Homeland Security And A Code Orange Congress

Also In This Issue

- A Prescription for Internet Pharmacy Safety
- Making Public Participation in E-Rulemaking More Meaningful
- NCCUSL Call for Input on Model State APA Revisions
- Rhode Island’s Failed Separation of Powers Experiment
- Agency Choice of Policymaking Form
As we begin the new ABA year, I am privileged to lead the Ad Law Section and grateful for the opportunity. It is an honor to follow in the footsteps of so many esteemed predecessors.

Speaking of predecessors, my first order of business is to extend my appreciation on behalf of our members to Bill Funk, in ABA lingo our “Last Retiring Chair.” Bill's leadership moved us steadily forward on a number of fronts. As importantly, Bill always conducted our affairs in the collaborative manner that is our Section’s hallmark. Bill is off to Germany for a sabbatical year, but I know he will be only a few keystrokes away when I need his counsel.

At an organizational meeting for committee chairs in June, I promised an especially busy year as we pursue what I believe are our three core objectives: providing opportunities for professional education and career development; improving government administration and regulation at all levels; and providing a congenial forum to accomplish the first two goals. To be successful, we need the active involvement of many Section members, so I encourage you, if you have not already done so, to go to our website, join a committee or two, and participate!

As a way of encouraging your participation, and demonstrating the wide-ranging interests and talents of our members, I want to highlight just a few of the major activities and projects planned for the coming year.

On October 21–22, we will hold our annual Administrative Law Conference. This is now the nation’s premier conference on regulatory affairs. In conjunction with our committees, our conference chair, John Duffy, has arranged a wide array of cutting-edge CLE programs, ranging from communications law, environmental law, and energy and electricity regulation to EU competition policies, campaign finance regulation, and banking and securities regulation. Not to mention a set of process-oriented programs of government-wide interest, such as recent developments relating to electronic rulemaking and the Federal Advisory Committee Act. High-ranking government officials, such as new FTC Chair Deborah Majoras and regulatory commissioners from the FCC, FERC, and the FEC will speak. D.C. Circuit judges A. Raymond Randolph and Merrick Garland will deliver major addresses. A special program will be held at the Supreme Court featuring former Solicitors General Theodore Olson, Seth Waxman, Walter Dellinger, and Charles Fried. To top it off, the conference will conclude with an elegant dinner at the Supreme Court hosted by Justice Sandra Day O’Connor.

In Spring 2005, we will launch a major new CLE initiative—the first of what I hope will become annual sessions of the National Institute of Administrative Law and Regulatory Practice. The Institute, co-chaired this year by Jack Young and Ernest Gellhorn, will be intensively practice-oriented. The first topic, “Making Agency Law Through Rulemaking” will provide attendees with the knowledge and techniques needed to navigate the agency rulemaking process from start to finish.

The Section has now launched, under the direction of Chief Reporter George Bermann and Assistant Chief Reporters Charles Koch and James O’Reilly, an ambitious project to study the administrative law of the European Union. We will ultimately produce a blackletter statement of EU administrative law, along with scholarly supporting studies examining EU regulatory practices across various industry sectors. More details are available on our website.

Exemplifying our law improvement efforts, in August the ABA House of Delegates adopted our Section’s resolution encouraging federal agencies to use administrative regimes that permit the imposition of civil penalties as part of a regulatory program’s comprehensive enforcement scheme. Section member Jamie Coburn was instrumental in developing this resolution. Also in August, our Council approved a recommendation that will now be submitted to the House of Delegates proposing amendments to the adjudication provisions of the Administrative Procedure Act. You can read more about this important recommendation elsewhere in this issue and on our website. For now, suffice it to say that this project is a major undertaking that has been led by Michael Asimow, with the active collaboration of many Section members.

There are many other programs and projects worthy of mention as well, which I’ll highlight in future messages. Here, I want to spotlight just one more new endeavor dear to me, our mentoring program. We have begun matching younger and less experienced Section members with some of our old hands. The idea is simply to make it easier for new members to integrate themselves.

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## Administrative & Regulatory Law News

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Congressional Oversight of Homeland Security

By Thomas M. Susman

If we were to take a page from the Department of Homeland Security’s Threat Advisory System, with green being exemplary and red counterproductive, the consensus would likely be that congressional oversight of homeland security rates an Orange: it is at the same time both duplicative and inadequate; in a word, a failure.

This essay addresses three points: First, I provide some background on congressional oversight generally, distinguish oversight from investigation, and suggest a set of criteria against which effective oversight should be measured. Second, I describe what is going on today in the area of oversight of Homeland Security, along with some characterizations by others of the process and committee activities. And third, I take a stab at looking to the future: I describe what has been proposed, what is needed, and whether these objectives might be attained.

Importance of Oversight

Congressional oversight of the executive branch is integral to our system of government. It is an essential element of the basic checks and balances that help maintain fairness, honesty, openness, and balance in all branches of government. One of the best arguments for vigilant oversight from the legislative branch was advanced by John Stuart Mill, who wrote in 1875, addressing parliamentary oversight, that “the proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which anyone considers questionably; to censor them if found condemnable.” CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 42 (1875). Woodrow Wilson a decade later echoed those views when he wrote that in a system based on separation of powers, “quite as important as legislation is vigilant oversight of administration.” CONGRESSIONAL GOVERNMENT 195 (1885).

Basis for and History of Modern Congressional Oversight

Oversight is inherent in Congress’ powers to carry out its legislative activities. Courts have recognized the power of Congress to investigate in furtherance of “legislative purpose” and have broadly interpreted what falls within that definition, showing a readiness to imply valid legislative purpose in the face of challenge. Grabow, CONGRESSIONAL INVESTIGATIONS § 4.1[a].

Modern oversight began with the 1946 Legislative Reorganization Act, authorizing permanent, nonpartisan professional staff for all committees, consolidating overlapping and conflicting committee jurisdiction, and reducing numbers of committees. The law directed that committees shall—

Exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which in within the jurisdiction of such committee . . . .

The Act created roughly parallel committees in each of the chambers, with a goal of having joint meetings of corresponding committees whenever possible to reduce duplication of efforts. See 2 Byrd, THE SENATE 253 et seq. (1991).

Investigation Versus Oversight

Congress may carry out investigations to advance its oversight function, but they have other objectives as well. One is to serve personal or partisan interests, such as attacks on an executive of a different party or advancement of the re-election goals of the Member. A second is simply to inform the public. The final two are more central to the oversight function: one, to inform and advance legislative objectives—that is, to obtain information to enable Congress to develop legislation. And, two, to improve the administration of programs by the agencies themselves. In many ways, this last one is the key feature that distinguishes oversight from investigation.

Before we can confidently make judgments about the quality of congressional oversight, we need to identify what constitutes effective oversight. Effective oversight has a number of characteristics:

1. It is directed at Executive agencies, although it can target private actors to assess effectiveness, honesty, propriety, etc. of executive action.
2. It is routinely carried out, with continuity and follow-through, but is not duplicative or unreasonably burdensome or trivial.
3. It is pursued professionally and fairly.
4. It assists agencies in shaping priorities, policies, and procedures.
5. It uncovers inefficiency and waste, as well as corruption.
6. It lays the foundation for appropriate congressional direction through legislation.

You will notice that I say “pursued professionally and fairly”—this does not suggest that effective oversight must be nonpartisan. Unquestionably, many of the notable oversight hearings during the past 4 decades were carried out by a congressional committee overseeing an executive of the opposite party.

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1 This essay is adapted from a presentation made at the ABA Annual Meeting in Atlanta, Georgia on August 6, 2004. The author is a partner in the Washington Office of Ropes & Gray, is past chair of the Section on Administrative Law and Regulatory Practice, and currently represents the Section in the ABA House of Delegates.
Dingell, Gaylord Nelson, and Frank Church were hardly nonpartisan, but they conducted classic oversight hearings that were important and effective.

Based on the six characteristics of effective oversight listed above, oversight of Homeland Security so far would not receive a passing grade.

Organization of Congressional Oversight of Homeland Security

Today, responsibility and oversight of the Department of Homeland Security in Congress is fragmented and incoherent. In the Senate, the Committee on Governmental Affairs provides nominal oversight; in the House, there is a temporary Select Committee.

In the Senate, the Governmental Affairs Committee retains jurisdiction over everything from the District of Columbia to the Postal Service. Focus and continuity has not been its strength over the past two decades. And it has no plans to develop reauthorization legislation for DHS.

The House Select Committee has no real jurisdictional authority. On that committee sit 9 chairmen of other panels with jurisdiction, several of whom have expressed the view that the committee should not exist. And, in fact, it is slated to disappear at the end of this session. Little wonder, according to some commentators, DHS treats the committee “with indifference or contempt.”

Ornstein, Roll Call (July 28, 2004). While the House Committee has developed a reauthorization bill, it does not even mention important agencies like the Coast Guard and Transportation Security Administration—a deliberate omission, made to avoid turf battles with other committees. Chairman Chris Cox may get an “E” for effort, but not for effectiveness so far.

In reality, jurisdiction in both chambers remains allocated to dozens of committees and subcommittees. From January to June 2004, DHS officials testified before 126 hearings, or about 1 1/2 per day of legislative session, not including briefings or other meetings. Secretary Ridge estimated that he has been called to appear before 80 different committees and subcommittees on the Hill; apparently he missed a few, since 88 have been said to have oversight over foreign intelligence and homeland security. Epstein, San Francisco Chronicle (July 25, 2004).

(Although the number 88 was advanced by the Administration, it clearly overstates things, since most committees have limited jurisdiction, bicameralism automatically doubles any number, there have always been dual roles for authorizing and appropriations committees, and subcommittees are less a sign of fragmentation than specialization. Nonetheless, the number is far more than needed or desirable.)

A couple of examples will illustrate the problem. For one example: The Faster and Smarter Funding for First Responders Act (H.R. 3266) was introduced in the House Select Committee to bring discipline and focus to state and local HS grants. But both Judiciary and Transportation Committees offered competing bills, leaving the House Rules Committee to decide which bill and which amendments should be considered by the full House. Carafano, Heritage Foundation Web Memo # 528 (July 7, 2004). Another example comes from Congressman Jim Turner, Ranking Democrat on the House Committee: While DHS’s “one face at the border” initiative attempts to merge Customs and INS functions at the point of entry, the Department faces 4 different congressional committees asserting jurisdiction over this program.

Despite the large numbers of appearances and committees with jurisdiction, oversight of intelligence and homeland security has been characterized as “feckless and episodic.” Priest, Washington Post (May 27, 2004). And the 9/11 Commission Report (p.420) found that the congressional committees, as a general proposition, “lack the power, influence, and sustained capability to meet” the challenge.

Current Oversight Assessed

In an exchange of letters with the Chairman of the House Government Reform Committee chairman Tom Davis, Ranking Democrat Henry Waxman highlighted what he characterized as a double standard that applies to oversight where the executive branch and Congress are under the same political party. Waxman called for a more balanced approach, observing: “Excessive oversight distracts and diminishes the executive branch. But absence of oversight invites corruption and mistakes. The Founders correctly perceived that concentration of power leads to abuse of power if unchecked.” Waxman, Washington Post at A19 (July 6, 2004).

It can be accurately observed that Mr. Waxman is a fierce partisan who may have more than a small amount of political motivation for urging greater oversight of the Bush administration. Nonetheless, the final report of the 9/11 Commission stands as an apolitical document that reaffirms Waxman’s assertions. The Commission’s conclusion:

Of all our recommendations, strengthening congressional oversight may be among the most difficult and important. So long as oversight is governed by current congressional rules and resolutions, we believe the American people will not get the security they want and need. 9/11 Report at 419.

A Brookings Institution Report, (Daalder et al, July 2002), agreed that many of the promised benefits of the executive branch reorganization on homeland security are likely to be lost unless Congress revamps its oversight structure. As that Report observes, Congress “can hold agencies accountable and reflect public concerns about priorities and trade-offs, both for resources and for sensitive issues such as the appropriate balance between security and civil liberties.” Thus, the consequences of failed congressional oversight of homeland security are likely to include not only poorer performance by the agency, increased opportunities for waste, priorities that may be less likely to have public imprimatur, and conflicting or at best uncoordinated signals from Congress; they also will include the tilt of the balance of institutional power toward the White House.

What is Next?

There is no dearth of recommendations to increase congressional oversight of homeland security. We need to keep in
mind the observation made by the Brookings Report that a formal structure for oversight is least necessary when the subject is in the headlines. “The challenge is to create institutional arrangements that will assume sustained responsibility even after the issue area slips from the front pages…”

The 9/11 Commission had two proposals for oversight of intelligence—The creation of a joint committee or creating House and Senate combined committee with authorizing and appropriating powers. That proposal has already drawn a great deal of criticism on Capitol Hill. As to homeland security, the Commission proposes “a single, principal point of oversight and review for homeland security,” leaving it up to Congress to select which committee “should have jurisdiction over the Department and its duties,” so long as it is a single, permanent standing committee with a nonpartisan staff. The House Temporary Committee’s chairman Chris Cox believes that creation of a permanent House Committee on Homeland Security is indispensable; others have urged creation of a comparable permanent standing committee in the Senate. The benefits of eliminating duplication and focusing expertise are obvious. 88 committees and subcommittees with some jurisdiction over DHS are just too many for any one to be expected to do a competent job.

Some overlap, and even competition among committees, can be valuable, however. First, the tendency for hostages to identify with their captors illustrates the problem of too much long-term coziness between committee and agency; remember, the transportation deregulation movement was brought about in the ’70s despite, not because of, the Commerce Committees. Second, it is always useful to have a second voice on issues like civil liberties, freedom of information, privacy, and even administrative procedure from a committee with special expertise in these areas. Hermetically sealing off oversight may be worse than uncontrolled overlap.

Some proposals call for continuing a Select Committee composed of committee chairs, similar to the structure of the current Select Committee in the House. This is not a good idea. We cannot expect different oversight results in the future from continuing the same structure we have had in the past. Another proposal is to create focused appropriations subcommittees while leaving existing authorization procedures in place. I view that as another bad idea; it simply does not solve the problems of overlap and duplication of the substantive committees and fails to recognize the narrower focus of appropriators.

Another idea is to create more traditional Select Committees without legislative authority over the underlying programs. And it has even been suggested that jurisdiction over DHS be vested in a Subcommittee of the House Reform Committee. Neither proposal rises to the challenge our nation faces today. The Brookings Report observes that the “ideal structure for congressional oversight” involves creation of both new appropriations subcommittees and new authorizing committees. Needless to say, key congressional leaders—not coincidentally committee chairs—have voiced opposition to these suggestions.

In the early 1970s, 83 congressional committees and subcommittees had jurisdiction over some aspects of energy policies and programs. Consolidation occurred with a congressional reorganization—the last one we have seen. Can Congress rise to the challenge of reorganizing again now, with terrorism surely posing a greater threat today to our nation than the energy crisis of the ’70s?

**Explanation and Outlook**

One final question merits discussion: Why has congressional oversight of homeland security been so lacking? The absence of effective oversight in general has been attributed to a sharp decline in “institutional patriotism” in Congress—the belief that the independent role and function of one’s institution transcended individual ideological or partisan interests. As Norman Ornstein puts it:

“Twenty years ago, you could find tons of Members in both houses who cared about their own institution. Now, care about or identification with the institution is a waning quality. Most sadly, that is true for leaders as much as followers, and especially for those in the majority… Even where there is committee oversight in these areas, there is no will on the part of the majority leadership to use the findings to promote reform or change—especially if the findings are critical of the administration. Roll Call (Jan. 28, 2004).

Not until Members of Congress see their own legislative role as transcending their partisan loyalty or personal ambitions is there likely to be serious change. Unfortunately, this may not occur without another catastrophe—one for which Congress will have to share any blame. If Congress does not rise to the occasion, our nation, as well as the Department of Homeland Security, will be the worse for it.”

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Internet Pharmacies: Why State Regulatory Solutions Are Not Enough

By Linda C. Fentiman

Internet pharmacies are an economic and communications miracle—and a regulatory nightmare. It is estimated that Americans spent some $3.2 billion in 2003 on medications from the Internet, but Internet pharmacies permit consumers to evade long-standing regulatory protections, particularly those that rely on the oversight of drug prescribing and dispensing by licensed physicians and pharmacists.

Dispensing Drugs in Cyberspace

There are two major kinds of Internet pharmacies: the Internet versions of a “bricks and mortar” pharmacy and so-called “lifestyle” or “rogue” pharmacies. The first is simply an online version of a traditional pharmacy, such as drugstore.com. Visiting these pharmacies online, customers deliver their prescriptions to a pharmacist electronically, via facsimile, or by mail, and the drugs are sent to them.

The second type is a specialty Web pharmacy. These typically feature prescription drugs with mass appeal, such as Viagra, Prozac, Propecia, or Meridia, to help aging baby boomers do more, feel better, have more, or have less. Many of these “lifestyle” pharmacies do not require the patient to present a physician’s prescription, but instead permit prescriptions to be filled after an Internet “consultation.”

Most consumers choose Internet pharmacies because they offer easy access to desired drugs, saving time, and sometimes money. Internet pharmacies have the potential to increase access to healthcare, particularly for consumers for whom transportation or communication is difficult, but there are reasons to be concerned about Internet pharmacies. Some dispense expired, subpotent, superpotent, contaminated, or counterfeit drugs, particularly foreign Internet pharmacies. Controlled substances may be available from foreign Internet pharmacies, and neither the U.S. Customs Service nor the Drug Enforcement Administration can intercept more than a fraction of illegally imported drugs.

Another major concern is the lack of medical oversight, which has long been an essential part of drug prescribing in the United States. Although online “consultations” purportedly ensure that patients receive medically appropriate drugs, in fact they are frequently a charade.

The Current Regulatory Framework

Responsibility for ensuring that a drug is safe, effective, and appropriate for a particular patient is now allocated among an array of agencies. The federal government oversees and regulates drug safety, efficacy, labeling, and advertising, as well as the importation of pharmaceutical products and medical devices. State governments license and discipline physicians and other drug prescribers, and the pharmacies and pharmacists who dispense these medications.

In order to prescribe medication in a particular state, the prescriber must be licensed there. If physician oversight is to be meaningful, the physician must examine the patient before prescribing. This may be undercut when Internet pharmacies offer online medical “consultations” through questionnaires. Often the “correct” answers are pre-checked, so there is no way to verify the patient’s vital signs, symptoms, and overall medical condition to ascertain if the medication is appropriate and physicians are often paid only when they prescribe a requested drug.

More than half the states have adopted at least some requirements, either by statute or by medical licensing board decision. More than twenty states have initiated disciplinary proceedings against physicians who have engaged in Internet or telephone prescribing without an appropriate examination.

State Oversight of Pharmacists and Pharmacies

Pharmacists and pharmacies must be licensed by the state where they are physically located in order to dispense medication. States have adopted various regulatory schemes. A few have enacted new statutes, some have enforced existing laws in the Internet context, and others have adopted new policies via pharmacy board action.

California illustrates the first approach. Its statute forbids pharmacists to dispense drugs unless the prescriptions are the product of “a good faith prior [medical] examination,” in essence imposing a duty to inquire about the nature of the physician–patient interactions that led to the prescription. Some states, including Illinois, New Hampshire, and New York, require Internet pharmacies to register with that state’s board of pharmacy and make appropriate on-line disclosures, but defer to the state board of pharmacy where the Internet pharmacy is licensed before taking enforcement action. Other states’ boards of pharmacy have adopted policies prohibiting the dispensing of medication without a prescription obtained from a legitimate physician–patient encounter.
Obstacles to Successful Prosecution

Civil jurisdiction
Lack of civil jurisdiction is an obstacle because a court can only exercise personal jurisdiction over an out-of-state defendant if the defendant has had “minimum contacts” with the forum state. In light of Supreme Court due process analysis and recent lower court decisions, plaintiffs should be able to assert jurisdiction over out-of-state or foreign Internet pharmacies, under a theory of “purposeful availment” or “foreseeable tortious effects.”

Two seminal decisions have established the parameters of “purposeful availment” in the Internet context, Cybersell, Inc. v. Cybersell, Inc., and zippo manufacturing co. v. zippo dot com, inc.? The Zippo court articulated, and the Cybersell court applied, a “sliding scale” of personal jurisdiction, with at least three discrete points:

1. At one end of the spectrum are situations where a defendant clearly does business over the Internet, [by forming] contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet . . . [Here,] . . . jurisdiction is proper.
2. At the opposite end, . . .[a] passive Web site that does little more than make information available . . . is not grounds for the exercise [of] personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer.

Establishing jurisdiction over a foreign Internet pharmacy should be relatively straightforward under Cybersell and Zippo. After all, the raison d’être of Internet pharmacies is to enter into commercial transactions to sell drugs to buyers in various states, putting them at the “jurisdiction is proper” end of the spectrum.

An Internet pharmacy will satisfy the “purposeful availment” test by entering into sales contracts and thus choosing to do business in the states where the consumers reside. Similarly, Internet pharmacies providing online medical “consultations” should be subject to jurisdiction in the consumer’s state because they can anticipate the tortious effects of their conduct, which is arguably the unlicensed practice of medicine.

Criminal jurisdiction
State prosecutors can establish jurisdiction over an Internet defendant by demonstrating either that one of the defendant’s actions took place within the state or that the defendant, although acting outside the state, intended those actions to have effects within the jurisdiction. Federal prosecutors can establish jurisdiction over Internet pharmacies, since it is a felony under the Food, Drug, and Cosmetic Act to dispense a drug that has not been properly prescribed. Using the Internet to defraud will also violate the federal wire fraud statute, and may support a RICO prosecution if a pattern of racketeering activity is shown.

Dormant Commerce Clause
By far the greatest potential challenge to state action against Internet pharmacies is the Constitution’s “dormant” Commerce Clause. Federal power to regulate interstate commerce is broad because of the need for a uniform, national approach to activities that affect either foreign or interstate intercourse. Even when Congress has not acted, state legislation may not unduly burden interstate or foreign commerce through its extraterritorial effects, reflecting the latent, or “dormant,” aspect of federal commerce power. Under the balancing test set forth in Pike v. Bruce Church, Inc., when a statute is facially neutral and “regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”

In recent years, lower courts have split in evaluating the states’ exercise of traditional police powers when they regulate conduct on the Internet. American Libraries Association v. Pataki, enjoined a New York criminal law prohibiting the communication of sexual material to a minor via a computer, stating because “the Internet is . . . an area . . . of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether . . . [O]nly Congress can legislate in this area.”

In contrast, other courts have upheld the exercise of state power against out-of-state defendants, whether they were purveying arguably indecent speech, tobacco products or spam email.11 Given this trend, it is likely, but by no means certain, that a state law regulating Internet pharmacies’ interactions with its residents would survive a commerce clause challenge.

Practical obstacles
Even when theoretical obstacles to state actions against Internet pharmacies are absent, prosecutors still face substantial hurdles in finding defendants and their assets and bringing them into the forum state. Once human defendants are located, they must be brought to the forum for trial. Obtaining the physical presence of American defendants in the forum is relatively simple, but non-United States citizens can only be extradited to an American court if the United States has an extradition treaty with the country where the defendant is located.

Why a New Federal Approach Is Necessary
The current patchwork system of federal and state regulation of pharmaceuticals is inadequate to address either the health and safety concerns raised by Internet pharmacies or the jurisdictional, commerce clause, and practical law enforcement problems. Because the Internet is indisputably a medium of interstate and foreign commerce, it should be regulated by the authority best able to achieve comprehensive and effective law enforcement—the federal government.

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Citizen Participation in Electronic Rulemaking

Citizen consultation is essential to the successful functioning of the administrative process. Participation informs rulemaking. But participation also expands the conversation about rulemaking to a wider society and creates public debate surrounding the most important and far-reaching form of lawmaking in our democracy. Participation confers the added dignitary benefits to citizens of engaging in self-governance.

Now, with impetus and funding provided by the E-Government Act of 2002, the federal government wants to employ new technology to move rulemaking on-line and to centralize all agency activity into one website, http://www.regulations.gov under the supervision of the Office of Management and Budget. As part of this transformation, all agency dockets will become available via the Internet and the “notice and comment” rulemaking process will also be conducted in cyberspace. The question is: what impact will this shift from paper-based to electronic or, so-called e-rulemaking, have on the right of citizens to participate in the process and on the agencies’ ability to get and manage meaningful public input? Will e-rulemaking herald a revolution or “the terror”? The current design for the e-rulemaking system (which, admittedly, is only in its infancy) allows an interested party to search for rules open for public comment. The website displays the text of the draft from the Federal Register and provides a box in which to type a comment. Clicking a button marked “Submit Comments” sends the comment about the rulemaking from the regulations.gov website to the agency.

Transposing the notice-and-comment process as is on the Internet so that anyone can post a comment reduces the costs of participation. Unifying disparate agency procedures into a centralized “portal” removes the hurdle of learning agency practices. Automating the comment process makes it simpler for interest groups to participate using bots—small software “robots”—to generate instantly thousands of responses from stored membership lists.

Suddenly, anyone or anything can participate from anywhere. And that is precisely the problem.

Without the tools and methods to coordinate participation, quality input will be lost; malicious, irrelevant material will rise to the surface, and information will not reach those who need it. The current plan for e-rulemaking is nothing short of a disaster. Attention and investment are focused on digitizing paper—dragging the agency file cabinet into cyberspace—rather than on the workings of participation, which informs the process. Managing documents is necessary to inform rulemaking but should follow from the dictates of managing people and organizing their ideas. In short, e-rulemaking, as currently proposed, will frustrate the goals of citizen participation and exacerbate the status quo in which the reading of public comments has to be outsourced to third-party consultants.

It is, therefore, imperative for lawyers, policymakers, social scientists and those who understand the goals of citizen participation to demand attention to the technology for participation before “notice-and-comment” becomes “notice-and-spam.”

Rethinking Bureaucracy through Technology:

From Rights to Practice

The necessity to translate the precise how-to’s of rulemaking into the design of e-rulemaking software brings the practices of participation to the fore. Having to choose the technology opens the political imagination to considering how to “enhance public participation in government by electronic means.”

E-rulemaking is potentially revolutionary because it will demand nothing short

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of a rethinking of bureaucracy itself and the role of citizens in it.

Electronic rulemaking precipitates focusing, not simply on the right to participate, but on the practices of participation that bring that right to life. The software determines the agenda for citizen consultation and participation, who sets that agenda, who can speak, when and how often, and what comprises the rules of dialogue. The code of the e-rulemaking technology maps the communication and information flows of the groups involved in the rulemaking process. New information and communication technology can be used to realize the goals of citizen participation, to make it, not only possible for citizens, but also practicable for agencies.

To be clear, technology itself is not the savior of citizen participation. Rather, it is the way the tools embed methods of interpersonal communication and information exchange to make communication manageable and relevant. I call this methods-plus-technology “speech tools.” Speech tools are technologies that enable collaboration, not because they are interactive, but because they structure and limit communication through rules.

Take, for example, the difference between a website that invites the user to “click here to comment” without more and the website that asks the citizen to respond to or rate another citizen’s comment in exchange for the privilege of posting one’s own. This simple, costless design change stimulates more deliberative participation, ensures a higher degree of responsiveness among commenters, and connects disparate individuals into a community of rulemaking practice. Speech tools make communication useful by managing it and can therefore make meaningful consultation with groups possible.

By refocusing the attention of policy in this area on the actual practices of rulemaking, we can move away from the traditional critiques, which regard the shortcomings of participation as chronic and endemic, toward design-centered correctives that exploit the potential of new technologies in operation. This approach has the potential both to ground the law of rulemaking in the reality of actual practice and to anchor that practice in the theory of participatory democracy and the administrative law.

### Designing for Democracy

Whether one views the purpose of participation as instrumental to informing rulemaking or as a form of democratic self-expression, design of the technology matters. The development of tools for e-rulemaking should take account of citizen participation. “Click here to comment” does nothing to enable more deliberative, less hierarchical, more sustained and informed participation by interest groups and individuals.

Rather, the technology for e-rulemaking should take account, first, of the outcomes at each stage of the rulemaking process and how information and communication technology might be employed to achieve the desired goals. Second, e-rulemaking speech tools should not only support citizen consultation as directed by government but also encourage citizens to talk about rulemaking, initiate participation and provide meaningful feedback to government and to the public about the important work of agencies.

With this normative purpose in mind, e-rulemaking technology can be designed to achieve necessary outcomes and bolster the rulemaking community of practice. For example, early on, the agency needs to define a particular policy problem, explore the range of possible solutions and to identify those with knowledge to share. Merely posting the notice from the Federal Register to the web is not nearly as effective as using a “news feed” tool, such as RSS, to broadcast an expression on interest to the websites of all relevant local and state authorities, media organizations and interest groups.

To obtain helpful ideas at this stage, agencies should augment an unstructured comment process in favor of on-line consultative dialogues with clear rules and measurable outcomes. Such online “citizen juries” might learn from the off-line experience of the National Issues Forum, a dialogic method used to organize community deliberations on important national issues or the Danish Consensus Conference model used by the Danish Board of Technology, an administrative agency of the Danish government, to create concise public policy statements on complex technical issues. They can take advantage of on-line deliberation tools like those offered by WebLab (http://www.weblab.org), which organizes asynchronous small-group dialogue; Bodies Electric, which provides synchronous group discussion via the Unchat (http://www.unchat.com) software tool; or the Rotisserie H2O software developed at Harvard Law School (http://h2oproject.law.harvard.edu/rotisserie.html).

At the comment stage in the process, the agency is trying to decide on a particular course of action, draft a rule, ensure that all-important viewpoints are heard and then to settle on a policy solution in the public interest, whether or not the end-result is popular. Imagine if, instead of reams of unwieldy comments, agencies received sorted comments. Participants could indicate whether a comment was on a portion of the rule, rather than the whole; whether a comment went to substance, form or both; whether a comment contained supporting scientific or historical or personal information. Participants might rate each other’s comments or have the

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3 RSS is a format for syndicating news and the content of news-like sites.

4 http://www.nifi.org.

7 The Danish Board of Technology has organized twenty-two such Consensus Conferences since developing the methodology in 1987. See Danish Bd. of Tech., Methods, at http://www.tekno.dk/subpage.php3?survey=16&language=uk (last visited Mar. 15, 2004). For more on the range of consultative methodologies employed, see id. See also OECD, Two Analyses of Digital Communication Between Citizens and Public Institutions, at http://www1.oecd.org/puma/focus/compend/denmark/govcit.htm (Oct. 1999).

8 Unchat was developed by the author.
option to “sign onto” an existing comment rather than writing one’s own as a way to cut down on input into the agency and make that information received more relevant and more likely to be read. If comments are taken account of by the agency, interest groups and citizens are more likely to participate and to participate well.

Done right, more sophisticated visualization tools can eventually be integrated into the comment process. Such tools include those that aid in mapping public preferences, graphically capturing and charting viewpoints, quantitatively analyzing inputs, and enabling the regulator to make sense of data. Imagine being able to see who is participating in a rulemaking process on a map that sorts comments by industry or background. Imagine comments being charted on a scatterplot so that participants can visualize where different arguments lie and how they are clustered. Or imagine visualization tools that show how commenters felt about a proposal.

Once an agency promulgates a rule, it needs to ensure compliance and successful implementation of the chosen solution. Now some agencies use list-servs (electronic mailing lists) to inform the public of a final rulemaking. Under the Small Business Regulatory Enforcement Fairness Act (SBREFA), agencies are already required to publish one or more compliance guides for each rule or group of related rules for which it is required to prepare a final regulatory analysis under the Act. Rule writers should have publishing tools available to them to publish such compliance guides online. Better yet, what if rule writers could translate a rule into a step-by-step compliance diagram? These diagrams permit a user to determine compliance by clicking through a series of questions. If all the necessary steps are selected, a button marked “In Compliance” lights up. Or imagine, what if regulations.gov allowed users to create their own “compliance weblogs,” on-line journals where affected stakeholders could discuss their experience with compliance, trade ideas and share information with each other and with the agency? The agency would not have to run such a blog. A lawyer who is intimately involved in that regulated industry might be the convener, instead. If a blog exists for all those interested in complying with a particular rule on the weight of trucks, for example, the Department of Transportation can subsequently turn to this compliance community for input on the next rulemaking on airbags in trucks, reinforcing the virtuous cycle of participation.

### The E-Rulemaking Toolkit and the Future of E-Rulemaking Policy

The above examples of on-line speech tools are easy, cost-effective, already-existing innovations that might be employed in the e-rulemaking context. Such technologies—and the underlying methods for communication and information exchange they reflect—should be built into an “e-rulemaking toolkit,” a suite of speech tools made available to rule writers and to the public over the Web for public participation.

A rulemaker in the future, for example, should be able to select “Create a National Issues Forum” from a menu of available Web-based tools and have the software guide him in creating and running a deliberative forum in connection with a rulemaking. The transcripts from such discussions will provide an impetus for further blogging and linking and ongoing discussion.

But having these speech tools is still not enough to institutionalize participative practice in rulemaking. In order to genuinely improve participation (and to justify and prioritize spending on e-rulemaking innovations), it is essential to develop a policy framework for evaluating the success of e-rulemaking in terms of participation. As long as no consensus exists as to what constitutes “better” citizen participation, it is important to have a range of clearly articulated metrics. Measuring e-rulemaking on the basis of its success at engaging the public will shift the emphasis of policy toward realizing the right to participate and inform the process.

If OMB requires data relevant to citizen participation in electronic rulemaking to be gathered, then agencies must adopt this democratic priority or risk illegitimacy. Measuring the success of citizen participation practices requires OMB to define success in terms of these democratic outcomes. It puts citizens at the forefront of the rulemaking agenda and helps to realize the Administration’s stated goal of “citizen-centered” e-government. As OMB considers which tools and procedures to implement as part of a centralized e-rulemaking toolkit, it must do so on the basis of successful experimentation with technologically-enabled practices that further the democratic mandate of citizen participation.

### If We Build It Will They Come?

If we attempt to strengthen citizen participation through the design of technology, there is still no guarantee that e-rulemaking will produce more deliberative and informed dialogue among those who already participate or better access to those who do not.

Yet if we do not build it, they are guaranteed not to come. We are putting in place the IT systems that will determine the shape of administrative process for at least the next decade. To do so without regard for the improvement in participation technology might enable will squander the singular opportunity to realize the right to citizen participation enshrined in the Administrative Procedure Act. Moreover, our failure to do so would set us further apart from the growing number of advanced nations that are using technology to institutionalize citizen participation as a component of e-government. All attempts to integrate interactive technology into legal and political processes present the same conundrum: how to strengthen the practices by which diverse groups of citizens discuss or decide complex issues across a distance. The challenge is improving, not just e-government but e-democracy, where citizens play a meaningful, informed and practical role in making law and policy.

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9 The “clickable law” project is an initiative of Professor David R. Johnson of the New York Law School Institute for Information Law and Policy. For more information, see [http://www.nyls.edu/infolaw](http://www.nyls.edu/infolaw).
NCCUSL Seeks Input from the Profession for its Revision of the 1981 Model State Administrative Procedure Act

By John Gedid

At its annual meeting in 2003, the National Conference of Commissioners on Uniform State Laws appointed a committee (Revision Committee) to revise the 1981 Model State Administrative Procedure Act (1981 MSAPA). The basis for the decision to revise was the numerous changes and developments in the states since the 1981 revision. In addition, NCCUSL believed that the state legislatures and courts have enough experience with the 1961 and the 1981 MSAPAS to be able to evaluate the strengths and weaknesses of each. The Conference appointed a revision committee of able commissioners for the project; the chair of the committee is Francis Pavetti of Connecticut, and the reporter is John Gedid of Pennsylvania. Revision Committee members are: Duchess Bartmess of Oklahoma, Deborah E. Behr of Alaska, Stephen C. Cawood of Kentucky, M. Michael Cramer of Maryland, Brian K. Flowers of the District of Columbia, H. Lane Kneedler of Virginia, Nathaniel Sterling of California, and Robert J. Tennesen of Minnesota.

An important part of the approach to this revision is the express NCCUSL perception that agencies are where most citizens interact with the government; administrative procedure, by setting the rules for that interaction, has more impact on citizens than virtually any other area of the law. Accordingly, NCCUSL will conduct this revision as one of its major and most important projects. That approach has consequences that will be more fully developed later; however, the most important is that NCCUSL seeks input from all interested parties, organizations and groups.

At its organizational meeting the Revision Committee singled out several areas for examination. Some of the most important areas identified are:

1. Comparison of the 1961 MSAPA and the 1981 MSAPA. The Revision Committee observed that the two APAs involve very different drafting styles and substantive content. How has that affected the acceptability of the two APAs in the states? What sections of the two APAs have the states adopted? Which sections have worked best in the states? This comparison will lead to producing a product that is maximally useful to the states.

The Revision Committee also noted that so many states have adopted the 1961 MSAPA that it has operated almost like a uniform act. However, both APAs are model acts, and must be evaluated from that standpoint. That is especially true of the 1981 MSAPA, which, although not adopted wholesale, has been widely used as a guidebook in statutory drafting by legislative drafting services and by agencies.

A particularly important idea that has surfaced in the Revision Committee meetings is whether the revision should consist of a “core” of basic sections, similar to the 1961 MSAPA, supplemented by a relatively more detailed and numerous set of sections similar to the 1981 MSAPA. The Revision Committee believes that this may well be a structure that will be of maximum usefulness to the states.

2. Applicability of Formal Adjudication Requirements. Numerous persons involved in the administrative process in many states have indicated dissatisfaction with the applicability of formal adjudication requirement of the 1961 MSAPA and with the wide applicability of the 1981 MSAPA adjudication requirements. The Revision Committee has decided to examine this matter.

3. Emergence of Citizen Bills of Rights in Agency Procedure. Agencies in many states have hybrid procedures that insulate them from the requirements of the state APA; also, in most state APA revisions, some state agencies successfully lobby the legislature for exemption from the state APA. In many states the result is that across the agency spectrum administrative procedure is a patchwork; instead of one, unified procedure (the state APA), agency procedure varies from agency to agency. This denies citizens many protections built into the state APA. Several states recently appear to have successfully addressed this problem by creating Citizen Bills of Rights for agency adjudications that are applicable to all agencies. The Revision Committee will examine and evaluate this approach to accomplishing a unified procedure for all agencies in a state.

4. Rulemaking Developments

a. The growth of the Internet and the potential usefulness of e-rulemaking. The Internet was born and developed exponentially after the 1981 MSAPA enactment. The widespread acceptance and use of digital communication makes possible the tool of e-rulemaking, which would encourage and promote participation in rulemaking through digital means. Digital technology holds enormous potential for public input and information in the operation of government. It may also be much

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less expensive for government rule-making operations. The Revision Committee will explore and evaluate procedure for developing that potential.

b. Negotiated Rulemaking. The federal government and several states have recognized negotiated rulemaking. The Revision Committee will examine the experience with negotiated rulemaking and whether to include it in the revision.

c. Sunsetting Regulations. Sunsetting, setting an expiration date for statutes and regulations, was very popular in the 1970’s, but appears to have lost some of its attractiveness in the states. In this revision should we retain a major sunsetting provision for regulations or should we adopt some variation that will help to reduce the amount of outdated regulations?

d. Legislative & Executive Vetoes. The states have adopted many different variations of these two devices. The Revision Committee will review the effectiveness of various types of legislative & executive vetoes and make changes as indicated.

e. Regulatory Analysis Requirements. Regulatory analysis, the requirement that agencies compile an extensive report that weighs the costs and benefits of a rule, are popular devices in many states. On the other hand, state officials who have worked in various positions (preparing, receiving, evaluating) regulatory analyses observe that, among other things, they are extremely expensive, frequently require unreliable or unverifiable or subjective quantification, increasingly have become formulaic and therefore useless, and are difficult to understand in terms of what they mean or establish and how they should be used.

f. Required Rulemaking. The 1981 MSAPA introduced a concept, which had been discussed for many years, closely related to required rulemaking. Are any states using this device? What has been their experience with it? Is there another device that can deal with the problem that any states have used?

g. Distinction between Substantive Rulemaking, Policy Statements and Interpretive Rules. The Revision Committee will examine this problem in connection with required rulemaking, since it is closely related. There is now many more years of development of this distinction in the states that can be drawn upon for guidance.

This list is only a sample of the numerous issues that the Revision Committee has decided to examine in review and possible revision of the 1981 MSAPA. NCCUSL seeks maximum input from all interested parties and organizations in this revision. The organization’s objective is to make the revision process as open and transparent as possible, with the greatest possible participation and communication from all parties with an interest in, or idea about, this area. To that end we solicit input from: ALJ’s and hearing officers; private industry, both large and small firms; state officials who work in the area, including those who work in the executive, legislative and judicial branches; attorneys general and consumers. Every comment, complaint and suggestion will be carefully acknowledged and reviewed by the Revision Committee. A web site will be created in the near future, before the next meeting of the Revision Committee in November, 2004 in Philadelphia, Pennsylvania. In the meantime, any person wishing to contact the NCCUSL Committee for the Revision of the 1981 MSAPA may contact the reporter at the following address:

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Chair’s Message
continued from inside front cover

into Section activities. If you would like to become a mentor or a mentee, contact Cynthia Drew, who is coordinating this program.

Finally, in somewhat the same vein, recall I said at the outset that one of our main goals is to provide a congenial forum for accomplishing our professional objectives. To that end, I am going to make a special effort to attract more spouses and significant others to attend our conferences and social events. The sense of conviviality created by such wider participation helps create the life-time friendships that make our professional work more satisfying.

So, I look forward to working with you to have a productive and enjoyable Ad Law year. Don’t hesitate to contact me, or Kim Knight, our Section director, with your ideas and suggestions.
Rhode Island’s Radical Experiment:
The Misfortunes of Repudiating Separation of Powers

By Carl T. Bogus

“It is one of the happy incidents of the federal system,” Louis Brandeis famously said, “that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” Surely one of the most radical experiments conducted by a state—not merely a social or economic experiment, but a political one—has been Rhode Island’s rejection of one of the most fundamental features of American constitutional democracy, namely, the principle of separation of powers.

Most Rhode Islanders believe this two hundred year experiment produced poisoned fruit. Voters will bring it to an end in November 2004 when they ratify an amendment incorporating the doctrine of separation of powers into the state constitution. There is little doubt the amendment will be ratified; in recent years voters expressed their desire for separation of powers in two non-binding referenda that passed with majorities of 67 percent and 75 percent respectively. Both houses of the state legislature overwhelmingly (but begrudgingly) approved the amendment, and directed it be placed on the ballot only after a political firestorm swept Rhode Island. To everyone’s amazement this abstract principle of political science had become the most prominent issue in the state. Moreover, this was not merely a favorite issue of the educated elite but of the populace as a whole. In every way they could—when they confronted candidates on the campaign trial, in letters-to-the-editor, in calls to talk radio, and in letters, telephone calls, and e-mails to legislators (so many, in fact, that at one point the General Assembly’s e-mail system crashed)—citizens made it plain that they would turn out of office legislators who failed to support the amendment.

It is a story that, somewhere in heaven, has James Madison smiling.

Conflict of Interest
Rhode Island did not adopt a constitution during or following the Revolutionary War. Instead, with some modifications, it continued to operate under a royal charter granted by Charles II in 1663. “The most significant feature of Rhode Island’s colonial government was the supremacy of the legislature,” one historian has written. There was, however, no mechanism for amending this increasingly out-of-date document, and the power structure did not want to. It took a revolution—the Dorr Rebellion of 1842—to force the establishment to write a constitution. The revolutionaries wanted the constitution to expressly adopt separation of powers; the establishment wanted to preserve legislative supremacy. Neither side was able to force a decisive win, and Rhode Island ended up adopting a constitution that was deliberately vague about separation of powers. Over the next century and a half, there were times when the legislature claimed its nearly supreme powers had been preserved. In 1935, for example, the legislature fired and replaced all members of the state supreme court, claiming the power to do so not because the constitution gave it that authority but merely because it did not expressly forbid it. The issue was not tested because the removed justices accepted life-time pensions in return for their agreement to not litigate. Thus, ambiguity about separation of powers remained.

As the administrative state grew in Rhode Island, as it did in the rest of the nation, some Rhode Island agencies were created in the traditional structure in which the governor appoints the agency’s director with the advice and consent of the state senate. However, as time marched on the legislature increasingly employed mechanisms to gain operating control over agencies. Its favorite device was to provide that a regulatory agency was to be governed by a board of directors, which had the power to appoint and remove the agency’s director. The legislature camouflaged its objective of controlling the agency by giving the governor the power to appoint a portion of the board but reserved to itself—typically to the speaker of the house and the president of the senate—the authority over other members. According to a review by Common Cause of Rhode Island, the legislature eventually wound up appointing a total of 234 members on the governing boards of 73 executive agencies, in some instances by filling these seats with members of the General Assembly themselves. The legislature appointed outright majorities on the governing boards on some of the state’s most powerful agencies. But even when the legislative appointees constituted a minority of the board, they wielded special power, for they represented the entity that controls the agency’s budget and determined the scope of its authority.

The incredible proliferation of Rhode Island agencies—depending upon how one counts, little Rhode Island may have more administrative agencies than does the federal govern-

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1 Professor of Law, Roger Williams University School of Law. For a more extensive discussion, see The Battle for Separation of Powers in Rhode Island, 56 Administrative Law Review 77 (2004), from which this article is adapted.
ment—has been exacerbated by issues of legislative control. But the bloating of agencies is only one of several maladies resulting from a lack of divided control over administrative agencies.

When Congress establishes a new agency there is a high level of confidence that it is doing so for reasons of public policy because a new agency gives Congress itself no patronage or other benefits. But when a state legislature creates, funds, staffs—and operates—a regulatory agency, the capacity for mischief is enormous. First, the legislature creates patronage opportunities for itself. Second, when legislators themselves serve on the governing boards of regulatory agencies, their prestige and perceived influence in that particular industry is enhanced and, with it, the ability of part-time legislators to make money in the private sector. Third and most significantly, when the legislature controls an agency it has the power to quietly exempt political supporters and other favored parties from rigorous enforcement of the law. All it takes is, say, a phone call from an assistant to the speaker of the house to an assistant to the director of Agency X noting the speaker is concerned that agency staff may be pursuing a particular matter zealously. The signal is clear but publicly invisible and protected by plausible deniability. After all, the director of an agency can always find a rationale for not bringing a particular enforcement action.

Agencies may become improperly politicized under executive control, of course, but legislative oversight provides some check when that occurs. Under the usual system, when a business is forced to strictly comply with governmental regulations while a competitor is not, it can complain to legislators, who in turn can earn political stripes by exposing the abuse. But when the legislature both operates and oversees an agency, that safeguard is gone. There is no one with the power to demand explanations from agency officials.

In recent decades, the legislative program to seize control over regulatory agencies became progressively more aggressive. One example concerns the state’s environmental regulation. The nation’s geographically smallest state has several environmental agencies. The largest is the Department of Environmental Management, which has general jurisdiction over environmental protection in the state. DEM is administered by a director who is appointed by the governor with the advice and consent of the senate. However, the General Assembly also created another agency, the Coastal Resources Management Council, which is governed by a sixteen member council, eight of whom are appointed by the legislature. CRMC’s director is considered a legislative loyalist; and it is no surprise that CRMC has been criticized for operating in secret and too readily allowing developers to undertake environmentally detrimental projects, as well as suffering from conflicts of interest. And the legislature created yet another agency, the Narragansett Bay Commission, with particular responsibilities over the state’s largest body of water. By law, the 23 members of that commission include two members of the House and two members of the Senate.

Starting in 1996, a special committee of the House of Representatives held a series of televised, McCarthyesque hearings that, under the guise of legislative oversight, seemed principally designed to disparage DEM. Many people—stunned by the committee’s personally vicious and demeaning treatment of DEM employees—came to believe the legislative strategy was to diminish DEM’s public reputation and provide a rationale for legislation either transferring much of DEM’s authority to CRMC or merging both agencies into a single entity controlled by the General Assembly. But the legislative strategy backfired. Legislators pursued their mission in so meanspirited and ham-handed a manner that they created concerns not about the agency but about themselves.

This was but one of many episodes that fueled public alarm over legislative oversight. In the 1980s, the General Assembly weakened state regulation over credit unions in the state. The conflicts of interest by legislators who were influential in the process were stunning. One state senator was simultaneously a director of a credit union with a soaring deficit and the member of a senate committee that killed legislation that would have required credit agencies to obtain federal deposit insurance. A state representative was simultaneously a member of a relevant state regulatory agency and a house oversight committee—and was the recipient of substantial favors from the regulated industry, including a large loan (often in default) from a credit union and junkets from the credit union trade association. Another state representative was both vice-chair of the House Finance Committee and president of the trade association that lobbied the legislature on behalf of credit unions industry. That is not all. He was also a member of the State Investment Commission, a state agency that decided to invest millions of dollars of public funds in credit unions. The same representative was also a member of a board that set the salaries of the political appointees in the state, including the Director of Business Regulation and the State Treasurer, who had responsibilities for regulating credit unions. How free are regulators to blow a whistle that will offend someone who sets their salary?

On December 31, 1990, the Rhode Island Share and Deposit Indemnity Corporation declared that it was insolvent and could not insure accounts at the state’s credit unions, many of which were in severe financial trouble. The next morning the governor closed the 45 financial institutions supposedly insured by RISDIC. Fifteen never reopened, and the state and private parties raised nearly one billion dollars to repay depositors.

**Unholy Alliance**

In 1998, the state Lottery Commission voted to authorize the expansion of video-slot machines in the state. The governor, who opposed gambling, challenged the composition of the commission in two cases before the Rhode Island Supreme Court. He argued that the principle of separation of powers was an implicit part of the state constitution and that the principle was violated by the legislature appointing a majority of the commission’s members.

The legislature argued that because of its peculiar history Rhode Island had two
co-equal branches—the legislative and judicial departments—and a “diminutive” governor. In oral argument, when asked who, within the executive branch, the legislature could not appoint (beyond the constitutionally elected officers), legislative counsel promised only that the legislature would never seek to appoint the governor’s personal secretary.

In what are surely among the most radical decisions ever rendered by the highest court of an American state, the court bought the legislature’s arguments. It described Rhode Island government as “a quintessential system of parliamentary supremacy.” The General Assembly possesses “all of the powers inhering in sovereignty” except only for authority expressly granted to other branches of government, declared the court. In a ringing sole dissent, Justice Robert Flanders said his colleagues were reducing the governor to “the functional equivalent of a show captain, propped up on the ship of the state’s main deck in full-dress regalia for all the passengers to ogle, while the real legislative bosses steered the ship, barked orders, and hired, fired, and supervised the crew and all those who toiled away in the boiler rooms below.”

The Plot Thickens

The people were outraged at this unholy alliance between the court and the legislature. There was enormous steam for a constitutional amendment. As things moved to a crescendo, a breaking scandal added yet more fuel on the fire of disgust with consolidated legislative power. The public learned that a young woman who had worked as a legislative researcher had accused the speaker of the house of sexual harassment and that to avoid public revelation the parties cut a secret deal. The woman promised to remain silent in return for $75,000 and a new job. A new permanent position was created specifically for her at Rhode Island College. This was the first time in 25 years that a new full-time position of any kind—administration, faculty, or staff—had been created at this public university.

For our purposes, here’s the rub: the person who arranged the deal—who approved the worker’s compensation settlement over the objection of the director of the worker’s compensation department, created the new position at Rhode Island College, and moved around monies to fund it—was the director of the state’s Department of Administration. This man was a gubernatorial appointee and a member of the governor’s cabinet. Yet he accomplished this extraordinarily unusual and politically significant task without informing the governor.

The event illustrated something the public understood—the dynamics of consolidated power. Deep in space there are black holes with so much concentrated mass that nothing escapes their enormous gravitational force. In Rhode Island so much power became concentrated in the legislature—and in the House in particular—that influence radiated outward, extending deep into the executive branch.

Conclusion

Separation of powers is not a single idea but a cluster of concepts including theories of sovereignty, division of authority, and checks between the branches. Nevertheless, it is mainly about two principles. The first springs from the belief that power has a pernicious effect on human nature. In Lord Acton’s famous axiom: “Power tends to corrupt and absolute power corrupts absolutely.” Thus, too much power should not reside in one place. The second principle is rooted in the belief that any person or group possesses limited wisdom and even the majority’s collective wisdom can be overcome by passions of the moment. Thus, there needs to be checks and balances to guard not only against corruption but improvident or impetuous decisions as well.

There is no single way to meet those objectives, and the fifty state governments differ considerably in how they seek equipoise among the branches. In many states, however, there are increasing legislative encroachments into executive and judicial spheres, a new gathering of power into the impetuous legislative vortex. In Pennsylvania, legislative appointments to executive agencies are growing, with what one knowledgeable commentator calls “pernicious results.” In Illinois, North Carolina, Ohio, Pennsylvania, Wisconsin, among other states, there is a trend toward aggressive “rules review,” where legislatures do not merely exercise general oversight over the promulgation of rules and regulations by executive agencies but allow a committee or other entity controlled by legislators to suspend or veto regulations, a practice that the Supreme Court has held to be unconstitutional within the federal government. When legislative oversight over agencies drifts into supervision, legislative control becomes dominant, for the agency must look to the legislature not only for funding but also for specific approval of its work product—which means, in practice, the legislature will dictate agency work.

Rhode Island may be unique in the degree to which power became consolidated in the legislature, but its lessons should be heeded elsewhere nonetheless. The Rhode Island experience illustrates the dangers of consolidated legislative power, but happily it also demonstrates the ability to rally the people to against it.

Comments and suggestions on the style and content of this publication should be sent to KnightK@staff.abanet.org.
Agency Choice of Policymaking Form

By M. Elizabeth Magill

A n administrative agency delegated some task—protect the environment, assure the integrity of the securities markets, improve auto safety—might, depending on the background law, be able to carry out that obligation by adopting a legislative rule, bringing or deciding a case, or announcing its interpretation of the statute. In fact, an agency might choose to rely on all of those quite distinct policymaking tools in the course of implementing its statutory mandate. Not only will an agency be able to choose its preferred policymaking instrument, but, under long-settled administrative law doctrine, it will not be required to explain to a court why it chose one instrument or the other.

This phenomenon is well-known and generally treated as unremarkable. But it is remarkable. For one, most government actors are not free to select from a menu of policymaking tools. The legislature adopts statutes; prosecutors bring cases; courts decide cases brought to them by parties. Confining legislatures, prosecutors, and courts to particular ways of doing their jobs is no accident. Those assignments spring from the most essential aspects of the Constitution’s design. But most administrative agencies are not so constrained. Many can rely on policymaking instruments that look like legislating, enforcing, and adjudicating. Nor are most exercises of agency discretion insulated from judicial examination. When an agency exercises its discretion, and a suitably injured party challenges its action, courts will usually require the agency to explain in a reasoned way why it settled on its course of action. Yet they urged agencies to rely more heavily on notice-and-comment rulemaking. Today, this topic is back in the news as scholars and judges express concern that agencies are “regulating by guidance.” This renewed attention is a welcome development, but more needs to be done to come to terms with agency choice of form. It turns out that, on close inspection, the judicial reaction to choice of procedure is much more complicated than a statement of black-letter doctrine would suggest. I argue below that courts actually have “reviewed” agency choices of procedure, albeit in a roundabout way. A more nuanced understanding of judicial reaction to agency choice of procedure is a useful corrective, but determining whether this judicial examination is adequate is an important question that we are not now prepared to answer because we do not have a good working understanding of how agencies actually choose among their available policymaking tools.

To address those questions, one must first understand the set of policymaking tools agencies typically have available. Owing to the differences in statutes that agencies operate under, there is wide variation across agencies. Even so, one can identify a standard set of policymaking tools that statutes and case law make available to agencies. Consider, for example, the Securities and Exchange Commission (SEC), which is authorized by various statutes to regulate the securities markets. Imagine that the SEC is concerned that a certain kind of financial transaction may violate the anti-fraud provisions of those laws. The SEC is authorized by statute and governing precedent to promulgate a legislative rule prohibiting the transaction; bring an administrative enforcement action against an individual who has engaged in the transaction; or bring a judicial enforcement action. The SEC might also choose to provide what we might call guidance—for example, through congressional testimony, speeches, or a more formalized “release”—advising interested parties of its concerns about the transaction. Though it would surely influence the behavior of private actors, that guidance would be advisory only. The SEC is thus authorized to take one of four paths to address the transaction with which it is concerned: legislative rule; administrative adjudication; judicial enforcement; or guidance. The SEC is not alone in having a range of options to advance its views. Many agencies are able, in at least some range of cases, to choose from several policymaking forms—and often this standard set—to effectuate their policy judgments.

The choice among these instruments matters because each is distinct. The differences are significant and they run along three dimensions: the process the agency follows, the legal effect of the instrument, and the availability and nature of judicial examination of the agency’s action. Focusing on just some of the differences, consider the contrast between legislative rules and administrative adjudication. The former is usually prospective, general, and if valid, binds all that come within its reach like a statute; the latter is usually retrospective and binds only an individual, although often with some precedent force. Legislative rules and nonlegislative rules provide another contrast. Legislative rules require a relatively elaborate process but, if valid, operate like a statute. Interpretive rules (one species of nonlegislative rules) are by comparison cheap to produce but do not of their own force have legal effect. Needless to say, the agency’s choice among its available instruments is consequential. It probably affects the substance of policy, but, in any event, the choice matters for the agency and all those who follow what it does.

How do courts react to agency choices of procedure? It is a commonplace, dating to the second SEC v. Chenery

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case (Chenery II) in 1947, that an agency authorized to rely on rulemaking and adjudication can choose between those two instruments and a court will not second-guess that choice. The Supreme Court has characterized such agency decisions as discretionary and in theory an agency could abuse its discretion in choosing one instrument over the other. But as the doctrine has developed, and as administrative law treatises report, there are very few cases finding such an abuse of discretion. This “Chenery principle,” in fact, reaches beyond just the choice between rulemaking and adjudication to encompass all of the agency’s available policymaking instruments. This claim is hard to document but it seems to be confirmed by practice. Imagine an agency has declined to issue enforcement guidelines and is instead articulating its enforcement criteria in the course of individual decisions. Would a litigant argue that the agency has abused its discretion by relying on individual cases instead of issuing enforcement guidelines? That itself seems unlikely, and, if a litigant did press such a claim, a court would be unlikely to entertain it.

Even though this principle is far-reaching, it does not mean that an agency can do whatever it wishes. An agency can choose its preferred tool, but it cannot design it. The features of the policymaking instruments — the process the agency must follow, the legal effect of the action, and whether and how the action can be challenged in court — are fixed, not by the agency, but by statute and judge-made law. At one level this is obvious. An agency cannot issue a press release and then act as if it has promulgated a legislative rule. Such clarity is often obscured by context, however. The many cases about the boundary between legislative and nonlegislative rules well make the point. Those cases do nothing to undermine the principle that an agency can choose among its available tools; they just underscore that an agency must respect the form it has chosen. An interpretive rule does not have the legal effect of a legislative rule and if the agency is treating it as if it does, a court will step in.

Whatever its scope, the Chenery principle is a puzzle because it appears to be out of step with judicial review of other agency exercises of discretion. If there is a suitable party and the challenge is timely, courts will usually require an agency to provide a reasoned explanation for its exercise of discretion. To be sure, sometimes the reasons will not be subject to the most rigid scrutiny, but in the standard case, they are required. But there is no such reason-giving requirement when agencies select their policymaking form. The effects of this judicial stance are evident on the ground. An agency does not feel obligated to explain and defend its choice of policymaking instrument, and a litigant will not ask it to do so. An agency can select its preferred tool for a good reason, a bad reason, or no reason at all. Agency choice-of-procedure is not, in doctrinal terms, unreviewable, but it might as well be.

Several possible explanations for this different judicial treatment of choice-of-procedure decisions are not persuasive. Agencies are no more “expert” about choice of procedure than they are about a wide range of discretionary choices that courts will expect agencies to defend in a reasoned way. Nor are choice-of-procedure decisions analogous to certain categories of agency decisions — such as the exercise of enforcement discretion or the allocation of resources among agency programs — that will predictably run into reviewability problems. Choice-of-procedure decisions are not “failure to enforce” cases, nor are they systematically about the allocation of resources within wider programs.

Perhaps courts do not demand explanations for these agency choices because there are no standards by which a court could judge whether the agency has a good reason for its choice. While more plausible, this is not persuasive either. There is no shortage of developed opinion about what policymaking tools agencies should use. Decades ago there was a groundswell of support for legislative rulemaking as preferable to adjudication as a vehicle for making policy. Today, many bemoan agencies’ alleged use of too much guidance, or too many enforcement actions, to effectuate policy judgments. More than that, even if courts’ sense of the right instrument for the right circumstances is weakly developed, that doesn’t mean that there are no criteria to consult. Courts could ask agencies to explain why they chose one instrument over another; most reasons would pass muster, but some that courts might uncover (punishing a particular party; evading judicial review) would not. In the end, the reasoned decision-making requirement that is applied to many exercises of discretion is as much about the internal logic and persuasiveness of the agency’s reasons as it is about criteria supplied by a statute. There is no obvious reason why choice-of-procedure decisions are different in kind from other exercises of discretion.

There is an explanation for this otherwise puzzling judicial reluctance to ask an agency to explain its choice, an explanation that squares the Chenery principle with the rest of the law governing discretionary agency actions. That explanation takes the focus off direct evaluation of agency explanations as a way of reviewing agency action. Recall that agencies can choose their form but they may not choose what follows from that choice; the elements of the policymaking tools are fixed by statutes and judge-made law. And judge-made law has played a crucial, perhaps even decisive, role in shaping the consequences that follow from an agency’s choice to rely on one tool or another. Courts are the primary architects of the standards by which agency action will be assessed (arbitrary and capricious, substantial evidence, reasonable interpretation of law); they have leeway to determine who can bring a suit to challenge agency action and when that suit can be brought; they sometimes have the ability to fix the legal effect of an agency’s action; they can in some ways shape the procedures that an agency must follow when it relies on a policymaking tool.

By adjusting the consequences of choosing one form or another, courts have the opportunity to respond to whatever concerns they might have about an agency’s choice of procedure. Courts’ ability to do so makes direct inquiry into the agency’s reason for its choice unnecessary. Some examples continued on page 32
Today, the diffusion of regulatory authority between the states and the federal government makes it easy for Internet pharmacies to escape effective government oversight. While many states have promulgated new statutes, regulations, or policies, bringing actions under them is expensive and inefficient. The fact that even a successful judgment or consent decree is only effective within one state means that state attorneys general will husband their scarce resources and that many dangerous Internet pharmacies will escape detection and/or prosecution.

Even successful actions against Internet pharmacies raise important federalism issues, whether they are framed as “due process,” “minimum contacts,” or “the dormant commerce clause.” How far should a state’s jurisdiction extend, either legislatively or adjudicatively? Should the outcome depend, as stated in American Libraries Ass’n v. Pataki, on whether the state statute invoked mentions the “I word” (the Internet), or is the underlying substantive concern more basic: i.e., under what circumstances may a state adopt a domestic policy which affects other states?

The challenge posed by Internet pharmacies is an opportunity to creatively rethink how to expand access to affordable medication while protecting consumers from the adverse consequences of an unpolicing marketplace. Congress should adopt comprehensive changes in the Food, Drug, and Cosmetic Act to protect the public from unsafe and ineffective pharmaceutical products. First, the Act should provide that a drug is “misbranded” unless it is prescribed by a physician who holds a state license to practice medicine and has examined the patient within the last six months. Second, the law should prohibit pharmacists from dispensing prescription medications without evidence that the prescribing physician has performed a recent physical exam. Third, the law should authorize the securing of electronic information generated in the course of an Internet pharmacy transaction, to permit prosecutors to follow a defendant’s “electronic trail.”

By enacting this law, Congress will be taking an important step toward ensuring that legitimate commerce in pharmaceutical products can take place over the Internet, thus increasing competition while protecting the public’s health.

Internet Pharmacies: Why State Regulatory Solutions Are Not Enough

continued from page 6

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The Supreme Court issued several constitutional rulings with administrative law implications this quarter. Three June 28 rulings, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), *Rasul v. Bush*, 124 S. Ct. 2686 (2004), and *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), shed light on due process requirements for “enemy combatant” detainees. The most important of these, *Hamdi*, involved an American citizen captured in Afghanistan. The Court, in a 7–2 opinion by Justice O’Connor, emphasized that the federal habeas statute itself outlined procedures, indicating that basic due process protections applied, especially because Hamdi had conceded no facts that would have eliminated the need for further process.

The Court used the balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine the amount of process due. Hamdi’s interest was “the most elemental of liberty interests”—the interest in being free from physical detention by one’s own government”—an interest that was not “offset by the circumstances of war or the accusation of treasonous behavior.” *Id.* at 2646. The Government also asserted “weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States.” *Id.* at 2647. In balancing these interests, the Court gave Hamdi the minimal due process, holding “that a citizen–detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” *Id.* at 2648–49. Moreover, the Court accorded the Government much flexibility in meeting these requirements, suggesting that it should be allowed to rely on hearsay, that a rebuttable presumption in the Government’s favor and a burden shifting scheme would be acceptable, and that military tribunals might be acceptable. Moreover, the Court emphasized that process is not due on the battlefield, but rather “only when the determination is made to continue to hold those who have been seized.” *Id.* at 2649.

*Rasul* involved alien detainees being held at the Guantanamo Bay Naval Base in Cuba. While the Court, in a 6–3 opinion by Justice Stevens, resolved only the narrow issue that the district court had jurisdiction to hear these cases, based on its conclusion that Guantanamo Bay is within the United States’ territorial jurisdiction, it nevertheless suggested that *Hamdi* due process will apply to these detainees. Specifically, the Court distinguished *Johnson v. Eisencrager*, 339 U.S. 763 (1950), noting that *Johnson* had been a purely constitutional case and emphasizing that, unlike the *Johnson* petitioners, the *Rasul* petitioners

“are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in a territory over which the United States exercises exclusive jurisdictional control.” *Id.* at 2693–94. However, the Court also stressed in *Rumsfeld*, a 5–4 decision authored by Justice Rehnquist, that the ordinary rules for habeas petitions apply: the petitioner can file suit only against the official in charge of the petitioner’s detention, and only in the jurisdiction where the petitioner is being detained.

The Court addressed separation of powers issues in two of its decisions this quarter. In *Hamdi*, the Court made short work of rejecting the Government’s separation of powers claims in connection with the Guantanamo Bay detainees, emphasizing that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” 124 S. Ct. at 2650. It was more amenable to Vice President Cheney’s separation of powers concerns in *Cheney v. U.S. District Court for the District of Columbia*, 124 S. Ct. 2576 (2004), which involved the Vice President’s mandamus challenge to the district court’s discovery order in the Sierra Club’s and Judicial Watch’s suit against the National Energy Policy Development Group, which claims that the Group violated the Federal Advisory Committee Act, 5 U.S.C. App. § 2. Essentially, the issue before the Court was where the burden of raising separation of powers issues lay. The district court and the D.C. Circuit both concluded that the Vice President had to object to the district court’s discovery order and assert executive privilege before that court was obligated to modify that order. The Supreme Court disagreed in a 7–2 decision by Justice Kennedy. Acknowledging that mandamus is a “drastic” remedy, the Court relied on *United States v. Nixon*, 418 U.S. 683, 715 (1974), to nevertheless conclude that the presence of the Vice President altered the normal mandamus calculus. As a result, the Court of Appeals should have considered separation of powers concerns in its mandamus decision, especially because, unlike in *United States v. Nixon*, the plaintiffs here sought discovery in civil litigation, where “[t]he need for information . . . , while far from negligible, does not share the urgency or significance of the criminal subpoena requests in *Nixon,*” and “[w]ithholding the information . . . does not hamper another branch’s ability to perform its ‘essential functions’ in quite the same way,” 124 S. Ct. at 2589. Moreover, the lower courts should seek to avoid forcing the Vice President to rely on executive privilege; “an extraordinary assertion of power,” in order to avoid conflicts between the branches. *Id.* at 2592. The Court remanded the case to the Court of Appeals for further consideration.

The only APA decision this quarter was *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004), in which the Court unanimously determined that APA actions to

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“compel agency action unlawfully withheld or unreasonably delayed,” 5 U.S.C. § 706(1), “can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.” Id. at 2379. This case involved the Bureau of Land Management’s (BLM’s) regulation of off-road vehicles in “wilderness study areas” on federal lands in Utah pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701 et seq. The Southern Utah Wilderness Alliance filed suit against the BLM claiming that BLM: (1) had violated it FLPMA obligation to “continue to manage [wilderness study areas] … in a manner so as not to impair the suitability of such areas for preservation as wilderness,” 43 U.S.C. § 1782(c), by permitting off-road vehicle use in wilderness study areas; (2) had failed to implement resource management plan provisions related to off-road vehicle use; and (3) had failed to take a “hard look” at whether increases in off-road vehicle use in wilderness study areas warranted supplemental environmental analysis under the National Environmental Policy Act (NEPA).

The Court, in an opinion by Justice Scalia, characterized all three claims as “failure to act” claims. After reviewing the “five categories of decisions made or outcomes implemented by the agency” that qualify as “agency actions” for purposes of the APA—“agency rule, order, license, sanction [or] relief,”” id. (quoting 5 U.S.C. § 551(13)), the Court determined that a “failure to act” for purposes of section 706(1) is the failure to take one of these “circumscribed, discrete agency actions” or their equally discrete equivalents. The Court then affirmed its principle “that the only agency action that can be compelled under the APA is action legally required.” Id. at 2379.

Applying this two-part test, the Court quickly reversed the Tenth Circuit and dismissed all three of the plaintiff’s claims. Because the nonimpairment obligation in § 1782(c) did not mandate that the BLM totally exclude off-road vehicle use, there was no discrete action to compel; “[g]eneral deficiencies in compliance … lack the requisite specificity for agency action.” Id. at 2380-81. In contrast, the second claim involved no legal requirement. While the Court acknowledged that the BLM cannot take actions contrary to its resource management plans, it nevertheless concluded that resource management plans “are a preliminary step in the overall process of managing lands” and thus that “will do” statements in those plans “are not a legally binding commitment enforceable under § 706(1)” unless “an action called for in the plan … merely reiterates duties the agency is already obligated to perform, or perhaps when language in the plan itself creates a commitment binding on the agency.” Id. at 2382-84. Finally, regarding the NEPA claim, the Court reiterated its view in Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989), that NEPA requires supplementation only if “major Federal action” remains. Because the BLM’s plan was completed when approved, “no ongoing ‘major Federal action’ [remained] that could require supplementation … .” Id. at 2385.

Finally, Supreme Court watchers interested in the Court’s statutory interpretation methodologies should note the paucity of textualist “plain meaning” interpretations this quarter, especially when the Court’s constructions had international implications. Justice Scalia, joined by Justices Rehnquist and Thomas, dissented from Rasul specifically to disagree with the majority’s extension of federal habeas relief to Guantanamo Bay, arguing that the plain meaning of the habeas statute grants jurisdiction to district courts only for detainees “within their respective jurisdictions.” Similar splits occur in Sosa v. Alvarez-Machain, 124 S. Ct. 2379 (2004), which construed the Alien Torts Statute, 28 U.S.C. § 1350, and F. Hoffman-LaRoche Ltd. v. Empagran, SA, 124 S. Ct. 2359 (2004), in which the majority relied heavily upon legislative history in construing the Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6a, commenting that “[f]or those of us who find legislative history useful, the House Report’s account should end the matter.” 124 S. Ct. at 2365. Most interesting, perhaps, was the Court’s decision in Intel Corp. v. Advanced Micro Devices, Inc., 124 S. Ct. 2466 (2004), where the majority employed a wide range of tools to interpret the scope of 28 U.S.C. § 1782(a), which gives the federal district courts jurisdiction to order discovery “for use in a proceeding in a foreign or international tribunal … .” While Justice Scalia joined the decision, he concurred especially to insist that the majority should not have relied on legislative history.

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When is an Agency Statement an Interpretive Rule?

Three recent decisions address the question of whether an agency statement constitutes an interpretive rule. The first, Independent Equip. Dealers Ass’n v. EPA, 372 F.3d 420 (D.C. Cir. 2004), involved a provision of the Clean Air Act under which manufacturers of certain engines must, in order to sell them in 2004, attach labels certifying compliance with the Act. Dealers began importing engines that were unlabeled but otherwise identical to those sold with labels in the United States. Domestic sellers of labeled equipment asked EPA to strengthen enforcement of the import rules. Beginning in 2000, EPA issued three informal statements to the effect that engine manufacturers could choose to label some engines for domestic use and not label others. Unlabeled engines, although otherwise identical, could not be sold in the US without going through an expensive review process. In 2002, plaintiff argued to EPA that the agency’s position violated the statute. EPA responded in 2003 by reiterating and defending its position. Plaintiff then challenged EPA’s 2003 statement as a substantive rule issued without notice and comment.

The D.C. Circuit held that EPA’s 2003 statement was not a rule because it did not add anything to what EPA had already done: “By restating EPA’s established interpretation of the certificate of conformity regulation, the EPA Letter treads no new ground. It left the world just as it found it, and thus cannot be fairly described as implementing, interpreting, or prescribing law or policy.” The court also held that the statement did not constitute final agency action. Although the agency’s position was undoubtedly final, the court found that the statement failed the “rights or obligations” prong of the Bennett v. Spear finality test because “The Letter was purely informational in nature; it imposed no obligations and denied no relief.” Mere practical effect, said the court, was not sufficient.

The court’s determination that EPA’s statement is not a rule is questionable. The statement seems to “interpret” existing law or policy, even if it is merely reiterating a previously stated interpretation. As to finality, however, the court is on firmer ground in recognizing that a repetition of an earlier statement does not qualify as creating rights or obligations. To rule otherwise would render reviewable any agency repetition of a long-standing position previously stated in informal issuances. On the other hand, this ruling creates the danger that agencies could avoid review by embedding significant statements in obscure issuances and later arguing that a challenge is out of time when someone challenges a repetition of the statements.

In Erringer v. Thompson, 371 F.3d 625 (9th Cir. 2004), Medicare beneficiaries challenged guidelines set out in an HHS manual, arguing that they constituted a substantive rule issued without notice and comment. The manual governed decisions by Medicare contractors, which issue determinations affecting Medicare claimants. Under Medicare, contractors judge whether Medicare claims involve “reasonable and necessary” services. In making those determinations, contractors may rely upon Local Coverage Determinations (LCDs), which contractors develop pursuant to guidelines set out in the agency’s Program Integrity Manual (PIM). The PIM was issued without notice and comment.

The 9th Circuit held that the PIM was an interpretive rule. Applying the test of American Mining Congress v. Mine Safety & Health Admin., the court noted that the “reasonable and necessary” provision of the statute was a sufficient statutory basis for enforcement in absence of this rule. The beneficiaries argued that the “binding effect” of the LCDs in the early stages of the agency appeal process meant that the PIM had the force of law, but the question is whether the agency statement is binding outside the agency. Although the LCD is binding on program participants outside the agency, the PIM is not. The contractors are effectively inside the agency for this purpose. Moreover, even if the challenge were to the LCDs, they are subject to challenge before the ALJ and in the federal courts, so they, too, do not have the force of law. The court also held that the PIM did not effectively amend a prior statement. This test would be met “only if [the statement] is inconsistent with another rule having the force of law.”

The third decision, Coke v. Long Island Care at Home, 2004 WL 1632642 (2d Cir. 2004), declined to grant Chevron deference to a rule despite the fact that it had been issued through notice and comment and published in the CFR. The opinion represents a significant refinement of the vague guidance provided by US v. Mead.

In 1974, the FLSA was amended to extend protections to domestic workers, subject to an exemption for those providing “companionship services . . . (as such terms are defined and delimited by regulations of the Secretary [of Labor]).” The agency then issued two regulations. The interesting part of the opinion involves the second regulation, under Subpart B, “Interpretations,” which extended the exemption to employees of third parties, in addition to those employed by the household or family of the person being served. In addition to being issued under the heading of “Interpretations” in the CFR, this regulation had been issued through a notice and comment process in which the original proposal was the opposite of the position taken when the regulation was actually issued. Nonetheless, the regulation had been enforced for nearly thirty years and had not been disturbed by Congress.

In a careful parsing of US v. Mead, Judge Walker held that the second regulation did not qualify for Chevron deference. Noting Mead’s reference to the use of procedures such as notice and comment as a basis for Chevron deference, Judge Walker empha-
sized that the question was whether the agency had exercised delegated legislative rulemaking authority in issuing the regulation. The mere fact that an agency chooses to employ notice and comment does not mean that the rule is entitled to *Chevron* deference. Moreover, the fact that an agency is authorized to engage in legislative rulemaking on a particular topic does not mean that every rule issued through notice and comment on that topic qualifies for *Chevron* deference. The agency must have intended to exercise its legislative rulemaking authority.

On these facts, Judge Walker found that the agency had not exercised legislative rulemaking authority in issuing the second regulation. The agency consistently referred to its statement as an interpretation, and it included its statement in a subpart headed “Interpretation.” Moreover, the agency’s regulations explicitly state that the definitions required by the statute appear in other sections of the regulations.

Having rejected *Chevron* deference, Judge Walker applied *Skidmore* analysis and found the regulation wanting. Judge Walker found, among other things, inconsistency with other regulations and gaps in reasoning. He might well have struck down the regulation even under *Chevron*.

Agency counsel will need to consider this decision carefully both in developing new regulations and in reviewing those already in existence. Judge Walker’s opinion draws what may often be a highly artificial distinction. If the mere listing of interpretive statements under the wrong heading may deprive those statements of *Chevron* deference, agency counsel will need to make it quite clear that an interpretive statement is issued in the exercise of the agency’s statutory delegation.

FOIA—Two Circuits Refine Application of the “Deliberative Process” Privilege

In *Moye, O’Brien, O’Rourke, Hogan & Pickert v. National RR Passenger Corp.*, 2004 WL 1566567 (11th Cir. 2004), the court held that the deliberative process privilege is not limited to the deliberations of the ultimate decisionmaker, but extends to the deliberations of lower-level agency staff. The district court had held that the records sought were “not protected by the deliberative process privilege because they were not considered by the final decision-maker.” The 11th Circuit reversed, emphasizing that the privilege protects “the entire auditing process.” Thus, if “the decision-making process . . . bear(s) a reasonable nexus to the documents sought,” the privilege applies even if the particular documents were not considered by the ultimate decisionmaker.

As to what subjects are protected, in *Envirotech Int’l, Inc. v. EPA*, 371 F.3d 370 (7th Cir. 2004), the requester argued that records were not protected by the privilege if they related to a decision that was not within the authority of the agency. Under the Clean Air Act, EPA was authorized to identify acceptable alternatives to ozone depleting chemicals. EPA proposed to list a particular chemical as acceptable if it was subject to certain workplace exposure limits. Envirotech argued that the privilege did not apply to EPA’s deliberation concerning the workplace exposure limits because EPA had no authority to set such limits.

The 7th Circuit disagreed, ultimately holding that EPA’s recommendation, which was not itself binding, was within the agency’s authority to identify acceptable alternatives. In so doing, however, the court in dicta strongly affirmed the need to protect agency deliberations on matters of policy, even if the policy involved matters beyond the agency’s authority. Where there was no specific statutory limitation on EPA’s authority, the privilege would protect the agency’s deliberations as to a policy issue not within its authority.

**Circuits Split on Access to Review – 4th Finds preclusion, D.C. Circuit Refuses to Mandate Exhaustion.**

Two recent decisions illustrate how seemingly fine factual and statutory distinctions can produce different results as litigants seek review of agency action. Both decisions involve pre-enforcement challenges to agency positions. Both statutes provided for agency enforcement through judicial action. Both provided for internal agency consideration of any challenge to its position. Neither explicitly precluded judicial review or specifically required exhaustion.

In *National Taxpayers Union v. SSA*, 2004 WL 1575103 (4th Cir. 2004), when the Social Security Administration threatened enforcement of prohibitions on the misleading use of the term “Social Security,” the plaintiff went to District Court. Relying on *Thunder Basin Coal Co. v. Reich*, the 4th Circuit held that the statute’s detailed provisions for administrative civil penalty enforcement and review in the court of appeals precluded review by the district court. It is noteworthy that the civil penalty process can be initiated only by the agency. In that context, the court held that Congress intended to preclude the review sought by the plaintiff. Judge Wilkinson concurred because the statute and agency did not seek to stifle criticism of the agency, but to prevent misleading representations. He suggested that, “sometimes the nature of the claim being asserted and consequences of deferring review will bear on district court jurisdiction.”

By contrast, the D.C. Circuit in *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243 (D.C. Cir. 2004), left open the possibility of review against a claim of failure to exhaust. Avocado importers challenged the constitutionality of a statute under which the USDA imposed assessments to support the promotion of avocado consumption. The agency had issued an order imposing the assessments, but it had not sought to enforce the order. The agency argued exhaustion, relying on statutory provisions under which anyone subject to such an order could petition
forces the agency to seek a stay of the decision in order to save.

Randolph argued that it is always preferable to vacate. This violates circuit precedent. Concurring as to the remedy, Judge vacate the rule a position roundly criticized by the dissent as “reverse” the agency, the majority held that it was required to without vacating the rule. Since the Act authorized the court to reconsider the construction of a permanent repository for high level nuclear wastes at Yucca Mountain, Nevada.

While the availability of an administrative remedy always triggers consideration of non-jurisdictional exhaustion, jurisdictional exhaustion applies only when specifically required by statute. As the court put it, jurisdictional exhaustion is required only by “sweeping and direct” statutory language indicating that there is no federal jurisdiction prior to exhaustion, or the exhaustion requirement is treated as an element of the underlying claim.” The mere provision for petitions to the Secretary was not enough to mandate exhaustion.

D.C. Circuit Debates Consideration of Costs and When Court May Remand Without Vacating.

Ozone depleting chemicals were also the subject of agency action in 6374 E3d 1363 (D.C. Cir. 2004). The Clean Air Act bans the use of such chemicals where an acceptable substitute is “available” for the purpose. Honeywell, which had developed a non-ozone depleting chemical, challenged EPA’s decision to list two ozone-depleting chemicals as acceptable. The decision is worth reviewing for its discussion of the “injury in fact” and “zone of interests” aspects of standing, but particularly for its treatment of EPA’s consideration of costs and its refusal to remand without vacating.

The majority held that EPA had improperly considered costs in listing the ozone-depleting chemicals as acceptable. Noting that EPA had relied upon “technical considerations,” to justify its position, the majority wrote treated this assertion as merely a cover for economic considerations. For example, the need to use thin insulating foam to maximize space in refrigerated rail cars merely reflects the economic interest in maximizing the amount of product carried in the cars. The majority’s analytical approach could well open the door to a broader range of attacks on agency decisions as impermissibly considering costs.

Perhaps the most significant aspect of this opinion is the majority’s decision that the statute did not permit a remand without vacating the rule. Since the Act authorized the court to “reverse” the agency, the majority held that it was required to vacate the rule a position roundly criticized by the dissent as violating circuit precedent. Concurring as to the remedy, Judge Randolph argued that it is always preferable to vacate. This forces the agency to seek a stay of the decision in order to save the rule. That round of litigation would produce arguments more clearly directed to the remedial issues and addressing long-accepted standards for issuance of a stay.


Two recent decisions illustrate judicial review of technically complex issues. Nuclear Energy Institute, Inc. v. EPA, 373 E3d 1251 (D.C. Cir. 2004), involved challenges to agency decisions approving the construction of a permanent repository for high level nuclear wastes at Yucca Mountain, Nevada.

Agencies must determine the sorts of protections a repository must provide and how far into the future those protections will be effective. In a case of considerable factual and legal complexity, the agencies prevailed for the most part under both hard look and Chevron Step 2 review. For example, the government had decided that a controlled area would extend some 18 kilometers south of the facility. This meant that government would control the entire area, but it also meant that the agencies could measure radiation exposures at 18 km, rather than closer to the facility. Nevada argued that this distance was too great because there is no certainty about the permanence of government controls over thousands of years, and people might well at some point live closer to the facility. EPA overcame this objection with a sufficient explanation that it is extremely unlikely that people will live in the area after government control degrades. As to such difficult predictions, the court said, “Where issues involve elusive and not easily defined areas . . . our review is considerably more deferential, according broad leeway to the [agency’s] line-drawing determinations.”

But when reviewing an agency statutory interpretation under Chevron Step 2, leeway may not be quite as broad. The Energy Policy Act required that repository radiation protection standards be “based upon and consistent with the findings and recommendations of the National Academy of Sciences.” The NAS had concluded that the likely peak exposure period was tens or hundreds of thousands of years in the future, that exposure assessment was possible out to one million years, and that there was no scientific basis for setting the protection period at 10,000 years. In so doing, the NAS noted that its view was based on technical considerations and did not address some policy issues that would be within the purview of the agency. EPA exploited this opening and set the regulatory period at 10,000 years. EPA’s explanation was essentially that a longer period was “not practical for regulatory decision-making,” and that EPA might choose to adopt certain policies in the future. The court’s reaction: “Only in Superman Comics’ Bizarro world, where reality is turned upside down,” could the government’s position

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By Yvette M. Barksdale


This article presents a textualist defense of the constitutionality of Article I tribunals based upon a new “inferior tribunals” account of the interplay between Article I and Article III. The author contends that Congress may constitute inferior “tribunals” to hear matters which fall outside the Article III judicial power, such as, traditionally, public rights claims, courts-martial proceedings, and local matters before territorial courts. However, Article I tribunals constitutionally must remain inferior to the Article III judicial department, given the history of widespread Article III judicial oversight. Every case need not have appellate review; but the Supreme Court’s role as the final expositor of federal law must be secure.


This article addresses conflicts between federalism and Federal conditional spending grants to States. The author wants to reasonably constrain the Spending Power without unduly preferring state autonomy interests. The article's principal case study concerns Chevron v. NRDC, 467 U.S. 837 (1984) and Penhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) conflicts regarding interpretations of federal statutory conditions on Spending Clause grants to States. Under Chevron, courts should defer to federal agency interpretations of ambiguous statutory conditions. However, under Penhurst, a court, on federalism grounds, should reject ambiguous statutory conditions on federal grants to States for lack of fair notice. Instead of an either/or analysis, the author advocates flexible, middle-ground analytical solutions which distinguish between different types of spending programs, applying Chevron to some (e.g., simple regulatory conditions), and Penhurst to others (e.g., massive benefit programs, such as Medicaid, which states cannot easily leave, once committed.)


This article is an empirical study of the Supreme Court's use of canons of statutory construction in workplace law cases over a 34 year period from the Burger court to the present day. Among the findings are 1) technical, complex or less ideologically charged interpretation issues are more likely to trigger Court reliance on language (e.g. grammatical) canons; however 2) canons usage as a whole tends to support the Justices' ideology (liberal judges use canons to support liberal outcomes, conservatives to support conservative ones); 3) Justices frequently use canons to support conservative results in i) closely divided cases with a 1 or 2 vote margin, or ii) when canons conflict with legislative history; and 4) canons are not particularly useful, neutral, interpretive tools since Justices can usually trade dueling canons to support conflicting interpretations.


This article addresses federal court interpretation and application of federal treaties, particularly whether federal treaties can be a source of federal common law. Part I reviews the constitutional foundation for treaties as directly applicable federal law. Part II provides the legal framework for analyzing the lawmakers of federal courts, beginning with Erie and progeny. The author concludes that federal common law must stem from a specific, independent grant of authority. Part III asserts that the judiciary's relationship with self-executing treaty law has the same source of authority as with Article I legislation. The author concludes that interstitial judicial lawmaking does not represent “an unconstitutional assumption of powers by [the] [C]ourts of the United States.”


This article addresses the proper regulatory response to so-called “irrational” public fears. The author draws upon the World Trade Organization’s (WTO’s) response to a United States/European Union (EU) dispute over beef growth hormones, which are heavily used by the American cattle industry, but are banned in the EU partly in response to public safety fears. The WTO overturned the ban, finding the fears had no scientific basis; but the WTO acknowledged that public fear might be a legitimate regulatory concern. Drawing in part upon Professor Cass Sunstein's analysis of regulatory responses to public fears, the author agrees that reducing public fear is a legitimate regulatory objective, even when technocrats consider the fear irrational. However, regulators...
should assess whether regulation may promote fear by seemingly validating unfounded fears and giving regulation-seekers incentives to fearmonger.


This article advocates a rigorous “cost-effectiveness analysis” to evaluate “transfer regulation,” such as social security and welfare payments, which is not suitable for cost-benefit analysis. Cost-effectiveness analysis would assess whether a particular program is the cheapest means of achieving the regulatory objective. Although existing Executive orders appear to require cost-effectiveness analysis for large economic impact transfer regulations, the agencies’ record is dismal. Discussed are 1) transfer regulations, 2) cost-effectiveness analysis and its usefulness and 3) examples of agency evaluation of transfer regulations.


The author reviews the effects of 9/11 on the FDA’s role as gatekeeper of new drugs, vaccines, and diagnostic and blood products. One consequence has been that the FDA has modified its review and approval mechanisms to hasten the approval of defense-related medical products. For example, FDA rules now allow for the approval of “defensive” drugs without pre-market human testing, a policy unheard of before 9/11. These modifications may have important consequences for the FDA product approval mechanisms that will be felt for years to come.


This Essay uses an economic transaction costs analysis to evaluate when it is beneficial for government to contract out government services to private actors. The author borrows transaction costs analysis from analysis of economic “make or buy” decisions; this analysis suggests a reasonable degree of skepticism about outsourcing of government regulation. The author first explains transaction costs analysis and why it is applicable to government outsourcing. The author concludes that 1) outsourcing to private actors is less costly in some cases and more costly in others; 2) the use of private parties commonly involves costly incomplete contracts, opportunistic behavior, and hold-up problems, and thus is often more costly than using government employees; and 3) the use of more costly private parties is generally motivated by ideological or political concerns which are inconsistent with the agency’s regulatory mission.


These two articles critique the Bush administration’s refusal to regulate mercury (MeHg) levels despite what the authors conclude was unusually clear and consistent support for such regulation in science, law, economics and justice. This refusal pushed beyond the previous boundaries of legitimate environmental and public health policy disagreements between conservatives, moderates, and progressives. Part I discusses 1) MeHg’s impact on public health, including scientific and technical arguments advanced to support the Bush administration’s policies and 2) the administration’s decision to embrace market-based air emissions trading for coal- and oil-burning power plants and to forego meaningful controls on mercury cell chlor-alkali plants. Part II discusses 1) the Administration’s effort to apply cost-benefit analysis to its trading decision, and 2) the public health and environmental justice implications of allowing unrestricted trades of such an extremely toxic substance.


This article addresses the constitutionality of the recent federal Department of Justice (DOJ) policy authorizing state and local officials to enforce immigration laws. The author concludes that DOJ’s policy, because of its voluntary nature and the expansive discretion it gives to local officials, will necessarily violate the constitutional requirement of uniform immigration laws and interfere with Congress’ exclusive constitutional authority over immigration.


This article critiques recent scholarship which argues that the Article II Vesting Clause (“[t]he executive Power shall be vested in a President of the United States of America”), is a grant of inherent, broad, Executive power. Part II of the article discusses why the constitutional text does not by itself establish the case for this Vesting Clause Thesis. Parts III to V examine historical sources including 1) the views of seventeenth and
eighteenth century political theorists, 2) state practices as they relate to the issue of executive power, 3) the lessons of the Articles of Confederation, 4) the constitutional Founding, and 5) relevant practices and debates during the eight-year George Washington Administration.


This article summarizes an interdisciplinary, empirical project to predict Supreme Court decisions prior to oral argument. The study compares the predictions of a statistical model with predictions by legal experts. The statistical model predicted the Supreme Court's 2002 term decisions better (75% success level) than did the legal experts (59.1% success level). This was because the statistical model better predicted the centrists Justices' votes (Kennedy and O'Connor). The experts better predicted the more ideologically extreme Justices' votes. Results also varied by issue, with the statistical model better predicting economic votes, and the experts better predicting judicial power votes.


The author argues that voter ignorance about government and public policy issues undercuts the “countermajoritarian” difficulty in judicial review, because politically ignorant voters are less able to police whether legislative decisions reflect their preferences. Consequently, legislative decisions are less likely to be responsive to true majoritarian preferences. The article is based upon a comprehensive empirical study of citizen political knowledge surrounding the year 2000 general elections.


This article critiques the “private judging” practice of unpublished opinions in state and federal courts. The author concludes that the policy’s genesis was not merely efficiency concerns about opinion overload, but an attempt by Southern courts to shield mainstream legal discourse from the flood of pro se and civil rights decisions arising out of the justiciability revolution of the 50s and 60s, and to diminish these decisions’ precedential effect.

Recent Symposium of Interest:

News from the Circuits
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have prevailed. EPA could not rely upon vague policy assertions to avoid a requirement that its standards be “consistent with” a position that explicitly rejected the very period that EPA had adopted as the radiation protection standard.

EPA had better luck on the statutory side in Bluewater Network v. EPA, 370 F.3d 1 (D.C. Cir. 2004), but it stumbled on hard look review of the agency’s application of its statutory interpretation. The Clean Air Act required EPA to set snowmobile emissions standards that are “achievable” by 2012. EPA set standards that it believed would be “achievable” by the entire fleet of snowmobiles being produced by the industry. Plaintiff argued that the statute did not permit a standard so lenient that all models could continue in production.

The court disagreed, holding that “EPA may rely upon cost and other statutory factors to set standards at a level less stringent than that reflected by across-the-fleet implementation of advanced technologies.” EPA’s justification of its statutory position was sufficient. But the court held that EPA’s position was arbitrary and capricious because the agency had failed to explain why it hadn’t addressed the possibility of eliminating some of the 30% of noncomplying models. EPA’s generalized reference to resource constraints was not enough to justify the lenient standard. Thus, while EPA had the statutory authority to base its standard on the costs of the entire fleet, it had failed to survive hard look review of the implementation of that authority.
A Mayor’s Dilemma — Can I Ignore a Statute I Think is Unconstitutional? Another Skirmish in the Gay Marriage Wars

By Marsha N. Cohen

Is a California city or county an administrative agency? That was the question the California Supreme Court was expected to answer in Lockyer v. City and County of San Francisco and Lewis v. Alfano, 2004 Cal. LEXIS 7238 (Aug. 12, 2004), the cases arising from San Francisco Mayor Gavin Newsom’s decision to request that the county clerk make marriage available to same-sex couples. California’s Constitution, art. III, § 3.5, includes a provision, added by a vote of the people in 1978, specifically providing that “An administrative agency … has no power … [to] declare a statute unenforceable, or refuse to enforce a statute, on the basis of its being unconstitutional, unless an appellate court has made a determination that such statute is unconstitutional.” This provision was at the center of debate in the parties’ briefs and at oral argument. But in ruling against the mayor, the California Court (in an opinion written by Chief Justice Ronald George) decided that it need not, and thus would not, take this opportunity to decide “whether the actions of the local executive officials here at issue fall within the scope or reach” of this provision. Lockyer, at 48.

Instead, the Court found it “well established” before 1978, in California and elsewhere, that a local executive official “charged with the ministerial duty of enforcing a state statute,” id. at 5, exceeds his or her authority when deliberately declining to enforce a statute on the basis of its unconstitutionality in the absence of a court determination to that effect. But no string of citations supports the holding. Instead, the opinion reads very much like a case of first impression, reaching for parallels and policies to support its decision.

Most broadly, the Court based its decision on “the rule of law”—on the need to ensure that our public officials respect the limits of the authority granted to them. This conclusion, the Court continued, was also consistent with the “classic understanding of the separation of powers doctrine:” that the executive power is “the power to execute or enforce statutes,” and not to interpret them and determine their constitutionality. While that doctrine doesn’t create “an absolute or rigid division of functions,” and executive officials and legislators “may take into account constitutional considerations in making discretionary decisions” such as whether to enact or veto legislation or exercise prosecutorial function, when a statute imposes a ministerial duty they are bound to obey. Id. at 8.

The Court’s reliance on separation of powers is unsurprising to those familiar with California administrative law. For decades, the California Court insisted that traditional administrative agencies have no judicial power. Lacking that power, their adjudicative decisions that affect fundamental vested rights must be subject to independent judgment review by the courts, rather than the more—traditional substantial evidence review. (More recent cases give the legislature power to change the independent judgment rule, suggesting it is not mandated by the California Constitution.) The same-sex marriage cases buttress my long-held suspicion (admittedly based in large part on personal discussion with a former member of the Court) that the judiciary simply does not trust the judgment of administrative or executive officials on legal issues. Thus, California rejects Chevron and retains the power to substitute its judgment on questions of law. The Court here pointedly states as a practical rationale for its rule that “most local executive officials have no legal training and thus lack the relevant expertise to make constitutional determinations.” Id. at 99.

Like local executive officials, most administrative agency heads also have no legal training. That fact did not appear to concern the Court in 1976 when it decided Southern Pacific Transportation v. Public Utilities Commission, 18 Cal. 3d 308, 556 P.2d 289 (1976). Yet it was only dictum in the majority opinion in that case that indicated the PUC had power to rule on constitutional questions. That dictum drew fire from Justice Stanley Mosk, in a concurring and dissenting opinion, and led to the adoption of art. III, § 3.5, of the California Constitution, placed on the ballot by a unanimous vote of the legislature. Reese v. Kizer, 46 Cal. 3d 996, 1002, 760 P.2d 495, 499 (Sept. 22, 1988).

In its decision in the same-sex marriage cases, the Court detailed the history of this section, but concluded that even after its Southern Pacific decision, and before the adoption of art. III, § 3.5, the only administrative agencies with authority to determine the constitutionality of statutes were those to which California’s Constitution had granted judicial or quasi-judicial power. The PUC had such a grant of power, but a local executive official, then or now, did not. When art. III, § 3.5 went into effect, it overruled Southern Pacific, taking away power from the PUC and similarly-situated agencies. But, we are told, “it is abundantly clear that this constitutional amendment did not expand the authority of [local executive] officials so as to permit them to refuse to enforce a statute solely on the basis of their view that the statute is unconstitutional.” Lockyer, at 71. Thus, the Court did not need to rule whether local officials are “‘administrative agencies’” within the meaning of art. III, § 3.5.

The Court declared the issue before it “relatively narrow,” id. at 4, given its application only to ministerial and not discretionary decisions. (Of course, mandamus law is littered with cases that struggle with the utterly indeterminate distinction between ministerial and discretionary decisions.) The Court further narrowed its holding by recognizing some rather major
exceptions. In a significant line of California cases, executive officials with a ministerial duty to act have refused to do so because of their doubts about the constitutional validity of statutes authorizing the issuance of bonds, the letting of public contracts, and the disbursement of public funds. In none of these cases were the officials criticized for their actions. Id. at 73. Instead, the validity of the statutes was determined in mandate actions similar to that brought against Mayor Newsom.

The Court approved this exception for two reasons. First, it affords a mechanism for a timely judicial determination of the validity of the bond issue, contract, or expenditure. Efficient access to a decision is necessary for governments to operate in the financial markets. Second, the public officials involved frequently face personal liability if their bonds, contracts, or expenditures are ultimately found invalid. Mayor Newsom faced no such risk, given that his conduct would not have violated a clearly established right which a reasonable person would have known. Id. at 76-80 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

Besides, the Court noted, there were other ways to bring the underlying constitutional issue before a court. San Francisco officials could simply “have denied a same-sex couple’s request for a marriage license and advised the couple to challenge the denial in superior court.” Id. at 82. Indeed, the first-in-the-nation decision striking down California’s antimiscegenation statute arose in a case brought by a couple denied a marriage license. Could the City simply have brought an action for a declaratory judgment? In its footnote 27, the court finessed that question, while noting the legislature has authorized public officials to take such action in parallel situations.

Suppose the United States Supreme Court has ruled unconstitutional a state law identical to one in California. Do executive officials engaging in ministerial functions need to continue to apply the California statute because it has not yet been challenged? While no such facts exist in this case (given that decisions on gay marriage come from other states), the Court recognized an additional exception to its rule, allowing public officials to refuse to comply with a statute “that any reasonable official would conclude is unconstitutional.” Id. at 93. That exception obviously applies even though the public officials still have no legal training, but the standard for fitting under the exception is likely to be high. The Court suggests that a parallel exception would apply to art. III, § 3.5.

The Court tells us that its holding puts California in line with 26 of the 33 other states that have addressed the issue before it, many of which recognize the exception for public finance cases. The A.L.R. annotations and many of the cases upon which the Court relies are very old; an 1895 Louisiana case, we are told, is one of the most quoted.

The Court includes a lengthy “parade of horribles” that would befall us from a contrary holding. In addition to the lack of expertise on the part of most local executive officials, there are due process concerns, fears of chaos and lack of uniform statewide applicability of statutes, and confusion during the length of time it would take for the courts to rule on the constitutional issues involved. In contrast, the Court assuages fears of officials that they would be in violation of their oath of office if they fail to act upon concerns of unconstitutionality of statutes they must implement. After all, the oath of office is to the constitutional system, which includes following duly-adopted statutes, which are presumptively valid until the judicial branch has ruled them invalid.

While I have so far said nothing about the underlying issue, the Court discusses at length the California scheme for regulation of marriage. Most basic, it finds that mayors have no authority to modify the duties of county officials working under state statutes; Newsom thus exceeded his authority in giving any direction to the county recorder on this issue. Further, the duties of the county clerk and recorder are entirely ministerial. Since Newsom acted, in more than one respect, beyond his authority, he was properly enjoined, and the acts taken improperly need to be undone. Thus the Court, without ruling on the constitutionality of California law that restricts marriage to opposite sex couples, declared about 4000 marriages void ab initio.

Although the Court’s holding on the Mayor’s lack of authority was unanimous, three of the seven Justices wrote separately. Justice Werdegar would have preserved the status quo by leaving the marriages intact until a final decision on the underlying constitutional issue. “To recognize that an executive officer has the practical freedom to act based on an interpretation of the Constitution that may ultimately prove to be wrong does not mean the rule of law has collapsed.” Id. at 173 (emphasis added). As long as the courts are available, the rule of law is preserved. And, after all, requiring the executive branch to ask a court’s permission before refusing to comply – that too, is at odds with notions of separation of powers.

Nor did Justice Werdegar find the ministerial/discretionary distinction, so basic to the majority’s opinion, particularly helpful. Looking to history for a hypothetical, she noted that the majority would agree that local officials, after Brown v. Board of Education, would have acted appropriately in failing to continue to follow state statutes requiring school segregation. Id. at 179. But couldn’t the maintenance of separate-but-equal public schools be deemed merely a ministerial function? If so, could those officials have justified their failure to follow Brown? Were they forced, in fact, to be statutory automatons? Id. at 176.

Justice Werdegar also criticizes the Court for the extensive scope of its opinion. “I consider the majority’s determination to speculate about the limits of a state official’s duty to obey the federal Constitution unnecessary and regrettable.” In fact one joins her in wondering how the words of this opinion might return to haunt the Court in future cases.
Section Approves Recommendation for Amending APA Adjudication Provisions

By Michael Asimow

The Section’s APA project passed another landmark at the annual meeting in Atlanta when the Council unanimously approved recommendations for amending the adjudication provisions of the APA. The recommendation will go forward to the ABA’s House of Delegates for consideration at its winter meeting in Salt Lake City. The final draft of the recommendation can be found on the Section’s website.

The most important part of the recommendation is to apply many of the APA’s fair hearing procedures to “Type B adjudication.” Type B adjudication means evidentiary hearings required by statute that are not covered by the existing APA. These include such important hearing schemes as deportation, veterans’ benefits, public contracts, security clearances, federal personnel decisions, IRS collection due process cases, and about 80 other hearing schemes. Presiding officers (POs) conduct Type B adjudication. Type B hearings are not “informal adjudication,” since a statute requires the agency to conduct an evidentiary hearing. The recommendation also distinguishes Type B adjudication from Type A adjudication (these are the hearings usually conducted by ALJs that are covered by the existing APA). Type A adjudication is not significantly affected by the recommendation.

The recommendation also proposes that a code of ethics be adopted covering both POs and ALJs and that full-time POs be protected against removal without good cause.

House of Delegates Approves Civil Monetary Penalty Resolution

By Jamison E. Colburn

The House of Delegates voted at the annual meeting to adopt the final resolution and report of the Section regarding the use of administratively-imposed civil penalties as an effective tool in federal agency enforcement programs. Co-sponsored by the Tort Trial and Insurance Practice Section, the resolution generally encourages the use of administratively imposed civil money penalties by federal agencies against regulated persons and entities as one part of an administrative enforcement program that already includes civil or criminal sanctions and recommends the use of administrative law judges and the Administrative Procedure Act’s “formal adjudication” procedures in cases where “significant” penalties are in question.

In the report, the Section detailed in depth the spectrum of federal laws that confer this authority on federal agencies and some of the history behind them. A now well-known series of reports by the Administrative Conference of the United States (ACUS) in the 1970s and 90s described the variations of administratively-imposed civil penalties, both in terms of amounts sought and in terms of procedures agencies use. The Section report also emphasized the importance of a person’s right to seek judicial review from any kind of administratively-imposed civil penalty, whether the product of formal or informal adjudication.

New Section Fellows

As one of his last official acts, outgoing Section Chair Bill Funk had the honor of nominating four individuals to be inducted as Section Fellows. The nominees, unanimously approved by the Council are D.C. Circuit Judge Merrick B. Garland and Victor G. Rosenblum, Nathaniel L. Nathanson Professor of Law Emeritus at Northwestern University School of Law, as Senior Fellows, and U.S. Court of Federal Claims Judge Susan G. Braden and Past Section Chair Neil R. Eisner as Fellows. The new Fellows will be inducted during the fall Administrative Law Conference and will be honored on October 22nd during the reception preceding the Gala Dinner at the Supreme Court of the United States.

National Judicial College Holds Elections

The ABA Board of Governors, meeting as the Members of the National Judicial College (NJC) concurred with the recommendations of the NJC Board of Trustees and elected former section chair and current section delegate Thomas M. Susman and re-elected Hon. Deborah J. Agosti of Carson City, Nevada, Hon. Carl O. Bradford of Portland, Maine, and Hon. Procter R. Hug, Jr. of Reno, Nevada, as NJC representatives to the NJC Board of Trustees, all for three-year terms, which began at the conclusion of the NJC’s annual meeting in June 2004.

Full Slate of Nominees Unanimously Elected

The nominees recommended for office by the Nominations Committee were unanimously elected at the annual meeting. The list of nominees, with a short description of each office seeker, was published in the summer issue of the News. See Nominations, ADMIN. & R.EG. LAW NEWS, Summer 2004 at 2. The elected are as follows: Chair—Randy May; Chair-Elect—Eleanor Kinney; Vice Chair—Dan Troy; Secretary—Jonathan Rusch; Budget Officer—Dan Cohen; Council Members—Bernie Bell, Kathleen Kunzer, Ron Smith, and Wendy Wagner.
Chair-appointed liaisons include: Executive Branch—Jennifer Newstead; Legislative Branch—Consuela Washington; Judicial Branch—A. Raymond Randolph; Administrative Judiciary—Ann Young; and State Administrative Law—Paul Afonso.

EU Project Update

Columbia Law Professor George Bermann furnished the Council with a written update on the Section’s European Union Administrative Law Project.

The central objective of the Project is the development and publication of a “Statement of European Union Administrative Law,” a description of the general principles and practices that govern the conduct of the EU’s principal administrative functions. To the extent feasible, this treatise would be organized in a manner similar to “A Black Letter Statement of Federal Administrative Law,” prepared by the Administrative Law and Regulatory Practice Section and published in the Administrative Law Review in the winter of 2002.

The project participants ultimately hope to educate lawyers, businesses, and the broader public concerning current EU administrative law and regulatory practice; encourage and facilitate constructive discussions between US and EU lawyers and interested members of the public; and produce scholarly studies that will serve as a basis for trans-Atlantic dialogue and for suggesting changes to EU or US law that may be desirable.

Project participants include: Co-Reporters Michael Asimow and Lisl Dunlop for Adjudication; Co-Reporters Donald Elliott and Peter Strauss for Rulemaking; Co-Reporters Christoph Feddersen, Ron Levin and Beth Nolan for Judicial Review; Co-Reporters Cynthia Farina, Sid Shapiro, and Tom Susman, for Transparency and Data Privacy Protection; and Co-Reporters Fred Aman, Sally Katzen, and Alan Raul for Oversight.

The five sections of the project have made varying degrees of progress such that overall the project generally is on course. As of July 30, the project had received over $96,000 in cash and cash pledges toward the $160,000 necessary-to-proceed budget.

The project is profiled in the September 2004 issue of the ABA Journal.

Member News

Section Delegate Judy Kaleta has been appointed to the Committee on Rules and Calendar of the ABA House of Delegates. The Committee consists of five delegates responsible for: preparing the preliminary calendar for each meeting of the House, making recommendations to the House on the order of business, reporting to the House of proposals to amend the Rules of Procedure, and assisting the Chair in the expeditious handling of the business of the House. Kaleta, a senior counsel at the Center for Dispute Resolution at the U.S. Department of Transportation, was also recently elected to serve on the Council for the ABA Dispute Resolution Section.

Former council member Sidney A. Shapiro has been appointed to the new University Distinguished Chair in Law at Wake Forest University School of Law.

Susan Court, co-chair of the Ratemaking Committee and a vice-chair of the Energy Committee, has been named Chief of Staff at the Federal Energy Regulatory Commission. Court had been FERC’s associate general counsel for general and administrative law and the designated agency ethics official.

Mary C. Lawton & Scholarship Award

Recommendations Approved

The Council approved Thomas Spahr as the recipient of the 2004 Mary C. Lawton Award as recommended by the Subcommittee on Outstanding Government Service of the Section’s Annual Awards Committee. Spahr is recently retired from the position of Chief Legal Counsel for the Child Support Enforcement Division of the Human Services Department of the State of New Mexico. He served with the Child Support Enforcement Division from 1989 until his retirement at the end of 2003.

Mr. Spahr was nominated by the Public Law Section of the State Bar of New Mexico. The Subcommittee was particularly drawn to Mr. Spahr’s nomination because he demonstrates that a career in administrative law can have a direct, beneficial benefit on the lives of hundreds, if not thousands, of citizens.

The Council approved Professor Steven Croley of University of Michigan Law School as the recipient of the 2003 Award for Scholarship for his article “White House Review of Agency Rulemaking: An Empirical Investigation,” 70 U. Chi. L. Rev. 821-885 (2003), as recommended by the Subcommittee on Scholarship.

Professor Croley’s article is largely an empirical investigation of the phenomenon of White House review of rulemaking, but it goes well beyond the reporting of data. The article situates the data within larger debates concerning the regulatory state, the proper role of the President of the United States within the regulatory state, and the costs and benefits of centralized review.

Both awards will be presented at the Administrative Law Conference this fall.
Agency Choice of Policymaking Form

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drawn from developments in the law of judicial review of agency action make the point. Imagine a court is concerned that adjudication involves too few parties and can have brutal retroactive effects. Doctrines that permit expanded rights of participation and non-retroactivity of certain adjudicatory decisions directly respond to those concerns. Perhaps a court is concerned that the procedures required for informal rulemaking—as set forth in the Administrative Procedure Act—are too skeletal, and the primary scope-of-review provision (the arbitrary and capricious standard) that will apply is too deferential, given the significant authority that can be exercised in legislative rulemaking. Doctrines that read the notice requirements to require that interested parties be apprised of the basis for all the real options before the agency, and those that ratchet up the bite of the arbitrary and capricious test respond to such concerns. Imagine a court is concerned that the agency is using guidance when it should be issuing legislative rules, in part because the agency believes private parties will not be able to (given timing doctrines) or interested in challenging the guidance and will comply instead. Doctrines that treat the guidance as final and ripe for review, or that apply a standard-of-review less deferential to the agency, respond to those concerns, as would a decision to set the guidance aside as a legislative rule masquerading as an interpretive rule.

This is not to suggest that all developments that have elaborated on the features of policymaking forms were or are inspired by judges’ desire to respond to agencies’ choices of procedure. But this judicial freedom to help design the elements of an agency’s procedural form does explain the vitality of the Chenery principle. Choice-of-procedure decisions are not different in kind from other exercises of discretion. Courts “review” those choices, but they do so in an indirect way.

It is an important step forward to understand that, contrary to what the black-letter doctrines would suggest, courts actually do react to (and thereby review) agency choice-of-form decisions. It raises the question, though, whether this sub rosa review of these discretionary agency decisions is sufficient to take account of whatever concerns we might have about such choices. That is an important question, but it is one we are not now equipped to answer because we do not have a good working understanding of how agencies actually select their policymaking form.

There is no doubt that agencies make different choices. That is true historically. In the 1950s and 1960s, most agencies implemented their statutory directives by deciding individual cases; by the 1970s a noticeable shift had occurred and many agencies started to pursue their mandates by promulgating legislative rules. Detecting trends as they are developing—agencies’ increased reliance on collaborative policymaking tools or case-by-case settlements or exceptions to general rules to make policy. Whatever the broad trends, preferred policymaking instruments vary by agency today. Some agencies rely heavily on adjudication, others on legislative rules, and others on a rich mix of tools.

These varying practices invite questions about how agencies actually choose among their available options. A preliminary hypothesis would suggest that agency personnel will want to accomplish their policy objectives with minimal costs. Agency decisionmakers will treat each of the available instruments as a package with particular features—the process to be followed, the legal effect, and whether, when and how the action can be challenged in court. Some of those features will be attractive to agency decisionmakers and others will not. From the agency’s perspective, no ideal option is likely to exist. To solidify the agency position, for instance, an agency will be required to invest substantial resources in developing, pursuing, and perhaps defending its policy. Less investment means less chance of turning its preferred policy into the rules of the game. So agency personnel will have to balance the advantages and disadvantages of each of the forms as they make their choices.

What might concern us about such agency choices? In theory, there are three potential problems. The first is that the agency will make bad policy if it chooses the wrong form. If the policy choice is complex, less investigation and less vetting of options may increase the likelihood of poor choices. Alternatively, it may be important for the agency to act quickly, and, if so, a labor-intensive process may be the wrong choice. An independent concern is that the agency will choose a form that is unfair to the parties. Even assuming that the agency has settled on the right policy, there is still the question whether those affected by the choice had an adequate opportunity to participate and express their views. Finally, one might be concerned that the agency has chosen a particular form for strategic reasons—for instance, deliberately presenting its position in a friendly forum that is especially likely to vindicate its views.

Whether agencies typically select their policymaking forms for troubling reasons is something we do not yet have a handle on because it depends on thorough-going empirical study of actual agency practices. Such an investigation is also a precursor to determining whether the current constraints on choice of form are adequate. One thing is sure, however. Contrary to conventional understanding, there is a method by which judges can and do react to agency choices of procedure. Judicial adjustment of the consequences of choosing one form or another can be seen as a way of regulating the agency’s choice in the first instance. And that method of judicial regulation could respond to any of the concerns one might have about agency choice of form. Assessing whether the constraints provided by such indirect judicial regulation are adequate, however, must await future work.
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