

ADMINISTRATIVE & REGULATORY LAW NEWS



Section of Administrative Law & Regulatory Practice

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Non-Entitlement Benefits



Should Due Process Mean No Process?

Also In This Issue

- Administrative Finality and Central Panel Gumbo
- Inherent Reconsideration
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- The Impact of Regulatory Requirements on Rulemaking

Chair's Message



Randolph May

First, I am pleased to report that at the Midyear Meeting in Salt Lake City, the ABA House of Delegates approved without opposition the Section's resolution urging that Congress adopt revisions to the adjudication sections of the Administrative Procedure Act. Most significantly, the resolution calls for Congress to bring under the APA many types of adjudication for which evidentiary hearings are required by various statutes, but which presently are not subject to the APA's procedural protections. This would mean that in these hearings, protections such as the right to notice, the right to an impartial decisionmaker, and prohibitions on *ex parte* contacts would apply.

Elsewhere in this issue, (see Section News & Events), you will find an article written by Michael Asimow that provides more detail on the resolution. Michael did the lion's share of the work over a two year period, researching and writing the report and resolution. But I am sure he will agree that the adjudication project was a true team effort, with many Section members involved in important ways. In this respect, the project reflected the best traditions of the Ad Law Section. While it is impossible to credit here all who contributed, Ann Young, a member of the administrative judiciary, deserves special mention. Indeed, many of our friends in the administrative judiciary worked cooperatively with us throughout the process. Council member Ron Smith was very helpful. And our Section delegates, Judy Kaleta and Tom Susman, provided key guidance that ensured approval in the House of Delegates. Now, as Michael says in his article, if Congress adopts our recommendation, the result will be the most fundamental change to the APA since its 1946 enactment.

In my last message, I highlighted the increased number of new luncheon programs, including our active "Conversation with the General Counsels" programs, we have put on in the last six months. I am pleased to report that, if anything, our efforts to increase the number and variety of educational and networking opportunities for our Section members are accelerating. As I write this, over the next several months, due in large part to the initiative of our committees, we will present an unprecedented number of programs. The topics range from the new OMB peer review guidelines for federal agencies, to agency rules for sharing information related to terrorism, to the practices and procedures employed by the World Customs Organization, to balancing privacy and civil liberties after 9/11.

Check our website, www.abanet.org/adminlaw, for program updates.

By the time you read this, all lawyer Section members who have paid their dues for this year will have received a complimentary copy of *Developments in Administrative Law and Regulatory Practice, 2003–2004*. This annual volume analyzes the past year's developments both as a matter of administrative process (for example, adjudication and rulemaking) and of substantive law (for example, energy and communications regulation). I am confident that you will find this year's book, once again edited by Jeffrey Lubbers, to be a valuable addition to your library. And I am proud that so many different members of our committees volunteered their time to ensure the success of this showcase project.

Finally, I invite you to attend our Spring meeting in Savannah, Georgia on April 30–May 2. With its many tree-filled squares and elegant gardens, and countless well-preserved old buildings and homes, Savannah is beautiful any time of year, but especially in the Spring. While we have set aside plenty of time to stimulate the senses through enjoyment of the sights, sounds, and the city's great cuisine, we also have planned a set of informative programs to stimulate the mind. I want us to use the more relaxed setting of the Spring meeting to think in a forward-looking and fresh way about the next generation of administrative law and governance issues. So, for example, one panel is entitled: "An Administrative Law Agenda for the Twenty-First Century: What Should a New ACUS Do?" There will be a similar panel to consider a "Twenty-First Century" ad law agenda for the states. We will continue our consideration of a rather unique and proliferating type of administrative institution, the interstate compact agency. This time the spotlight will be on judicial review of compacts. And William Eggers, author of the widely-acclaimed new book, *Government 2.0: Using Technology to Improve Education, Cut Red Tape, Reduce Gridlock, and Enhance Democracy*, will speak on transforming government in the new century.

Once again we have activities specially planned for spouses and significant others. So please, join your fellow Section members for a weekend of enlightenment, collegiality, and fun in the city made famous in the "Midnight in the Garden of Good and Evil."

As always, I thank you for your interest and participation, and I welcome your ideas. 

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A Standards-Based Theory of Due Process

By Sidney A. Shapiro* and Richard E. Levy**

Under the Supreme Court's current due process jurisprudence, due process applies only when government actors deprive a person of a protected interest in life, liberty, or property, and government benefits are property only when someone has an entitlement to the benefit. Thus, Congress or a state legislature can preclude the application of the Due Process Clause simply by declining to create an entitlement to a government benefit. By "government benefits," we mean the broad spectrum of benefits provided by government, including welfare and social security, public employment and government contracts, and occupational licenses or building permits. Given the centrality of rule of law principles to the constitutional order, we have always been bothered that such a basic rule of law safeguard as due process is dependent upon political discretion, just because the interest at issue is a governmentally created one.

In a forthcoming article,¹ we propose an alternative theory of due process suggested by early Supreme Court due process decisions. This approach, which we call the "standards-based" approach, encompasses two fundamental principles. First, the Constitution requires due process whenever the allocation of government benefits is subject to legal standards, whether or not there is an "entitlement" to the benefit, although the scope of procedural requirements will vary with the nature of the decision and the interest involved. Second, the legislature may decide whether or not to provide government benefits, but once it chooses to provide benefits, it is constitutionally compelled by the non-delegation

doctrine to provide statutory standards for the allocation of those benefits, except in limited circumstances in which the Constitution itself contemplates standardless discretion.

Unlike the Court's current approach, established in *Board of Regents v. Roth*, 408 U.S. 564 (1972), the legislature would not control the application of due process under the standards-based approach. The Due Process Clause would apply anytime there are legal standards that guide and control the execution of the law. We think this outcome is entirely appropriate. Once legal standards are in place, the rule of law requires government officials to comply with them, regardless of the character of the right at issue. Due process is a crucial constitutional safeguard for ensuring compliance with legal standards and therefore should apply whenever there are legal standards. The rule of law does not change simply because the government is depriving someone of a government benefit, as opposed to private property. In either case, failure to comply with legal standards violates the rule of law.

Background

The Supreme Court's refusal to reformulate its due process jurisprudence has received considerable academic attention, but the theoretical difficulties with the current entitlement approach are of more than academic interest. Current case law creates three problems for the rule of law with practical significance for potential benefit recipients.

First, current case law denies due process safeguards to individuals who cannot claim an entitlement to government benefits, no matter how important the benefit is to them or how arbitrarily the government has acted. This vulnerability is illustrated by welfare reform in Wisconsin. Wisconsin has eliminated "pre-termination" hearings for individuals declared ineligible for Temporary Assistance to Needy Families (TANF)

and provides only limited post-deprivation review of some adverse decisions. See WIS. STAT. §49.152 (2002-02). Although the Supreme Court held in *Goldberg v. Kelly*, 397 U.S. 254 (1970), that states had to have a hearing before the termination of welfare benefits, Wisconsin apparently believes that due process does not apply because both TANF and state law expressly disclaim the creation of any entitlement to benefits. The constitutionality of this aspect of Wisconsin's law has not been resolved, but the lower federal courts have been receptive to arguments against the existence of a property interest in benefits when statutes contain such disclaimers. See, e.g., *Washington Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 38 (D.C. Cir. 1997); *Mover Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716, 719 (8th Cir. 1995); *Colson v. Silman*, 35 F.3d 106, 108-09 (2d Cir. 1994).

Second, there is still considerable uncertainty about whether due process applies to applications for (as opposed to the termination of) benefits. According to *Roth*, due process only applies to benefits already acquired, apparently because the benefits do not become "property" until an initial entitlement to them has been established. Although the federal courts of appeals have unanimously rejected an absolute rule that due process never attaches to applications for benefits, the lower courts have generally imposed especially exacting standards for the creation of a legal entitlement in the context of applications. See, e.g., *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667 (3rd Cir. 1991); *Welch v. Paicos*, 66 F. Supp. 2d 138, 164-65 (D. Mass. 1999). For its part, the Supreme Court repeatedly has described the issue as undecided while declining to resolve it.

Finally, due process is also inapplicable under current case law when government officials allocate benefits subject to standards which leave some discretion whether or not to award a government

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¹ Sidney A. Shapiro & Richard E. Levy, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Due Process*, 57 AD. L. REV. ___ (2005).

benefit. Most courts require mandatory language or its equivalent to create a property interest. See, e.g. *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577, 581 (2d Cir. 1989); *Welch v. Paicos*, 66 F.Supp. 2d 138 (D. Mass. 1999).

It is true Congress or a state legislature can and often does incorporate statutory requirements for notice and a suitable hearing to plug these gaps, but there is no guarantee that this will happen. Indeed, legislatures have strong incentives to minimize (or even eliminate) procedural protections for unpopular groups, such as welfare recipients or, in an earlier era, persons accused of being Communists.

Due Process Before *Roth*

The current gap in due process protection is relatively new, dating back to *Roth* in 1972. According to the conventional account of due process law, “new property” interests, such as government employment, licenses, and welfare benefits, were entirely beyond the scope of due process prior to *Roth* and the other cases that make-up the so-called due process revolution of the 1970s. Quite simply, this account is wrong. Prior to *Roth*, a number of cases, some of them quite old, applied due process to various government benefits, although the cases left considerable ambiguity about what triggered the application of due process.

Consider, for example, government employment. According to the conventional understanding of the pre-*Roth* case law, government employment was beyond the scope of due process because it was a “mere privilege.” The critical feature of these earlier cases, however, was whether the legislature had established statutory constraints on firing. When someone’s employment was subject to statutory standards, the Court did not hesitate to apply due process. See, e.g., *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938); *Hall v. Wisconsin*, 103 U.S. 5 (1880). Although these decisions relied on substantive as opposed to procedural due process, the trigger for these two types of protections should be the same. See *City of Cuyahoga Falls v. Buckeye*

Community Hope Foundation, 538 U.S. 188, 198-99 (2003).

Government employment and other pre-*Roth* cases might be reconciled with the right-privilege distinction on the theory that they resemble traditional property or liberty interests, but the Court prior to *Roth* also extended due process protections to government benefits that were regarded as largess. Thus, in *Flemming v. Nestor*, 363 U.S. 603 (1960), the Court rejected the contention that Social Security benefits were vested rights and upheld retroactive disqualification for benefits upon deportation, but it nonetheless applied the minimum rationality test of due process to the disqualification.

Roth

We are interested in this prior case law not only because it establishes that the “new property” is not new, but also because many of these earlier cases contain language supporting the standards-based due process that we propose. Since the reasoning of these cases mixed notions of property, the importance of the interest to the claimant, and broader considerations of legal regularity, they left unclear precisely why due process attached. Nonetheless, when the Court decided *Roth*, it had an opportunity to adopt a standards-based approach based on these earlier cases, which unfortunately it missed.

It is long been rumored that a law clerk who was asked to distinguish the *Goldberg* case came up with the entitlement theory that the Court adopted. Our research does not reveal whether this story is true, but it is plausible since *Goldberg* referred to welfare benefits as an “entitlement,” and the Court was obviously seeking some way to rule against *Roth*, the plaintiff, notwithstanding *Goldberg*.

The Court, however, was hardly compelled by the Constitution or prior case law to adopt the entitlement approach. While it may seem self-evident that some definition of property is mandated by the reference to “life, liberty, or property” in the Due Process Clause, treating each of these terms as separate and distinct requirements for due process to attach is not the only

plausible reading. It is equally plausible to read the phrase “life, liberty, or property” as a general reference to all individual interests of value, a reading that has support in both the text and the history of the Due Process Clause.

Textually, it is particularly instructive to compare the language of the Fifth Amendment’s Due Process and Takings Clauses. While the Due Process Clause refers to “property,” the Takings Clause incorporates the more technical and specific term “private property.” Although one must be cautious about drawing inferences from differences in language, the proximity of the Due Process and Takings Clauses strongly suggests that the difference was intended to have some meaning. Most clearly, it seems to dispel any argument that due process applies only to private property.

Moreover, as Professor Rubin has pointed out, the connection between due process and Magna Carta suggests the Framers’ emphasis “was on the concept of due process, not on liberty or property.”² While it is impossible to say with certainty that the framers understood the phrase “life, liberty or property” in this more general way, it is equally impossible to say with certainty that the Clause compels the reading adopted in *Roth*.

Nor was a strict requirement of a protected interest compelled by precedent, insofar as prior cases had not imposed a “protected interest” requirement. Indeed, the *Roth* opinion cited virtually no authority for either the protected interest requirement or the legal entitlement concept it used to define property. As noted earlier, the case law is quite vague about what makes due process attach, and these cases can be read to employ a standards-based approach.

Our analysis is not meant to prove that Justice Stewart’s approach was wrong (although we believe that it was), but rather to make the case that *Roth* was not compelled by the prior case law or the constitutional text. We suspect that the Court found the entitlement approach attractive because it wanted to avoid any appearance of recognizing an affirmative

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² Edward Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1093 (1984).

Administrative Finality and the Pelican State: A Recipe for Central Panel Gumbo

By Edward P. Richards and Kelly M. Haggar*

This is an essay about an ongoing case in Louisiana, *Wooley v. State Farm*, 2005 Lexis La. 142, ___ So.2d ___, 2005 WL 106495, Case No. 04-CA-0882 (La. 01/19/05),¹ that has important lessons for all states about the legislative control of agencies. While the case is about the legislature's power to control agency decision making, the lesson is about the folly of confusing ALJs with judges.

Assemble Ingredients

Since the days of Huey Long, the Louisiana legislature has been driven by naïve populism. This is further complicated by Louisiana exceptionalism. A common view here is, since Louisiana's legal system is a unique combination of the civil and common law traditions, that there is little from other states' experiences in government or the provision of social services that can be imported into this state. Add in a state constitution written during the tenure of Governor Edwin Edwards (currently in federal custody) that blurs the notion of separation of power, and you have the unique recipe that resulted in this case.

Until 1995, Louisiana had the same basic administrative law regime and organization as other states; ALJs in the agencies conducting hearings which were used by the agency to arrive at final decisions and orders. Business interests and libertarian groups, using populist rhetoric, attacked the agency/ALJ system as unfair because the ALJ worked for the agency and thus had a strong interest in ruling for the agency: How could the little man have a chance in such a system?

In response, the legislature created a central panel of ALJs. This has been done by several other states that were also concerned about the potential conflicts in agency-based ALJ systems. The ALJs were put in a new Division of Administrative Law within the Department of Civil Service, an independent agency. The law also transferred most, but not all, ALJ decision-making to this panel. (A number of specialized hearings, such as prison inmate complaints and workers' compensation claims were exempted from the central panel, as were all professional and occupational licensing boards, of which Louisiana has a vast profusion. For example, in no other state need one possess a license to place flowers in a vase. Yes, there is a board for florists and it has a written exam to license arranging flowers.)

The law grandfathered in a group of existing ALJs, some of whom had no legal background, although new ALJs must have both a law degree and 5 years experience. This lack of qualifications raised questions in the ensuing litigation because it rankled the district court judge that non-lawyers were wearing robes and making decisions on legal issues that looked too much to her like those that judges make. The core issue, whether ALJ decisions are binding on the agency, turned on a unique twist of the Louisiana ALJ scheme. The key statutory provision in LA RS 49:992 at issue in *Wooley* was:

In an adjudication commenced by the division, the administrative law judge shall issue . . . the final decision or order, whether or not on rehearing, and the agency shall have no authority to override such decision or order.

This provision looks suspiciously like the legislature did not appreciate the difference between an ALJ hearing, which may just be a fact finding that

provides information in a more complex agency proceeding, and a court decision, which is complete unto itself. (Alternatively, the legislature did indeed comprehend the distinction but ignored it.) Thus ALJs with no expertise in the subject of the adjudication—and perhaps no legal training at all—are now empowered to shape the final order in complex proceedings, a power that transcends what an ALJ in any agency could do. Taken alone, this provision puts Louisiana in a unique position as regards the power of central ALJ panels over the agency. A second prong of the legislation makes sure that this dominance has its intended result, the further weakening of regulation in Louisiana:

(3) Nothing in this Section shall affect the right to or manner of judicial appeal in any adjudication, irrespective of whether or not such adjudication is commenced by the division or by an agency. However, no agency or official thereof, or other person acting on behalf of an agency or official thereof, shall be entitled to judicial review of a decision made pursuant to this Chapter.

Just to make sure that the agency's hands are effectively tied, this provision prevents the agency from going to court to overturn adjudications that go against it, even if only to reform badly designed orders. While the language is ambiguous, it is reasonable to assume that the legislature also meant to foreclose legal actions brought by third parties such as environmental groups, which would argue on behalf of the now neutered agency.

Taken together, these provisions not only shift the hearing process to a central panel, they give the ALJs in the panel much broader authority than the ALJs in the agencies that they displace. The law creates a ratchet to weaken regulation in Louisiana. All adjudications that go against the agency stand as unappealable,

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¹ Also available at: <http://www.lasc.org/opinions/2005/04ca0882.opn.pdf>.

while all that support the agency are contested in court, with the expectation that at least some of those will be turned against the agency. Even without any corrupt intent, the law must ratchet toward ever less regulation.

Then Stir

The *Wooley* case pits the elected head of the Louisiana Department of Insurance against an insurer claiming that the ruling of a central panel administrative law judge binds the agency. The Insurance Commissioner, as an elected office, was created by the 1970s Louisiana constitution. The position has no specific duties in the constitution and the constitution allows the legislature to convert the position from elected to appointed by the governor. (This has been seriously discussed in the light of the past three insurance commissioners having ended up in prison.)

This simplifies the separation of powers issue: if the elected official's duties are limited to those assigned by the legislature, and the office itself exists at the sufferance of the legislature, the legislature should be able to fundamentally change the role of the commissioner without raising separation of powers issues. While it is often noted that the legislature determines the duties of an agency, it is unusual to find such a broad power to do so in an independently elected state office. In this case, the court found that taking the decision making power from the commissioner did not violate separation of powers because the commissioner could not point to any constitutional basis for lodging the power in his office.

The dispute in *Wooley* was over the approval of a form insurance policy. State law requires that these policies be approved by the State Insurance Commissioner. State Farm first submitted the policy to the Insurance Commission for review and approval. The Commission refused to approve the policy, finding that it was not in compliance with Louisiana statutory requirements. After extensive discussions (2 years), the Commission still refused to approve the policy.

State Farm, based on the then newly enacted statute that moved all decision making to the central panel, petitioned for an ALJ decision on whether the policy was valid and could be issued. An ALJ heard the dispute, approved the policy, and directed the Commissioner to issue an order allowing State Farm to use it. The Commissioner of Insurance then asked the district court for a declaratory judgment that the law establishing the central panel was unconstitutional violation of separation of powers. Ironically, the first test of a law passed to protect the little man thus arose from an insurance company using the law to escape consumer protection scrutiny from the Insurance Commission.

Let Simmer

The district court judge informally announced that she thought that the central panel violated separation of powers, but it was nearly a year later before she delivered a memorandum opinion from the bench (http://biotech.law.lsu.edu/la/briefs/state_farm.htm). During the interval, the legislature put a constitutional amendment before the voters to try to head off her opinion. The amendment was very ambiguous and major newspapers in the state opposed it as both poorly thought out and premature. It was soundly rejected by the voters (60% opposed), but found support among some of the state's regional newspapers.

The *Wooley* opinion addressed two issues: whether the central panel violated the separation of powers because it took away the authority of an elected official; and whether these newly empowered ALJs were unconstitutionally created judges. The district court judge looked to the aping of judicial behavior by the ALJs and on the finality of their rulings:

The court finds, having conducted a hearing, a trial, and having ... visited that agency, that the [ALJs] hold themselves out as judges. There is a judge's entrance.... Some ... of them appear in the Baton Rouge Bar Association booklet in robes. They address each other as judges, and they exercise power that is reserved to the judiciary without being subject to the Supreme Court in its judicial functions, and

without being subject to the judicial counsel for its quasi-judicial functions.

The district judge held that the finality and unappealability of the ALJ's decision as to the Insurance Commission made the ALJ's decision a judicial ruling and not a permissible agency decision. Given the peculiar nature of the Insurance Commissioner in the Louisiana constitution, the creation of unconstitutional judges was the key issue on appeal. Under Louisiana policy, the case went directly to the Supreme Court because it involved declaring a law unconstitutional.

The Louisiana Supreme Court first found that as long as the legislature was not interfering with a constitutionally granted agency power, it could change the allocation of powers between agencies. The bulk of the opinion deals with whether the grant of finality over agency actions and the limits on agency appeals impermissibly intruded on the prerogatives of judges. The court used a notion of quasi-judicial functions when evaluating the ALJs, allowing them broad latitude to resolve both questions of law and fact. This broad reading of the allowable authority of ALJs is influenced by the special nature of judges in Louisiana. Unique to Louisiana, judges, even appeals and supreme court judges, may reform jury verdicts, making new rulings of fact based on the record. This is rooted in the civil code tradition of trials on written documents and it blurs the law/fact distinction which is more important in other states.

Having disposed of the attire and formalities of the central panel as a determinant of their judicial status, the Supreme Court established what it sees, at least in this case, as the core determinant of judicial power, the right of the judge to enforce his opinions:

The testimony in the record reveals that ALJs do not have the power to enforce their decisions and orders, a power that unquestionably lies in Article V courts. The ALJs simply are not constitutionally allowed to exercise the judicial power of the state and Act 739 does not impermissibly attempt to

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Administrative Finality and the Pelican State

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authorize the exercise of judicial power. The ALJs make administrative law rulings that are not subject to enforcement and do not have the force of law.

In a pure administrative law sense, this is exactly correct: even when the agency delegates final decision making to the ALJ, it is the agency that decides whether and how to enforce the decisions. The Court seems to be reminding the legislature that there is more to administrative law than just making decisions. The Court did not elaborate on this holding, ensuring a continuing saga of litigation.

Serve Hot

Enforcement is not an issue when the ALJ rules with the agency. Then the agency will want to enforce the ALJ's ruling. The problem arises in a case such as *Wooley*, where the ALJ rules against the agency. Has the ALJ created a right that State Farm can enforce by going to court and asking the court to order the agency to issue the policy approval? More to the point in this case, does the ALJ's opinion constitute approval by the Commissioner of Insurance? State Farm cannot use the disputed policy form without clearly resolving this issue.

More troubling for State Farm, there is a Louisiana precedent (although in an unpublished circuit court opinion) denying a mandamus proceeding under a similar set of facts. A private party had prevailed in an ALJ hearing, obtaining an ALJ "order" which the agency did not obey. The person sought a writ of mandamus to force that agency to act after the ALJ hearing. However, the court refused to issue a mandamus, holding that the ALJ was not a judge. Thus, a district judge, reading the Supreme Court's statement that an ALJ decision is unenforceable, and given this precedent, is unlikely to order the agency to produce the necessary order to allow the policy to be used.

State Farm has requested a rehearing to try to resolve their dilemma. They asked the Court to rule that the ALJ finding is final as to subsequent judicial review, meaning that courts will be bound by it. Yet on the face of the opinion, such a ruling would force the district judge to enforce the ALJ's order, which would seem to violate the Court's notion that only judges issue enforceable orders.

Refrigerate Leftovers

Louisiana's predicament should be instructive in other states where opponents of government regulation seek to

limit the power of agencies through control of their adjudication process. While the authors believe that central panels defeat the primary value of adjudications—expert, non-adversary decision making—agency ALJs do pose special conflicts problems in small state agencies. As *Wooley* demonstrates, however, giving final decision-making power to the ALJ just shifts the question from "decision making" to "enforcement." Giving the ALJ enough power to enforce orders would either violate separation of powers or defeat the purpose of having agencies at all. (It also shifts the real power to someone who has not won an election, either to the bench or to a state-wide office.)

In a further irony, as the central panel stresses the "efficiency" of this unique Louisiana system, agencies are shifting decision making to the courts where they can control the process more effectively than with the central panel. Thus the long-term result of the central panel in Louisiana will be to limit the use of ALJs, making regulation more time consuming and expensive for the state and for the regulated parties. The little man who was going to benefit from the independent ALJ will now have to hire a lawyer for a full court proceeding rather than an informal adjudication. 

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Inherent Administrative Reconsideration: Inherently Unfair?

By Daniel Bress*

Do federal agencies possess the “inherent” power to reconsider their own final judgments in the absence of an express grant of reconsideration authority in a statute or regulation? And if so, is that generally a desirable state of affairs? These issues arise when an agency seeks to revisit a prior final judgment and a litigant protests that the agency lacks the power to reconsider because no statute, or regulation pursuant to statute, provides for reconsideration or sets forth its attendant procedures. Federal courts have had to confront these issues in hundreds of cases, as has nearly every state.

The power to reconsider, often termed the power to “reopen” or “rehear,” is the ability of an adjudicatory body to revisit its own prior final judgment; hence, this article considers agencies in their adjudicatory capacities only.

While the federal APA does not confer upon federal agencies any power to reconsider, the United States Code and Code of Federal Regulations are replete with detailed provisions granting agencies engaged in adjudication the power to reopen their own final judgments. When such a statute or regulation is lacking, however, the vast majority of federal courts have found, perhaps surprisingly, that agencies nonetheless possess the inherent power to reconsider.

But this inherent power to reconsider is worth reconsidering, most importantly because the Supreme Court precedents that have been marshaled in its support may in fact foreclose it, and because the vast array of reconsideration provisions in statutes and agency rules fairly preclude it. In this author’s opinion, federal administrative agencies should only have the

power to reconsider when that power has been expressly granted by Congress, or when an agency has promulgated a valid reconsideration procedure pursuant to its rulemaking processes.

The Power to Reconsider is Inherent in the Power to Decide

Nearly every federal court that has addressed the issue has adopted the default presumption that in the absence of specific statutory or regulatory authority, agencies engaged in adjudication still possess the inherent power to reconsider their own final decisions. The “inherent power” formulation appears to have originated in the 1950 case of *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950), where the D.C. Circuit announced the often-cited maxim that “[t]he power to reconsider is inherent in the power to decide.” This proposition has never been ratified by the Supreme Court, and as argued below, the limited Supreme Court precedent in this area counsels against it. Nevertheless, a reading of the relevant cases indicates that federal courts begin with the premise that agencies have the inherent power to reconsider, but in a variety of contexts have determined that the presumption of inherent power does not hold.

While the caselaw is not the hallmark of consistency, federal courts are generally less likely to accord an agency the inherent power to reconsider in four main circumstances. First, courts are often unwilling to find the inherent power to reconsider when reconsideration is invoked to effectuate a change in policy. Among the factors that courts have considered as evidence of improper policy reversals are changes in presidential administrations and when the reconsideration is based on a more recent and contrary decision by the agency in a separate but analogous matter. See, e.g.,

Coteau Properties Co. v. Department of Interior, 55 F.3d 1466 (8th Cir. 1995). This line of cases may find some support in *United States v. Seatrail Lines*, 329 U.S. 424 (1947), where in dicta the Supreme Court disapproved of a reconsideration that appeared to be motivated by a desire to execute a new policy.

Second, federal courts are less willing to invoke the inherent power to reconsider when agencies have not reconsidered their initial decisions in a timely fashion. Most courts have adopted the general rule that reconsideration must occur within a “short and reasonable time period,” and some of these courts have indicated that a reasonable time period “would be measured in weeks, not years.” See, e.g., *Behville Mining Co. v. United States*, 999 F.2d 989, 1000 (6th Cir. 1993). The cases reveal a wider range of results, however, with reconsiderations occurring several years after an initial adjudication still upheld as timely. A review of the cases indicates that the most common factors considered are the time between the initial adjudication and the notice of reconsideration, the complexity of the decision, and the probable impact of an erroneous agency decision absent reconsideration.

Third, courts indicate that agencies are less likely to have the inherent power to reconsider when parties have relied heavily on the initial adjudication. In no case, however, has a federal court used reliance as the sole basis for a determination that the inherent power presumption does not apply.

Fourth, and finally, federal courts are less willing to find the inherent power to reconsider when statutes or regulations already provide for a more limited form of administrative reconsideration. But see, e.g., *Gun South, Inc. v. Brady*, 877 F.2d 858 (11th Cir. 1998).

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Inherent Administrative Reconsideration *continued from previous page*

Federal courts generally uphold the inherent power to reconsider in the absence of the four situations described above (hence the default nature of the presumption), and affirmatively permit reconsideration in three other contexts. First, federal courts agree that agencies have the inherent power to reconsider to correct their own inadvertent administrative errors. The Supreme Court appears to have confronted this issue in *American Trucking Ass'n v. Frisco Transportation Co.*, 358 U.S. 133, 145 (1958), where it noted that “the presence of such authority in administrative officers and tribunals to correct such errors has long been recognized—probably so well recognized that little discussion has ensued in reported cases.” Second, there is equally little disagreement that an agency has the inherent power to reconsider when its initial determination was tainted by fraud. As the Second Circuit explained, “[i]t is hard to imagine a clearer case for exercising th[e] inherent power than when a fraud has been perpetrated on the tribunal in its initial proceeding.” *Alberta Gas Chem., Ltd. v. Celanese Corp.*, 650 F.2d 9, 13 (2d Cir. 1981).

Lastly, federal courts have said that agencies affirmatively have the inherent power to reconsider to correct legal error. The decisions seem to fall into cases where the initial decision was made haphazardly or where the agency later alleges that it misinterpreted substantive law in its first determination. An example of the latter category is *Gun South, Inc. v. Brady*, 877 F.2d 858 (11th Cir. 1989), where the Eleventh Circuit allowed the BATF to reconsider its initial determination that certain semi-automatic rifles fell within the statutory definition of firearms with a “sporting purpose.” It is difficult, however, to reconcile these cases with the cases that disallow the inherent power to reconsider when it is used to effectuate a policy reversal—BATF’s reconsideration could seemingly be recharacterized as an attempt to reverse its policy on the importation of semi-automatic rifles.

An Evaluation of the Inherent Power to Reconsider

There are three arguments that suggest the inherent power to reconsider is not justified. First, and most importantly, while various Supreme Court precedents have been marshaled in support of an inherent power to reconsider, these cases lend little support to the proposition, and a more thorough reading indicates that they may in fact foreclose it. Most lower federal courts have located the inherent power to reconsider in *Civil Aeronautics Board v. Delta Airlines*, 367 U.S. 316 (1961). In *Delta*, the CAB granted Delta certificates to operate flights on certain routes and then several months later reconsidered its decision and revoked the certificates. While there was no reconsideration statute or regulation, the Court decided the case on the narrower ground that a hearing was required, thereby avoiding the issue addressed here. The Court did note, however, that administrative reconsideration involves the competing policies of finality and reaching the correct result, *Delta*, 367 U.S. at 321, and lower federal courts have read this aspect of *Delta* to mean that it is their responsibility to fashion a rule that mediates between these two interests.

The *Delta* opinion suggests otherwise. Noting that the CAB is “entirely a creature of Congress,” the Court emphasized that “administrative and judicial feelings have been opposed to the proposition that the agencies may expand their powers of reconsideration without a solid foundation in the language of the statute.” *Delta*, 367 U.S. at 322, 334. The dissent notably disagreed, arguing that “the power to reconsider is inherent in the power to decide,” the only Supreme Court opinion to accept the inherent power default. *Delta*, 367 U.S. at 339 (Whittaker, J., dissenting). The *Delta* Court also relied on *Seatrains Lines*, discussed above in the context of policy reversals, and critically, described *Seatrains* as “overruling the [agency’s] contention that it had inherent power to reconsider effective certificates.” *Delta*, 367 U.S. at 328–29.

Several lower federal courts have also relied on the Supreme Court’s decision in *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223 (1965) to support the inherent power to reconsider, but *United Gas Improvement* involved ratemaking, which the APA characterizes as rulemaking, not adjudication. As the Second Circuit has recently made clear, the series of cases discussed in this article are limited to the context of adjudication. *Natural Res. Def. Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004).

The second argument against the inherent power to reconsider is that the network of extremely detailed reconsideration provisions in statutes and agency rules has resulted in the regulation of administrative reconsideration to such an extent that broader inherent powers to reconsider should be heavily disfavored. This finds support in *Delta* as well. After surmising that “the determinative question is not what the [agency] thinks it should do but what Congress has said it can do,” the *Delta* Court itself recognized that “[t]his proposition becomes clear beyond question when it is noted that Congress has been anything but inattentive to this issue in the acts governing the various administrative agencies.” *Delta*, 367 U.S. at 322.

Finally, the inherent power to reconsider is normatively unattractive because it results in significant procedural uncertainty. This is because the inherent power default is invoked in precisely those situations where agencies do not have formalized procedures for reopening adjudications. Indeed, slightly less than half the states have rejected the inherent power to reconsider as a matter of state administrative law on the ground that it allows agencies to make up the rules as they go along. See, e.g., *Heap v. City of Los Angeles*, 57 P.2d 1232, 1324 (Cal. 1936). Nor has a reliable body of federal common law developed to fill this void—even the most crystalline aspects of the doctrine provide poor substitutes for the guidance afforded by an express consid-

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SEC Proposed Rule 14a-11: Letting Stockholders Nominate Corporate Directors

By James P. Gerkis and Aileen Daly*

On October 14, 2003, the Securities and Exchange Commission (the “SEC”) issued Securities Exchange Act Release No. 34-48626 which proposed a new rule (“Proposed Rule 14a-11”) that would, under limited circumstances, require companies to include in their proxy materials stockholder nominees for election as director. Proposed Rule 14a-11 creates a mechanism for nominees of long-term stockholders, or groups of long-term stockholders, with significant holdings to be included in company proxy materials (if state law permits) where one or more triggering events has occurred that evidence stockholder dissatisfaction with the effectiveness of a company’s proxy process. Proposed Rule 14a-11 supplements the SEC’s new regulations, which require expanded disclosure of the director nominating process.

Background

Section 14(a) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), enables the SEC to promulgate rules and regulations regarding the solicitation of proxies. The grant of this authority stems from Congress’s belief that “fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange.” H.R. Rep. No. 1383 (1934).

The SEC has considered the issue of stockholder access to company proxy materials for more than 60 years. In 1942, the SEC considered a proposal that minority stockholders be given an opportunity to use management’s proxy materials in support of their own nominees. The SEC did not adopt the proposal at that time. In 1977, the SEC

requested comments on whether stockholders should have access to management’s proxy materials for the purpose of nominating their own nominees. At the time, the SEC did not propose changes to these stockholder access rules. In a subsequent report to the Senate, the SEC staff concluded that, due to the emerging concept of nominating committees, the SEC should not adopt a proposal, but rather should monitor the development of nominating committees and the committees’ consideration of stockholder recommendations. In 1992, the SEC commented in Exchange Act Release No. 34-31326 that to include stockholder nominees in the company’s proxy statement would represent a “substantial change” to the proxy rules.

With Proposed Rule 14a-11, the SEC re-visits the role of stockholders in the nomination procedure. The SEC has decided to re-open the discussion once again, in part, because the presence of nominating committees has not eliminated the barriers to meaningful participation in the proxy process in connection with the nomination and election of directors. In addition, the recent changes in the self-regulatory organizations listings standards, while imposing a range of corporate governance reforms, do not address stockholder participation in the nomination process.

Description of Proposed Rule 14a-11

Proposed Rule 14a-11 would apply to all companies subject to the SEC’s proxy rules that are incorporated in states that allow stockholder nominations. Foreign private issuers would be exempt. The SEC also is considering if Proposed Rule 14a-11 should apply only to “accelerated filers,” i.e., reporting companies with over \$75 million of public float. Hence, a company only would be subject to

Proposed Rule 14a-11 where the company’s stockholders have an existing state law right to nominate a director. However, if a state law permits a company to prohibit stockholder nominations through the company’s charter or by-laws, Proposed Rule 14a-11 would not apply to a company with such a provision in its governing documents.

Triggering Events

Under Proposed Rule 14a-11, stockholders would have direct access to the company’s proxy materials upon the occurrence of certain circumstances (“Triggering Events”). Proposed Rule 14a-11 provides for two Triggering Events:

At least one of the company’s director nominees receives “withhold” votes from more than 35% of the votes cast (other than in the case of a contested election or an election in which a stockholder nominee is included in the company proxy material pursuant to Proposed Rule 14a-11); or

A stockholder or group of stockholders holding more than 1% of the voting stock for at least one year submits a proposal, pursuant to Rule 14a-8, providing that the company be subject to Proposed Rule 14a-11 and the proposal receives more than 50% of the votes cast at that meeting (“Direct Access Proposal”).

The SEC is considering including a third Triggering Event: a company’s failure to implement a stockholder proposal (other than a Direct Access Proposal) that was approved by more than 50% of the votes cast at the prior year’s annual meeting by the 120th day prior to the mailing of the company proxy statement. The SEC also considered other Triggering Events such as poor economic performance, being delisted by a market, being sanctioned by

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SEC Proposed Rule 14a-11

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the SEC, being indicted on criminal charges or having to restate earnings. Ultimately, however, the SEC concluded that the Triggering Events should be closely tied with evidence of ineffectiveness or stockholder dissatisfaction with the company's proxy process.

Once a Triggering Event has occurred, Proposed Rule 14a-11 would require the company to give stockholders notice in its next Form 10-Q, 10-QSB, 10-K or 10-KSB.

Nomination Process

After the occurrence of a Triggering Event, the following nomination procedures would apply.

To be eligible to submit a nomination, the stockholder or group of stockholders would be required to:

- Beneficially own, individually or in the aggregate, more than 5% of the securities that are eligible to vote for the election of the directors at the next meeting, with each of such securities having been held continuously by such stockholder or group of stockholders for at least two years from the date of nomination.
- Intend to continue to own those securities through the date of the meeting.
- Be eligible to report beneficial ownership on Schedule 13G (i.e., may not have the purpose of changing or influencing the control of the company).
- Have filed a Schedule 13G or an amendment to Schedule 13G reporting beneficial ownership as passive or institutional investors and certifying that the stockholder or group of stockholders has held more than 5% of the subject securities for the required two-year period.

Proposed Rule 14a-11 would not apply to stockholders who are seeking control of the board of directors of the company. Stockholders acting as a group would be required to file a Schedule 13G

declaring their status. If the stockholders did not qualify as a group for Schedule 13G, they could not act as a group for purposes of Proposed Rule 14a-11.

All nominations would have to be consistent with all applicable laws and regulations and would have to meet the independence criteria of the applicable securities exchange. The nominee could not be affiliated with, or receive a fee from, the nominating stockholder or group of stockholders. These limitations address concerns that the nominated director would be a "special interest" or "single issue" director that would fail to advance the interests of all the company's stockholders.

The number of stockholder nominees would be determined by the size of the company's board of directors, as follows:

Number of Directors	Number of Nominees
< 8	1
8-19	2
> 20	3

If the number of proposed stockholder nominees exceeded the above limit, the company would include the nominees from the stockholders or group of stockholders with the largest ownership.

In order to have a nominee included in the company's proxy statement, the SEC has proposed that the nominating stockholder or stockholder group be required to provide notice to the company no later than 80 days before the date that the company mails its proxy materials for the annual meeting. The notice would include:

- Representations that all the requirements of Proposed Rule 14a-11 are satisfied.
- Information to be included in the proxy statement with respect to the nominee.
- Background information on the nominating stockholder or group of stockholders.

- Methods by which the nominating stockholder or group of stockholders plan to solicit other stockholders.

Under Proposed Rule 14a-11, the nominating stockholder or group of stockholders would be prohibited from forming an agreement with the company regarding the nomination process. The board of directors would nominate separate directors. The proxy card would not permit stockholders to vote for the company's nominees as a group. In addition, the directors could include a statement in its proxy materials in opposition to any stockholder nominee.

Once a Triggering Event occurred, the Direct Access Right would remain in effect for two years—the remainder of the calendar year in which it was triggered, the calendar year thereafter, and the portion of the second calendar year thereafter up to and including the annual meeting. If the SEC adopts Proposed Rule 14a-11 in its current form prior to the 2006 proxy season, the occurrence of a Triggering Event during the 2005 proxy season will result in the opening of the company's proxy materials to eligible stockholders in the 2006 proxy season.

State law and the company's governing instruments would continue to govern the vote required to elect a director.

Reaction to Proposed Rule 14a-11

Since its proposal, Proposed Rule 14a-11 has evoked a considerable amount of interest. The SEC received thousands of comments reacting to the proposal. Supporters of Proposed Rule 14a-11 include unions, pension funds, social funds, environmental funds, religious funds, institutional investors and individual stockholders. Opponents of Proposed Rule 14a-11 include corporations, corporate executives, corporate directors, law firms and business associations.

The following are some of the arguments presented in favor of Proposed Rule 14a-11:

- The proposed rule creates greater accountability of board members to stockholders.
- The inclusion of stockholder nominees in the company's proxy materials would be the most direct and effective method of giving stockholders a meaningful role in the proxy process.
- As the proposed rule sets out to improve corporate governance, this will help restore investor confidence.

The following are some of the arguments advanced against the adoption of Proposed Rule 14a-11:

- There is no need for additional reform until the SEC has had time to assess (i) the impact of the Sarbanes-Oxley Act of 2002, (ii) the amendments enacted by the securities exchanges to their listing standards, and (iii) the SEC's own recent reforms.
- Proposed Rule 14a-11 would turn every election of directors into a costly and disruptive contest.
- There would be a detrimental effect on companies and boards of directors because the proposed rule would facilitate special interest directors, disrupt and polarize boards, discourage qualified candidates from serving on boards, and diminish board accountability by bypassing companies' nominating committees.
- The effect of improving corporate governance and increasing stockholder participation in the director selection process can be achieved by means that are less complex to administer, such as changing the current system to require majority voting for directors rather than the existing plurality rule.

Several newspapers have commented on the proposal. For example, the *Washington Post* has stated, "Mr. Donaldson [the SEC Chairman] understandably would rather avoid casting a deciding third vote that angers this constituency [the nation's CEOs]. But before the chief executives lobbied him, he was clear in his support for this measure, and in a recent speech he repeated that managers exploit the current system to ignore shareholder

protests when they mishandle their companies. Mr. Donaldson's original proposal is modest. He should avoid diluting it, and he should vote his principles." Editorial, Mr. Donaldson's Next Move, *Wash. Post*, June 28, 2004, at A20.

Other Trends

Few of the thousands of director elections during the 2004 proxy season produced high withhold votes thereby not qualifying under the first Trigger Event. Only five companies exceeded 30 percent withhold votes last year. Stephen Deane, *Board Moves: "A New Corporate Governance World,"* in *A New Corporate Governance World: From Confrontation to Constructive Dialogue*, 2004 Institutional Shareholder Services Postseason Report.

Corporate reforms are not only being achieved through federal regulation and legislation, but also through legal agreements. There were at least five such settlements in 2004. In July 2004, Broadcom Corp. reached a settlement that does not provide any money for stockholders but guarantees that the firm will provide the right to nominate at least one candidate for its board of directors. In the past, some settlements included corporate governance reforms, however, there were less instances of publicly traded companies acknowledging that board members should be accountable to their stockholders.

At several companies, stockholders have submitted their own director-nomination resolutions to adopt Proposed Rule 14a-11. Companies are reluctant, however, to accept these proposals. In 2004, the SEC staff rejected proposals filed by stockholders at Verizon Communications Inc. and Qwest Communications International Inc. because the eligibility standards differed from those set forth in Proposed Rule 14a-11. See Verizon Communications Inc., SEC No-Action Letter (January 28, 2004), 2004 SEC No-Act. LEXIS 200; Qwest Communications International Inc., SEC No-Action Letter (March 22, 2004), 2004 SEC No-Act. LEXIS 522. In September 2004, stockholders at The Walt Disney Company submitted a resolution urging the company to adopt

Proposed Rule 14a-11. Disney requested permission through a no-action letter to exclude the proposal, but the staff of the SEC's Division of Corporation Finance rejected the request. However, upon Disney's appeal to reconsider, Alan Beller, Director of the SEC's Division of Corporation Finance, announced that Disney could exclude the proposal under Rule 14a-8(i)(8), which permits a company to exclude a shareholder proposal if the proposal relates to an election for membership on the company's board of directors. See The Walt Disney Company, SEC No-Action Letter (December 28, 2004), 2004 SEC No-Act. LEXIS 909; see also Ted Allen, *Mixed Signals on Proxy Access*, ISS Governance Weekly, at <http://www.institutionalinvestor.com> (Jan. 7, 2005).

Current STATUS

The SEC has yet to enact Proposed Rule 14a-11 or to issue another release with revisions thereto. SEC Chairman William Donaldson, who initially supported Proposed Rule 14a-11, appears to have retracted his earlier support due to opposition from the business community and fellow Republican Commissioners, Paul Atkins and Cynthia Glassman. Chairman Donaldson has neither put forward a plan or announced a timetable for the proposal. Democratic Commissioners Roel Campos and Harvey Goldschmid generally have supported initiatives that provide stockholders with greater power. However, Commissioner Goldschmid plans to leave the SEC by this summer which has led some investors to conclude that the proposal has died. Stephen Labaton, *S.E.C. at Odds On Plan to Let Big Investors Pick Directors*, *N.Y. Times*, July 1, 2004, at C1; Stephen Labaton & Jenny Anderson, *S.E.C. Chief Under Cross-Pressure, Sees Some Modest Changes*, *N.Y. Times*, February 10, 2005, at C9. ○

Two Months in the Life of the Regulatory State

By Stuart Shapiro, Ph.D.*

Regulation has become a fundamental tool of governance. The Cato Institute's annual report on the regulatory state notes that in 2002, agencies issued 4,167 final rules and the Federal Register consumed 75,606 pages. There have, however, been very few empirical studies of the process that generates this massive amount of regulation. There have been various studies on the economic impact of regulations and various case studies of the regulatory process and these have been valuable. The significant disagreements in the economic studies, however, and the limited generalizability of the case studies leave a considerable gap in our knowledge.

I have begun a project to gather data on a wide variety of regulations. Unlike work by economists, my research aims primarily to determine how the various requirements of the regulatory process affect regulations. My hope is that by building a database of regulations and the regulatory requirements to which each was subjected, we will be better able to understand the impact of those requirements. In current debates about proposed regulatory reforms (e.g., electronic rulemaking; peer review of information agencies use to support proposed rules), information about the process as it now stands is absent. These debates would be well served by an improved understanding of how our regulations are currently generated.

There are many questions that a comprehensive database could answer. For example, many scholars, including Thomas McGarity, have criticized the rulemaking process for taking too long.

With a comprehensive database, we could determine how the various requirements imposed on the regulatory process actually affect the time that it takes to finalize a rule. Do rules with many public comments take longer to finish? (The answer to this question will be particularly important in light of the movement toward electronic rulemaking, as this reform could multiply significantly the number of comments agencies receive.) We will learn whether rules subject to review by the Office of Management and Budget (OMB) take longer, and which agencies take the longest to finalize proposed rules.

Additionally, it will be useful to learn what factors affect the extent of change that a rule undergoes from its proposed to its final version. My database will include a simple variable representing the extent of change: a rule will be assigned a "0" if there was no change between the proposed and final versions; a "1," if there were only clarifications; a "2," if there was at least one significant change; and a "3," if the entire direction of the rule was reversed (a very rare occurrence). With this variable in hand, we will be able to answer another series of questions about the regulatory process. For example: Are rules that garnered more comments more likely to be changed by agencies? Do rules with more changes take longer to finalize? Are rules more likely to change if they are finalized by a different Administration than the one that proposed them?

To begin this project (and to test its feasibility), I gathered data from all final rules published in the Federal Register in November and December 2003. (The only exceptions were temporary final rules; clarifications or corrections; changes in effective dates; and rules from the Federal Communications Commis-

sion entitled "Radio stations; table of assignments.") My research assistant and I gathered the data by reading through the preambles to the 392 final rules issued during the two-month period. What follows are my observations from two months in the life of the regulatory state.

A Few Qualifications Before We Get Started

These observations are necessarily limited in scope to those aspects of the process that can be meaningfully analyzed using only 392 observations. For example, because many rules go through the notice-and-comment process, I was able to draw meaningful conclusions about the effect of that process. By contrast, it is harder to draw conclusions about the impact of OMB review and the Paperwork Reduction Act because only 10-15% of these 392 rules are subject to these requirements. As this project expands to a larger number of rules, I hope to be able to provide meaningful analysis on aspects of the regulatory process such as OMB review which occur less frequently.

The Administrative Procedure Act (APA) defines a rule as "the whole or any part of any agency statement of general or particular applicability . . ." In the terminology of the APA, "particular" rules affect a specific entity, while "general" rules have a broader impact. Only rarely does the text of a rule identify the rule as "particular" or "general," and the legal distinction is sometimes controversial. To avoid this controversy, I use my own labels, referring to rules as being of "general" or "narrow" impact.

In my two-month sample, 222 of the 392 rules were of general impact. The 170 rules with a narrow impact were mostly "airworthiness directives" from

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the Federal Aviation Administration; “flood elevation determinations” from the Federal Emergency Management Agency; and “clean air act permit actions” by the Environmental Protection Agency. These 170 rules (like all narrow rules) did not involve the type of rulemaking typically discussed in controversies over regulatory policy. I will be careful to differentiate them from rules of general impact in the analysis that follows.

Avoiding “Notice and Comment”: Interim and Direct Final Rules

The best-known aspect of the regulatory process is the notice-and-comment process that has evolved to meet the requirements of the APA. Notice and comment is designed to solicit public input and information regarding agencies’ proposed rules. The APA, however, allows agencies to circumvent the public comment process by issuing either “interim final rules” or “direct final rules.” On direct final rules, the agency does not request comments; on interim final rules, the agency asks for comments and leaves open the possibility that it may modify the interim final rule into a final rule at a later date. In either case the rule becomes effective without the benefit of public comment. Another important distinction between interim final rules and direct final rules is the predicate for their issuance. Direct final rules are rules for which the agency has found public comment to be unnecessary (rules in which the agency infers the public will have little interest), whereas interim final rules are ones with respect to which the agency has determined that public comment is impractical (usually because of some type of emergency).

Over the two-month period examined, 159 or 40.6% of the rules examined were either direct or interim final rules. Thirty-nine of these were interim final rules and 120 were direct final rules. In other words, in 40.6% of all rulemakings, agencies did not solicit public comments before their rules took effect. Had these rules been mainly ones of narrow impact, then this might have raised little concern.

In fact, however, un-commented rules were almost equally divided between narrow and general. (Specifically, 39.1% of general rules and 42.9% of narrow rules became effective without benefit of public comment. This difference is not statistically significant.)

There was, however, a difference between direct and interim final rules. Fifty percent of the 120 direct final rules were of general applicability, while two thirds of the 39 interim final rules were of general applicability. From this we can infer that the interim final rule “loop-hole” for avoiding notice and comment is more often used for the more important rules than on less important rules. I examined the “good causes” that were given for the seven most prominent interim final rules in the period in question (using whether or not the rule was subject to OMB review as an indicator of prominence). One of the seven rules was issued as an interim final rule to meet a statutory deadline. In another instance, the regulating agency gave no reason for issuing an interim final rule. Five other agencies gave varying excuses, mainly claiming that some benefit to the public would be lost if the agency waited for public comment to issue a final rule.

The public comment process is often heralded as an important control on agency action. However, if in 40% of cases agencies avoid notice and comment, then it is apparently a control that can be ignored in many circumstances. One of the most interesting findings in looking at two months’ worth of regulations was the widespread use of interim and direct final rules. Examining a broader set of data will answer the important questions of how this use varies by agency and how it has varied over time.

Public Comments: Who, How Many, and How Much Influence?

As just noted, only 59.4% of the final rules examined received the benefit of public comment. Of the 233 rules that were opened for public comment there was a clear difference between rules of general and those of narrow impact. Table 1 highlights this difference.

The table shows us several things about the notice and comment process. Rules of narrow impact get very few comments; more than half get none. Rules of more general impact get a greater number of comments, but the distribution is quite skewed: a very few receive a high percentage of the total. (In this two-month period, a National Park Service rule got 104,000 comments, a Forest Service rule received over 133,000, and a Fish and Wildlife Service proposal received over 50,000. Only two other rules received more than 1,000 comments, and only several received between 100 and 1000.)

The extent to which comments are submitted via the internet may be of interest to those (including this author) in the research community. Unfortunately, agencies rarely make this information easily available in the preambles to their final rules. I examined the ten rules that received the greatest volume of public comments to try to determine the extent to which electronic commenting was used. Information was available for only one of the ten: on the National Park Service rule just mentioned, nearly 90% of the over 100,000 comments were received electronically. Three of the ten rules noted that the agency had not permitted electronic commenting, and the other six said nothing about the

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Table 1: Frequency of Public Comments.

	# with no comments	Mean # comments	Median # comments
General Rules (136)	25	2408	5
Narrow Rules (97)	59	1.1	0
Total	84	1384	1

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breakdown between electronic and written comments.

Who were the commenters? Table 2 identifies them by specific categories. (Note that many rules had more than one type of commenter.)

Table 2: Who Were the Commenters?

Category	# of rules commented on
Industry	64
Public Interest Groups	39
Individuals	33
Other Federal Agencies	23
State Agencies	23
Academics	3
Unions	2
Others	12

As one can see, a diverse set of commenters participated in the regulatory process. Significantly, industry commented on a greater number of rules than any other group. This agrees with academic predictions that the greater impact of regulations upon industry coupled with industry's greater resources will lead to industry's becoming more involved than other groups.

Measuring the influence of comments is a very tricky thing. Rules change between being proposed and finalized for many reasons; no particular change, therefore, can conclusively be attributed to the effect of public comments. That said, noting how changes in rules vary with the extent of public participation will be a first step in determining how and whether comments have an impact.

In order to determine whether change varies with the presence of public comments, I assigned each rule a value ranging from 0 to 3 to quantify the degree of change from proposal to final rule (if the rule was preceded by a proposal). Of the 232 rules preceded by a proposal, only two received a "3" (these

Table 3: Changes in Rules of General vs. Narrow Impact.

	0	1	2	3
General Rules	59 (44%)	39 (29%)	34 (25%)	2 (1%)
Narrow Rules	83 (85%)	11 (11%)	4 (4%)	0

Table 4 Changes in Rules vs. Comments Received.

	0	1	2	3
All Rules	142 (61%)	50 (22%)	38 (16%)	2 (1%)
Rules with Comments	58 (39%)	49 (33%)	38(25%)	2 (1%)
General-Impact Rules with comments	35 (31%)	39 (36%)	34 (31%)	2 (2%)
Rules with Industry Comments	22 (33%)	24 (36%)	19 (29%)	1 (2%)

were an Occupational Safety and Health Administration rule on tuberculosis and a Federal Election Commission rule on Leadership PACs). Of the remaining rules, there were 142 for which there was no change (resulting in a value of "0"), fifty for which there were only clarifying changes (yielding a "1"), and thirty-eight for which at least one provision had a significant change (a "2"). Change between the proposed and final stages of a rulemaking was neither the norm nor a rarity.

As shown in Table 3, rules with a general impact were much more likely to be changed. It is likely that this is in part true because these general rules were much more likely to receive public comments.

Table 4 shows data on the extent of changes between proposed and final rules for four categories of rules: all rules, rules with comments, general rules with comments, and rules with comments from industry.

Several interesting observations present themselves:

- Not surprisingly, proposed rules that received comments were more likely to be changed than proposed rules that didn't receive them. (If a proposed rule receives no comments, an agency is limited, legally, to making changes that are

"logical outgrowths" of the proposal.) However, 72% of the proposed rules that received comments underwent only minor or clarifying changes. This tends to confirm the conclusions/predictions of scholars William West and Marissa Golden, who contend that comments have only a minor impact on agency decisions.

- Comments had a more significant effect on rules of general than on rules of narrow impact. (This was evaluated with a chi-squared test at a 2.5% significance level.) This is most likely due to the greater volume of comments on general rules.
- Rules on which industry commented were no more likely to be changed (even under the pro-industry Bush administration) than rules on which only parties outside of industry commented. (This was again evaluated using a chi-squared test.) There are several possible explanations for this phenomena: it could mean that agencies are unaffected by the source of comments, or it could mean that industry was so satisfied with the proposed rules that it felt no need to advocate significant changes.

In future work I will use regression techniques to see if the number of

comments affects the extent of change between proposed and final rules.

Why Does It Take So Darn Long to Finalize a Proposed Rule?

The amount of time it takes a federal agency to complete a rulemaking has been the subject of much discussion and uninformed analysis. Critics generally blame the length of time on the many procedural requirements imposed on agencies writing regulations. There is also a general consensus that it is taking longer to write a rule with each passing year. In contrast, skeptics who do not believe the rulemaking process is broken, point to the large number of regulations issued each year.

The average time between proposal and finalization of the rules in my study was 322 days. The median time was 175 days—meaning that half of the rules

studied were completed in less than six months' time. The far shorter median time also shows that a small number of rules take far longer to complete than the rest. How do specific characteristics of regulations correspond to the length of time it takes to finalize them? Table 5 breaks down the duration of rulemakings by category of rule:

The basic results are not surprising: rules of general impact take longer to complete than those of narrow impact; rules with comments take longer than those without; rules reviewed by OMB take longer than those not reviewed by OMB; and rules that change more take longer than rules that change less. More work needs to be done to separate out how much of the extra time to finish a rule is due to each of these components. (For those who are curious, there were 11 general rules with comments,

reviewed by OMB, that received a change variable of 2. These rules took an average of 578 days to complete.)

Conclusion

The regulatory process is often criticized, often reformed, and always poorly understood. The results presented above mark the beginning of what I hope will be a series of efforts to better understand how the way we write our regulations works in practice. In just looking at this initial set of data, we were able to generate a number of interesting observations.

- The fact that roughly 40% of all final rules are promulgated without the benefit of public comment tells us that federal agencies often find ways around the APA's notice-and-comment requirement.
- There are often limited changes between proposal and final rule, even when public comments have been received by the agency. A deeper understanding of the frequency and distribution of public comments and the relationship between comments and changes to final rules will help us understand the utility of public comment when it does occur.
- Finally, the length of the regulatory process is often bemoaned. It is clear from these results, however, that if we want the benefits associated with public comment, OMB review, and other regulatory procedures, then some delay may be the inevitable price. ○

Table 5: Length of Time to Finalize a Proposed Rule

Type of Rule	Median Days to Completion	Mean Days to Completion
All Rules	175	322
General Rules	293	423*
Rules with Comments	285	414*
Rules Reviewed by OMB	371	520**
Change = 0	138	257***
Change =1	296	343***
Change =2	366	472***

* Different than the opposite category (particular rules and rules without comment) at the 1% level of significance.

** Different than rules not reviewed by OMB at the 5% level of significance.

*** Categories 0 and 1 and 1 and 2 are different at the 5% level of significance. Categories 0 and 2 are different at the 1% level of significance.

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April 29–May 1, 2005
Westin Savannah Harbor Resort
Savannah, Georgia

Friday, April 29, 2005

- 8:30am – 1:30pm Committee Meetings
2:30pm – 3:30pm *State Administrative Law Themes for the Twenty-First Century*
3:45pm - 5:15pm *A Federal Administrative Law Agenda For the Twenty-First Century: What Should A New ACUS Do?*
6:00 pm – 7:30 pm Reception at *The Gingerbread House* in historic downtown Savannah (www.thegingerbreadhouse.net)
8:00 pm Dine-Around in Historic Savannah
10:30 pm Chairman's Reception at the Westin

Saturday, April 30, 2005

- 7:30 am – 9:00 am Women in Administrative Law Networking Breakfast
8:00 am – 9:00 am Section Breakfast
9:00 am – 10:30am Section Council Meeting Part I
9:30 am – Noon Spouse/Guest Excursion: “*Midnight in the Garden of Good and Evil*” Tour
10:45 am – Noon Section Council Meeting Part II—*Judicial Review of Interstate Compacts*
Noon – 6:00 pm Tours/Golf/Activities On Your Own
Noon – 1:00 pm Publications Committee Meeting
1:00 pm – 2:00 pm Membership Committee Meeting
6:00 pm – 9:00 pm Section Reception and Dinner—*The Clubhouse* at the Westin
9:30 pm Chairman's Reception at the Westin

Sunday, May 1, 2005

- 8:30 am - 9:30 am Special Breakfast Program—*Bacon and Eggs: A Breakfast Conversation With Bill Eggers Concerning the Use of Technology to Transform Twenty-First Century Governance*
9:30 am - 11:30 am Section Council Meeting
9:00 am – Noon Spouse/Guest Activity: The Greenbriar Spa at the Westin

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by Robin Kundis Craig*

None of the Supreme Court's decisions this quarter focused primarily on administrative law. Nevertheless, some of its decisions have potential implications for administrative law practice.

Standing and the Rights of Third Parties

In *Kowalski v. Tesmer*, ___ U.S. ___ 125 S. Ct. 564 (Dec. 13, 2004), the Court, 6-3, held that two attorneys who potentially would be called upon to represent indigent defendants lacked standing in a § 1983 action to challenge the constitutionality of "Michigan's procedure for appointing appellate counsel for indigent defendants who plead guilty." *Id.* at 566. Michigan amended its constitution in 1994 to provide that appeal by an accused who pleads guilty or nolo contendere was by leave of the court, not as of right, and, as a result, Michigan state judges were denying indigent defendants court-appointed counsel for their appeals.

The *Kowalski* Court began by noting that "[t]he doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. This inquiry involves 'both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'" *Id.* at 567 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). However, the Court explicitly skipped the constitutional standing analysis to "address the alternative threshold question whether [the attorneys] have standing to raise the rights of others." *Id.* It emphasized that "[w]e have adhered to the rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties,'" *Id.* (quoting *Warth v. Seldin*, 422 U.S. at 499), but also noted that "[w]e have not treated this rule as an absolute, . . . recognizing that there may be circumstances where it is necessary to grant a third party standing to assert the rights of another." *Id.* Specifically, to assert third-party standing, (1) the plaintiff must have a "close relationship" with the person holding the right; and (2) there should be some hindrance that interferes with the ability of the person holding the right to assert his or her own interest. *Id.*

The attorney plaintiffs in *Kowalski* failed both prongs of the analysis and hence lacked third-party standing. The asserted attorney-client relationship failed to create the requisite "closeness," despite the Court's allowance of such relationships in the past, because an "existing attorney-client relationship is, of course, quite distinct from the hypothetical attorney-client relationship posited here." *Id.* at 568. Because the two attorneys were not actually representing indigent clients at the time of challenge, they "do not have a 'close relationship' with the alleged 'clients'; indeed, they have no relationship at all." *Id.*

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As for the "hindrance" prong of the analysis, the attorneys asserted that, without counsel, the indigents could not successfully navigate Michigan's appellate procedures. The Court pointed out, however, that several indigent defendants in Michigan had successfully done so, concluding that "[w]hile we agree that an attorney would be valuable to a criminal defendant challenging the constitutionality of the scheme, we do not think that the lack of an attorney here is the type of hindrance necessary to allow another to assert the indigent defendants' rights." *Id.* at 569. In addition, the *Kowalski* Court was troubled "on a more fundamental level" by the plaintiffs' attempts to use "a federal court to short-circuit the State's adjudication of this constitutional question." Emphasizing that "federal and state courts are complementary systems for administering justice in our Nation," *Id.* (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999)), and that the indigent plaintiffs in the § 1983 action had been properly dismissed pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), because their state criminal proceedings were ongoing, the Court concluded that "[t]here also was no extraordinary circumstance requiring federal intervention" and that "an unwillingness to allow the *Younger* principle to be . . . circumvented is an additional reason to deny the attorneys third-party standing." *Id.* at 569-70.

Justice Thomas, in concurrence, emphasized that "[i]t is doubtful whether a party who has no personal constitutional right at stake in a case should ever be allowed to litigate the constitutional rights of others." *Id.* at 571 (J. Thomas, concurring). Dissenting Justices Ginsburg, Stevens, and Souter, however, argued that "[t]his case implicates none of the concerns underlying the Court's prudential criteria," *Id.* at 575 (J. Ginsburg, dissenting), because it "presents an unusual if not unique case of defendants facing near-insurmountable practical obstacles to protecting their rights in the state forum," especially because "it is the deprivation of counsel itself that prevents indigent defendants, many of whom are likely to be unsophisticated and poorly educated, from protecting their rights . . ." *Id.* at 576 (J. Ginsburg, dissenting). The *Kowalski* decision thus underscores a running split in the current Court regarding citizen access to the federal courts in non-traditional suits.

The Sixth Amendment Right to a Jury Trial and the Federal Sentencing Guidelines

In a fractured opinion in *United States v. Booker*, ___ U.S. ___, 125 S. Ct. 738 (Jan. 12, 2005), the Supreme Court decided, 5-4, in an opinion by Justice Stevens, that mandatory application of the Federal Sentencing Guidelines to criminal defendants by federal judges violated those defendants' Sixth Amendment rights to a jury trial. *Id.* at 746, 750-56 (J. Stevens). The Court also decided, 5-4, in an opinion by Justice Breyer, that the appropriate

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remedy was to sever and invalidate 18 U.S.C. §§ 3553(b)(1) and 3742(e), so that the Federal Sentencing Act, 18 U.S.C. §§ 3551 *et seq.*, would effectively make the Federal Sentencing Guidelines advisory rather than mandatory. *Id.* at 756–57, 757–68 (J. Breyer).

Booker is manifestly a criminal law opinion. Nevertheless, numerous administrative–agency–administered statutes contain specific criminal provisions, often specifying criminal penalties and factors at odds with the Federal Sentencing Guidelines, and many courts have, in the past, allowed the Federal Sentencing Guidelines to supersede these more specific criminal provisions. The relationship between these specific statutory provisions and the now—“advisory” Federal Sentencing Guidelines arguably has become an open question, one that *Booker* itself does not address. Moreover, this relationship may be complicated even further for corporate defendants in administrative criminal cases: the *Booker* Court relied heavily on individuals’ Sixth Amendment rights to jury trials to invalidate the mandatory application of the Federal Sentencing Guidelines, but corporate defendants may not enjoy that same constitutional right.

Statutory Interpretation

The Supreme Court issued two opinions with statutory interpretation issues of note. In *Cooper Industries, Inc. v. Aviall Services, Inc.*, ___ U.S. ___, 125 S. Ct. 577 (Dec. 13, 2004) (oral argument discussed last column), in an opinion authored by Justice Thomas, the Court held 7–2 that a private party who has not been sued under either § 106 or § 107 of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9606, 9607, cannot sue other Potentially Responsible Parties (PRPs) pursuant to § 113(f)(1) of CERCLA for contribution for the costs of the party’s cleanup of a release of hazardous substances.

The interpretative issue arose in *Cooper Industries* because of the seemingly contradictory language in CERCLA’s contribution provision, section 113(f)(1):

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

42 U.S.C. § 9613(f)(1) (emphasis added). Given this language, the Court had to decide whether Aviall Services could sue four

other PRPs for contribution after Aviall cleaned up four properties at the direction of the Texas Natural Resource Conservation Commission, when “[n]either the Commission nor the EPA ... took judicial or administrative measures to compel cleanup.” *Cooper Industries*, 125 S. Ct. at 582.

The majority concluded that “[s]ection 113(f)(1) does not authorize Aviall’s suit.” *Id.* at 583. Focusing on the first sentence of section 113(f)(1), the majority concluded that “[t]he natural reading of this sentence is that contribution may only be sought subject to the specified conditions, namely, ‘during or following’ a specified civil action.” *Id.* Against Aviall’s argument that the “may” in this sentence indicated that the sentence should be read as creating a permitted but not exclusive option, the majority again emphasized that “the natural reading of ‘may’ in the context of the enabling clause is that it authorizes certain contribution actions—ones that satisfy the subsequent specified condition—and no others.” *Id.* In addition, Aviall’s reading would make other provisions in section 113 superfluous, including “the explicit ‘during or following’ condition” and section 113(f)(3)(B), “which permits contribution actions after settlement ...” *Id.*

More surprising, perhaps, was the majority’s announcement that “[t]he last sentence of § 113(f)(1), the saving clause, does not change our conclusion.” *Id.* According to the majority, “[t]he sole function of the sentence is to clarify that § 113 does nothing to ‘diminish’ any cause(s) of action for contribution that may exist independent of § 113(f)(1).” *Id.* at 583–84. “Reading the saving clause to authorize section 113(f)(1) contribution actions not just ‘during or following’ a civil action, but also before such an action, would again violate the settled rule that we must, if possible, construe a statute to give every word some operative effect.” *Id.*

The majority also looked at the larger context of section 113. It emphasized that section 113 “provides two express avenues for contribution”—“during or following” civil actions, and after settlements—and “provides two corresponding 3-year limitations periods for contribution actions ...” *Id.* at 584. “Notably absent ... is any provision for starting the limitations period if a judgment or settlement never occurs, as is the case with a purely voluntary cleanup.” *Id.* Thus, the overall structure of section 113 supported the Court’s conclusion that Aviall could not bring its contribution action.

Most dramatically, the majority disavowed any need to look at CERCLA’s purposes when deciding this issue of statutory interpretation: “Given the clear meaning of the text, there is no need ... to consult the purpose of CERCLA at all.” *Id.* Emphasizing its strict plain meaning approach, the majority noted that “it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” *Id.* (quoting *Oncale v. Sandowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998)).

The disagreement between the majority and dissenting Justices Ginsburg and Stevens concentrated not on the meaning

of section 113(f)(1) but rather on the availability of section 107 as an alternative cause of action for Aviall's contribution claim. The majority "decline[d] to address the issue" because the lower courts had not addressed it. *Id.* at 584–86. The dissenters, in contrast, argued not only that section 107 supplied such a cause of action but also that the Fifth Circuit had already determined that issue, and hence there was "no cause for protracting this litigation." *Id.* at 588 (J. Ginsburg, dissenting).

Another 7–2 majority, in an opinion by Justice Scalia, expounded upon the canon of "constitutional avoidance" in *Clark v. Suarez Martinez*, ___ U.S. ___, 125 S. Ct. 716 (Jan. 12, 2005). This case involved a habeas petition by an inadmissible alien detained by the Immigration and Naturalization Service (INS) beyond the 90-day period allowed by 8 U.S.C. § 1231(a)(1)(A). Section 1231(a)(6), however, rather open-endedly allows the Secretary of Homeland Security to detain aliens "beyond the removal period." In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court had determined, based on "the 'serious constitutional threat' the Court believed to be posed by indefinite detention of aliens who had been admitted to the country," *Martinez*, 125 S. Ct. at 722 (quoting *Zadvydas*, 533 U.S. at 699), that *resident* aliens ordered removed could be detained under section 1231(a)(6) only as long as was reasonably necessary to effectuate the alien's removal, presumptively six months. The issue for the *Martinez* Court was whether the *Zadvydas* limitations on detention applied to *inadmissible* aliens as well, even though the constitutional considerations were not relevant.

The *Martinez* majority concluded that "[t]he operative language of § 1231(a)(6), 'may be detained beyond the removal period,' applies without differentiation to all . . . categories of aliens that are its subject. To give these same words a different meaning for each category would be to invent a statute rather

than to interpret one." *Martinez*, 125 S. Ct. at 722–23. The majority emphasized that the principle of constitutional avoidance in statutory construction can limit *all* applications of a statute, even though some applications do not raise constitutional concerns: "It is not unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern." *Id.* at 724. Specifically, "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Id.*

However, the majority stressed, the canon of constitutional avoidance "is not a method of adjudicating constitutional questions by other means." *Id.* Instead, "[i]t is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Id.* As a result, "[t]he canon of constitutional avoidance comes into play only when, after application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a *means of choosing between them*." *Id.* at 726.

Justices Thomas and Rehnquist argued in dissent that the different constitutional status of resident aliens "made all the difference" to the *Zadvydas* decision, *id.* at 728 (quoting *Zadvydas*, 533 U.S. at 693) (J. Thomas, dissenting). As a result, they concluded, the Court could not reconcile *Martinez* and *Zadvydas* and *Zadvydas* should be overruled. ○

Reconsideration

continued from page 8

eration provision. The inherent power to reconsider is the ultimate in agency flexibility, but is little solace to litigants who have obtained a favorable adjudication.

There are at least two possible responses to these arguments, but neither seem persuasive. First, one could argue that agencies should have the inherent power to reconsider to ensure that they reach the correct result in each case. The problem with this argument is that it proves too much, because it does not explain why agencies could not achieve the same policy goal with an express reconsideration provision. Agencies could retain a

significant amount of flexibility with express provisions for reconsideration, and this would give parties much greater notice about the finality of their initial adjudication. Second, one could argue that the power to reconsider is no different from any number of agency actions that may have little basis in statutory or regulatory authority. This argument also seems unpersuasive. The best reading of the Supreme Court's few precedents in this area is that the inherent power to reconsider is not particularly favored, and the sharp division among state courts on this issue shows that states have also distinguished the power to reconsider from other possible inherent powers.

Conclusion

The more appropriate default rule, and the one adopted by many states, is that agencies should only have the power to reconsider when that power is expressly provided in a statute, or when an agency has used its rulemaking powers to promulgate formal reconsideration provisions. Perhaps the better solution would be to amend the APA to provide general rules for reconsideration, which could serve as default rules unless and until either Congress or agencies provided otherwise in specific statutory or regulatory schemes. ○

By William S. Jordan III*

First Circuit Emphasizes Flexibility of APA Sec. 556

If you read one Circuit Court decision from the last few months, it should be *Citizens Awareness Network, Inc. v. United States*, 2004 WL 2827697 (1st Cir., Dec. 10, 2004), in which the First Circuit provides a much needed illumination of the procedural requirements governing so-called “formal adjudications.” Widespread agency implementation of the logic of this decision could significantly reduce litigation on the procedural requirements that are triggered by statutory hearing requirements for adjudications. This is, in a sense, the *Vermont Yankee* for adjudications.

After decades of struggling with cumbersome trial-like hearings on reactor licenses, the Nuclear Regulatory Commission issued a rule that would significantly reduce the formality of those proceedings. Of greatest significance, the NRC replaced its discovery provisions with a mandatory disclosure requirement, created a presumption that the hearing officer would conduct the questioning of witnesses (with questions suggested by the parties), and provided for cross-examination only where a party shows it is “necessary to ensure the development of an adequate record for decision.” In proposing the rule and in defending it before the First Circuit, the NRC argued that the hearing requirement of Section 189(a) of the Atomic Energy Act does not trigger the “on the record” language of Section 554(a) of the Administrative Procedure Act, with the result that NRC reactor licensing hearings are not governed by the seemingly burdensome requirements of Section 556 and 557 of the APA.

Displaying considerable impatience with the NRC’s myopia in focusing on whether Section 189(a) triggers “formal adjudication,” the court chose not to address that issue. Instead, the First Circuit assumed the NRC’s hearings were governed by Section 556, and upheld the new rule as consistent with the requirements of that section. In so doing, the court emphasized the minimal requirements of Section 556: “The APA lays out only the most skeletal framework for conducting agency adjudications, leaving broad discretion to the affected agencies in formulating detailed procedural rules. . . . In specific terms, the APA requires only that the agency provide a hearing before a neutral decisionmaker and allow each party an opportunity ‘to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.’”

Citing *Vermont Yankee*, the court emphatically rejected the proposition that the seriousness of the risks of nuclear reactors somehow dictates enhanced procedures. Courts may not, it said, impose anything beyond the statutory minima. Turning to the particulars, the court noted that the APA makes no reference to

discovery, and it rejected the argument that discovery is necessary to allow impecunious intervenors to develop the record for review. In so doing, the court emphasized that the license applicant must bear the burden of convincing the Commission that it has met the applicable requirements. Since the applicant has a strong incentive to provide all of the necessary information, that information “should be adequate for a reviewing court to determine whether the agency’s action is supportable.” As to the limits on cross-examination, the court accepted the NRC’s representation that its rule embodied the Section 556(d) authorization “to conduct such cross-examination as may be required for a full and true disclosure of the facts.”

Perhaps the most telling aspect of the decision is the court’s willingness to uphold the NRC on a ground that had barely been mentioned to that point. As noted, the NRC had argued that Sec. 189(a) of the AEA simply did not trigger Sec. 556 of the APA. Citing *SEC v. Chenery*, an opponent had argued that the court could not uphold the NRC based upon a theory that had not been argued by the agency. Despite its core argument, however, the NRC had asserted almost in passing that it believed the new rule would meet the requirements of Sec. 556. This was enough for the First Circuit.

In context, the First Circuit seems to have wanted to make the point, as articulated by Judge Lipez’s concurring opinion, that the careless use of terminology such as “formal adjudication” and “trial-like hearing” has created the impression that the APA requires greater formality than it actually does. The NRC, in particular, and agencies in general have been struggling unnecessarily with quasi-trials, when Judge Lipez’s articulation of the core requirements of the APA demonstrates that agencies have “a great deal of flexibility in tailoring on-the-record hearing procedures to suit their perceived needs.”

D.C. Circuit Backtracks on Remand Without Vacating

As reported in the Fall issue, the D.C. Circuit in *Honeywell International, Inc. v. Environmental Protection Agency*, 374 F.3d 1363 (D.C. Cir. 2004), held that the Clean Air Act authorization to “reverse” the agency did not authorize the court to remand without vacating. If it found the rule invalid, the court was required to vacate it. Judge Randolph, writing separately, argued that it is always preferable to vacate, essentially because it will cause clearer attention to the remedial issues in considering a request for a stay of the mandate. Judge Rogers dissented, arguing that circuit precedent had clearly established the propriety of remand without vacating.

The panel has had a slight change of heart, although not one that changed the outcome. In *Honeywell International, Inc. v. EPA*, 393 F.3d 1315 (D.C. Cir. 2005), the panel withdrew its holding on this point. Instead, Judges Sentelle and Randolph vacated the rule for the reasons given in Judge Randolph’s previous concurring opinion. Judge Rogers again disagreed, arguing that “binding precedent requires a remand when vacatur might be

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unnecessarily disruptive.” Since the court had not “engage[d] the prudential inquiry our case law requires,” and had “ignore[d] that clarification by the agency may render the error harmless and that vacatur risks disruption to the regulatory scheme,” she dissented from the decision to vacate the rule.

At this point, it seems that the likelihood of remand without vacating in the D.C. Circuit is strictly a matter of the makeup of the panel. As a matter of law, the remedy is still available, at least until there is a stronger panel or an en-banc statement to the contrary. Some judges (Sentelle and Randolph) will generally insist on vacating regardless of the justifications for remand without vacating in a particular case, while others (Rogers) will examine the effects of vacating in the particular case (Rogers). It is important, however, to remember Judge Randolph’s emphasis in his previous concurrence on the availability of post-decision motions as a “safety valve” through which an agency could raise the matters of concern to Judge Rogers.

D.C. Circuit Struggles with Standing, Mootness, Ripeness

In four recent decisions, the D.C. Circuit split over (1) the distinction between standing and mootness, (2) the showing needed to establish standing to protect procedural rights, and (3) when an advocacy organization has standing to challenge an agency action related to the subject matter of the organization’s efforts.

In *Entergy Services, Inc. v. FERC*, 391 F.3d 1240 (D.C. Cir. 2004), three utilities filed four petitions challenging FERC orders related to payment of the cost of connecting to the power network. These issues arose because statutes require utilities to allow customers with generating facilities to connect to their networks. When these connections are made FERC must decide whether the costs of making the connection are to be borne by the connecting customer or by all of the customers served by the network. As to the substantive issues, the court upheld FERC as to one connection but otherwise remanded for an explanation of FERC’s apparent change from a prior position.

The court reached those issues because one utility had clearly met all of the applicable requirements for review. The other two utilities, however, stumbled on mootness, standing, and ripeness. Entergy Services and Southern had entered into agreements with connecting customers, but they had then withdrawn from two of the agreements upon FERC’s disapproval. Only then did the utilities file two of the petitions in this action. The majority held that these claims were moot despite the argument that “there [was] a reasonable chance of the dispute arising again between the government and the same” party. According to the majority, the mootness obstacle remained because the private parties themselves had effectively withdrawn from the field by canceling the underlying contracts.

Thus, there was no longer any basis for a dispute over who should pay costs related to the contracts. The recurring dispute mootness exception would apply only where the government had tried to moot the issue by some action on its part.

Although this is a useful explanation of this aspect of mootness doctrine, Judge Tatel argued that standing, not mootness, was the true barrier. Citing *Laidlaw Environmental*, he noted that standing is judged by the circumstances at the time the action is filed, mootness by events that occur afterward. Since the utilities had cancelled the particular contracts prior to bringing the action, they had no standing. With standing as the issue, mootness-related arguments such as the recurring issue doctrine become irrelevant.

Southern, however, had filed one of its actions before abrogating that particular contract. The particulars of that contract were moot for reasons stated by the majority, but Southern had also argued that FERC’s action required it to revise its other interconnection agreements, at a cost of some \$22 million. D.C. Circuit precedent recognized a “policy challenge” exception to mootness, which Judge Tatel considered, but he ultimately held that Southern’s challenge was not ripe. The policy in question was not yet final. Indeed, it had since been revisited by FERC, which had articulated further explanation. Moreover, the only hardship was the burden of later filing another lawsuit.

In two decisions, the D.C. Circuit reached contrasting outcomes on the question of whether a party has standing to challenge a violation of a “procedural right.” The first, *Electric Power Supply Association v. FERC*, 391 F.3d 1255 (D.C. Cir. 2004), found that the Electric Power Supply Association (EPSA) had standing to challenge FERC’s attempt to create an exception to the *ex parte* communication provisions of APA Sec. 557(d) for some of its proceedings. FERC’s effort derived from the nature of its regulatory scheme, under which it relies upon private market monitors to gather information about the electricity market. Attempting to treat those private bodies as arms of the agency, FERC issued a rule creating an exception to 557(d) strictures for market monitor communications with agency decision makers. In a relatively straightforward decision on the merits, the court would have none of it, but first there was the problem of standing to challenge a violation of a procedural right.

FERC argued that the EPSA had no standing because it could not show particularized harm to itself or its members from what a market monitor might say to a relevant decision-maker. The court disagreed. First, as a regular participant in FERC proceedings (along with its members), EPSA had a right to the fairness provided by Sec. 557(d). Second, a party seeking to protect a procedural right does not have to meet all of the normal standards for redressability and immediacy. EPSA does not have to show likely financial harm. The interference with the “particularized interest[] in fair decision making” would be

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enough to support standing. Noting that EPSA “is seeking to enforce procedural requirements designed to protect EPSA’s concrete interest in the outcome of hearings to which EPSA is a party,” the court held that EPSA did not have to “show, with any certainty, that its or its members’ financial interests will be damaged by” the alleged procedural violation. All that is necessary is for the challenger to show that a violation of the procedural right would pose a “distinct risk to a particularized interest of the plaintiff.” (emphasis supplied)

For three reasons, the court also held that EPSA’s challenge was ripe for review. First, this was clearly a legal issue. Second, hardship is nearly irrelevant when both parties have an interest in resolving the question. Third, the hardship of this sort of exception is clear with respect to participants in the relevant proceedings because “it would be absurd to require [participants] to guess about when *secret* communications” might affect a proceeding.

The second “procedural rights” case involved a challenge to the make up of a negotiated rulemaking committee created pursuant to the No Child Left Behind Act. A non-governmental organization and a parent challenged the committee on the ground that it did not represent an adequate balancing of interests, as required by the statute. In *The Center for Law and Education v. Department of Education*, 2005 WL 119831 (D.C. Cir. 2005), the D.C. Circuit articulated the following test to determine whether a party has standing to challenge a procedural injury: “plaintiffs have standing only if, *inter alia*, (1) the government violated their procedural rights designed to protect their threatened concrete interest, and (2) the violation resulted in injury to their concrete, particularized interest.”

As to the first point, the court held that Congress gave no indication of an intent to protect the interests of organizations. Although the Act was clearly designed to protect the interests of parents, the court held that short timelines for issuing the implementing rules, *inter alia*, demonstrated that Congress did not intend these interests to be met through protective litigation. Rather, the purpose of broad representation on the negotiating committee was simply to assure input from a broad range of views.

As to the question of injury, the court held that there was no showing of injury to a concrete interest and that there was no showing of a causal connection between committee membership and any injury to the plaintiff. According to the majority, mere “increased risk” was not sufficient to establish standing, and even if it were no such increased risk had been demonstrated.

Concurring with the result, Judge Edwards disagreed with the majority’s discussion of the significance of “increased risk.” He argued that the lesson of *Electric Power Supply Association*, discussed above, was that standing can be premised on an increased risk of injury. The parent could, under his approach, have standing despite a lack of certainty that the agency’s action

would harm the parent’s interest. Still, however, there must be a link to particularized harm to the plaintiff. On that score, he agreed with the majority.

Taken together, these cases suggest a fairly clearly line between efforts to protect “procedural rights” in adjudications as opposed to rulemakings. The nature of adjudication is such that procedural requirements are intended to protect the participants in the proceeding. Thus, a threat to an adjudicatory procedural right is a threat to the particularized interest in fairness and in the outcome of the proceeding. By contrast, the nature of rulemaking is such that interests are much more diffuse. Procedural requirements such as a balanced negotiating committee, or even notice and comment, are arguably designed to assure a well founded and well considered decision but not to protect the interests of the participants. On that theory, “procedural rights” in rulemaking are comparable to those at issue in *Lujan v. Defenders of Wildlife* and would generally not support standing. As to rulemaking, it would be necessary to show some other harm to concrete and particularized interest of the plaintiff.

Finally, *Rainbow/PUSH Coalition v. FCC*, 2005 WL 267951 (D.C. Cir. 2005), caused a similar split on the D.C. Circuit. The Coalition had petitioned the FCC to deny an FM station operating license due to the station’s allegedly discriminatory hiring practices. When the FCC denied the petition, the Coalition sued, basing standing on the interest of one of its members as a regular listener and on its own interests as an organization combating discrimination. As to the individual member, the court held that mere listener status is not enough to support standing without some showing of concrete and particularized injury to the individual.

The more interesting question was standing for the organization, as to which the panel was split. The organization relied upon the fact that one of its functions was to serve as a job counselor seeking to place its clients and that the station’s discrimination placed a burden on the Coalition, which must keep track of discriminatory companies and counsel its clients as to how to deal with such companies. The Coalition relied upon *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), in which the Supreme Court had recognized standing for an organization if the discriminatory practices of a defendant adversely affected the activities of the organization in fighting discrimination. In *Havens Realty*, the plaintiff sent black “testers” to the defendant’s apartments, where they were falsely told that no apartments were available. The Court held that such “steering” of black renters, if proven, would be sufficient to support standing because it frustrated the plaintiff’s efforts to help minorities gain equal housing and was required to devote significant resources to combat the discriminatory practices.

This was not enough for the majority, which distinguished *Havens Realty* on the ground that the supporting affidavit in *Rainbow/PUSH Coalition* had never asserted that the radio

station's discriminatory practices had frustrated its efforts or that it had had to expend any resources to identify and counteract the discrimination. Thus, the Coalition sought only to pursue its abstract social interest in advancing racial equity. It seems from the majority's discussion that an organization in this situation might be granted standing if it adequately demonstrated a link between the actions of the discriminatory actions of the station and the work of the organization.

Judge Rogers dissented, asserting that "the court applies a heightened evidentiary standard for causation and redressibility that precedent does not require." Accusing the majority of a "fundamental misconception about the purpose of the standing requirement," she emphasizes that the question at this stage is not the likelihood of success on the merits, but whether the plaintiff has demonstrated a sufficiently "defined and personal stake in the outcome." In her view, the Coalition met the test of *Havens Realty*. On the merits, however, she would have ruled against the Coalition.

Taken together, the latter two cases reveal a court split on the degree of specificity that is needed to establish standing. *Electric Power Supply Association v. FERC* suggested that a showing of "increased risk" of harm from the agency's action would be sufficient, at least where the agency's action affected procedural rights in formal adjudications in which the challenger would be participating. In *The Center for Law and Education v. Department of Education*, Judge Edwards took that opening seriously in his concurring opinion, but even he still found an insufficient link where the procedure at issue was an early stage of a negotiated rulemaking. Finally, in *Rainbow/PUSH Coalition*, the "increased risk" test seemed to have little salience to the majority, but as articulated in *Laidlaw Environmental Services*, it was the foundation of Judge Roger's dissent. The lesson, as it has been at least since *Lujan v. National Wildlife Federation*, is that plaintiffs must allege with specificity a connection between the actions of the agency (or, for example, the challenged licensee) and the concrete and particularized interests of the plaintiff.

D.C. Circuit Applies *Barnhart* Multi-factor Test

Mylan Laboratories, Inc. v. Thompson, 389 F.3d 1272 (D.C. Cir. 2004), involved a dispute over the application of patent-related provisions of the Food, Drug and Cosmetic Act to facts that stood just outside the specific terms of the statute. Mylan Laboratories sought to market a generic version of a drug patented by ALZA Corp. and others. The statute provided that Mylan could do so upon disputing the validity of the patent but that its right to do so would be automatically stayed if ALZA filed an infringement action by a set deadline. Had ALZA filed in time, it would both have protected the patent and been able to take advantage of a six-month extension of patent protection. But ALZA missed the deadline. It then prevailed in the infringement action. The question, then, was whether the six-month extension was available, as to which the statute was not clear.

By letters to the various parties, the FDA held that ALZA was entitled to the six-month extension. On review, the question was whether the FDA's decision was entitled to *Chevron* deference. Mylan argued that informally issued letters qualify only for *Skidmore* deference, as held in *Christensen v. Harris County*. The D.C. Circuit disagreed.

The interesting point is how the court reached that conclusion in light of *U.S. v. Mead*, 533 U.S. 218 (2001). *Mead*'s reference to *NationsBank of N. C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995), suggested that the availability of *Chevron* deference to informally issued statements depended upon the strength of the delegation to the agency actor. *Mead* justified deference in *NationsBank* as follows: "[t]he Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of [the rule of deference] with respect to his deliberative conclusions as to the meaning of these laws." 533 U.S. at 231, n. 13. By the same token, one could simply conclude that the FDA is similarly charged with enforcement of the drug safety laws to an extent justifying *Chevron* deference when it decides a particular dispute, as it did here. *Mead* could be distinguished on the ground that it involved a decision that could be made at any of several offices across the country, hardly a situation in which Congress would have intended *Chevron* deference.

Rather than working from *Mead* itself, however, the court relied upon dicta in *Barnhart v. Walton*, 535 U.S. 212, 222 (2002), to the effect that the *Chevron* question is to be resolved through a multi-factor test that takes into account such things as "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." Noting the complexity of the statutory scheme, the FDA's expertise, and the FDA's reliance on its own previous pronouncements on the same or similar issues, the D.C. Circuit held that *Chevron* applied. These were all factors that provided the basis for strong deference well before *Chevron* was decided. In theory, they are now directed toward a conclusion that Congress probably intended to delegate interpretive authority, rather than toward the more general question of whether strong deference is appropriate. The lesson is that *Chevron* deference may well be available for agency statements issued without formal process if a good case can be made under the multi-factor analysis. It is important to emphasize that the agency statements in both *NationsBank* and *Mylan Laboratories* are quite distinct from those at issue in *Christensen* or *Skidmore*. In both of the former cases, the agency issued its interpretation in the context of resolving an informal adjudication. Its actions directly affected the participating parties. Although this factor alone does not appear to be sufficient to trigger *Chevron* deference, its absence would seem to weigh heavily against strong deference. ○

Edited by Michael Asimow*

Hey Listen Up, Dude! Land Use Planning Before the City Council

By Michael Asimow

Lacy St. Hospitality (LSH) operated an adult cabaret (the Blue Zebra) featuring nude female dancers. It sought to modify land use restrictions that kept it from opening before 6 PM. The request was denied and LSH appealed to the Los Angeles City Council. During its presentation, hardly anybody on the Council was paying attention. The members were talking on cell phones, chatting with each other, eating, or reviewing paper work. All this was documented by a videotape. Needless to say, the Council rejected LSH's appeal.

The California Court of Appeal held that the Council's inattention violated due process. *Lacy St. Hospitality Service Inc. v. City of Los Angeles*.¹ The rationale seemed to be drawn from the old Morgan I idea that "he who decides must hear"² and the court took the word "hear" literally. The City suggested that the Council had paid no attention to either side's arguments, but the court replied that both sides had a right to be equally heard, not equally ignored.

While emotionally appealing, especially to frustrated lawyers, the decision is dubious on several grounds. The Council violated good manners, but it probably didn't violate due process. First, it is unclear why due process applied at all, given that the City was applying a discretionary standard.³ Second, *Morgan I* is satisfied if the decisionmaker is roughly familiar with the issues, for example by reading about them or because of a staff briefing. There is no requirement that there be an oral argument at all, much less that the decisionmakers pay attention to it. Undoubtedly, the Council's staff had evaluated LSH's appeal and recommended to the members that it be rejected. Third, the decision is unrealistic. The L.A. City Council has a vast volume of business to transact, much of it involving important policy issues, as well as a large number of zoning appeals it

must dispose of. The Council meets almost every day. The members have to multi-task during meetings, reading materials or interacting with colleagues, constituents, or lobbyists. They simply can't be sitting in their seats throughout the meeting paying attention to every word like a judge hearing a criminal case or like diligent students in a classroom.

Fundamentally, the *LSH* case raises the question of whether due process should apply to local land use planning at all. These decisions are inherently political much more than they are legal and should be treated as such. They're about campaign contributions and lobbying and community organizing, not sober application of legal standards. Many times, it's impossible to figure out whether the decisions are adjudicative or legislative in nature. The Supreme Court has dispensed with procedural due process requirements in various kinds of cases (such as government contract disputes⁴ and some government torts such as paddling students⁵) so long as substantive judicial review is provided by state courts. It's time to consider doing the same for land use cases.

Intent not an Element in Establishing a Willful Violation Under the Georgia Securities Act

By Hon. John B. Gatto⁶

Cox, Secretary of State v. Garvin et al., 2005 Ga. LEXIS 15 (January 10, 2005), addresses the definition of a "willful violation" under the Georgia Securities Act of 1973 ("Act"). In *Garvin*, the Secretary of State sought to impose a cease and desist order and an administrative penalty against Garvin for offering for sale and selling Payphone Equipment Lease Programs that she determined were unregistered, non-exempt securities. An ALJ of the Georgia Office of State Administrative Hearings determined that the lease programs were a "security" and imposed an administrative penalty of \$8,400 after having concluded that Garvin had "willfully" violated the Act. The ALJ determined that a willful violation does not require knowledge that the law is being violated but only the intentional doing of the act that constitutes the violation. The Court of Appeals reversed the ALJ and concluded that the term "willfully" requires a knowing and intentional violation of the Georgia Securities Act. The Georgia Supreme Court reversed the Court of Appeals and held that the term "willfully" requires proof only that Garvin intended to commit the conduct which is violative of the Act.

What's Cooking in New York? Food Inspection Procedures Invalid Under New York City APA

By Molly Klapper⁷

While even cognoscenti are unaware that New York City boasts its own Administrative Procedure Act ("CAPA"), the New York State Restaurant Association representing restaurant

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¹ 22 Cal.Rptr.3d 805 (2004).

² *Morgan v. United States*, 298 U.S. 468 (1936) (*Morgan I*); *Vollstedt v. City of Stockton*, 269 Cal.Rptr. 404 (Ct.App. 1990).

³ See *Board of Regents v. Roth*, 408 U.S. 564 (1972), holds that "property" under due process means an entitlement, not a discretionary standard. In addition, LSH was requested a benefit, not resisting a sanction. See *American Mfgs. Mutual Ins. CO. v. Sullivan*, 526 U.S. 40 (1999). In fact, neither of these federal rules is followed under the California constitution, but a balancing analysis is used instead. The court seemed oblivious to the question of which constitution it was applying.

⁴ *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189 (2001).

⁵ *Ingraham v. Wright*, 430 U.S. 651 (1977); *Parratt v. Taylor*, 451 U.S. 527 (1981) (destruction of prisoner's property).

⁶ Judge, Georgia Office of State Administrative Hearings

⁷ Professor, Touro Law Center; Administrative Law Judge, City of New York.

owners and operators (“Association”) obviously is not. In *The New York State Restaurant Association v. New York City Department of Health and Mental Hygiene*, 5 Misc.3d (1009A), 2004 WL 2423561 (N.Y. Sup.), the Association challenged the new point inspection system put in place by the NYC Board of Health and Mental Hygiene (“Board”) for failure to comply with CAPA’s Publication and Public Comment provisions.

The Board had issued a booklet explaining how its new point method for scoring food service establishments would better reflect a restaurant’s overall sanitary conditions. The highlights of the changes were that a point value would be assessed for each violation, with a total of 28 or more points considered a failed inspection, subjecting the food establishment to closure. The Board maintained that the new scoring system was a mere internal guideline for inspectors and therefore exempt from CAPA’s “informal rulemaking” provisions. Moreover, it argued,

since none of the regulations applicable to food safety had changed, nor were any new fines imposed, the new scoring method was not a “rule.”

However, Supreme Court Justice Lehner found in favor of the Association and struck down the new inspection guidelines. In one of the finest definitions of a rule I have recently encountered, the Court found that the new guidelines have all the hallmarks of a “rule” in that they remove “discretion.” Unlike the current system, they contain a rigid, numerical policy invariably applied across-the-board without regard to individualized circumstances or mitigating factors, and therefore fail to comply with CAPA’s Notice and Comment provisions, which were meant “to give the citizenry a voice in the operation of government.” “Will New Yorkers now eat out less without these guidelines in place? ○

A Standards-Based Theory of Due Process *continued from page 3*

constitutional right to government benefits. But, as we explain next, a standards-based approach, unlike the current approach, supports the rule of law and still avoids any appearance of endorsing affirmative constitutional rights to government benefits.

Standards-Based Due Process

By focusing on standards, as opposed to “entitlements,” our approach avoids the contingent character of due process. The government would continue to control the creation and character of benefit programs, but it could no longer foreclose the application of due process simply by declining to create an entitlement to the benefit. So long as there are standards governing when someone is eligible for a benefit, due process would attach. Decisions regarding most legal standards would be subject to due process because the Constitution requires legal standards that guide and control the execution of law, except in narrow areas where the Constitution permits standardless political discretion.

The standards-based approach not only closes significant gaps in current doctrine, it does so without requiring a wholesale reconstruction of current

administrative law practices. Consider, for example, government employment. The proposed approach is consistent with the existing case law concerning the President’s prerogatives to hire and fire government employees, but it offers a different basis for the outcome of these cases. When the Constitution justifies standardless discretion, as in most appointment and some removal decisions, the due process clause would not apply. Due process would not apply because the President normally would be acting under his own standardless constitutional authority or under statutes that did not contain, and were not required by the Constitution to contain, legal standards governing removal. When, however, Congress creates such statutory standards (and has the constitutional authority to do so), due process would apply because of the existence of statutory standards triggers the application of due process.

Conclusion

Government benefits are everywhere. Thus, if ours is to be a “government of laws and not of men,” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), the rule of law, and hence due process, must apply to government benefits. Current

case law leaves significant gaps in the application of due process to government benefits, thereby providing a shaky foundation for the rule of law. By comparison, the standards-based approach provides solid constitutional foundations for the rule of law, and it would do so without requiring wholesale changes in current practice or wholesale rejection of historical precedents.

The standards-based approach, which has its roots in due process cases dating back to the 1800s, resonates with the idea of rule of law by emphasizing and preserving governmental regularity. Except in narrow areas where the Constitution itself permits standardless political discretion, governmental regularity requires legal standards that guide and control the execution of the law. Once legal standards are in place, it is the duty of all government officials to comply with them, regardless of the character of the right or interest at issue. Due process is a crucial constitutional mechanism for ensuring compliance with legal standards and therefore should apply whenever there are legal standards. The time has come for the Supreme Court to restore rule of law to its application of the Due Process Clause. ○

Recent Articles of Interest

By Yvette Barksdale*

1. Yochai Benkler, SHARING NICELY: ON SHAREABLE GOODS AND THE EMERGENCE OF SHARING AS A MODALITY OF ECONOMIC PRODUCTION, 114 Yale L. J. 273 (2004).

In this essay, the author analyzes an innovative form of economic production, eleemosynary “sharing” of excess capacity. After defining a particular class of physical “shareable goods” which systematically have excess capacity, the author suggests that such excess capacity could better be harnessed through social sharing relations than through secondary markets. He examines two models for such sharing arrangements, 1) carpooling and 2) SETI@home (which facilitates the sharing of idle computer processing capacity.) The author concludes that whether sharing or market mechanisms for these goods are superior depends upon transaction costs and the likely reward to participating individuals. The author concludes that social sharing will outperform secondary markets when the state of technology results in excess capacity being distributed in small dollops. In this circumstance, transaction costs render secondary markets less efficient than sharing mechanisms for distributing this excess capacity. The author further analyzes the potential of social systems, such as social sharing, as alternative modalities of economic production. The author argues that sharing resembles ideal markets; however, sharing uses social cues and motivations, not prices, to produce information and motivate action.

2. Public International Law & Policy Group and the Century Foundation, ESTABLISHING A STABLE DEMOCRATIC CONSTITUTIONAL STRUCTURE IN IRAQ: SOME BASIC CONSIDERATIONS, 39 New Eng. L. Rev. 53 (2004).

This report is an in-depth assessment of what considerations are relevant to “reconstituting an Iraqi state.” The report primarily addresses structural choices regarding 1) whether the new government should be unitary or federal; 2) whether Kurds should possess autonomy or have an asymmetrical relationship with the central government; 3) whether the government should be parliamentary or have a separate legislature and executive; 4) whether the executive should be centralized or pluralistic; 5) what is the electoral system for selecting representatives; and 6) what are the mechanisms to protect minority and human rights. The report summarizes the views of relevant parties, relevant precedent, a variety of options, and recommendations. The Report does not propose a constitutional

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structure, but instead seeks to provide a primer for the constitutional debate.

3. M. Elizabeth Magill, AGENCY CHOICE OF POLICYMAKING FORM, 71 U. Chi. L. Rev. 1383 (2004).

The author reexamines the judiciary’s traditional abdication of significant review of agency choice of policymaking form (rulemaking, adjudication, policy statement). The author critiques institutional competence justifications for such limited judicial review (for example, the belief that administrative agencies have superior information and expertise concerning regulatory strategies). Instead, an agency’s choice of policy making form should not escape the review applicable to other policymaking decisions. Such agency choice of form affects interested parties, the public, and the overall efficacy of regulatory policy. The author strongly recommends additional research on this topic.

4. James B. Speta, DEREGULATING TELECOMMUNICATIONS IN INTERNET TIME, 61 Wash. & Lee L. Rev. 1063 (2004).

This article reassesses the Telecommunications Act of 1996 and prescribes a comprehensive new regulatory agenda that will help the Act to achieve its original goals of increasing competition in “telephony and emerging data services.” The author argues that the 1996 Act failed in this goal because the telecommunications industry was not already structurally competitive, as were previously deregulated industries such as airlines and trucking. Consequently, mere deregulation would not generate competition in the telecommunications industry, as it had for the airline and trucking industries. Unfortunately, “network sharing,” Congress’ solution to this competition problem, has not produced an acceptable level of competition in the industry. The author advocates a substantial rewriting of the current 1996 Telecommunications Act, based upon a “clear agenda to increase intermodal (and all other facilities-based) competition in local communications markets.” The author strongly recommends a shift from wire-based to Internet based transmission and comments upon 1) the political possibilities of such substantial reform, and 2) regulatory resources and judicial review.

5. Robert L. Glickman and Sidney A. Shapiro, IMPROVING REGULATION THROUGH INCREMENTAL ADJUSTMENT, 52 U. Kan. L. Rev. ____ (2005) (Forthcoming) [Draft At: [Http://Papers.Ssrn.Com/Sol3/Papers.Cfm?Abstract_Id=653781](http://Papers.Ssrn.Com/Sol3/Papers.Cfm?Abstract_Id=653781)].

This article builds on the authors’ work in their book *Risk Regulation At Risk: Restoring A Pragmatic Approach* (2003). That book recommends controlling regulation by “back-end” (post-regulation) rather than “front-end” (pre-regulation) strategies. In this article, the authors evaluate Congress’ use of two types of back-end processes, 1) deadline extensions and 2)

waivers, exceptions and variances, as means of improving regulatory policy. The authors recommend mechanisms to improve the effectiveness and accountability of those agency processes.

6. Carl H. Coleman, RATIONALIZING RISK ASSESSMENT IN HUMAN SUBJECT RESEARCH, 46 *Ariz. L. Rev.* 1 (2004).

This article evaluates the decisionmaking methodology of institutional review boards (“IRBs”). IRBs are committees within research institutions which oversee the use of human research subjects. These IRBs decide which research protocols can go forward and under what conditions. Most of the current discussion about IRB reform has focused on the basic structure of the IRB system. However, even well funded, knowledgeable, and conflict-free IRBs may perform poorly if their underlying decisional methodology is ineffective. Accordingly, the author takes a critical look at the process IRBs use to review research protocols, focusing specifically on risk assessment, one of the most important, and least understood, elements of protocol review. Relying on the premise that IRBs are engaged in a process of legal decision-making (they interpret specific regulatory requirements pursuant to authority delegated to them by administrative agencies), the author compares IRB decision-making processes with those of juries, judges, administrative agencies and other institutions which interpret and enforce legal requirements. The author concludes that IRBs have embraced a decision-making model that is ill-suited to the underlying goal of protecting human subjects, and 2) suggests alternative mechanisms to transform the way IRBs work.

7. Michael Herz, THE REHNQUIST COURT AND ADMINISTRATIVE LAW, 99 *Nw. U. L. Rev.* 297 (2004).

This Rehnquist Court symposium article examines the record of the Rehnquist court in administrative law and concludes that these cases contradict the common portrayal of the Court as “overconfident, arrogant, undeferential, and too fond of its own power.” The author discusses cases concerning 1) the relationship between courts and agencies in matters of interpretation and discretionary decision-making, 2) the Court’s decisions on justiciability and the availability of judicial review of agency action, 3) the still moribund nondelegation doctrine, and 4) the Court’s willingness, or lack thereof, to impose its own views of regulatory policy on administrative

agencies. The author concludes that the Court’s administrative law decisions are surprisingly less aggressive and more deferential to administrative decision making. The author suggests that the Rehnquist Court may apply a “law/policy” dichotomy to support a strong judicial role in the law construction, but a weak, deferential one in policy review.

8. John Reese, BURSTING THE CHEVRON BUBBLE: CLARIFYING THE SCOPE OF JUDICIAL REVIEW IN TROUBLED TIMES, 73 *Fordham L. Rev.* 1103 (2004).

In this article, the author advocates abandoning the use of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), as the starting point for judicial review of an agency’s construction of its authorizing legislation. Rejecting the conventional view that *Chevron* was a sea-change in the doctrine of judicial review, the author concludes instead that *Chevron* was a continuation of the Court’s historical approach to statutory interpretation. The author argues that *Chevron* and post-*Chevron* cases are all consistent with the pre-*Chevron* tradition of judicial review evidenced in cases like *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111 (1944), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Viewing all of these cases as part of this historical tradition will promote doctrinal clarity. Such clarity is particularly necessary to guide judicial review of administrative interpretations of the hurriedly enacted post 9/11 anti-terrorist legislation. Such judicial review is essential to achieving consistency among federal court decisions and the appropriate balance between national security and individual rights, particularly when such administrative actions can affect personal rights.

9. Derek Jinks and David Sloss, IS THE PRESIDENT BOUND BY THE GENEVA CONVENTIONS?, 90 *Cornell L. Rev.* 97 (2004).

This article is an exhaustive, in-depth research analysis of whether the President is bound by the Geneva Convention. The authors conclude the President is bound by the Geneva Conventions both as a formal legal matter and as a practical matter. ○

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you get more involved with Section activities.*

Section News & Events

ABA House Approves Expansion of APA'S Adjudication Sections

By Michael Asimow

At its Winter meeting, the ABA House of Delegates approved the Section's Resolution 114 which urges Congress to adopt revisions of the adjudication sections of the Administrative Procedure Act. This resolution has been under development for several years and arises out of the Section's APA project.

The various adjudication sections of the existing APA apply only if another statute calls for an "on the record" hearing. Administrative law judges (ALJs) preside over APA hearings which include Social Security and other benefit cases and hearings provided by traditional regulatory agencies like the FTC, NLRB, FEREC, and SEC. The proposed resolution refers to these as Type A cases. However, a vast number of other hearings required by federal statutes are *not* covered by the existing APA. These include a range of civil penalty cases as well as immigration, veterans' benefits, public contract, patent and trademark, IRS collection due process, security clearances, and many others. Presiding officers (POs) rather than ALJs preside in these cases. The resolution calls these Type B proceedings.

Resolution 114 would bring Type B hearings under the APA. The APA's various protective provisions requiring separation of functions, prohibitions on ex parte contact, impartial decision-maker, right to notice and trial-type hearing, and so on would apply to Type B hearings. Fulltime POs would be protected against discharge without cause. However, the resolution does not require that ALJs preside in Type B cases. In addition, Resolution 114 requires adoption of a code of ethics for all members of the administrative judiciary and proposes various other clarifying changes to the APA's adjudication provisions.

If Congress adopts Recommendation 114, the result would be the most fundamental and far-reaching changes to the APA since its enactment in 1946. These provisions would insure that norms of basic adjudicatory fairness would apply to all evidentiary hearings conducted by federal agencies.

Section Membership Takes Off

The Administrative Law and Regulatory Practice Section is one of the fastest growing bodies within the American Bar Association today. Membership numbers released in conjunction with the Midyear Meeting in Salt

Lake City last month reveal that Admin Law Section membership increased 22.4%—from 16,632 to 20,353—during the twelve months ended January 31, 2005, a time when most ABA entities experienced declines in membership or just managed to maintain strength. Although much of the Section's growth stemmed from a 27.6% increase in non-dues law student memberships—from 10,359 to 13,221—the number of dues paying lawyers in the Section jumped a healthy 14.6%—from 6,039 to 6,920, more than offsetting the slight 9.4% decline in associate members from 234 to 212. By comparison, total ABA membership improved by only 2.9%, from 464,088 to 477,608, during the same period.

Fall Meeting Finances Break Into Black

Section Chair **Randy May** reported at the Midyear Meeting that the Section has begun yielding a profit on its fall Administrative Law Conference, as shown in the following three-year chart:

	2002	2003	2004
Revenue	\$14,869	\$51,000	\$81,802
Expense	\$40,816	\$60,000	\$67,315
Net	(\$25,947)	(\$9,000)	\$14,487

The growing number of law-firm sponsorships (*see ADMINISTRATIVE & REGULATORY LAW NEWS*, Fall 2004 at 19) has clearly turned the tide. May stressed the importance of building on this success by continuing to strengthen what has become the Section's premier annual event.

Member News

Section delegate **Judy Kaleta** has been named Acting Chief Counsel at the Federal Transit Administration. Section Vice Chair **Dan Troy** has left his Chief Counsel position at the Food and Drug Administration to become a partner at Sidley Austin Brown & Wood LLP. Transportation Committee Chair **Tom Bolling** has been named a fellow at the American Bar Foundation. Rulemaking Committee Vice Chair **Bob Anthony**, Budget Officer **Dan Cohen**, and former Section Chair **Jim O'Reilly** have joined the Admin Law News Advisory Board.

Readers should send any Section member news they might have to KnightK@staff.abanet.org. 

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CLE HOURS?**

Visit the Section's Website at www.abanet.org/adminlaw and click on ONLINE CLE for access to Section programs at WestLegalEdcenter

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OFFICERS, COUNCIL, AND PAST CHAIRS

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Annual Meeting:	Theodore Livingston Katherine Siddon

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