

ADMINISTRATIVE & REGULATORY LAW NEWS



Section of Administrative Law & Regulatory Practice

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DELIVER US FROM DERIVATIVES

bail•out \ 'ba-laut \ n (1951) : a rescue (as of a corporation)
from financial distress

fore•clo•sure \ -'klo-zher \ n [ME, fr. MF forclos, pp. of forclore,
fr. fors outside (fr. L foris) + clore to close — more at FORUM] (1728) : an act or instance of foreclosing;
specif : a legal proceeding that bars or extinguishes a mortgagor's right of redeeming a mortgaged estate

melt•down \ 'melt-daun \ n (1963) 1: the accidental melting of the core of a nuclear reactor 2: a rapid or
disastrous decline or collapse

mort•gage \ 'mor-gij \ n [ME mortgage, fr. MF, fr. OF, fr. mort dead (fr. L mortuus) + gage gage — more at MURDER]
(15c) 1: a conveyance of or lien against property that is defeated upon payment or performance according to stipulated
terms 2a: the instrument evidencing the mortgage b: the state of the property so mortgaged
c: the interest of the mortgagee in such property

rec•es•sion \ ri-'se-shen \ n (ca. 1652) 1: the act or action of receding : withdrawal 2: a departing
procession (as of clergy and choir at the end of a church service) 3: a period of reduced economic activity

re•pos•sess \ re-po-'zes also -'ses \ vt (15c) 1 a: to regain possession of b: to restore to
possession (as of clergy and choir at the end of a church service) 3: a period of reduced economic activity
possession — re•pos•ses•sion \ -'ze-shen also -'se- \ n —
re•pos•sess•or \ -'ze-ser also -'se- \ n

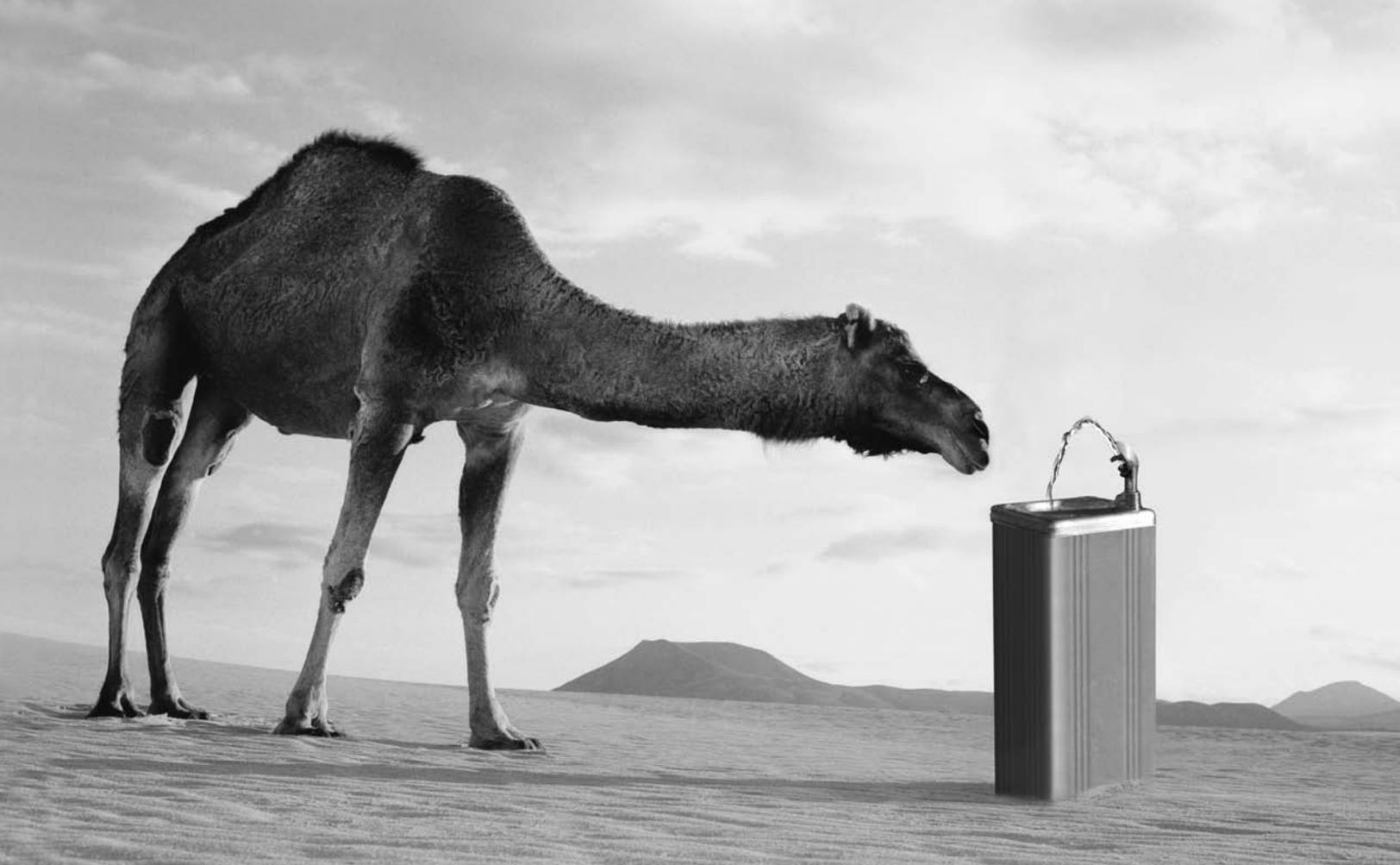
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Chair's Message



H. Russell Frisby

It has been a very busy fall for the Section and our members have been active on a number of fronts. As the new Administration prepares to take office, the Section delivered two reports to the President-Elect of the United States: "Improving the Administrative Process" and "Achieving the Potential: The Future of Federal e-Rulemaking." Both reports were the subject of panels at our successful Fall Administrative Law Conference. Conference Chairs Charlotte Bahin and Marc Scheineson crafted a thought-provoking and diverse agenda which attracted media coverage and outstanding attendance. In fact, two sessions — "Wall Street to Main Street: Bail Out and Financial Restructuring" and "Corporate Co-Operation with a Government Investigation: What does it Mean? What is the Risk? Has Anything Changed?" — were profiled by major news outlets. The always-essential "Annual Review of Major Developments in Administrative Law" continued to be one of the highlights of the conference.

Various committees and working groups have been active in the past few months, commenting on numerous requests from other entities and participating in coordinating committees. This pace will quicken during the next several months. For example, a Section representative will participate as a member of the newly formed Coordinating Committee on Health Law. Section representatives and liaisons will also participate in the efforts of ABA working groups and task forces formed to provide input to the new Administration and Congress in the areas of Health Care Access Proposals, Federal Agency Preemption, and Financial Regulations. I encourage all interested members to review the leadership page on our Section web site at <http://www.abanet.org/adminlaw/leadership/leaders.html> and to visit the Committees page at <http://www.abanet.org/adminlaw/committee.html> to volunteer to serve in other ongoing efforts. I particularly welcome and encourage our young lawyer members, and new law student members to get involved — the rewards for participation in these endeavors greatly exceed the time required.

As we move forward we will be upgrading the quantity and type of information found on our Section web site. I encourage all committee leaders to take advantage of the opportunity to communicate frequently not only with your committee members on your individual list serves, but by sharing your work with the Section at large through a committee newsletter or an information update on your committee home page. I would like to recognize the outstanding efforts of the Transportation Committee, and in particular Jason Schlosberg, for the outstanding quality of the newsletter he produces quarterly for this committee. View his latest edition at [http://meetings.abanet.org/webupload/commupload/AL326000/sitesofinterest_files/TQ2008Fall\(reduced\).pdf](http://meetings.abanet.org/webupload/commupload/AL326000/sitesofinterest_files/TQ2008Fall(reduced).pdf)

The Section continues its robust publishing operations, with the completion by Jeff Lubbers of the Developments in Administrative Law and Regulatory Practice for 2008. This outstanding publica-

tion is a testament to the hard work and tremendous contributions made by Administrative Law Section members throughout the year in every aspect of practice. Thank you to all of the authors and to Jeff for a tremendous effort.

We also applaud the publication of the Winter 2008 *Administrative Law Review*. Andy Kavel and his Advisory Board and staff have produced an excellent scholarly work. We thank the Washington College of Law American University for its commitment and for the resources dedicated to producing this work.

And last but certainly not least, I want to thank Bill Morrow, Editor-in-Chief, and the Advisory Board of the outstanding *Administrative & Regulatory Law News*. This is a tremendous benefit of membership in the Section, and is made possible only by a tremendous personal commitment and the great wealth of knowledge possessed by the Advisory Board producing this publication.

Due shortly are two fascinating books, one edited by Michael Asimow on lawyers and television, and a compendium of works on Homeland Security Law being developed by Joe Whitley and Lynne Zussman.

The Section's Award programs recognize outstanding efforts, and we are pleased to begin the nominations process for 2009. Visit the web site at <http://www.abanet.org/adminlaw/awardsprogram/2009essays/writings.html> for information on the 2009 Gelhorn-Sargentich Law Student Essay Award Contest. Paul Verkuil will administer the selection of the Award Winner.

In January committees responsible for determining the winners of the Annual Award for Scholarship, chaired by Russell Lee Weaver, and the Mary C. Lawton Award for Outstanding Government Service, chaired by Lisa Schultz Bressman, David Frederick and Elaine Reiss, will begin seeking nominees. Visit the Section web site for more information and instructions for this process in January.

We hope that you will plan to attend the upcoming Homeland Security Law Institute. Taking place in Washington on February 26 and 27, this outstanding program brings together the latest information and top-ranking officials, and it promises to be a fascinating look at planning in the new administration. Details will be available shortly on the Section's web site at <http://www.abanet.org/adminlaw/>. Registration opens in mid-December.

Plans are well underway for the Mid-Year Meeting in Boston, with a tremendous CLE program agenda on tap from Co-Chairs Renée Landers and Paul Afonso. Programs include financial bailout issues, regional greenhouse gas approaches, updates to education and communications law, health reform, and FMLA. Information can be found on the Section web site.

Vice-Chair Jonathan Rusch is planning the 2009 Administrative Law Institute, and Co-Chairs Christine Franklin and Janet Belkin are well underway with planning for the 2009 Annual Meeting. The Section's Spring Meeting is planned for Williamsburg, Virginia in April. Look for more information shortly on all of these upcoming events. ○

Table of Contents

Chair's Message	1
Regulatory Gaps for Over-the-Counter Derivatives: Regulation of Derivatives, Insurance, Securities and Gambling.	3
Preemption and Federal Administrative Law	5
Targeted Financial Sanctions	8
Maybe the Experts Were Wrong About the ANPRM.	10
The Time for State and Local Governments to Consider the ABA Model Legislation for Land Use Procedures Is Now!	11
Midyear Meeting.	14
Supreme Court News	15
News from the Circuits	21
News from the States.	25
Recent Articles of Interest.	26
Section News and Events	28

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Regulatory Gaps for Over-the-Counter Derivatives: Regulation of Derivatives, Insurance, Securities and Gambling

By Thomas Lee Hazen*

The recent credit crisis has highlighted the lack of regulation for credit default swaps that has both magnified and contributed to market failure of the past several months. Credit default swaps (CDSs) have been justified as a useful device for dealing with risk. There are many other risk shifting devices including traditional insurance. Insurance, of course is a regulated activity, with state-based insurance regulation. A credit default swap is one type of derivative investment. There currently is increased sentiment to regulate the CDS market. For example, Securities and Exchange Commission Chairman Cox has called for a centralized regulated CDS clearing system. The President's Working Group on the credit crisis also proposed centralizing the CDS market. New York announced plans to regulate CDS transactions as insurance but has since decided to delay that action. But why limit the forgoing discussion to the CDS markets? Unregulated derivatives include over-the-counter foreign currency (Forex) contracts, interest rate swaps, equity swaps, and other highly complex derivatives that may equally warrant some sort of regulation.

Fungibility

Derivative (futures and option) contracts are publicly traded on the

various commodities exchanges subject to federal regulation by the Commodities Futures Trading Commission (CFTC). Derivatives based on securities and related financial instruments are publicly traded on the securities exchanges which are regulated by the Securities and Exchange Commission (SEC).

Investing in securities is generally considered to be a productive activity as it allows businesses to raise capital which in turn will increase productivity and benefit society. Investing also offers the possibility of wealth building for those who invest. Derivatives and insurance provide an opportunity for risk-shifting as well as investment opportunities (often thought of as speculation). Individuals and businesses who have exposure to risk can either hedge against that risk with a derivatives contract or seek insurance against losses that could occur if the contingencies created by the risk materialize. In contrast to investing, hedging, and insurance, gambling is not generally viewed as a productive activity or one that provides a benefit to society. The only benefit attributed to gambling is the entertainment it provides. Long ago, all forms of gambling were outlawed, primarily for moral reasons. Over time, gambling regulation was eased significantly as additional forms of legalized gambling were recognized. Current law recognizes gambling's entertainment value as outweighed by the social costs and moral objections to wagers and other gambling activities but gambling is only permitted under strict regulation.

Many gambling contracts remain illegal. Consider two inveterate gamblers who make a wager on whether it will rain the next day. This contract would be considered an illegal wager under the law of most states. Compare this gamble with a farmer who is concerned about a predicted drought and wants to hedge

against loss of crops by entering into a derivatives contract based on corn. This is legal as a forward or futures contract and will be enforced. Alternatively, the farmer could make the hedge specifically against damage due to drought and enter into a derivatives contract based on the weather. This more closely resembles the illegal weather wager but would be a legitimate and hence enforceable derivatives contract. That same farmer has the alternative of seeking crop insurance or drought insurance. In all of the above situations one party (the farmer) is allocating to the other (the counterparty) the risk of a drought. The wager is illegal, but the futures, forward, and derivatives contracts, as well as insurance, are legitimate commercial transactions. A similar point could be made with respect to sports wagers which are not permitted except to a limited extent through some state sanctioned casinos. Even under those limited circumstances, participants in the sport are not able to wager even though such a wager could arguably be defended as hedging against the financial loss that would result from losing the sporting event.

One answer to the charge that many derivatives are nothing more than legalized gambling is that they provide legitimate hedging opportunities for investors and, more importantly, for commercial participants in the underlying commodities markets. It also is often pointed out that speculators help make markets more efficient by providing additional liquidity which in turn performs a price discovery function. Hedging operates much like insurance as it allows a risk averse party to pass the risk on to someone else who is willing to do so for a premium. That premium can take the form of an insurance premium

continued on next page

* Thomas Lee Hazen is the Cary C. Boshamer Professor of Law at the University of North Carolina at Chapel Hill. He is the author and co-author of leading treatises on securities law and commodities law. This article is an updated and shortened version of Thomas Lee Hazen, Disparate Regulatory Schemes for Parallel Activities: Securities Regulation, Derivatives Regulation, Gambling, and Insurance, 24 ANNUAL REVIEW OF BANKING & FINANCIAL LAW 375 (2005), which provides details of each of the regulatory schemes mentioned herein.

or the cost of an options, futures, or swap contract.

With respect to traditional insurance, the risk is absorbed by the insurance company which pools its premiums and manages that pool as an investment to cover claims as they are made by policy holders. It is conceivable in the derivatives markets that both parties to a bilateral derivatives contract will be two hedgers who are able to allocate reciprocal risks to one another. However, it is also common for risk averse parties seeking a derivatives contract to look to speculators to lay off their risk. For example, a commercial participant may not be able to locate a counterparty to a desired hedging contract if that counterparty must itself be a commercial hedger. Speculators may be characterized as those who accept risk that hedgers do not want. As such, speculators can perform an important function for commercial participants hedging business risks. Permitting these hedging contracts creates an opportunity for speculators that is a form of legalized gambling not otherwise permitted under gambling regulation. Thus, the same type of risk shifting can be accomplished through insurance, derivatives transactions, and simple wagers.

Who's Minding the Store?

Securities transactions, insurance, and gambling are subject to extensive regulation. Until the 1980s, derivative contracts could only be traded in the regulated commodities markets. The expansion of the exclusion of "forward" contracts from futures contract regulation led to emerging over-the-counter derivatives markets for certain large investors engaged in bona fide hedging transactions. This market expanded in the 1990s with the CFTC taking more of a *laissez-faire* approach notwithstanding the problems that befell some derivatives investors such as the Bank of New York, Procter and Gamble, and Orange County California. These unregulated derivatives markets were given formal approval in the Commodities Futures Modernization Act of 2000. The ill-advised rationale for no regulation was that the market would act as its own

regulator — a mistake recognized by one of its strongest supporters former Federal Reserve chair Alan Greenspan.

The contract market monopoly for futures contracts eroded due to increased use of forward contracts and swap transactions that were pigeon-holed into existing exemptions from CFTC regulation. The Commodity Exchange Act granted the CFTC exclusive jurisdiction over derivatives, thus precluding SEC regulation of the derivatives markets. In the 1990s, the CFTC's exclusive jurisdiction eased due to continued jurisdictional battles between the CFTC and the SEC with respect to investments that could be characterized either as futures contracts or as securities. The Modernization Act eliminated the former monopoly by permitting over-the-counter and essentially unregulated transactions between qualified market participants.

Commodities law formerly imposed a gate-keeping requirement on the types of permissible derivatives contracts that served a similar function to the insurable interest requirement for insurance policies. Until the adoption of the amendments to the Commodity Exchange Act that were brought in by the Modernization Act of 2000, the CFTC and the various commodity contract markets had to approve each contract that was traded. One of the purposes of this approval process was to assure the economic integrity of each contract. This contract approval process functioned in much the same way as insurance regulation. The Act also changed the designation process so that the CFTC no longer has responsibility for reviewing the economics underlying publicly traded derivatives. Preapproval of the terms of insurance contracts parallels the CFTC's former role in approving futures contracts before they could be publicly traded. To the extent that insurance resembles the derivative investment markets, then it seems appropriate to have parallel regulatory schemes.

To the extent it had jurisdiction, the SEC followed the CFTC's lead in taking a hands-off approach to the over-the-counter derivatives markets. Some sort of regulation now seems inevitable but

which regulator should fill the regulatory gap?

Choosing the Best Cop

In the quest to identify the most appropriate regulator, we should not lose sight of the moral hazard concern that leads to the insurable interest requirement imposed by insurance regulation. Nor should we lose sight of the similarity to gambling. Gambles and wagers are not the only examples of contracts that have been outlawed because of their perceived moral repugnancy. In 2003, the Pentagon devised a short-lived plan to create a futures market to allow a hedging against future terror attacks. The proposal was quickly quashed. What was it about the proposed terrorism futures that the public found so horrific? Some observers suggested that a market for terrorism futures would allow people to profit from sharing information about future attacks that they should share simply as a matter of good citizenship. There also is the visceral reaction that an investor should not be able to profit from someone else's misery. However, we generally do not look at an investor's motives in determining whether a particular transaction is legal. When put in perspective, how different is a terrorism futures contract from taking out insurance against acts of war? An investor who stands to gain from a terror attack may simply be hedging against losses that would result from such an attack. Investors have always been able to take investment positions in order to "bet" in favor of disaster. There are other ways to invest in terror-related disaster. Defense industry stocks and gold have traditionally been among the havens for investors desiring economic protection against the ill-effects of war or terrorism, but these investments are made as part of the regulated securities markets. Just as betting on terrorism raises moral hazard issues, so should betting on wide-spread credit defaults such as could be done through the CDS market or through synthetic collateralized debt obligations (CDOs).

To some extent, any form of market regulation is paternalism, but paternalism that is justified. One of the longtime

continued on page 28

Preemption and Federal Administrative Law

Brian Galle* and Mark Seidenfeld**

Who should have the power to decide whether federal law will displace state law — courts, Congress, or federal agencies? That is the question at the heart of many of the Supreme Court's recent struggles with the preemptive effect of federal regulations. It has also been the site of much dispute among scholars of administrative law. With some modest exceptions, most courts and commentators have looked to Congress as the ultimate preemption authority, with agencies having little input.

Current law sidelines agencies in two different ways. First, it is arguable that any agency action preempting state law is invalid unless expressly authorized by Congress. That, at least, was Justice Stevens's view in *Watters v. Wachovia Bank*, 127 S. Ct. 1559, 1579, 1585–86 (2007) (Stevens, J., dissenting), and it is shared by preeminent commentators, such as Yale's Tom Merrill. Professor Merrill points to language in *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), stating that the delegation of power to regulate does not include “the authority to decide the pre-emptive scope of the federal statute,” *id.* at 919. While we question whether *Gonzales* is as sweeping as Professor Merrill suggests, at a minimum that case seems to stand for the proposition that the Supreme Court will not grant *Chevron* deference to an agency's views about preemption. *Gonzales* thereby reverses the usual primacy of agencies over courts in matters of statutory interpretation.

We argue instead that federal agencies should often be the preferred institutions in which to vest the authority to allocate power between states and the federal

government. Federal agencies should at times have the power to preempt, even in the absence of an express grant of preemptive authority from Congress. And courts should sometimes defer to administrative determinations that preemption is the best outcome. However, in our view this authority must be cabined to account for constitutional limits on federal power, and deference must be earned through careful agency deliberation. Thus, we propose a sliding scale of both authority and deference, in which agency control over the preemption question should increase in direct proportion to the need for federal intervention and the quality of the agency's outputs.

Rationale for Limits on Agencies

The foundations of current preemption law are a concern for federalism and the Supreme Court's functional analysis of which institution is best suited to safeguard an appropriate role for states in the nation's policymaking. Since the mid-1980's, the Court has been reluctant to render irreversible, constitutional rulings on the limits of congressional power. Instead it has used “clear statement” rules to slow federal expansion, holding in many areas that Congress can displace state authority only when it enacts express language to do so. The so-called “presumption against preemption,” although unevenly invoked, in its stronger forms fits within this framework.

The clear-statement approach rests on a set of institutional judgments. It acknowledges that the judiciary alone probably is not structured to reach the best outcomes. But, by insisting on explicit language, the Court aims to ensure that when Congress acts, it will have first deliberated carefully, been open to input by states and other affected parties, and secured a majority of both chambers in favor of displacing the states.

We agree with this functionalist methodology, but think that so far it has underestimated the role of agencies. To

date, opponents of regulatory preemption have argued that all of the rationales for the clear statement rule apply *a fortiori* to agencies. They argue that agencies are less deliberative, less open to outsiders, and less democratic. Moreover, there is a fear that, given the relative ease of agency rulemaking, allowing preemption by agencies would greatly decrease the power of states. These same considerations have driven doctrine in other fields. For example, it is well established that, absent clear congressional authorization, an agency cannot enact regulations that would *arguably* extend beyond the limits of federal power, even if a court would ultimately uphold the constitutionality of the regulation. *Solid Waste Agency of N. Cook County (SWANCC) v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173–74 (2001).

As a result, limits on agency power stem from a set of rather broad generalizations about both how agencies will behave as well as the desirability of federal action. If agencies in fact can be as deliberative and democratic as Congress, and if the need for speed-bumps on federal power is low, then the logic behind special limits on agencies becomes weak. It is our view that both situations can arise frequently.

The Quality of Agency Deliberation

The institutional logic behind federalism clear-statement rules implies that agencies should often be able to supply the required clear statement.

Agency deliberation about preemption questions is more likely to be fully-informed, expert, and objective. Congress must overcome its own inertia — the tremendous difficulty of enacting legislation. Inertia and vote trading create an environment in which deliberation is scarce. Bicameralism and other obstacles to enactment can create legislative inertia that virtually obliges legislators to engage in logrolling and vote trading to pass any

continued on next page

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statutes. As a result, most legislation that Congress passes represents a compromise of coalitions rather than a consensus of all legislators — a triumph of bargaining over deliberation. The opacity of the logrolling system, which can conceal the absence of considered justifications, may exacerbate this tendency. Further, because administrative action is ongoing while legislation is episodic, agencies are more agile and responsive to changing facts than Congress.

Another leading commentator, Nina Mendelson, has argued that in the federalism context, Congress may be the superior deliberator because its structure guarantees a voice for regional interests. To the contrary, we think that Congress is an unlikely defender of local interests. Individual members of Congress have incentives to enlarge federal power in order to pursue their own legislative goals, and to expand the field of those who must lobby them. State lobbying in favor of general state prerogatives typically is weak, as each state assumes it can free ride on the efforts of others. There may be instances where a federal law would fall particularly heavily on just a few states, diminishing the incentive to free ride. But in order to obtain the votes they would need to block such legislation, the affected states would have to be willing to trade enough to overcome the desire on the part of other legislators to expand their own power. Thus, Congress offers unique structural protections for states only in the rare instance that legislation would impose a very heavy burden on a few states. Moreover, regionalism can be a weakness as well as a strength, as where a handful of minority states (coal-producers, say) create costs for the rest of the country.

Another measure of the relative quality of political institutions is the degree to which they succeed in capturing popular preferences. Here the conventional wisdom is that Congress has an

indisputable advantage over unelected bureaucrats. Both Congress and the President, however, have important levers for controlling bureaucratic outcomes, ranging from budgetary power to oversight hearings or OMB review. And, crucially, major agency initiatives, such as notice and comment rulemaking, are largely within the control of the political leadership of each agency. While there no doubt is some “slack” in political oversight of agencies, there is less than at first glance.

*...deference is as much
a tool for courts to
control agencies as
it is a mechanism for
yielding power
to them.*

Moreover, agencies have a temporal advantage over Congress and courts. As *Chevron* recognizes, because litigation is episodic, while administration is continuous, agencies are better in touch with popular norms than courts. Congress, if anything, acts more fitfully than courts. For any given statute, there can be a significant lag between popular preferences at the time of enactment and enforcement. Agencies, which face a lower threshold for changing even their most formal pronouncements, thus can actually be more responsive to *current* preferences than Congress.

Another key factor to consider in evaluating agency performance is that it is not fixed, but rather contingent on

the surrounding body of administrative law. If the central concern behind clear statement rules limiting agency action is the accountability or deliberativeness of agencies, the solution may be not to limit agency power categorically, but instead to reform administrative law in ways that will improve performance.

Judicial review and increased political oversight of agency policymaking processes has already powerfully shaped not only the deliberation of agencies but also their very makeup. Courts demand that an agency give reasons for its decisions, forcing the agency to explain its decisions in terms that do not simply reduce to ideological or political preferences but rather can be connected to legislatively specified criteria or broadly accepted public values. This demand, along with demands from the political branches for various types of regulatory analyses, has also forced agencies to change their structure. To satisfy judicial review, agencies need staff members from a multitude of professions who can understand the views of all greatly affected interest groups.

Just as judicial review has prompted agencies to consider a myriad of other concerns, courts can force agencies at least to consider issues of federalism as part of judicial review for reasoned decisionmaking. To the extent that agencies are relatively disinclined to examine closely the federalism implications of their decisions, courts can offer them additional incentives to do so through rules of review and deference that increase or decrease the agency’s cost and reward structure. For example, courts could hold that conclusory assertions, put forward in regulatory preambles without evidentiary support and without public comment, do not have preemptive effect. Indeed, we would go further and require notice and comment rulemaking as a threshold for most preemptive rules, as notice and comment rulemaking maxi-

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mizes an agency's deliberative powers, openness to stakeholders, and political responsiveness.

In sum, there is good reason to think that agencies are, or with wise doctrines of judicial review could be made to be, at least as capable as Congress of deliberating and responding to most federalism issues.

Need for Federal Action

Another justification for the clear statement rule rests not on the quality of legislative outcomes but rather simply on quantity. Enacting precise statutory language is difficult, and the sweep of law covered by express (rather than implied or imputed) statutory language is correspondingly narrow. The clear statement rule thus serves as a second-best restraint on federal power — less restrictive than outright judicial prohibitions, but still a significant speedbump. Since the burdens of overcoming inertia are far lower for agencies than for Congress, permitting agency regulations to satisfy any clear-statement requirement would essentially flatten the speedbumps.

Although we accept the factual premise behind the preference for Congress, we question its uniform application. Why should all expansions of federal power be equally difficult to implement? In some cases, federal agency action is consistent with, rather than at odds with, federalism values. Moreover, the normative justification behind sheltering the states may be stronger or weaker in varying circumstances. At times, flattening the speedbumps to federal action is exactly what courts should be doing.

The case for resisting federal authority is weakest where a single state's choices interfere with the autonomy of other states. Spillovers are the readiest source of examples. Lax regulations in one state — be they on handguns, fireworks,

or abortions — can make restrictions in nearby states largely fruitless. Upwind pollution makes East Coast clean-air efforts prohibitively expensive, for example, and tax havens siphon funds away from states with preferences for more government services. Federal law can be a vehicle for coordinating these conflicts. In those instances, courts should facilitate, not resist, federal action.¹ In other instances, states will already have a strong voice in federalism outcomes, as under the "SIP" regime common in environmental statutes.

Thus, the underlying purposes of federalism clear-statement rules imply that the rules should be applied selectively only to those instances in which federal authority should truly be limited. In contrast, current doctrine seems to condemn *all* agency action raising constitutional questions.

Deference

Thus far we have focused on the question whether agencies should have the bare authority to issue preemptive regulations, but the question of judicial deference to those regulations is also important. In our view deference is as much a tool for courts to control agencies as it is a mechanism for yielding power to them. Where the threat of invalidity is the stick courts wield to encourage deliberation, deference to the outcome of those deliberations is the carrot. Granting a higher degree of deference for thoroughly reasoned agency-federalism decisions therefore serves two dovetailing ends: it reduces courts' cost of conducting their own analysis while increasing the likelihood that the agency decision is right.

It is worth emphasizing that these benefits from deference arise only if the processes that underlie the agency's decision are consistent with the goals of the clear statement rule. A thorough, deliberative decision, weighing the conflicting factors that might justify or undermine preemption, in which state and private stakeholders have a place at the table and a meaningful voice in outcomes, should command substantial respect, because it resolves many of the concerns that would motivate resistance

to federal action. At the same time, opaque, conclusory, or interest-group-driven determinations should face heavy skepticism.

Thus, we recommend an approach to deference similar to that articulated by the Court in *Barnhart v. Walton*, 535 U.S. 212 (2002). That is, we would grant a sliding scale of deference, up to and including binding, *Chevron*-type deference in instances where there are strong reasons for granting it. Leading commentators, such as Catherine Sharkey, have previously called for *Skidmore* deference to certain aspects of agencies' preemption decisions. As a doctrinal matter, we think *Skidmore* is an imperfect vehicle. It is often treated as an empty tautology by courts, and, unlike *Chevron* and *Barnhart*, results in decisions that cannot easily be reversed by the agency. Moreover, we would focus on the agency's consideration of the specific factors justifying federal action, rather than more generically the "quality" of the agency's deliberation.

Conclusion

Overall, even taking at face value the arguments usually offered to justify prohibiting preemption by agencies, it appears that agencies should in many cases have the authority to preempt without express authorization from Congress. There are instances where preemption is an appealing policy choice. If an agency reaches that conclusion after careful weighing of the alternatives and consultation with outside interests, courts should be cautious in second-guessing, particularly where second-guessing would diminish agency incentives to take as much care in the future.

We emphasize again that we do not endorse a blank slate for agencies. Our test would likely reject as invalid many recent and prominent efforts by agencies to preempt, such as FDA's bald assertion in a preamble that its approval insulates consumer products from private state suits. Preemption has costs and benefits, just like any other enforcement choice, and an agency must lay these out and analyze them before it can meet the concerns behind the federalism clear statement rule. ○

¹ This premise can be extended to a number of federalism doctrines. For example, the Court has concluded a number of its Dormant Commerce Clause decisions with a plea for congressional resolution, often fruitlessly. We think many more of these pleas would be answered if the Court were willing to accept an answer from the Executive.

Targeted Financial Sanctions

John F. Cooney*

Many foreign governments have long resisted U.S. efforts to compel them to observe unilateral sanctions that our government has imposed on countries we regard as rogue regimes. In recent years, by utilizing basic administrative law principles to cabin its discretion, Treasury has persuaded other major financial powers to adopt multilateral sanctions that exclude suspected supporters of terrorism and weapons proliferators from international financial networks. This change in position by foreign States is a significant, but little noted, accomplishment of American financial diplomacy. This article explores how Treasury structured its discretion and induced other governments to cooperate with this important national security program.

Unilateral U.S. Financial Sanctions

After the 9/11 attacks, Treasury recognized that many of the external threats the country faces — including terrorism and proliferation of weapons of mass destruction — depend on financial support networks whose principal actors could be identified and whose support lines could be mapped through the money trails left by transactions. The Executive Branch developed a series of unilateral financial sanctions that prohibited persons and entities found to present threats to the national security from conducting transactions with U.S. financial institutions and froze all their assets within U.S. jurisdiction.

Terrorist Financing. Immediately after 9/11, President Bush issued Executive Order No. 13224, 66 Fed. Reg. 49,079 (Sept. 24, 2001), which prohibited U.S. financial institutions from engaging in transactions with persons designated as terrorists or supporters of terrorism and

froze all property held by those persons under U.S. jurisdiction. By forcing terrorists and their supporters out of the formal financial system, Treasury sought to compel them to follow more cumbersome and riskier methods of moving money, which would have a greater likelihood of detection and disruption.

Under this Order, the U.S. government has prohibited its financial institutions from engaging in transactions with Al-Qaeda and almost 500 other entities found to be supporting terrorism. For example, on September 12, 2006, Treasury utilized this process to prohibit U.S. financial institutions from direct or indirect transactions, including U.S. dollar clearing, with Bank Saderat, a large Iranian state-owned bank with over 3400 branches. The evidence gathered by Treasury showed that Iran had used the bank to transfer money to Hizballah and Hamas. 71 Fed. Reg. 53,569 (Sept. 12, 2006).

Weapons of Mass Destruction. On June 29, 2005, President Bush issued Executive Order No. 13382, 70 Fed. Reg. 38,567 (June 29, 2005), which prohibited all U.S. financial institutions from engaging in transactions with persons found to have assisted in the proliferation of weapons of mass destruction or their means of delivery and blocked their assets within U.S. jurisdiction. Based on financial intelligence gathered by other agencies and foreign governments, Treasury utilized this Order to impose targeted financial measures to attack nuclear weapons activity by Iran and North Korea. For example, on February 21, 2007, Treasury prohibited transactions with Bank Sepah, an Iranian government-owned bank that served as a key financial institution for Iran's main missile manufacturing firm. 72 Fed. Reg. 7,919 (February 21, 2007). On October 25, 2007, Treasury imposed similar sanctions on two other banks owned by the Iranian government, Bank Melli, the largest bank in Iran, and Bank Mellat, for facilitating the government's proliferation

activities and transferring funds to the Islamic Revolutionary Guard Corps.

Anti-Money Laundering Controls. Section 311 of the USA Patriot Act, 31 U.S.C. § 5318A, authorizes Treasury to exclude a specific entity from access to the U.S. financial system upon finding that reasonable grounds exist for concluding that it is a "primary money laundering concern." For example, in March 2006, Treasury blacklisted the Commercial Bank of Syria from any contact with the U.S. financial system, based on its finding that this Syrian-government controlled bank had served as a conduit for laundering the proceeds of illicit sales of Iraqi oil and had been used by terrorists and persons associated with terrorist organizations. 71 Fed. Reg. 13,260 (March 15, 2006). Similarly, in March 2007, Treasury blacklisted Banco Delta Asia of Macau, based on its findings that the bank had ignored or promoted money laundering and other financial crimes by North Korean government agencies and front companies and had provided North Korean entities access to the international financial system with little oversight or control. 72 Fed. Reg. 12,730 (March 19, 2007). The bank agreed to freeze \$25 million in North Korean funds. The loss of its capital and the disruption of one of its few channels to the international financial system helped force North Korea to abandon its nuclear program.

Multilateral Adoption of Targeted Financial Measures

Unilateral U.S. sanctions can, by themselves, have a significant impact on the ability of a targeted entity to access international financial systems. The United States remains the world's leading financial center, and the dollar the dominant currency. Dollar-denominated funds transfers, wherever originated, often pass through U.S. banks or U.S. branches of foreign institutions. A unilateral prohibition of further direct transactions through these channels and the threat of

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an asset freeze can disrupt the designated entity's operations and force it to find new pathways and new business partners through which to carry out its surreptitious business, thereby driving up its costs and increasing the risk of detection.

The effects of unilateral U.S. sanctions are limited, however, because bad actors may still access domestic financial networks indirectly by transactions through foreign banks. To force rogue States to change behavior, U.S. financial sanctions must be imposed and enforced on a multilateral basis. The necessity of obtaining international support for U.S. initiatives presented Treasury with a challenge. Many foreign governments, with support of the public, have long refused to support blunderbuss U.S. sanctions against an entire foreign country (notably Cuba). Foreign opposition generally has been based on the grounds that these measures were designed to promote U.S. foreign policy interests, rather than adherence to international norms of conduct, and that innocent civilians in the targeted country would suffer from cutting its links to international financial markets.

To overcome these objections, Treasury adopted a new approach, and Treasury and the Department of State undertook a diplomatic program to persuade foreign governments and multilateral organizations to follow the U.S. lead and exclude the same entities from contacts with their institutions. Treasury abandoned the country-wide sanction in favor of seeking a prohibition on a specific person or entity. It attempted to persuade foreign governments that sanctions were justified by submitting confidential information showing that the targeted person had conducted financial transactions to support specific actions that were illegal and threatened the national security of other countries. This approach required Treasury to work with U.S. anti-terrorism and intelligence agencies to develop a package of facts about the activities of the target that other countries could analyze and compare with their own findings.

Treasury's use of specifically targeted, conduct-based measures, supported by objective financial intelligence, overcame to a significant degree the resistance that foreign governments previously

had manifested to U.S. financial sanctions. Foreign governments and financial institutions more readily understood the mutual alignment of interests when presented with evidence of illicit financial activities by bad actors, especially activities that occurred through their own institutions. The multilateral adoption of these targeted measures has proved effective in denying terrorist financiers, weapons proliferators, and rogue States access to international financial systems.

The U.S. diplomatic initiative has had two components: persuasion, through the sharing of evidence that was sufficient to justify imposition of U.S. sanctions under standards set forth in the law or Executive Orders; and compulsion, exercised through the threat of application of the elaborate U.S. regulatory program that requires financial institutions operating in this country to prevent money laundering through their accounts.

Persuasion. Treasury worked directly with the finance ministries and central banks of other major financial powers to share the U.S. findings about the potential threats that members of terrorist and weapons proliferation networks present to common interests of the international community and each country's self-interest. Treasury sought to persuade individual countries to exercise their authorities to prohibit suspicious persons from doing business with their financial institutions. It also sought to develop consensus within multilateral organizations to recommend to their members that they take concerted action against these entities. Upon review and confirmation of the U.S. evidence package, many countries have concluded, over time, that they should adopt similar sanctions to protect their own national security and preserve the integrity of their financial systems.

While working directly with governments, Treasury simultaneously sought to persuade major international financial institutions to sever their relations with the targeted entities, without waiting for their home-country regulator to impose binding legal restrictions. Many institutions have complied voluntarily with the U.S. program to avoid facilitat-

ing terrorism or weapons proliferation and to preserve their reputations. For example, in 2006 alone, Treasury shared with more than 40 foreign banks information it had collected concerning financial transactions conducted by the Iranian government and discussed the risks of doing business with entities in Iran. Many large European banks with longstanding relationships with Iran were persuaded to terminate or curtail relations with entities the United States identified as suspicious and with State-controlled banks that transacted business for these entities.

Compulsion. Treasury also effectively used the threat of sanctions under the U.S. Anti-Money Laundering ("AML") program to persuade foreign banks doing business in the U.S. that it was not in their financial self-interest to maintain relations with a customer that the U.S. had designated as a terrorism supporter or weapons proliferator.

The AML program requires domestic and foreign banks to make a risk-based review of each customer account and determine whether its retention is justified in light of the risks it presents. Most major foreign financial institutions have offices in this country through which they interact with U.S. financial market. These U.S. outposts, though small in terms of assets, often are vital to the ability of the entire institution to do business. Since 2004, the Federal Reserve and other U.S. bank supervisors have imposed numerous regulatory orders on the U.S. branches of many large foreign banks for the failure of their U.S. offices to satisfy their AML obligations. The resulting remedial orders have, in many cases, imposed compliance requirements that apply *de facto* to all the international institution's operations, wherever located, because system-wide compliance is the only reliable method to assure that dollar-denominated transactions with suspicious persons will not be processed through an institution's U.S. office.

Periodic examinations of the U.S. office's AML compliance efforts have provided the U.S. government opportunities to discuss with foreign institutions the risks presented by continuing to do

continued on page 13

Maybe the Experts Were Wrong About the ANPRM

By Andrew Emery* and Fred Emery**

In the early days of the Carter Administration a Task Force comprised mostly of White House staff was working on a regulatory reform effort that eventually produced Executive Order 12044, Improving Government Regulations. Some White House staff members were so enamored with the Advance Notice of Proposed Rulemaking (ANPRM) that they wanted to make it mandatory in virtually every rulemaking. Several “rulemaking experts” talked them out of the idea. Given that ossification of the rulemaking process has increased several orders of magnitude since those days, perhaps the time has come to reconsider the idea of a mandatory, or at least strongly encouraged, ANPRM requirement.

Ironically, one of the experts’ main arguments in 1977 was that the ANPRM was a very useful tool, but only if used sparingly. In particular, they were concerned that overuse of the ANPRM would undermine the impact and slow down the rulemaking process by adding another phase of bureaucracy to the process. Why then would now be a good time to start using the ANPRM more often? This article will make a case for the ANPRM.

There are many reasons why the informal rulemaking process no longer resembles the process set out in the

Administrative Procedure Act. The list of potential culprits is long, but here are the major categories:

- Statutory requirements (e.g., Regulatory Flexibility Act, Paperwork Reduction Act, National Environmental Policy Act, Federal Advisory Committee Act, Information Quality Act).
- Executive Orders (e.g., E.O. 12866, Regulatory Planning and Review, as amended; E.O. 13132, Federalism; E.O. 12630, Property Rights; E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks).
- Pre-enforcement Judicial Review.
- OMB/OIRA Review.
- Limits on agency resources.

The result is, except for emergency situations, the time from an agency first thinking about the need for rulemaking to publishing an NPRM in the *Federal Register* is more often measured in years than in weeks or months.

Recently this Section and a task force sponsored by OMB Watch offered recommendations to the new Administration on ways to improve the rulemaking process. Both groups focused on the need to speed up the process while improving public participation in the process. If one looks carefully at the length of any rulemaking process, one finds that the longest segment of that process occurs within the government rather than in the public portion of the process. The agency must clearly identify a problem, then decide whether rulemaking is the proper solution, then explore rulemaking options, then convince the policy makers which option to choose, etc. In most regulatory agencies, this process must first occur at the agency level (e.g., FAA, FMCSA, NHTSA), then at the Department level (DOT), and then again at OMB/OIRA.

We believe that more frequent use of the ANPRM could both speed up the

rulemaking process and enhance public participation.

1. At the ANPRM stage the agency need not, in fact, should not, have made its policy decision(s).
2. At the ANPRM stage the agency probably needs lots of help gathering the information necessary to understand the problem and the information necessary to identify possible viable solutions. Agencies often do not have the information they need or the resources to get the information.
3. At the ANPRM stage the agency is less likely to have locked into a solution. Thus, it still should be possible for an outside group to truly affect the policy decision.
4. At the ANPRM stage senior management (agency and departmental) and OMB/OIRA should not feel that they have to review and concur with every dotted “i” and crossed “t.”
5. The time required to produce a meaningful ANPRM should be a matter of days or weeks, not months or years.

Much of the early agency work (research, testing solutions, etc.) could proceed in parallel with the ANPRM process, and yet the agency’s early work would benefit from the comments submitted in response to the ANPRM. For frequent use of ANPRMs to work, senior management officials, at all levels, would have to allow (trust) their staffs to float trial balloons. Departmental level and OMB level “reviewers” and “deciders,” for the most part, would have to stay out of the game until agency staff is ready to recommend going forward with a Notice of Proposed Rulemaking (NPRM). Probably the only time that an ANPRM should require review at the departmental and OIRA levels would be when the issues involved are considered

continued on page 25

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** Vice President of TRG. Mr. Emery has been conducting courses on the Federal regulatory process for more than 25 years. Mr. Emery is a former Director of the Federal Register and a Fellow in the Section of Administrative Law & Regulatory Practice.

The Time for State and Local Governments to Consider the ABA Model Legislation for Land Use Procedures Is Now!

By Edward J. Sullivan★

For more than two years, a Joint Task Force from the American Bar Association (“ABA”) Sections on Administrative Law and Regulatory Practice (“Admin Law”) and State and Local Government Law (“SLGL”) labored over a project that brought out the best in both sections. At the ABA Annual Meeting in Chicago in 2006, Professor Michael Asimow, then Vice Chair of the Admin Law section, presented a paper critical of local government decision making in land use matters and proposed some solutions. Yours truly, then Chair Elect of SLGL, agreed with Professor Asimow on the deficiencies of land use decision making, but disagreed with the solutions proposed. As lawyers and academics do, we researched our views and set them out in writing. The result of these discussions was the appointment of the Joint Task Force by both sections to work on model legislation.

Land use decision making is familiar territory for SLGL members, but the addition of the Admin Law expertise enhanced the effort to produce a set of standards that will make land use decision making transparent, uniform, and practical. Not only did the sections attack the problems of the administrative process, but they took on the more difficult issue of judicial review. The Model Legislation on Land Use Procedures law resulted.

A Brief History

Most states have enacted one or another variation of the Standard State Zoning Enabling Act, authored in 1926 by a blue ribbon committee of architects, lawyers and planners under then Secretary of Commerce Herbert Hoover. While some of these mecha-

nisms provided under the Act (such as variances and special exceptions) were “administrative” (quasi-judicial) in nature and reviewable by *certiorari* like decisions of administrative agencies, there were few procedures governing decision making. Moreover, most states viewed the adoption of the original zoning map, and any amendment thereto, whether affecting a large area or one or two parcels, to be a legislative act, with no procedural requirements, other than notice and an opportunity to be heard.

Courts really didn’t do much to create higher procedural expectations in land use decision making. There was the erratic and ultimately self-defeating use of substantive due process, which, in land use law, appeared to survive the fall of that constitutional standard in other areas by 1940. But procedural due process litigation fared no better because the courts demanded that a challenger demonstrate a “property right,” rather than a mere expectation, something most applicants and neighbors did not possess. It is no wonder that the First Amendment or the taking clause became the chosen weapons of constitutional litigation in land use.

Participants in land use hearings were thus in a bind, for there were few statutory and almost no constitutional checks to ensure a good decision making process. To be sure, there were efforts to reform the process, including one to rewrite the State Standard Zoning Enabling Act in 1975 by the American Law Institute. In 2004, the American Planning Association (“APA”) also undertook this same challenge, which resulted in the publication of the Growing Smart Legislative Guidebook. A few states have since amended their planning enabling laws to require adoption of a comprehensive plan as a basis for land use regulation and also

provided certain substantive standards for rezoning. But even the APA’s efforts were less successful in controlling the land use decision making process on the local level, as Professor Asimow has so eloquently articulated in his various articles on the subject.

The New Model

The Joint Task Force Model Legislation, which has received the *imprimatur* of the American Bar Association, urges states, territories and local legislative bodies to adopt a higher standard of decision making procedure.

The Model Legislation on Land Use Procedures addresses a number of important objectives:

1. Provide a disciplined and integrated decision making process for administrative land use decisions.
2. Provide a format for quasi-judicial hearings and decisions.
3. Provide a comprehensive basis for the judicial review of administrative land use decisions.

Within these broad reforms, there are a host of details. For example, an application for a development permit must undergo a “completeness check” to assure that all information needed to process the permit is present. If complete, a permit must be processed within a time certain. The permit may go straight to a quasi-judicial hearing or proceed to a hearing only if an administrative decision by staff is appealed by an affected party. All applications for hearings must be noticed. Multiple permits for the same use can be consolidated. All permit applications must be the subject of findings and a permit may be conditioned if approved. A structure for the application process and appeal fees is also provided. The Model Legislation also provides an optional hearing examiner

continued on next page

★The author is a partner in the Portland Oregon office of Garvey Schubert Barer.

ABA Model Legislation *continued from page 11*

system when applications are not decided by, or appealed from, planning staff. This more formal hearings process allows for evidence to be presented and rebutted before a neutral decision maker who either makes a recommendation or a final decision subject to further review.

A third alternative tier of review is provided by a Land Use Review Board which acts like a Board of Zoning Appeals. Following these reviews, the decision may be reviewed by a court.

Judicial Review is generally limited to the record of the proceedings below and all local reviews must be exhausted before the courts are used. The Act provides for a fairly low standing bar,

and courts are entitled to stay local proceedings and permits while review is undertaken. The standards of review are also limited to the usual quintet of constitutionality, jurisdiction, improper construction of applicable law, substantial evidence on the whole record, and gross procedural error that substantially affected the rights of a party.

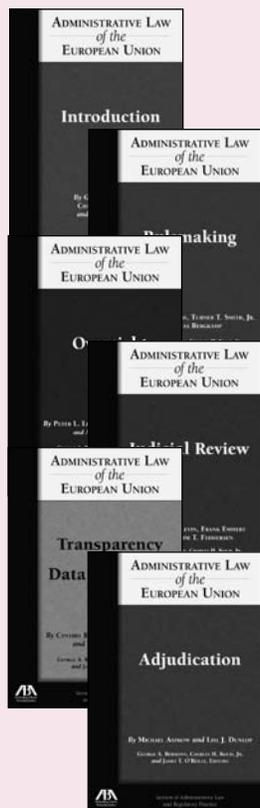
Going Forward

Now that the ABA House of Delegates has acted on this model legislation, it is time for state and local governments to act. These agencies should reevaluate their enabling legislation and land use procedures and, where deficiencies are

noted, consider adopting the Model Legislation. The ABA is transmitting this proposal to state legislatures. The American Planning Association has given extensive publicity and support to the Model Legislation as well. For those Admin Law Section members who have overlooked the vast number of land use decisions made at the local level, this is a good time to be an agent for reform.

The Standard State Zoning Enabling Act was written in the time of the Model-T. This proposal fits the needs of the 21st century. Whatever your politics, the Model Legislation on Land Use Procedures is change we, as professionals, can all believe in. ○

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Targeted Financial Sanctions *continued from page 9*

business with an entity that the U.S. has designated for supporting terrorism or proliferation. The risk of further sanctions, potentially including closure of the U.S. branch and thus exclusion from the U.S. market, persuaded many major foreign financial institutions to discontinue doing business with entities and regimes that the U.S. seeks to isolate.

The greatest success of the targeted financial measures program has been the broad international adoption of U.S. measures to exclude from international financial markets entities that support Iran's nuclear program. Starting in 2006, Treasury imposed unilateral sanctions on Iranian banks including Bank Saderat. Based on evidence collected by U.S. intelligence and anti-terrorism agencies, the United Nations Security Council has adopted three Resolutions imposing increasingly severe sanctions on Iran, including Resolutions that required member States to cease doing business with Bank Sepah, Bank Melli and Bank Saderat. The multilateral Financial Action Task Force, created under the auspices of the G-7, adopted several

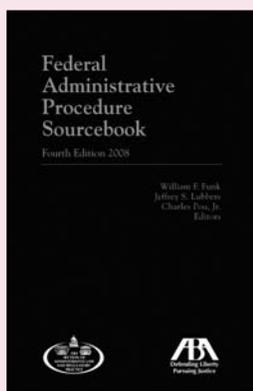
Statements that cited Iran for failure to maintain an adequate AML or counter-terrorism program. The FATF actions in turn justified Treasury in further tightening U.S. unilateral measures and seeking to persuade other countries to extend their prohibitions against doing business with these entities.

From their experience with the AML compliance program and examinations of their U.S. operations, foreign banks understand that the United States regards Iranian banks and their customers as high risk and that they may be subject to significant U.S. sanctions if a transaction occurs through its accounts that later is determined to have been suspicious. In 2006-2007, ABN Amro, Barkley's, Crédit Lyonnais, Crédit Suisse, HSBC, Société Générale, Standard Chartered, UBS, Commerzbank and Deutsche Bank limited or ended their dealings with Iranian banks. Thanks to effective U.S. financial diplomacy, the home country governments of these banks have not complained publicly that the U.S. essentially had imposed its laws on their banks on an extraterritorial basis

through creation of these disincentives. In part, these governments recognize the strength of the U.S. evidence of malfeasance by Iranian banks. In other respects, they understand that they need not remonstrate to protect the ability of their institutions to compete in international markets, because banks in the U.S. and other countries also have ceased doing business with the targeted entities.

Through this multilateral effort, Treasury has excluded Iran from most direct or indirect contacts with the international financial system without having to bear the negative diplomatic consequences of a unilateral order that foreign countries might resist. This success is attributable in substantial part to Treasury's willingness to cabin its discretion through standards that define when it would designate a foreign entity for sanctions and to its willingness to share its evidence with other countries. It also depends upon the fact that any sanctions imposed by the U.S. would be imposed under a regulatory program that the U.S. has applied consistently to foreign and domestic banks alike. 

From the ABA Section of Administrative Law and Regulatory Practice Federal Administrative Procedure Sourcebook, Fourth Edition



William F. Funk, Jeffrey S. Lubbers, and Charles Pou, Jr. – Editors

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**In Boston, MA
February 12–13, 2009**

Program Co-Chairs: Paul Afonso & Renee Landers

Thursday • February 12, 2009

Suffolk University Law School

4:00 pm – 5:30 pm Room 285	Managing the Bailout: Execution and Oversight of the Federal Response to the Financial Crisis
5:30 pm – 7:00 pm Faculty Boardroom	Reception Panel and Reception Sponsored by the Rappaport Center for Law and Public Service, Suffolk University Law School
7:00 pm	Prix-fixe Dinner in a local restaurant

Friday • February 13, 2009

Fairmont Copley Plaza Hotel

8:00 am – 9:00 am	Registration
9:00 am – 10:30 am	Recent Developments in Education Law and Communications Law
10:45 am – 12:15 pm	FCC vs Fox
12:30 pm – 1:45 pm	Luncheon with Guest Speaker
1:45 pm – 3:30 pm	Regional Greenhouse Gas Initiatives — Lasting Model or Historical Artifact?"
1:45 pm – 3:30 pm	Implementing Health Reform: The Massachusetts Example
3:30 pm – 5:00 pm	Family Medical Leave Act Update

By Robin Kundis Craig*

The U.S. Supreme Court has heard or scheduled oral argument in a number of cases this term that may be important to administrative law practitioners. A summary of those cases and likely issues follows.

Challenges to Federal Agency Regulations, Interpretations, and Decisions

Winter v. Natural Resources Defense Council, 518 F.3d 658 (9th Cir. 2008), cert. granted June 23, 2008, oral argument heard October 8, 2008, decision issued November 12, 2008: The Natural Resources Defense Council (NRDC) challenged the Navy's use of its medium frequency active sonar (MFAS) in submarine-finding training exercises off the coast of California because of the Navy's failure to complete an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332. The Navy's use of these high-powered sound pulses allegedly injures marine mammals such as whales and dolphins. After lower courts imposed mitigation requirements on the Navy through "carefully tailored" injunctions to reduce harm to marine mammals, the Council on Environmental Quality (CEQ) concluded, pursuant to its NEPA regulations, that "emergency circumstances" existed. It therefore allowed the Navy to use alternative procedures to comply with NEPA. As presented to the Supreme Court, therefore, one issue in the case was whether the CEQ had permissibly construed its own regulation and whether that regulation was valid under NEPA.

As generally expected, the Supreme Court decided this case quickly. *Winter v. NRDC*, — U.S. —, — S. Ct. — 2008 WL 4862464 (Nov. 12, 2008). However, the Court did not decide whether the CEQ's use of the "emergency circumstances" exception was valid. Instead, in a 5-2-2 decision, in a majority opinion authored by Chief Justice Roberts, the Court concluded that the lower courts had impermissibly issued preliminary injunctions against the Navy, because the public interest in national security clearly outweighed the potential harm to marine mammals.

Summers v. Earth Island Institute, 490 F.3d 687 (9th Cir. 2007), cert. granted January 18, 2008, oral argument heard October 8, 2008: In this case, several environmental organizations argued that the U.S. Forest Service violated the Forest Service Decision Making and Appeals Reform Act (FSDM&ARA), Pub. L. 102-381, § 322, when the Service promulgated regulations that changed its administrative review and appeals procedures. The Ninth Circuit concluded that: (1) the plaintiffs had standing to challenge the regulations that

precluded appeal of Forest Service decisions regarding activities and projects that were categorically excluded from NEPA's EIS requirement; (2) those regulations violated the FSDM&ARA; and (3) plaintiffs' challenges to other regulations were unripe because the Forest Service had not yet used those new regulations. The Ninth Circuit enjoined the invalid regulations nationwide.

All four issues — including the validity of the nationwide injunction — are before the Supreme Court. However, standing was clearly foremost on the Justices' minds during oral argument, and their eventual opinion may change the status of so-called "procedural standing." Regarding the basic principles of standing applicable to the case, the government argued that "procedural wrong is not Article III injury," that "[t]he procedural regulation does not cause injury," and that any injury to the plaintiffs had to derive from the underlying activity being challenged, not the regulation itself, because "standing has to focus on the particular site-specific place where the individual has visited . . ." Plaintiffs, in turn, emphasized that the Court has always allowed facial challenges to broadly applicable regulations. Moreover, plaintiffs emphasized that even under a more constricted view of standing, they had established standing with respect to the Burnt Ridge Project at the beginning of the litigation; completion of the Burnt Ridge Project during the litigation became a question of mootness, not standing.

Justice Breyer suggested that the mere facts that the plaintiffs frequently challenge Forest Service activities and Congress wanted such plaintiffs to be able to challenge Forest Service decisions should give those plaintiffs standing. Justice Souter pressed the government on the need for elasticity in standing doctrine to allow certain kinds of regulations to be challenged at all, especially regulations like the ones at issue, which preclude administrative challenge or appeal. Justice Ginsburg, in turn, suggested that the FSDM&ARA itself gave citizens rights to notice, comment and appeal and hence that citizens should have standing to enforce those rights, just as is the case under the Freedom of Information Act. Justice Scalia, in contrast, emphasized that the regulation itself could be challenged in connection with a challenge to a specific project or activity and that Congress cannot eliminate the Article III standing requirements; hence, that challenges to regulations — even facial challenges — had to wait for a concrete application to particular facts. Moreover, he expressed skepticism regarding the plaintiffs' ability to base standing on their interests in all forests throughout the United States. Chief Justice Roberts emphasized language from the *Lujan* decision, especially the significance of language in footnote 2 of that case, and debated the acceptability of affidavits to establish standing filed at later stages of the litigation.

Regarding ripeness, Chief Justice Roberts suggested that the purely legal issue of the regulations' validity worked against

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the government's argument that the challenges were not ripe, to which the government argued that the need to determine whether an EIS was in fact required would require a factual analysis. Plaintiffs' counsel emphasized that the regulations had actually been applied and hence that their effects were not merely theoretical.

Justice Ginsburg asked specifically about the nationwide injunction, characterizing it as "the Ninth Circuit making a law for the entire nation . . ." The plaintiffs argued that a decision on the basic legality of a regulation was different from a decision regarding the propriety of certain practices or based on particular facts and that the district court properly weighed the *Mendoza* interests. The government, in contrast, argued that injunctions are discretionary relief and the Ninth Circuit and district court had abused their discretion.

***Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007) (en banc), cert. granted February 25, 2008, oral argument heard November 3, 2008:** Under the Indian Reorganization Act of 1934, 25 U.S.C. § 465, the Secretary of the Interior, acting through the Bureau of Indian Affairs (BIA), can take land into trust for federally recognized Indian tribes, limiting state authority over those lands. Under this statute, the Department of the Interior (DOI) accepted a 31-acre parcel of land in Rhode Island in trust for the Narragansett Tribe, to be used for tribal housing. The State of Rhode Island and Town of Charlestown challenged this action. The First Circuit decided, *en banc*, that the DOI's construction of the Act so that it applies to tribes not federally recognized in 1934 was entitled to *Chevron* deference, that the BIA had not acted arbitrarily and capriciously in taking the land in trust for the Tribe, and that the BIA did not violate NEPA by issuing a Finding of No Significant Impact for the transfer. The Supreme Court granted *certiorari* to review two of the three issues presented, namely: (1) whether the 1934 Act allows the DOI to take land into trust to benefit tribes not recognized in 1934; and (2) whether an act of Congress extinguishing aboriginal title and all claims based on Indian rights and interests in the land prevents the DOI from creating "Indian country" lands in the same place.

Oral argument suggested that statutory interpretation, deference to federal agencies, and federalism concerns will all play a role in the final decision. Indeed, while primarily a statutory interpretation/*Chevron* case, the Court's decision also has the potential to pit the concerns of tribes against the concerns of states.

At oral argument, counsel for Rhode Island and the Town emphasized that the Indian Reorganization Act defines Indians to be "members of any recognized Indian tribe now under Federal jurisdiction" and argued that the word "now" limited the Act's scope to tribes recognized in 1934. While acknowledging that context is important in determining the referent for "now," the plaintiffs nevertheless argued that in the context of the Act that "now" means "at the time Congress enacted the

legislation." In response to Chief Justice Robert's question, they also noted that the potentially broader definition of "tribe" was limited in context by the modifier "Indian," and thus that the temporal limitation held although, as Justice Stevens noted, "Indian" also modified "adult," even though adult status for particular individuals would clearly change after 1934. Finally, in rebuttal, the plaintiffs picked up on Justices' concerns about federalism to argue that Congress had been nowhere near clear enough to abrogate states' authority over lands within their borders for tribes not recognized in 1934. In contrast, the government argued that "now" referred to "at the time the statute is applied or invoked." It pointed to varying uses of "now" throughout the Act and emphasized that Congress twice used the much more specific phrase "at the time of passage of this Act" when it wanted to be explicit about that timing. It also pointed out that the Secretary of the Interior has uniformly applied its definition when implementing the Act, since the very beginning, and that Congress has relied on the Secretary's reading of the Act. Finally, it argued that the United States has a trust responsibility to the tribes and that statutes should be interpreted to the tribes' advantage.

Justice Kennedy, Chief Justice Roberts, and Justice Ginsburg questioned the plaintiffs about the historical context of the Act, asking what kinds of Indians were not under federal jurisdiction in 1934 and how "recognized" tribes should be identified, given the lack of formal recognition process at the time and numerous acknowledged errors in the list eventually produced. Even Justice Scalia suggested that there could be no clear meaning to "now under the jurisdiction of the United States" if the factual issue of federal recognition was unclear at the time. In questioning the federal government, however, Chief Justice Roberts argued that the agency's position was that the Act meant the same thing with the word "now" as it would mean without it. Justice Scalia, in turn, suggested that the government's interpretation would allow the DOI to include whomever it wanted, without limitation. Both Justices suggested that the Court's decision in *United States v. John* foreclosed the government's interpretation. Justice Ginsburg and Justice Souter questioned the government's assertion that tribes being federally recognized and tribes being "now under federal jurisdiction" meant essentially the same thing. Justice Breyer expressed skepticism that the meaning of "now" was something that Congress would choose to delegate to the DOI.

Regarding federalism concerns, Chief Justice Roberts emphasized that "we are talking about an extraordinary assertion of power. The Secretary gets to take land and give it a whole different jurisdictional status apart from State law . . ." Similarly, Justice Kennedy asked whether there "is some canon of construction, some principle of Federalism which makes us be very cautious before we take land out of the jurisdiction of the State."

Federal Communications Commission v. Fox Television Stations, 489 F.3d 444 (2d Cir. 2007), cert. granted March 17, 2008, oral argument heard November 4, 2008: The Federal Communication Commission (FCC) polices indecent speech in broadcasts pursuant to 18 U.S.C. § 1464 and 47 U.S.C. § 503(b)(1)(D) while simultaneously being prohibited from engaging in censorship by the Federal Communications Act, 47 U.S.C. § 326. On November 6, 2006, the FCC announced a “fleeting expletives” enforcement policy in an administrative enforcement order regarding two Fox broadcasts. After Fox challenged the enforcement action, the Second Circuit found that the policy represented an abrupt change from prior FCC regulation and case law and that the FCC had failed to articulate a rational explanation for the policy. As a result, the Second Circuit declared the new policy arbitrary and capricious under the Administrative Procedure Act (APA).

At oral argument, the government conceded that the FCC had indeed changed policy. Nevertheless, it argued that the new policy was not arbitrary and capricious, because: (1) the FCC acknowledged its change in position; (2) it gave a concrete explanation for that change; and (3) the explanation is plausible and consistent with the agency’s statutory mandate. It also emphasized the FCC’s overall goal of protecting children in family homes during prime time hours. Fox’s counsel, in turn, argued that the FCC had *not* forthrightly acknowledged that it was changing policies, even though it assessed no fines, and that agencies have a higher burden of explanation when they are changing policies. In response to questions from Chief Justice Roberts, Fox acknowledged that the FCC could simply decide that its prior policy was wrong, so long as it explained why — but Fox emphasized throughout its argument that the FCC had never explained what in American society had suddenly changed to require reversal of a 30-year regulatory understanding. Finally, Fox emphasized that the FCC was enforcing a general criminal statute and hence had only limited authority to decide on its meaning.

In response to the government’s argument, Justice Ginsburg questioned the operation of the FCC’s indecency policies, seeing no consistency in when the FCC considered use of expletives to be appropriate and when it considered them indecent. Similarly, Justice Stevens questioned whether expletives could be considered indecent in all contexts, or only when clearly referring to sex. Justice Ginsburg, Chief Justice Roberts, and Justice Kennedy questioned the use of “community standards” of decency, while the Chief Justice also raised the question of the FCC’s efficacy when so many other media are available besides broadcast television. Justice Breyer asked about the practicalities of forbidding fleeting expletives during broadcasts of live events.

During Fox’s argument, the Justices concentrated their questions on what the FCC would have to say to survive arbitrary and capricious review. Justice Souter, for instance, asked

whether increased complaints from viewers could serve as the basis for a justification for a change in policy. Chief Justice Roberts suggested that children, like the FCC, are quite capable of determining the relevance of context to the use of expletives and hence that the FCC’s case-by-case discretion is not arbitrary or capricious. Justice Scalia seemed unwilling to make distinctions between fleeting expletives and the “verbal shock treatment” discussed in *Pacifica*. Justices Stevens and Souter ended the discussion with questions regarding how to define “indecent” and whether the number of times a word is used affects whether it is “indecent” for purposes of the federal criminal statute, while Justice Scalia argued that the FCC should be entitled to deference in its interpretation.

Throughout the argument, the background First Amendment concern loomed large, and the Justices appeared to have different philosophies regarding whether courts can reach constitutional issues during an APA arbitrary and capricious review. Fox argued that First Amendment standards had to be relevant to the arbitrary and capricious review, prompting questions from Justice Souter about the constitutional avoidance doctrine and questions from Justice Scalia and Chief Justice Roberts about the limited scope of the APA and the *Vermont Yankee* doctrine. This questioning tends to suggest that the Justices wish to resolve the case on administrative law grounds rather than reaching First Amendment issues. In particular, Justice Scalia argued that if Fox wanted a constitutional decision, it should have insisted that the district court give it one.

United States v. Eurodif S.A. and USEC, Inc. v. Eurodif S.A. (consolidated), 506 F.3d 1051 (Fed. Cir. 2007), cert. granted April 21, 2008, oral argument heard November 4, 2008: Pursuant to 19 U.S.C. § 1673, the federal trade antidumping statute, the Department of Commerce (DOC) concluded that contracts to have uranium enriched overseas and then brought back to the United States involved sales of goods and hence were subject to the antidumping statute. The Federal Circuit determined that the claims regarding these determinations were not ripe, because the claims concerned the application of DOC’s decisions to future entries of low enriched uranium. Before the Supreme Court, however, the DOC and USEC argued that the Federal Circuit erred in rejecting the DOC’s interpretation of the statute, which should have received *Chevron* deference. The Justices’ questioning suggests that one issue in their decision may be the differences between uses of *Chevron* deference and substantial evidence review.

At oral argument, the government noted that the DOC had determined that the separate work unit (SWU) contracts at issue did result in merchandise — the enriched uranium — being sold in the United States and hence that the antidumping statute applied. It argued that the determination was reasonable and therefore that the Court should sustain it. USEC similarly argued that SWU contracts could be characterized a number of

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ways but that the DOC's characterization was reasonable. The companies, finally, argued that the DOC's interpretation represented a change in policy that would cause great uncertainty in the industry.

Justice Breyer and Justice Stevens questioned the government extensively about the potential breadth of the DOC's interpretation to U.S. trade. Chief Justice Roberts asked the government to clarify its test for determining when exactly goods would be covered, and Justice Scalia raised the potential role of the common law in defining which contracts really involved the sale of goods. Justice Ginsburg asked the government to distinguish the uranium rulings from the position of the government in the *Florida Power* case, where similar contracts were deemed service contracts exempt from the statute. Finally, Justice Stevens asked about the proper way to interpret "sales" under the Act.

Justice Breyer questioned USEC extensively about the history of the DOC's interpretation of the 90-year-old anti-dumping statute. Justice Stevens, similarly, asked whether the DOC had ever received *Chevron* deference for its antidumping interpretations or determinations. Justice Kennedy suggested that *Chevron* deference and the substantial evidence standard were being confused, and Chief Justice Roberts also questioned whether the case involved an interpretation of law for *Chevron* purposes or an application of law to the facts. Justice Stevens inquired as to whether the case could be resolved on the basis of whether SWUs involved "sales" under the common law or Uniform Commercial Code.

Justice Scalia dominated the questioning during the companies' argument, pressing the point that there was no way to tell whether the initial owners of the uranium got the exact same uranium back, and hence that transfers of title could occur. He also was looking for a meaningful distinction between processing contracts and sales contracts. Justice Souter also pressed for more detailed descriptions of the enrichment contracts at issue, while Justice Breyer emphasized that the utilities themselves eventually used the uranium rods directly, without an intervening sale. Justice Kennedy and Justice Stevens also pressed several questions about the mixing of uranium feedstocks and the inevitable transfer of title that would occur.

Entergy Corp. v. Riverkeeper, Inc., PSEG Fossil LLC v. Riverkeeper, Inc., and Utility Water Act Group v. Riverkeeper, Inc. (consolidated), 475 F.3d 83 (2d Cir. 2007), cert. granted April 14, 2008, oral argument scheduled December 2, 2008: Section 316(b) of the federal Clean Water Act provides that Section 301 effluent limitations and Section 306 new source performance standards "applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. § 1326(b). After an aborted attempt in 1977 and much litigation thereafter, the Environmental Protection Agency (EPA)

finally began promulgating the Section 316 cooling water intake regulations in three phases: regulations issued December 18, 2001, governed cooling water intake structures for new facilities; regulations issued July 9, 2004, governed cooling water intake structures at existing large power plants; and regulations yet to be issued will govern cooling water intake structures at all other existing facilities.

This litigation involves the 2004 Phase II regulations, which are designed to reduce deaths of and injuries to aquatic organisms that otherwise become trapped during the intake of large amounts of cooling water at power plants. States, environmental organizations, and utilities challenged these technology-based regulations on a variety of grounds, but the Supreme Court granted *certiorari* for only one question: Whether Section 316(b) of the Clean Water Act authorizes the EPA to engage in cost-benefit balancing to determine what constitutes the "best technology available for minimizing adverse environmental impact" (BTA).

The Second Circuit concluded that Section 316(b) did *not* permit use of cost-benefit analyses. As the Second Circuit recognized, "Section 316(b) does not itself set forth or cross-reference another statutory provision enumerating the specific factors that the EPA must consider in determining BTA." 475 F.3d at 97. Looking more generally at Section 301 effluent limitations, the court concluded that when the Clean Water Act shifted from effluent limitations based on "best practicable technology" (BPT) to the more stringent "best available technology" (BAT)-based standards, the EPA's ability to consider cost substantially diminished. Specifically, "the EPA may consider cost as a factor to a limited degree, . . . but only as to whether the cost of a given technology could be reasonably borne by the industry and not the relation between that technology's costs and the benefits it achieves." *Id.* at 98 (citing *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 71 (1980)). Similarly, Section 306 new source performance standards reflect "the best available demonstrated control technology" (BADT), and, while Congress allowed the EPA to consider the costs of that technology in setting the standards, it did not require a cost-benefit analysis. *Id.* Finally, with respect to BTA in Section 316(b), the Second Circuit concluded "that the language of section 316(b) itself plainly indicates that facilities must adopt the best technology available and that cost-benefit analysis cannot be justified in light of Congress's directive." *Id.* at 98-99.

Peake v. Sanders, 487 F.3d 881 (Fed. Cir. 2007), cert. granted June 16, 2008, oral argument scheduled December 8, 2008: The Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, requires the Department of Veterans Affairs (VA) to provide a four-part notice to benefits claimants. Under 38 U.S.C. § 7261(b)(2), review of administrative decisions resolving claims for veterans benefits must "take due account of the rule of prejudicial error." Claimant Woodrow Sanders sought veterans' benefits for an eye injury that allegedly occurred during

World War II. After successfully petitioning the VA to re-open his claim after its original denial in 1949, Sanders nevertheless had his claim denied again in October 2003. He argued on appeal to the Veterans Court that the VA had failed to give him notice of who was responsible for providing substantiating evidence of his claim, as the VCAA requires. The Veterans Court found that Sanders had failed to demonstrate prejudice from this violation and upheld the denial of his claim. The Federal Circuit reversed, holding that VA procedural errors are presumed to be prejudicial and that the burden is on the VA to show that the error did not affect the essential fairness of the adjudication.

The Federal Circuit emphasized the purposes of the VCAA in general and the notice requirements in particular to conclude that “[t]he requirement that a claimant demonstrate prejudice as a result of a VCAA notice error is at odds with the very purpose behind the passage of the VCAA,” 487 F.3d at 889 — namely, “to ensure that the VA assisted veterans claiming VA benefits.” *Id.* at 885.

***Coeur Alaska, Inc. v. Southeast Alaska Conservation Council and Alaska v. Southeast Alaska Conservation Council*, 486 F.3d 638 (9th Cir. 2007), cert. granted June 27, 2008, oral argument scheduled January 12, 2009:** The federal Clean Water Act creates two permit programs for discharges of pollutants into the waters of the United States — the Section 404 permit program for discharges of dredged or fill material, 33 U.S.C. § 1344, and the Section 402 National Pollutant Discharge Elimination System (NPDES) permit program for discharges of all other pollutants. 33 U.S.C. § 1342. The states and the federal Environmental Protection Agency (EPA) implement the NPDES permit program, while the U.S. Army Corps of Engineers issues almost all Section 404 permits.

Coeur Alaska applied to the Army Corps for a Section 404 permit, proposing to discharge process wastewater containing tailings from its Kensington Gold Mine in southeast Alaska into Lower Slate Lake, a navigable lake for purposes of the Act. Specifically, Coeur Alaska proposed to discharge approximately 210,000 gallons of wastewater containing 1440 tons of tailings into the lake each day in the form of a slurry that is 45% water and 55% tailings. Over the life of the mine, Coeur Alaska would deposit about 4.5 million tons of tailings into the Lake, raising the bottom of the lake 50 feet, to its current high water mark, killing all the fish and most of the aquatic life, increasing the lake’s pH to over 10, and adding several potentially hazardous materials such as lead and mercury.

The issue in the litigation is what kind of Clean Water Act permit Coeur Alaska’s operations require. The Army Corps took jurisdiction and issued a Section 404 permit on grounds that the slurry is “fill material” because it would have the effect of raising the bottom elevation of the lake. 33 C.F.R. § 323.2(e). However, the EPA has promulgated a new source performance standard for purposes of the NPDES

permit program, applicable to Coeur Alaska’s operations, that completely prohibits discharges from froth floatation mills into waters of the United States. 40 C.F.R. § 440.104(b)(1).

The Ninth Circuit concluded that the NPDES permit program applied and hence reversed the district court’s grant of summary judgment in favor of the Army Corps. After reviewing the structure of the Clean Water Act and its two permit programs, it concluded that Section 301 effluent limitations and Section 306 new source performance standards apply to *all* discharges, regardless of permit program, and “§ 404’s silence regarding the explicit and detailed requirements in § 301 and § 306 cannot create an exception to those sections’ strongly-worded blanket prohibitions.” 486 F.3d at 646–47. Moreover, “[i]f EPA has adopted an effluent limitation or performance standard applicable to a relevant source of pollution, § 301 and § 306 preclude the use of a § 404 permit scheme for that discharge.” *Id.* at 647. Finally, the Ninth Circuit emphasized that when the EPA was promulgating its froth floatation regulation and while both agencies were promulgating the regulatory definitions of “fill material,” they recognized the potential conflict at issue in this case and agreed that the NPDES permit program should govern. *Id.* at 648–53.

In addition to issues of statutory and regulatory interpretation, the case potentially raises a longstanding problem of deference under the Clean Water Act — namely, when the EPA and Army Corps disagree, whose position controls? Finally, Coeur Alaska has framed the case as raising the issue of whether the Ninth Circuit has upset 35 years of agency practice and reallocated regulatory authority between the two agencies.

Federal Preemption of State Law

***Altria Group, Inc. v. Good*, 501 F.3d 29 (1st Cir. 2007), cert. granted January 18, 2008; oral argument heard October 6, 2008:** The federal Cigarette Labeling and Advertising Act Act, 15 U.S.C. §§ 1331–1336, prohibits states from imposing any “requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes” and authorizes the FTC to regulate unfair or deceptive acts and practices in cigarette advertising. Pursuant to this authority, the FTC allows manufacturers of cigarettes with lower tar and nicotine levels to advertise those cigarettes using terms such as “light.” The plaintiffs contended that such descriptions are misleading and violate the State of Maine’s Unfair Trade Practices Act. The First Circuit concluded that the federal statute does *not* preempt such claims.

In oral argument, the Justices focused on the breadth of the statutory preemption provision. Justice Breyer suggested that Congress’s main interest was in ensuring that cigarette companies put warning labels on cigarette packages and hence did not intend to preempt traditional state regulation of false and deceptive advertising, and Justice Stevens asked directly, “is a

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State requirement prohibiting false statements about smoking and health a requirement based on smoking and health?” Both Justices expressed skepticism that Congress would want to eliminate a traditional requirement that advertising be truthful. Justice Ginsburg, similarly, pressed the defendants on the issue of whether Congress intended to make the FTC and its regulations the sole limiter on what cigarette companies could advertise, and Justice Souter pointed out that parallel state and federal regulation is the norm.

In contrast, Justice Alito and Chief Justice Roberts indicated that they thought the plaintiffs were trying to evade the breadth of prior cigarette labeling preemption decisions. Like Justice Stevens, Chief Justice Roberts focused on whether a general duty not to deceive could be a requirement or prohibition based on smoking and health and hence preempted. A good deal of this questioning then turned to exactly what the plaintiffs were claiming and what damages they could seek if the claims were not based on the supposed health differences between regular and “light” cigarettes. Also relevant to the discussion was the master cigarette settlement agreement.

Interestingly, the United States refused to take a position on the preemption issue, choosing instead to focus on the scope of the FTC’s authority. In particular, the government declared that the FTC was considering changing its position on low tar and low nicotine cigarettes in light of new scientific information suggesting that such test results do not reflect the true effects on smokers. Moreover, it emphasized that “it is Supreme Court law [that] the Commission does not supplant State law; it acts cooperatively with State law. The Commission does not act as a gatekeeper like FDA in approving things. It acts as a law enforcement agency.”

Wyeth v. Levine, 944 A.2d 179 (Vt. 2006), cert. granted January 18, 2008, oral argument heard November 3, 2008: The plaintiff, a hospital patient, brought a state-law failure to warn claim after doctors there injected a nausea drug, causing gangrene and amputation of the injected arm. The Vermont Supreme Court held that the Food and Drug Administration’s (FDA’s) regulations under the federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.*, did not preempt the claim. The question before the U.S. Supreme Court is whether the prescription drug labeling judgment that the FDA imposed on the manufacturer preempted the state-law product liability claim because that claim was premised on the theory that the FDA needed to reach a different judgment in order to make the drug reasonably safe for use.

At oral argument, Wyeth, the drug manufacturer, argued that the case presented a clear issue of specific conflict preemption, because it was impossible for it to comply both with the FDA’s requirements and with Vermont state tort law. It expressly disclaimed the need for rule of field preemption and acknowledged that the FDCA lacks an express preemption provision for drugs. However, Wyeth emphasized the nature of the regula-

tory process and the fact that the FDA must approve changes to a drug label to emphasize that it could not just routinely change its label to respond to new information or to state law requirements. The United States, as amicus, agreed with Wyeth’s conflict preemption argument, also emphasizing that it was not arguing for general preemption of state tort law. However, in response to questioning by Justice Scalia, the government did suggest that the preemption analysis would come out differently if the drug manufacturer failed to provide the FDA with critical information. However, the government also emphasized that the FDA’s position is that only new information justifies a change in the label. Plaintiff’s lawyer, in turn, argued that the FDA’s regulations require the drug manufacture to revise drug labels “as soon as there is reasonable evidence of an association of a serious risk with a drug.” Moreover, he argued that the FDA never dealt specifically with increased risks from IV push, as opposed to IV drip, and that Wyeth failed to ask the FDA to approve stronger language warning against using the drug through an IV push; in fact, in response to pointed questioning from Justices Scalia, Souter, Stevens, Ginsburg, and Chief Justice Roberts, he conceded that the case would turn on whether Wyeth specifically asked the FDA to change the label to reflect the specific risks from IV push and on whether the FDA specifically rejected that request.

Justice Kennedy challenged Wyeth’s conflict preemption argument as a textual and logical matter, while Justice Ginsburg asked about the FDA’s awareness of a potential problem with intravenous administration of the drug. In response to the government’s illustration that the FDA had been aware of the issue and made it part of the labeling requirements, prompting both Justice Alito and Justice Ginsburg to ask how the FDA could conclude that a risk of gangrene outweighed the benefits of suppressing nausea. Chief Justice Roberts asked about the differences between preemption in the medical device context, where the Act contains an express preemption provision, and in the drug context, where no such provision appears. Several Justices questioned the litigants about what the FDA actually knew at the time it ordered the existing labeling, what would constitute “new” information, and what the relationship between new information and tort liability is or should be. Justice Scalia suggested that the burden on the FDA if drug manufacturers were allowed to change their labels in response to tort litigation demonstrating additional and worse risks would be unworkably high, to which the plaintiffs responded that the drug companies would be acting to protect public health and safety. Justice Scalia then argued that “[i]t would not promote public safety if you believe that the name of this game is balancing benefits and costs.” Justice Kennedy and Justice Stevens also raised the differences between federal preemption and the regulatory compliance defense to some state tort liability. ○

By William S. Jordan III*

D.C. Circuit Splits Constitutionality of Accounting Oversight Board

In the wake of Enron and other accounting scandals, Congress enacted the Sarbanes-Oxley Act of 2002, which established the Public Company Accounting Oversight Board (the Board) to oversee the auditing of publically traded companies. It seems that Congress was doubly determined to insulate the Board from political influence, including influence by the President. The Act provides that the Board is to be appointed by the SEC after consultation with the Chairman of the Federal Reserve Board and the Secretary of the Treasury. And Board members may be removed only for cause and only by the SEC. Despite the Board's apparent significance, the President plays no role in either the appointment or removal of its members.

This arrangement caused a deep split on the D.C. Circuit in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 537 F.3d 667 (D.C. Cir. 2008). Judges Rogers and Brown rejected constitutional challenges rooted in the appointments clause, the President's removal power, and separation of powers. Judge Kavanaugh, on the other hand, issued a scholarly thirty-page dissent arguing that the Board is unconstitutionally distant from presidential control. Perhaps more important in the long run, he took sharp, if appropriately deferential, aim at the Supreme Court's flexible analytical approach in *Morrison v. Olson*. Judge Kavanaugh argues for a strong application of the unitary executive principle, in which the President is fully in control and thus fully accountable for the actions of the Executive Branch.

As a threshold matter, the court rejected the Board's argument that the challenger had failed to exhaust the statutory review procedures as required by the Act. The Act specifically prohibits review of any "objection to an order or rule" of the Board (emphasis supplied by the court) unless the party seeking review has first argued the objection to the agency. Relying upon the Supreme Court's decision in *Thunder Bay Coal Co. v. Reich*, the court held that this facial challenge was a "broad-scale attack" as to which Congress did not require exhaustion. The claim was "wholly collateral" to the statutory review provisions and "outside the agency's expertise."

On the merits, the majority held that the Board members are inferior officers and thus not subject to the Appointments Clause requirement for senatorial consent. Board members are inferior officers because they are subject to removal for cause by the SEC and because Board rules had to be approved by the SEC, the SEC could abrogate, add to, or delete from any rule issued by the Board, and the SEC exercised *de novo* review of

all Board adjudications. The SEC may also relieve the Board of any enforcement activities, censure the Board, and limit the Board's activities in various ways. The majority noted that the SEC exercises greater control over the Board than the Attorney General exercised over the Independent Counsel, which was recognized as an inferior officer in *Morrison v. Olson*. Applying the logic of *Humphrey's Executor*, the majority upheld the limitation to removal for cause.

Emphasizing the SEC's substantial control over the Board's activities, the majority also rejected a separation of powers challenge to the Board's authority and function. In particular, the majority saw no difficulty with the unique double layer of "for cause" limitations on the removal of members of the Board.

Weaving together constitutional history and recent precedent, Judge Kavanaugh argued that the framers intended to protect liberty by assuring presidential control of and accountability for agency decision making. As to the question of whether Board members are inferior officers, Judge Kavanaugh relied upon *Edmonds v. United States*, 520 U.S. 651 (1997), as having gone beyond *Morrison v. Olson* to specify a test for determining whether a federal official is an inferior officer: "Inferior officers 'are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" Board members, he argued, are not directed and supervised by the SEC because they are not removable at will and because the SEC controls only the outcome of Board decisions, not such things as inspections, investigations, and the initiation of enforcement actions, which can significantly threaten individual liberty. Indeed, he emphasized, a major point of Sarbanes-Oxley was to assure the Board's independence and prevent control by the politically accountable executive.

Although *Morrison v. Olson* would seem to validate for-cause restrictions on removal of an inferior officer not subject to detailed control by her superiors, Judge Kavanaugh saw a distinction in the fact that Board members are removable only by the SEC. He argued that the logic of *Morrison v. Olson* could not apply where the superiors were themselves subject to removal only for cause. *Morrison v. Olson* depended upon the fact that the Attorney General is the President's "alter ego," subject to removal at will for any reason. According to Judge Kavanaugh, the double barrier to removal so undermined presidential control and accountability as to render the Sarbanes-Oxley provisions invalid.

At this writing, the D.C. Circuit has denied petitions for rehearing. The force and erudition of Judge Kavanaugh's opinion, coupled with the changed membership of the Supreme Court, may well result in a grant of certiorari in this case. Even if the Court does not take review, Judge Kavanaugh's opinion will take an important place in the intellectual history of this debate.

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9th Circuit Twice Invokes “Procedural Injury” to Sustain Environmental Standing

Litigants may rely upon “procedural injury” to establish standing where the procedure that is alleged to have been violated is intended to protect a concrete interest threatened by agency action. The National Environmental Policy Act is the classic example of procedural injury as a source of standing. NEPA establishes no substantive requirements or prohibitions, but the NEPA process is intended to minimize or avoid harm to the environment. Thus, a plaintiff whose environmental interest is threatened by a proposed federal action has standing based on the alleged procedural injury of inadequate NEPA analysis.

The 9th Circuit relied upon this concept to grant standing in two recent decisions. In *Salmon Spawning & Recovery Alliance v. Gutierrez*, 2008 WL 4490533 (9th Cir. 2008), environmental interests challenged the United States’ entry into and remaining in the Pacific Salmon Treaty, which they alleged allowed Canadian fisheries to overharvest endangered salmon. The plaintiffs challenged the Biological Opinion authorizing entry into the Treaty, the continuing implementation of the treaty, and the failure by relevant federal agencies to initiate a new Endangered Species Act consultation where new information might well produce an outcome different from the previous Biological Opinion. The first two claims foundered primarily on the fact that the Treaty was already in place. The entry into the Treaty was a *fait accompli*, with the court unable to order the Executive to withdraw from the Treaty. The challenge to continued implementation of the treaty failed for the same reason and because a court unable to control the behavior of Canadian fisherman could not provide redress against over-harvesting.

By contrast, the challenge to the failure to initiate a new consultation was forward-looking. The Endangered Species Act consultation, like NEPA analysis, is designed to protect certain environmental interests. The idea in this case is that the relevant agencies will take the new information into account in deciding what actions, if any, to take with respect to the Pacific Salmon Treaty. Although it was uncertain whether a new consultation ordered by the court would actually protect the salmon, the court would provide redress if it ordered the agency to initiate the procedure because the procedure itself is intended to protect endangered and threatened species like the salmon. The fact that actual protection would depend upon positions taken by the Departments of Commerce and State, in addition to the Canadian government, did not prevent the challengers from having standing to assure that those bodies would act in light of the relevant information.

In *NRDC v. US EPA*, 542 F.3d. 1245 (9th Cir. 2008), on the other hand, the 9th Circuit used the procedural injury concept by analogy to avoid requiring a nearly impossible specific showing of injury. In 2000, EPA listed construction industry

stormwater discharges as point sources that would require controls known as effluent limitation guidelines (ELGs) and New Source Performance Standards (NSPSs). In 2002, EPA had issued a proposed rule setting out three options for addressing construction industry stormwater discharges. In 2004, EPA decided to adopt its third option, which sought to avoid issuing ELGs and NSPSs by relying on existing control programs. EPA asserted that the potential benefits of imposing ELGs and NSPSs did not justify the cost. EPA later removed construction sites from the 304(m) plans.

NRDC sued to force EPA to promulgate ELGs and NSPSs for storm water pollution discharged by the construction and development industries. NRDC based its claim on Section 304(m) of the Clean Water Act, which requires EPA to identify categories of sources discharging toxic or non-conventional pollutants for which ELGs and NSPSs have not yet been published. Once EPA has identified those sources, EPA is required to establish a plan for publishing ELGs and NSPSs and to publish them within three years establishing the plan. Since EPA had identified construction and development industry stormwater discharges as including toxic and non-conventional pollutants, NRDC argued that EPA had a mandatory duty to meet the deadline for establishing ELGs and NSPSs.

The hurdle was standing. EPA argued that NRDC’s member affidavits did not support standing because they did not show that the affiants were affected by the pollutants that the ELGs or NSPSs are designed to address. Thus, any injury could not be traced to the absence of these controls, and the issuance of these controls would not necessarily redress the injury experienced by NRDC’s members.

The court, however, considered this claim to be comparable to a claim of procedural injury, which does not require the same degree of certainty as a claim of actual harm. Just as a plaintiff may enforce procedures that are “designed to protect some threatened concrete interest,” so NRDC could enforce the ELGs/NSPSs requirement because EPA’s inclusion of construction sites on the 304(m) list establishes that such sites are sources of the relevant pollutants. It is apparently crucial that this statutory provision is designed to reduce risk, while others address the harms of particular pollutants.

Simply put, the result is that NRDC did not need to allege (or ultimately prove) that the particular construction sites affecting their members released the pollutants at issue. It could rely upon the fact that EPA had included the category of such sites in its 304(m) list. This is quite distinct from the case in which a plaintiff may challenge an upstream polluter for permit violations despite the fact that the plaintiff cannot demonstrate actual contact with the pollutant. The court’s theory allows a regulatory challenge by a plaintiff who may not actually be subject to pollutants that would be controlled by the ELGs or NSPSs sought by NRDC.

Federal Circuit Grants *Chevron* Deference to Informal PTO Statements

Cooper Technologies Company v. Dudas, 536 F.3d 1330 (Fed. Cir. 2008), involved the meaning of the term “original application” in the American Inventors Protection Act of 1999. The Act provides that *inter partes* reexamination is available for “any patent that issues from an original application filed in the United States on or after” Nov. 29, 1999. If the term “original application” is limited to the first application in a series of applications by the inventor, *inter partes* reexamination is limited to patents arising from that application, a desirable outcome for the holder of patents arising from continuation applications or other applications that may follow the original application in a series. On the other hand, if, as the Patent and Trademark Office (PTO) has said informally, the term “original application” includes “first filed applications, continuations, divisionals, continuations-in-part, continued prosecution applications and the national stage phase of international applications,” interested parties will find it much easier to challenge later patents.

Applying this understanding of the statutory term, the PTO reexamined and invalidated a patent by Cooper Technologies Co. Arguing that the patent at issue had not arisen from an “original application” as the term is properly interpreted, Cooper challenged the PTO’s decision. Although the PTO’s interpretation has appeared only in informal issuances, including the PTO’s Official Gazette, the preamble to a final rule, and the Manual of Patent Examination and Procedure, the Federal Circuit held that the PTO’s interpretation was entitled to *Chevron* deference.

In addressing this issue, the Federal Circuit emphasized that the (PTO) is authorized to issue regulations “to govern the conduct of proceedings in the Office.” Ironically for *Chevron* purposes, the PTO’s authority is limited to procedural rules, which means that the PTO may rely on the APA’s exception for procedural rules in order to issue these statements without going through the notice and comment rulemaking process. Under *U.S. v. Mead*, the PTO thus did not take advantage of the mechanism that would virtually have assured *Chevron* deference. Still, *Mead* held that *Chevron* deference will apply when there is “some other indication of a comparable legislative intent” that the courts should defer to the agency’s determination if it is reasonable.

In *Cooper Technologies*, the Federal Circuit apparently found such an indication in the fact that the Patent Office “has the authority to establish regulations to govern the conduct of proceedings in the Office.” The court saw in this authority a congressional delegation of “plenary authority over PTO practice.” It did not matter that the interpretation did not appear in the Code of Federal Regulations because “An agency’s interpretive rule of a statute relating to matters of procedure, subject to notice and comment if required, need not be published in the Code of Federal Regulations to be entitled to deference.”

At its broadest, this language could be read to recognize *Chevron* deference whenever an agency has been delegated the authority to establish regulations in a certain area. Surely that goes too far. Somewhat more narrowly, this opinion suggests that *Chevron* deference always applies to procedural rules, regardless of whether they are adopted through notice and comment, at least if they are published in a forum comparable to those used by the PTO here. On the other hand, the opinion can probably be narrowed considerably by an argument that the highly specialized PTO is comparable to the Comptroller of the Currency, to whom the Court granted deference in the *NationsBank* decision on which *Mead* relied.

9th Circuit – Army Corp Jurisdictional Determination not Reviewable Final Action

The 9th Circuit recently issued what it described as the first published opinion in the U.S. Courts of Appeals on the question of whether an approved wetland jurisdictional determination by the Corps of Engineers constitutes final agency action reviewable under the APA. In a response to a request from Fairbanks North Star Borough, the Corps examined a parcel owned by the Borough and issued an approved determination that the entire parcel constituted a wetland within the jurisdiction of the Corps and subject to the permitting requirements of the Clean Water Act. After the Corps denied an administrative appeal, the Borough tried to challenge the substance of the determination. In *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir. 2008), the 9th Circuit held that the determination did not constitute final agency action.

Applying the two-prong test of *Bennett v. Spear*, the court first held that the Corps’ decision constituted the consummation of the agency’s decisionmaking process. The determination explicitly said that it was good for five years, and the decision was “devoid of any suggestion that it might be subject to subsequent revision.” Moreover, the Corps’ regulations made it clear that the denial of an administrative appeal rendered the action final for administrative purposes. The possibility of future revision should circumstances change did not undermine this conclusion.

There remained, however, the question of whether the Corps’ jurisdictional determination was an action “by which rights or obligations have been determined, or from which legal consequences will flow.” The court held that it was not. Indeed, the determination was nothing more than the Corps’ expression of an opinion on the legal significance of certain facts. Such a statement lacks the “status of law or comparable legal force.” It binds no one, including the Borough. It may have the practical effect of requiring the Borough to submit to the permitting process or undermining any claim that a Borough violation of the Act occurred in good faith, but neither of those is a legal consequence of the jurisdictional determination. ○

FOURTH ANNUAL HOMELAND SECURITY LAW INSTITUTE

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Due Process in Rent Control – How Do We Get Through the Agenda?

By Michael Asimow

Due process can be highly inconvenient for local agencies with big caseloads. *Manufactured Home Communities Inc. v. County of San Luis Obispo*, 84 Cal. Rptr. 3d 367 (2008) involved mobile home rent control. The rent control ordinance did not apply to leases, only to month-to-month tenancies. The tenants at MHC's park signed 12-month leases, but they claimed that MHC had assured them that rent control applied and they were protected from rent increases. At the hearing before the full Rent Review Board, a series of tenants testified about MHC's misrepresentations. There was a 2-minute limit on their testimony. MHC vehemently denied that it had made any misrepresentations. No cross examination was allowed, with one board member observing "we always allow the people to speak without fear of cross-examination, because it is a fearful thing." So true!

The Court of Appeal held that MHC was denied due process, because cross-examination is an essential part of fair procedure when adjudicatory facts (such as whether misrepresentations were made) are in issue. This makes good sense; even such despised creatures as landlords at mobile home parks are entitled to due process. Still, the case poses severe practical problems for part-time local rent control boards that must hear many cases during their occasional nightly meetings. If trial-type adversarial procedure is required, the Board will have to allow more than two minutes for direct testimony and lots more time for the cross examination. Yet its jammed agenda includes many such cases. To get through its business, the agency will probably have to hire hearing officers to conduct adversarial hearings. The landlords will have lawyers, but the tenants will be on their own. The written decisions would be appealed to the Board. All this will involve considerably increased expense (for which there is undoubtedly no budget) and delay in deciding cases. It will also separate the Board from its constituents which is politically disadvantageous.

As Grant Gilmore once remarked, "The worse the society, the more law there will be. In hell, there will be nothing but law, and due process will be meticulously observed."

Office of Administrative Hearings Moves Chambers to Charlotte School of Law

The North Carolina Office of Administrative Hearings (OAH) has moved the Charlotte court chambers of Administrative Law Judge Selina M. Brooks to leased space at the Charlotte School of Law effective September 15, 2008.

OAH is an independent quasi-judicial agency established to provide a source of independent Administrative Law Judges (ALJ) to preside in contested agency cases and ensure that rulemaking, investigation, advocacy and adjudication remain separate processes.

The Charlotte branch office of OAH is leasing office space to accommodate the Judge's chamber and an assistant's office. Judge Brooks will have access to Charlotte School of Law's library, a 100,000-volume collection that represents the largest, most comprehensive law collection in western North Carolina.

The OAH will also have access to Charlotte Law's mock courtroom for occasional hearings when necessary and appropriate for the law school environment. It is hoped this arrangement will provide opportunities for law students to observe administrative law proceedings.

"Moving our office to the law school makes sense on a number of levels, and convenience was a major consideration," said OAH Judge Selina Brooks. "Charlotte School of Law is close to the courthouse and Uptown, and having easy access to a law library and librarians provides an invaluable resource for our office."

Judge Brooks added that she hopes for a dynamic and cooperative relationship with the school, where students can gain experience as research assistants and the student body has regular interaction with a judge and the court.

According to Charlotte School of Law Dean, Gene Clark, "Administrative law is becoming increasingly important as an area of community interest as well as law and legal practice. Having the administrative law judge situated in the school is an excellent way to promote a greater understanding by our students of this important topic and of the court system generally."

For more information contact: Judge Selina Brooks, selina.brooks@ncmail.net 704.971.8580

Maybe the Experts Were Wrong About the ANPRM *continued from page 10*

significant. Even in those cases, review at these levels probably should not be automatic or lengthy. The concerns raised by the experts in 1977 would only be realized if government management insisted on making more of the ANPRM than it is. It is not a proposed rule. In most cases it is only an announcement of a problem and a request for help.

We are not suggesting that more frequent use of the ANPRM will completely de-ossify the rulemaking process, nor are we saying it will guarantee early and meaningful public participation in every rulemaking. However, given the history of the last 40 years, what do agencies have to lose? 

Recent Articles of Interest

By Yvette M. Barksdale*

1. Barbara J. Evans, *Congress' New Infrastructural Model of Medical Privacy*, 84 NOTRE DAME L. REV. ___ (2009) (Forthcoming). AVAILABLE: <http://ssrn.com/abstract=1186462>. This article addresses the regulatory challenges of the federal government's new patient Nationwide Health Information Network (NHIN or The Sentinel System), a database to be administered by the Food and Drug Administration (FDA). The database will include patients' Medicare, military, and private insurance claims data, health records, pharmaceutical purchase data, and "other data as the Secretary [of Health and Human Services (HHS)] deems necessary." The project's goal is to improve access to information about drug safety and aims to include health information on 25 million patients by 2010, and 100 million patients by 2012. Drug safety information currently is provided primarily by clinical trials, which often miss rare risks, and risks of problematic drug interactions, off-label uses or long-term use of a drug. Characterizing the project as a national infrastructure development mandate, the author argues the FDA currently is not well-suited to its new duties which will include regulating how and by whom the health information data will be collected, used and maintained, and the applicability of the Health Insurance Portability and Accountability Act Privacy Rule, applicable to the NHIN by Congressional mandate.
2. Fred H. Cate, *Government Data Mining: The Need For A Legal Framework*, 43 HARV. C.R.-C.L. L. REV. 435 (2008). This article discusses the massive increase in recent years of the federal government's collection of personal data on individuals. Although much of the information was previously available, recent technological and legal developments in the availability, collection and organization of information have significantly expanded the federal government's ability to compile detailed dossiers on individual persons. The article discusses 1) the broad range of data collection programs, 2) the current regulatory framework for the collection and use of the data, and 3) the impact of data collection on individuals. The author strongly criticizes the government's data collection programs' efficacy and protections for personal privacy, and recommends a baseline legal framework for regulating government data mining activities.
3. John H. Walsh, *Institution-Based Financial Regulation: A Third Paradigm*, 49 HARV. INT'L L.J. 381 (2008). The author argues that an "institution based" paradigm for financial regulation is an emerging alternative to the traditional principles based (regulated entities must meet regulatory objectives) and rule based (government imposes binding legal rules) models. In contrast, the new *institution* based models require regulated entities to develop their own internal regulatory compliance institutions. Agencies using this new institutional model include the federal Securities and Exchange Commission (SEC), and the Financial Industry Regulatory Authority (FINRA). The author points to the SEC's 1) December 2003 issuance of rules requiring compliance institutions at funds and 2) 2004 approval of rules of the National Association of Securities Dealers which required broker-dealers to maintain enhanced compliance departments. The author, writing in his own individual capacity, and not as a representative of the SEC, is an Associate Director and Chief Counsel in the Office of Compliance Inspections and Examinations of the SEC. He advocates increased global use of institution based models.
4. David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095 (2008). Using the Environmental Protection Agency (EPA) decisions at issue in *Massachusetts v. EPA*, 549 U.S. 497 (2007), (MASSV.EPA), as an example, the author argues that White House over-politicization of agencies may be a larger concern than over-centralization of control of administrative decision-making in the White House. With over-politicization of agencies, a President installs an unprecedentedly deep cadre of political appointees within agencies who do the President's bidding without need of White House direction. The author describes this over-politicization as a peaceful merger, rather than a hostile takeover. The author argues that MASS. V.EPA suggests two possible judicial responses to such over-politicization: 1) "expertise-forcing" judicial review, which requires the agency to utilize its scientific expertise free of outside political pressures, and 2) *experiment-enabling* judicial review, (*the author's preference*), which limits federal agency preemption of state and local regulation, allowing state experimentation to pinch-hit for an absent independent federal agency voice.
5. Kenneth A. Bamberger, *Normative Canons In The Review Of Administrative Policymaking*, 118 YALE L.J. 64 (2008). This article aims to harmonize the judicial role in *Chevron v. NRDC*, 467 U.S. 837 (1984), statutory interpretation with the judicial role in applying "normative" canons of statutory construction (*canons which protect extra-statutory values, such as separation of powers, federalism, respect for Native Ameri-*

* Associate Professor of Law, The John Marshall Law School, Chicago, IL (on leave); Co-Chair, Constitutional Law and Separation of Powers Committee and Contributing Editor. These abstracts are drawn substantially from the authors' introductions to or summaries of their articles. To avoid duplication, the abstracts do not include articles from the Administrative Law Review which Administrative Law Section Members already receive.

can autonomy, etc.). A substantial majority of federal courts address such canons under *Chevron* Step One (judicial interpretation), while a significant minority favor *Chevron* Step Two (judicial deference.) However, the author rejects both categorical positions, favoring a more flexible, variable approach that considers 1) differences both in statutory context, and in the agencies' capacity to properly balance the applicable norms, and 2) the type of limits on judicial authority expounded in *National Cable & Telecom. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

6. The following articles address welfare hearing rights from historical and contemporary perspectives.

- a) Felicia Kornbluh, *Redistribution, Recognition, And Good China: Administrative Justice For Women Welfare Recipients Before Goldberg v. Kelly*, 20 YALE J.L. & FEMINISM 165 (2008). This article addresses the "fair hearings campaign" by low income women which ultimately led to the *Goldberg v. Kelly* litigation, 397 U.S. 254 (1970). The fair hearings campaign used the pre-*Goldberg* welfare "fair hearings" process to highlight the inadequacy and dysfunction of the AFDC bureaucracy, establishing a record and narrative which created legal and political space for the *Goldberg v. Kelly* decision.
- b) Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, And Public Assistance Administrative Hearings*, 32 N.Y.U. REV. L. & SOC. CHANGE 131 (2008). This article addresses continuing problems with the welfare administrative hearing process which the author characterizes as the "primary social justice system for poor people in the United States." The loss of Medicaid, Food Stamps and other benefits frequently leads to hunger, homelessness, disability, or lack of medical care for persons adversely affected. The author characterizes the current hearing process as "fundamentally unfair" to its low-income participants, particularly after severe funding reductions for the Legal Services Corporation, the primary source of legal representation for low income persons. The author advocates shifting burdens of production and persuasion from recipients to the government, holding it to a clear and convincing evidence standard in cases involving the "denial, reduction, overpayment, or termination" of needs-based public assistance.

SYMPOSIA OF INTEREST

1. ORDERING STATE-FEDERAL RELATIONS THROUGH FEDERAL PREEMPTION DOCTRINE, 102 NW. U. L. REV. 503 – 902. Articles by: Nury Raquel Agudo & Alison E. Buckley, *Foreward: Symposium on Ordering State-Federal Relations Through Federal Preemption Doctrine*, p. 503; David A. Dana, *Democratizing the Law of Federal Preemp-*

tion, p. 507; Richard A. Epstein, *Federal Preemption, and Federal Common Law, in Nuisance Cases*, p. 551; Robert L. Glickman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption By Federal Environmental Regulation: The Case of Global Climate Change*, p. 579; Howard A. Learner, *Restraining Federal Preemption When There Is An "Emerging Consensus" Of State Environmental Laws and Policies*, p. 649; Raymond B. Ludwizewski & Charles H. Haake, *Cars, Carbon, and Climate Change*, p. 665; Nina A. Mendelson, *A Presumption Against Agency Preemption*, p. 695; Thomas W. Merrill, *Preemption and Institutional Choice*, p. 727; Mark D. Rosen, *Contextualizing Preemption*, p. 781; Robert A. Schapiro, *Monophonic Preemption*, p. 811; Catherine M. Sharkey, *The Fraud Caveat to Agency Preemption*, p. 841; and Ernest A. Young, *Executive Preemption*, p. 869.

2. Sanford M. Jacoby, FINANCE AND LABOR: PERSPECTIVES ON RISK, INEQUALITY, AND DEMOCRACY, 30 COMP. LAB. L. & POL'Y J. 17 – 121 (2008). Principal Article by: Sanford M. Jacoby, *Finance And Labor: Perspectives On Risk, Inequality, And Democracy*, p. 17. Commentary by: Simon Deakin, *The Rise of Finance: What Is It, What Is Driving It, What Might Stop It?*, p. 67; Gerald Friedman, *The Dialectics of Management and Politics*, p. 77; Teresa Ghilarducci, *Solving the Paradox of Workers as Shareholders: A Comment on Sanford Jacoby*, p. 85; Thomas A. Kochan, *Beyond "Financialization": The Era Ahead*, p. 89; and Brishen Rogers, *The Complexities of Shareholder Primacy: A Response to Sanford Jacoby*, p. 95. Response by: Sanford M. Jacoby, *The Future of Labor and Finance*, p. 111.
3. CHANGING CLIMATES: ADAPTING LAW AND POLICY TO A TRANSFORMING WORLD, 55 UCLA L. REV. 1479 – 1882 (2008). Abstracts at: <http://www.uclalawreview.org/articles/archives/?view=55&detail=1>. Articles by: Ann E. Carlson, *Implementing Greenhouse Gas Emissions Caps: A Case Study of the Los Angeles Department of Water and Power*, p. 1479; Daniel A. Farber, *The Place-Based Theory of Standing*, p. 1505; Sean B. Hecht, *Climate Change and the Transformation of Risk: Insurance Matters*, p. 1559; Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, p. 1621; Cass R. Sunstein, *The World vs. the United States and China? The Complex Climate Change Incentives of the Leading Greenhouse Gas Emitters*, p. 1675; Michael P. Vandenbergh, Jack Barkenbus & Jonathan Gilligan, *Individual Carbon Emissions: The Low-Hanging Fruit*, p. 1701; Michael Wara, *Measuring the Clean Development Mechanism's Performance and Potential*, p. 1759; Jonathan B. Wiener, *Climate Change Policy and Policy Change in China*, p. 1805; Jonathan Zasloff, *The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change*, p. 1827.

Section News and Events

NAPA Fellow

Section Delegate, and former Section Director, **Randy May** has been elected a Fellow of the National Academy of Public Administration, a non-profit, independent organization chartered by Congress in 1967 and composed of top public management and organizational leaders who tackle the nation's most critical and complex challenges.

2009 Gellhorn-Sargentich Competition

The 2009 Gellhorn-Sargentich Law Student Essay Competition is underway. Submissions must be postmarked no later than March 31, 2009 and mailed to: American Bar Association, Admin Law Essay Competition, 740 15th Street NW, Suite

900, Washington, D.C. 20005; or sent via email to kieferra@staff.abanet.org. For more details visit the Section's website: www.abanet.org/adminlaw.

TQ Interviews Transportation Secretaries Burnley and Slater

The Transportation Committee Quarterly has struck pay dirt with an interview of former Transportation Secretaries **James H. Burnley IV** and **Rodney Slater**. To read the interview, go to the Section's website at www.abanet.org/adminlaw and click on "Committees" on the left. Then select "Transportation" under the "Government Functions Committees".

Regulatory Gaps for Over-the-Counter Derivatives *continued from page 4*

premises of securities regulation is that investors need protection not only against those who would take advantage of them, but also against themselves. The wholesale deregulation of the sophisticated derivatives markets has proven to be a failed free market experiment — even according to its biggest supporter Alan Greenspan. No doubt some form of regulation will be imposed. In terms of how regulatory schemes evolved, the CFTC would be the appropriate regulator as these derivatives grew out of what formerly were known as the commodities markets. On the other hand, the intertwining of derivatives with other financial instruments led the SEC to put in its bid to regulate the CDS market. To the extent that the CDS markets derive their justification as a type of insurance, then insurance regulation could be seen as the appropriate fix, permitting only those market participants with an insurable interest and those counterparties subject to regulation as an insurance provider. Although this would seem logical, to the extent that this is a national and even a world-wide problem, state-by-state regulation such as traditionally exists for insurance may not be the most suitable venue.

Additional questions remaining include whether the CFTC's familiarity with existing derivatives regulation is sufficient to extend it to the CDS and other over-the-counter derivatives

markets or whether the SEC is better equipped to fashion suitable regulation. Other suggestions include merging the CFTC and SEC, establishing the Treasury Department as the overseer of the SEC and CFTC, or the creation of a new Financial Regulatory Authority to regulate both the securities and derivatives markets as is done in the U.K. Another question is the extent to which investment market regulation should be more directly tied to banking and other financial institution regulation.

Conclusion

The dividing lines between futures, swaps and other derivatives, securities, insurance, and gambling regulation have been blurred. The overlapping nature of the sophisticated financial markets makes it difficult to identify the most natural regulator. It follows that we should look for the most suitable regulator in terms of expertise and understanding of the complex financial and derivatives markets. One thing is clear. We need to avoid continuation of a regulatory gap simply because market participants can disguise insurance or gambling as a derivatives contract. Policy makers should focus on substance — regulation that is not dependant on the form of the contract but rather is designed to apply across risk-shifting markets. ○

MAKE YOUR OPINION COUNT

The Section values the input of all its members. Make your opinion count. **Contact us at knightk@staff.abanet.org**. Also, please let us know how we can help you get more involved with Section activities.

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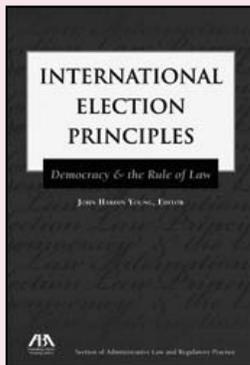
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