Time For Informational Regulation Of Individual Behavior?

Also In This Issue

- Putting the Unitary Executive in Perspective
- Improving E-Rulemaking Quality
- Increasing Agency Counsel Effectiveness

2005 ADMINISTRATIVE LAW CONFERENCE  •  WASHINGTON, D.C.  •  NOVEMBER 17-18, 2005
With a great kick off reception at Sidley Austin Brown and Wood, the Section convened its committee leadership on September 15th to plan the upcoming year. Dominating the discussion were the tragic events in New Orleans and the failure of government at all levels to save lives and property in the early days following Hurricane Katrina.

Rarely have the challenges for administration and administrative law been greater. A major American city has been evacuated and its future hangs in doubt. Millions of residents are refugees in their own country. The tragedy also exposed some troubling characteristics of American society – increasing inequality of income, persistent poverty amid great affluence, and resource constraints in mobilizing government responses that often attend a nation at war.

The Section of Administrative Law and Regulatory Practice has its work cut out. We have been asked by the ABA leadership to respond to the crisis as a section. It is our moral duty to respond regardless. The question is what we should do and how?

The section is launching an initiative to respond to the administrative law challenges posed by Hurricane Katrina. For this initiative, the section leadership is asking each committee to consider what are the important administrative law issues posed by the response to Hurricane Katrina and to report to the section’s leadership on ways in which the committees and the section can contribute to the recovery efforts. Programs have been planned for our fall meeting, and in January 2006, the section will launch an Institute on Homeland Security Law that will address many of the issues developed in this initiative.

Several committees are already working on projects to consider serious problems of governance and administration when the physical infrastructure of government is under water. For example, how should displaced people apply for conventional and emergency government benefits? Another issue is the location of the Federal Emergency Management Agency (FEMA) in the administrative structure of the federal government. The list goes on.

But the section is about so much more than responding to Hurricane Katrina. In November, the Section will hold its annual conference on Administrative Law scheduled in Washington, DC. Our fall conference offers a wide-ranging menu of programs of interest to lawyers engaged in all aspects of regulatory practice.

Featured at the fall Administrative Law Conference will be the Section’s comprehensive project to restate the administrative law of the European Union (EU). This project, funded in part by the European Union, convenes task forces of practicing and academic lawyers as well as policymakers on both sides of the Atlantic to analyze the massive body of procedural law governing the work of the institutions of the European Union which increasingly affect commercial and other interests in the United States. It is our pleasure to have the EU ambassador to the United States, the Honorable John Bruton, as our dinner speaker on Friday, November 18th. He will be introduced by our section member and former chair, C. Boyden Gray, whom President Bush has nominated to be the US Ambassador to the EU.

In the spring, the Section will hold its second Annual Administrative Law and Regulatory Practice Institute. Following a highly successful institute in Spring 2005 on rulemaking, next year’s institute will be on lobbying. This practice-oriented program will provide practitioners, industry representatives, and government officials with the knowledge and techniques to navigate Congress and federal agencies from the creation of an idea through enactment.

Mark your calendars for the important section meetings. In addition to the Administrative Law Conference in November 2005, we will have the Midyear Meeting in Chicago in February. Our Spring Meeting at the end of April 2005 will be at the Elbow Beach Club in Bermuda, one of the Atlantic Ocean’s most beautiful spots. Then we go to the gems of the Pacific – Honolulu Hawai‘i – for the Annual Meeting.

We have a busy and challenging year ahead of us. Please join us and get involved.
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Administrative & Regulatory Law News

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When we think of polluters, most of us envision a billowing smokestack or a bubbling pipe. This view assigns large firms the principal if not exclusive role as polluters, and it may have been entirely appropriate when much of the modern regulatory state was formed in the late 1960s and early 1970s. Yet after thirty years of regulation focused on large firms, individual behavior has emerged as a leading source of many toxic and conventional pollutants. In some cases, the quantities released by all individuals far exceed the quantities released by all large industrial facilities. Individual behavior is a significant factor not only for environmental regulation but across a wide range of health, safety and other regulatory fields. At a minimum, accounting for individual behavior will require regulators to look beyond command-and-control and economic measures to new regulatory strategies that target social influences on behavior. But we also might anticipate broader changes in the management of federal agencies, the allocation of responsibility among federal, state and local agencies, and the administrative law protections that enhance regulatory accountability.

**Individual Behavior As A Discrete Source Category**

To focus on the role of individuals, it is first necessary to define individual behavior as a discrete source category. By individual behavior, I mean all of the activities that are under the substantial control of a private individual. A private individual is one who is acting in a personal capacity, not in the course of employment. By substantial control, I mean that the individual has a meaningful ability to affect the societal risks arising from the behavior. I assign to the individual behavior category the emissions from sources that are exclusively or predominantly under the control of the individual, such as burning garbage in private backyards. I do not assign emissions to the individual behavior category that are predominantly out of the individual's control, such as emissions from a facility that manufactures industrial products. The most difficult cases arise when individuals, firms and government all have some degree of control. If individuals have a substantial degree of control over the emissions that arise from a behavior, I assign the emissions to the individual behavior category. For example, I assign the emissions from private motor vehicles and residential electricity use to individuals. In each of these situations, the individual has sufficient control over the emissions from the product that important changes in individual behavior can occur without action by industry or government.

**Driving by private individuals releases just under 10 times as much benzene as do all large industrial facilities.**

Even more striking, the aggregate individual contribution of many air toxics arising just from private motor vehicle use is many times that of all large industrial facilities combined. For example, driving by private individuals releases just under 10 times as much benzene as do all large industrial facilities. In addition, consider that the release of mercury to sewers from all households roughly equals the release of mercury to surface water by all large industrial facilities. Households use pesticides in substantial quantities, but the vast majority of the toxics arising just from private motor vehicle use is many times that of all large industrial facilities combined.

**Taking Individual Behavior Seriously**

By Michael P. Vanderbergh*

Large shares of the toxics arising from private motor vehicle use are many times that of all large industrial facilities combined. For example, driving by private individuals releases just under 10 times as much benzene as do all large industrial facilities. In addition, consider that the release of mercury to sewers from all households roughly equals the release of mercury to surface water by all large industrial facilities. Households use pesticides in substantial quantities, but the vast majority of the toxics arising just from private motor vehicle use is many times that of all large industrial facilities combined.

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Although quantities do not translate directly to risks, several characteristics suggest that the risks posed by releases from individuals may be substantial. At the outset, the large quantities alone provide the potential for substantial risk creation. These releases also may generate greater human exposures per quantity of pollutant released than releases from

other categories. For example, household chemicals may be handled by a user or other household members, creating a “personal cloud” effect. These releases also may be particularly likely to result in exposure to children and other sensitive subpopulations. Other releases from individuals, such as those from personal watercraft, may occur in areas of particular ecological sensitivity. In short, the data raise important questions about risk creation and suggest the need for further study.

Outside the environmental context, individual behavior is also a source of the risks targeted by other federal agencies. For example, individual behavior, including not only drunk driving, but also cell phone use, eating, and other sources of “inattention blindness,” has become the most common cause of motor vehicle crashes, surpassing both vehicle and roadway safety. In addition, the second leading cause of preventable deaths in the United States is obesity, leading to direct and indirect medical expenses of roughly $100 billion annually. This point is not that large firms should no longer be regulated in each of these areas but that individual behavior should be viewed as a discrete source category when policymakers are identifying potential regulatory targets and selecting regulatory measures.

The Challenge of Individual Behavior

Even though individual behavior is often a large source of a societal risk, the nearly exclusive focus on large firms may be defensible if individuals are not amenable to regulation. In fact, individual behavior is resistant to change. The intrusiveness and expense of enforcing formal legal measures against millions of individuals make individual behavior difficult to regulate through formal legal measures backed by sanctions. As a result, extension of the command-and-control regulatory approaches often used against industrial sources is unlikely to be effective, efficient, or politically feasible. Past attempts to use traditional approaches generally have failed miserably. Not surprisingly, few regulatory measures focus directly on individual behavior, and those that do are rarely enforced.

Economic incentive measures have been effective when directed at industrial sources, but they also face limitations when applied to individual behavior. Market trading can be an efficient, flexible means of reducing emissions from industrial sources, but the large number of potential market participants and the minute emissions from any one participant will make it difficult to extend market trading to many individual behaviors. Similarly, although taxes and subsidies can provide incentives for socially desired behavior, taxes are deeply unpopular, and subsidies are vulnerable to diversion in favor of special interests rather than societal environmental goals.

Norms hold more promise. In recent years, legal scholars have begun to acknowledge that informal social influences often affect individual behavior as much or more than formal legal measures and economic incentive measures. The scholarship has recognized that the law can influence the creation, modification, and enforcement of social norms—informal obligations that are enforced through social sanctions or rewards—and personal norms—obligations that are enforced through an internalized sense of duty to act and guilt or related emotions for failure to act. This norm scholarship has begun to identify the ways in which information disclosure and other regulatory measures may affect social influences on behavior.

Working on a parallel track, social psychologists have developed models of behavior that are compatible with the legal norms approach. Although substantial differences in approach remain, the ability to model the responses of individuals to environmental information appears to be improving. In addition, empirical studies have identified an increasing number of individual behaviors that are influenced by personal or social norms. Although the approach must be finely tuned to be successful, the studies suggest that public information campaigns and other norm campaigns, either alone or in combination with formal legal and economic measures, can make meaningful changes in recycling, residential electricity use, waste disposal and other environmentally significant behaviors.

Experience in several other regulatory fields also suggests that properly designed norm campaigns may be quite successful, particularly when used in combination with other regulatory measures. Both smoking and seat belt use have been the subject of command-and-control laws (e.g., bans on smoking in certain areas and seat belt use requirements), economic incentives (e.g., cigarette taxes and child safety seat subsidies), and public information campaigns (e.g., anti-smoking and seat belt campaigns). Both areas have demonstrated dramatic changes in individual behavior over a several decade period.

Policymakers thus can now draw on a growing base of theoretical and empirical work to aid in the design of norm campaigns and other types of informational regulation. This work can lead to low-cost, non-intrusive new regulatory measures. For example, I have proposed extension of the current Toxic Release Inventory (TRI), which requires the public reporting of toxic chemical releases from large industrial facilities, to include an Individual Toxic Release Inventory (ITRI). The ITRI would use survey techniques to develop estimates of toxic releases from individual behavior. If generated in the same format and released at the same time as the TRI data, the ITRI data on individuals’ toxic releases may activate norms in the general public and enable policymakers to make more rational allocations of regulatory resources.

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Implications for the Regulatory Administrative State

Addressing individual behavior will require not only changes in the types of regulatory measures used by agencies, but also changes in agency management, the allocation of responsibility among federal, state, and local governments, and the procedural protections that ensure agency accountability. Agency management changes will be required across many areas. In the environmental arena, EPA and other agencies will need to collect and publish data in ways that allow policymakers and the public to assess the contributions of individuals to environmental harms. Research will be needed to develop and refine models designed to predict the influences of legal, economic, and social incentives on individuals. A panel of the National Research Council of the National Academies of Science recognized these needs in a recent report.4 Agency staffing and resources also will need to be shifted. Agencies that are now largely dominated by lawyers, economists, and engineers will need to add expertise in social psychology and other areas with expertise in steering individual behavior.

In addition, cost-benefit analysis techniques will need to be modified when individuals are potential regulatory targets. Cost benefit analyses will need to account not only for legal and economic influences but also for social influences on individual behavior. The ability to evaluate and demonstrate the efficacy of informational regulation of individual behavior will be important. In particular, agencies will need to conduct rigorous, quantitative assessments of the effects of their information-based regulatory efforts on individual behavior.

The federal-state relationship also will need to be re-examined. Economies of scale exist at the federal level to conduct, assess and report to the states and local governments on research regarding environmentally significant behaviors. At the same time, national norm campaigns may fail if they overlook regional differences in belief, norms or even language. For some issues, EPA and other federal agencies may be better situated to provide information directly to the public as well as to facilitate the activities of state and local government. For others, states and localities may be better positioned to tailor public information campaigns and other informational regulatory efforts to local populations.

Finally, as agency information dissemination begins to rival rulemaking as an important agency regulatory function, procedural protections will become more important. The Administrative Procedure Act (APA) reflects the focus of the New Deal regulatory state on promulgating formal and informal regulations to direct the conduct of large firms. Among the unspoken assumptions that underlie the APA are that these rulemakings are agencies’ most significant regulatory activities, and that the rulemaking processes required by the APA provide a means for regulated entities and the public to participate in agency regulatory activity.

In contrast, the procedural protections of the APA typically do not extend to the types of agency actions that are more likely to be directed toward individuals, such as data disclosure and public information campaigns. Procedural safeguards will be needed to ensure that some measure of the public access, transparency in agency decision-making and careful deliberation required by the APA for rulemaking is extended to agency information dissemination efforts. Scholars have begun to turn their attention to the importance of standing and judicial review when agencies engage in informational regulation, but many issues remain unexplored. These issues include the extent to which the APA should be amended to require disclosure of proposed agency informational regulatory actions, solicitation of public comment, creation of a public record, and disclosure of the reasons for engaging in informational regulation.

The recently enacted Information Quality Act (IQA)5 also may play a large role in steering the informational regulatory activities of EPA and other federal agencies. The IQA required OMB to provide federal agencies with guidance to ensure “the quality, objectivity, utility, and integrity” of the information they disseminate. Difficult questions remain to be resolved about whether the IQA, as implemented by federal agencies and interpreted by courts, will prevent egregious misuse of information in agency norm campaigns or will be used as a tool to bar agencies from employing effective, low-cost efforts to change individual behavior.

Conclusion

The movement in the 1960s and early 1970s toward regulation of firms to the exclusion of individuals was a rational one for government faced with a wide array of risks created from an increasingly industrial society. Indeed, the regulation of industrial sources gave us a thirty year reprieve from the need to address many of the environmental and other effects of individual behavior. That time is past. With population increasing at a rate of 38% every thirty years and many other relevant measures of individual behavior increasing at an even greater clip, steering individual behavior can no longer be an afterthought. Despite their success, the environmental, health, and safety laws and administrative apparatus have communicated the implicit message that individuals are not important sources of societal risks. Re-conceptualizing individuals as worthy targets of regulatory action will present fundamental challenges. A radical re-direction is unlikely to occur, and may not be advisable given the continuing importance of industrial sources. But rational regulation from here forward will not be possible without accounting for the contributions of individual behavior.
The Unitary Executive in Historical Perspective

By Steven G. Calabresi and Christopher S. Yoo*

The impeachment of President Clinton and a steady stream of separate opinions in Supreme Court’s decisions on presidential power have intensified the already simmering debate over the legitimacy of limits on the president’s authority to execute the law. The key question is whether the Constitution rejected the “unitary executive” in favor of a “unitary executive” in which all administrative authority is centralized in the president. The constitutionality of such familiar institutions as special counsels and independent agencies hangs in the balance.

Although the initial analyses centered on the text and structure of the Constitution, more recent scholarship has focused on historical practices. Some scholars have suggested that independent agencies and special counsels are such established features of the constitutional landscape that any argument in favor of a unitary executive is foreclosed by history. Others, led by Bruce Ackerman, have claimed that the New Deal represents a “constitutional moment” that altered the distribution of power within the federal government. Still others have argued that the added policymaking role of the modern administrative state justifies allowing Congress to impose greater limits on presidential control over the execution of the law. Many of those offering such arguments have candidly recognized the need for a more comprehensive assessment of the historical record of presidential control over the execution of the law.

We have responded to this challenge by embarking on a four-article series examining the history of the president’s assertions of authority over the execution of the law. In conducting our presidential-by-president review of executive practices, we have employed an interpretive method known as “departmentalism” or “coordinate construction,” which holds that all three branches of the federal government have the power and duty to interpret the Constitution and that the meaning of the Constitution is determined through the dynamic interaction of all three branches. Only if a long-standing and unbroken practice exists in which both Congress and presidents have acquiesced can one justifiably claim that a practice has become established. Our methodology resembles the one followed by the U.S. Supreme Court in INS v. Chadha, 462 U.S. 919, 942 n.13 (1983), which relied on the fact that eleven of thirteen presidents from Woodrow Wilson to Ronald Reagan had refused to accede to the legislative veto in rejecting arguments that the legislative veto had become accepted under the separation of powers.

Our study reveals that the historical record is much more interesting and colorful than what the conventional wisdom would suggest. Most importantly for our purposes, it shows that presidents throughout history have consistently defended the unitary executive by opposing attempts to limit their control over the administration of federal law. As it is impossible to do justice to the richness of more than two centuries of history in a few short pages, we will simply point out a few of the highlights of our analysis.

The Civil Service

Perhaps the most interesting result of our study is with respect to the civil service system. It is a common misconception that the Civil Service Act of 1883 placed substantive limits on the president’s removal power. In fact, the Act left the president’s removal power unfettered, aside from prohibiting the discharge of a federal employee for refusing to make political contributions. Indeed, the original Senate bill contained broader limits on the removal power. These provisions were removed in response to President Arthur’s specific objections.

If anything, the civil service laws had the effect of reinforcing, rather than weakening, the unitariness of the executive branch. By limiting appointments to non-policy-related positions to those who had passed a competitive examination, the Act’s effect was to weaken the patronage influence of the Senate, which had the inevitable effect of strengthening the president’s control over the administration of the law.

Thereafter, a long line of chief executives, including Presidents Benjamin Harrison, Cleveland, McKinley, Theodore Roosevelt, Taft, Franklin Roosevelt, Eisenhower, Kennedy, Nixon, and Carter, has maintained that the Civil Service Act placed no substantive limits on the power to remove. Subsequent executive orders and statutes added greater procedural protections and

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* George C. Dix Professor of Constitutional Law, Northwestern University, and Professor of Law, Vanderbilt University, respectively. This represents an abridged version of the final two installments of our more comprehensive analysis of presidential practices with respect to the unitary executive. See The Unitary Executive: During the Third U.S. Century, 1489—1984 (1985) and THE UNITARY EXECUTIVE IN THE MODERN ERA, 1945—2004, 91 J. STA. L. REV. 661 (2005) (with Anthony J. Colangelo). The complete history is forthcoming as a book entitled A History of the Unitary Executive: Executive Branch Powers from 1789 to 2005, (University Press).

provided that members of the classified service could be removed "for such cause as will promote the efficiency of the service and for reasons of political economy and the consistency with which presidents have asserted that the civil service system is "unitary," and also of surprisingly recent vintage. Given the persistently and the Federal Communications to remove policymaking officials, it is hard to see how this development could turn the civil service laws into an established derogation from the unitariness of the executive branch.

Independent Agencies

Independent agencies, such as the Securities and Exchange Commission and the Federal Communications Commission, are often regarded, incorrectly as it turns out, as another established derogation from the unitary executive. The institution of the independent agency is generally traced to the creation of the Interstate Commerce Commission (ICC) by the Interstate Commerce Act of 1887. There is reason to question whether the creation of the ICC merits the significance usually accorded to it. Through the decade-long debate leading up to the Act’s passage, members of Congress consistently referred to the ICC as part of the executive branch. Consistent with this view, the ICC was initially placed within the Department of Interior and thus was not independent at all. It was not until 1899 that the ICC was removed from the Department of Interior, and even that shift was made for purely practical reasons.

It is also far from clear that the provision limiting removal of members of the ICC for inefficiency, neglect of duty, or malfeasance was intended to represent a departure from the unitariness of the executive branch. Even critics of the unitary executive acknowledge that it is not at all obvious that these removal provisions in any way precluded the president from removing a member of the ICC simply for disagreements over policy.

Presidents and courts have consistently construed these new restrictions as simply reinforcing the statutory prohibition on removals for failure to contribute to political campaigns without imposing any other substantive limits. It was not until the mid-1970s that the first real limits on the president’s removal power over the civil service finally emerged. Interestingly, the threat to presidential power came not from Congress, but rather from a series of Supreme Court decisions holding that the civil service system gave federal employees a property interest in their jobs for purposes of procedural due process. See, e.g., Arnett v. Kennedy, 416 U.S. 134, 151 (1974). The subsequent enactment of the Civil Service Reform Act of 1978 (CSRA) codified some of these procedural protections. Even so, the CSRA retained the previous standard for dismissal limiting removals “only for such cause as will promote the efficiency of the service” and added a list of prohibited personnel practices, including, among other things, discrimination, political coercion, nepotism, and retaliation against whistleblowers. The statute did contain provisions exempting all officials occupying policymaking positions, which limited the scope of the CSRA to purely ministerial officials. As such, it did not represent a significant derogation from the unitariness of the executive branch.

The idea that the civil service laws limit the president’s power to remove is thus of surprisingly recent vintage. Given the consistency with which presidents have asserted that the civil service system did not limit the president’s power to remove policymaking officials, it is hard to see how this development could turn the civil service laws into an established derogation from the unitariness of the executive branch.

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to assert his authority over the independent agencies and to remove members as he saw fit. Roosevelt further attempted to resolve the issue by pushing through the recommendations of the Brownlow Committee that the independent agencies be integrated into the executive departments, only to see that effort derailed by the change in political winds caused by the failure of FDR’s court packing plan.

Subsequent presidents continued the practice of asserting their control over the independent agencies. Backed by reports issued by the first and second Hoover Commissions, James Landis, and the Ash Council, Presidents Truman, Eisenhower, Kennedy, Johnson, Nixon, Carter, Reagan, George H.W. Bush, and Clinton issued policy directives to the independent agencies, included them in executive orders mandating ethical standards, ex parte contacts, and procurement rules, and subjected them to centralized budget and regulatory review by the Office of Management and Budget (OMB). In fact, a number of distinguished administrative and constitutional lawyers, including Kenneth Culp Davis, Lawrence Lessig, Richard Pierce, Peter Strauss, Cass Sunstein, and Laurence Tribe, have questioned whether the “for cause” removal restrictions preclude presidents from removing a member of an independent agency for failing to follow a presidential policy directive. It would thus seem too facile to conclude that independent agencies represent an established derogation from the traditional system of checks and balances in the unitary executive in which presidents have acquired.

Independent Counsels

The institution of special prosecutors has a long history that dates back to the Administrations of Presidents Theodore Roosevelt, Coolidge, and Truman. In each of those instances, the special prosecutors were fully removable by the president and thus posed no theoretical challenge to the unitary executive. Political support for independent counsels insulated from presidential control began to grow following the “Saturday Night Massacre,” in which Nixon directed Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus to remove Archibald Cox as Watergate special prosecutor, notwithstanding the Justice Department order granting Cox the “greatest degree of independence that is consistent with the Attorney General’s statutory accountability” and providing that Cox would not be removed “except for extraordinary improprieties on his part.” After Richardson resigned and Ruckelshaus was removed for refusing to fire Cox, the task fell to Solicitor General Robert Bork.

Over time, many leading Department of Justice officials have questioned the conventional wisdom that the Saturday Night Massacre showed the need for a prosecutorial institution operating free from presidential control. The political uproar following Cox’s dismissal forced Nixon to appoint another special prosecutor, Leon Jaworski, who completed the Watergate investigation and drove Nixon out of office. The aftermath to the Saturday Night Massacre showed how political constraints can ensure the effectiveness of investigations of high-level government misconduct without resort to constitutionally problematic institutional arrangements. From this perspective, it is Jaworski’s successful completion of the Watergate prosecution, rather than Cox’s removal, that represents the central lesson for the unitary executive debate. Indeed, the fact that Nixon was forced to resign under threat of impeachment without an independent counsel law shows that the traditional system of checks and balances can be made to work in the absence of such a law.

Nonetheless, the post-Watergate years witnessed the enactment of the Ethics in Government Act of 1978 (EIGA), the first statute to sanction independent counsels operating outside of executive control. Despite the severe misgivings of senior Carter Administration officials about the Act’s constitutionality, the political atmosphere in the wake of Watergate was such that Carter had little choice but to sign the law. This decision must be seen in light of the fact that the Administration fought hard to preserve presidential control over the Department of Justice in the face of a hostile Congress. The Ethics in Government Act was a small price to pay for the greater goal of preventing a post-Watergate Congress from turning the entire Justice Department into an independent agency. The constitutionality of the EIGA was opposed (albeit not with complete consistency) by every president to follow Carter. The most notable exception was the opposition of Ronald Reagan, who pushed his challenge to the constitutionality of the EIGA all the way to the Supreme Court, only to be turned back in the landmark decision of Morrison v. Olson, 487 U.S. 654 (1988). The years that followed bore out Justice Scalia’s warning that special prosecutors could be manipulated for political purposes, as both parties accused the other of using ethics probes as political weapons. The controversy over independent counsels eventually culminated with the impeachment of President Clinton. In the wake of the impeachment, the Clinton Administration opposed reauthorization of the EIGA as an unconstitutional violation of the separation of powers. A bipartisan array of former attorneys general, senators, and independent counsels agreed. The abruptness of the collapse of political support for the EIGA was somewhat shocking. At the end of 1997, the statute continued to enjoy broad support, although many commentators and legislators believed some adjustments might be necessary. By the end of 1998, political support had almost completely evaporated, and the statute was allowed to lapse in 1999.

Thus, as we predicted in the first article in this series in 1997, the rise and fall of the EIGA would ultimately parallel the rise and fall of the Tenure of Office Act of 1867 chronicled in our prior work. Both statutes were enacted by imperial Congresses at a time of great presidential weakness: the Andrew Johnson Administration in one case and the post-Watergate Carter Administration in the other. Both statutes lasted roughly twenty years, during which time they worked ineffectively. Both statutes were then finally repealed in a show of bipartisan determination to return to

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A Modest Proposal: Improve E-Rulemaking by Improving Comments
By Fred Emery* and Andrew Emery**

The Commenting Game
Much has been said about using e-rulemaking technology to make it easier for interested public citizens to comment on government agency rulemakings, and much has been said about using similar technology to help government agencies deal with the onslaught of comments. However, little in this dialogue has focused on improving the quality of the comments or the overall quality of the citizen-government discourse. The goal of increased public participation in rulemaking should be to improve the quality of the citizen-government discourse, not to increase the sheer volume of comments. But this objective has been lost in a technology-driven battle, which on the one side generates and shuffles comments and on the other side collects and unshuffles them.

The goal of e-rulemaking from the public citizen perspective is to increase the opportunity and ease by which the public can contribute to the participatory democracy that is rulemaking. One of the goals of e-rulemaking from the agency perspective is to increase the quality of comments. However, this agency goal is often overshadowed by the imperative of dealing with masses of jumbled comments. Sometimes it is no accident that the comments are jumbled. Interest groups have been known to encourage their members to take steps to make it hard for an agency to treat a mass of comments as if they were just X number of form letters.

In this same publication a year ago, Professor Beth Noveck declared, “The current plan for e-rulemaking is nothing short of a disaster.” The problem overlooked by e-rulemaking is that the comments numbers game it is fueling. The Internet as a means for expanded public participa-
tion in rulemaking has inspired a sort of rulemaking arms race. Some commenter organizations are investing excessive time and money in technology that will enable them and their members to produce large numbers of comments as quickly as possible in response to any rulemaking. Some commenter organizations are convinced that their position is so unique that masquerading them as thousands of unique thoughts from thousands of thoughtful taxpayers.

Under the current e-rulemaking plan, interest groups spend money on the latest software to generate thousands of e-comments, and agencies are forced to invest in sophisticated software that will enable them to mine the thousands of comments to identify the ten salient points. This is a silly, wasteful, and circular game the rulemaking world has engaged in. It is reminiscent of the dilemma faced by Matthew Broderick in the movie War Games.

The shortcomings of the “current plan for e-rulemaking” and the shortcomings of many preferred solutions are a result of a failure to recognize that the source of the problem of dealing with masses of public comments is not related to e-rulemaking. Many agencies were besieged by commentors long before the coining of the phrase e-rulemaking. The problem of dealing with large numbers of comments will not be solved by focusing on advances in technologies that exacerbate and complicate the problem and render more expensive the “solution.” The source of the problem is that commentors don’t know how to comment effectively and agencies don’t do an effective job at inviting comments. The only sensible solution is to convince all of the players that the comment numbers/shuffling game not only produces no winners, but also is pointless. In the movie War Games, a supercomputer learned that there were no winners in a global nuclear war. Perhaps we can learn that there are no winners if the rulemaking process is completely turned over to supercomputers. The solution requires the federal regulatory agencies to learn better ways of communicating their requests for comments to the public, and it requires the federal regulatory agencies to educate commenters and government how best to submit their ideas to the government.

While rulemaking is called a participatory democracy, it is not governed by majority vote. One thoughtful analysis can trump thousands of scrambled form letters. For a fraction of the money the government would spend on software that mixes public comments for common themes and useful input, the government could engage in a public relations campaign to educate those who honestly wish to participate in rulemaking.

Recommendations
Clearly Structure Requests for Comments
Agencies should structure their requests for comments to notices of proposed rulemakings in the same way the do in advanced notices of proposed rulemakings and similar documents. When
Implement Public Comments on Preferable Method of Submitting Comments

Federal agencies need to make a coordinated effort to convince the public that quality matters more than quantity. Associations and interest groups need to get the message that they should submit one clearly organized comment with as many signatories as they wish, rather than flood the agencies with thousands of scrambled messages. While it may be difficult to convince these groups that rulemaking is not a vote, it may be possible to convince them that their purposes would be better served by having their membership send emails with a simple statement that they support the positions on issues raised by ABC Organization, rather than submitting a medley of ABC’s concerns.

Implement Public Relations Campaign

The Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) has been very effective in getting the word out to agencies about Regulations.gov. Regulations.gov could publish a Web page, called something like “Submitting Effective Comments,” explaining the regulatory process and how to write a good, persuasive, and effective comment. OIRA could issue a memorandum to agencies instructing them to put a reference to the Regulations.gov “Submitting Effective Comments” Web page in all requests for comments.

Another possibility is for agencies to insert boilerplate in their documents about “proper submission of comments,” explaining to would-be-commenters the process that underlies the game of rule-making and how to most effectively participate. Agencies may even want to adopt procedural rules that establish guidelines for effective commenting.

While agencies could not refuse to consider comments that do not follow the guidance, commenters who ignore the agency guidance would be less likely to succeed if they challenge the agency in court on procedural grounds. In addition to efforts made through OMB, all agency press offices/public affairs offices should provide speaking points to agency personnel so that, when appropriate, agency executives speaking at association and interest group meetings could address the issue of submitting effective public comments.

Conclusion

While the above suggestions do not guarantee that in the future the public comment process will work perfectly, they are at least worth trying. The potential commenters who would most likely object to these efforts are those whose hidden agenda is to undermine the rule-making process. Why not let these people sue if they want and trust the courts to rule in an agency’s favor if the agency has done everything in its power to treat legitimate public comments fairly?

The best argument for pursuing the above recommendations is cost. The cost to provide an organized request for comments and to undertake a public relations campaign on effective commenting would be minuscule compared to the cost of the technological arms race that is now getting underway within agencies and among interest groups. Not to mention the across-the-board cost to government and society of further hamstringing the “efficiency” of the informal rulemaking process, the process that Ken Davis once called “one of the greatest inventions of modern government.”

We anticipate that the strongest opposition to these recommendations will come from those who would profit from the alternative—groups intent on killing rules through floods of comments, technology companies who would like to sell software to both sides of the commenting game, and “experts” who would like to spend the next decade living off grants that fund their studies of the commenting process. These recommendations are not a call to abandon technology. Technology and the Internet are going to be deeply embedded in all rulemaking efforts in the future, and they have the potential to improve it. These recommendations are merely a request for the exercise of a little sound judgment. Let’s not get so carried away with the enthusiasm over the newest bit of software that will mine one million jumbled comments in ten seconds that we can’t step back to ask the question, “Why do we have one million jumbled comments?”

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Leslie, the role of government lawyers. See, Melanie
Clients: Why Privilege the Privileged?

SMC Recommendation 04:
Administrative and Regulatory Law News Volume 31, Number 1
Public Service by Public Servants

There are at least three articles that analyze
England; General Counsel, Administrative
Visiting Professor of Law, University of Hull,
University Washington College of Law and
* Fellow in Administrative Law, American
University Washington College of Law and
Visiting Professor of Law, University of Hull,
England; General Counsel, Administrative

NPR was concerned that the
interests may conflict. They saw
agency lawyers as essentially “nay-sayers,”
who were quick to point out the legal
risks in various courses of action but less
quick to array the legal risks or recom-
mend feasible options. NPR saw the
private bar’s concept of “attorney-client”
as the solution to agency management
frustration because, if political appointees
or program-managers were characterized
as “clients,” they would then be entitled
to receive zealous and loyal “represen-
tation” of their program objectives. Indeed,
NPR analogized “clients” to
“customers” and proposed the franchising
of agency legal services so that
program officials, as customers, could
shop for legal services and select the
lawyers they wanted to represent them.

NPR asked the Administrative
Conference of the United States (ACUS
or the Conference), the government’s expert advisory body on agency organi-
ization and procedure, to convene an
inter-agency task force to explore the
issue thoroughly. A task force composed
of senior political and career civil
servants, including representatives of the
Department of Justice and the White
House Counsel’s Office, examined the
issue in 1995 under ACUS auspices. The
ACUS task force completed a set of
recommendations and sent them to
NPR on October 19, 1995. The recom-
mendations did not receive any apparent
publication.

The role of government lawyers
in an age of dynamic administrative
and regulatory change remains a vital
one. The ACUS task force provided
a thoughtful response to NPR’s concerns
that merited further evaluation. The Exec-
utive Branch and the public would be
well served if the role of agency offices
of general counsel was thoroughly exam-
ined—not by the Section or a
revitalized ACUS.

Set out below are excerpts from the
ACUS task force report and recommen-
dations. As best I can determine, despite
the passage of a decade, this is their first
wide-scale publication.

Report of the ACUS Inter-Agency
Group (September 1995)

As part of its comprehensive review of
government operations, the National
Performance Review (NPR) examined
management control systems within

Assessing “Who is the Client” in the
Government Context

By Gary J. Edles*

W

When the Clinton Administra-
tion took office in 1993, it
began a comprehensive
examination of management
centred systems and within govern-
mental departments and agencies. A
special task force was created under the
direction of Vice President Gore, known as the National Performance Review, or
NPR. NPR’s management goals were to
enhance the effectiveness of govern-
ment units and save tax dollars in the
process. It issued a series of reports on a
variety of subjects.

One portion of NPR’s Report enti-
tled Streamlining Management Control
(SMC) took a cursory look at the
mission of the government’s numerous
offices of general counsel. Noting what
it described as “the restrained climate
in which both managers and general coun-
sels have been asked to operate,” NPR
took the view that government lawyers
were insufficiently innovative and oper-
ated in a “culture laden with red tape.”

SMC Recommendation 04: Increase the
Effectiveness of Offices of General Counsel,
at 28 (September 1993) (hereafter SMC
04). It acknowledged that the offices of
general counsel (OGCs) throughout the
government were pivotal players in the
clearance process for agency initiatives.

But NPR was concerned that the
government lawyers’ role as interpreters
of the law and representatives of their
clients’ interests may conflict. They saw

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government departments and agencies. The NPR recognized the importance of effective management systems for achieving agencies’ missions and programs while, at the same time, enhancing public confidence that tax dollars are spent wisely. The NPR found the federal government’s existing management control systems were “vast, complicated, very expensive.” Office of the Vice President, Accompanying Report of the National Performance Review, Streamlining Management Control (SMC) (September 1993) at 1.

One portion of this accompanying report looked at “the legal culture of the federal government,” particularly the role of agencies’ offices of general counsel (OGCs). Noting the pivotal position of OGCs (“in order to accomplish their agency’s mission, top managers rely on their OGC to determine the legal implications of management initiatives”), the report pointed out that some program managers viewed OGCs as only “naysayers,” i.e., obstacles to the accomplishment of program goals, and both managers and general counsels operated in a “culture laden with red tape.” SMC Recommendation 04: Increase the Effectiveness of Offices of General Counsel at 27, 28…

SMC 04 concluded that agencies could better achieve their missions by increasing the effectiveness of their offices of general counsel and recommended that this could best be accomplished by identifying or defining the agency’s “client.” Once the client was identified, SMC 04 further recommended that agency heads encourage OGCs to be more responsive to their client by allowing program managers a choice in selecting legal services, perhaps via a “franchising operation or other market mechanism.” The report also recommended that agency heads, in collaboration with line managers, develop performance measures and “feedback loops” for offices of general counsel that would encourage close cooperation with clients. Id. at 29-30.

The recommendation called on the Administrative Conference to convene and facilitate an inter-agency group of general counsels (or their equivalents), OGC staff members, and a representative of the Department of Justice for the purpose of “defining clearly who is the client of the Offices of General Counsels within agencies.”…

In response, the Administrative Conference assembled an ad hoc inter-agency implementation group in accordance with the criteria specified, to review SMC 04’s recommended actions and to propose guidance for agencies’ OGCs. The twelve (12) members represent a wide variety of experience, perspectives, and agencies… The inter-agency group held four separate meetings to discuss SMC 04 and the proposed guidance, particularly client identification and OGC effectiveness. In these discussions, the group evaluated the recommendations, using its broad and diverse experiences as agency general counsels and OGC staff members. The group also considered a report of a recent customer survey conducted by the general counsel of the Department of Education. In addition, the group met with the chief drafter of SMC 04 and discussed its methodology, sources, and conlcusions. Finally, the group reviewed the Conference staff’s research and analysis.

Conclusions

Based on its experience and analysis, the group reached several conclusions, for the reasons discussed below, with respect to increasing the effectiveness of offices of general counsel:

1. Given that many agency managers experience or perceive lawyers as obstacles to the accomplishment of program goals, the group believes each agency’s office of general counsel should take all necessary steps to increase its effectiveness by changing those experiences and perceptions.

2. However, the group does not agree with SMC 04’s chief reliance on client identification as the framework for increasing OGC effectiveness. Rather, the group is of the view that offices of general counsel can and should become more effective by addressing and resolving management and communications problems within their offices and between their offices and agency program offices.

3. The group believes that agency program and other subordinate managers should not select their own source of legal services through “franchising” or similar mechanisms.

Discussion

Identification of the Client

The need to increase the effectiveness of offices of general counsel, including, particularly, the need to improve working relationships between agency lawyers and program managers is clear. SMC 04 suggests the chief way to make OGCs more effective is to identify or “define” their agency client.

It is not hard to understand SMC 04’s reliance on client identification as central to increasing OGC effectiveness. Frustrated and dissatisfied by the extraordinary effort and time it sometimes takes to carry out management initiatives, managers often blame the lawyers, whether correctly or not, for a large part of the problem. Managers believe they develop plans or programs, only to be told by the office of general counsel, often at the eleventh hour, that their plans or programs are unlawful. These managers, and SMC 04, see the private bar’s concept of “client” as a solution to the problem, reasoning that if program managers were deemed “clients,” they would be entitled to increased zealous and loyal representation for their plan or program from agency lawyers.

The inter-agency group, however, believes that “defining the client” is not the best way to increase the effectiveness of offices of general counsel, mainly because the recommendation underestimates the complexity and efficacy of such an exercise in the federal agency context. The private bar’s concept of “client” flows from the fundamental and long-standing ethical principle that a lawyer cannot represent conflicting interests, for example, both the buyer and the seller in the same transaction. This principle, which precludes private-sector continued on next page
lack of a lawyer-client relationship. The National Performance Review rightly emphasized the importance of agencies serving their “customers,” but “client” is more than just another name for customer. It has a specific legal meaning and represents the legal professional’s effort to regulate and hold accountable private lawyers on behalf of their private clients. This is not to say that public sector lawyers should not be held to high professional and ethical standards in their dealings with program units. It is, rather, to say that the “client” concept is less suitable to the public sector, where the relationship among agency officials, managers, and lawyers is inherently complex, and the identity of the client may vary according to the nature or stage of the matter, even in a single case, and according to the purpose for which the “client” concept is used (e.g., management efficiency or ethical considerations). …

Even more important, when a government lawyer is confronted by a genuine conflict of interest or position between or among agencies or units within an agency, well accepted procedures are ordinarily in place to resolve the conflict, unlike the private bar, which must rely on standards of professional conduct. To properly identify the position to represent (i.e., the client) the government lawyer can rely on these established processes to resolve conflicts within and among agencies — from submission of the conflict to the agency head for resolution, to cabinet decisions, to the President’s instructions. In a very few situations, resolution of potential or actual conflicts might require assignment of a lawyer to represent a particular agency unit, or even representation by counsel other than agency lawyers (e.g., an agency official accused of unlawful behavior). Nonetheless, SMC 04 spotlights a genuine problem: agency managers’ experience with or perception of inadequate lawyering. It is important to address this issue and remedy long standing problems between agency managers and general counsel, including poor communications, unrealistic analysis of risk, limited discussion of alternatives, and delayed clearances.

Thus, the inter-agency group has concluded that to best increase the effectiveness of offices of general counsel and to fairly address the complaints noted in SMC 04, the issue must be recognized as a management issue within a representative democracy: How can government lawyers, taking into account existing legal obligations, work more closely and productively with agency managers to better achieve agency objectives, while remaining cognizant that ultimate policy decisions properly rest with politically accountable agency heads, or their designees?

The group believes increasingly scarce attorney resources should be focused on developing sound advice and legally defensible positions for the agency, not fragmented in support of one or more intra-agency “clients.” Consistent with this view, specific recommendations for improving the effectiveness of offices of general counsel are set out below.

**Franchising Legal Services**

Providing increased opportunities for competition was a key concept of the entire NPR Report. In SMC 04, the concept was presented as “franchising” or a similar market-like mechanism, permitting program managers to shop for legal services and select the lawyer(s) with whom they wish to work. The inter-agency group does not believe that such arrangements would ensure consistent, reliable, high quality legal services. Although not in favor of franchising legal services, the group does agree that the agency’s decision maker should have the benefit of considering the full range of legal views, including risks, on any given matter, and that agency heads can achieve this in a number of ways. The group also supports provision of centralized legal services by the agency’s chief legal officer; however, the group understands there may be unique situations (e.g., offices of Inspectors General or commissioners’ personal legal assistants at multi-member agencies) where lawyers should work for and represent a specific agency program or official.

In all cases, the establishment of closer, more productive working relationships between agency lawyers and managers, particularly early involvement, reasonable risk assessment, and the development of alternatives, likely would provide managers and decision makers the benefit of multiple views without the need to go lawyer shopping. Specific recommendations are set out below.

**Recommendations**

1. Offices of general counsel can best increase their effectiveness by reviewing their own management and communication structures and policies, as well as those for communicating and working with program managers who require legal services, and by instituting necessary improvements. Surveys, periodic meetings, program managers who require legal services, and by instituting necessary improvements. Surveys, periodic meetings, periodic informal telephone inquiries may provide useful feedback.

2. The centralized legal services provided by the agency’s chief legal officer should present the full range of legal opinions, options for agency action, and assessment of legal risks to managers and the agency decision makers. To ensure the quality of such services, subordinate managers should not select their own source of legal services. A small number of unique situations (e.g., offices of Inspectors General or multi-member regulatory agencies) may require that a lawyer be assigned to work for and represent a specific agency official or program, and such lawyers should also present the full range of legal opinions and advice.

3. Unless otherwise specified by law or regulation, representational conflicts should be resolved on a case-by-case basis by politically accountable officials using established processes. Conflicts between program managers and offices of general counsel should be resolved ultimately by the agency head. Inter-
agency disputes should be resolved through established channels (e.g., the Department of Justice, the Administrator of the Office of Information and Regulatory Affairs, the President).

4. Agency program managers and officials should be encouraged to involve offices of general counsel at the earliest possible point in planning and decision making about agency initiatives and to maintain such involvement throughout. Offices of general counsel should provide timely legal advice and design a streamlined approval or sign-off process in such matters.

5. Offices of general counsel should ensure that their lawyers promptly evaluate proposed management initiatives and inform managers of the probable legal risks associated with particular initiatives or courses of action. In these evaluations, lawyers should employ realistic risk management concepts and present feasible alternatives.

6. Office of general counsel should ensure that their lawyers explore and present to program managers all appropriate alternative courses of action if a proposed management initiative is deemed legally unacceptable. Lawyers should be careful to distinguish between matters with which they disagree as a matter of policy and those that are not legally defensible.

7. To ensure continued improved communications and management, agency heads should encourage offices of general counsel and program managers to devise and participate in innovative and flexible joint arrangements, such as details, joint assignments, and training courses in cooperation, team building, and legal analysis.

8. Offices of general counsel should adopt mechanisms to regularly share information among lawyers and should institute frequent and regularized contact between lawyers and program staff to build better understanding of the rules of each.

9. The Attorney General or his delegate and the Chairman of the Administrative Conference or her delegate should undertake a joint review to determine the merit and efficacy of expanding the mission of and participants in the current successor to the Federal Legal Council, or establishing a separate body to facilitate the exchange of information among agencies’ offices of general counsel regarding issues of common concern, including issuance of written materials explaining the functions and responsibilities of agency legal officers, as well as sponsorship of training and education courses addressing, in particular, methods of rendering more effective legal services.

The Unitary Executive In Historical Perspective
continued from page 7

The system of presidential removal power that the Framers so wisely bequeathed us.

Conclusion
There is much more that could be said about the consistency with which presidents have defended the unitariness of the executive branch, including their opposition to the legislative veto, their willingness to direct subordinate executive officials in the performance of their duties, their efforts to reorganize the executive, their issuance of executive orders banning discrimination by the entire federal government, their opposition to the exercise of executive functions by the comptroller general and the inspectors general, and the centralization of budgetary and regulatory control in OMB, just to name a few. Even the brief recitation we offer here should be sufficient to raise doubts about claims that the unitary executive has already been foreclosed by the sweep of history. On the contrary, the historical record suggests that presidents have opposed attempts to restrict their authority over the execution of the law with enough consistency to keep a question open as a constitutional matter. Resolution of these fundamental and enduring constitutional questions must thus turn on the legal and normative merits.

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Or email adminlaw@abanet.org to be put on the mailing list.
Eight Justices agreed that federal agencies are free to “overrule” federal court constructions of the statutes that the agencies administer unless the federal court finds the statute is unambiguous.

Chevron and Federal Courts’ Interpretations of Statutes

In the most significant administrative law decision this quarter, National Cable & Telecommunications Association v. Band X Internet Services, 125 S. Ct. 2688 (June 27, 2005), the Supreme Court addressed the role of Chevron analysis in its review of the Federal Communication Commission’s (FCC’s) declaratory ruling that cable companies providing broadband internet access were exempt from mandatory regulation under Title II of the Communications Act, 47 U.S.C. §§ 151 et seq. That Act subjects all providers of “telecommunications service” to mandatory common-carrier regulation. However, it also distinguishes “telecommunications service,” which is “the offering of telecommunications for a fee directly to the public . . . regardless of the facility used,” Id. § 153(46), from “information service,” which is “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” Id. § 153(26). In March 2000, the FCC concluded that broadband internet service provided by cable companies is an “information service” but not a “telecommunications service.” Id. because Internet access provides a capability for manipulating and storing information and because of “[t]he integrated nature of Internet access and the high-speed wire used to provide Internet access . . . .” 125 S. Ct. at 2698.

Ultimately, in a 6-3 decision authored by Justice Thomas, the Court upheld the FCC’s decision under both the Chevron and “arbitrary and capricious” analyses. Justices Scalia, Souter, and Ginsburg dissented on the grounds that “the Commission has chosen to achieve[a whole new regime of non-regulation] through an implausible reading of the statute, and thus has exceeded the authority given it by Congress.” Id. at 2713 (Scalia, dissenting). More importantly than the Justices’ construction of the Communications Act, however, was that eight Justices agreed that federal agencies are free to “overrule” federal court constructions of the statutes that the agencies administer unless the federal court finds the statute is unambiguous.

When numerous parties petitioned for judicial review of the FCC’s declaratory ruling, the case ended up through judicial lottery, in the federal Court of Appeals for the Ninth Circuit. However, rather than using Chevron to review the FCC’s construction of the Communications Act, the Ninth Circuit invalidated the FCC’s ruling based on its own precedent in AT&T Corp. v. Portland, 216 F.3d 871 (9th Cir. 2000), in which it had held that cable modem service was a “telecommunication service” subject to federal regulation under the Act.

On appeal, the Supreme Court held that the Ninth Circuit should have used the Chevron analysis, not its own precedent, to evaluate the FCC’s construction of the Act. First, the Chevron analysis applied because Congress had delegated to the FCC authority to execute and enforce the Communications Act and “[t]he Commission issued the order under review in the exercise of that authority . . . .” 125 S. Ct. at 2699. Moreover, the majority stressed that application of the Chevron doctrine does not turn on agency inconsistency; instead, “[p]recedent inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.” Id.

Second, with regard to the role of federal courts’ constructions in the first step of the Chevron analysis, “[a] court’s prior judicial construction of a statute trumps an agency’s construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and leaves no room for agency discretion.” Id. at 2700. The majority reasoned that “allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court’s interpretation to override an agency’s (Chevron’s) premise that it is for agencies, not courts, to fill statutory gaps.” Id. The Court distinguished its own prior decision in Nat'l v. United States, 516 U.S. 264 (1996), in which a prior Court construction resulted in no deference to the agency, on the grounds that the judicial precedent at issue in Nat'l “had held the relevant statute to be unambiguous.” 125 S. Ct. at 2701.

Third, the Supreme Court majority indicated that a federal court will not be found to have held that a statute is unambiguous unless the court’s decision clearly indicates that its reading is “the only permissible reading of the statute.” Id. The Ninth Circuit’s decision in AT&T Corp. v. Portland did not achieve this level of exclusiveness because the Ninth Circuit had made no explicit holding that the Communications Act was unambiguous regarding whether cable internet services were “telecommunications services.”

Several aspects of the National Cable & Telecommunications Association decision suggest that further Supreme Court explications of the role of the Chevron analysis will be necessary. First, Justice Stevens concurred to emphasize that the “unambiguous rule”...
“would not necessarily be applicable to a decision by this Court that would presumably remove any pre-existing ambiguity.” Id. at 2712 (J. Stevens, concurrence). Justice Stevens thus suggested that in the future the Justices may treat their own constructions of statutes differently than interpretations by the lower federal courts.

Second, the majority opinion, Justice Breyer’s concurrence, and Justice Scalia’s dissent all at least touched on the evolving significance of the Court’s decision in *United States v. Meat Corp.*, 533 U.S. 218 (2004), which appeared to indicate that the formality of the agency’s proceeding was relevant to the level of deference that a federal court should give the agency’s construction of the statute. Justice Breyer in particular emphasized that congressional delegations to agencies may be shown in a variety of ways and that “the existence of a formal rule-making proceeding is neither a necessary nor a sufficient condition for according Chevron deference to an agency’s interpretation of a statute.” Id. at 2712 (J. Breyer, concurring) (emphasis added). This cross-debate regarding the significance of *Meat* underscores the ambiguities that that decision created with regard to the applicability of the *Chevron* analysis.

Third, as Justice Scalia pointed out in his (on this point, lone) dissent, the Court’s decision appears to create a “breathtaking novelty: judicial decisions subject to reversal by Executive officers.” [even when the agency itself is part to the case in which the Court construes a statute . . .].” Id. at 2719, 2720 (J. Scalia, dissenting). Thus, the National Cable & Telecommunications Association rule at least potentially raises constitutional separation-of-powers concerns.

Finally, as a practical matter, the federal courts have been construing federal statutes for decades without knowing that they had to make, fairly explicitly, findings of statutory non-ambiguity in order to have their constructions control future agency actions. Thus, the import of *National Cable & Telecommunications Association* for even longstanding judicial constructions of federal statutes—especially those constructions that Congress may arguably have approved or acquiesced to in subsequent amendments to the relevant statutes—will almost certainly require additional federal court elaboration.

**Constitutional Takings**

Three Supreme Court decisions in May and June have potential implications for the regulatory takings doctrine and agencies’ ability to regulate private property. First, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), “A second categorical rule applies to regulations that deprive an owner of ‘all economically beneficial use[e]’ of her property.” Id. (citing *Loretto v.* New York City, 438 U.S. 104 . . . (1978)).

The Court addressed the full faith and credit intricacies of litigating a federal takings claim in *San Remo Hotel, L.P. v. City and County of San Francisco, California,* – U.S. –, 125 S. Ct. 2491 (June 20, 2005). The petitioners, hotel owners bringing a § 1983 takings claim against San Francisco challenging the city’s application of a hotel conversion ordinance, first litigated takings claims under California state law through the California Supreme Court, before their parallel federal claims were ripe under federal takings law. Nevertheless, the California courts made factual findings and legal conclusions that should have controlled in the eventual federal litigation under the Full Faith and Credit Clause and the federal full faith and credit statute, 28 U.S.C. § 1738. All nine Justices, in two opinions, refused to create an exception to the full faith and credit requirement for unripe federal takings claims. According to the majority opinion by Justice Stevens, “[a]l low, petitioners’ claim amounts to little more than the concern that it is unfair to give preclusive effect to state-court proceedings that are not chosen, but are instead required in order to ripen federal takings claims. Whatever the merits of that concern may be, we are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum.” Id. at 2507.

The Court’s final Fifth Amendment/Fourteenth Amendment decision, *Kelo v. City of New London, Connecticut,* – U.S. –, 125 S. Ct. 2655 (June 23, 2005), involved the City of New London’s exercise of its eminent domain authority in furtherance of an economic development plan. In a 5–4 decision authored by Justice Stevens, the majority of the Court upheld the condemnation of private property in pursuit of such a plan as a legitimate “public use,” noting that “[t]hose who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference.” Id. at 2664–65. Thus, the Court upheld and arguably extended the line of eminent domain cases, including *Hawaii Housing Authority v. Mid-Island*, 467 U.S. 229 (1984), that stress both the broad nature of the “public purpose” requirement and the duty of the federal courts to defer to the findings of state and local governments on such redevelopment issues.
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McConnell Shays had rejected an FEC position under because they refused large donations as a matter of principle. To increased contribution limits put them at a disadvantage because they refused large donations as a matter of principle. To the McConnell court, this meant that any injury was not caused by the statutory limit, but by the plaintiffs own choices. The FEC made a similar argument in Shays, suggesting that the Shays plaintiffs were harmed only by their own failure to campaign in ways permitted by the FEC regulations. The majority rejected this argument, noting that the Shays plaintiffs were not merely foregoing available opportunities but seeking to enforce statutory limits that had no role in the McConnell analysis.

In an opinion that will undoubtedly be thoroughly mined for later arguments, the majority drew upon two lines of authority. First, it relied upon competitor standing decisions such as Clarke v. Securities Industry Association and National Credit Union Administration v. First National Bank & Trust Co. for the proposition that competitors have standing to challenge the illegal structuring of a competitive environment. Second, it relied upon the procedural standing decisions such as Electric Power Supply Assn. v. FERC and PATCO v. FLRA for the proposition that "when agencies adopt procedures inconsistent with statutory guarantees, parties who appear regularly before the agency suffer injury to a legally protected interest in fair decision making." Taken together, these decisions "embody a principle that ... when regulations illegally structure a competitive environment -- whether an agency proceeding, a market, or a reelection race -- parties defending concrete interests (e.g., retention of elected office) in that environment suffer legal harm under Article III." Finally, as to the nature of the injury required for standing, the majority said, "our cases hold that when adverse use of illegally granted opportunities appears inevitable, affected parties may challenge the government's authorization of those opportunities without waiting for specific competitors to suffer them." Given the history of campaign abuses, there was no need for the plaintiffs to show the actual use of any practices that would be illegal under the BCRA.

Judge Henderson dissented as to standing, making for an instructive debate. As to the competition theory, she argued that the BCRA was not meant to protect candidates from competition with each other; the regulations did not increase competition or disadvantage any particular candidates, and the plaintiffs did allege a specific competitive injury. As to the procedural rights precedent, she argued that they were limited to procedures affecting decisions by the agency that adopted the procedures, and that any procedural rights under the BCRA were meant to protect the general electorate, not the candidates.

Final Agency Action: Two Opinions, One Judge The National Association of Home Builders (NAHB) won one finality argument but lost another in two decisions written by Judge Henderson. In NAHB v. Napolitano, 415 F.3d 8 (D.C. Cir. 2006), published on July 8, the NAHB challenged a "Survey Protocol" that the Fish and Wildlife Service had issued to provide guidance concerning detection of habitat of the endangered snail kite. The Protocol included maps of potential habitat areas, "recommended, but did not mandate, habitat assessment" in those areas, stipulated that surveys would have to be conducted by a "biologist possessing a recovery permit," and said that surveys "may not be considered valid" unless they conform to the methods described in the Protocol.

by William S. Jordan III*

D.C. Circuit Panel Battles over Congressmen's Standing to Challenge FEC Rules. In Shays v. FEC, 414 F.3d 76 (D.C. Cir. 2005), two members of the House of Representatives challenged FEC regulations as permitting campaign-related activities that violate the Bipartisan Campaign Reform Act. Two examples illustrate their concerns: First, the regulations limited restrictions on so-called "coordinated communications" (involving coordination between the campaign and outside groups) to 120 days preceding an election. Second, the regulations essentially define the terms "solicit" and "direct" as meaning to ask for contributions (as opposed to recognizing more subtle ways of soliciting funds). The challengers argued that such lenient interpretations of the BCRA would permit their campaign opponents to engage in illegal campaign activities.

On the merits, the court struck down several aspects of the FEC regulations, some as statutory violations under Chevron Step 1 analysis, others as arbitrary and capricious. These analyses are noteworthy for two reasons. First, where the district court had rejected an FEC position under Chevron Step 2, the D.C. Circuit chose to forego statutory analysis and rely instead on arbitrary and capricious review. Second, the court did, indeed, impose a "hard look," rejecting, for example, the proposition that the 120 day period could be justified by the fact that the statute itself established similar periods of 30 and 60 days for control of other activities. On this and several other issues, the court wanted a more complete explanation.

The decision's greater significance lies, however, in its extensive discussion of standing. The Congressmen argued that they had a statutorily recognized interest "in seeking re-election through contests untainted by BCRA-banned practices." Perhaps their greatest hurdle was McConnell v. FEC, 540 U.S. 93 (2003), in which the Supreme Court had denied standing to some plaintiffs in the process of generally upholding the various campaign financing restrictions adopted in the BCRA. Among other things, certain McConnell plaintiffs had complained that increased contribution limits put them at a disadvantage with statutory guarantees, parties who appear regularly before the agency suffer injury to a legally protected interest in fair decision making. "Taken together, these decisions "embody a principle that ... when regulations illegally structure a competitive environment -- whether an agency proceeding, a market, or a reelection race -- parties defending concrete interests (e.g., retention of elected office) in that environment suffer legal harm under Article III." Finally, as to the nature of the injury required for standing, the majority said, "our cases hold that when adverse use of illegally granted opportunities appears inevitable, affected parties may challenge the government's authorization of those opportunities without waiting for specific competitors to suffer them." Given the history of campaign abuses, there was no need for the plaintiffs to show the actual use of any practices that would be illegal under the BCRA.

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* C. Blake McDowell Professor of Law, The University of Akron School of Law; Vice Chair Judicial Review Committee, and Contributing Editor.
Since the Protocol had gone through two iterations involving public input and extensive revisions, the court had no difficulty concluding that the Protocol was the “consummation” of the agency decision making process, the first test of Bennett v. Spertus. The question was whether the Protocol was an agency action “by which rights or obligations have been determined, or from which legal consequences will follow.” The court accepted the agency’s argument that issuance of the Protocol did not constitute final agency action, essentially because there was no legal requirement to conduct such surveys at all. The agency merely recommended that they be conducted under certain circumstances.

The problem from the point of view of a developer is that the failure to conduct a survey, or to conduct one acceptable to the agency, would likely play a significant role in an enforcement proceeding. This was not enough, however, because “[p]ractical consequences, such as the threat of having to defend itself in an administrative hearing should the agency actually decide to pursue enforcement, are insufficient to bring an agency’s conduct under our purview.” Despite seemingly mandatory statements in the Protocol, the court also rejected the argument that the issuance cabined the agency’s discretion under Community Nutrition Institute v. Young.

There is some tension between this decision and NAHB v. U.S. Army Corps of Engineers, 2005 WL 17697340 (July 29, 2005), in which the NAHB challenged Nation Wide Permits (NWPs) issued by EPA under the Clean Water Act. The Act prohibits discharges into the nation’s waters without a permit, of which there are two types. Any potential polluter may seek an individual permit, which involves an expensive and time-consuming review process. To reduce delays and administrative burdens, EPA developed the concept of NWPs, through which the agency authorizes various activities having minimal environmental impacts as long as the activities meet certain criteria. Generally, a developer who qualifies for an NWP may proceed with the development without seeking EPA approval. If a developer does not qualify for an NWP, however, it may still seek an individual permit, which may well be approved.

The NAHB challenged the NWPs on the ground that the criteria were too stringent. The district court held that the NWPs did not constitute final agency action because they were merely the first step in the larger permitting process, which included the possibility of an individual permit. The D.C. Circuit disagreed because Corps had not just “altered the procedural framework for obtaining the Corps’ permission to discharge fill or dredged material into navigable waters.” Rather, the NWPs “carry easily-identifiable legal consequences for the appellants and other would-be dischargers.”

As with the butterfly Protocol, there was no question that the NWPs were the culmination of the agency’s decision making process. But did they affect legal rights and obligations? In one sense, there is no question that they did. They clearly permitted certain discharges into the nation’s waters. So the NWPs determined the legal rights of those who met their terms. But the NWPs did not establish that others would not be able to discharge. They established only that others would have to seek individual permits in order to discharge. Arguably, the NWPs determined legal rights for some, but not for others. For those not qualifying for NWPs, their true effect was, as the court emphasized, that “[i]n any project proponents . . . will design their projects to comply” with the NWPs.

On both of those points, the NWPs are comparable to the butterfly Protocol. The Protocol did not determine the legal rights of the challengers (or anyone else). And the true effect of the Protocol was presumably that developers would follow it in order to avoid enforcement under the Endangered Species Act. Since the later Clean Water Act decision does not refer to the earlier butterfly decision, the court did not reconcile the two. The distinction seems to be that the Protocol had no legal effect at all. A developer could use other means to establish that its project would not threaten the quino butterfly. By contrast, the NWPs seem to be final because they affected the legal rights and obligations of those who qualified for them, thereby favoring some and disfavoring those who would have to pursue individual permits. Both decisions are well worth perusal not only as to finality, but also as to standing and ripeness.

FOIA and the Deliberative Process Exemption

Two recent decisions clarify three points concerning application of the Freedom of Information Act. The first, Judicial Watch, Inc. v. Department of Energy, 412 F.3d 125 (D.C. Cir. 2005), involved requests for records related to the work of the National Energy Policy Development Group (NEPDG), which President Bush had established under the Vice President to advise the White House on energy policy. Judicial Watch and others filed FOIA requests with eight federal agencies whose employees had been detailed to work for the NEPDG. The requests extended not only to documents that might be in the agencies’ files, but also to those created by the agency employees but kept by the Office of the Vice President.

The court addressed two issues. First, it held that such records could qualify for the deliberative process protection of Exemption 5 even though the records were not intended or used for deliberations within the agency itself. The fact that the NEPDG was not an agency did not preclude the documents from being “inter-agency or intra-agency memoranda.” The important point is that the agencies are part of the Executive Branch. “[W]hat matters is whether a document will expose the pre-decisional and deliberative processes of the Executive Branch,” not merely those of a particular agency.

Second, the court held that agency employees on detail to the NEPDG were not, during the detail, agency employees for the purpose of FOIA. The fact that they continued to be paid continued on page 23.
Recent Articles of Interest

By Yvette Barksdale*

1. Matthew D. Adler, Against “Individual Risk”: A Sympathetic Critique Of Risk Assessment, 153 U. PA. L. REV. 1121 (2005). This article is a comprehensive, theoretical critique of regulatory reliance upon “individual risk assessment.” (as opposed to population risk assessment). The author argues that risk to individuals 1) is normatively irrelevant across a range of plausible moral theories, and 2) distorts risk analysis because individual risk assessments do not consider the size of at-risk populations.

2. Shubha Ghosh and David M. Dreissen, The Functions Of Transaction Costs: Rethinking Transaction Cost Minimization In A World Of Friction, 47 ARIZ. L REv. 61 (2005). The authors contest the standard view that economic transaction costs should always be minimized. Transaction costs add independent value, including efficient transactions that otherwise would not occur. The authors offer an information theory-based explanation of why these benefits occur, and an analysis of the implications of this transaction-costs approach for a wide variety of legal issues.

3. Mark J. Roe, Delaware’s Politics, 118 HARV. L. REV. 2491 (2005). This article analyzes how power allocations between federal and state government influence the development of corporate law. Delaware caters to managers and investors who control incorporation and thus Delaware’s franchise tax revenues. In contrast, counter-coalitions among the federal government’s broader constituencies can counter Delaware’s preferred policy choices. Analogizing the federal/Deleware relationship to the Congress/independent agency relationship, the author argues this public law analysis is more apt than “ interstate market forces” analyses which usually are applied to corporate law formation. The author argues that Delaware moderates policies in response to federal competition, not just to interstate competition.

4. As insight into the challenges facing current day courts, the following two articles examine the troublesome record of World War I courts in the United States and England when addressing their countries’ national security challenges.

   a. Rachel Vorspan, Law And War: Individual Rights, Executive Authority, And Judicial Power In England During World War I, 38 Vand. L. TRANNSATY’S, L. 261 (2005). Wartime World War I legislation and administrative regulations gave the English government unprecedented control over almost every aspect of social, economic and political life, including constraints on physical liberty, speech and property. The English courts not only upheld these powers, but actively and aggressively enhanced them, creatively managing law, facts and moral ideology to enlarge executive powers in all areas except property rights. Ethnic out-groups, particularly the Irish, fared particularly poorly. The English courts also fiercely protected their own jurisdictional and other institutional interests. The author concludes the English World War I experience suggests that judicial review is insufficient to cabin increased executive national security powers.

   b. Christina E. Wells, Fear And Loathing In Constitutional Decision-Making, 2005 WIS. L. REV. 115 (2005). Using the Cold War Eugene Dennis prosecutions as a focal point, this article examines the psychological history of the Supreme Court’s deference to “questionable, if not outright illegitimate” government national security actions. Using insights from behavioral science, the author argues that such questionable decisions are caused by psychological and social factors that lead persons, including judges, to vastly exaggerate and react against threats posed by disfavored groups. These factors include informational and reputational “ cascades” by which skewed perceptions of out-groups are transferred and reinforced within a group. Such distortions are often instigated by “ available entrepreneurs” who manipulate media portrayals to serve their political and ideological ends. After examining such intergroup dynamics, the author advocates refined balancing tests. Such tests would push judges to ask more detailed and rigorous questions which might counteract the skewed risk assessments caused by fear and prejudice.

* Associate Professor of Law, The John Marshall Law School, Chicago, Ill., former Vice-Chair, Constitutional Law and Separation of Powers Committee, and Contributing Editor. These abstracts are drawn primarily from the authors’ introductions to their articles. To avoid duplication, the abstracts do not include articles from the Administrative Law Review which Administrative Law Section Members already receive.
5. Rui J. P. de Figueiredo, Jr. and Barry R. Weingast, Self-Enforcing Federalism, 21 J.L. Econ. & Org. 163 (2005). The article provides a game theory model of how to optimally organize federalist states to solve the central federalism problem of preventing constituent governments from nullifying each other’s power. To study the sustainability of a federation, the authors use the game theoretic concept of equilibrium. Their model helps to clarify critical features necessary for a federal system’s stability. Based upon the model’s predictions, the authors hypothesize when, as a function of the exogenous characteristics of the constituent units, self-enforcing federations can exist, including the degree of central power, the division of rents between the states and the center, and the degree of “central goods” provided.

6. Tomiko Brown-Nagin, Elites, Social Movements, and the Law: The Case of Affirmative Action, 105 Colum. L. Rev. 1436 (2005). This article uses the Grutter/Gratz affirmative action litigation as a comprehensive case study to analyze the efficacy of constitutional litigation in advancing the aims of social movements. Focusing in particular on the experiences of the University of Michigan intervenors, the author critiques the prevailing scholarly view that jurisdictional law is and should be a critical player in the evolution of social movements. Rather, after analyzing social science literature, and 19th and 20th century social movement history, the author concludes that litigation can undermine social movements because success in the law essentially co-opts their struggle, making it more difficult for the movements to achieve their aims.

7. David A. Super, Rethinking Fiscal Federalism, 118 Harv. L. Rev. 2544 (2005). The author critiques the cooperative fiscal federalism model under which federal/state funding operates. This model is deeply flawed, due in part to 1) serious deficiencies in states’ fiscal capacities, and 2) systemic state constitution biases against programs for low and moderate income persons. These state deficiencies often undermine federal fiscal policy. The author asserts that traditional, scholarly, models of federalism are less useful in analyzing these funding relationships because the models fail to adequately account for the difference between regulatory federalism (federal/state allocation of regulatory power), and fiscal federalism (the federal/state allocation of funding responsibility). The author suggests changes to the federal/state funding relationship that might ameliorate its current problems.

8. Peter M. Shane, Ambiguity and Policy Making: A Cognitive Approach to Synthesizing Chevron and Mead, Forthcoming, 16 Vill. Envtl. L. J. 19 (2005). This essay argues that both the Chevron/Mead decisions were far less revolutionary than their rhetoric implies. Rather, a careful examination of these decisions leads to neither revolution nor paradigm shift. Instead, the decisions set forth a fairly straightforward set of interpretive propositions regarding the judicial role in review of agency interpretations of law. The author argues that the choice between Chevron and Mead matters only in a narrow set of cases in which the statute is susceptible to multiple plausible meanings, but the judge thinks that one meaning is most attractive or persuasive than the others. Then Chevron counsels deference to the agency while Mead permits the judge a larger interpretive role.

9. Michael P. Vandenbergh, Order Without Social Norms: How Personal Norm Activation Can Protect the Environment, 99 NW. U. L. Rev. 1101 (2005). Much environmental damage is caused by private individuals, rather than by industries, or other institutions, notes the author. Such individual behavior can have large aggregate social effects, but is difficult to regulate where 1) ordinary economic cost/reward incentives do not work because the individual’s compliance costs exceed the individual’s compliance benefits, and 2) social norms are difficult to enforce because the communities are too large and diffuse. To address these problematic individual behaviors, the author advocates policies directed to changing personal norms, rather than social norms. [Ed. Note: An adapted version appears elsewhere in this issue].

10. Lawrence M. Solan, Private Language, Public Law: The Central Role of Legislative Intent in Statutory Interpretation, 93 Geo. L.J. 427 (2005). The article seeks to reclaim the role of legislative intent in statutory interpretation. Relying upon insights from linguistics, social and development psychology and philosophy, the author argues that legislative or group intent is a coherent concept which is essential to ascertaining the meaning of unclear language. The author also argues that countervailing

continued on next page
values, such as coherence, lenity and avoiding constitutional problems, should displace intent as a relevant interpretive factor only if the value's proponents, to advance the value, would be willing to thwart the legislators' intent.


**Recent Symposia, Colloquy and Book Review Compilation, of Interest**


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News from the Circuits
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by their agencies was not determinative. Rather, where “during their
detail, the employees worked exclusively on NEPDG
matters, were supervised by the Office of the Vice President,
and did not occupy an office at the DOE,”2 the detailees were
as a practical matter employees of the NEPDG, and not of the
agency.3 This approach to the issue was important to protect the
prerogative of the Executive Branch to make such use of
agency employees while still maintaining the autonomy and
confidence to which the President is entitled.

The second decision, National Council of La Raza v. Depart-
ment of Justice, 411 F.3d 350 (2d Cir.2005), serves as a warning
to agencies to be very careful in deciding what they should say
in their public pronouncements. In 1996, the Office of Legal
Counsel prepared and published a memorandum concluding
that state and local police do not have the authority to detain
people “solely on suspicion of ‘civil deportability.’”4 In 2002, the
Office of Legal Counsel prepared a memorandum in which it
concluded that states and local governments had the legal
authority to enforce civil provisions of the immigration laws.
Had someone sought the 2002 memorandum at that point,
there was no doubt that it would have qualified for an exemp-
tion as pre-decisional advice or under the attorney-client
privilege. Mere reliance on a document’s conclusions does not
necessarily involve reliance on a document’s analysis; both will
ordinarily be needed before a court may properly find adoption
or incorporation by reference. On the facts, however, “the
Department embraced the OLC’s reasoning as its own,” relying
upon the analysis to demonstrate the legality of its position. For
the same reasons, DOJ waived the attorney-client privilege. On
these facts, “the principal rationale behind the attorney-client
privilege — ‘to promote open communication between attor-
neys and their clients so that fully informed legal advice may be
given,’” like the principal rationale behind the deliberative
process privilege, evaporates, for once an agency adopts or
incorporates [a]document, frank communication will not
be inhibited.”

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News from the States

Edited by Michael Asimow*

Can The Legislature Appoint Agency Members? Beach Goers Sigh in Relief While Property Owners Sulk
By Michael Asimow

One of the fixed stars in the federal constitutional firmament is that Congress can’t appoint agency members, only the president can. *Buckley v. Valeo*, 424 U.S. 1 (1976). However, state legislatures frequently appoint agency members. In a long-awaited decision, the California Supreme Court upheld a statute in which each house of the legislature appoints one-third of the members of the powerful California Coastal Commission. (Four appointees are picked by the Speaker of the Assembly, four by the Senate Rules Committee, four by the Governor). *Marine Forests Society v. California Coastal Commission*, 30 Cal.Rptr.3d 30 (2005).

The Commission was created by a voter-approved initiative in 1972 and regulates all land development within 1000 yards of California’s long coastline. It has made many enemies because it often refuses applications to build or remodel property or forces beachfront owners to dedicate easements for public access as the price of granting an application. The Commission earned a tenacious new enemy when it denied Marine Forest’s application to construct underwater nesting places for marine life out of old tires and similar junk.

Marine Forests attacked the Commission under separation of powers and won big victories in the lower courts. The legislation reviewed by the lower courts allowed each house to remove its own appointees at any time, but after that provision was invalidated, the legislature changed the law. Under the revised version, legislative appointees had four year renewable terms but could not be removed by the legislature during their terms.

The Supreme Court upheld the revised statute. *Buckley v. Valeo* is inapplicable in California because i) the legislature has plenary power (unlike Congress which has only limited powers), ii) the executive function is divided among a number of elected officials (unlike the president who is a unitary executive) iii) the California constitution contains no language like the appointments clause in the federal constitution, and iv) the legislature clearly had appointment powers under prior California constitutions.

Still, the Court indicated that there are some limits on the legislature’s power to give itself appointing authority. It indicated that these tests are based on a pragmatic assessment of the legislation, not on any absolute rule. First, the legislative appointment must not intrude on a “core function” of the governor (or other elected official) by impeding the exercise of that function. Second, the appointment must not compromise the ability of the Coastal Commission to exercise its functions. Needless to say these tests are extremely mushy and can be manipulated to produce whatever result one desires.

On the “core function” argument, the Court indicated that the legislature could not appoint a trusted advisor of the governor, whereas the Commission is a largely independent agency. Moreover, the Commission exercises a range of functions (judicial and legislative in nature) that are not purely executive. Finally, land use planning has historically been a local, not a state, function so it could not be a core function of the governor.

That the members of the Commission are appointed by the legislature doesn’t compromise the ability of individual members (or the Commission as a whole) to do their jobs, even though the legislature might threaten not to reappoint a member with whom it was dissatisfied. Instead, the Court stressed that the complex arrangement by which commissioners are appointed was intended to disperse power so that opponents of the regulatory scheme would find it difficult to obstruct the Commission. Often, the two branches of the legislature are controlled by different political parties and the governor may also belong to a different party than one or both houses. And half of the legislative appointments have to be drawn from a list of officials nominated by local government. Thus legislative appointment might enhance, rather than derogate from, the Commission’s ability to carry out its difficult tasks.

The Court strongly hinted, however, that the result would have been different if the legislature had the power to remove Commission members at will (as it did under the repealed version of the law overturned by the lower courts). That might well have given the legislature an excessive amount of control over the decision making of the Commission.

Even if the Commission’s structure violated separation of powers before the amendment that stripped the legislature of its removal powers, this wouldn’t invalidate all of the Commission’s previous decisions going back to the ’70s. Under the de facto officer doctrine, the commissioners had apparent authority to make their decisions. (That loud sound you just heard was a sigh of relief from millions of beachgoers who worried that the Court might invalidate all prior Commission decisions; that might have ignited a development binge at the seashore and erased beach access easements).

* Professor of Law Emeritus, UCLA Law School; Section Vice Chair; and Contributing Editor.
In the Spring issue of the Nyon, this column discussed and criticized Lacy St. Hospitality Service Inc. v. City of Los Angeles, 22 Cal.Rptr.3d 805 (2004). That Court of Appeal case held that the city council denied a party due process when the council members failed to pay attention to the party’s oral argument. The Lacy St. case has now been depublished by the California Supreme Court. Depublication, an institution perhaps unique to California, allows the Supreme Court to dispense with an inconvenience precedent without actually taking the trouble to grant a hearing and write its own opinion. Once depublished, a case cannot be cited in any future briefs or opinions, but it remains a binding decision as far as the litigants were concerned.

Two Florida appellate courts recently have examined the question of citizen standing to seek judicial review of agency action approving amendments to comprehensive land use plans. Under Florida law, local governments are required to develop Comprehensive Plans; they also have the authority to amend those Plans. Amendments are vetted before the State Department of Community Affairs (DCA), which is empowered to approve or reject Plan Amendments.

In July 2005, Florida’s 1st District Court of Appeal, in Florida Wildlife Federation v. St. John County, 2005 WL 1660806 (Fla. App. 1 Dist.), dismissed a citizen challenge to a State DCA Order that approved a local government Comprehensive Plan Amendment, on the ground that the citizens lacked standing. The court determined that the citizens had failed to show that they were “adversely affected” by the challenged order. Florida’s 4th District Court of Appeal had reached the same decision in two 2004 decisions, Melzer v. Florida Department of Community Affairs, 874 So. 2d 673 (Fla. 4th DCA 2004), and O’Connell v. Florida Department of Community Affairs, 874 So. 2d 673 (Fla. 4th DCA 2004).

The appellants in the 1st District case have moved to certify the question to the State Supreme Court. The key question involves the definition of “adversely affected.” The court in the two Fourth District cases, cited with approval by the First District in its July 2005 opinion, held that simply owning property in the county involved did not create standing. In addition, a “mere interest in a problem,” “no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem,” is not enough by itself to confer standing. O’Connell, supra (quoting Sierra Club v. Morton) These cases, in short, elaborate on the definition of “adverse effects” in determining the extent to which the appellate courts are available to citizens who are dissatisfied with administrative decisions. Additional elaboration no doubt will be required.

A side note concerning the decisions: the court held that standing to challenge a Plan Amendment at the administrative level (before the DCA) is easier to obtain than standing to challenge subsequent DCA decisions in court. See e.g., Melzer, supra (noting that “standing to appeal [to the courts] is more narrow than the standing to participate at the administrative level.”) Governing state law provides standing to challenge local government amendments before the DCA to anyone “affected” by the amendments, while the State APA restricts judicial standing to challenge agency action to “adversely affected” parties.

By Michael Asimow

California Depublishes LACY ST. Case

The argument. The Florida Appellate Courts: Appeals Standing More Restrictive Than Agency Standing

By David Markell

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By Molly Klapper

In Allied Manor Road LLC v. Grube, reported in N.Y.L.J. at 21 (April 20, 2005), New York Civil Court Judge Turner denied summary judgment to Manor, the landlord, in a not unusual dispute over succession rights to a valuable federally-subsidized apartment, holding Manor’s reliance on a clear-cut HUD Handbook rule for vacating the unit was misplaced in that the Handbook had never been published in the Federal Register and hence could not be accorded the dignity of a regulation entitled to the full force and effect of law. Rather, it would be considered as policy guidelines carrying persuasive though not conclusive authority.

Grube contended that his living openly, notoriously and interdependently with the tenant on record for the past thirteen years entitled him to remain in the federal Section 8 assisted-living apartment after the prime tenant’s death. However, as Manor pointed out, during all the years of Grube’s alleged residency, his name had never been added to the lease, as required by the succession rights clearly spelled out in Rule §3-15(B)(1) of the Handbook.

In deciding against granting summary judgment in favor of Manor, the Court ruled that since §3-15(B)(1) was not promulgated pursuant to the notice provisions of the Administrative Procedure Act, it cannot be accorded the dignity of a regulation entitled to the full force and effect of law. However, it is not a slam dunk for Grube. The Court accorded the rule considerable weight in light of the fact that other federal statutory requirements, and also relevant lease provisions, had obligated the named tenant to place

continued on next page
By Lawrence E. Sellers, Jr.

During its 2005 Regular Session, the Florida Legislature enacted a number of changes to the state Administrative Procedure Act (APA). Three of these proved objectionable to Governor Jeb Bush, who vetoed the bill. Here’s a brief summary of some of the key provisions in the bill, including the three provisions that were mentioned in the Governor’s veto message:

**Expanding Internet Noticing to All Agencies.** Initially, the principal purpose of the bill (CS/CS/CS/SB 1010) was to provide for “internet noticing” for all agencies. Several years ago, the legislature created a pilot project by which the Florida Department of Environmental Protection publishes its official notices on its web site, rather than in the Florida Administrative Weekly. One provision of the bill would have expanded the pilot project to all state agencies. This provision also would have provided for e-mail notification and for electronic commenting on proposed rules. In his veto message, Governor Bush expressed strong support for this key provision.

**Limiting Required Contents of Enforcement and Disciplinary Petitions.** In vetoing the bill, the Governor identified these three provisions:

1. **Providing for Equitable Tolling**. Several recent appellate decisions, in dicta, have suggested that the doctrine of equitable tolling may be applied to extend the administrative time limit in cases where the petitioner “has been misled or lured into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum.” However, commentators have questioned the application of equitable principles in light of the legislature’s clear expression that untimely petitions for hearing may not be considered. Accordingly, a section in the bill would have revised the APA to make clear that the time for filing a petition will be extended in these circumstances. The Governor objected to this section because he thought it was too “open-ended,” “would likely increase litigation and associated costs,” and could “raise the possibility of retroactive remedies [being] imposed years after an action is taken.”

2. **Limiting Required Contents of Enforcement and Disciplinary Petitions.** In a recent appellate decision, Judge Cope had recommended that the legislature amend the APA to limit the required contents of a petition for hearing when the administrative action is initiated by the filing of an administrative complaint by the agency. In particular, Judge Cope suggested that it should be sufficient for the respondent to submit a document that sets forth those paragraphs of the administrative complaint that are admitted, denied, or as to which the respondent is without knowledge—along the lines allowed for civil cases by Florida Rule of Civil Procedure 1.110(c). The Uniform Rules of Procedure, which expressly apply in administrative proceedings, impose much more limited pleading requirements in cases involving suspension, revocation, annulment or withdrawal of a license. However, some wondered whether these rules are authorized by the APA, so another section of the bill would have revised the APA to make clear that these detailed pleading requirements do not apply to petitions requesting hearings in response to agency enforcement or disciplinary actions brought by an agency.

3. **Clarifying “Small Business Party” Under FEAJA.** Although not located within the APA itself, the Florida Equal Access to Justice Act authorizes an award of attorney’s fees and costs to parties to administrative proceedings.”

continued on page 28
Section Election Results

The following candidates for section office were unanimously elected by the members present at the Annual Meeting in Chicago this past August. Vice Chair, Michael Asimow; Delegate, Judy Kaleta; Budget Officer, Dan Cohen; Asst. Budget Officer, William Morrow; Secretary, James Conrad. Council Members: Nina Olson, Michael Herz, Richard G. Stoll, Ann Marshall Young, Richard Parker. Per section bylaws Eleanor D. Kinney and Daniel Troy automatically succeeded to the office of Chair and Chair-Elect, respectively.

New Fellows

Homeland Security Chair Lynne Zusman and Outstanding Government Service Subcommittee Co-Chair Cynthia Farina were inducted as Section Fellows. Former Section Chair Vic Rosenbloom was inducted as a Senior Section Fellow.

Section Recommendations Pass House of Delegates

The following recommendations sponsored or co-sponsored by the Section were approved by the House of Delegates.

10A JUDICIAL INDEPENDENCE: Affirms the belief that a fair, impartial, and independent judiciary is fundamental to a free society and calls on all Americans, including elected officials, to support and defend our judiciary and its role in maintaining the fundamental liberties under the Constitution of the United States.

101A ENVIRONMENTAL LAW: Encourages Congress and the president to take specific legislative, regulatory and other actions necessary to improve the structure of our country’s domestic management and regulation of its marine resources in order to better protect the integrity of its marine ecosystems and to ensure ecologically sustainable use and development of its marine resources.

102 ELECTION LAW: Adopts the Election Administration Guidelines and Commentary, dated August 2005, to supplant Ballot Integrity Standards Applying to Election Officials, dated August 1989 and Election Administration Guidelines, dated August 2001 and recommends that all election officials ensure the integrity of the election process through the adoption, use and enforcement of these Guidelines.

104A MEDIATION: Adopts the Model Standards of Conduct for Mediators, dated August 2005, which are intended to guide individual mediators in their practice, provide a model for entities that establish standards of conduct for mediators and inform potential and actual participants in mediation about what they should expect in mediation.

106A ADMINISTRATIVE LAW: Encourages Congress to establish the Administrative Law Judge Conference of the United States as an independent agency to assume the responsibility of the United States Office of Personnel Management with respect to the Administrative Law Judges, including their testing, selection, and appointment.

106C COURTS: Urges Congress, the Department of Justice Judicial Security Review Group and the Department of Justice Office of Inspector General to determine whether the United States Marshals Service has corrected significant vulnerabilities to critical elements of its judicial security program that were identified by the IG as its March 2004 report entitled “Review of the United States Marshals Service Judicial Security Process.”

The National Administrative Law Judge Foundation, the public interest arm of the National Association of Administrative Law Judges, is requesting applications for its 2006 Fellowship. The Fellowship was endowed to encourage research and scholarship for improving administrative justice.

The 2006 Fellowship topic is "What Can the Administrative Judiciary Do to Relieve Congestion in the Judicial Branch." The Fellow will prepare an original article for publication in the Journal of the National Association of Administrative Law Judges, and will deliver a fifty-minute oral presentation at the 2006 annual meeting in Seattle, Washington, in the fall of 2006. In addition to a $1,000 cash stipend, the Fellow will receive air transportation, accommodations, and meals at the annual meeting. The final draft of the paper will be due by January 1, 2007.

Applicants should submit two copies of a detailed outline for the proposed article, an abstract or an introduction to the paper, along with a writing sample, curriculum vitae, and a list of publications by April 1, 2006. Email submissions are highly encouraged. The Fellowship Committee will review the submissions and select a Fellow by May 30, 2006. Additional information is available at www.nalj.org.

Applications and inquiries should be addressed to the Chair of the Fellowship Committee:

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Colorado Office of Administrative Courts
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Denver, Colorado 80202
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