

ADMINISTRATIVE & REGULATORY LAW NEWS



Section of Administrative Law & Regulatory Practice

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Globalizing Administrative Law

Also In This Issue

- Notice & Comment Rulemaking in China
- Best Practices Regulation
- 2008 Election Meltdown
- 2006 Gellhorn-Sargentich Law Student Essay Winner
- Applying APA to PTO

2006 FALL MEETING ■ WASHINGTON, DC ■ OCTOBER 26–27, 2006

Chair's Message



Daniel E. Troy

Why, in a world of intensely competing demands, should overtaxed lawyers belong to, and spend time on, the Section? Allow me to suggest at least the following benefits: intellectual satisfaction, fun and rewarding social experiences, interesting places to visit, worthwhile professional contacts, practical tips, and the ability to have a positive impact on the law and on society.

Intellectual satisfaction. Although I went to Columbia University, where former Section Chair and Ad Law giant Peter Strauss teaches, I made the mistake of not taking his course in administrative law. I was ignorant of the notion that administrative law is “con law in action” and, like many a starry-eyed law student, focused on constitutional law. To the extent that I have learned administrative law – and I picked up enough of it to end up as FDA’s Chief Counsel for more than 3 years – I absorbed it through the Section. The Section’s activities and meetings are suffused with learned discussions about judicial review, standing, deference, hermeneutics, ripeness, etc. Our publications – particularly the *Administrative Law Review*, by far the leading journal in the field, and the lively *AdReg Law News* – are consistently stimulating and informative. Our programs – be they brown bag luncheons, panel discussions, teleconferences, or on-line discussions – further enhance a deep theoretical as well as practical understanding of the administrative state. Recently, the Section has had intense debates about preemption by administrative agencies of state tort law and the ability/obligation of the President to refuse to enforce laws he believes to be unconstitutional. Those two issues, as well as many others, are sure to spur debate for much of the coming year.

Fun social experiences. When I joined the Section, I knew no one associated with it who was not also at my law firm. I found the members of the Section to be remarkably open, accessible, welcoming, and friendly. And I must admit that for a 30 year old mid-level associate, it was quite a heady experience to be hanging out with the likes of Ernie Gellhorn, Ted Olson, Judges Ray Randolph, Stephen Williams, and Merrick Garland – to mention only a few of our luminaries. From Ernie Gellhorn, whose passing we all mourn, I learned not only about administrative law. Ernie taught us all how to broker a compromise, draft a resolution, and address a crowd. But he also taught about life. In particular, Ernie had an incredibly special relationship with his wife Jackie. And they were amazingly generous in sharing the secrets of their lasting marriage. Some may be intimidated by at least some of the famous and accomplished lawyers like those who tend to show up at the Section’s meetings. But traveling to far-away places with the same group of people three to four times a year tends to break down any barriers and promote lasting friendships. This is especially so given the warm and inviting nature of the people who are involved in the Section.

Interesting trips. Washington is always a treat in fall for those who live out of town, and easily accessible to those who do. This year’s winter meeting will be in Miami, Florida – a perfect place to visit in February. In May, we will travel to Austin, Texas – a town that marries a capital, a leading university, and a cutting-edge music and entertainment scene. The summer will find us in San Francisco – a perfect

place to cool off during the hot summers that we seem to be experiencing more and more frequently.

Worthwhile professional contacts. The Section provides the opportunity not just to learn the practice and theory of administrative law, which can help you answer questions when they arise. But there are also questions that come up to which you may not know the answer. In that case, the Section offers the opportunity to develop relationships with people who can help answer the questions you need to answer, often on a rapid basis. To go back to my example of Ernie Gellhorn, many was the time when, either because of my lack of time, imagination, or ability to find certain answers, I resorted to calling Ernie to ask him what he thought. If there was an answer, he would not only tell me, but steer me to the leading cases and articles. And if there was no answer, because the question was so new, he would not only confirm that fact for me – often valuable information in its own right – he would also generously give me the benefit of his analysis and thoughts, assessing what he thought the right answer was and how likely it was that a court (depending on the forum I was in) would approach the question the same way. The cross-section of government officials, private practitioners, academics, and in-house attorneys that are active in the Section make for an enormous resource, and a terrific professional network.

Practical tips. As long as the Section is on leading academics, it is also filled with government officials and private attorneys who practice administrative law on a day-to-day basis. One of the signal advantages of the Section is that it provides a forum for those who teach and write about the law to interact with those who live under the regimes they study. That cross-pollination is a key feature of the Section. The new Administrative Law Institute, pioneered and led by former Section Chair Jack Young, has offered intensely practical tutorials on rulemaking and lobbying. This year, the Institute will focus on advanced rulemaking. As befits the Section, it will feature addresses from leading academics as well as practitioners – all to the point of giving practical advice. To mention one just one more practical initiative, we are going to try to take Elizabeth Magill’s award-winning article on how to choose whether to promulgate a new standard by guidance, rule, or another form of communication, and translate it into an algorithm for government attorneys in particular to use in deciding what is the best form in which to embody the communication of a policy.

A positive impact on society. Many enjoy the ABA because of the opportunity to communicate the position of the bar on legal and public policy questions of the day. Such positions can be in the form of recommendations and reports to the ABA’s House of Delegates. But they can also take the form of letters that seek “blanket authority” to communicate a policy position on behalf of the Section.

I recognize that, if you are reading this, you are already a Section member and are not only getting but you are also reading our terrific *AdReg Law News*. My hope is that this message will help persuade you to become even more active than you are in our Section, as well as help you recruit others to our Section. Thank you in advance for your participation and help. 

Table of Contents

Chair's Message	Inside front cover
Globalizing Administrative Law	2
Notice-and-Comment Rulemaking Comes to China	5
Best Practices Regulation	7
The 2008 Election is Heading Towards a Meltdown that May Surpass Florida in 2000	10
2006 Gellhorn-Sargentich Law Student Essay Competition	11
Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law	15
Section Elections	18
Supreme Court News	20
News from the Circuits	23
News from the States	26

ADMINISTRATIVE & REGULATORY LAW NEWS

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Globalizing Administrative Law

By Daniel C. Esty*

We live in a world of increasingly evident international interdependence. From the 9/11 terrorist strikes to recent fears about a worldwide pandemic of bird flu, it is now evident that national governments cannot address on their own a range of critical issues, including terrorism, trade liberalization, economic integration, infectious diseases, and worldwide environmental issues such as global warming. Scholars have highlighted the value of some degree of international policymaking for years, and the theoretical logic of organizing collective action on a scale proportional to the issues or threats to be addressed is well understood.

Yet the nation-state remains the dominant structure in international relations, and skepticism about “global governance” runs deep, particularly in the United States. Fundamental to the distrust of international institutions is their distance from the public to be governed and their perceived lack of democratic legitimacy. This leaves us with a puzzle: how are we to square the demonstrable need for structured international collaboration in response to shared challenges with the political strain that arises whenever policymaking authority is lodged in global institutions?

But these issues are not entirely new. Unhappiness about delegating important policy choices to unelected officials who are perceived to be unaccountable and unfamiliar with local circumstances and

values also plagued the American administrative state in its early days. Indeed, I argue that the rules and procedures of administrative law that were developed to address legitimacy concerns in the domestic context should now be more fully deployed in the international domain. While the appropriate degree of international policymaking remains contested, some structure of global cooperation and governance is manifestly necessary. In this regard, transfusing the key principles and practices of administrative law into the global domain promises to improve the quality, enhance the accountability, and strengthen the legitimacy of whatever scale of global policymaking is agreed upon.

The argument in favor of deploying administrative law globally has both an empirical element, drawn from a close review of the performance of existing international institutions, and a normative dimension, derived from political theory and the observed experience of the functioning of administrative law on the national level. Fundamentally, the argument rests on the promise of improved institutional performance and enhanced legitimacy

As a theoretical matter, I submit that legitimacy is not and has never been simply a function of elections and majority rule. While democracy provides a special logic for public acceptance of political authority, other bases of legitimacy exist. Specifically, legitimacy often adheres to decisionmaking that: (1) draws on rationality and expertise and generates social welfare gains (in the spirit of Weber’s writings on bureaucracy), (2) provides clarity, order, and stability (as advanced by Hobbes’s political theory and the more recent work of Lon Fuller on the rule of law), (3) reflects a structure of checks and balances (building on Madison’s arguments for constraining the exercise of power), (4) follows thorough debate and deliberation (invoking Habermas’s insight that dialogue contributes significantly to public acceptance

of policy outcomes), and (5) derives from a well-designed policymaking process (offering procedural safeguards and a promise of “good governance”).

In the realm of supranational governance, where the democratic underpinnings for rulemaking are particularly weak, procedural legitimacy takes on special significance. Administrative law cannot completely compensate for the absence of an electoral connection between the governed and public officials. Nevertheless, a refined system of rulemaking can substitute, in part, for a lack of democratic legitimacy in international decisionmaking by providing alternative mechanisms of accountability and connection to the public. In addition, a thoughtfully designed decision-making process strengthens the other bases of legitimacy. Both directly and indirectly, procedural rigor enhances rationality and efficacy, promotes clarity and stability, helps to balance perspectives and interests, and facilitates openness and deliberation. If properly constructed and implemented, administrative procedures support careful rulemaking, efficient delivery of public goods, and fair treatment of both individuals and economic entities.

Of course, the various types of legitimacy outlined above are in some tension. For example, greater reliance of expertise often comes at the expense of public participation and dialogue. But good governance, based on sound procedural foundations, almost always works to reinforce legitimacy based on rationality and improved results, clarity and order, checks and balances, as well as political debate.

It is important to note that some international governance activities raise almost no hackles and few questions about limited accountability or lost sovereignty. Concerns about legitimacy — and a particularly urgent need for procedural legitimacy — emerge under certain circumstances. Two issues are of critical importance: (1) how much authority has been lodged with supranational officials and (2) how formal and

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binding the results of the international policy process will be. As the following matrix suggests, where the power remains with national officials and the supranational governance activities are limited in scope and effect, and thus fall near the merely “intergovernmental” end of the vertical axis, legitimacy issues are likely to be minimal. As the governance activities become more significant and real authority is being exercised at the supranational level, questions about legitimacy are likely to intensify.

Likewise, if the international rulemaking produces informal outcomes such as norms or guidelines that fall at the “soft law” end of the horizontal spectrum, legitimacy concerns tend to be limited. As the international decisionmaking process becomes more formalized, leading to “hard” law outcomes with more binding effect, legitimacy again looms larger as an issue.

Legitimacy is also a function of the sort of issue under discussion. When the international policy focus is essentially scientific or technical, having international officials address the matter may not be controversial. Delegating decisions to international bodies will more likely be contested, however, when the issue

under consideration becomes more political or values laden. Another critical variable is the degree to which an issue involves deep interdependence or more limited links among countries. The payoff to supranational governance will be higher — but the need for administrative law to legitimize the work of international officials greater — under conditions of deeper interdependence and greater political content.

Exactly what sort of administrative rules and procedures would support good governance and strengthen the legitimacy of global-scale decisionmaking depends on the specific policy setting. Just as the sources of legitimacy interact in complex ways, often reinforcing or substituting for one another but sometimes working at cross purposes, the elements of a global structure of administrative law will, at times, provide mutual support but, on other occasions, be in tension.

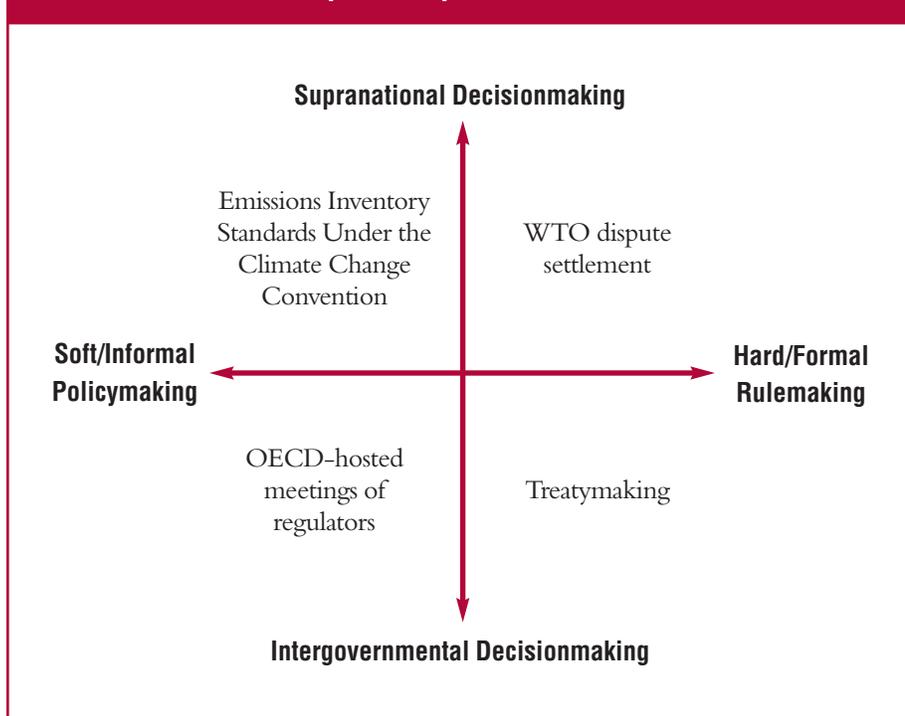
Some of the strategies and tools that might be applied can be drawn directly from the domestic administrative law context, including the US Administrative Procedure Act and similar laws in the European Union, Japan, South Korea, and other countries. Other approaches and elements will need to be modified

for application in the supranational setting. The basic global administrative law “toolbox” should include: (1) controls on corruption self-dealing, and special interest influence; (2) support for systematic and sound decisionmaking; (3) mechanisms to ensure transparency and public participation; and (4) a system of checks and balances. Within this “toolbox” would be a number of specific requirements and procedures including:

- Conflict of interest rules (prohibiting nepotism and self-dealing)
- Inspections and audits (designed to smoke out corruption or incompetence)
- Lobbying disclosure requirements (disciplining special interest manipulation of the decision process)
- Publishing of draft rules (inviting deliberation and drawing in multiple perspectives on the issues at hand)
- Notice and comment procedures (providing clarity and a mechanism for public participation)
- Clearly identified decisionmakers and procedures (ensuring openness and putting an end to unexplained “black box” decisionmaking)
- Documented decisions (promoting transparency over who and what has influenced decisionmakers)
- Transparency rules (facilitating debate and clarity)
- Hearings and other opportunities for public participation (engaging the public as well as NGOs and limiting the sense of distance to decisionmakers)
- Structured factfinding including a public docket (producing greater transparency, clarity, and incentives for rationality)
- Mandatory evaluation of policy options and discussion of alternatives (reinforcing the logic of dialogue and requiring rational explanation of policy choices)
- Access to information (granting those wishing to challenge the prevailing wisdom a foundation for doing so)
- Data collection and construction of metrics (facilitating performance benchmarking which highlights best practices — and sub-par results)

continued on next page

Matrix 1: Depth of Supranational Governance



- Dispersion of authority both horizontally and vertically (checking abuses of authority and facilitating dialogue)
- Review or appeal rights – institutionalized “second opinion” mechanisms (promoting rationality in decision-making as well as limiting over-reading and mistakes)
- “Arbitrary and capricious” standard of review (ensuring rationality, avoiding errors, and unmasking bias)

Although the length of this article does not permit a full evaluation of the current structure of international institutions against this good governance template, it can be said that the existing decisionmaking procedures in the international trade, public health, and environmental policy regimes fall short of idea. In each of these realms, some of the administrative law procedures and mechanisms that are essential to good governance have been adopted, but other tools and approaches remain underutilized.

As my theoretical framework would suggest, the structure of administrative law appears to be most advanced where the governance is supranational, formal, and addresses normative issues. This observation raises an interesting question of causation: Do international organizations get authority and gain legitimacy because

they have adopted good governance practices? Or do they adopt administrative rules and procedures as a way to seek legitimacy or protect their authority?

The World Trade Organization (WTO) has developed a quite substantial body of administrative law. It has adopted a principle of transparency, publishes policy decisions, provides opportunities for dialogue, and has in place an Appellate Body that ensures careful review of all dispute settlement outcomes. But the WTO lacks a fully appropriate structure of procedural safeguards and administrative law. It still conducts dispute settlement hearings behind closed doors, does little to control or even disclose private party lobbying, and fails to discipline special interests.

The World Health Organization (WHO) has made significant strides in recent years. As it has been called upon to play a regulatory role in response to chronic problems such as tobacco smoke exposure as well as global crises like SARS and avian flu, the WHO has done more to promote dialogue, publish drafts for comment, hold public hearings, and gather expert advice. But, like the WTO, it still has some distance to go in controlling special interests and developing a full structure of administrative rules and procedures.

The international environmental regime, centered on the United Nations

Environment Program (UNEP), has the most advanced procedures for public participation, but in most other respects it lags in the adoption of administrative law. The prevailing weak procedural foundations for decisionmaking may explain, in part, why UNEP has recently played a very limited governance role.

While a Global Administrative Procedure Act with requirements that apply across all international organizations makes little sense, a commitment to strengthening appropriate governance rules and procedures, drawing on the menu of concepts and tools mentioned above, and tailored to the needs of particular global policymaking bodies, promises to facilitate international cooperation in response to shared challenges. Taking steps toward good governance at the supranational scale would help to legitimate the degree of decisionmaking the world community needs to manage interdependence in response to an inescapable range of issues that spill across national borders. Simply put, even if supranational governance remains limited and must confront divergent traditions, cultures, and political preferences, a baseline structure of global administrative law offers an important way to strengthen whatever scope and scale of supranational policymaking is undertaken. 



2nd Annual
Homeland Security Law Institute
 January 17–19, 2007 ★ Washington, DC

Potential panels include:

- ★ Homeland Security: The Year in Review
- ★ 2006 & 2007 Regulatory Initiatives
- ★ Emergency Preparedness — State & Local
- ★ Homeland Security & Law Enforcement
- ★ Business Continuity/Disaster Preparedness for Corporations
- ★ Transportation & Supply Chain Security
- ★ Immigration
- ★ Information Sharing & Privacy
- ★ Private Sector General Counsels.

Some of the topics expected to be discussed are chemical and port security legislation, the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (“SAFETY Act”), the Transportation Workers Identification Credential (TWIC) and the Critical Infrastructure Information Act of 2002 (CII Act), among many others. Plus, two luncheon speakers of national prominence. Visit www.abanet.org/adminlaw for more details.

Notice-and-Comment Rulemaking Comes to China

By Jeffrey S. Lubbers*

A recent newspaper article contained the following quote that everyone in the ABA Administrative Law Section could readily agree with:

The work of law-making must be professional and precise. But to invite public suggestions into the law-making process shows an open, scientific and democratic attitude. Thus the process to solicit public opinion is a process of education, a process to foster and improve democratic awareness, as well as a process to promote democratic and legal construction.

This was not an American or EU commentary; it was an excerpt from the Chinese *Worker's Daily*. The quote was carried in the April 18, 2006 edition of the English-language *China Daily*¹ in an article that mentioned that the National People's Congress had received over 320,000 "opinions" on a draft labor contract law.

While the National Legislation Law of 2000 does not expressly mandate such public participation, the idea of written public comments, public hearings, and other forms of public participation is beginning to catch on, especially in local government rulemaking, as I learned in a trip to China this July.

Neil Eisner (former Section Chair and Assistant General Counsel for Regulation and Enforcement at the U.S. Department of Transportation) and I were invited by the Yale Law School's China Law Center, to discuss rulemaking developments in China along with the Center's Deputy Director Jamie Horsley, Associate Director Jeffrey Prescott, and an affiliated scholar, Professor and Associate Dean Wang Xixin of Beijing University Law School. We had all attended a Beijing

workshop on U.S.-style rulemaking in 2003 and now had the opportunity to see just how far things had come.

The focal point of our trip was the City of Guangzhou (population around 10 million), which had just completed its first venture into notice-and-comment rulemaking, with the advice and counsel of the Yale advisers. The Director of the Guangzhou Office of Legislative Affairs (OLA), Chen Licheng, pronounced it a big success—so much so that the city had immediately thereafter enacted an ordinance (the "Measures on Public Participation in Formulating Rules") mandating that, starting in 2007, all future municipal rules must be issued according to a sophisticated and open system of public participation.

The pilot Guangzhou rulemaking concerned the regulation of commodity trade markets in the city. It underwent two phases of public participation.² In the pre-proposal stage (what we would call an "advance notice of proposed rule-making"), public notice of a 30-day comment period was posted on November 30, 2005 on the bulletin boards of 1630 commodity transaction markets, 176 grass-roots commercial offices, the websites of the city government and the OLA, and several newspapers. Twelve comments containing 30 recommendations were received. In addition the OLA invited 15 market representatives and 12 wholesalers to a meeting to discuss the proposal on December 26, 2005. In a significant first step for China,³ a

summary of all of the inputs with an OLA response to the comments was posted on the OLA website on February 9, 2006.⁴

To give one example, a customer of a meat and vegetable market, Mr. Huang, commented that in such markets the public scales are often not open on holidays and weekends and sellers change their scales and hurt consumers. He suggested that management of scales be standardized and that such manipulations be punishable by fines. The OLA's response indicated that this kind of situation will be dealt with in the new regulation.⁵

OLA then formulated a discussion draft text and announced a second round of notice and comment, this time on the full draft text, with a 35-day comment period. An extensive outreach was undertaken, including the distribution of 5000 booklets of the draft distributed in 1630 markets. In addition the OLA conducted on-site mini-conferences in two major markets and held "open debates" jointly with the wholesaler's "chamber of commerce." Through this outreach the OLA received 109 comments including 21 in writing. The final rule was then submitted for approval to the Guangzhou Municipal Government in early June and approved on July 3. Although we did not have the final text at the time of our meeting, the OLA representatives said it had been revised according to the public comments and the electronic docket and that the final text, the entire set of comments, and OLA responses would be posted soon on its website. The Guangzhou newspapers

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¹ Public Input on Law Important, *China Daily* (Apr. 18, 2006), available at <http://www.china.org.cn/english/GS-e/165887.htm>.

² The following description is based on the discussions at the Guangzhou meeting and a paper disseminated at that meeting by Jamie Horsley, "Administrative Rulemaking in Guangzhou" (July 4, 2006) (on file with author).

³ It is not typical for the National People's Congress (NPC) to respond to comments such as those made to the draft labor contract law, discussed above. However, in 2005, the NPC did publish a response to 24 major issues it identified in the 11,543 responses it received to a draft of the Property Law. See *id.*, at 7, n.4

⁴ These summaries were provided at the Guangzhou meeting (on file with author).

⁵ The draft of the final rule submitted by the OLA for approval, provided to us at the meeting, indeed did contain an article (28) that required market organizers to maintain, verify, and provide consumers with necessary measuring instruments.

continued on next page

provided extensive coverage of this process.⁶

Interestingly, after the close of the second comment period, the OLA's Research Center undertook a formal survey of about 100 members of the commodity market community to ascertain its awareness of the rulemaking and the opportunities for public participation. The survey results (also provided to us in advance of the meeting) indicated that the relatively low level of participation was due to inexperience with such procedures and a lack of confidence among the public in the process of public participation. The OLA hopes to overcome this through more education and publicity concerning the government's responsiveness to the public comments.

Based on this pilot rulemaking, and while it was going on, the Guangzhou OLA began drafting a policy on future rulemakings. The Yale team was able to make suggestions on these "Measures" during the drafting process and the final version that emerged in July 2006 (effective for all Guangzhou rulemaking after January 1, 2007) was quite comprehensive and progressive.⁷ The 34 articles of the Measures contain numerous laudable provisions, including:

- The public is given the right to propose rules, which triggers a requirement for an agency response that will be made public within 45 days.
- OLA should solicit, and respond to the public's opinions⁸ on its overall work agenda.
- Drafting agencies should offer a 30-day comment period on all rules contained in the rulemaking work agenda, through a series of listed methods for seeking such written comments (including

e-mail). Such comments shall be publicly posted within 5 working days.

- Drafting agencies should also use public forums, and where appropriate, some combination of open meetings, expert meetings and formal hearings, to solicit public opinions, before submitting their drafts to the OLA.
- When the OLA has received (and possibly revised) a drafting agency's draft rule, it shall afford the public a 15-day comment period on the OLA's proposed draft rule.
- Within 30 days of the rule's promulgation, the OLA shall publish the text of the final rule on its website, along with an "Explanation of the Circumstances of Public Participation," including how public opinions were solicited and the "circumstances regarding accepting" these opinions.
- The OLA shall establish an electronic docket, with specified contents, for each rulemaking.
- Members of the public whose comments are accepted may be honored by the OLA with commendations or honorary certificates.

While there are few provisions that we might quarrel with—for example a provision creating an exception from the public release of opinions which "violate the norms of morality" or which the agency "has reasonable grounds to believe are not suitable to be made public"—the Guangzhou Rulemaking Measures are a sophisticated set of rulemaking provisions and deserve accolades from anyone interested in public participation and increased openness of the regulatory process.

Clearly, Guangzhou is ahead of the curve in rulemaking in China with its menu of public participation alternatives and its electronic docket, but there have been experiments in other parts of country as well. A representative from the Beijing Municipal OLA described the capital city's experience with public participation, including website solicitation of opinions, in the regulation of firecrackers and fireworks and on regulating development (e.g., bars, restaurants, and stadiums) in "densely" populated areas. Representatives of Shenzhen and Shanghai also indicated great interest in increasing public participation though

they admitted that their efforts had not gone as far as Guangzhou's.

As for the national government, several leaders met with us and the Guangzhou OLA representatives in a later meeting at the Beijing National School of Administration. At that meeting there was a frank discussion of the potential benefits of more public participation on the national level. The meeting included a judge on the Administrative Tribunal of the Supreme Court who was very complimentary of Guangzhou's efforts and even raised the possibility of judicial remedies for violations of such procedures if and when they are enshrined in national law. Other participants from the National State Council sounded a more cautionary note, suggesting that the process must be demonstrated to work well without unduly interfering with the government's discretion and expertise.

Thus, while a national law (or amendment of the National Legislation Law) requiring the same sort of process as will be required in Guangzhou is not currently on the table, the experience of large municipalities can be seen as China's version of our "50 state laboratories" for reforms. It is still far too early to be confident that the implementation of the new Guangzhou Measures will be successful, but the city's willingness to at least listen to the public is to be applauded. If the Measures are successful, then I believe that other municipalities, provinces, and eventually the national government will also move forward with similar types of reforms.

It is hard not to be impressed on such a visit with China's overall dynamism—large-scale projects are completed on a scale and in a time-frame that we Americans envy now. However, such development has a downside in terms of environmental degradation and social displacement that must also be dealt with. The people want to be heard on such matters and the government is showing signs that it wants to hear them. The rapid growth of the Internet provides a potentially low-cost way for governments at all levels to hear directly from the people. But this too must be administered in a regularized way, and the U.S. approach of notice-and-comment rulemaking seems in many ways to be a good fit for this in China. ○

⁶ A major Guangzhou newspaper also covered our meeting, specifically quoting Mr. Eisner's comments about the benefits of an electronic rulemaking docket.

⁷ These Measures build upon a set of Rule-making Measures, promulgated by Guangzhou in 2002, which also called for public participation, but was much less specific about the methods to be used. Guangdong Province (of which Guangzhou is the capital) also issued an Open Government Affairs Regulation, effective October 2005, which also contains the concept of "advance disclosure" of important decisions. See Horsley, note 2, *supra*, at 5, n. 2.

⁸ The text of the draft uses the term "opinions," more widely used in China, instead of the term "comments."

Best Practices Regulation

By David Zaring*

In traditional administrative law, agencies pass rules and courts review them. But what if agencies stopped acting by rule and started leading by example?

Leading by — or at least, pointing to — example is, in fact, what agencies are increasingly doing. And they are doing it through a recent turn to “best practices” instead of rules to ensure the success of regulatory programs. Although best-practice rulemaking has been largely ignored by the legal literature, regulation through best practices has increased sevenfold in the past ten years in the federal government alone, touching every aspect of administrative law.

For example, Congress has directed that best practices be observed in federal information policy and for federal employee discipline. Consideration of best practices is statutorily mandated for agricultural programs, military programs, education funding, and national parks. The term appears three times in the statute governing the new Department of Homeland Security and in agreements outlining multilateral initiatives in the war on terror. The list of statutes requiring agencies to act through best practices goes on, and has risen exponentially since 1980.

Among agencies, best practices are even more popular. In one summer week in 2004, for example, the Department of Defense created a task force that reviewed best practices for protection and security of “high-value installations” such as airports, harbors, nuclear power facilities, and military bases; the Department of Transportation offered grants to programs that identified best practices in getting Hispanics to wear seat belts; and the Department of Labor offered similar grants to entities designing workplace policies that would allow disabled indi-

viduals to telecommute most effectively. All told, the term “best practices” appeared 300 times in the 2004 *Federal Register*, up from three appearances in 1980.

What is this popular new form of administrative action? At their core, best practices are a method of regulation that works through horizontal modeling rather than hierarchical direction. In a classic best practices scheme, regulated entities themselves devise practices to comply with relatively unspecific regulatory requirements. These practices are selected and publicized as “best,” but not mandated by central administrators as they would be in regulation through a more traditional vertical command-and-control model. The idea is that these best practices will subsequently be adopted by other regulated entities.

Consider the example of the EPA’s best practices program under the Clean Water Act. Congress has instructed the Agency to oversee a process whereby states devise “best management practices” to deal with run-off from fields and cities that finds its way into navigable waters. These best management practices are left undefined by the authorizing statute and the agency. Moreover, states are not required to adopt *any* best management practices under the Act. For those that do, states, rather than the EPA, are charged with identifying the practices. The EPA’s role is simply to serve as a receptacle for reports that identify the practices and to share these practices with other states.

Defined this way, best practices might seem like a benign form of localism or subsidiarity, a method of regulation in which central administrators provide advice and disseminate information, instead of mandating a one-size-fits-all regulatory scheme. Indeed, it might suggest a rather democratic form of regulatory experimentalism, in which regulated entities experiment with best

practices as a way of vindicating the broad principles of various regulatory programs, while the regulators keep track of their progress and help to celebrate and publicize particularly successful local initiatives.

But best practices usually fall short of this ideal. They are not a panacea, not always horizontal, and often, at least in effect, not really voluntary. In short, although best practices purport to be “best,” there is nothing particularly “best” about them. The rulemaking technique is a way of obtaining *common* practices, not ideal ones. There are, accordingly, some contexts in which best practices may be appropriate and effective forms of regulation, and other contexts where they are not.

In this article I look at the various ways in which best practices rulemaking operates, and evaluate its advantages and disadvantages.

Best Practices and Traditional Administrative Control

Traditional administrative law offers almost no restraints on agencies inclined to promulgate best practices instead of rules, making the tool an appealing one for administrators concerned about the prospect of judicial review.

Because best practices are not issued as mandatory rules, they are generally unreviewable by courts. The APA exempts “interpretative rules” and “general statements of policy” from its notice and comment requirements. Federal courts have found that best practices are “non-binding and unenforceable,” and should therefore be treated differently from binding administrative rules. I know of no case where a court has sanctioned an agency for failing to issue best practices through notice and comment, and no case where a court has

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reviewed agency statements of best practice for arbitrariness or capriciousness. Nor have federal courts used the mere existence of a statement of best practices as a baseline of conduct that an agency must follow.

Courts have accordingly been excised from administrative practice involving best practices, and the lack of supervision means, at least theoretically, that agencies that use best practices may do so without fear of reversal by the judicial branch.

If judicial supervision is unlikely for administration by best practices, one place to look for supervision would be from Congress. And while political scientists and legal scholars have found a new appreciation for the mechanisms of congressional supervision of agency action, best practices present some different problems. Best practices schemes, for example, are often quite technical, as is the case with the EPA's encouragement of "best management practices" to deal with the problem of nonpoint source water pollution, while Congress and its staffers are generalists, interested in public relations as well as governance.

It is accordingly somewhat rare, though not unprecedented, for Congress to exercise much supervision over agency best practices work.

A History of Best Practices

Why are legislators and regulators pursuing their administrative goals through best practices now, when New Deal and Cold War regulators did not? The term was first used by Congress in a Depression-era statute creating a thrift regulator, after which the concept spent four decades in obscurity.

The current popularity enjoyed by best practices in domestic administration may arise from its prominence in business management, where the widespread use of the concept has led to harmonization in competitive, non-harmonious environments. The source of best practices also provides some insights about their function — they create standardized approaches to regulatory projects, just not centralized ones. Best practices are also consistent with a deregulatory

agenda increasingly in vogue in both major political parties. Best practices thus are different from traditional administrative action not only in the form they take — outside the review requirements of the APA, and so on — but also because they are a novel procedural technique couched in the language of the private sector.

The story of the modern vogue for best practices begins with a particularly difficult era for the Xerox Corporation. In the late 1970s, Xerox was rapidly losing market share in the photocopier field that it had both created and long dominated. The problem was one of pricing. In 1979, Xerox found that its Japanese competitors "were selling machines for what it cost Xerox to make them," as one of its executives, Robert Camp, put it.

The new reality spurred the company to examine systematically how its competitors were producing machines, which it called "quality and feature comparisons." It then tried to match those quality and feature offerings that it deemed to be in the "best" of its competitors. Xerox called this process "benchmarking," which Camp defined as "the search for industry *best practices* that lead to superior performance."

*"The paradigm is to
keep up with the Joneses,
instead of doing the
Joneses one better."*

Keeping up with the competition is not something that federal officials would seem to need to worry about. Nonetheless, despite the real differences between public agencies and private firms, scholars and reformers devised theories of public management in the 1990s that sought to structure public agencies more like private firms.

Accordingly, efforts in the 1990s to reform government practice relied heavily on these private management-inspired theories. David Osborne and Ted Gaebler's influential book *Reinvent-*

ing Government — a title used by Vice President Al Gore to brand his efforts at bureaucratic reform — for example, praised Tom Peters and Waterman's work, *In Search of Excellence*, a book that popularized the Xerox best practices approach. Adopting the latter pair's private sector recommendations for the public sector, Osborne and Gaebler argued for a decentralized and entrepreneurial form of government. By identifying successful public management innovators, they hoped to reinvent government and "turn bureaucratic institutions into entrepreneurial institutions." As George Frederickson has observed of Osborne and Gaebler, "these doctrines are argued. . . on the observation of so-called best practices."

How Best Practices Work

Best practices appeal to regulators because they offer the promise of freedom from constraint and a delegation of onerous responsibilities. Operating through best practices offers agencies relative freedom from supervision, especially judicial supervision. Moreover, inviting best practices can mobilize private parties — like regulated entities or experts — to devise practices that they think fit the bill. In this way, best practices can reduce the transaction costs of rulemaking, at least for central rulemakers.

But there is more to the story than purely rational bureaucratic aggrandizement of flexibility. Best practices can be a coherent, rather than chaotic, way to implement a nationwide regulatory program because of what we know about behavioral economics and psychology. Best practices work because of the mixed blessings of cascades, copying, and follow-on imperatives.

The idea is that people confronted with a surfeit of options find it hard to choose among them, and regulators are no different. Best practices provide a manageable way of limiting the range of options for regulatory programs. In a world of technical complexity, where agencies are granted a great deal of discretion over how to regulate, the range of options is vast, and the complexities of supervision daunting.

Confronted with a wide range of remedial options in a complex issue-area, regulators can rationally save costs through the adoption of “off the shelf” rules, such as best practices. Government officials, like most people, rarely prefer lengthy adducements of reasons to act in a particular way to more straightforward algorithms listing programs to adopt. The “horizontalness” of best practices regulation helps to solve problems of unconstrained choice by providing available “go-bys” that limit the universe of choices.

Thus, best practices are consistent with theories of rational ignorance, under which regulators choose not to acquire sufficient information to fully develop regulatory alternatives, under the assumption that the costs of the acquisition of the information would ordinarily be greater than any expected benefits.

Accordingly, although best practices seem imbued with a sense of technocratic possibility — the concept, after all, is designed to get at “best” forms of regulation — it need not necessarily be a particularly thoughtful concept. Indeed, the widespread adoption of best practices may tell us very little about the “bestness” of the practice. Best practices work through copying. The paradigm is to keep up with the Joneses, instead of doing the Joneses one better.

Conclusion

Recommendations

Best practices can be beneficial in some contexts, and worth extra scrutiny in others. They may be particularly appropriate in areas of regulation that offer tremendous complexity and a wide range of alternatives. There, best practices offer a low-impact form of coordination. Where such an approach is valuable, or unavoidable (as in the anarchic world of international regulatory cooperation), best practices can play a useful role. However, they are unlikely to be successful at forcing technology to adapt to new problems — best practices do not force anything.

Moreover, the substantive problems of regulation through best practices are exacerbated by the way they are imple-

mented, which essentially makes them the first and most important step in a two-step regulatory process.

In the first step best practices are used to identify the legal rules that would, if enacted, have the force to law. But this devising process occurs without any procedural safeguards — judicial review or guarantees of public participation.

The result is that when agencies finally do adopt the practices gleaned from one another and pointed to by central regulators — the second step of the process — they often can defend their adoption of best practices for a number of reasons that courts are likely to accept, such as because it conforms to a larger scheme, or it duplicates efforts that other jurisdictions have used. The inability to challenge this sort of *fait accompli* is problematic.

To rectify this problem, I propose that Congress and the agencies themselves adopt some thoughtful policies about best practices, while retaining them as an alternative to APA rule-making.

First, Congress should be encouraged to make extra efforts to exercise supervision over the institutionalized process of horizontal regulation. It could do so through the hearings process, or by the requirement of annual reports on best practices initiatives. Of course, Congress may wish to require agencies to make rules through best practices where appropriate (or indeed, permit agencies to develop best practices regimes on their own). We can predict that it would be more likely to provide active, police-patrol-style supervision in matters of high importance, such as high politics or high value harmonization initiatives. The potentially expensive adoption of international accounting standards is an example.

Second, agencies should be encouraged to utilize best practices transparently. Agencies such as the EPA already publicize these practices on their websites; they should be encouraged to continue to do so and to publicize best practices initiatives in the *Federal Register*. If a standard has been widely adopted, it may be appropriate for a

federal agency to ratify it with notice and comment rulemaking. Here is an area where Congress can provide guidance, perhaps through an “Informal Administrative Procedure Act,” modeled off the Regulatory Negotiation Act, requiring agencies to publicly announce best practices initiatives and say why they are pursuing such practices.

Implications

The advent of best practices as a popular form of rulemaking can tell us something about administrative law more generally.

First, disaggregated methods of rulemaking lead to harmonization, rather than disaggregation. Without top down instruction, rulemakers may simply copy one another, leading to a regulatory equilibrium that may be different than the one that would have been set by an ideal central rulemaker, but that nonetheless is real and generally stable.

Second, harmonization techniques come with their own set of problems, particularly the problems of network forms of governance. Copying can lead to dominance of second best (or even worse) rules, where most of the networked rulemakers adopt a rule without seriously considering whether it is an optimal one.

We should therefore be cautious about informal harmonization, whether through best practices or other means. But we needn't be too cautious because of the procedural deficiencies: Best practices are a means of avoiding traditional administrative legal procedural controls, to be sure, but they do afford some participation by interested parties, and my prescriptions for best practices reform are straightforward and implementable. The reason to be cautious is because there is no reason to suspect that the substantive creations of these procedural innovations will necessarily be good ones. They will just be copied ones, couched in the language of technocracy. They are ways that low-level administrators figure out what to do next, not through reasoning, but through borrowing. ○

The 2008 Election is Heading Towards a Meltdown that May Surpass Florida in 2000

*By John Hardin Young**

No one can forget the bizarre aspects of the Florida 2000 election: butterfly ballots, hanging chads, clueless election officials “eye-balling” ballots, a politically biased Secretary of State charged with making judgment calls, a lack of statewide standards, lawyers everywhere, and numerous court decisions that left more questions than answers – other than who would be president, but without a satisfactory reason why. After the Florida recount, reforms abounded.

The election of 2004, however, was no improvement over the one in 2000. Long lines replaced the butterfly ballot, election officials still had problems administering the process when they excluded thousands of voters from the registration rolls, new voting machines proved fallible and unreliable, yet another politically biased Secretary of State was in charge (this time in Ohio), and statewide standards failed to appear. The only saving grace to the 2004 election was that the results were not close in the targeted states that mattered.

In the interim, Congress passed the Help America Vote Act, created the Election Assistance Commission, appropriated billions of dollars to improve voting machinery, mandated statewide registered voter lists, expanded the right to cast a provisional ballot, and authorized the requirement for voters to show identification in order to vote on Election Day. But the system has not improved. Problems still exist in the administration of elections throughout the nation.

The root of the election problem is found in the local nature of the process. Elections are run and managed on the

precinct level, where training is marginal and help almost non-existent. New machines are mandated, but sufficient training is not. County and city electoral boards are generally understaffed, under-trained in modern technology, and unable to deal with the influx of new registrations generated by the non-profit and 527 groups. At the state level, it appears to be politics as usual. Political appointees and those seeking higher office are in charge. The few professional election administrators are the exception.

The administration of elections need not be this difficult, particularly with the amount of money being spent at the federal and state levels.

First, state legislators must realize that elections at all levels warrant a solid centralized process. Professional administrators are needed at the highest level. The days of political appointees running elections are over. State laws need a complete overhaul from registration to recounts. One example is in the 2005 Virginia election where the State Board of Elections and the Recount Court in the Attorney General’s Office were presented with evidence that votes were not counted, but ultimately were unable to require that the ballots be recounted manually or by machine.

Second, state and local officials need to recognize that they jumped too quickly into the electronic voting machine briar patch. As the most recent Brennan Center for Justice Report finds, present e-voting machines “pose a real danger to the integrity of national, state and local elections.” Voting machines present unique challenges because of the challenges to their accuracy. There is good evidence, at least anecdotally, of lost or miscounted votes. Recent elections have raised significant concerns about the security and reliability of electronic

machines, including weak security controls, system design flaws, inadequate system version control, inadequate security and ballot testing, incorrect system configuration, poor security management, and vague and incomplete standards and training. Ballot definition files (which tell the voting machine software how to display ballot information, interpret a voter’s “touch,” and record the tally) are constantly being questioned. Localities, moreover, are not open to double checking ballot images that are printed from touch-screen machines (Florida 2004). In some states, reviewing and rerunning optical scan ballots, even when confronted with evidence of problems, (Virginia 2005) does not occur. In early and absentee voting, an additional concern is raised by the need to ensure the security and accountability of all ballots received (e.g. have all the ballots been counted?). It is time to step back and demand reliable, auditable processes for voting and vote counting.

Third, too many eligible voters are turned away from the polls. Some are in the wrong precinct, some are not on the registered voter lists because of administrative mix-ups, and some do not have the correct form of identification. States have attempted to deny the vote by requiring strict compliance with photo identification cards to the exclusion of other valid means of allowing individuals to vote. Plus, many do not have the time to waste in line for hours. Each of these problems is solvable now, but may well linger into the 2008 election and beyond. State and local officials must recognize that all qualified citizens have the right to vote. The days of poll taxes and voter restrictions are over. Routine changes in polling places, consolidation

continued on page 28

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2006 Gellhorn-Sargentich Law Student Essay Competition

Kari A. Bergeron, is the winner of the first annual Gellhorn-Sargentich Law Student Essay Competition. Ms. Bergeron was a second-year student at Southern University Law Center when she submitted her entry. Her composition is a model of clarity, even if the subject matter remains murky to this day despite the Supreme Court's recent ruling on the cases addressed in Ms. Bergeron's essay (see Supreme Court News this issue).

Singing the Blues: Muddy Waters and the Scope of Federal Authority Over Isolated, Inland Wetlands under the Clean Water Act

I. Introduction

With little more than his dreams, Muddy Waters left his Mississippi Delta home in 1943 for the bright lights of the Windy City.¹ His innovative guitar techniques and soulful tales about life as a sharecropper led Muddy Waters to become known as “the father of Chicago blues.”² His name, however, has become a homophone associated with judicial decisions, especially those related to the Clean Water Act (CWA),³ which concern the definition of “navigable waters of the United States.” Specifically, the metaphor “muddy waters” has been used to describe the confusion associated with the scope of federal jurisdiction over isolated, inland wetlands with little or no hydrological connection to navigable waters. On February 21, 2006, the United States Supreme Court heard consolidated oral arguments by two Michigan landowners challenging the regulatory jurisdiction asserted by the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA). The broad jurisdiction asserted over these inland wetlands raises serious questions in administrative and constitutional law, and this federal control has fueled tension between private property rights and environmental protection.

¹ The Official Muddy Waters Website, http://en.wikipedia.org/wiki/Muddy_Waters (last visited Mar. 24, 2006).

² *Id.*

³ 33 U.S.C. 1251 et seq.

A. *United States v. Rapanos*⁴: “Messin’ With the Man”⁵

Sixty-nine year old John Rapanos, a land developer, was charged with illegally dumping fill material into wetlands on his 175-acre plot of land in Williams Township, Michigan, between 1988 and 1997. Rapanos, in hope of obtaining a permit to construct a shopping center, asked the state to inspect a parcel of his land. Upon inspection, the Michigan Department of Natural Resources (MDNR) cautioned Rapanos that the site likely contained protected wetlands. Rapanos believed that the site was merely a cornfield filled with drainage ditches and allegedly violated a MDNR cease-and-desist order and an EPA compliance order by filling in parcels of his property with sand.⁶ The government subsequently brought civil and criminal actions against Rapanos.⁷ During Rapanos's original sentencing hearing in 1998, Judge Zatkoff pointed out a drug dealer he had sentenced earlier that day and stated:

Here we have a person who commits crimes of selling dope and the government asks me to put him in prison for 10 months. And then we have an American citizen, who buys land, pays for it with his own money, and moves some sand from one end to the other and [the] government wants to give him 63 months in prison. Now if that isn't our system gone crazy, I don't know what is.⁸

Rapanos challenged the authority of the federal jurisdiction because the

⁴ *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004) (Rapanos II), *cert. granted*, 126 S. Ct. 414 (2005).

⁵ *Muddy Waters* (Geffen 1994).

⁶ *Rapanos II*, 376 F.3d at 632.

⁷ *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003) (Rapanos I), *cert. denied*, 541 U.S. 972 (2004).

⁸ *Wetlands Desperado*, Wall St. J., August 23, 2004, at A12.

wetlands on his property allegedly did not abut navigable water, nor did the wetlands have a “significant nexus” to navigable waters.⁹ Additionally, the wetlands were as far as twenty miles away from the nearest navigable water. Regardless, the Sixth U.S. Circuit Court of Appeals court held that the Corps had jurisdiction over Rapanos's property because it was part of the same hydrological system, as a result of tributaries and other waterways, as the nearby waters of the United States. This decision prompted Rapanos to appeal to the Supreme Court.¹⁰

B. *Carabell v. United States Army Corps of Engineers*¹¹: “No Escape From the Blues”¹²

Developer Keith Carabell was refused a permit to develop a condominium complex in Macomb County, Michigan, because the Corps determined that his property contained wetlands. The wetlands are adjacent to a ditch, which connects to a drain, which then flows into Lake Clair. The lake is part of the Great Lakes drainage system, which is a regulated navigable water of the United States. Carabell challenged the jurisdiction, alleging that no hydrological connection existed to navigable water since a manmade berm (a manufactured barrier) completely separated the wetland from the drain. In other words, the presence of the berm blocked the water from the wetland from reaching the drain. Even without a hydrological

⁹ *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

¹⁰ *Rapanos II*, 376 F.3d at 632.

¹¹ *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704 (6th Cir. 2004) (Carabell), *cert. granted*, 126 S. Ct. 415 (2005).

¹² *Muddy Waters* (Epic/Legacy 2001).

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connection, the Sixth Circuit affirmed the district court's decision, finding that a "significant nexus" existed between the wetland and the ditch based on the adjacency of the wetland itself. Consequently, Carabell sought review from the Supreme Court.

II. Administrative law: "Who Do You Trust"¹³ to enforce the CWA?

A. The CWA and Congressional Delegation to the EPA and Corps

In 1946 Congress passed the federal Administrative Procedure Act (APA), which established how federal administrative agencies may propose and promulgate regulations and how agency decisions were to be reviewed by the federal courts.¹⁴ The APA is the major source for federal administrative law and was enacted to provide some sort of uniformity among all federal administrative agencies.¹⁵

The Federal Water Pollution Control Act Amendments of 1972,¹⁶ better known as the Clean Water Act (CWA), was enacted "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁷ One way to achieve this purpose is Congress's prohibition of discharging pollutants, including dredged or fill material, into "navigable waters" except pursuant to a permit issued in accordance with the Act.¹⁸ The CWA defines "navigable waters" as the "waters of the United States, including the territorial seas,"¹⁹ which federal regulations delineate as including "wetlands adjacent to" navigable waters or their tributaries.²⁰ Wetlands are defined by federal regulations as those areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of

vegetation typically adapted for life in saturated soil conditions."²¹

Determining which wetlands are "adjacent to" navigable waters has been difficult. According to the Code of Federal Regulations, "adjacent" means "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"²² Wetlands must have some connection to navigable waters or interstate commerce in order for federal jurisdiction to be invoked.²³

Two federal administrative agencies, the EPA and the Corps, have concurrent jurisdiction authorized under Section 404(a) of the CWA to issue or deny permits over the dredging and filling of material into the waters of the United States.²⁴ CWA "empowers the agencies to issue administrative compliance or 'cease and desist' orders, assess administrative penalties, or initiate judicial enforcement proceedings seeking injunctive relief and fines for civil and criminal violations."²⁵ The principle authority for overseeing the Section 404 program is left to the Corps, and it receives guidance from the EPA. However, both agencies share the duty to enforce non-compliance with the terms and conditions of the 404 permitting program.²⁶

C. Chevron Doctrine

Chevron deference or "administrative deference" pertains to the judicial review of statutory interpretations by an agency. When Congress delegates authority to an administrative agency to enforce a statute, and that statute is silent or unclear, the Court will defer to the agency's reasonable interpretation of the statute.²⁷ Unless the agency's interpretation of the statute is "arbitrary, unreasonable, or manifestly contrary to the statute," the interpretation by the agency should be applied.²⁸

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of*

*Engineers*²⁹ (SWANCC), another battle over CWA jurisdiction, the Supreme Court did not apply *Chevron* deference to the Corps' Migratory Bird Rule. This rule allowed the Corps to assert jurisdiction over isolated wetlands that had no hydrologic connection to navigable waters through the movement of migratory birds across state lines. The Court held that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."³⁰ "Where an administrative interpretation of a statute invokes the outer limits of Congress' [s] power, we expect a clear indication that Congress intended that result."³¹ The Court further noted that the Migratory Bird Rule impeded the state's "traditional and primary power over land and water use" and therefore was not entitled to *Chevron* deference.³²

However, in *United States v. Riverside Bayview Homes, Inc.*³³ the Supreme Court applied *Chevron* deference to the Corps' interpretation that "waters of the United States" included wetlands adjacent to navigable waters.³⁴ In *SWANCC*, the Court recognized that the deference afforded in *Riverside* was appropriate because there was a "significant nexus" between adjacent waters and navigable waters that was not present in the "nonnavigable, isolated, intrastate ponds" at issue in *SWANCC*, whose only connection to interstate commerce was the occasional visiting by migratory birds. In the *Rapanos* and *Carabell* cases, the government is hoping the Court relies on its reasoning from *Riverside*, which would allow for the broad reading of CWA and thus allow the Corps to assert broad jurisdiction.

The *Rapanos* and *Carabell* cases involve wetlands that lie somewhere between the remote, nonnavigable wetlands in *SWANCC* and the wetlands that were adjacent to waters in *Riverside Bayview*.

¹³ Muddy Waters (Epic/Legacy 2005).

¹⁴ 5 U.S.C. § 500 et al.

¹⁵ *Id.*

¹⁶ Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566.

¹⁷ 33 U.S.C. 1251(a).

¹⁸ 33 U.S.C. 1311(a), 1362(12)(A).

¹⁹ 33 U.S.C. 1362(7).

²⁰ 33 C.F.R. §§ 328.3(a)(1), (5), (7); 40 C.F.R. §§ 230.3(s)(1), (5), (7).

²¹ 33 C.F.R. § 328.3(b).

²² 33 C.F.R. § 328.3(c).

²³ *Rapanos II*, 376 F.3d at 635.

²⁴ CWA § 404, 33 U.S.C. § 1344(a).

²⁵ 33 U.S.C.A. §§ 1319 (a)(3), (b), (c), (d), & (g).

²⁶ 33 U.S.C.A. §§ 1319; 1344(s); 1365.

²⁷ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

²⁸ *Id.* at 844.

²⁹ 531 U.S. 159 (2001).

³⁰ *Id.* at 173-74.

³¹ *Id.* at 172.

³² *Id.* at 173-74.

³³ 474 U.S. 121.

³⁴ *Id.* at 134-35.

If the Court applies Chevron deference to the Rapanos and Carabell cases, property owners will be singing the blues because the federal government will be able to assert jurisdiction over every ditch, drain, and puddle in the United States. During oral arguments before the U.S. Supreme Court, Justice Scalia said, “I do not see how a storm drain under anybody’s concept is a water of the United States.”³⁵ “In other words, the agencies argue they can and should define their own jurisdiction, which they attempt to do here by laying claim to the entire tributary system of a traditional navigable waterway, whatever its form.”³⁶

Conversely, if Chevron deference is not applied, then the Corps and the EPA will have less authority, and such a narrow reading of the statute may subject thousands of acres of wetlands vulnerable to degradation. If “waters of the United States” in the CWA “were read to exclude nonnavigable tributaries, then discharges of such materials as sewage, toxic chemicals, and medical waste into those tributaries would not be subject to the CWA’s permitting requirements... and... would impair the quality of traditional navigable waters downstream.”³⁷ Justice Souter, during the oral arguments, stated that “[a]ll they have to do is get far enough upstream and they can dump anything they want to.”³⁸ The Justice was referring to “evil polluters” who could escape getting a permit and “wreck” the navigable waters of the United States with no consequence.

III. Constitutional Law & Wetland Jurisdiction: “They Call Me Muddy Waters”³⁹

A. Commerce Clause

Article I, Section 8, Clause 3 of the United States Constitution, known as the Commerce Clause, empowers the United States Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

³⁵ Rapanos, S. Ct. No. 04-1034; Carabell, S. Ct. No. 04-1384; Tr. at 53 (Feb. 21, 2006).

³⁶ Rapanos, S. Ct. No. 04-1034, Brief of Petitioner at 5.

³⁷ *Id.*, Brief of Respondent at 20-21.

³⁸ Rapanos, S. Ct. No. 04-1034; Carabell, S. Ct. No. 04-1384; Tr. at 7.

³⁹ Muddy Waters (Geffen 2000).

In *United States v. Lopez*⁴⁰ the Court restricted Congress’s authority under the Commerce Clause to regulate only the channels of commerce, the instrumentalities of commerce, and action that substantially affects interstate commerce.⁴¹ To determine which activities fall within the last category, the court must examine (a) whether the statute controls a commercial activity or some activity necessary to the regulation of commercial or economic activity; (b) whether the statute’s language includes a jurisdictional requirement ensuring that the regulated activity affects interstate commerce; and (c) how far the rationale for upholding the statute extends.⁴² These standards were promulgated “to assure that the federal government’s powers will not become co-extensive with the general regulatory powers of the states, and legislation must not be interpreted or applied to compromise these standards.”⁴³

The Corps and the EPA have asserted jurisdiction under the CWA to regulate the isolated, inland wetlands with little or no hydrological connection to navigable waters in *Rapanos* and *Carabell* under Congress’s Commerce Clause power to regulate (1) the channels of interstate commerce and (2) the activities that substantially affect interstate commerce.

The government asserts that Congress’s power to regulate the channels of interstate commerce includes the power to keep navigable waters free from pollution. To pursue this objective, the government contends that Congress may regulate conduct that occurs outside traditional navigable waters if such nonnavigable tributaries or their adjacent wetlands could affect the conditions of the channels in commerce. “So long as the inclusion of such tributaries and wetlands within the Corps’ jurisdiction is a reasonable means of protecting... traditional navigable waters, the constitutionality of the Act does not depend on the directness of the link to traditional navigable waters...”⁴⁴

⁴⁰ 514 U.S. 549 (1995).

⁴¹ *Id.* at 558-9. See also *United States v. Morrison*, 529 U.S. 598 (2000).

⁴² *Lopez*, 514 U.S. at 563-64.

⁴³ Carabell, S. Ct. No. 04-1384, Brief of Petitioner at 26 (citing *SWANCC*, 531 U.S. at 172).

⁴⁴ Rapanos, S. Ct. No. 04-1034, Brief of Respondent at 16.

The Fourth Circuit recently held in *United States v. Deaton*⁴⁵ that Congress’s “power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce”⁴⁶ and deferred to the Corps’ interpretation of “waters of the United States” to include upland property that contained wetlands when the owners excavated a ditch and deposited the fill into the wetlands. Significantly, the wetlands in *Deaton* were not adjacent to navigable water, but instead the water from the wetlands drained into a roadside ditch, which flowed into a culvert, and into a second roadside ditch before flowing into several creeks connected to navigable waters.⁴⁷ Furthermore, the government in *Rapanos* asserts, as did the Court in *Deaton*, that “in the aggregate, pollutant discharges into wetlands adjacent to tributaries can be expected to have substantial impacts on interstate commerce, including but not limited to the deleterious effects of such discharges on the traditional navigable waters downstream.”⁴⁸

Conversely, section 404(a) of the CWA applies to “navigable waters,” and the Court ruled in *SWANCC* that “navigable” expresses Congress’s intent to use “its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.”⁴⁹ Actual navigable waters can be used as channels of commerce by their definition; however, the wetlands at issue in the *Rapanos* and *Carabell* cases are not navigable and cannot be made navigable. To expand the federal regulation of the wetlands at issue, one of which is nearly twenty miles from the nearest navigable stream in the *Rapanos* case,⁵⁰ “is to render meaningless any notion of limits on federal power.”⁵¹ The landowners

⁴⁵ 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004).

⁴⁶ 332 F.3d at 706. See also *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979).

⁴⁷ *United States v. Deaton*, 209 F.3d 331, 333 (2000).

⁴⁸ Rapanos, S. Ct. No. 04-1034, Brief of Respondent at 16.

⁴⁹ *SWANCC*, 531 U.S. at 172.

⁵⁰ Rapanos I, 339 F.3d 447.

⁵¹ Rapanos, S. Ct. No. 04-1034; Carabell, S. Ct. No. 04-1384; Brief for Claremont Institute Center for Constitutional Jurisprudence as Amicus Curiae in Support of Petitioners (Claremont Brief) at 16 (2005 WL 3309661).

continued on next page

contend that the government is “not regulating the channels themselves . . . but only activities that arguable may affect the channels of commerce, the discharge of dredged or fill materials into wetlands adjacent to any ‘tributary.’”⁵² Rapanos and Carabell each sought to make improvements on his private property, not move anything into interstate commerce. “Land, of course, is the quintessential thing that does not move in interstate commerce.”⁵³

B. Tenth Amendment and State’s Rights

According to the Tenth Amendment of the U.S. Constitution, the federal government has the power to regulate only matter specifically delegated to it by the Constitution. Powers that are not enumerated to the federal government are reserved to the States, or to the people. The Commerce Clause is one of those few powers specifically delegated to the federal government; therefore, its interpretation is very important in determining the scope of federal legislative power.

In *New York v. United States*⁵⁴ the Court acknowledged that the principle of reserved powers fundamental to the Tenth Amendment serves as a barrier to the exercise of power by Congress. Fundamentally, this division of power serves as an independent check by the states on the federal government preventing the expansion of its powers over the rights of ordinary citizens.⁵⁵ This check “was designed so that decisions affecting the day-to-day activities of ordinary citizens would continue to be made at a level of government close enough to the people so as to be truly subject to the people’s control.”⁵⁶ When Congress, or a federal agency in reliance on an act of Congress, acts beyond the scope of its enumerated powers, it intrudes upon the sovereign powers of the states and acts without constitutional authority.⁵⁷ Property right advocates

allege that the jurisdiction asserted by the Corps is “[a] pretext for the exercise of police powers by Congress, powers that were and of right ought to be reserved to the States, or to the people.”⁵⁸ Further, the stated purpose of the CWA is not to preserve the *navigability* of the nation’s waters, but to preserve the physical integrity of the nation’s waters. The preservation of these waters is arguably an exercise of the states’ police power to protect the health, safety, and welfare of its citizens. The landowners contend that their cases are not about the regulation of wetlands, but rather, *who* has the authority to regulate them: the state or the federal government?

The Corps contends that the asserted jurisdiction does not violate states’ rights since the CWA expressly allows states to regulate activities that fall under 404(a). This complementary permitting program is authorized under Section 404(g), which allows state officials to assume responsibility for certain discharges of dredged or fill materials into navigable waters.⁵⁹ Pursuant to Section 402, the discharge of pollutants, other than dredged or fill material, may be authorized by the EPA, or by a state with an approved program under the National Pollutant Discharge Elimination System (NPDES) program.⁶⁰ This partial delegation “gives a state the authority to render a comprehensive federal/state wetland permit decision with the federal government playing the role of overseer in the consideration of permit applications.”⁶¹

Notably, the state of Michigan does participate in a state-approved permitting program through the Michigan Department of Environmental Quality (MDEQ). The Carabells applied for and were ultimately granted a permit by MDEQ to fill 15.9 acres of forested area for their condominium project. However, the Corps subsequently asserted its federal jurisdiction and denied the Carabells the 404(a) permit because the permit expressly stated that the issuance of the permit by the state did not waive the jurisdiction of the Corps.⁶²

As the Sixth Circuit noted in Rapanos’s civil case,⁶³ the CWA’s allowance for state involvement in the permitting program does not allow the state to alter the CWA. The state program must be conducted in accordance with the CWA and “[w]hile States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.”⁶⁴ According to Michigan’s Geomare-Anderson Wetlands Protection Act, wetlands are defined with slight variations to the CWA. Michigan allows wetlands that are not contiguous to the Great Lakes, an inland lake or pond, or a river or stream and less than five acres in size to escape Michigan’s Wetlands Protection Act.⁶⁵ The Court held that the allowance of Michigan to participate in enforcing portions of the CWA did not allow the state to weaken the CWA.⁶⁶

IV. Conclusion: “Lonesome Road Blues”⁶⁷

The aggressive tug of war between private property owners and environmentalists would certainly leave anyone’s hands blistered. The tension over the balance of state and federal power to regulate inland wetlands has escalated, especially since the 2001 decision in *SWANCC*. And since the federal circuits are in conflict over this jurisdictional issue,⁶⁸ the Court carries a heavy burden in deciding whether to allow the broad jurisdiction asserted under the CWA to continue. Many are hoping the Court clarifies the definition of “navigable waters” and Congress’s intent to regulate these wetlands under the CWA. Regardless of how the Court decides, one thing is certain: someone will be singing the blues. My suggestion? Listen to a little Muddy Waters, and if you are a property owner, get a wetland delineation before you buy property. Otherwise, you could be fighting the government for years, just like Mr. Rapanos. 

⁵² Rapanos, S. Ct. No. 04-1034, Brief of Petitioner at 15.

⁵³ Claremont Brief at 15 (citing *Camps Newfound/Owatonna v. Town of Harrison*, Maine, 520 U.S. 564, 609 (1997) (Thomas, J., dissenting)).

⁵⁴ 505 U.S. 144, 156-57 (1992).

⁵⁵ Claremont Brief at 3 (citing *Morrison*, 529 U.S. at 616 n.7; *Lopez*, 514 U.S. at 552, 582).

⁵⁶ Claremont Brief at 4.

⁵⁷ See, e.g. *The Federalist* No. 33, at 204 (Hamilton)

⁵⁸ Claremont Brief at 20.

⁵⁹ 33 U.S.C. § 1344(g).

⁶⁰ 33 U.S.C. § 1342

⁶¹ *Michigan Peat v. EPA*, 175 F.3d 422, 424 (6th Cir. 1999).

⁶² *Carabell*, 391 F.3d at 706.

⁶³ *Rapanos II*, 376 F.3d at 646.

⁶⁴ 40 C.F.R. § 233.1(d).

⁶⁵ Mich Comp. Laws § 324.30301(p) and (p)(ii).

⁶⁶ *Rapanos II*, 376 F.3d at 646.

⁶⁷ *Muddy Waters* (Geffen 1997).

⁶⁸ See *In re Needham*, 354 F.3d 340 (5th Cir. 2003); *D.E. Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001).

Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law

By Stuart Minor Benjamin and Arti K. Rai*

Attention to administrative law principles has long been a striking feature of the patent system. In contrast with communities in other technically complex areas (e.g., environmental law, telecommunications law, and food and drug law), the patent law community has tended to pay little attention to administrative law. In part, this has been because, until *Dickinson v. Zurko*, 527 U.S. 150 (1999), the Court of Appeals for the Federal Circuit (which hears all appeals in patent cases) denied that the Administrative Procedure Act (APA) even applied to its review of the Patent and Trademark Office (PTO). Additionally, unlike such prominent agencies as the Environmental Protection Agency and the Federal Communications Commission, the PTO does not have authority to issue substantive rules, and it does not render legal interpretations of the patent statute to which courts must give *Chevron* deference.

In the past few years, many influential institutions – ranging from the National Academy of Sciences and the Federal Trade Commission to the PTO itself – have called for improved administrative procedures. These calls for improvement provide a fresh opportunity to revisit the application of administrative law principles to the PTO. In this article, we take up that opportunity. We conclude that for the most part, judicial review based on ordinary administrative law doctrine, coupled with modest changes to existing PTO procedures, provide a result that is both politically possible and normatively desirable. Judicial review of these

proceedings based largely on standard administrative law principles would provide reasonably accurate, cost-effective determinations of patent validity. Additionally, proper application of administrative law principles would provide an institutional foundation for the determinations of economic policy that the patent system should be making, including economic policy determinations regarding how patent principles should apply with respect to different types of technological information.

Legal Analysis for Existing Proceedings

A threshold question is what level of deference the Federal Circuit should, as a matter of formal legal analysis, apply to the PTO in existing proceedings. The APA provides the default rules for all agencies. With respect to judicial review, nothing in the Patent Act displaces or modifies the APA. However, the Federal Circuit has resisted application of the APA to its review of PTO decisions. Even after *Zurko*, which specifically instructed the Federal Circuit to apply the APA to its review of PTO factual findings, the court has taken the path of less deference. It has applied substantial evidence review to PTO fact-finding (even though the PTO's proceedings are not formal adjudications) and disallowed official notice (despite the fact that the APA specifically provides for broad official notice). With respect to legal determinations, the Federal Circuit has repeatedly stated that it grants no deference whatsoever to PTO legal interpretations of the Patent Act, ignoring *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The Federal Circuit has even stated that it grants no deference to PTO interpretations of its regulations, despite the fact that such interpretations are entitled to very strong deference

under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The Federal Circuit's treatment of PTO policy decisions and exercises of discretion is also notable. The court recognizes that the PTO exercises discretion. With few exceptions, however, the court has failed not only to apply well-established principles of hard look review to PTO policy decisions, but also to recognize policy decisions as a separate category of PTO behavior. In contrast, the Federal Circuit routinely applies standard administrative law principles to its review of other agencies.

Comparative Institutional Analysis and Judicial Review

We turn next to the normative question of what review we should want. In broad outline, agencies generally have an advantage over courts in terms of technical competence. One of the central rationales for creating administrative agencies was that they would have greater expertise than generalist courts. The advantages in competence that flow from specialization may have drawbacks, however, in the form of bias resulting from capture by narrow interests or tunnel vision. This former concern flows in significant part from the logic of collective action: small groups of players with concentrated interests will have an easier time organizing, and influencing decisionmakers, than will large, diffuse groups. Although courts can be captured as well, most scholars believe that courts are less likely to be captured than agencies.

What does this suggest for administrative law? The standard answer is that courts should give great deference to agencies' findings of fact, and less deference to their legal interpretations and policy determinations. As to facts, the

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* Professors of Law, Duke Law School. This contains portions of an article with the same title that will appear in Volume 95 of the *Georgetown Law Journal*. A draft of the full article is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=897307.

idea is that accurate factfinding in complex areas requires specialized knowledge, so competence looms particularly large. In contrast, an agency's legal interpretations and its policy decisions are not as dependent on the understanding of technical data. Accordingly, they can be more effectively reviewed by courts. In addition, legal and policy determinations that sweep broadly are likely to be the subject of the most intensive lobbying and thus may be the determinations we most want to insulate from the possibility of capture. The deference scheme suggested by this comparative institutional analysis is close to the system we actually have. Courts give great deference to agency factfinding and less deference to policy decisions and many legal determinations. The exception to this general conformity with comparative institutional analysis is *Chevron* deference, particularly with respect to informal rulemaking. As cabined by *Mead*, *Chevron* deference applies to legal interpretations made in informal rulemakings or formal adjudications. While the trial-type context of formal adjudication generally alleviates concerns about bias affecting the agency's decision, informal rulemaking allows for powerful interests to present arguments privately to the decision maker.

Fortunately, because the PTO does not engage in informal rulemaking, this exception is not an issue. But that still leaves the larger question of whether the comparative institutional analysis should play out differently given the specialization of the Federal Circuit.

We begin with law and policy. The repeated exposure of Federal Circuit judges to appeals from the PTO – and appeals in patent cases more generally – means that they have greater familiarity with the underlying statutory regime than a generalist judge would about a typical agency that she reviews. However, concerns about bias and tunnel vision are also quite salient in the context of legal and policy determinations. Because of its specialization, the possibility of bias is greater for the Federal Circuit than for the regional United States Courts of Appeals. Just as agencies can suffer from tunnel vision, so too can specialized courts.

How, if at all, should the Federal Circuit's somewhat greater bias and expertise about legal and policy determinations change the deference calculus outlined in the previous section? The problem with answering that question is that expertise and capture pull in opposite directions, and it is difficult to determine whether one outweighs the other. What seems clear, though, is that the change from the deference template discussed above would be fairly small.

What about factfinding? As we discussed above, the expertise factor is most important in the area of factfinding. The judges of the Federal Circuit are certainly more steeped in patent jurisprudence than generalist judges, and the Federal Circuit does have a small technical staff. But it is not clear that Federal Circuit judges know more about any given technology than a generalist judge would. Any increase in the expertise of the Federal Circuit over a generalist court is so marginal, in light of the greater resources of the PTO, that such specialization should make little if any difference in the deference accorded to the PTO on factfinding. So, once again, the generic deference template has significant appeal.

“Mead and Skidmore suggest a fair amount of deference to agency legal determinations made in the course of...denials – and less deference in the context of patent grants”

There is a different consideration, though, that suggests a bigger relative change from the generic deference template outlined above – the context for PTO patent denials versus patent grants. The structure of patent examination makes PTO denials sufficiently difficult that there is strong reason to believe that false positives (patent grants that should be denials) are much more common than false negatives (denials that should be grants). Under the patent statute, the patent examiner has the

burden of demonstrating lack of patentability. Moreover, because of the severe resource constraints under which the patent office operates, the examiner must typically meet this burden in about 18 hours. Most importantly, a patent denial diverges from a patent grant in that it goes through significant appellate review even before it reaches the Federal Circuit. The disincentives for PTO patent denials are sufficiently great that bifurcated, or asymmetric, review would be attractive – with patent denials subject to much more deference than patent grants.

Bringing Doctrine and Normatively Attractive Standards Together

Can doctrine and normatively attractive standards be brought together? The default APA-level deference for PTO factfinding mandated by *Dickinson v. Zurko*, if applied properly by the Federal Circuit, would work well for patent denials. With respect to factfinding in patent grants, substantial evidence review might apply with respect to evidence on which the PTO had actually made a determination. However, as a matter of logic, such review could not apply in the many cases where new evidence is presented at trial. With respect to new evidence, review would have to be de novo. As for deference on questions of law, *Skidmore* explicitly allows for a sliding scale of deference based on “the thoroughness evident in [the agency's] consideration” in determining how much deference to grant to the agency's decision. 323 U.S. at 140. As *Mead* elaborated, under *Skidmore* courts look to “the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position.” 533 U.S. at 228. The level of care and thoroughness entailed in patent denials is considerable (as is the PTO's relative expertness). As a result, *Mead* and *Skidmore* suggest a fair amount of deference to agency legal determinations made in the course of such denials – and less deference in the context of patent grants, which do not entail significant internal review. As for policy determinations, a “hard look” approach would also favor patent denials over patent grants.

To the extent the PTO engages in economic reasoning, it is much more likely to do so comprehensively in the context of the fairly extensive procedures involved in patent denials than in its routine patent grants.

Combining New Procedures with Existing Administrative Law Principles

Another possibility would be for Congress to create new PTO procedures and then either specify the review applicable to those procedures or, more simply, let the application of existing administrative law principles complete the move to more normatively attractive standards of review. We focus here on one modest change, post-grant opposition proceedings, which are currently included as a feature in various Congressional reform proposals. Generally speaking, these proposals use estoppel-based approaches to judicial review. In other words, if an opponent loses a particular issue of fact or law in the post-grant review, it is estopped from raising the issue in subsequent litigation.

The problem with estoppel is that it exacerbates the collective action problem that already lurks in the post-grant review proceeding. To the extent a challenger successfully invalidates a patent, it invalidates the patent both for itself and for the world. With estoppel, the challenger not only provides a public good if it wins, but the challenger is uniquely disadvantaged if it loses. Only the challenger is barred from raising again questions of invalidity. In patent litigation, victory has a hundred fathers but defeat is an orphan.

A second problem with an estoppel-based approach is that, if the patent survives post-grant review, estoppel obviates the need for only a limited amount of litigation – litigation against the party who brought the opposition. Other competitors are free to challenge the patent unhindered.

Deference could reduce the intensity of both of these problems. Deference to the results of post-grant review would have to operate with respect to both fact and law: although facts are particularly critical to patent validity, deference on legal determinations would also be

important because patent validity has been deemed ultimately to be a question of law. Specifically, once the PTO had ruled a patent valid in a post-grant review, the PTO's factfinding on evidence it had considered would be subject to APA level deference, and the determination of patent validity as a whole (again, with respect to the evidence considered) would be subject to *Chevron* deference. Both deference on factfinding and *Chevron* deference would obviously apply irrespective of the identity of the party against whom it was asserted. Such deference would mean that unless the administrative opponent had pursued an appeal to the Federal Circuit (and was therefore properly subject to estoppel under traditional principles of civil procedure), it would be no worse off than any other potential infringer. Moreover, even if the administrative opponent were uniquely subject to estoppel, other potential infringers would also feel the negative effects of the deference. Ex ante, that would mean that all potential infringers would have an incentive to help the administrative opponent. After all, if the opponent lost, the consequences of such a loss would be visited not only upon the opponent but also upon other potential infringers. Such assistance could be provided through a variety of existing mechanisms; better yet, post-grant review could specifically provide mechanisms for multiple challengers to oppose a patent.

The intuition behind a deference-based approach – taking administrative procedure seriously and not treating it simply as a subset of procedures used in litigation – is also found in the apparently successful European system of post-grant review. Under the European system, post-grant review is the major venue for *any* party that wishes to challenge validity. Deference would similarly make post-grant review the main avenue for challenging validity in the United States.

Some commentators, such as the Federal Trade Commission, have addressed the question of judicial review of post-grant oppositions by recommending that Congress include in its legislation authorizing such oppositions a provision for *Chevron* deference to the results. But a specific statutory provision

regarding *Chevron* deference is not necessary: ordinary principles of administrative law would provide *Chevron* deference even if Congress were to omit any reference to a standard for judicial review. The various post-grant review proceedings that have been proposed would be trial-type procedures on the record that bear the hallmarks of formal adjudication. Such proceedings would have sufficient formality to satisfy *Mead*'s test for application of *Chevron* deference. Thus, if Congress created these procedures and said nothing more, *Chevron* deference would seem to apply to them.

Conclusion

The Federal Circuit, and many commentators, has long treated administrative law as tangential (at best) to patent law. But the PTO is an administrative agency, and the APA applies to the PTO, and to the Federal Circuit's review of PTO decisions. Bringing the APA (and administrative law doctrine more generally) to bear on patent law regularizes patent law, by applying established standards of review. Thus the APA, and the voluminous case law interpreting it, replaces ad hoc standards created by the Federal Circuit.

Application of administrative law principles also brings into focus possibilities for making realistic and normatively attractive changes to PTO procedures, and the Federal Circuit's review of the PTO. It is tempting for academics, and daunting for policymakers, to posit radical changes in existing law that would create an ideal system. Such a recasting of patent law is not necessary, however, for us to move patent law a considerable distance toward normatively attractive standards of review. First-best solutions are (by definition) the most attractive, but second-best solutions fare well if they are much more realistic and give us much of what we want. The application of administrative law principles outlined in this Article presents such a second-best. So, while we wait (indefinitely) for an ideal PTO and Federal Circuit to be created, principles of administrative law offer real improvement based on a huge body of experience in other areas of complex, technical regulation. ○

2006 Elections



Section Chair

(automatic succession
by operation of the bylaws):

Daniel Troy. Dan is a partner in the firm of Sidley Austin Brown & Wood in Washington, D.C. He is former Chief Counsel of the Food and Drug Administration. Dan has been a cochair of the Constitutional

Law and Separation of Powers Committee and a Member of the Section's Council.



Section Chair-Elect

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operation of the bylaws):

Michael Asimow. Michael is a professor emeritus at the University of California at Los Angeles and co-author of a leading textbook on administrative law. He is a former liaison to the Section's Council for

State Administrative Law and a former Council Member. He is the editor and a co-author of the Section's *A Guide to Federal Agency Adjudication*, the drafter of the 2005 ABA resolution on adjudication, a past chair of the Adjudication Committee, and a co-reporter for the EU administrative law project.



Vice Chair:

H. Russell Frisby, Jr.

Russell, a graduate of Swarthmore and Yale Law School, currently practices law with Fleischman and Walsh, L.L.P. in Washington, D.C. Before joining Fleischman and Walsh, Russell was the President and CEO of CompTel/ASCENT, the leading

telecommunications trade association. Russell also served as Chairman of the Maryland Public Service Commission. Russell is a longstanding member of the Section, with stints as Budget Officer and Vice Chair of both the Regulatory Policy Committee and the Communications Committee, as well as the Section's representative to the ABA Commission on Racial and Ethnic Diversity in the Profession.



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Eleanor D. Kinney. Eleanor is the Hall Render Professor of Law and Co-Director of the Center for Law and Health at Indiana University School of Law in Indianapolis. She has been a Council Member as well as chair of both the Section's

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Thomas Susman. Tom, a partner at Ropes & Gray in Washington, D.C., served as Section Chair from 1991-92 and has also been a member of the ABA Board of Governors. His numerous other past Section activities include chairing its committees on Government Information and Privacy and on Legislative Process and Lobbying.

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(second one-year term):

James Conrad. Jamie is an Assistant General Counsel at the American Chemistry Council. He recently served as cochair of the Section's Regulatory Policy Committee and has organized numerous educational programs for the Section.

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Lisl Dunlop. Lisl is Counsel to Shearman & Stearling in New York City, where she practices in the antitrust group. Lisl received an LL.M. from Cornell University in 1997, and an LL.B. and B.Sc. from the University of Sydney in 1991. She is a co-reporter for adjudication in the EU administrative law project.

Kenneth Hurwitz. Ken is a partner at Haynes and Boone in Washington, D.C. He previously served on the Council to fill a vacancy and is a co-chair of the Energy Committee.

William Jordan. Bill is a professor of law at the University of Akron Law School. He is chair of the Judicial Review Committee and the Contributing Editor for News from the Circuits in the *Administrative & Regulatory Law News*.

Richard Parker. Richard is a professor of law at the University of Connecticut School of Law. He previously served on the Council to fill a vacancy and is a former cochair of the Regulatory Policy Committee.

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by Robin Kundis Craig*

At the end of its 2005–2006 term, the U.S. Supreme Court issued a number of decisions touching on administrative law issues. The issues addressed included: Congress' ability to withdraw federal court jurisdiction; due process; exhaustion of prisoners' administrative remedies; and the intersections of federalism, deference to administrative agencies, and statutory interpretation in the context of the Clean Water Act.

Federal Court Jurisdiction

Absent constitutional problems, Congress can restrict access to the federal courts. Whether Congress had actually done so was the subject of two Supreme Court opinions this quarter.

In *Whitman v. Department of Transportation*, — U.S. —, 126 S.Ct. 2014 (June 5, 2006), an employee of the Federal Aviation Administration (FAA) sued in federal court to challenge the FAA's drug testing policies, claiming that they violate the employee's First Amendment rights, without first pursuing the grievance procedures in his collective bargaining agreement. An FAA statute, 40 U.S.C. § 40122(g)(2)(C), incorporates the provision of the Civil Service Reform Act of 1976, 5 U.S.C. § 7121(a)(1), that gives exclusive jurisdiction over federal employee grievances related to "prohibited personnel practices" to the grievance bodies established through collective bargaining agreements. As a result, both the district court and the U.S. Court of Appeals for the Ninth Circuit dismissed the FAA employees case for lack of subject matter jurisdiction. In a *per curiam* opinion, the Supreme Court vacated the lower courts' decisions and remanded for a more explicit determination that the statutory exclusivity provisions actually applied to the case and for determinations on the issues of: (1) whether there was final agency action for the employee to appeal; and (2) how the doctrine of exhaustion of administrative remedies should apply (or not) to the lawsuit. 126 S. Ct. at 2015–16.

However, the Supreme Court upheld federal court jurisdiction over the pending habeas claims of Guantanamo Bay "enemy combatants," and held that the Executive Branch's proposed military commissions to try those prisoners were illegal, in *Hamdan v. Rumsfeld*, — U.S. —, 126 S. Ct. 2749 (June 29, 2006). Mr. Hamdan is a Yemeni national captured in Afghanistan and being held by the United States in Guantanamo Bay, Cuba. He filed a habeas petition to challenge the military commission that the United States intended to use to try him on conspiracy charges. In a 5–3 decision authored by Justice Stevens (Chief Justice Roberts did not participate), the Supreme Court held that the military commission lacked authority to proceed "because its structure and procedures violate both the UCMJ [Uniform Code of Military Justice] and the Geneva Conven-

tions." 126 S. Ct. at 2759. The Court reached this conclusion primarily on the grounds that, as proposed, the military commission could exclude Mr. Hamdan's civilian counsel from seeing probative evidence that the commission itself would rely on.

Before reaching that substantive conclusion, however, the Court had to address the Government's motion to dismiss on the grounds that section 1005(e)(1) of the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, 119 Stat. 2739, stripped federal courts of the authority to hear pending habeas petitions from Guantanamo Bay prisoners. Hamdan challenged this provision on both constitutional and statutory grounds, but the Court resolved the issue purely through statutory interpretation, essentially invoking the presumption against retroactive application of statutes. *Id.* at 2764–69. More specifically, the Court noted that sections 1005(e)(2) and 1005(e)(3) both explicitly apply to pending habeas petitions, while section 1005(e)(1) was silent on that issue. In addition, the majority concluded that there was no reason to abstain until the commission had reached a final decision, *id.* at 2769–72, and that its review of the case did not raise separation of powers issues because the President's power to establish military commissions is limited to compliance with the law of war, and neither Congress' Authorization of the Use of Military Force nor the DTA authorized the President to deviate from the UCMJ. *Id.* at 2774–76.

Due Process Limitations on States

In *Jones v. Flowers*, — U.S. —, 126 S. Ct. 1708 (April 26, 2006), the Supreme Court resolved a conflict among the states' supreme courts and the federal courts of appeals regarding states' Due Process duties when mailed notices of tax foreclosure sales are returned to the state. In a 5–3 decision (Justice Alito did not participate) through an opinion authored by Chief Justice Roberts, the Court held "that when mailed notice of a tax sale is returned unclaimed, the state must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is reasonable to do so." 126 S. Ct. at 1713. Because additional reasonable steps were in fact available to the state in this case, the tax sale was reversed. *Id.*

Supreme Court Justice-watchers might also be interested in the somewhat unusual split in this case. While Chief Justice Roberts authored the opinion, it was Justices Thomas, Scalia, and Kennedy who dissented.

Exhaustion of Administrative Remedies

The Prisoner Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), requires prisoners to exhaust all available remedies before taking their § 1983 claims to federal courts, the Supreme Court decided in *Woodford v. Ngo*, — U.S. —, 126 S. Ct. 2378 (June 22, 2006). In a 6–3 decision authored by Justice Alito (Justices Stevens, Souter, and Ginsburg dissented), the Court decided that the PLRA requires prisoners to exhaust all "available" remedies in *any* lawsuit challenging prison conditions. The majority noted that "[p]roper exhaustion demands

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compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." 126 S. Ct. at 2386. As a statutory matter, moreover, section 1997e(a) appeared to use "exhausted" in the administrative law sense, and requiring exhaustion fits with the general scheme of the PLRA, which "attempts to eliminate unwarranted federal-court interference with the administration of prisons." *Id.* at 2387. In addition, exhaustion is the normal requirement in habeas-type litigation. *Id.* at 2387-90.

Statutory Interpretation, Federalism, and Chevron Deference: The Clean Water Act Cases

The Supreme Court decided two Clean Water Act cases this quarter. In May, it issued a unanimous decision regarding the applicability of section 401 of the Act to a Federal Energy Regulatory Commission (FERC) relicensing in *S.D. Warren Co. v. Maine Board of Environmental Protection*, — U.S. —, 126 S.Ct. 1843 (May 15, 2006). In June, it issued a fractured, five-opinion, 4-1-4 non-decision regarding the scope of "waters of the United States" for purposes of section 404 in *Rapanos v. United States*, — U.S. —, 126 S.Ct. 2208 (June 19, 2006). Both cases, however, blend issues of *Chevron* deference, statutory interpretation, and federalism considerations.

In *S.D. Warren*, the unanimous U.S. Supreme Court, in an opinion by Justice Souter, affirmed the Supreme Judicial Court of Maine regarding the state's right to condition a Federal Energy Regulatory Commission (FERC) relicensing of hydroelectric dam projects. Section 401 of the Clean Water Act requires applicants for federal licenses and permits to obtain water quality certifications from the relevant state if the licensed or permitted activity may result in a "discharge" that can affect state water quality. 33 U.S.C. § 1341(a). In *S.D. Warren*, the parties disputed whether a "discharge" would occur and hence whether section 401 was triggered.

To interpret the term "discharge," the Court looked first to statutory definitions, noting that the Act does not precisely define "discharge" but rather only states that the term "includes a discharge of a pollutant, and a discharge of pollutants." 126 S. Ct. at 1847 (quoting 33 U.S.C. § 1362(16)). According to *Webster's New International Dictionary*, the ordinary meaning of "discharge" when applied to water is a "flowing or issuing out" or "[t]o emit; to give outlet to; to pour forth; as, the Hudson discharges its waters into the bay." *Id.* (quoting *Webster's New International Dictionary* 742 (2d ed. 1949)). The Supreme Court found support for its proposed interpretation in non-Clean Water Act cases, *id.* at 1847-48 (citations omitted); in its prior section 401 decision, *PUD Np. 1 of Jefferson Cty. v. Washington Dept. of Ecology*, *id.* at 1848 (citing PUD No. 1, 501 U.S. 700 (1994)); and in statements by the Environmental Protection Agency (EPA) and FERC. *Id.* (citations omitted). The Court was careful to note that the agencies were not entitled to deference regarding this definition "because neither the EPA nor

FERC has formally settled the definition"; nevertheless, "the administrative usage of 'discharge' in this way confirms our understanding of the everyday sense of the term." *Id.* at 1848-49. The Court then rejected S.D. Warren's objections to its interpretation based on the canon of *noscitur a sociis*, *id.* at 1849-50; on the Court's interpretation of "discharge of a pollutant" — a defined term under the Act — for purposes of the section 402 permit program, because section 401 and section 402 are separate provisions of the Clean Water Act, with different statutory triggers, *id.* at 1850; and on legislative history (a part of the opinion Justice Scalia would not join), referring to S.D. Warren's highly technical argument about wording based on drafting amendments as "a lawyer's argument." *Id.* at 1851, 1852.

Unusually, the Court then extended its discussion beyond the narrow issue of the meaning of "discharge" — all that was needed to decide the case — to emphasize the federalism aspects of water quality protection. Noting that S.D. Warren's technical arguments "miss the forest for the trees," *id.* at 1852, the Court emphasized States' roles in implementing the Act's broader purposes: "to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'" with "the 'national goal' being to achieve 'water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.'" *Id.* (quoting 33 U.S.C. § 1251(a) and citing PUD No. 1, 511 U.S. at 714). As a result, "[c]hanges in the river like [those caused by the hydroelectric dam] fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns." *Id.* (citing 33 U.S.C. §§ 1251(b), 1256(a), 1370). In the Court's opinion, "[r]eading § 401 to give 'discharge' its common and ordinary meaning preserves the state authority apparently intended." *Id.*

The case of *Rapanos v. United States*, 126 S. Ct. 2208 (2006), consolidated two cases, *Rapanos and Carabell*, both of which involved the issue of the Army Corps' section 404 jurisdiction over the dredging and filling of wetlands that are adjacent to tributaries of the traditional navigable waters. The Justices issued five opinions, splitting 4-1-4 with a very limited majority decision to remand the case to the lower courts.

At the beginning of his plurality opinion for himself, Chief Justice Roberts, Justice Thomas, and Justice Alito, Justice Scalia emphasized what he considered to be section 404's vast violation of federalism principles, announcing that "[t]he enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act — without any change in the governing statute — during the past five Presidential administrations." *Id.* at 2215. Nevertheless, the plurality dismissed Rapanos' argument that Clean Water Act jurisdiction was limited to the traditional "navigable waters." *Id.* at 2220. It then focused on the meaning of "waters," relying on *Webster's New*

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International Dictionary to conclude that “the waters of the United States’ include only relatively permanent, standing or flowing bodies of water” – that is, “continuously present, fixed bodies of water, as opposed to ordinary dry channels through which water occasionally or intermittently flows.” *Id.* at 2220–21. Given this definition of “waters,” Clean Water Act jurisdiction extends to

only those wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between “waters” and wetlands, are “adjacent to” such waters and covered by the Act. . . . Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: First, that the adjacent channel contains a “wate[r] of the United States,” (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.

Id. at 2226–27 (citations omitted). The plurality also indicated that its interpretation of the Act would foreclose *Chevron* deference for any future Army Corps and EPA regulations. Specifically, it concluded that only its definition of “waters of the United States” was consistent with principles of federalism and the Act’s policy of respecting the rights of States. *Id.* at 2223–24.

Justice Kennedy wrote separately to concur in the plurality’s decision to remand but otherwise offer his own analysis. According to Justice Kennedy, the issue in *Rapanos* was “whether the term ‘navigable waters’ in the Clean Water Act extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact.” *Id.* at 2236 (J. Kennedy, concurring). This issue, in his opinion, should be resolved through “significant nexus” test that the Court had announced in its 2001 decision of *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), and he concluded that the cases should be remanded because, “though the Court of Appeals recognized the test’s applicability, it did not consider all the factors necessary to determine whether the lands in questions had, or did not have, the requisite nexus.” 126 S.Ct. at 2236 (J. Kennedy, concurring).

Justice Kennedy agreed with the plurality that “in enacting the Clean Water Act Congress intended to regulate at least some waters that are not navigable in the traditional sense. *Id.* at 2241 (citations omitted). However, he objected both to the plurality’s insistence that “waters” had to be significant and relatively permanently bodies or flowing waterways and to its definition of adjacent wetlands as being those with a direct surface water connection. *Id.* at 2241–47. Instead, Justice Kennedy emphasized the importance of an ecological connection. *Id.* at 2248. Specifically,

wetlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, either

alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable.” When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term “navigable waters.”

Id. The process for establishing the Corps’ jurisdiction over adjacent wetlands would thus depend on what kind of waters the wetlands abutted:

When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps’ regulations, this showing is necessary to avoid unreasonable applications of the statute. Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region.

Id. at 2249. Finally, Justice Kennedy emphasized that his interpretation “does not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption” because “in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will raise no serious constitutional or federalism difficulty.” *Id.* (citations omitted). Moreover, “[t]he possibility of legitimate Commerce Clause and federalism concerns in some circumstances does not require the adoption of an interpretation that departs in all cases from the Act’s text and structure.” *Id.* at 2250 (citing *Gonzales v. Raich*, 545 U.S. 1, —, 125 S. Ct. 2195, 2206 (2005)).

Justice Stevens authored the dissenting opinion for himself and Justices Breyer, Souter, and Ginsburg. The dissenters, essentially arguing for the status quo ante, emphasized Congress’ broad purposes in enacting the Clean Water Act. *Id.* at 2252 (J. Stevens, dissenting). Notably, the dissenters would have deferred fully to the Army Corps’ regulations, and they accused the plurality of undoing “more than 30 years of practice by the Army Corps” and “disregard[ing] the nature of the congressional delegation to the agency and the technical and complex character of the issues at stake.” *Id.* Justice Kennedy’s approach was better, but still “fails to defer sufficiently to the Corps . . .” *Id.* In contrast to both of these approaches, the dissent would have accorded the Army Corps’ regulations *Chevron* deference. *Id.* at 2252–53. As a result, the dissenters would have affirmed both *Rapanos* and *Carabell*. However, recognizing that the Scalia/Kennedy split left the lower courts with no clear test, the dissenters instructed that “on remand each of the judgments should be reinstated if either of those tests is met.” *Id.* at 2265. ○

By William S. Jordan III*

D.C. Circuit Denies Review of NHTSA Guideline Letter

Even when an agency states that it will take a particular action under certain circumstances, the agency has not taken “final action” that is subject to judicial review. After *Center for Auto Safety v. National Highway Traffic Safety Administration*, 2006 WL 1715358 (D.C. Cir. June 23, 2006), any agency should be able to couch its informal statements in way that avoids review.

The National Highway Traffic Safety Act of 1966, recodified through the National Highway Safety Administration Authorization Act of 1991, requires auto manufacturers to undertake recalls of vehicles with safety-related defects. NHTSA is authorized to order recalls, but auto manufacturers undertake many recalls voluntarily under NHTSA supervision. In the mid-1980’s, manufacturers began undertaking “regional recalls” in which they limited consumer notification and repairs to regions in which climatic conditions caused the defects in question. This practice continued unchallenged until the late 1990’s, when the Assistant Administrator for Safety Assurance wrote several letters expressing NHTSA’s concerns about the practice. These letters, whose substance ultimately became known as the “1998 policy guidelines,” distinguished between circumstances when defects arose from short-term exposures to meteorological conditions and those in which defects arose from long-term exposures. As to the former, the guidelines said that regional recalls were generally not appropriate, but that NHTSA might be willing to permit some modifications of manufacturer notification obligations. As to defects arising from long-term exposures, the guidelines said that, “if the manufacturer is able to demonstrate that the relevant environmental factor (or factors) is significantly more likely to exist in the area proposed for inclusion than in the rest of the United States, NHTSA will approve a regional recall.” (emphasis supplied).

The Center for Auto Safety challenged the “policy guidelines” as rules issued without notice and comment and as arbitrary and capricious. Since the action arose under federal question jurisdiction and § 704 of the APA, the court said that the Center had to establish either that the guidelines constituted final agency action or that they “constitute[d] a *de facto* rule or binding norm that could not properly be promulgated absent the notice-and-comment rulemaking required by § 553 of the APA.” Although the latter language suggested that the court was prepared to consider the practical effects of the guidelines, the court explicitly rejected that proposition.

Applying the familiar two-prong test of *Bennett v. Spear*, the court first acknowledged that the guidelines could be viewed as

the “consummation” of agency decisionmaking. As to the second prong of the test, however, the court held that, “The guidelines are nothing more than general policy statements with no legal force. They do not determine any rights or obligations, nor do they have any legal consequences. But why? After all, the agency said that under certain circumstances it “will” approve regional recalls. This sounds remarkably like the informally-stated “action level” provision that triggered review in *Community Nutrition Institute v. Young*, 818 F.2d 943 (D.C. Cir. 1987).”

While in *CNI v. Young* the agency had effectively bound itself in the exercise of its enforcement discretion, the court characterized the 1998 policy guidelines as merely “reflect[ing] NHTSA’s views on the legality of regional recalls.” Even if adverse to a party’s interests, such expressions are not reviewable. Characterizing the guidelines as “nothing more than a privileged viewpoint in the legal debate . . . [that] do not purport to carry the force of law,” the court said: “They do not define ‘rights or obligations.’” The court justified this conclusion by reference to the general and conditional language of the guidelines’ discussion of defects arising from short-term exposures. To this extent the court is surely correct. The guidelines did nothing more than leave the door open for flexible agency response to a request for a regional recall in such circumstances.

The court is considerably less convincing in its discussion of the agency’s position on regional recalls when defects arise from long-term climate exposures. Although the guidelines require certain conditions to be met, and they prohibit public statements on such recalls prior to discussion with the agency, the fact remains that the agency said it “will” approve regional recalls when such conditions are met. As to that point, the agency appears to have cabined its own discretion. The court’s subsequent assertion of agency enforcement discretion does not change that appearance. It is true that this is not *Appalachian Power*, in which an informal statement required others to use a certain monitoring method, but the distinction from *Community Nutrition Institute* is not convincing.

Perhaps the court is on firmer ground when it emphasizes that the guidelines’ author did not have the authority to issue guidelines with binding effect. Since his statements could not “change an automaker’s legal obligations under the Act,” they could not meet the *Bennett* test of creating new legal rights or obligations. This would be a much simpler way to resolve such disputes, but it allows agencies to avoid review by careful choice of the agency official who signs any given issuance.

Judge Randolph, also taking a simpler approach, concurred on the ground that the guidelines did not constitute the consummation of the agency decisionmaking process. Since any interested person could seek a hearing on a recall proposal, final agency action would have to await the outcome of any

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continued on next page

such hearings. To him, this situation is comparable to an agency seeking to achieve compliance through threats of enforcement. The threats themselves are not reviewable. Judge Randolph does not address *Community Nutrition Institute*, which perhaps is best forgotten.

D.C. Circuit Rejects SEC Reversal But Upholds FCC Reversal.

Hedge funds are essentially unregulated private investment vehicles designed for very wealthy investors who can be expected to protect themselves. In the wake of the near collapse of Long-Term Capital Management and the bailout engineered by Alan Greenspan, and in light of the increasing “retailization” of hedge funds, the SEC issued a rule that effectively required hedge fund advisors to register under the Investment Advisers Act, although the funds remained unregulated under the Investment Company Act. The SEC accomplished this feat by redefining the word “client.”

Hedge fund advisers generally fall within the definitions of the Investment Advisers Act, but they had been exempt under a provision excluding from regulation advisers who had “fewer than fifteen clients.” Hedge fund advisers had been exempt because their clients were considered to be the hedge funds themselves, and they simply advised fewer than fifteen funds. The SEC changed the landscape (and its own previously articulated position) by issuing a rule providing that the term “client” included the investors in the funds (the “beneficial owners” of the funds), not merely the funds themselves.

In *Goldstein v. SEC*, 451 F.3d 873 (D.C. Cir. 2006), the D.C. Circuit first rejected the proposition that the term “client” was ambiguous because it had not been defined in the statute. Rather, “the ‘words of the statute should be read in context, the statute’s place in the overall statutory scheme should be considered, and the problem Congress sought to solve should be taken into account’ to determine whether Congress has foreclosed the agency’s interpretation.” In light of certain statutory language, the SEC’s previous position, and a related Supreme Court decision, the court came tantalizingly close to a *Chevron* Step 1 rejection of the SEC’s interpretation. Noting, however, that it “may be that ... the strict dichotomy between clarity and ambiguity is artificial, that what we have is a continuum, a probability of meaning,” the court ultimately finessed Step 1 and held that the agency’s interpretation was unreasonable. As we have come to expect, the court’s analysis at Step 2 reads like the application of the arbitrary and capricious standard of review. The court emphasizes the agency’s prior position, the tension involved in extending regulation for only the limited purpose of registration and disclosure (not for other regulatory purposes), and conflicts inherent in the proposition that an adviser’s clients could be both the funds themselves and the beneficial owners of the funds. How could one have a fiduciary duty to both when their interests can conflict?

By contrast, the FCC prevailed in *American Council on Education v. FCC*, 451 F.3d 226 (D.C. Cir. 2006), which involved the FCC’s determination by rule that both broadband internet service and voice over Internet protocol (VoIP) constituted “telecommunications carriers” for purposes of the Communications Assistance for Law Enforcement Act. The CALEA requires telecommunications carriers to assure that communications on their services can be subject to surveillance by law enforcement. The statutory problem was that the CALEA applies to “telecommunications carriers,” but not to “information services.” Moreover, the FCC had previously held that these were not “telecommunications services” under the Telecommunications Act of 1996.

The FCC had approached the issue by identifying three categories of services: purely telecommunications, purely information services, and a hybrid of both that would be governed by the CALEA only to the extent that it constituted telecommunications. The FCC considered broadband internet service and VoIP to be in the third category. The FCC relied upon the different purposes of the Telecommunications Act of 1996 (deregulatory) and the CALEA (to assure law enforcement access) as justifying different treatment. It also relied upon a provision explicitly reaching services that constituted a replacement of traditional telephone service. The majority essentially accepted the FCC’s explanation and upheld its interpretation as a reasonable policy choice.

Judge Edwards vehemently disagreed. He emphasized statutory language that drew a clear distinction between telecommunications carriers and information services, and that explicitly did not apply the CALEA requirements to information services. He saw the majority’s decision as a highly purposive effort to help law enforcement, contrary to the plain language of the statute as applied to broadband internet services. He would, however, have allowed the FCC to reach VoIP through the provision reaching replacement for traditional telephone service.

9th Circuit Finds NRC Terrorism Decision Unreasonable

San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016 (9th Cir. 2006), involved an application for a license to increase dry cask spent nuclear fuel storage at the Diablo Canyon nuclear reactor. Mothers for Peace sought to intervene in the licensing proceeding to argue that National Environmental Policy Act required the NRC to consider the environmental consequences of a terrorist attack on the spent fuel storage facility. Mothers also asked the NRC to delay the licensing proceeding pending a review of security provisions for the entire Diablo Canyon facility. The NRC rejected both arguments. As to the denial of intervention, it cited four reasons: “(1) the possibility of terrorist attack is too far removed from the natural or expected consequences of agency action to require study under NEPA; (2) because the risk of a terrorist attack cannot be determined,

the analysis is likely to be meaningless; (3) NEPA does not require a “worst-case” analysis; and (4) NEPA’s public process is not an appropriate forum for sensitive security issues.” As to the more general facility challenge, it had already undertaken a thorough security review of the facility. The NRC prevailed as to the general facility challenge because it went beyond the context of the licensing proceeding, but it lost the argument about NEPA’s application to the effects of terrorist activities.

In a decision with ramifications for many federal or federally-licensed activities, the Ninth Circuit held that “it was unreasonable for the NRC to categorically dismiss the possibility of terrorist attack on the Storage Installation and on the entire Diablo Canyon facility as too ‘remote and highly speculative’ to warrant consideration under NEPA.” Dissecting the NRC’s reasoning, the court held that it was unreasonable to say that the possibility of terrorist attack was too remote to justify NEPA analysis, while also engaging in extensive “efforts and expenditures to combat this type of terrorist attack against nuclear facilities.” The fact that the risk of an attack cannot be determined does not prevent NEPA analysis. As with many other threats, it requires a probabilistic risk assessment. The court said this was not a request for “worst-case analysis,” but for a reasoned examination of the range of likely effects of a terrorist attack, and security risks have never been an excuse for failing to comply with NEPA.

FOIA I: D.C. Circuit Holds Electronic Calendars Constitute “Agency Records”

In two recent decisions, the D.C. Circuit addressed the new (the status of electronic calendars as “agency records”), and the old (the requirements of the venerable *Vaughn* Index). As to the first, in *Consumer Federation of America v. Department of Agriculture*, 2006 WL 1789006 (D.C. Cir. June 30, 2006), the Consumer Federation sought the electronic calendars of six USDA officials for the purpose of determining whether they had engaged in ex parte contacts during a rulemaking proceeding. The agency denied that the calendars constituted “agency records.” In support of this claim, each of the officials submitted an affidavit to the following effect: “In order to better communicate about my availability, to prevent, among other things, double booking of periods of time, my personal calendar was shared with [certain specified individuals].” In one case, the calendar was distributed only to the official’s secretary; in all others it was distributed to at least eleven other agency employees. The listing of particular individuals was followed by this assertion: “Calendar entries were distributed to these few individuals and were in no way distributed widely within USDA or FSIS,” with the obvious purpose minimizing the significance of the electronic calendar within the agency and reducing the likelihood of its being declared an agency record.

The D.C. Circuit didn’t buy it. Relying heavily upon *Bureau of Nat’l Affairs, Inc. v. United States Dep’t of Justice*, 742 F.2d 1484

(D.C. Cir. 1984), the court held that only the calendar that was distributed only to the official’s secretary did not constitute an agency record. In *BNA*, the court had held that agendas distributed to other officials constituted agency records, while a desk calendar available only to a secretary did not. Although the test focused “on a variety of factors surrounding the creation, possession, control, and use of the document by an agency,” the question of “use” was determinative. Mere creation by an agency employee and location within the agency were not necessarily enough in themselves. In *BNA*, the documents had not been officially integrated into agency files, so that could not make them records, so the crucial point was that the agendas were used by other agency personnel in performing their official tasks.

In applying *BNA* to the electronic calendars, the court noted in passing that, unlike the documents in *BNA* (and unlike the materials at issue in *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980)), the USDA calendars were not merely located within the agency, but stored on the agency’s computers. “At a minimum, this suggests that USDA had more “control” over its officials’ calendars . . .” Although this statement may spawn arguments that agencies “control” all documents in their computer systems, the D.C. Circuit relied instead upon “the manner in which the documents were used within the agency.” They were used to communicate with other employees, and they were continually updated, not merely located on the computer system. With the exception of the calendar distributed only to a secretary, this type of use rendered them all agency records.

Concurring in the result, Judge Henderson thought that the Supreme Court in *United States Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989), in rejecting an “intended use” test had discredited the rationale of *BNA*. She also was not satisfied that the court had adequately addressed the differences between paper and electronic records. She said the court had left two questions unanswered: (1) how many people must a document be distributed to in order to become an agency record, and (2) “does it make a difference to whom it is distributed?” The former seems an unduly mechanical question. If the question is whether it is used in carrying out the agency’s mission (as opposed to the individual’s performance), distribution to anyone else would probably be enough. Which means that the “to whom” question is more important. Indeed, Judge Henderson questions the conclusion that documents distributed to a secretary necessarily qualify as merely personal, not agency records.

Perhaps more interesting, she notes that these electronic calendars were not so much distributed to others (as by pressing a “send” key), as made available to them. This may be a true difference from paper communication. Paper cannot be seen in

continued on page 28

*Edited by Edward J. Schoenbaum**

Mandatory Arbitration on the Farm—Pushing the Envelope?

By Michael Asimow¹

Concerned that California farmers and farm worker unions could not reach agreement on labor contracts, the state legislature imposed a system of mandatory arbitration. A private arbitrator is empowered to impose a contract on the parties with only limited review by the Agricultural Labor Relations Board and the courts. A farmer complained, but the Court of Appeals upheld the statute by a 2-1 vote. *Hess Collection Winery v. ALRB*, 45 Cal.Rptr. 3d 609 (2006). Its decision is troubling.

The court held that the arbitrator's decision is legislative rather than adjudicative action. This distinction has important consequences for the scope of judicial review (which is much narrower for legislative than for adjudicatory decisions) and for procedural due process (which doesn't apply to legislative action). Normally, the legislative/adjudicative distinction turns on whether a decision is individualized or generalized (see *US v. Florida East Coast RR*, 410 US 224, 244-46), or perhaps on the number of persons involved (*Bi-Metallic Inv. Co. v. SBE*, 239 US 441), or perhaps on whether the case involves adjudicative or legislative facts (see the various editions of the Kenneth Davis treatise). However, in *Hess*, the court used a different criterion: because the arbitrator was not applying "existing rules to existing facts" but instead was creating a relationship for the future, his action was legislative in nature. This is disturbing because the decision was individualized and turned entirely on economic facts specific to the parties. As a result, the various protections applicable to adjudication should apply to the arbitrator's decision.

The court also held that the delegation to the arbitrator was not unlawful, despite a line of California authorities that question delegations of legislative power to private parties. Here, the delegation is problematic since the applicable statute and regulations provide little guidance to the arbitrator, provide few procedural safeguards against abuse, and permit only a narrow form of administrative and judicial review of the arbitral decision. Empowering a private arbitrator to establish the terms of a contractual relationship on an unwilling party with few standards or safeguards seems troubling. The California Supreme Court badly needs to consider the *Hess* case (and readers should treat the intermediate court decision in *Hess* with caution unless and until the Supreme Court decides not to grant a hearing).

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Florida Out Front with New Certification Program

By Keith W. Rizzardi²

The movement toward lawyer specialty certification continues. Recently, The Florida Bar Board of Governors approved its twenty-first board certified specialty program, this one covering State and Federal Government and Administrative Practice (SFGAP).

Florida's SFGAP certification is focused on procedural aspects of the law, especially administrative agency rulemaking and adjudication, litigation with governmental entities, and agency actions based on the Florida and Federal Administrative Procedures Acts. In addition, substantive topics such as ethics, government in the sunshine, and public records law are expected to be a part of the certification process. The name, although lengthy, distinguishes the SFGAP certification from other practice areas, including City, County and Local Government Law certification, and emphasizes the point that the field includes more than just the APA.

The SFGAP certification program earned strong support from The Florida Bar Government Lawyer Section, because that Section believed that many government lawyers, despite (and sometimes because of) their diverse experience, were unable to qualify for other programs.

Through the new SFGAP certification program, government and private sector lawyers alike can now obtain board certification by completing an application showing their range of experience in administrative and government practice. Qualifying experiences include not only direct APA-related adjudication and rulemaking experiences, but also include other litigation and agency transactions, such as contracting, licensing and permitting. Lawyers seeking this certification will also undergo a peer-review process and must successfully pass an exam. However, a grandfather clause allows some lawyers with more than 20 years experience to earn certification without an examination.

The proposal took years to develop and generated some controversy within The Florida Bar, especially on the extent to which "administrative law" included topics other than the state and federal APAs, and whether a minimum amount of experience in specific areas of the state and federal APA should be required before a lawyer could obtain certification. The many contributors to the process eventually reached a compromise using a unique "point system," assigning values to various types of administrative and governmental actions.

Over the coming months, this Section will evaluate Florida's program, and hopes to offer CLE programming to benefit the legal community in Florida as they begin the implementation of this important certification program.

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Florida Amends APA

By Larry Sellers³

Last year, Governor Jeb Bush vetoed a bill that would have amended Florida's Administrative Procedure Act (APA). This year, the Legislature again approved similar legislation, but incorporated several changes designed to address the Governor's concerns. Here's a brief summary of some of the key provisions in the 2006 bill, Chapter 2006-82.

Expansion of E-Rulemaking to All Agencies. In 2002, the Legislature created a pilot project by which the Department of Environmental Protection publishes its official notices on its website, rather than in the Florida Administrative Weekly. Chapter 2006-82 expands this project to all state agencies by providing for the electronic publication of the Weekly on an internet website managed by the Department of State. The Department also is required to continue to publish a printed version of the Weekly and to make copies available on an annual subscription basis. The bill requires this website to allow users to search notices, subscribe to an automated e-mail notification of selected notices, and to comment electronically on proposed rules. The Department recently has established a new Florida Government Electronic Rulemaking System, which may be found at www.flrules.com/default.asp.

Equitable Tolling. Several judicial 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 lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." Chapter 2006-82 revises Section 120.569(2)(c) to simply provide that "this paragraph does not eliminate the availability of equitable tolling as a defense to the untimely filing of a petition." Language in the 2005 bill that was intended to codify the judicial definitions of equitable tolling was not included, as this language was one of the stated reasons for the Governor's veto.

Revision of Required Enforcement/Disciplinary Petition Contents. An appellate court had recommended that the Legislature amend the provisions in the APA governing the sufficiency of a petition when the administrative action is initiated by the filing of an administrative complaint by the agency. In particular, the court 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, similar to what is allowed by Florida Rules of Civil Procedure. The 2005 bill would have revised Section 120.54(5)4 to make clear that the Uniform Rules may establish less-detailed pleading requirements for persons requesting hearings in response to agency enforcement or disciplinary cases brought by an agency. The Governor interpreted this provision as exempting actions relating to agency enforcement and disciplinary actions altogether

from any pleading requirements, and he objected because he thought it was important for petitions in such cases to contain certain basic information, including whether there are disputed issues of material fact. Chapter 2006-82 addresses this objection by requiring the Uniform Rules to establish specific pleading requirements for a request for administrative hearing filed by a respondent in agency enforcement and disciplinary actions.

Clear "Point of Entry" for Declaratory Statements. Chapter 2006-82 also requires the Uniform Rules to describe the contents of the notices that must be published in the Florida Administrative Weekly, including any applicable time limit for the filing of petitions for leave to intervene or petitions for administrative hearing by persons whose substantial interests may be affected.

Summary Hearings. One of the frequently-heard complaints about the Florida APA is that it has become too complex or complicated for resolving the "garden variety" dispute. Another complaint is that the administrative hearing process has become too time-consuming and expensive. In 1996, the Legislature amended the APA to establish the summary hearing process. The process has been little used, no doubt because it requires the agency to agree that the Administrative Law Judge (rather than the agency) will issue the final order. It has been suggested that the Legislature should require that certain types of cases be conducted pursuant to the summary hearing process. In an effort to identify those cases, Chapter 2006-82 requires each agency and the Division of Administrative Hearings annually to list the types of disputes in which the agency is involved that would be amenable to the summary hearing process.

"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 a prevailing "small business party" in any adjudicatory proceeding or administrative proceeding pursuant to the APA initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist that would make the award unjust. The appellate courts had split on whether an individual is a "small business party" eligible for attorneys fees under Section 57.111, and the Florida Supreme Court held that it is not. The 2005 bill sought to correct this, but the Governor's veto message expressed concern that this new provision "could generate unwarranted litigation that consumes limited legal, programmatic and fiscal resources, regardless of whether an agency's actions were substantially justified." The 2006 bill addresses this objection by revising the definition of "small business party" to simply fix the problem created by the Florida Supreme Court's decision. In particular, Chapter 2006-82 revises Section 57.111(3)(d) to make clear that a small business party includes an "individual whose net worth does not exceed \$2 million at the time the action is initiated by a state agency when the action is brought against that individual's license to engage in the practice or operation of a business, profession, or trade."

The bill was approved by Governor Bush on June 7, and it became effective on July 1. 

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2008 Election *continued from page 10*

of polling places for administrative convenience, restrictive identification requirements, lack of machines, and untrained officers of election are all the new poll tax – intended to restrict who can vote. Voting by provisional ballot and requiring voters to later confirm their right to vote are not the answers; rather, they are solid evidence of an election process that is out of control, especially given that more than two-thirds of those voting by provisional ballot were entitled, in the first instance, to cast an Election Day ballot.

State and local officials, as well as the Election Assistance Commission, do not seem to understand the urgency of these problems. One solution is allowing anyone

with an ID, which includes a picture and verifiable address, to vote regardless of whether they are on the voter list or have even registered. Such persons should have the opportunity to register at the polls on Election Day and vote that day. As for the state, it should already know the identity and address of each person because it issued the ID card to them.

Another solution is to encourage early voting and no-fault absentee voting, and even expand Oregon and Washington's mail-in voting opportunities. States should, moreover, not certify, and consider de-certifying, voting equipment that does not meet the highest standards for security, accuracy and audit-ability (for which standards, unfortunately, are

still evolving and unclear, and which means no new voting machines should be acquired and many of the newer machines taken out of commission and returned to the manufacturer based on any number of breaches of warranty and fitness reasons). In the meantime, the voting machine of choice should be precinct counted optical scan machines – with access for the disabled – which store and print paper records, combined with laws that make the paper ballots the official ballots in any recount or contest.

Unless strong standards and centralized non-political administration are put in place, with greater access for qualified voters, Florida 2000 can happen again. No state is immune. ○

News from the Circuits *continued from page 25*

another office without being sent there. Electronic computer calendars can be. Judge Henderson suggests that this weakens the argument that they are agency records. Such a reading of the term could limit access to materials that, as with these calendars, are clearly used by several agency employees in the exercise of their duties.

FOIA II: D.C. Circuit Clarifies Vaughn Index Requirements

In *Judicial Watch v. Food and Drug Administration*, 449 F.3d 141 (D.C. Cir. 2006), the D.C. Circuit reviewed the FDA's response to a request for all documents related to the drug mifepristone, or RU-486, which the agency had recently approved for medical abortions within 49 days of conception. The agency released 9,000 documents on a compact disk, denied some 4,000, and released parts of another 2,000. In so doing, the FDA provided a *Vaughn* index of some 1,500 pages and a supporting affidavit from the official supervising the response. The *Vaughn* index listed, sometimes quite cryptically, information (including the claimed FOIA exemption) about each of the documents that was not fully released. The supporting affidavit discussed and sought to justify application of each of the exemptions, but it did not specifically discuss each of the withheld documents individually.

Judicial Watch challenged the structure of the *Vaughn* index because the affidavit did not specifically address each of the documents. It also challenged many of the exemption claims as unduly vague. In upholding the FDA's general approach, the court emphasized the purpose of the *Vaughn* index: "[I]t forces the government to analyze carefully any material withheld, it enables the trial court to fulfill its duty of ruling on the applica-

bility of the exemption, and it enables the adversary system to operate by giving the requester as much information as possible, on the basis of which he can present his case to the trial court." If an agency's response serves this function, its length and form are not significant. In this case, with thousands of documents at issue, it was acceptable for the agency to combine the detailed list with the generic discussion in the affidavit. According to the court, the affidavit discussed, "*commonalities*, not *generalities*." When combined with the detailed list, the structure was acceptable. Moreover, as to the partially released documents, the very information released could be sufficient to identify and explain the nature of the information that had been redacted. More generally, the adequacy of the *Vaughn* index is a question of context (which includes the reality of *in camera* review), not of rigid technicalities.

While the court upheld the FDA's approach to the response, it found several of the exemption claims to be unduly vague. Bureaucratic jargon may not be enough: "Scientific lingo and administrative slang, when unfamiliar, often baffle the brightest among us. To prevent confusion and aid resolution of this case, the FDA should have endeavored to make its technical world appear a little less foreign—and its shorthand a little less short—to Judicial Watch and the court." Similarly, the use of terms such as "fax," "q&a," "draft," while somewhat descriptive, were not sufficient to permit review of FOIA exemption claims. Even with thousands of documents to address, the agency must provide enough information to allow a reasoned judgment about each claim of an exemption. Finally, the court upheld the agency's assertion that the danger of abortion-related violence justified withholding the identities and addresses of those who had been involved in the drug studies or the decision. ○

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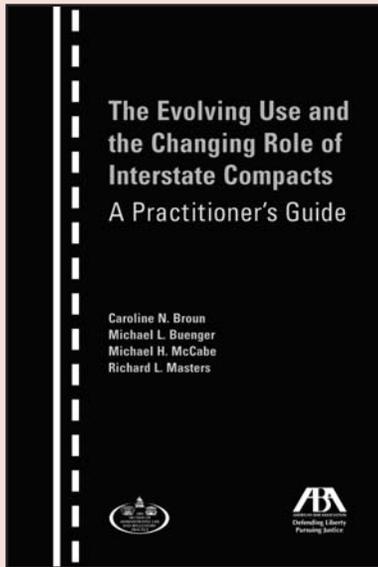
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