the articles containing the Matthews mistake (553 of the total 3493). The fact that the first name is most problematic is shown by the fact that there were only 6 cases and 7 articles where “Eldridge” was spelled “Eldredge.”

I attribute this to the “Dave Matthews Band” effect.

Jeffrey Lubbers, Washington College of Law, American University
The Cycle Continues: Congress Amends the FOIA in 2007

By Daniel J. Metcalfe*

On New Year’s Eve, when most Americans were welcoming in a presidential election year, those in the openness-in-government community were waiting to learn what the current president would do with the package of Freedom of Information Act amendments that Congress had passed despite Administration objections just prior to the end of its 2007 session.

President Bush could have vetoed the bill (S. 2488), though it no longer contained an arguably unconstitutional penalty provision for agency time-limit violations. He could have signed it, perhaps with one of his controversial “signing statements” designed to lay a foundation for eliding one or more of its provisions. He even could have allowed the bill to become law without his signature, under Art. I, Sec. 7 of the Constitution, given that the Senate technically was not “in recess.” But he simply signed it without fanfare, and at nearly the last minute, thus ensuring that the “2007 FOIA Amendments” would join previous ones in a near-perfect 10-year cycle of legislative activity stretching back to the enactment of the Administrative Procedure Act (APA) in 1946.

Not that these amendments to the FOIA are as comprehensive as the previous ones made in 1974, 1986, and 1996. In fact, the 2007 FOIA Amendments are entirely procedural in nature and contain absolutely nothing sought by federal agencies as a needed reform from their own perspective — hardly what one might have expected of the first major post-9/11 FOIA amendments.

Yet they nevertheless include several points of ambiguity and uncertainty that can be expected to breed litigation for years to come. Among them is a new attorney fee standard that, viewed on its face, might alter the litigation landscape more than was expected during the legislative process. Likewise, a revised definition of “agency record” that newly encompasses many records held by government contractors has a facial breadth that should spawn much litigation if it is implemented too narrowly. And no small amount of controversy — albeit largely political, not interpretive — surrounds a novel provision that unambiguously establishes a new government-wide FOIA policy office within the National Archives and Records Administration.

New Provisions

These new FOIA provisions, which stem from a rare bi-partisan effort begun early in 2005 by Senators Patrick Leahy (D-Vt.) and John Cornyn (R-Tex.), fall into the following ten categories:

**New Attorney Fees Standard.** One of the primary driving forces of the 2007 FOIA Amendments was the strong dissatisfaction of media groups and other representatives of the FOIA-requester community with the availability of attorney fees in FOIA cases. When the Supreme Court rejected the longstanding “catalyst theory” for fee-shifting statutes such as the FOIA in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), that had the effect of limiting the circumstances under which FOIA plaintiffs could be awarded attorney fees and costs to only those involving formal court orders, a considerable curtailment. Members of public interest groups soon began complaining about agencies’ new-found ability to withhold records until the midst of litigation and then release them in advance of such a court order, contrary to the spirit if not the letter of the FOIA’s attorney fee provision, which provides for fees if a requester has “substantially prevailed.” 5 U.S.C. § 552(a)(4)(E).

Congress addressed this head-on, and it did so by going so far as to explicitly define, for the first time, what is meant by its “substantially prevailed” standard: “…a plaintiff has substantially prevailed if the complainant has obtained relief through either — (I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant’s claim is not insubstantial.” 5 U.S.C. § 552(a)(4)(E); as amended by Pub. L. No. 110–175 (effective as of Dec. 31, 2007). By taking such a big step, Congress certainly took care of the Buckhannon problem, yet in so doing it provided an opportunity for FOIA requesters to now argue that courts should award them fees once this distinct new standard is met, regardless of any other consideration, especially as there is nothing in the amendments’ sparse legislative history that prevents that. To be sure, the statute says that courts “may” award FOIA fees, which means that judicial discretion always is involved, but the very large body of FOIA case law that preceded this major legislative action now may be called into

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question by FOIA plaintiffs in future cases. Exactly which cases those soon might be is another issue that evidently will require adjudication. Like most of the amendments’ provisions, this new attorney fee standard silently took effect immediately upon enactment. But the Department of Justice soon thereafter signaled its intention to resist its applicability to cases that are already pending. On this question of “retroactivity” under the FOIA, the government previously had taken the position that legislation enacted during the pendency of litigation could be applied to a FOIA plaintiff’s disadvantage — that, for example, newly enacted Exemption 3 statutes could be invoked by an agency to withhold otherwise nonexempt information even if they were enacted as late in the day as while a case was pending in a court of appeals. See, e.g., City of Chicago v. ATF, 423 F.3d 777, 783 (7th Cir. 2005) (applying new Exemption 3 statute retroactively to pending cases); Sw. Ctr. for Biological Diversity v. USDA, 314 F.3d 1060, 1062 (9th Cir. 2002) (same).

Now the question is whether the government is entitled to the exact opposite result when the shoe is on the other foot, so to speak, and the new legislation benefits the other party. The basic justification for the government trying to “have it both ways” under the FOIA is that it is a waiver of sovereign immunity, so evenhandedness is not necessarily required. Such a position, if accepted by the courts, would unexpectedly defeat the immediacy of Congress’s Buckhannon fix. However, what it overlooks, among other things, is that when the FOIA’s attorney fee provision itself originally was enacted, as part of the 1974 FOIA Amendments, this same sovereign immunity argument was made by the government, in the same kind of effort to forestall the awarding of FOIA fees, and it was firmly rejected. Cuno v. Rumsfeld, 533 F.2d 1360, 1363-64 (D.C. Cir. 1977) (holding new FOIA attorney fees provision applicable to any “action which is terminated after [its] effective date”).

Prohibitions on Agencies Charging Fees. Another new provision deals with fees of a different kind. For a long time, representatives of the FOIA-requester community have urged Congress to enact some sort of “penalty provision” within the FOIA as a means of indirectly enforcing agency compliance with the Act’s time limits. Previous bills in the 109th and 110th Congresses had even gone so far as to propose that agencies be forced to waive the applicability of FOIA exemptions for their time-limit noncompliance, with insufficient safeguards for private interests and those of constitutional dimension, but that unrealistic approach ultimately yielded to the idea of penalizing agencies through the FOIA’s fee structure instead. (A miscellaneous 2007 FOIA Amendments provision specifying that attorney fees henceforth will be paid out of an agency’s own budget, see S. 2488, Sec. 4(b) (likely to be codified in title 31 of the United States Code), has been called by some an additional attempt to “penalize” agencies into better FOIA compliance, but it actually is not; the legislative record is clear that it was merely a last-minute procedural device designed to comply with technical “PAYGO requirements” in order to ensure passage in the House.)

What Congress did instead was to provide that “if [an] agency fails to comply with any time limit” of the Act, its penalty is loss of its right to charge search fees for that FOIA request, no matter what type of requester is involved — even a commercial requester. 5 U.S.C. § 552(a)(4)(A)(viii). And for the types of FOIA requesters who under the provisions of the 1986 FOIA Amendments are not obliged to pay search fees to begin with (such as representatives of the news media and academic requesters), the penalty is the complete elimination of duplication fees, no matter how many thousands of document pages or items of electronic media are involved and no matter how long the applicable fee would be.

While this penalty provision does not take effect until the end of this year (i.e., by applying to requests filed on or after December 31, 2008), anyone who regularly files FOIA requests should recognize that it holds enormous potential for affecting the administration of the Act. At many agencies, regular compliance with the Act’s 20-working-day deadline is beyond their reach even for the simplest of requests. And at any other agency, even one so small that it never or hardly ever runs a “backlog,” the next FOIA request to arrive could always be so large and/or complex that the same result obtains — especially if that requester were interested in enjoying a new freedom from search and/or copying fees. This of course applies to the Act’s 20-working-day deadline for adjudicating administrative appeals as well. In fact, because this new provision speaks of “any time limit,” it should not be overlooked that it also encompasses an agency’s failure to make a timely response to a request for “expedited processing,” which under the 1996 FOIA Amendments must be done within ten calendar days. See 5 U.S.C. § 552(a)(6)(E)(i)–(ii). This last aspect alone could be used by many FOIA requesters, especially “representatives of the news media” (as newly defined — see below), to impose upon agencies quite a penalty indeed.

The only caveat to this is that Congress left the door open to the possibility of an exception. With an oddly structured formulation, this provision imposes the new penalty “if” there is a deadline failure and then “if no unusual or exceptional circumstances … apply to the processing of the request.” 5 U.S.C. § 552(a)(4)(A)(viii). It remains to be seen, of course, to what extent agencies will attempt to seek refuge in this terminology, let alone succeed with it in litigation. One of its two terms, “exceptional circumstances,” refers to the standard applied by courts in litigation to determine whether an agency is entitled to a so-called Open America stay of judicial proceedings, see 5 U.S.C. § 552(a)(6)(C)(i)–(ii), so it is difficult to imagine it operating at the administrative level where fees are first set as a practical matter. The other term, “unusual circumstances,” is the longstanding statutory standard by which an agency, if such circumstances do exist, invokes an additional ten working days to respond to a request, see 5 U.S.C. § 552(a)(6)(B), something that agencies with time limit problems hardly ever bother doing. Furthermore, the statute not only contemplates agencies sending requesters timely “unusual circumstances”
letters when such circumstances do exist (letters which must specify an exact date for the extended response), it also quite pointedly commands that "unusual circumstances" be used by agencies "only to the extent reasonably necessary to the proper processing of the particular requests." 5 U.S.C. § 552(a)(6)(B)(iii). At a minimum, FOIA processing is likely to become far more interesting due to this new provision.

Contractor Records. A quite novel provision in these amendments is their extension of the FOIA to records maintained not by federal agencies but by federal contractors instead. This is accomplished by supplementation of the Act’s definition of “agency record” to more expansively include information “that is maintained for an agency by an entity under Government contract, for the purposes of records management,” 5 U.S.C. § 552(6)(B), as amended by Pub. L. No. 110-175 (effective as of Dec. 31, 2007), language that may be read either broadly or narrowly. While there are indications in the legislative history of this language that it was meant to be given a relatively narrow construction, i.e., applying only where an agency contracts out its “records management” functions per se, it nevertheless is broad enough on its face to potentially include a much wider range of contractor records under the FOIA.

For example, the federal government now engages in the “contracting out” of many agency functions in accordance with the dictates of OMB Circular A-76 (as revised in 2003), which necessarily involves the removal of records pertaining to those functions from the FOIA’s ordinary reach. The information in such contractor records typically is maintained “for an agency,” and any such contractor regularly maintains information, in the words of the definition’s separate second clause, for “purposes of records management.” It is unclear why this new definition would not readily encompass all types of records now held by contractors instead of agencies, lest they be removed from FOIA coverage merely by dint of a “contracting out” enterprise.

Also unclear is how a novel thing such as this might work in actual practice. Generally speaking, FOIA requesters know that they should make their requests to the agency (or in some cases agency component) that maintains the records sought, and agencies are obligated to search through their records for any that are responsive to a FOIA request’s terms. With the universe of records that are subject to the FOIA suddenly broadened by this provision, however, this becomes a much more complicated enterprise, far outside the norm for the FOIA’s usual administration, and it raises a host of questions. For instance, how will FOIA requesters gain the full benefit of this “agency record” expansion? Should they make their requests to an agency’s contractor, to the agency itself, or perhaps even to both? How can both requesters and agencies best ensure that adequate record (and electronic information) searches are in fact conducted with respect to this new statutory provision? And looking forward, will all disagreements over interpreting the new definition’s scope properly be preserved for litigation? When this provision took effect upon its enactment, agencies became obligated to promptly amend FOIA regulations to address such questions (regulations which ought to be uniformly from one agency to the next) in order for the provision to be properly implemented.

Agencies also are obliged to put potential FOIA requesters on notice of the records that now can be sought by them under this provision. Indeed, under requirements that were added by the 1996 FOIA Amendments, each agency must maintain and promptly update a FOIA reference guide for the benefit of potential FOIA requesters, one that serves as “a guide for requesting records or information from the agency” and addresses the “various types and categories” of records that are requestable there. 5 U.S.C. § 552(g). Inasmuch as this broadened “agency record” definition already is in effect, agencies now are out of compliance with this legal requirement as well.

Definition of “Representative of the News Media.” In another provision pertaining to the charging of fees, Congress also defined the term “representative of the news media,” which became a major part of the FOIA’s multi-tiered fee structure though the 1986 FOIA Amendments. It did so largely by combining and codifying the pertinent language of two sources — the government-wide fee guidelines that the Office of Management and Budget (OMB) issued by legislative direction in the wake of those amendments, see OMB Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,012, 10,018 (Mar. 27, 1987), and the D.C. Circuit’s FOIA fee decision in National Security Archive v. DOD, 880 F.2d 1381, 1383-85 (D.C. Cir. 1989). See 5 U.S.C. § 552(a)(4)(A)(ii), as amended by Pub.L. No. 110-175 (effective as of Dec. 31, 2007). But the combined codification language that Congress used is not exactly the same as what appears in those two sources, and it certainly differs from the content of existing agency regulations — which means that agencies urgently need to amend their FOIA regulations for this purpose also, and OMB should finally update its 20-year-old government-wide fee guidelines as well. This must happen without delay for proper implementation.

A controversial question left unresolved by this statutory definition is whether “bloggers” qualify as “representatives of the news media.” Much to the disappointment of many, they are not mentioned in Congress’s lengthy definition of the term, or even in the only committee report underlying the amendments, a Senate report dating back to April 30, 2007. Here, too, implementation regulations issued pursuant to APA notice-and-comment procedures should confront this, particularly by considering the significance of repeated individual statements by the provision’s Senate sponsors that their definition “will not automatically exclude” such requesters. This new definition also could hold significance for the granting of “expedited processing” under a provision added by the 1996 FOIA Amendments, as mentioned above, insofar as both parts of the statute now speak to the process of “disseminating information” to the public, 5 U.S.C. § 552(a)(6)(E)(v)(II), and agencies should be consistent in

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their implementation of the two provisions.

**Office of Government Information Services.** Congress took another novel step in the 2007 FOIA Amendments that almost immediately became controversial: It created a new office to deal with matters of government-wide FOIA policy, the “Office of Government Information Services” (OGIS), and it placed it within the National Archives and Records Administration (NARA). Without mentioning the existing office that for decades has guided government-wide policy under implied statutory authority -- the Justice Department’s Office of Information and Privacy (OIP), see 5 U.S.C. § 552(e) (6) — Congress mandated that this new government-wide FOIA policy office be established to “review” all agencies’ FOIA “policies and procedures,” to likewise review agencies’ FOIA “compliance,” and then to “recommend policy changes to Congress and the President to improve the [FOIA’s] administration.” 5 U.S.C. § 552(h)(1)-(2). This office also is to play a new statutory “ombudsman” role under the FOIA by “offer[ing] mediation services” and if need be “issu[ing] advisory opinions.” 5 U.S.C. § 552(h)(3). What’s more, while these five functions necessarily would have to be discharged with existing NARA funding at least at the outset, Congress pointedly specified, alone among all other parts of the bill, that the section containing this mandate “shall take effect on the date of enactment.” S. 2488, Sec. 10(b), Pub. L. No. 110-175. At a conference held at American University Washington College of Law on January 16, NARA General Counsel Gary M. Stern recognized this “unfunded mandate” as immediately applicable, leading to the question of whether NARA might be able to get additional support for it through OMB in the Administration’s upcoming FY 2009 budget. This subject also was addressed at a counterpart conference held by the Justice Department later that day, but it reportedly leaked out that the Administration’s budget might instead attempt to “shift” funding to the Justice Department for this purpose, contrary to the mandate of the statute. Senators Leahy and Cornyn, thus alerted, each seized the opportunity to press new Attorney General Michael B. Mukasey on the point at an oversight hearing held on January 30, but to no avail.

On February 4, the Bush Administration’s last budget was released and it contained no proposed funding for OGIS at NARA. Rather, in provision tucked at the end of an appendix dealing with the Commerce Department (where it presumably would have been able to escape detection had no one been alerted), the Administration proposed that the new OGIS functions be discharged by the Justice Department (i.e., OIP), not by NARA, and that, as part of the appropriations process, new subsection (h) of the FOIA be repealed. Predictably, such an ironically transparent gambit raised a furor in the FOIA-requester community, drew a sharp response to OMB from Senators Leahy and Cornyn, and led to increased media scrutiny of the relative neutrality of Justice and capabilities of OIP. As it now stands, it appears that the Administration will treat the OGIS mandate as if by entangling it in a lengthy appropriations process, even if no longer covertly, it can “run out the clock” on this year. But Congress, which is expected to hold FOIA oversight hearings in both the House and the Senate this spring, may have other ideas.

**Executive Order Codification.** In a far less controversial vein, Congress also codified and thus perpetuated several elements of the executive order on the FOIA that was issued two years ago, such as all agencies having a “Chief FOIA Officer,” a “FOIA Public Liaison,” and a “FOIA Service Center” (previously “FOIA Requester Service Center”). 5 U.S.C. § 552(j), (k), (l) (codifying, in part, Exec. Order No. 13,392). Agencies are statutorily required to comply with these requirements now, though in what appears to be a drafting error Congress included a separate “FOIA Public Liaison” provision that is largely duplicative and was not effective upon enactment. See 5 U.S.C. § 552(a)(6)(B)(ii), as amended by Pub. L. No. 110-175 (effective as of Dec. 31, 2008).

**Tracking Information on FOIA Requests.** Mandating something else that long had been sought by FOIA requesters, Congress also required agencies to establish a formal “tracking system” for their FOIA requests by the end of the year, one that will allow requesters to obtain “information about the status of [their] request[s]” through “a telephone line or Internet service.” 5 U.S.C. § 552(a)(7). Although the Justice Department advised all federal agencies in January that this provision, too, just “codifies existing requirements set forth in Executive Order 13,392,” in fact it does much more than that: It compels an agency to come up with “an estimated date on which [it] will complete action on [a] request,” a date that for first time must be calculated and made readily available to FOIA requesters. 5 U.S.C. § 552(a)(7)(B)(ii).

**Time Limit Procedures.** Speaking of new complexity, and perhaps difficulty, the 2007 FOIA Amendments introduce a brand new statutory term to the Act — the “tolling” of time limits during the pendency of an agency’s request for information from the FOIA requester. 5 U.S.C. § 552(a)(6)(A)(ii), as amended by Pub. L. No. 110-175 (effective as of Dec. 31, 2008). They disjunctively provide that an agency “may make one request to the requester for information and toll” the Act’s basic 20-working-day time limit if the information sought from the FOIA requester is “reasonably requested” by the agency “or ... if necessary to clarify with the requester issues regarding fee assessment.” 5 U.S.C. § 552(a)(6)(A)(ii)(I)-(II). “In either case,” this amendment goes on to specify, “the agency’s receipt of the requester’s response to the agency’s request for information or clarification ends the tolling period.” 5 U.S.C. § 552(a)(6)(A)(ii)(I)-(II). While the Justice Department in January suggested to other agencies that they may seek to toll the Act’s time limits with multiple information requests to their FOIA requesters, “in stages,” the language of this amendment says otherwise. (At stake in this, of course, will be the triggering element of time-limit noncompliance for purposes of the potent “penalty” provision discussed above.)
This amendment also makes clear that the Act’s basic response time commences upon a request’s receipt at the appropriate component of an agency, or no more than ten days after its receipt at “any component of the agency that is designated [to receive FOIA requests] in the agency’s regulations.” 5 U.S.C. § 552(a)(6)(A)(ii).

Exemption Specification. The closest that Congress came in these amendments to touching on the FOIA’s exemptions is a provision that now mandates what can be called “exemption specification” — but it should not be overlooked. The Act now mandates that all agencies make it a standard practice to state “the exemption under which [a] deletion is made,” and to do so “at the place in the record where such deletion is made,” i.e., not merely in overall language contained in a responding cover letter. 5 U.S.C. § 552(b) (concluding sentences), as amended by Pub. L. No. 110-175 (effective as of Dec. 31, 2007). This significant requirement was added to the amendments near the very end of the legislative process, at the behest of the House, and it began to apply to all agency’s FOIA processing immediately upon enactment. In the absence of proper attention to it, however, it is doubtful that it is being implemented throughout the executive branch as it ought to be, with full and timely compliance. Indeed, the Justice Department itself just observed that this now is standard practice at only “some agencies.”

Reports. Lastly, the 2007 FOIA Amendments contain several provisions pertaining to FOIA-related reports, provisions which as a group: (1) make extensive revisions to the contents of annual FOIA reports, including as to new categories of response times, agency component breakdowns, data on administrative appeals (with inel- plicable variation between “days” and “business days”), and the long-sought addition of “average” to “median” time calculations, see 5 U.S.C. § 552(e) (1)-(2); (2) bolster the Act’s administrative sanction mechanism by requiring reporting to Congress by the Attorney General and the Office of Special Counsel in all such cases, see 5 U.S.C. § 552(a)(4)(F); (3) explicitly require the Government Accountability Office to issue reports on FOIA implementation, see 5 U.S.C. § 552(i); and (4) call upon the Office of Personnel Management (OPM) to report to Congress by the end of the year on “whether changes to executive branch personnel policies could be made that would,” among other things, bring about the “encouragement” and “enhance[ment]” of FOIA personnel, 5 U.S.C. § 552 note (likely codification). Interestingly, this latter report by OPM is to include consideration of the need for further FOIA “awareness training” of agency employees, and Congress asked OPM to consider this with respect to the Privacy Act as well. Id.

Most significantly, Congress did not delay the effectiveness of its new annual FOIA report requirements, which means that they were in effect for the month prior to agencies’ February 1 reporting deadline, but there is no indication that any federal department or agency made any effort to connect the two things at all. Much less, the Justice Department before that deadline suggested to other agencies that even at the February 1, 2009 reporting time they might file only “a partial year report” in relation to Congress’s current requirements. Also lacking was advisory focus on a new provision that, although set apart from the other annual reporting requirements, should prove to be very significant to those who analyze the FOIA’s administration (not to mention fairly distressing to agencies): “In addition, each agency shall make the raw statistical data used in its [annual FOIA] reports available electronically to the public upon request.” 5 U.S.C. § 552(e) (3), as amended by Pub. L. No. 110-175 (effective as of Dec. 31, 2007). Not only is this provision effective immediately, there is no good reason why it would not apply to all such statistical data, for years past, that doubtless many agencies still have on hand.

Conclusion
In sum, the 2007 FOIA Amendments hold more than enough complexity to threaten their proper implementa-

This time around, however, there are strong indications that Congress might “break the mold” of this 60-year legislative cycle by revisiting the Act sooner than 2016, possibly even right away. The chairmen of the committees holding FOIA jurisdiction in the Senate (Sen. Leahy) and the House (Rep. Henry Waxman) have made statements suggesting as much. Further, there is the fact that in 2007 Congress failed in its effort to include a quite popular amendment of one exemption, Exemptions, 3, due to an unrectified drafting problem (see Sec. 8 of S. 849, as passed by the Senate on Aug. 3, 2007) that left it providing the opposite of what was intended; it stands as the kernel around which more comprehensive FOIA reform amendments could readily be developed. Whether the development of such an amendment package would include the consideration of provisions proposed by agencies based on their own FOIA experience — something glaringly absent from the Bush Administration’s last-minute handling of the FOIA amendment process in 2007, despite its historical antecedents — remains to be seen.

One thing is certain, however: There are many people — members of the FOIA-requester community, members of Congress, and agency FOIA officers alike — who have sound ideas for the FOIA’s further improvement, ideas that should not wait another decade for careful consideration.
American Bar Association
Section of Administrative Law and Regulatory Practice
SPRING MEETING

April 11-13, 2008
Paris Hotel
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Meeting Details are online at
www.abanet.org/adminlaw
By Robin Kundis Craig*

In the last quarter, the U.S. Supreme Court has issued only a few opinions relevant to administrative law practitioners. Moreover, most of these opinions underscore the role of statutory interpretation in regulatory schemes.

For example, on December 4, 2007, a unanimous Court determined that, under the Railroad Revitalization and Regulatory Reform Act, railroads may challenge state methods for determining the value of railroad property for ad valorem tax purposes. *CSX Transportation, Inc. v. Georgia State Board of Equalization,* — U.S. —, 128 S. Ct. 467 (2007). The Court concluded that, in order to effectuate Congress’s purpose in the Act, “district courts must calculate the true market value of in-state railroad property.” *Id.* at 472. Such calculations, in turn, required that the federal courts be able to “look behind the State’s choice of valuation methods.” *Id.*

Interestingly, in overturning the Eleventh Circuit’s decision, the *CSX Transportation* Court discounted federalism arguments that the Court of Appeals had found worthy of judicial consideration. First, the Supreme Court rejected Georgia’s argument that federal court examination of state taxation valuation methodologies interfered with principles of federalism on the grounds that the federal courts would be interfering with the states’ sovereign power to tax. The Court emphasized instead that Congress had mandated such “interference” (if it was truly interference at all), because “judicial scrutiny of [the States’] methodologies is authorized by the . . . Act’s clear command to find market value.” *Id.* Similarly, the Court rejected Georgia’s argument that the Court’s interpretation interfered with States’ ability to choose a valuation methodology. According to the Court, States remain free to choose any valuation methodology they want — so long as they do not discriminate in the taxation of railroad property. *Id.* at 475.

*CSX Transportation* thus suggests that federalism values are less important in federal court statutory interpretation when: (1) Congress’s intent and commands are clear; and (2) clear federal interests, such as railroads, are involved. Similar considerations, although framed more in a sovereign immunity rather than federalism context, played into the Court’s January 2008 decision in *John R. Sand & Gravel Co. v. United States,* — U.S. —, 128 S. Ct. 750 (2008), which involved the special statute of limitations governing suits against the United States in the Court of Federal Claims. Specifically, the Court concluded, 7-2 (Justices Stevens and Ginsburg dissented), that the federal courts must *sua sponte* consider whether a plaintiff’s claim violates that statute of limitations, even if the United States had technically waived its statute of limitations defense. According to the Court, the special statute of limitations is one of those that seeks “to

achieve a broader system-related goal” than just encouraging timeliness of lawsuits. *Id.* at 753. The Court also emphasized that it treats these kinds of statutes of limitations as “more absolute” than the normal kind. *Id.* at 753-54. The Court’s precedents — some dating to the 19th Century, supported that reading. *Id.* at 754. Moreover, subsequent modifications to the statutory language did not change the statute of limitation’s import or require a different outcome. *Id.* at 754-55. Finally, the plaintiffs had offered no convincing arguments for overruling the Court’s prior decisions. *Id.* at 755-757.

On January 15, 2008, a divided Supreme Court held that the private right of action judicially implied into § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), could not be extended to a securities fraud class action brought by investors against two cable TV services corporations, Scientific-Atlanta and Motorola, whose knowingly fraudulent actions had caused Charter Communications to inflate its revenue statements, when the investors had relied on Charter’s statements. *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, — U.S. —, 128 S. Ct. 761, 766 (2008). In his opinion for the five-justice majority (Justices Stevens, Souter, and Ginsburg dissented; Justice Breyer did not participate in the decision), Justice Kennedy emphasized that the implied right of action did not extend to the two companies “because the investors did not rely upon their statements or representations” when deciding to invest in Charter. *Id.* Citing to its own precedent, Congress’s reactions, and the common law tradition that underlies § 10(b), the majority noted that the implied right of action does not extend to aiders and abettors; instead, the plaintiffs had to show that each defendant had engaged in a deceptive practice before the implied right of action applied. *Id.* at 768-69.

The majority also relied on separation of powers principles to avoid extending the scope of the private right of action. Noting that judicially implied private rights of action impinge on Congress’s legislative authority, the majority concluded that these “[c]oncerns with the judicial creation of a private cause of action caution against its expansion.” *Id.* at 772-73.

The three dissenters, in an opinion by Justice Stevens, did not oppose the majority’s interpretation of the scope of the implied right of action. Rather, they argued that because Charter had inflated its revenue statements in reliance on Scientific-Atlanta’s and Motorola’s knowingly fraudulent actions, and then the investors had relied on Charter’s revenue statements when deciding to invest, Scientific-Atlanta and Motorola had in fact engaged in deceptive practices for purposes of the Securities Exchange Act. *Id.* at 774-75 (J. Stevens, dissenting). As a result, the investors’ suit fell within the scope of the implied right of action.

The most divided of the Supreme Court’s decisions this quarter was its late January 2008 decision in *Ali v. Federal*

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*Attorneys’ Title Insurance Fund Professor of Law, Florida State University College of Law.*
Bureau of Prisons, — U.S. — 128 S. Ct. — 2008 WL 169359 (Jan. 22, 2008). In this case, a prisoner brought a lawsuit pursuant to the Federal Tort Claims Act (FTCA) against various prison officials who lost the prisoner’s personal property in the course of prison transfers. The FTCA generally waives the federal government’s sovereign immunity for tort lawsuits. However, the Act also creates several exceptions to that waiver. The Bureau of Prisons officials claimed that the prisoner’s lawsuit fell within one of these exceptions and hence was barred by federal sovereign immunity. The relevant exception to the FTCA’s waiver, they claimed, was for a “claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer.” 28 U.S.C. § 2680(c) (emphasis added).

The Supreme Court split 5–4 in deciding that the exception did apply to the Bureau of Prisons officials and hence that the lawsuit was barred. As the majority framed the issue, in an opinion by Justice Thomas, the question was whether Bureau of Prisoners officials qualified as “any other law enforcement officers” under the Act. In its “plain meaning” interpretation, the majority emphasized that Congress had repeatedly referred to “any” other law enforcement officer and that “any” “suggests a broad meaning . . . .” Id. at *3—*4. Moreover, the majority invoked separation of powers considerations in its “plain meaning” interpretation, concluding that “[w]e are not at liberty to rewrite the statute to reflect a meaning we deem more desirable. Instead, we must give effect to the text Congress enacted . . . .” Id. at *7.

Justices Kennedy, Stevens, Souter, and Breyer dissented and would have given the Federal Tort Claims Act that “more desirable” interpretation through the use of canons of statutory construction — specifically, *ejusdem generis* and *noscitur a sociis* — that would have connected the phrase “any other law enforcement officer” to the exception’s beginning focus on the collection of taxes and customs duties. In particular, Justice Kennedy emphasized that:

Statutory interpretation, from beginning to end, requires respect for the text. The respect is not enhanced, however, by decisions that foreclose consideration of the text within the whole context of the statute as a guide to determining a legislature’s intent. To prevent textual analysis from becoming so rarefied that it departs from how a legislator most likely understood the words when he or she voted for the law, courts use certain interpretive rules to consider text within the statutory design.

*Id.* at *8* (J. Kennedy, dissenting). Applying the contextual principles embodies in the *ejusdem generis* and *noscitur a sociis* canons of construction, the dissenters concluded that, in order for this exception to the FTCA’s waiver of sovereign immunity to apply, the “any other law enforcement officers” had to be acting like the “officers of customs or excise” — that is, detaining property in connection with the collection of taxes or customs duties. Because the Bureau of Prisons officials had no connection to taxes or customs duties, the dissenters would have held the exception inapplicable and allowed the lawsuit to proceed. *Id.* at *9—*12.

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5th Circuit Validates Preemption Based on Agency Informal Statements

When the O’Hara’s daughter was injured in a vehicle rollover accident, they sued General Motors for defective design of the vehicle’s side windows. GM defended on the ground that its use of tempered glass in the side windows complied with a safety standard issued by the National Highway Traffic Safety Administration and thus preempted the state law tort claim.

In Geier v. American Honda Motor Co., the Supreme Court had previously held that the statute’s express preemption provision did not reach common law claims, but that the statute’s savings clause (providing that a safety standard “does not exempt a person from liability at common law”) did not prevent the application “of ordinary conflict pre-emption principles.”

In Geier, the Court had held that Federal Motor Vehicle Safety Standard 208 preempted a tort claim for failure to install side airbags because the standard reflected a policy that auto manufacturers should able to choose among various passive restraint options for a certain period of time. Thus, a state common law decision effectively requiring the installation of side airbags conflicted with the federal policy embodied in Standard 208. The question in O’Hara v. General Motors Corp., 508 F.3d 753 (5th Cir. 2007), was whether Standard 205, concerning window glass, similarly resulted in a conflict where a plaintiff argued that “advanced glazing” should have been used, rather than tempered glass. This depended upon whether Section 205 was intended to create only a “minimum safety standard,” or whether, as in Geier, the agency had deliberately left the design choice to the manufacturer.

To address this question, the 5th Circuit looked to the text and history of the regulation, including various informal statements that NHTSA had made during the extended rulemaking process, including a Notice of Withdrawal explaining why NHTSA had previously declined to pursue a requirement of advanced glazing for side windows. In so doing, the court recognized that informal interpretations would be given considerable deference under Auer v. Robbins, but that informal policy statements have only persuasive weight under Skidmore. By contrast to Geier, in which the Court had relied in part on such statements to identify the preemptive federal policy, the 5th Circuit could find no such policy in O’Hara. The lesson, nonetheless, is that the courts will seriously consider informal agency statements in seeking to determine the precise nature of the federal policy embodied in a given rulemaking. The question is not so much whether the agency believes its regulation should preempt, but whether the agency’s description of the policies underlying its regulation support a conclusion that a common law claim would conflict with those policies.

D.C. Circuit Curtails “Increased Risk” Standing

Continuing its assault on challenges to the adequacy of safety and health regulations, the D.C. Circuit in Public Citizen, Inc. v. National Highway Traffic Safety Administration, 2008 WL 169778 (D.C. Cir. 2008), denied standing to Public Citizen’s claim that a tire safety regulation would not adequately protect the public as required by the statute. The regulation at issue required a warning when tires become unsafe due to loss of tire pressure. Public Citizen challenged the regulation on the ground that it did not require all replacement tires to be compatible with the warning system, and it permitted the warning light to appear as late as twenty minutes after detection of the low pressure.

In support of standing, Public Citizen provided various statistical analyses purporting to demonstrate the enhanced risk of this rule, as opposed to one reaching replacement tires and requiring an earlier warning.

In a previous opinion, the court had denied standing to the tire industry (as opposed to the automobile industry, which is directly regulated by the rule). In so doing, it had noted that standing for Public Citizen was “not precluded” but is “substantially more difficult to establish” because “the asserted injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of someone else.” (quoting Lujan, 504 U.S. at 562). The court had also emphasized that recognizing standing in “increased-risk” claims could allow virtually anyone to claim injury as a result of a minimal increased risk, thereby eviscerating “the Supreme Court’s standing doctrine.”

Having signaled the near impossibility of bringing an increased risk challenge against the tire standard, the D.C. Circuit had nonetheless remanded to give Public Citizen an opportunity to demonstrate both substantially increased risk and substantial probability of harm. The result, as recognized by Judge Sentelle’s dissent, was a “wide-ranging, near-merits discussion” of the details of statistical analyses concerning risks under various scenarios. Once the standing threshold is pushed this far, it is easy to see why Judge Sentelle views these as “the sort of thing that congressional committees and executive agencies exist to explore.” Judge Sentelle would not even have given Public Citizen the opportunity to demonstrate the substantiality of risk and probability because “the probabilistic approach

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to standing now being applied in increased-risk cases expands the ‘proper — and properly limited — constitutional role of the Judicial Branch beyond deciding actual cases or controversies; and ... entail[s] the Judiciary exercising some part of the Executive’s responsibility to take care that the law be faithfully executed.’”

Ironically, if the court had allowed the challenge to go forward, the court would never have needed to decide the substantiality of the risk — clearly a matter for experts. If could, instead, have maintained its appropriate role of evaluating the agency’s reasoning under the highly deferential arbitrary and capricious standard of review. The D.C. Circuit’s insistence upon captioning “increased-risk” claims thrust the court into deciding the merits of technical and scientific issues that are utterly unsuited for judicial decision.

**D.C. Circuit Finds Adequate Notice in Obscure Administrative Decision**

In *Abbe & Soeboda, Inc. v. Chao*, 508 F.3d 1052 (2007), a government contractor challenged a Department of Labor ruling that its wages violated wage rates set under the Davis-Bacon Act. As to the wage rates themselves, the contractor argued that the Secretary’s determination was arbitrary and capricious for failure to consider certain information and that it was not supported by substantial evidence. The contractor also argued that the Secretary was estopped from denying the wage rates that had been accepted by the Connecticut Department of Transportation, that DOL had violated due process in adopting the ALJ’s opinion, and that DOL had failed to provide adequate notice of the required means of classifying employees.

As a threshold matter, DOL sought to dismiss for lack of subject matter jurisdiction under a previous Supreme Court ruling that the Act precluded review of the Secretary’s determination of wage rates in a given locality. Emphasizing the *Abbott Laboratories* presumption of reviewability, the D.C. Circuit joined several others in distinguishing between challenges to the substance of the Secretary’s wage rate determination, which may not be reviewed, and procedural challenges, which may be reviewed. Thus, the court would not address the substantive challenge to the rate determination.

As to estoppel, the court held that even if estoppel were available against the federal government, it could not arise from the actions of an independent entity such as the Connecticut Department of Transportation. As to due process, the court rejected an argument that the DOL Administrative Review Board had improperly affirmed ALJ findings adopting portions of the Administrator’s post-hearing brief. Neither of those rulings is at all remarkable. The court gave greater attention to the claim that the contractor had not had adequate notice of wage classifications before bidding on the job in question. Here, the court found notice in the Davis-Bacon Act itself but also in a previous administrative decision that had not been officially published but that had appeared in a commercial reporter and had been the subject of discussion in later administrative and judicial cases. The lesson — those who contract with the government must be fully aware of relevant administrative decisions and practices.

**D.C. Circuit Finds no Inherent Agency Authority to Reverse Earlier Decision**

Although Section 112 of the Clean Air Act is supposed to control the most dangerous air pollutants (hence the term “Hazardous Air Pollutants” or “HAP”), EPA’s long-time failure to list many such pollutants as hazardous prompted Congress in 1990 to require EPA to regulate more than 100 specific HAPs, including mercury, on specific schedules. Congress also required EPA to undertake a careful study of the public health effects of HAP emissions by electric generating units (EGUs — coal-fired power plants) and to regulate EGUs under § 112 if EPA determined such regulation was “appropriate and necessary.” Finally, Congress restricted EPA’s discretion with respect to sources of hazardous air pollutants by dictating that EPA could not remove any sources from the list of regulated sources (“delist” the sources) unless it concluded that emissions from those sources would not “exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source.”

In December 2000, the Clinton Administration EPA issued a finding that it was “appropriate and necessary” to regulate EGU emissions of mercury under § 112. In 2005, the Bush Administration EPA removed EGUs from the list of regulated sources under § 112 and created, instead, an alternative means of regulating mercury emissions from EGUs. It justified this action on the ground that it could reasonably interpret the statute to permit it to revisit the decision about whether it was “appropriate and necessary” to regulate EGUs under § 112, particularly in light of the alternative regulatory approach, which EPA asserted rendered the § 112 approach neither appropriate nor necessary. EPA also claimed that “an agency has inherent authority to reverse an earlier administrative determination or ruling where an agency has a principled basis for doing so.”

Hoisting the conservative administration on its own literalist petard, the D.C. Circuit rejected EPA’s arguments. Despite the overall complexity of the statute, the court found no ambiguity in the relationship of the two relevant provisions. One required EPA to list if “appropriate and necessary.” The other prohibited delisting unless EPA could meet a stringent test. The two operated in tandem. Once any HAP is listed, it cannot be delisted without the required determination of protection of the public health and safety. The fact that there are two distinct provisions does not create ambiguity, particularly in light of Congress’

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By Otto J. Hetzel*

Third Annual Homeland Security Law Institute

Roughly 300 persons participated in the Third Annual Homeland Security Law Institute this year, held at the L’Enfant Plaza Hotel in Washington, DC, on January 17-18. It was an extraordinary program in which many of the former and current principal actors in the field of Homeland Security participated. Tom Ridge, former Secretary of the Department (DHS), John Ashcroft, former Attorney General, and Michael P. Jackson, former DHS Deputy Secretary, participated as keynote speakers, as did Paul McHale, Assistant Secretary for Homeland Defense and American Security Affairs, Department of Defense. Other former high officials who provided significant contributions to the program included: Phil Perry, former DHS General Counsel; Alan Larson, former Undersecretary of State for Economics; and, Janet Hale, former Undersecretary for Management at DHS.

Among current top government officials providing insights into their areas of responsibility were: DHS Acting General Counsel, Gus Coldebella; Rear Admiral William Baumgartner, Judge Advocate General of the Coast Guard; Julie L. Myers, Assistant Secretary for ICE (U.S. Immigration and Customs Enforcement), DHS; Stewart Baker, Assistant Secretary, Office of Policy, DHS; Marc Kesselman, General Counsel, Department of Agriculture; Valarie Caproni, General Counsel of the Federal Bureau of Investigation (FBI); Jeffrey A. Rosen, General Counsel and Senior Policy Advisor to the Office of Management and Budget (OMB); Ken Wainstein, Assistant Attorney General for National Security, DOJ; Rear Admiral James Watson, Director of Prevention Policy for Maritime Safety, Security and Stewardship, U.S. Coast Guard; and Jessica Herrera-Flanigan, Staff Director and General Counsel, House Committee on Homeland Security.

As the program’s scope discussed below reflects, those attending were provided with unparalleled access to a wide assortment of knowledgeable speakers with relevant experience in the field. Much of the program was organized into a tightly-packed, quite intense, but, diverse series of program panels covering a significant number of topics of importance to those practicing in this emerging field. The quality of the program and the speakers were superb and its coverage was clearly an effective draw to the large numbers of participants who attended this two-day program. Panels and plenary speakers focused on the latest developments in each area covered and generally allowed time for responses to questions raised by those attending.

Participants were welcomed by Section Chair-elect, M.H. Russell Frisby, Jr., Partner, Fleishman and Harding, LLP, who introduced the Institute’s two co-chairs, Joe D. Whitley, Partner, Alston & Bird, LLP, also a former General Counsel of DHS, and Lynne K. Zusman, President, Lynne K. Zusman & Associates. Both were involved in initiating the Institute programs and were assisted this year, by hard-working Vice-Chair, George A. Koenig, General Counsel and Vice President of LandBridge Equity LLC.

The program started off with remarks by DHS Acting General Counsel Gus Coldebella who provided a useful review of the year’s developments on issues of concern to the Department. Former DHS General Counsel Phil Perry, now a Partner at Latham & Watkins, followed with comments on the future of the Department and of the 9/11 Commission, including an analysis of implementing legislation currently under consideration.

Next, Julie L. Myers, Assistant Secretary for ICE (U.S. Immigration and Customs Enforcement) at DHS, gave a lively explanation of the active enforcement role she some 800 lawyers carried out. She discussed some of the typical problems and issues the encountered arising from: illegal re-entry; enforcement of immigration requirements at the workplace, especially in critical-infrastructure industries; use of administrative fines as an enforcement tool; and efforts to prevent entry of substandard or counterfeit goods.

The program then transitioned to the first panel on Regulatory Developments Expected for 2008, moderated by Lisa Branch, Counselor to the Administrator, Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). Presentations and predictions were provided by Marc Kesselman, General Counsel, Department of Agriculture; Joe Maher, Deputy General Counsel, DHS; James O’Neill, Associate Deputy Secretary, Department of Health and Human Services (DHHS), and Jeffrey A. Rosen, General Counsel and Senior Policy Advisor, OMB.

The Luncheon Keynote Speaker was former Attorney General and Senator, John Ashcroft, now of the Ashcroft Group, LLC., who spoke on the need for effective action in the Homeland Security field, and graciously fielded a large number of specific questions following his presentation. Participants then had a choice of several competing panels during the afternoon.

Ernie Abbott, Principal with FEMA Associates, a former General Counsel of the Federal Emergency Management Agency, moderated a panel on State and Local Emergency Preparedness — National Response Framework, with the issue “Will We Be Prepared the Next Time,” providing a common thread for panelists. Marko Bourne, Director, Office of Policy and Program Analysis, FEMA in DHS, who had rejoined FEMA to staff the effort, compared the Framework to the earlier Plan, and explained the matters covered in the new 78-page National Response Framework that was about to be publically released later in the week.

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Eleanor Kinney, a Professor of Law at Indiana, and former Ad
Law Section Chair, focused on the new Framework’s potential
effects for health care policies, while Evan Wolff, Director of
DHS Homeland Security Practice at Hunton & Williams, LLP,
formerly responsible for helping prepare DHS’s daily briefings
for the President, discussed the Framework’s implications for
critical infrastructure management. Ken Murphy, Director of
Emergency Management for Oregon, examined the potential
implications of the new Framework on the role of the states
and Tom Hughes, Vice-President of the National Security Tele-
communications Advisory Committee, ATT Communications,
explained the industry concerns with the new Framework and
its desire to make it work.

The implications of new government legislation relating to
Chemical and Rail Security Regulation and the industry’s
efforts to comply with these requirements were the focus of a
competing panel moderated by Joel Webber, Couri & Couri.
He introduced Jamie Conrad, Conrad Law & Policy Counsel,
formally with the American Chemistry Council, who provided
his analysis on the legislation’s impact on the chemical industry
and how that industry would respond to those requirements.
Ava Harter, Corporate and Emergency Services and Security
Counsel with Dow Chemical, provided her perspective
on those issues, as well. Brigham McCown, shareholder with
Winstead, P.C., former Deputy Administrator Pipeline and
Hazardous Materials Safety Administration, discussed his assessment
of how the increased government regulatory role might
affect regulation of other critical industries. Finally, Larry
Stanton, Director, Chemical Security Compliance Division,
DHS, expressed the Department’s perspective on the role of
critical infrastructure industries, as affected by the new legisla-
tive and regulatory requirements.

Two more simultaneous panel sessions concluded the first
day’s formal program. Baruch Weiss, Partner, Arent & Fox,
former Associate General Counsel for Border and Trans-
portation Security, DHS, moderated a panel on the Law
Enforcement Agenda for 2008. This lively panel started
with Rear Admiral William Baumgartner, Judge Advocate
General of the Coast Guard, who spoke about the Coast
Guard’s border enforcement role in the war on terror. He
discussed a variety of actions being taken, such as joint
command efforts with the Canadian Coast Guard that have
been initiated to help control our northern border, especially
given the lake access that constitutes a good extent of the
mutual boundary line.

Valerie Caproni, General Counsel, FBI, discussed the Bureau’s
role in interdicting terror financing activities; in counteracting
various intel. threats, including cyber threats, and, the FBI’s role in clamping down on export controls, especially involving
North Korea, Iran, and China. Ken Wainstein, Assistant Attor-
ney General for National Security, DOJ, covered such issues as coordination between intel. attorneys and prosecutors as to
when to initiate prosecutions rather than gain further intelligence, as well as coordinating and fashioning the various agency roles under the Director of National Intelligence, problems under the current FISA court’s role, and issues in the pending legislation relating to immunity of the communications industry. Michael Neifach, Principal Legal Advisor at ICE, discussed the ICE agenda in law enforcement for the coming year.

The other breakout session panel focused on Business
Continuity and Cyber Security for Corporations. It was
moderated by Andy Purdy, President of DRA Enterprises,
Acting Director, National Cyber Security Division, US-CERT,
Big Fix Executive Advisory Board. The four panelists, Larry
Clinton, CEO of Internet Security Alliance, Robert Dix,
Director of Government Affairs at Juniper Network, Andy
Grasso of Andrew Grasso & Associates, and Mark Pastin, Presi-
dent, Council of Ethical Organizations/Health Ethics Trust,
each discussed how their firms and clients were responding to
the challenges of protecting their operations in a terror climate.

Michael P. Jackson, former Deputy Secretary, DHS, provided
a thoughtful Keynote Address at the end of the day, sharing his perspectives on issues of importance to DHS. His presentation
was followed by a cocktail reception that rewarded those who
defied deteriorating weather conditions that afternoon.

The second day of the program began with a dynamic
presentation by Tom Ridge, former DHS Secretary and Gover-
nor of Pennsylvania, now President and CEO of Ridge Global
LLC. He provided his insights on a variety of current issues of
significance to the homeland security field. Two breakout panels
followed.

Dave Marchick, from the Carlyle Group, moderated a panel on
Critical Infrastructure & Foreign Investment. Stewart
Baker, Assistant Secretary, Office of Policy, DHS, provided his
insights on and assessed the significance of recent developments in Congressional oversight and control of foreign investment.
He addressed issues that had arisen with the Dubai Ports controversy and also discussed the comparatively quieter acquisi-
tion of Bell Labs, clearly a national security facility, by a French
company. He stressed that the use of mitigation agreements
largely ensured effective U.S. Government oversight of those
critical infrastructure acquisitions and he noted that they are
likely to continue, given the relative low cost of acquiring U.S.
 firms in a world economy where the Euro was significantly
higher than the dollar.

Jessica Herrera-Flanigan, Staff Director and General Counsel
of the House Committee on Homeland Security, provided her perspective on how Congress was handling its role,
particularly its oversight function, in this field. She noted the
potential advantages of briefing the Committee on prospec-
tive transactions and also the significant cooperation of DHS
in achieving good oversight of these acquisitions. Alan Larson,
Senior International Policy Advisor, Covington & Burling,
former Undersecretary of State for Economics and a career
Ambassador for the State Department, related his experiences in this area and the fact that most of these transactions went quite smoothly, with the exception of occasional political firestorms, such as occurred with Dubai Ports. Richard Mintz, the Harbour Group, provided insights from his experience in advising firms undergoing these acquisition activities and how to effectively handle the Congressional approval process.

Another competing panel examined the “Business of Homeland Security,” that provided public and private sector perspectives on procurement and development of homeland security technology and services. It was moderated by Angela Styles, Partner, Crowell & Moring. She introduced panelists who provided observations from their experiences with DHS in procurement and product certification and approvals. Brian Finch, Counsel, Dickstein Shapiro; Christopher Furlow, Partner at the Pennant Group and former Executive Director, Homeland Security Advisory Council to DHS; Janet Hale, Director for Business Transformation, Public Sector at Deloitte & Touche, former Undersecretary for Management at DHS; and, James Kemp, Co-founder and Chief Operating Officer at Kemp Partners, each shared their experiences in problems encountered by the private sector in procurement and product development/certification efforts.

A subsequent panel on Immigration Policy and Legal Issues: “Do All Roads Lead to a National Identity System and If So What are the Implications” was moderated by Robert Divine, Shareholder, Baker/Donelson, former Chief Counsel, U.S. Citizenship and Immigration Services. His panelists, Chad Bondreaux, Special Counsel, Baker Botts, LLP; former Deputy Chief of Staff, DHS; Jim Harper, Director of Information Policy Studies, CATO Institute; Nuala O’Connor Kelly, Chief Privacy Leader & Senior Counsel, General Electric, former Chief Privacy Officer, DHS; as well as Kathy Kraninger, Director of Screening Coordination, DHS, provided their perspectives into the current issues in this hot field of law, and assessed the significance of the implications for society of a national identity system.

The other concurrent panel examined Homeland Defense: Roles and Responsibilities for the Military and Private Security. Moderated by Paul Butler, Partner, Akin Gump, former Chief of Staff to the Secretary of Defense, panelists included: Phillip J. Crowley, a Senior Fellow and Director of Homeland Security at the Center for American Progress; Joseph E. Schmitz, Chief Operating Officer and General Counsel, the Prince Group; and Christine E. Wormuth, Senior Fellow, International Security Program, Center for Strategic and International Studies (CSIS). They reviewed the variety of issues impacting the role and responsibilities of the military and private security, with issues arising from Blackwater operations in Iraq receiving prime attention.

A very interesting luncheon program ensued when the scheduled speaker was unable to attend, allowing participants to join others with similar interests at designated tables, such as FEMA Programs, Congressional Oversight, Private Sector Interests, Procurement, Future Trends, Transition, Critical Industries, and the like. Reporters from each table, at Joe Whitley’s suggestion, provided summaries of the conversations that took place. Participants expressed appreciation for the opportunity for small group discussions and interaction with others with similar interests.

The afternoon breakout sessions included a panel on Food Safety—Hardening Defenses Against Bioterrorism and Natural Disasters, moderated by Nancy Bryson, Partner, Venable LLP. Her panelists included David W.K. Acheson, Assistant Commissioner for Food Protection, Food and Drug Administration (FDA), who reviewed the adequacy of current government standard setting and areas needing improvement; Professor Michael Greenberger, University of Maryland (Baltimore) Law School and Director, Center for Health and Homeland Security, who discussed state roles in food protection; and Steve Gruler, President, Global Quality Consultants, who explained his firm’s role in helping the food industry adequately protect the safety of their products in the distribution system. Joe Reardon, in the North Carolina USDA Office, provided an excellent detailed analysis of its role in protecting the food supply in the state, especially in the face of potential breakouts of food poisoning and tampering with the food stock.

The other competing session, moderated by Joe Waldron, Partner, Blank Rome LLP, covered Maritime & Transportation Security—Lessons Learned Regarding Security and the Impacts of the Transportation Workers Identification Credential. His panelists were Denise Krepp, Senior Counsel, House Committee on Homeland Security, Kristyn North, Office of General Counsel, American Petroleum Institute; Rear Admiral James Watson, Director of Prevention Policy & T outreach, former Undersecretary for Management at DHS; and Henry F. White, Jr., Executive Director, American Bar Association, and Member DHS Advisory Committee on Commercial Operations of Customs and Border Protection. Panelists shared their perceptions of the dominant legal and practical issues affecting transportation security, particularly port protection and transportation interdiction policies.

Paul McHale, Assistant Secretary for Homeland Defense and American Security Affairs, Department of Defense, followed the breakout sessions with a keynote speech, giving a thoughtful review of the issues in homeland security needing to be addressed in order to improve our Nation’s defense.

The final panel, moderated by Joe Whitley, focused on observations of The Private Sector and Homeland Security—General Counsels and Chief Security Officers. The prestigious private sector panel included John L. Howard, continued on next page
intent to restrain EPA’s discretion generally, and the agency did not have inherent authority to revisit its earlier decision. While environmentalists may take comfort in this particular decision, it does not bode well for expansive purposive interpretations of agency authority should a Democratic administration take over in 2009.

D.C. Circuit Allows Midstream Change from Rulemaking to Adjudication

There is no doubt, in light of SEC v. Chenery and its progeny, that an agency may enforce a statute or regulation against a particular target and thereby achieve the “retroactive effect” of imposing penalties or ordering actions based upon past behavior. Sometimes, again as in SEC v. Chenery, these decisions involve new or previously unstated interpretations or applications of the governing law. We call these actions “adjudications” and generally agree that they may have retroactive effects, subject particularly to the notice restraints of due process. These decisions frequently establish general principles that the agency can apply in the future.

As to rulemaking, on the other hand, Bowen v. Georgetown University Hospital established that there is a presumption against retroactivity, indeed, that rules may not be retroactive unless Congress has so indicated. In initiating a rulemaking, therefore, an agency, and presumably all interested parties, would be fully aware that the outcome will probably not be retroactive.

These differences did not matter to the D.C. Circuit in Quest Services Corporation v. FCC, 509 F.3d 531 (D.C. Cir. 2007), in which the FCC initiated a rulemaking concerning the status of two types of calling cards. Although the FCC explicitly began a rulemaking, it purported at some point to “bifurcate” the proceeding into an adjudication, with the result that the FCC and the parties faced a presumption of retroactivity, rather than a strong presumption against retroactivity. This was important because the agency ultimately decided that one type of calling card should be subjected to its ruling, but the other should not. The court remanded the latter aspect of the decision because the FCC had not overcome the presumption of retroactivity applicable to adjudications.

iBasis, the party subjected to the retroactive order, complained of the switch from rulemaking to adjudication. In response, the court found no limitation in the APA or elsewhere on bifurcating a rulemaking into an adjudication, relying on decisions such as Bell Aerospace for the proposition that an agency may establish general principles through adjudication. The court also could not identify any way that iBasis had been prejudiced other than being subjected to a retroactive order. Characterizing iBasis’ complaint as “circular,” the court allowed the FCC to achieve retroactivity by characterizing its action as adjudication. But it is in the nature of circles that they go both ways. The FCC should not be able to achieve retroactivity merely by renaming its procedure. Unfortunately, the court gives us no useful way of distinguishing between a rulemaking and an adjudication other than the label applied by the agency, and perhaps the degree of prejudice to one of the participants. Presumably, an adjudication would have given particular attention to the specific characteristics of the iBasis calling card, rather than to the general class of calling cards to which it belonged, but the court gave no indication that this was the crucial distinction. If the rulemaking-adjudication distinction is to remain viable, particularly if its application results in distinctly opposing presumptions, the courts will need to delve beyond agencies’ claims that they have appropriately switched from one to the other.

The Section’s Homeland Security and National Defense Committee will host a briefing by DHS Chief Privacy Officer Hugo Teufel and Chief of the Office of Civil Rights, Dan Sutherland, on their Annual Reports to Congress. Check the Section’s website at http://www.abanet.org/adminlaw for more details.
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