

# ADMINISTRATIVE & REGULATORY LAW NEWS



Section of Administrative Law & Regulatory Practice

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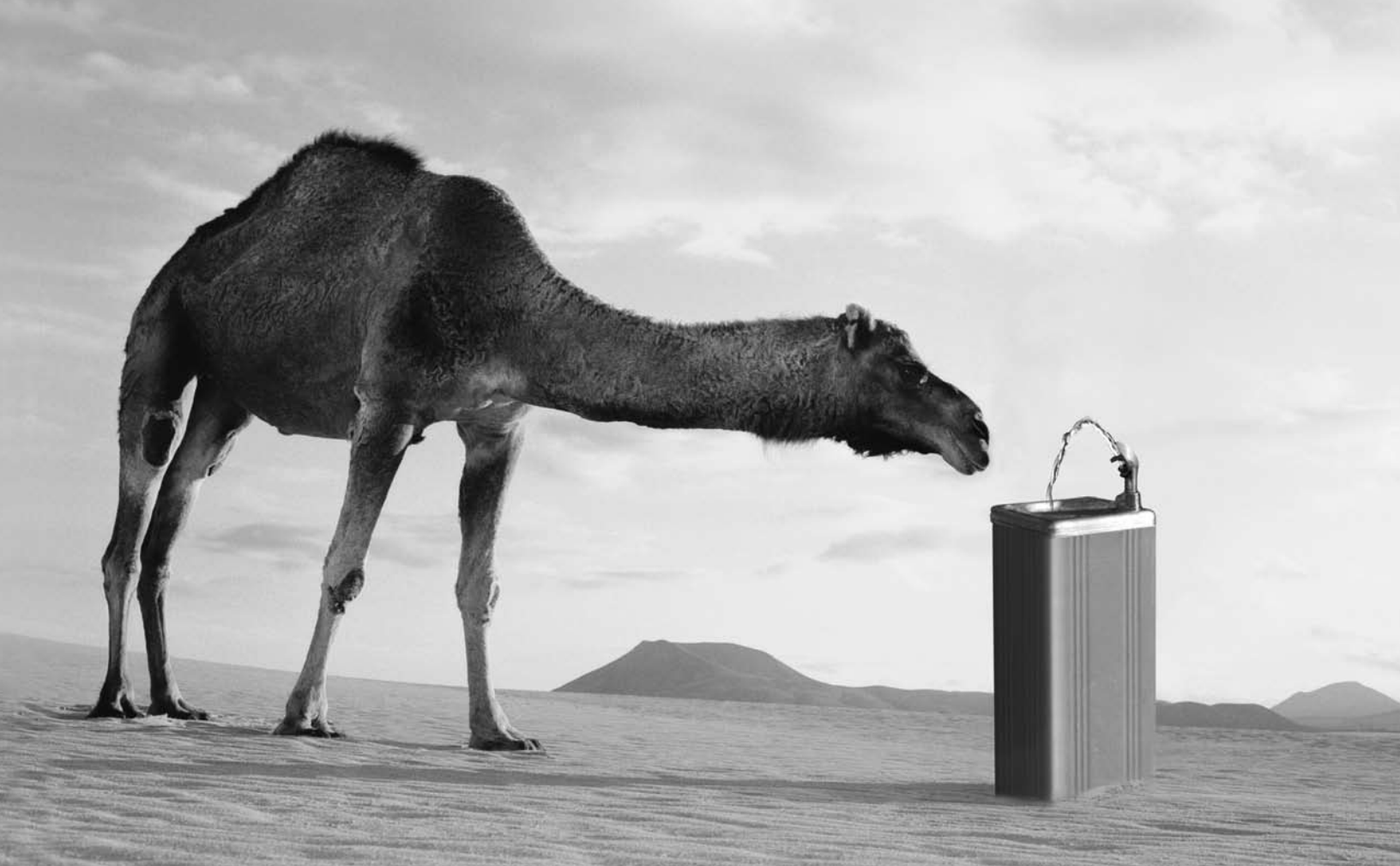


## EU Administrative Law Lifting the Fog

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# Chair's Message



H. Russell Frisby

It is a tremendous honor to have been chosen as Chair of the Section of Administrative Law and Regulatory Practice.

This Section has traditionally played and will continue to play an important role in the American Bar Association and the profession. As a long-time Section member, I will continue the tradition of principled leadership for which we are known. I would like to acknowledge the tremendous job that Michael Asimow did as Chair and congratulate him on a very successful year. I look forward to working with Bill Luneburg and Jonathan Rusch and the other Section leaders.

My goal for this year is to promote and facilitate what the Section does best: examine complex questions and make reasoned recommendations; educate the profession; and bring in and encourage the development of younger members. This will be particularly important given that, regardless of which candidate wins, a new Administration with new ideas and new goals will take office in January.

We already have two important reports that will be released in the fall. The first is the Section's Report to the President-Elect of the United States ("POTUS Report"). In this report we will make important recommendations regarding appointments, preemption, risk management, adjudication and the need to revive the Administrative Conference of the United States ("ACUS"). I would like to thank the many Section members who have participated in the process.

The second report is the Report of the Committee on the Status and Future of Federal e-Rulemaking entitled "Achieving the Potential: The Future of Federal e-Rulemaking" ("e-Rulemaking Report"). The e-Rulemaking Report proposes significant improvements to the Federal Government's electronic docket and rulemaking support system. I would like to thank Sally Katzen and Cynthia Farina for their fine leadership and the other members of the committee.

Other projects are in the works. However, too often the Section's reports have not received the attention that they deserved. We will work closely with the ABA to correct this and push to have the Section's recommendations implemented. In particular, now that ACUS has been reauthorized, we will work to have it funded.

Education is also an important component of the Section's mission. This fall, thanks to the efforts of Jack Young and Elizabeth Getman a fifty state election law manual will be released and will serve as a tremendous resource for the judges who have to resolve election day disputes.

We also have a very exciting Fall Meeting scheduled October 16 – 18, 2008 at the L'Enfant Plaza Hotel. Topics range from Election Law to Immigration, and Government Accountability to CO<sub>2</sub> Emissions. We will also discuss the POTUS and e-Rulemaking Reports.

In February we will hold the Annual Homeland Security Institute and in April we will hold the Annual Administrative Law Institute. Both will focus on issues and policies of concern to a new Administration.

This Section has a long history of inclusion. We must continue this tradition by bringing in young and diverse attorneys into our ranks, giving them meaningful roles on our committees, and guiding them through the leadership ranks. I am particularly looking forward to working with the Section's Young Lawyers Committee in this effort.

In concluding, I would like to thank Kim Knight and Jenny Abreu who have moved on to other ABA Sections for their service to the Section. We are very lucky to have selected Anne Kiefer as our new director. Anne comes to us from an Illinois association, with extensive experience as section director and a background in administration, meetings, membership and technology. We welcome her and look forward to a great year! ○

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# European Union Administrative Law

By Neil Eisner\*

## Introduction

The European Union (EU) has become the locus of an extraordinary range of activities that we in the United States associate with the field of administrative law. Their activities are of special interest because no other regulatory regime outside the U.S. affects American businesses and individuals as regularly and intensively as the European and no other regulatory regime constitutes as steady a frame of reference for comparison with American administrative law processes. As a result, several years ago, the ABA Section of Administrative Law and Regulatory Practice initiated an extensive study of EU administrative law conducted by a large team of experts put together by the Section. The research centered around five subject areas – rulemaking, adjudication, judicial review, transparency and data protection, and oversight – that readily enabled comparisons to U.S. administrative law. During the study, the Section presented a number of programs on the subject, obtained public comment on drafts of the reporters' research, and participated in ongoing U.S. – EU regulatory cooperation talks. The Section is now completing the project with the publication of its report and the presentation of additional programs. The purpose of this article is to present a very brief summary of this multi-volume report.

\*Assistant General Counsel for Regulation and Enforcement, U.S. Dept. of Transp.; former Section Chair; and Executive Director of the Administrative Law and Regulatory Practice Section project on European Union administrative law. The author takes no credit for the substance of this article. He liberally cut-and-pasted from the work of the project reporters – particularly from the “Executive Summary” by George Bermann and the “Introduction” by Charles Koch. The author offers many thanks to the reporters for their excellent, and very hard, work on this project and especially to George and Charles for their suggestions on a draft of this article. For more information go to <http://www.abanet.org/adminlaw/eu/home.html>. This article reflects the findings and views of the reporters and not the Department of Transportation.

## EU “Constitutional” Documents

The basic or “constitutional” documents of the EU have been created by the various treaties signed by European nations admitted into the Union (Member States). The first, in 1951, created the European Coal and Steel Community, the structure upon which the current EU is built. Treaties signed in 1957 created the European Economic Community and the European Atomic Energy Community. The institutions of communities were officially merged in 1965 through the “Merger Treaty.” These treaties were consolidated in the Treaty Establishing the European Community (TEC). The Treaty of European Union (TEU) created the “European Union” in

1992, establishing a structure that pushes the EU beyond commercial confederation and toward a true supranational government.

On December 13, 2007, the leaders of the 27 Member States signed the “Treaty of Lisbon,” which would modify the institutions, processes and, perhaps, relationship between the EU and the governments of the Member States, if ratified. It would end the distinction between the “Community” and the “Union;” make subtle but significant changes in EU institutions and processes intended to make EU decision-making quicker and more transparent with better democratic controls; and make a few key structural changes, including a President who would be elected by the European Council. The negative results of the June 2008 Irish referendum have placed the ratification process on hold and the entry into force of the Lisbon Treaty in danger.

## The EU Structure

The EU has five key institutions:

- The **European Council** is made up of the Heads of State or Government of the Member States and the President of the Commission, assisted by the ministers for foreign affairs and a Member of the Commission. The European Council provides general political guidelines. Its presidency rotates among the Member States every six months.
- The **Council of the European Union (Council)** exercises, along with the European Parliament, final legislative authority. Each Member State is represented on the Council by a minister, determined by the subject matter under consideration, who is authorized to commit his or her government. The Council has its own General Secretariat staffed by permanent officials, which is divided into Directorates-General. The Council's work is prepared or coordinated by the **Committee of Permanent Representatives (COREPER)**. COREPER is made up of senior national officials and to some extent represents the national governments. It exercises largely invisible power well beyond its formal status. Indeed, it is commonly believed that 90 percent of Council matters are decided by COREPER before Council meetings and are waived through by the Council.
- The **European Commission** is the hub of the EU, having significant legislative powers along with most of the administrative responsibilities. Acting collectively (as the “**College of Commissioners**”) it is directly involved in legislative and regulatory policy-making, initiating legislation and playing an important role throughout the legislative process. The Commission also implements EU policies through its Secretariat General and its departments known as

*continued on next page*

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Directorates-General, each of which is responsible for a specific policy area. There are also a number of specialized services, most prominent being Legal Service, which gives legal advice to all Directorates-General and represents the Commission in legal proceedings. If the heads of the Directorates-General reach unanimous agreement on a question, their decision is normally adopted by the Commission without debate.

- The **European Parliament** is the only directly elected institution, and its consent is needed for the passage of most EU legislation. It also must approve the membership of the Commission and may call for the Commission's resignation. Representation is based on a Member State's population.
- The **European Court of Justice (ECJ)** and the subordinate **Court of First Instance (CFI)** are vested with the EU judicial power. With a few notable exceptions, actions are filed and adjudicated in the CFI, with appeals to the ECJ available on issues of law only. There are no EU courts equivalent to "inferior" U.S. federal courts, so Member State courts are an integrated part of the European judicial apparatus.

The reporters noted the recent emergence of a variety of EU agencies with special mandates and processes. European agencies have increased from four in 1993 to twenty-two in 2007 and are expected to continue to increase.

## Rulemaking

Because the EU and its Member States mainly have parliamentary-style governments, the stark separation present in the U.S. between legislative and executive policy-making is absent. The four levels of EU "legislation," in descending order, are the treaties, which create basic law, somewhat comparable to the U.S. Constitution; "statutory-like documents" generally comparable to U.S. statutes; "delegated legislation," administrative rules having the force of law that might be considered comparable to U.S. "legislative rules," and "soft law," the equivalent in function and variety to U.S. guidance documents.

There are three types of formal legislation. Regulations most resemble U.S. statutes. They have binding force directly on persons, without further action by the Member States. In contrast, directives are binding on the Member States only and each Member State must take some action for them to affect others. Directives are often framework legislation and hence allow Member States freedom in the implementation of EU law. They may require Member States to harmonize their laws. Decisions are binding only on those named, implying individual action. However, "collective decisions" may have some general application.

As noted, legislative authority is divided among three institutions: the Commission, the Council, and Parliament. Technically, legislation must be proposed by the Commission. In reality, the Member States control the legislative agenda through a complicated interplay among the European Council, the Council, and the State holding the rotating Council Presidency. The Council considers the Commission's proposal and sends it to Parliament. Parliament considers the proposal and interacts with the Council and the Commission in finalizing the legislation. Increasingly, the Council and Parliament share the power of adoption.

The Commission's proposals are based on extensive study and consultation, leading our reporters to observe: "The European process may have succeeded to some extent in severing politics from policy analysis at the legislative level, and having developed an unusually interactive and transparent process for submitting comments to the Commission." The Commission engages its own experts and selects outside experts to study its proposals. There also are a variety of opportunities for interests inside and outside Europe to participate in the legislative process. A significant feature is that consultation occurs well before the Commission's policy preferences have taken firm shape resistant to change, but the specific and structured process may inhibit a spontaneous and free-wheeling exchange of views and opinions.

There are no clear boundaries between statutory-like legislation and

delegated legislation. Indeed, the process for formulating statutory-like proposals is more like the U.S. rulemaking process than the U.S. legislative process.

As in all modern governments, the EU relies on its bureaucracy to provide the implementing detail for delegated legislation, which may be issued in three ways. First, the Commission may receive delegated authority, which was more prevalent in early EU legislation. Second, the Council may have the authority based on a proposal from the Commission. Third, the Commission may act under the indirect control of the Council through supervisory committees under "comitology" procedures; the Council becomes involved only if the Commission and the appropriate committee cannot agree.

Perhaps the most criticized aspect of the European "rulemaking" process is the comitology process. The committees represent, at a minimum, fora for discussion and dialogue and are divided into five types that have varying degrees of power to influence the decision-making. They may harness expert knowledge and advice outside the Commission, but they are also a channel for the exertion of Member State influence.

The EU also has various devices for creating soft law, which creates the same conundrum between the value of efficient advice and absence of public procedures. The Commission has a menu of soft law devices. Chief among these is perhaps "communications," which are sent to other institutions, particularly the Council or Parliament. They may have considerable impact. "Guidance notes" explain how Member States or the regulatory community should interpret and apply an EU measure. "Action plans" set out objectives, principles, and priorities. "Resolutions" are political statements by the Council or the Parliament that have no basis in the Treaties.

The reporters conclude that the Commission has worked hard, and to a considerable extent succeeded, at developing innovative governance tools and producing transparent administrative processes. The concern is that some of the processes are not legislatively mandated or judicially enforceable.

## Adjudication

Most individual decision-making (in the U.S. sense) predicated on EU law is conducted at the Member State level. There are sectors, however – such as competition law and food safety – where decisions may be made at the EU level, generally by the Commission (where the decisions are prepared by the responsible Directorates-General), but in some exceptional cases by an EU specialized administrative agency. There is no single procedural model. Each sector has its own.

Some sectors are noteworthy for highly intrusive investigations, including unannounced site visits, while others rely heavily on the exchange and examination of documents. Although a “hearing” of some sort is available, the nature of the hearing may vary and is uneven across the sectors. There is no generalized opportunity for reconsideration of decisions. The typical remedy is review in the EU courts. Despite the differences, some important themes emerge, including the requirement that all individualized decisions must state the factual and legal reasons for the decision, providing enough detail for effective judicial review.

The reporters conclude the EU decision-makers follow a predominantly “inquisitorial” model – designed to produce and ultimately justify a decision. Accordingly, they entail much less of the structured and formal presentation of evidence and its countering found in the U.S. adversarial model. At the same time, the EU courts have stressed that a condition of validity for decisions is the basic “right to be heard.”

In some sectors, the hearings leading to an individual decision may be conducted by the same personnel who participated in, and may have led, the investigation. This is undergoing some change, however.

Despite the differences from the U.S. system, the reporters conclude that “there is an abundance of process and . . . in most cases a substantial opportunity to represent an interest.”

## Judicial Review

Most judicial enforcement of EU law takes place in the courts of the Member

States, though a “preliminary reference” system enables them to secure from the ECJ authoritative rulings on the meaning and validity of EU law measures. Even so, the EU courts offer an elaborate system of judicial recourse. EU institutions, Member States, and private parties with standing can challenge the validity of legal acts of general application taken by the EU in the EU courts. The reporters, however, have special criticism for the strictness of the standing criteria (which could be substantially relaxed under the Lisbon Treaty). Parties to whom individual decisions are addressed (and others to whom they are of direct and individual concern) can also challenge those decisions in the EU courts. EU institutions may be challenged for “inaction” as well as “action.” In contrast to the U.S. system, the EU courts give officials much less deference on interpretative questions. On the other hand, in conducting their review, they instinctively feel more constrained by legislative language than U.S. courts. (The existence of multiple authoritative language texts may create problems for statutory construction.) However, the EU courts engage in more policy analysis than they would if they followed the traditional standards of the continental judiciary.

The EU Commission plays a prosecutorial role in the ECJ, where it can bring “enforcement” or “infringement” actions against Member States (after the Commission and the State concerned have failed to resolve their differences in an elaborate administrative procedure). The introduction of the possibility of fines against a recalcitrant State is reported to have introduced a new and important incentive to compliance.

The dominant standard of review is “proportionality.” This standard is used throughout continental Europe and is even migrating into the review of the common law Member States. Simply stated, a reviewing court assures that the governmental measure is proportionate to the problem it seeks to remedy. It is often applied, for example, to Member State regulations; a justifiable health or safety regulation may be struck down if the court identifies alternatives that pose less risk to the single market. The “subsidiarity” principle declares EU legislation

within fields of concurrent competence permissible only where the relevant objective is in fact “better achieved by the Community” and “cannot be sufficiently achieved by the Member States,” though the justiciability of this principle is questionable.

Member State courts may be required (depending on the stage of the proceeding) to refer a question to the European Court of Justice on the proper interpretation and occasionally the validity of an EU law instrument.

## Transparency and Data Protection

The reporters were highly impressed with the dissemination of information by EU institutions. The websites of the Commission, the Parliament, and the Council offer a wealth of information that is highly accessible, well-organized, well-presented, and rather easily navigable. Public access to specifically requested documents is more nuanced. The legally enforceable right of access, subject to exemptions, covers a broad range of documents without a requirement to show interest or need, and subject to a short deadline. Although the system is clearly workable, the reporters note trouble spots. The Member States, for example, may request that documents originating with them not be disclosed, even if in the files of an EU institution. In addition, the institutions have no discretionary authority to release exempt documents.

Administrative appeals may be brought by those challenging decisions to grant or deny access. Further appeals may be taken to the EU courts or to an Ombudsman, who can attempt to reconcile the parties or issue a non-binding recommendation (but to which the institution is required to reply).

The requirements for consultation with third parties over whether to disclose documents are complex. However, there is strong personal data privacy protection in place, which provides more of a limitation on disclosure than exists in the U.S.

Strong privacy protection requirements extend to the Member States, which must also put in place and enforce protections

*continued on page 17*

# An Abridged Global Viewpoint on Environmental Permitting: The UK Integrated Permitting Regime

By Lisa E. Comer\*

The UK integrated permitting regime and its respective cultural and organizational framework presents an interesting counterpoint to the US media-specific environmental permitting approach and practice. This article offers an introductory glimpse into the UK environmental permitting scheme, highlighting several aspects of the UK permitting framework and briefly describing the cultural setting and modern regulatory strategy in the UK. It assumes a general knowledge of the United States' domestic environmental regulatory structure, but may be of interest to practitioners in other fields as well.

The contextual narrative that follows is largely drawn from and attributable to a recently-issued report exploring the European Union (EU) Integrated Pollution Prevention Control (IPPC) directive and specifically the UK implementation of that directive under the Environment Agency (EA) that has jurisdiction in England and Wales. That report, issued by the US EPA's National Center for Environmental Innovation (NCEI), *An In-depth Look at the United Kingdom Integrated Permitting System* (NCEI report), is intended to encourage and stimulate dialogue on the potential testing and application of innovative permitting practices in the US. (It is available online at [www.epa.gov/permits/integrated](http://www.epa.gov/permits/integrated).)

\* Ms. Comer is an attorney with the National Center of Environmental Innovation, US Environmental Protection Agency, and one of several principal authors of the report discussed in this article. Any inconsistencies or errors in this article's description of the UK integrated permitting regime are the author's sole responsibility.

† The PPC regulations were recently superseded by a new body of "Environmental Permitting" (EP) regulations; however these do not fundamentally alter the operation of the UK permitting system or affect the findings of the EPA report.

htm) The conclusion to this article discusses possible benefits of considering an integrated permitting system in the US, and its potential for informing regulatory and permitting innovation; these conclusions represent the author's personal opinion and do not necessarily reflect current or anticipated EPA policy.

## UK Integrated Permitting Framework and Environmental Regulatory Practice in Brief

In a nutshell, the UK environmental permitting scheme is defined by its comprehensive integrated approach embracing an ultimate goal of sustainability. (In contrast, consider the media-based, compliance-driven permitting system of the US). Officially mandated by the EU IPPC Directive of 1996, the integrated permitting regime establishes as its primary objective achieving a high level of protection for the environment as a whole – by first preventing emissions to air, water, and soil; and then, where prevention is not practicable, controlling emissions. The UK translation of the IPPC directive, the Pollution Prevention and Control (PPC) Act of 1999 and accompanying regulations, adopts a pollution-prevention, multi-media permitting approach that relies on facility-wide footprint assessments of all environmental impacts. The PPC law and its underlying regulations provide the framework for issuing integrated permits in England and Wales.<sup>†</sup> The PPC law has been implemented so as to incorporate compliance and enforcement, monitoring and reporting, sector management and communication, and public notice and participation in one regulatory construct. In a very general sense, the EU IPPC Directive can be analogized to US federal environmental laws and the UK PPC Act to US state laws promulgated to support

the authorization or delegation of federal programs to states.

The UK permitting system is implemented using a sector-strategy and risk-based approach. A number of industry sectors are covered by the IPPC system including manufacturers of pulp and paper, organic fine chemicals, pharmaceuticals, food and drink, textile treatment, and operators of large-scale intensive livestock production and hazardous waste landfills. For the most part, each sector has its own set of guidance documents regarding the "best available techniques" (BAT) for prevention or control of pollution in that sector. In addition, threshold criteria trigger IPPC applicability for the covered industries. That is, the IPPC system does not apply to all facilities: A set of criteria are used to determine whether a UK facility must apply for an IPPC permit based on its potential for causing pollution. The PPC regulations set forth these specific factors on a sector basis, including the type of facility operation, the production level, the kind and nature of the pollutant emitted, and the amount of the pollutant emitted. Under the IPPC, the consideration of the relative complexity and pollution potential of a facility's activities provides a classification scheme (e.g., Parts A and B) for UK facilities that is similar to the US designation of major and minor sources.

An IPPC integrated permit consolidates into one facility permit all of the environmental impacts typically covered by US media-specific permits and regulations (e.g., authorized by the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act) and also includes a number of provisions not found in most US permits. In short, an IPPC permit addresses a comprehensive set of pollution controls (e.g., air emissions, releases to water, waste handling and disposal), resource use (e.g., energy



efficiency, water and raw materials inputs, waste minimization), and both immediate and long-term practices and effects of facility operation (e.g., noise, vibration, and odor factors; environmental management techniques or environmental management system use; reporting and monitoring; site restoration, as well as other considerations).

Lastly, of notable interest to the legal scholar, the PPC Act functions as an umbrella statute. That is, the PPC law itself allows for the absorption and application of existing and evolving regulatory mandates (issued both by the EU and the UK) and supports consideration of new and improved environmental protection techniques over time. As new legislation is issued by the EU, for instance, the UK is able to incorporate corresponding requirements into the PPC national framework without promulgating new national law. Moreover, the PPC legal authority is far less prescriptive and detailed than corresponding legal authorities in the US. Even the PPC regulations do not contain the complex detail of many US statutes. Often underlying guidance is used to detail the application of specific legal requirements. The overarching legal framework in the UK results in a greater capacity to expeditiously address new issues. The UK's fluid, comprehensive legal arrangement lies in stark contrast to the US federal pollution control system consisting of independent, stove-piped, media-specific, dense, and relatively static (over the last 30 years) environmental statutory edicts.

### **A Few Comparative Highlights of the UK Integrated Approach**

In addition to the noteworthy characteristics of the UK system described above, what follows are a few comparative highlights selected among many described in greater detail in the NCEI report.

The UK integrated system uses a single standard-setting concept to set limits and address pollution prevention and sustainability. The central component of an IPPC permit is the application of the common standard Best Available Techniques (BAT). The UK BAT is broader and more encompassing than

the familiar-sounding terms employed in US statutes, such as, the Best Available Technology standard under the Clean Water Act. UK BAT standards apply to all facility activities that have environmental impacts. Thus, in determining UK BAT standards, factors include not only pollution control methods, but also pollution prevention considerations such as technological and scientific advances in production practices and resource efficiency considerations. Details on how to determine UK BAT conditions for a facility are contained in non-binding UK guidance documents. This guidance allows UK regulatory authorities to exercise additional technical discretion when setting permit conditions.

In applying BAT, the UK IPPC permit system allows for flexibility and input by industry on a site-specific basis. BAT standards are tailored to fit facility-specific operational conditions (e.g., technology and equipment in use) and location-specific conditions (e.g., surrounding geographic and environmental). Generally speaking, IPPC permitting synchronizes local and facility-specific conditions and sector-wide considerations. In addition, where a UK facility seeking a permit is not operating at appropriate BAT levels, improvement programs may be included in the permit to move the facility towards (and as close as possible to) the applicable BAT standards. On the other hand, some UK facilities are capable of achieving or even going beyond BAT standards specific to certain aspects of facility operation and may be required to do so.

The IPPC system holds both regulators and permit-holders accountable for continual improvement. Both the UK EA and industry have an ongoing responsibility to keep up with the latest developments and improvements in BAT. This knowledge may be directly applied to permit terms. For instance, since IPPC permit conditions include the implementation of environmental management systems of some nature and scrutiny of material inputs, operators are required to continually seek opportunities for performance improvement and sustainability. In this way, an IPPC permit reflects current performance at a facility while also encouraging continual

improvement. This contrasts with a US facility that (permitted to meet certain standards and legally stay in compliance) has little motivation for moving beyond what is required.

### **British Culture and Modern Regulatory Strategy**

The UK cultural backdrop sets the stage for the integrated permitting approach and differs noticeably from the more adversarial regulatory and enforcement culture in the US. The UK culture is the foundation for a collegial partnership between the governing regulatory authority and the regulated community. The cooperative relationship relies on continuing dialogue and institutionalized consensus-building between the UK EA and industries covered under the IPPC. Since an operator knows more about a facility than does the regulator, an operator is obligated to assess the environmental effects of a facility, identify ways to prevent and then control pollution, and propose permit conditions in an IPPC permit application for review by the regulator. Integral to the permitting application process is the Environmental Protection Operator and Pollution Risk Appraisal (EP OPRA) screening tool. An operator is required to submit an EP OPRA profile and score with any IPPC permit application. The OPRA screening tool provides a measure of the potential harm a facility can cause. This approximate risk information is used for planning and managing internal EA workload and resources, monitoring operations, targeting inspections, and setting permit fees. In determining a facility permit, the EA considers the technical information from the permit application (along with any comments received from the public or statutory consultees). The final permit incorporates all BAT/permit conditions and also includes an assessment of elements for an improvement program (where necessary).

The operator and regulator work virtually hand-in-hand through the permit application process. Actually, this partnership begins in the development stages of the permit application,

*continued on next page*

continues through permit issuance, and lasts throughout the effective life of the permit. As a whole, UK industry plays a significant role influencing sector-based planning and priority-setting and informing sector-wide indicators and performance targets. Not only does this collaborative approach capitalize on the relative expertise of and input by the relevant industry sector, it also benefits from the extensive experience of many EA permit writers and officials and the corresponding high-level of public trust seemingly inherent in British culture.

This culture of collaboration and trust is also reflected in UK enforcement practices. While the PPC law supports formal enforcement procedures, such actions are employed much less frequently than in the US. Instead, the EA tends to rely on a setting of real-time notification and information-sharing; mutual cooperation and communication; and a collective, iterative, problem-solving mindset. It can be said that the UK views its primary objective as ensuring the safety and protection of the environment and public health rather than punishing polluters – that is, using the minimal amount of formal regulation necessary to achieve compliance. And, in a complementary manner, the UK system shifts the burden of responsibility for environmental performance to a facility operator. In the UK, each IPPC facility has the duty of assessing (overall) environmental impacts and identifying and continually improving conditions to prevent and control resulting pollution and other environmental effects.

In essence, the UK system draws on an iterative, inclusive, and fluid style of administrative governance. Interestingly, the UK touts its system as more than just integrated *permitting*: The UK modern integrated *regulatory* scheme supports the creation of risk-based, results-focused,

consistent, and transparent regulation. This modern or responsive regulation style also allows for the EA's proportionate and balanced approach to compliance: rewarding good performance, driving environmental improvements and corrections where necessary, and taking strong measures where warranted. Under this government-wide approach, the EA is employed as the single institution (for England and Wales) responsible for environmental regulation, including compliance and enforcement, sector management and communication, along with permitting. Moreover, the concept of modern regulation and the single UK PPC system has made it relatively easy for the UK to incorporate and implement the regular tide of EU-issued environmental legislation.

### **Conclusion: Will the US Be Drowned by the Tide or Ride the Wave?**

Obviously, under examination, any permitting approach (integrated or media-specific included) has benefits and barriers. Practically since its inception, a myriad of voices both public and private have opined on the pros and cons of the US environmental permitting system. Indeed, over the years, there has even been experimentation with multi-media or integrated approaches to permitting in the US. Recognizing that a wholesale transition to integrated permitting is not advisable in the US at this time, the momentous expansion of integrated permitting overseas at the very least invites speculation about the potential of such an approach. Moreover, economic globalization, increasing world-wide competition, and dwindling natural resources may create incentives for looking for improvements to the US environmental protection strategy. Could it be that our current permitting system

is keeping American companies from competing on a level playing field with other industrialized nations?

At a conceptual level, there do appear to be a variety of possible advantages to considering an integrated permitting and regulatory model. In general terms, a few potential benefits of an integrated approach include creating efficiencies for both administrative and procedural processes; instilling a comprehensive, problem-solving foundation that supports the quest for (continually) improved controls for multi-media environmental impacts; and advancing pollution prevention and sustainability concepts and practices. At a minimum, in light of the growing global economy, the IPPC's ultimate goal of sustainability offers one reason to look to our continental contemporaries for inspiration.

Ultimately, if the US were to fully embrace an integrated system, legislative change would be necessary. Short of that, however, integrated methodologies and tools (such as the UK sector-wide BAT concept and EP OPRA tool) may offer ideas for improving working conditions and environmental performance within the current permitting system. Given current national predicaments, US policymakers and the public alike might be willing to consider innovative ideas reflective of an integrated approach; for it appears that America's once-enjoyed economic dominance, if not vanished already, exists in a particularly perilous state. In an effort to bring fresh perspectives and thinking to today's challenges, the NCEI report and continuing collaborative effort is a foundation for further research, dialogue, and possible expansion of the US integrated experience. These opportunities may lead to improvements in the US system overall and even help to uncover solutions for emerging environmental concerns both here and abroad. 

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# Can Law Manage Energy Markets?

By David B. Spence\*

## The Problem

Shortly after the creation of the electric and gas industries more than a century ago, policymakers in Europe and the United States concluded that both industries were natural monopolies for which competition was inappropriate due to their large economies of scale, or decreasing marginal and average costs across a very large range of output.

In Europe, state-owned firms were the norm prior to the late 1980s, and they remain common in the developing world. In the United States, the public utility model was dominant: governments licensed private firms as monopoly suppliers, regulating wholesale and retail rates and conditions of service. In the 1970s, economists began to challenge the notion that the provision of energy service is a natural monopoly at all. While energy transmission and distribution may be a natural monopoly, the sale of energy delivered over such a system is not.

Competition in energy sales should eventually weed out those who cannot provide reliable service at a competitive price, and consumers – broadly defined to include all consumer classes – should benefit from the cost discipline competition brings. Consequently, in the 1980s and early 1990s a series of legislative and regulatory initiatives in the United States and Europe mandated the unbundling of wholesale sales and distribution in the gas and electric industries, transforming networks from middlemen selling bundled energy (sales and delivery) services, on the one hand, into “common carriers” providing only delivery services to all users on a nondiscriminatory basis, on the other. A sizeable minority of U.S. states followed suit, restructuring their retail markets. Collectively, these changes have led to the development of robust

wholesale markets in the United States, the United Kingdom, Scandinavia, France/Belgium, and various parts of central Europe.

While there is some disagreement about the particular effects of restructuring on prices, restructuring has not brought the kind of general decline in energy prices across customer classes that many expected. Prices remain high in many places, and large price disparities persist across regions. Some analysts ascribe the bulk of the problem to increases in the cost of inputs; others ascribe high prices to the problem of too few sellers chasing too many customers, a problem which can offer those few sellers the opportunity to exert market power over prices.

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The destructive role played by sellers who abused market power in California's electricity market is well-known. A supply-demand imbalance and cost factors were a large part of the problem in California, but regulators determined that the state's poorly-designed market also created easy opportunities for sellers to exert market power over price, and to otherwise “game” the system.

While the California market was uniquely susceptible to the acquisition and abuse of market power, some version of this problem can arise in any market where there are sufficiently few sellers and/or sufficiently small supply margins, and American and European regulators remain concerned about abuses of market power.

The European Commission's Competition Directorate concluded in 2006 that incumbent firm market power had inhibited the development of energy markets there. In Europe, the problem of access for new market entrants to energy, and to the delivery system, is particularly acute, partly because European markets are less well developed in some places, and partly because of the absence of an energy regulator with direct authority to address it. In any case, both American and European market rules prohibit the abuse of market power and require transparency and nondiscrimination in the sale of network services. Yet these problems of incumbent market power and high prices persist. Why?

## Politics vs. Economics

Politically, the restructuring of energy markets has been a top-down affair, both in Europe and the United States. In both locations restructuring has been driven by elites: primarily, regulators convinced of the benefits of markets and industrial users who stood to benefit from competition. Most elected politicians favored restructuring as long as restructuring did not result in price increases.

Thus, there is a clear tension between the economic rationale for restructuring energy markets and its political rationale. The economic rationale for restructuring takes a long view, arguing that regardless of their distributional and short-term impacts, markets will bring Kaldor-Hicks improvements in the long run. The political rationale, by contrast, seeks Pareto improvements, and is focused on the very distributional and short-term impacts that the economic rationale shoves aside.

Energy markets cannot survive politically if their benefits accrue to a minority at the expense of the majority; nor can they survive if their long term net benefits entail unacceptably high short-term costs. On the other hand, in order for energy markets to work as intended, the

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distribution of benefits and costs must necessarily be uneven across buyers and sellers, and over time. It is over these two dimensions of restructuring – the distribution of impacts across customer classes, and the distribution of impacts over time – that the tension between restructuring’s economic and political rationales must be reconciled.

Over the long run, new entrants (or the threat of new entrants) should lower the costs of producing and supplying energy, all else equal. However, in some markets new entrants have difficulty acquiring and delivering energy. Assuming that hurdle can be overcome, prospective entrants will also require some assurance that they can sell their energy at prices sufficient to recover their costs and earn a competitive return on investment. However, it is not clear that existing energy markets offer prospective entrants that assurance. Future market prices are notoriously difficult to predict. New entrants must project their own cost curves, the cost curves of competing technologies, and the future demand curve. Furthermore, there is the additional possibility that regulators may cap prices in the future.

Consider the prospective builder of a gas-fired electric plant, one that will provide power only during periods of peak demand. Its success in the market will depend upon its ability to sell energy (and earn revenues) only when prices (and demand) are high. Will politicians and regulators allow owners of energy to capture scarcity rents when energy is scarce?

In both the United States and Europe, many jurisdictions have imposed price caps during the transition to competition, and beyond, and retain the power to outlaw rates that are too high. Neither European nor American regulators have articulated a clear distinction between price spikes caused by the (impermissible) exercise of market power and price spikes caused by the (permissible) capture of scarcity rents; indeed, there may not be one.

However, new entrants know that politicians and regulators would prefer to protect customers, particularly vulnerable customers, from high rates. Ironically,

if companies choose not to enter the market for these reasons, energy remains scarce, putting continuing upward pressure on price. Thus, regulators face a conundrum: in restructured markets, the very problem that undermines political support for restructuring – price volatility – is made more likely by the techniques used to protect customers from it.

## The Need for Policy Transparency

Both American and European regulators remain dedicated to the economic imperatives of letting markets work, while their political overseers remain dedicated to the political imperative of protecting consumers from high prices. This state of affairs cannot continue.

Even in efficient markets, prices will not decline monotonically; to the contrary, they will move in both directions, reflecting the forces of supply and demand. By papering over these essential truths, the path to competition did not offer policymakers or their constituents the opportunity to choose between the efficiency and uncertainty of market prices, on the one hand, and the inefficiency and certainty of regulated prices, on the other. Hence, restructuring is nearing a crossroads, one at which market skeptics and market proponents will have to confront one another more openly. It is not clear whether energy markets can satisfy their economic and political imperatives simultaneously.

Any sincere attempt to bring market efficiency to energy markets must include five essential elements, many of which seem politically risky. *First, politicians and regulators must make a credible commitment not to impose limits on the movement of energy prices in the absence of collusive or fraudulent behavior.* In other words, when scarcity drives prices high, politicians and regulators need to let the price signal work to attract new entrants into the market.

*Second, designers of restructured markets should ensure that buyers on wholesale and retail markets have available to them every tool they need to hedge price risk.* For buyers on wholesale markets (that is, retail sellers) that means that regulators should not

restrict their use of the full portfolio of energy contracts, including the purchase of energy using long-term contracts (to lock in energy purchases at a fixed price) and the purchase of energy derivative contracts to protect themselves (and their customers) against price risk.

*Third, politicians must assist regulators’ efforts to broaden the geographical scope of energy planning.* The European Commission’s efforts to enhance cross-border energy trade and the Federal Energy Regulatory Commission’s efforts to encourage regional transmission planning are good first steps, but are only first steps. Some underinvestment in energy production and transmission capacity is the result of nothing more than local unwillingness to accept the costs associated with hosting the capacity. When regulatory jurisdiction is balkanized, as it is in capacity siting in both the United States and Europe, local opposition can lead to significant underinvestment in new capacity.

*Fourth, market designers need to enhance demand response by letting retail customers see, and respond to, the effects of very short-term price changes.* Things like time-of-day rates and real-time metering communicate to customers the time-value of using power during different times of day and year. When customers voluntarily shave the peaks off of demand, fewer peaking plants need to be built, and satisfying load becomes a cheaper proposition for retailers.

*The fifth and final element of a market solution is to subsidize needy customers when prices exceed their ability to pay.* It would be far better to subsidize those customers’ payments than to simply cap prices, or to ascribe impermissible market power to sellers in such situations.

This portfolio of policies seems politically ambitious, to say the least. If it is politically unacceptable, we ought to ask ourselves why that is. Without such policies, energy markets have little chance to realize the long-term efficiencies promised to voters. If voters’ democratically-elected representatives prefer to shield voters from the truth about how markets work, then those elected representatives ought to rethink their support for markets in the first place. ○



# Why the Filed Rate Doctrine Should Not Imply Blanket Judicial Deference to Regulatory Agencies

By Jim Rossi\*

The filed rate doctrine is a venerable doctrine of public utility regulation. Federal courts applying the doctrine frequently defer to the regulatory agency and refuse to consider the merits of alleged violations of antitrust, tort or contract claims where resolution would require a departure from a filed rate.

For over a century, the filed rate doctrine has served many important purposes. However, with increased attention to market-based approaches to electric power, natural gas and telecommunications regulation, there is reason to question both the doctrine's continued applicability and usefulness. At a minimum, as markets are deregulated, the traditional principles of deference which courts applied in this context need to be reassessed.

## A Little History and Context

Under the filed rate doctrine, a utility was prohibited from offering customers rebates and discounts that are at odds with the filed tariff, which historically reflected a regulator's careful evaluation and affirmative approval of costs and prices. In addition to furthering the non-economic goal of fairness, prohibiting price discrimination limited a monopolist's ability to use its market power to extend its monopoly into secondary markets. The doctrine served two additional important purposes in historically regulated industries.

\* Harry M. Walborsky Professor and Associate Dean of Research, Florida State University College of Law. The article is adapted and condensed from earlier publications, including Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement in the Deregulatory Era*, 56 VANDERBILT L. REV. 1591, 1598-1601 (2003) and *Debilitating Doctrine: How the Filed Rate Doctrine Wreaks Havoc on Deregulated Energy Markets . . . And What Courts Can Do About It*, PUBLIC UTILITIES FORTNIGHTLY, November 2004, at 16-21.

First, where a federal court is asked to apply substantive state law, as often occurs in a fraud or breach of contract claim, there is a federal preemption strand to the filed rate doctrine. For example, the filed rate doctrine barred California's governor from commandeering expensive wholesale power contracts during the state's recent deregulation crisis. *Duke Energy Trading & Mktg., L.L.C. v. Davis*, 267 F.3d 1042 (9th Cir. 2001). The Ninth Circuit reasoned the state's action would present a conflict with a tariff filed with the Federal Energy Regulatory Commission (FERC) — at bottom a legal determination of federal preemption.

Second, and especially relevant to judicial consideration of federal antitrust claims, there is a longstanding agency deference strand to the doctrine. *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922), held that a private antitrust plaintiff is precluded from recovering treble damages against a carrier based on the claim that a tariff filed with the Interstate Commerce Commission was allegedly monopolistic. Justice Brandeis invoked a deference rationale, reasoning that the complex and technical issue of rates is best determined by the agency, not by a court.

## Regulatory Gaps in Newly Restructured Markets

The filed rate doctrine has been used to bar antitrust claims in the deregulated electric power industry. In *Town of Norwood v. New England Power Co.*, 202 F.3d 408 (1st Cir. 2000), the Keogh strand of the filed rate doctrine was invoked to bar a price squeeze claim against a utility — even where the tariff filed with FERC was based on competitively set prices. The *Norwood* court reasoned, “[i]t is the filing of the tariffs, and not any affirmative approval or scrutiny by the agency,

that triggers the filed rate doctrine.” *Id.* at 419.

However, as energy supply markets are deregulated, blanket deference to regulators under the filed rate doctrine is akin to pounding “a square peg into a round hole.” Richard Stavros, *Lost in Translation: Critics Say FERC's Filed Rate Doctrine is Wrong for the Times*, PUBLIC UTILITIES FORTNIGHTLY, June 2004, at 4. One commonly articulated concern with the filed rate doctrine in competitive markets is that, by valuing regulatory over market price determinations, it stands in the way of competitive markets.

In addition, the filed rate doctrine may have the unintended consequence of encouraging strategic actions on the part of firms in the regulatory process with a purpose of limiting judicial involvement in the resolution of conflicts. If firms can opt out of judicial remedies merely by filing broad tariffs with regulators, this encourages a type of private manipulation of the regulatory process absent any third party oversight.

As regulators implement competition policy for formerly rate-regulated services, judicial enforcement of remedies for market abuses based on violations of antitrust, tort and contract law can play an important role in protecting public welfare. While courts do not have the same degree of expertise that an agency possesses, courts do have some comparative institutional competence in implementing enforcement regimes that could benefit competitive markets. Unlike regulatory agencies, courts do not depend on budget allocations or legislative delegations of specific regulatory jurisdiction. Courts have wider remedial authority and discovery powers than do regulatory agencies, and also have greater political independence.

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Overbroad application of the filed rate doctrine is especially inappropriate where regulators have limited jurisdiction. For example, in 2004, a U.S. district court in Texas applied the filed rate doctrine to preclude antitrust claims for illegal conduct in deregulated wholesale power markets against numerous power supply companies. *Texas Commercial Energy v. TXU Energy, Inc.*, 2004-2 Trade Cases ¶ 74,497, Util. L. Rep. ¶14,512 (S.D.Tex. 2004), *aff'd* 413 F.3d 503 (5th Cir. 2005). In declining to consider the merits of the antitrust claims, the court reasoned that the agency charged by the state legislature with overseeing the Texas electricity market, the Texas Public Utilities Commission (TPUC), possesses the “institutional competence to address rate-making issues in the [] market, one of the principles underlying the filed rate doctrine.” However, a regulator could only possess institutional competence if it also has the authority to act; at the time Texas had no express or implied private right of action for injured purchasers, and TPUC also lacked authority to order refunds and damages.

To the extent courts allow the mere filing of tariffs to presumptively determine whether a court will entertain the merits of claims of anticompetitive conduct, the filed rate doctrine invites even more radical deregulation than either Congress or the regulatory agencies accepting tariffs would prefer – that is, markets absent antitrust and common law remedies. Surely, Congress did not intend this in the Federal Power Act or in subsequent energy legislation. To the extent the filed rate doctrine privileges private choice over assessment of the public interest in choosing the mechanism for enforcement, courts should refuse to apply it automatically to preclude judicial enforcement.

### How Other Legal Doctrines Further the Filed Rate Doctrine's Goals

As a defense in cases involving previously regulated markets, the filed rate doctrine continues to serve an important purpose where three conditions are present: (1) where nondiscrimination remains an important regulatory goal; (2) where regulators possess the author-

ity and in fact do evaluate costs and prices; and (3) where regulators possess an adequate remedy for nondiscrimination. While cost-of-service regulation may have justified a presumption against the exercise of judicial authority in most cases, in a deregulated environment it must be presumed that the agency has not engaged in an extensive firm-specific evaluation of nondiscrimination.

Before resorting to the filed rate doctrine to decline considerations of the merits of a dispute involving allegations of market wrongs, a court first needs to evaluate whether an agency accepting a tariff possesses the authority to protect against nondiscrimination and uses it in ways that would present a conflict with courts or make judicial enforcement unnecessary. In many contexts, as in Texas, it is not at all clear that agency regulators possess the authority to evaluate tariffs for nondiscrimination, or to remedy discrimination and other market abuses.

In other contexts, as in FERC's market based tariffs, it is not at all clear that regulators routinely evaluate and exercise authority to protect against nondiscrimination. *Lockyer v. FERC* held that the filed rate doctrine can apply to FERC's market-based rates, but only if FERC does something more than make a cursory finding of no market power in accepting a rate filing. 383 F.3d 1006 (9th Cir. 2004). If FERC does not actively monitor market-based rates for market abuses, “the purpose of the filed rate doctrine is undermined” and “the tariff runs afoul of . . . the FPA.” *Id.* at 1013.

Nondiscrimination may be a questionable regulatory goal in today's regulatory environment, in which markets not regulators are increasingly determining prices. However, as regulators are increasingly moving to competitive market approaches, nondiscrimination should no longer give rise to a presumptive filed rate defense.

In addition, federal courts have at their disposal commonly-used doctrines that better promote the other purposes of the filed tariff doctrine, such as federal preemption and deference. Absent a clear regulatory policy of protecting against nondiscrimination, along with active regulatory program designed to do so,

there is no reason to give a filed tariff an independent legal effect in order to further these goals.

Courts, for example, sometime find that national regulatory programs preempt state law remedies for breach of contract and tort. Such determinations are not automatic, but courts carefully evaluate the scope of the regulatory scheme and the extent to which it presents a conflict with state remedies. By contrast, courts applying the filed rate doctrine as in *Town of Norwood* often use the mere existence of a filed tariff to imply federal preemption, with little or no analysis of whether a regulatory conflict in fact exists.

In addition, the doctrine of primary jurisdiction — widely used in federal judicial proceedings involving agency regulation — makes it unnecessary for courts to apply the filed tariff doctrine in order to further the goal of agency deference in rejecting antitrust claims. While the filed tariff doctrine bars both present and future claims, primary jurisdiction does not confer complete immunity to the allegedly anticompetitive conduct. Instead, in applying the doctrine courts temporarily stay any judicial enforcement pending agency regulation of the conduct at issue. Primary jurisdiction provides a less blunt tool for courts to respect agency deference in a dual jurisdiction enforcement context involving both federal agencies and courts, as frequently arises under the antitrust laws.

Finally, in antitrust cases such as the antitrust complaints against power suppliers in Texas' deregulated market, a federal courts use of the filed rate doctrine to bar claims is a completely inappropriate — and astonishingly overbroad — defense to antitrust claims. In such instances, state action immunity, an alternative doctrine from antitrust law, is a more effective way for a court to evaluate the appropriateness of deference to the state regulator. This judicially-created antitrust defense originated when the Supreme Court rejected a Sherman Act challenge to a California marketing program brought by a grower because the program derived “its authority and its efficacy from the legislative command of

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# Will Congress Fund the Administrative Conference of the United States?

By Warren Belmar\*

The Administrative Conference of the United States (ACUS) was established by statute in 1964 as a permanent body to identify the causes of inefficiency, delay, and unfairness in administrative proceedings affecting public rights, and to recommend improvements to the President, the Departments and Agencies of the Executive Branch, the Congress, and the courts.<sup>1</sup> For almost 30 years, until its then \$1.8 million dollar annual budget was eliminated in 1995, ACUS achieved these purposes by bringing together the talents of acknowledged scholars of administrative law from various backgrounds, supported by an extremely competent career staff. The largest group of ACUS members came from the ranks of senior officials from every Department and Agency of the federal government, and representatives from the federal and state judiciaries and administrative law corps. The next largest group of ACUS members consisted of a diverse group of outstanding private (including “public interest”) practitioners and academics who served without compensation for two-year terms, and acted in a non-partisan fashion.

ACUS was led by a Chairman appointed by the President for a five year term who was confirmed by the Senate.

In addition to the Chairman, ACUS was composed of a Council of 10 additional individuals who were appointed by the President for three year terms, no more than one-half of whom could be federal employees, and an Assembly composed of the entire ACUS membership, which by statute could have no more than 101 nor less than 75 members. The Assembly acted as a legislative body, and initially established nine standing committees to develop recommendations for its consideration.<sup>2</sup> Committee recommendations would be reviewed by affected agencies before final committee action, and thereafter the committee-adopted recommendations would be forwarded to the Council and then to the Assembly for final action during a plenary session. Recommendations adopted by the Assembly were, by virtue of their own merit, often voluntarily adopted by various agencies, the Congress, and the courts. The result was the fairer and more efficient operation of the federal government, and the undisputed savings of tens of millions of dollars in excess of the funds appropriated for ACUS’ operations.

Notwithstanding the unanimous acknowledgment of the extraordinary value of ACUS’ contributions during its first 30 years, as reflected in reauthorizations by the 104<sup>th</sup> and 108<sup>th</sup> Congresses, ACUS has been inactive since 1995 because Congress has chosen not to appropriate the funds authorized for its operations. This was due initially to the conclusion of the House Committee on Appropriations in 1994 that ACUS had “fully accomplished its mission.”<sup>3</sup> This year, the 110<sup>th</sup> Congress once again acknowledged that ACUS’ mission has not been fully accomplished when it passed the Regulatory Improvement Act of 2007 (P.L. 110-290), (signed by President Bush July 30, 2008) which authorizes an annual appropriation of \$3.2 million for fiscal years 2008, 2009

and 2010 to reconstitute ACUS and resurrect its operations.

The legislative history of the Regulatory Improvement Act of 2007, like the legislative history of the Federal Regulatory Improvement Act of 2004 (P.L. 108-401) before it, makes a compelling case for the funding of ACUS. As spelled out in detail in the October 17, 2007 Report of the House Committee on the Judiciary accompanying H.R. 3564,<sup>4</sup> the need for an independent, nonpartisan ACUS to analyze the administrative law process and to develop recommendations to address today’s issues is undeniable, and the small amount of authorized funding will produce far greater societal and financial benefits for the Nation than the amount authorized for its operations. In only 17 pages, the Report recounts the many achievements of ACUS, lists support for ACUS’ reauthorization from all segments of the political and judicial sectors, as well as from private and public interest practitioners and their numerous organizations, and references past and current Congressional Research Service studies which identified areas that call out for attention by ACUS.

The American Bar Association, primarily through the efforts of members of the Section of Administrative Law and Regulatory Practice, has been in the forefront of the 14 year effort to reauthorize and fund ACUS. Among those who have helped are former Section leaders such as Supreme Court Justices Antonin Scalia and Stephen Breyer, former Section Chairs Phil Harter, Tom Susman, C. Boyden Gray and Randy May, and former ACUS leaders and Section members Jeffrey Lubbers, Gary Edles, Marshall Breger, and Robert Anthony. It is now our turn to pitch in and help secure funding for ACUS by recounting the innumerable accomplishments it achieved and by identifying the ways in which it can continue to make such contributions in the future. ○

\* Advisory board member, former section chair and former public member of ACUS; Deputy General Counsel for Energy Policy, U. S. Department of Energy.

<sup>1</sup> Administrative Conference Act of 1964 (P.L. 88-499).

<sup>2</sup> These committees were: (1) Agency Organization and Personnel, (2) Claims Adjudication, (3) Compliance and Enforcement Proceedings, (4) Grant and benefit Programs, (5) Informal Action, (6) Judicial Review, (7) Licenses and Authorizations, (8) Ratemaking and Economic Regulation, and (9) Rulemaking and Public Information.

<sup>3</sup> See H. Rep. No. 103-127 (1993) (Treasury, Postal Service, and General Government Appropriations Bill, 1994) at p. 76.

<sup>4</sup> H. Rep. No. 110-390 (2008).

# 2008 Gellhorn-Sargentich Law Student Essay Competition

*Karen Weathersbee is the winner of the third annual Gellhorn-Sargentich Law Student Essay Competition. Ms. Weathersbee was a second-year student at the University of Baltimore School of Law when she submitted her entry. Her article examines the policy considerations and legal implications that attend the use of quarantine as a defense against the spread of communicable disease.*

## Quarantine: Its Use and Limitations

In May 2007, an Atlanta attorney who was diagnosed with what was originally believed to be a dangerous form of tuberculosis was held in isolation at an Atlanta hospital. Under the first federal isolation order in forty-four years, he was sequestered under armed guard and later transferred to a Colorado facility.<sup>1</sup> Nearly two months later, a seventeen year old Mexican national living in the Atlanta area was diagnosed with tuberculosis.<sup>2</sup> The teenager refused medical treatment and, as a result, was held in medical isolation at Gwinnet County jail.<sup>3</sup>

Quarantine is a multifaceted issue that must balance individual rights against public safety. History reveals some instances where quarantine has been used as a weapon of prejudice and abuse. In a world where a dangerous contagion could potentially afflict millions in a very short amount of time, the proper implementation of quarantine requires careful consideration.

The use of quarantine as an extensive public health measure should be curtailed for the following reasons: 1) quarantine has been historically used to discriminate against minorities; 2) studies demonstrate that mass quarantine is ineffective; and 3) a large scale quarantine would be difficult to implement.

<sup>1</sup> Meredith Hobbs, *Speaker Beats TB, Now Wants Standing Back*, 118 FULTON CO. DAILY REPORT 176, Sept. 10, 2007.

<sup>2</sup> Craig Schneider, *Teen Jailed in Another Case of TB*, Atlanta Constitution, Aug. 26, 2007 at D1

<sup>3</sup> *Id.*

## History of Quarantine

The concept of quarantine is not recent. Medical historians believe the writings of Greek scholars Thucydides and Hippocrates suggest that the ancient Greeks “avoided the contagious.”<sup>4</sup> In 1374, Venice instituted a forty-day quarantine for ships entering the city.<sup>5</sup> Due to a fear of the plague, a ship’s crew and passengers were forced to remain in port until the time period ended.<sup>6</sup> In response to the plague, similar measures were later introduced throughout other parts of Europe.<sup>7</sup>

In the United States, one of the first documented instances of quarantine occurred in the Massachusetts Bay Colony. Ships from the West Indies were denied entry because of concerns they carried the plague.<sup>8</sup> Prior to 1796, quarantine legislation was the responsibility of the states. Congress enacted a quarantine law in 1796 largely in response to an outbreak of yellow fever.<sup>9</sup> The 1796 law was repealed and replaced in 1799 with an Act Respecting Quarantine and Health Laws.<sup>10</sup> The 1799 act authorized federal officials to assist states in the execution of their quarantine laws.<sup>11</sup>

In the late 1800s, an outbreak of yellow fever ravaged the United States.<sup>12</sup> Cholera was also prevalent during this time.<sup>13</sup> As a result of these epidemics, Congress passed an act in 1879 to prevent the introduction of contagious and infectious diseases in the United

<sup>4</sup> Howard Markel, *Quarantine: East European Jewish Immigrants and the New York City Epidemics of 1892*, 2 (1997).

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.*

<sup>7</sup> Paul Sehdev, *The Origin of Quarantine*, 35 (9) J. CLINICAL & INFECTIOUS DISEASE, 1071, 1072.

<sup>8</sup> Jennifer K. Elsea & Kathleen Swendiman, *Federal & State Quarantine Authority*, CRS REPORT (Jan. 23, 2007).

<sup>9</sup> Edwin Maxey, *Federal Quarantine Laws*, 23 (4) POL. SCI. Q. 618 (Dec. 1908).

<sup>10</sup> *Id.* at 619.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 625.

<sup>13</sup> *Id.*

States.<sup>14</sup> This act authorized the Board of Health to “erect temporary quarantine buildings” or “acquire on behalf of the United States titles to real estate for that purpose.”<sup>15</sup>

## State Quarantine Power

In the 19<sup>th</sup> century, while quarantine legislation was debated in Congress, states and state rights advocates argued that quarantine enforcement should be handled by states instead of the federal government.<sup>16</sup> In the case of *Morgan’s La. & T.R. & S.S. v. Board of Health of La.*, the shipping company argued that an assessment of a fee for quarantine inspection was “a regulation of commerce exclusively within the powers of Congress.”<sup>17</sup>

In response to the shipping company’s argument, the Supreme Court reiterated that the quarantine law of 1799 “clearly recognizes the quarantine laws of the states” and further stated that the state laws were “valid until displaced or contravened by some legislation of Congress.”<sup>18</sup>

Quarantine laws continued to be within the purview of the states for much of the early 1800s. With the continuing epidemics of yellow fever and cholera, a shift to federal control of quarantine enforcement began in 1866.<sup>19</sup> In 1870, Congress passed a resolution authorizing a visit to major port cities within the U.S. by an Army Medical Officer.<sup>20</sup> After the visit, the Army Medical Officer presented a report to Congress on his findings and recommended means for controlling the yellow fever epidemic.<sup>21</sup> Dr. Brown, the appointed officer at the time, believed “unity of control was necessary” to effectively control the outbreak of yellow

<sup>14</sup> *Id.* at 630.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 622.

<sup>17</sup> 118 U.S. 455, 461 (1886).

<sup>18</sup> *Id.* at 464.

<sup>19</sup> Maxey, *Supra* Note 9, at 623.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*



fever.<sup>22</sup> He also recommended that “a national system of quarantine be substituted for the various local systems.”<sup>23</sup>

## CDC Quarantine Regulations

The Centers for Disease Control (“CDC”) is authorized pursuant to the Public Health Service Act to promulgate regulations deemed necessary to control “transmission or spread of communicable diseases from foreign countries into the United States and from one State or possession into another.”<sup>24</sup> Regulations implementing federal quarantine authority were last substantively amended in 1985.<sup>25</sup> More recently, in November 2005, the CDC issued a proposed rule on quarantine.<sup>26</sup> The proposed regulations authorize CDC officials, and other authorized officials, to screen “at airports and other locations” for persons who may be infected with communicable diseases.<sup>27</sup> The proposed regulation also recognizes in instances where a passenger withholds consent, he or she may be detained for disease screening.<sup>28</sup> A person or group of persons deemed to be in the initial stages of a communicable disease may be detained under provisional quarantine.<sup>29</sup>

The proposed regulations outline three methods in which provisional quarantine may be initiated by the “quarantine officer” or “other authorized agents of the Director.”<sup>30</sup> First, the person or group of persons believed to be infected may be issued a “written provisional quarantine order.”<sup>31</sup> Second, an “authorized party” may issue a verbal provisional quarantine order to a person or group of persons believed to be infected with a communicable disease.<sup>32</sup> Finally, a person or group of persons may be placed under “actual movement restrictions.” The proposed regulations define “actual

movement restrictions” as when a person would understand that he or she is being detained and thus is not free to leave.<sup>33</sup>

The proposed regulations prescribe that provisional quarantine shall last “only as long as necessary for the quarantine officer (or other authorized agent) to ascertain whether the person or groups of persons are a possible carrier of disease.”<sup>34</sup> Provisional quarantine is only active a maximum of three days.<sup>35</sup> For quarantine periods in excess of three days, the Director will issue “a quarantine order.”<sup>36</sup> Person(s) placed in provisional quarantine will be offered medical treatment. While medical treatment is voluntary, those who refuse must remain in quarantine.<sup>37</sup>

The proposed regulations describe the process of issuing a provisional quarantine order and also generally describe what information this order would contain. The provisional quarantine order will usually be issued by the Director when a person or group of persons is placed in provisional quarantine.<sup>38</sup> While the proposed regulations specify that service of a provisional quarantine order “will typically occur through personal service,” in certain circumstances “public posting” may suffice.<sup>39</sup> The regulations further provide that the provisional quarantine order must inform the person or group of persons of the following: 1) the suspected disease; 2) that the person may be contagious or carry a disease with the potential of causing a public health emergency if spread; 3) that there is a “reasonable belief” the person or group will travel out of state; and 4) that the provisional quarantine is for a maximum of three days at which time the individual(s) may be released or “served with a quarantine order.”<sup>40</sup> Individual(s) served with a quarantine order may request an administrative hearing. In addition, judicial review may be sought by a petition for writ of habeas corpus.<sup>41</sup>

## Equal Protection Considerations of Quarantine

Quarantine in the United States has been used in some cases to discriminate against certain minority groups. Physician and medical historian Howard Markel writes of an extensive quarantine of Russian Jewish immigrants in response to an outbreak of typhoid in New York City. In 1892, four cases of typhoid fever were discovered in a tenement house among passengers who recently arrived on the ship *Massila*.<sup>42</sup> As a result, the New York City health officials, charged with enforcing quarantine regulations, ordered the quarantine of “every single Russian Jewish passenger of the *Massila*.”<sup>43</sup> New York City health officials quarantined 1,200 people, mostly Russian Jews, at North Brother Island. Approximately 1,100 of those quarantined were healthy people who happened to live near former *Massila* passengers.<sup>44</sup> Officials sought to link the illness with other Eastern European Jewish immigrants.<sup>45</sup> The 1892 quarantine would later be used by some members of Congress as a platform to exclude Eastern European Jewish immigrants from the United States.<sup>46</sup>

Similarly, the City of San Francisco enacted a quarantine regulation in 1900 that discriminated against Chinese residents. The regulation required all Chinese residents of San Francisco to be administered a bubonic plague vaccine.<sup>47</sup> The law additionally restricted Chinese residents of San Francisco from traveling outside of the city without the requisite documentation demonstrating they had been vaccinated against the bubonic plague.<sup>48</sup> Even though 350,000 people lived in San Francisco at the time, the resolution applied only to the city’s Chinese inhabitants.<sup>49</sup>

The San Francisco regulation was challenged in two cases, *Jew Ho v. Williamson*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> 42 U.S.C. § 361.

<sup>25</sup> 42 C.F.R. § 70.

<sup>26</sup> Control of Communicable Diseases, Proposed Rule, 70 Fed. Reg. 71,892 (Nov. 30, 2005).

<sup>27</sup> *Id.* at 71,902.

<sup>28</sup> *Id.* at 71,902-03.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 71,903.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Markel, *Supra* note 4 at 46.

<sup>43</sup> *Id.* at 50.

<sup>44</sup> *Id.* at 59.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 75.

<sup>47</sup> *Wong Wai v. Williamson*, 103 F.1, 3 (C.C.D. Cal. 1900).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 6.

*continued on next page*

and *Wong Wai v. Williamson*.<sup>50</sup> The plaintiffs alleged that the regulation violated the equal protection clause of the United States Constitution. The court noted “they [the regulations] are directed against the Asiatic race exclusively, and by name.” “They [Chinese residents] are denied the privilege of traveling from one place to another, except upon conditions not enforced against any other class of people.”<sup>51</sup> For these reasons, the court found that the regulation violated their rights under equal protection clause of the 14th Amendment.<sup>52</sup>

History has clearly shown how quarantines can be extremely abusive. In order to safeguard the rights of vulnerable groups and individuals, quarantines must be cautiously implemented and used only when absolutely necessary.

### Due Process Implications of Quarantine

Because of the restrictions imposed during quarantine, due process considerations are particularly important. The Supreme Court has found that “due process is flexible and calls for such procedural protections as the particular situation demands.”<sup>53</sup> In *Mathews*, the Supreme Court developed a three-factor test for assessing the adequacy of a proceeding under the Due Process Clause: 1) the privacy interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and 3) the Government’s interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.<sup>54</sup>

When there are potential threats to the public health, courts have generally given broad discretion to public health officials for quarantine enforcement. In the case of *Barnore v. Robertson*, a Chicago woman sought a writ of habeas corpus claiming that she was unlawfully quarantined at her home.<sup>55</sup> Although she had never been ill with typhoid fever, local health authorities believed that she carried the illness.<sup>56</sup>

The quarantine imposed by local health officials required her to remain at home. While under quarantine, she was to receive no visitors who had not been immunized.<sup>57</sup> The Supreme Court of Illinois deemed the imposition of quarantine of a seemingly healthy person necessary. The Court further found, “it is not necessary that one be actually sick, as the term is usually applied, in order that the health authorities have the right to restrain his liberties by quarantine regulations.”<sup>58</sup>

The loss of individual rights during quarantine should be considered relative to the loss of rights in comparable situations. Interestingly, the protection of these rights of quarantined individuals is in some cases less than the protection offered to prisoners. Biomedical research involving prisoners requires additional informed consent and ethical review procedures to ensure that they are not coerced into participating in the research.<sup>59</sup> Additionally, for biomedical research involving prisoners, the Department of Health and Human Services requires the appointment of an internal review board to determine whether the level of risk involved for prisoner volunteers is comparable to that of “nonprisoner volunteers.”<sup>60</sup> Thus, extra procedures are in place to ensure that prisoner volunteers are not coerced into participating in biomedical research. In contrast, if an individual is placed in quarantine and then consents to medical treatment that is required to leave quarantine, a question exists as to whether this consent was truly voluntary. The idea that an individual under quarantine has fewer rights than an individual in prison clearly points to an inherent problem with the proposed quarantine regulations.

### Implementation and Effectiveness Concerns of Quarantine

Another reason why extensive quarantine measures should be restricted is that quarantines are effective only in limited circumstances.<sup>61</sup> Richard Schabas points out three highly improbable factors that must be present in order for a quarantine

to work. 1) Patients must show signs of having a communicable disease that can be transmitted in its early stages. With many diseases, this simply is not possible. 2) Effective quarantine requires the identification of “all, or virtually all, people incubating the infection.” 3) Compliance is necessary in order for quarantine to be effective.<sup>62</sup> During the SARS outbreak in the early 2000’s, many people refused to comply with the quarantine implemented by the Canadian government.<sup>63</sup> Schabas further suggests that entry screening of airport passengers is unlikely to be effective against the importation of certain pandemic diseases due to their long incubation periods.<sup>64</sup>

In addition to the limited effectiveness of quarantine enforcement, the practical issues of quarantine must be taken into consideration. Quarantine enforcement would place a heavy burden on an overtaxed travel industry.<sup>65</sup> Large passenger jets can hold as many as five hundred passengers, making it economically and logistically nearly impossible to implement a reliable quarantine. As a reference, when an Iowa college student contracted measles while on a trip to India, he was sequestered for nearly two months upon his return.<sup>66</sup> A study estimated the cost of his isolation at \$142,252.<sup>67</sup> These concerns demonstrate that a further examination of the practicality and effectiveness of quarantine is needed before issuance of final quarantine regulations.

### Conclusion

Initially, quarantine may seem like a necessary tool to protect the public health in the event of pandemic illness. However, closer examination demonstrates that the use of quarantine can be full of potential missteps: discrimination, abuse of individual rights, and misapplication of valuable resources on an essentially ineffective measure. The CDC’s proposed regulations must be further developed not only to avoid these potential missteps, but also to effectively implement a quarantine. ○

<sup>62</sup> Richard Schabas, *Is the Quarantine Act Relevant?*, 176 (13) CAN. MED. ASS’N. J. 1840, 1841 (June 19, 2007).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Supra* note 61 at 1841.

<sup>66</sup> Gustavo H. Dayan, M.D., *The Cost of Containing One Case of Measles: The Economic Impact on the Public Health Infrastructure-Iowa 2004*, 116 (1) PEDIATRICS e1.

<sup>67</sup> *Id.*

<sup>50</sup> *Supra* note 46; *Jew Ho v. Williamson*, 103 F.10 (C.C.D. Cal. 1900).

<sup>51</sup> *Supra* note 46 at 9.

<sup>52</sup> *Id.*

<sup>53</sup> *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976).

<sup>54</sup> *Id.*

<sup>55</sup> 302 Ill. 422 (Ill. 1922).

<sup>56</sup> *Id.* at 424.

<sup>57</sup> *Id.* at 425.

<sup>58</sup> *Id.* at 433.

<sup>59</sup> 45 C.E.R. § 302.

<sup>60</sup> *Id.* at § 305.

<sup>61</sup> See Joseph Barbara, M.D., et al, *Large-Scale Quarantine Following Biological Terrorism in the United States*, 286 (21) J.A.M.A. (Dec. 5, 2001).

## European Union Administrative Law *continued from page 5*

concerning acquisition, maintenance, and dissemination of personal data by their institutions and by private parties. The public has the right to see data and rectify erroneous information and the “controllers” of data must obtain the consent of individuals before processing data, unless the data fit within one of the exceptions, which are wide-ranging. Judicial review, with the right to damages, is available.

The interface between the rules on access to documents and on privacy is potentially problematic. Where the access law requires disclosure, the privacy regulation law permits disclosure. But the former prohibits disclosure where it would undermine privacy protections. Unfortunately, there are different interpretations among responsible officials as to the scope of personal privacy protections under the law.

### Oversight

Oversight in the EU is complex compared to the U.S. because political authority is more diffuse. While no single entity or entities exercise ultimate “control” or “review,” the reporters conclude that

the administrative activities of the EU are reasonably “under control.”

Executive oversight of administrative activity of the Commission and the administrative agencies is exercised principally by the Council of Ministers and, on more purely political matters, by the European Council. They also exercise their authority through COREPER and the comitology committees.

Legislative oversight of administrative activity occurs at both the EU and national levels. The European Parliament is a part of the decision-making process and oversees the Commission and the administrative agencies. National legislative assemblies are increasingly overseeing EU administrative processes, with an emphasis on the principle of subsidiarity.

Another category of oversight is provided by bodies that are part of the EU governance architecture but operate with political independence. The reporters describe a number of these bodies, such as the European Data Protection Supervisor (who oversees implementation of data privacy guarantees at the EU level). As the

reporters note, “[t]hese independent bodies serve the interests of oversight by uncovering information about the substance of regulatory policies, their costs, or how programs are being administered, which then becomes available to other bodies engaged in more direct forms of oversight.”

Finally, external oversight is exercised by staff unions, lobbyists, nongovernmental organizations, academia, and the press.

There remains the question of the counterpart to the U.S. Office of Management and Budget. Increasingly, it appears that this role will be centralized within the Secretariat General.

### Conclusion

It is difficult to do justice to the institutional and procedural richness of the EU’s administrative processes, especially when the analysis is conducted through accepted categories of U.S. administrative law. Nevertheless, the Section and the reporters hope that their work provides guidance and understanding for those who work with the EU, as well as for those who are engaged in regulatory cooperation and convergence efforts. ○

## Why the Filed Rate Doctrine Should Not Imply Blanket Judicial Deference to Regulatory Agencies *continued from page 12*

the state.” *Parker v. Brown*, 317 U.S. 341, 350 (1943). As modern courts apply the doctrine, “First, the challenged restraint must be ‘one clearly articulated and affirmatively expressed as the state policy’; second, the policy must be ‘actively supervised’ by the state itself.” *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 455 U.S. 97, 105 (1980) (citation omitted).

The Texas federal district court which dismissed antitrust complaints failed to make any effort to determine whether the supplier’s alleged misdeeds are immune given state regulatory action under the federal antitrust laws. Indeed, since Texas affirmatively adopted a competitive market model but did not give TPUC plenary enforcement authority over suppliers, a claim of state action immunity in this case is unlikely to succeed.

Each of these alternative legal doctrines provides a much more precise

and effective means of promoting the goals of federal preemption and agency deference than the filed rate doctrine. In contrast to the filed rate doctrine these approaches are not dependent on firm-specific actions, but focus on the agency regulator’s authority and actions as well as the statutory scheme implemented. In this sense, they provide a more complete picture of the public interest in ensuring some enforcement of legal standards against market abuses in energy markets than overbroad resort to the filed rate doctrine.

### Conclusion

A more tempered approach to the filed rate doctrine is consistent with the *Otter Tail Power Co. v. U.S.*, 410 U.S. 376, 377 (1973), which refused to apply the filed tariff antitrust claims by competitors because the court perceived only “a potential conflict” with FERC’s authority over transmission. More recently, in

*Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, the Court held that courts clearly have the authority to apply general antitrust principles to regulated firms. 124 S.Ct. 872 (2004) (considering an essential facilities claim, refusal to deal, and monopoly leveraging, but rejecting these claims on the merits).

Courts would best serve the development of competitive markets in electric power, natural gas and telecommunications if they were to look to alternative legal doctrines to serve the purposes of the filed rate doctrine, rather than embracing blanket deference principles. Rate and tariff filings in the partially deregulated contexts that predominate in these industries today should be of no less legal and policy consequence than other regulatory instruments which receive judicial deference. But they also should not be of any more legal and policy consequence. ○

## 2008 Administrative Law Conference

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### CONFERENCE SCHEDULE

#### THURSDAY,

#### OCTOBER 16, 2008

8:00am Registration Opens

9:00am – 10:30am

2008 Report Of the Section of Administrative Law and Regulatory Practice To the President-Elect of the United States

10:45am – 12:15pm

George Washington University Law Review's Annual Scholar's Review of Administrative Law

10:45am – 12:15pm

Arbitrary and Capricious Review Revisited: *State Farm vs Vermont Yankee* at Last

10:45am – 12:15pm

Housing and Economic Recovery Act of 2008 –What it Means for Housing

10:45am – 12:15pm

Use of Journal Articles in Medical Product Promotion

12:15pm – 1:45pm

Annual Awards Luncheon

2:00pm – 3:30pm

Consumer Product Safety Commission

2:00pm – 3:30pm

Ethics and the Lawyer-Lobbyist—*Responding to Congress's Call for Lobbyist Self-Regulation*

2:00pm – 3:30pm

Can EPA Use Existing Authority to Regulate CO2 Emissions from Stationary Sources?

2:00pm – 3:30pm

EU Administrative Law, Part I

3:45pm – 5:15pm

EU Administrative Law, Part II

3:45pm – 5:15pm

E-rulemaking

3:45pm – 5:15pm

RGGI — *Regional Greenhouse Gas Initiative*

3:45pm – 5:15pm

Agency Litigating Authority: Use or Abuse?

5:30pm – 7:30pm

Cocktail Reception

#### FRIDAY, OCTOBER 17, 2008

7:45am Registration Opens

8:30am – 10:00am

Election Day: Ensuring A Fair Administrative Process

8:30am – 10:00am

Protecting the Integrity of Immigration Proceedings: Enhancement of Agency Pro Bono, Attorney Discipline, and Anti-Fraud Programs

8:30am – 10:00am

A Federal Agency Ombuds Act: Do We Need One and What Would it Look Like?

8:30am – 10:00am

New Frontiers in the Structure of Independent Agencies

10:10am – 12:15pm

Annual Review of Major Developments in Administrative Law

12:30pm – 1:45pm

Section Leadership Lunch

2:00pm – 3:30pm

GPRA, Regulatory Metrics, and Government Accountability

2:00pm – 3:30pm

Foreign Relations and the Administrative State

2:00pm – 3:30pm

Recent Developments in Education Law

3:45pm – 5:00pm

How to Get a Job in the New Administration

6:30pm – 9:30pm

Section Reception and Dinner  
Guest of Honor:  
Chief Judge  
Royce C. Lamberth,  
U.S. District Court for DC

#### SATURDAY,

#### OCTOBER 18, 2008

8:00am – 9:00am

Continental Breakfast

9:00am – Noon

Section Council Meeting

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By Robin Kundis Craig\*

## The *Chenery* Doctrine and Judicial Review of Administrative Action

Toward the end of its 2007–2008 term, the Supreme Court examined the Federal Energy Regulatory Commission's (FERC's) justifications for a rate decision in *Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County*, — U.S. —, 128 S. Ct. 2733 (June 26, 2008). Under the Federal Power Act, 16 U.S.C. §§ 824 *et seq.*, FERC regulates the sale of electricity in interstate commerce, including overseeing rate schedules, or “tariffs.” The Act requires that all wholesale electricity rates be “just and reasonable.”

In *Morgan Stanley*, in a 5–2 decision authored by Justice Scalia (Chief Justice Roberts and Justice Breyer took no part in the decision; Justices Stevens and Souter dissented), the Court acknowledged that “[t]he statutory requirement that rates be ‘just and reasonable’ is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions.” *Morgan Stanley*, 128 S. Ct. at 2738. However, in two cases in 1956, the Court also acknowledged that utilities should not be able to freely abrogate rates set in bilateral contracts by filing unilaterally a new tariff with FERC. Thus, when bilateral rate contracts exist, FERC is generally bound by this *Mobile-Sierra* presumption in favor of the contract rates – a presumption that the contract rate is itself “just and reasonable” and not in need of amendment – when the agency reviews tariff notifications.

*Morgan Stanley*, however, involved long-term contracts that western utilities entered into in 2000 and 2001, when electricity rates were “very high by historical standards,” especially in California. *Id.* at 2743. When that energy crisis passed, however, the utilities wished to purchase power at much cheaper rates and asked FERC to approve new tariffs. The utilities argued first that the *Mobile-Sierra* presumption should not apply because FERC had never initially approved the contract without the presumption. They also argued that, even under *Mobile-Sierra*, the contract rates were so high that they violated the public interest, rendering that contracts unjust and unreasonable.

“After a hearing, the ALJ concluded that the *Mobile-Sierra* should apply to the contracts and that the contracts did not seriously harm the public interest.” *Id.* FERC affirmed, but the Ninth Circuit reversed and remanded.

FERC's order “agreed with the Ninth Circuit's premise that the Commission must have an initial opportunity to review a contract without the *Mobile-Sierra* presumption, but maintained that” FERC had had that equivalent of that first review. *Id.* at 2745. Before the Supreme Court, however, FERC attempted

to change the rationale for its decision, “arguing that there is no such prerequisite – or at least that FERC could reasonably conclude so and therefore that *Chevron* deference is in order.” *Id.* (citations omitted). The Court, however, disagreed, invoking the doctrine from *SEC v. Chenery Corp.*, 318 U.S. 80, 94–95 (1943): “We will not uphold a discretionary agency decision where the agency has offered a justification in court different from what it provided in its opinion.” *Id.*

Nevertheless, the Supreme Court did not invalidate FERC's decision or remand on the basis of the *Chenery* doctrine. Instead, having concluded that FERC was required to apply the *Mobile-Sierra* presumption, it upheld FERC's decision. The fact that FERC “provided a different rationale for the necessary result is no cause for upsetting its ruling. ‘To remand would be an idle and useless formality. *Chenery* does not require that we convert judicial review of agency action into a ping-pong game.’” *Id.* (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766–67 n.6 (1969) (plurality opinion)).

In dissent, Justice Stevens, joined by Justice Souter, concentrated on the validity and import of the *Mobile-Sierra* doctrine itself, concluding that the presumption distorted the statutory “just and reasonable” standard. However, they also criticized the majority for mis-applying the *Chenery* doctrine. They emphasized that reviewing courts cannot accept an agency's *post hoc* rationalizations. *Id.* at 2758 (J. Stevens, dissenting). Moreover, “even assuming FERC subjectively believed that it was applying the just-and-reasonable standard despite its repeated declarations to the contrary,” the orders would then be too ambiguous to uphold.

The net effect of the majority's decision, according to the dissenters, was to inappropriately cabin FERC's discretion in rate review. By concluding that FERC was required to apply the *Mobile-Sierra* presumption, “[t]he Court has curtailed the agency's authority to interpret the terms ‘just and reasonable’ and thereby substantially narrowed FERC's discretion to protect the public interest by the means it thinks best. Contrary to congressional intent, FERC no longer has the flexibility to adjust its review of contractual rates to account for changing conditions in the energy markets or among consumers.” *Id.* at 2759 (J. Stevens, dissenting).

## Separation of Powers

Prisoners held at Guantanamo Bay, Cuba, were again the subject of Supreme Court expositions on the constitutional role of judicial review in *Boumediene v. Bush*, — U.S. —, 128 S. Ct. 2229 (June 12, 2008). In this 5–4 decision, Justice Kennedy authored the majority opinion, joined by Justices Stevens, Souter, Ginsburg, and Breyer. Chief Justice Roberts authored the dissenting opinion for himself and Justices Scalia, Thomas, and Alito.

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*continued on next page*

More specifically, the case involved Congress's authority to suspend the writ of habeas corpus. In the Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739, Congress amended 28 U.S.C. § 2241 to provide that "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." The Act also vested the D.C. Circuit with exclusive jurisdiction to review decisions of the Combat Status Review Tribunals (CSRTs), which the Department of Defense established to determine detainees' status as "enemy combatants."

After the Supreme Court determined that the Act did not apply to pending habeas proceedings, Congress enacted the Military Commissions Act of 2006 (MCA), 28 U.S.C. § 2241(e), §7, which purports to strip the federal courts of jurisdiction over pending as well as future habeas petitions by or on behalf of alien Guantanamo detainees determined to be enemy combatants or awaiting such determination. The Supreme Court in *Boumediene* determined that the procedures for reviewing detainees' status in the DTA "are not an adequate and effective substitute for habeas corpus" and hence that §7 of the MCA "operates as an unconstitutional suspension of the writ." *Boumediene*, 128 S. Ct. at 2240.

The Court's opinion in *Boumediene* is long and incorporated both a historical review of the role of habeas corpus and technical interpretations of both the statutes and the Constitution. Of perhaps most interest to administrative law practitioners, however, is the role that separation-of-powers principles played in the decision.

First, the Court figured the writ of habeas corpus as an essential component in the constitutional protection of individual liberty, a part of the Constitution's overall separation-of-powers scheme. "The Framers' inherent distrust of governmental power was the driving force behind that constitutional plan that allocated powers among three independent branches," and "the Framers considered the writ a vital instrument for the protection of individual liberty . . ." *Id.* at 2246. As a result, they allowed Congress only limited grounds for suspending the writ, and hence the Suspension Clause "ensures that, except during periods of formal suspension, the Judiciary will have the time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty." *Id.* at 2247 (citations omitted).

Second, the Court rejected the Government's formal interpretation of the extraterritorial application of the Constitution and hence the availability of the writ, in part on separation of powers grounds. Noting that "[t]he United States has maintained complete and uninterrupted control of the bay for over 100 years," the Court rejected the idea "that the Constitution had no effect there, at least to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term." *Id.* at 2258. In effect, the Government's argument proved too

much: "The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint." *Id.* at 2258-59. Such decisions were not for the Executive Branch and Congress to make:

Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." *Murphy v. Ramsey*, 114 U.S. 15, 44 . . . (1885). Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 . . . (1803).

*Id.* at 2259. Moreover, "[t]hese concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain." *Id.* In particular, "[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing." *Id.* at 2269.

The majority, therefore, clearly asserted the courts' duty to oversee and constrain the other two branches of the federal government. The dissenters, in contrast, viewed the Court as over-enthusiastically striking down "the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants" "without bothering to say what due process rights the detainees possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has even attempted to avail himself of the law's operation." *Id.* at 2279 (C.J. Roberts, dissenting). The dissenters would have been far more deferential to the political branches "amidst an ongoing military conflict," and perceived a different kind of separation of powers problem: "One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants." *Id.*

## Constitutional Interpretation

In its perhaps most controversial decision of the term, on June 26, 2008, the Supreme Court decided, 5-4, in an opinion by Justice Scalia (Justices Stevens, Souter, Ginsburg, and Breyer dissented) that the Second Amendment of the U.S. Constitution conferred an individual right to keep and bear arms and hence that statutes banning handgun possession are unconstitutional. *District of Columbia v. Heller*, — U.S. —, 128 S. Ct. 2783, 2816, 2821-22 (June 26, 2008). While the substance of the Second Amendment is generally outside the scope of administrative law practice, the Court's statements regarding the interpretation of the U.S. Constitution are nevertheless worth noting.

First, the Court emphasized that:

In interpreting this test, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” *United States v. Sprague*, 282 U.S. 716, 731 . . . (1931); see also *Gibbons v. Ogden*, 9 Wheat. 1, 188 . . . (1824). Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

*Id.* at 2788. Thus, the majority incorporated both a strict plain meaning and an originalist approach to its interpretation of the Second Amendment – the latter evidenced in its exhaustive historical review of the Second Amendment.

Second, the majority divided the Second Amendment into a prefatory clause (“A well-regulated Militia, being necessary to the security of a free State”) and an operative clause (“the right of the people to keep and bear Arms, shall not be infringed”). It then determined that, while the prefatory clause may “resolve an ambiguity in the operative clause,” “a prefatory clause does not limit or expand the scope of the operative clause.” *Id.* at 2789. As such, according to the majority, the phrasing of the Second Amendment could have equivalently been: “Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.” *Id.* As such, it focused its textual analysis on the operative clause, returning to the prefatory clause only “to ensure that our reading of the operative clause is *consistent* with the announced purpose.” *Id.* at 2789-90 (emphasis added). As such, the amendment's purpose did not limit the scope of the right but rather provided one reason for ensuring it.

In contrast, in his dissent, Justice Stevens argued that the purpose of the Second Amendment – “to protect the right of the people of each of the several States to maintain a well-regulated militia,” *id.* at 2822 (J. Stevens, dissenting) – also defined the scope of the right. “Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate

private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.” *Id.*

On an interpretive level, Justice Breyer agreed “that the Second Amendment protects militia-related, not self-defense-related, interests.” *Id.* at 2847 (J. Breyer, dissenting). In addition, he argued that governments still maintained the authority to regulate rights protected in the Constitution, so long as the regulations were reasonable. *Id.*

## Statutory Construction

In *Burgess v. United States*, — U.S. —, 128 S. Ct. 1572 (April 16, 2008), a unanimous Supreme Court, in an opinion by Justice Ginsburg, construed the meaning of “felony drug offense” in the Controlled Substances Act, 21 U.S.C. § 841(b)(1)(A), for purposes of determining whether a criminal defendant's sentence should be doubled. Specifically, the Court addressed the interpretive issue of whether the Act's definition of “felony” in Section 802(13) – an “offense classified by applicable Federal or State law as a felony” – limited the Act's definition of “felony drug offense” in Section 802(44), which otherwise defines such offenses as certain drug crimes that are “punishable by imprisonment for more than one year[.]” The relationship between the two definitions mattered because Burgess's prior drug conviction was punishable by more than a year of imprisonment but nevertheless was classified by the state as a misdemeanor; thus, if the state classification controlled, Burgess's new sentence could not be doubled.

The Court held that “felony drug offense” “is defined exclusively by § 802(44) and does not incorporate § 802(13)'s definition of ‘felony.’ A state drug offense punishable by more than one year therefore qualifies as a ‘felony drug offense,’ even if state law classifies the offense as a misdemeanor.” *Burgess*, 128 S. Ct. at 1575.

To reach this conclusion, the Court emphasized that “[s]tatutory definitions control the meaning of statutory words . . . in the usual case.” *Id.* at 1577 (quoting *Lawson v. Suwanee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)). Moreover, “[t]he language and structure of the statute . . . indicate that Congress used the phrase ‘felony drug offense’ as a term of art defined by § 802(44) without reference to § 802(13).” *Id.* First, that definition used the word “means,” effectively excluding any other definition of “felony drug offense.” *Id.* Second, felonies are commonly defined as crimes punishable by more than one year in prison. *Id.* at 1577-78. “Third, if Congress wanted ‘felony drug offense’ to incorporate the definition of felony in § 802(13), it easily could have written § 802(44) to state: ‘The term “felony drug offense” means a *felony* that is punishable by imprisonment for more than one year . . . .’” *Id.* at 1578. Fourth, the Court's reading “avoids anomalies” that the defendant's reading would create. For example, “felony” refers only to state

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and federal crimes, while “felony drug offenses” include foreign crimes. *Id.* In addition, not all states designate crimes as felonies or misdemeanors. *Id.* at 1578–79. “Finally, reading § 802(44) as the exclusive definition of ‘felony drug offense’ hardly renders § 802(13) extraneous.” *Id.* at 1579.

From the Act’s language and structure, the Court turned to the drafting history of the Act to confirm its interpretation. In particular, the Court emphasized that in 1994, Congress had deliberately amended the definition of “felony drug offense” to eliminate that definition’s dependence on the definition of “felony” specifically to remove differences in state classifications in crimes as a consideration in federal sentencing. *Id.* Thus, “[b]y recognizing § 802(44) as the exclusive definition of ‘felony drug offense.’ Our reading serves an evident purpose of the 1994 revision: to bring a measure of uniformity to the application of § 841(b)(1)(A) by eliminating disparities based on divergent state classifications of offenses.” *Id.* at 1579–80.

Finally, the Court refused to apply the rule of lenity. Asserting that this rule applies only when a statute is ambiguous, the Court concluded that the Controlled Substances Act’s enhanced sentencing provision, in the context of the definition of “felony drug offense,” was not ambiguous. *Id.* at 1580.

In contrast, in *United States v. Santos*, — U.S. —, 128 S. Ct. 2020 (June 2, 2008), the Court divided in its approach to interpreting *undefined* statutory terms. In this case, the issue was whether “proceeds” in the federal money-laundering statute, 18 U.S.C. § 1956(a)(1), means “receipts” or “profits.” While an unusual alignment five Justices – Justices Scalia, Sotter, Ginsburg, Thomas, and Stevens – agreed that the defendant was entitled to post-conviction relief, Justice Stevens wrote separately to concur only in the judgment, and Justices Breyer and Alito filed separate dissents, with Chief Justice Roberts, Justice Kennedy, and Justice Breyer joining Justice Alito.

Justice Scalia’s plurality concluded that because “[t]he federal money-laundering statute does not define ‘proceeds,’” “we give it its ordinary meaning.” *Santos*, 128 S. Ct. at 2024. After consulting the *Oxford English Dictionary*, *Random House Dictionary of the English Language*, and *Webster’s New International Dictionary*, however, the plurality concluded that “[p]roceeds’ can mean either ‘receipts’ or ‘profits.’ Both meanings are accepted, and have long been accepted, in ordinary usage.” *Id.* Moreover, “proceeds” “has not acquired a common meaning in the provisions of the Federal Criminal Code.” *Id.*

However, “[s]ince context gives meaning, we cannot say the money-laundering statute is truly ambiguous until we consider ‘proceeds’ not in isolation but as it is used in the federal money-laundering statute.” *Id.* Nevertheless, an examination of context “leaves the ambiguity intact.” *Id.* Moreover, “[u]nder either of the word’s ordinary definitions, all provisions of the federal money-laundering statute are coherent; no provisions are redundant; and the statute is not rendered utterly absurd.”

*Id.* at 2025. As a result, the rule of lenity applied, entitling the defendant to relief. *Id.* However, the rule of lenity also carried interpretive force with it: “Because the ‘profits’ definition of ‘proceeds’ is always more defendant-friendly than the ‘receipts’ definition, the rule of lenity dictates that it should be adopted.” *Id.* at 2025.

In his concurrence, Justice Stevens emphasized that “[w]hen Congress fails to define potentially ambiguous statutory terms, it effectively delegates to federal judges the task of filling gaps in a statute.” *Id.* at 2031 (J. Stevens, concurring). However, he also recognized “that the same word can have different meanings in the same statute” and hence disagreed with Justice Alito that the Court was bound to pick one meaning for “proceeds.” *Id.* at 2032 (J. Stevens, concurring). In addition, Justice Stevens disagreed with Justice Alito’s conclusion that the statute’s legislative history required “proceeds” to be defined as “gross receipts.” *Id.* As a result, “the rule of lenity may weigh in the determination,” and he concurred in the judgment. *Id.* at 2033–34 (J. Stevens, concurring).

Justice Breyer dissented. Like Justice Scalia’s plurality, “I doubt that Congress intended the money laundering statute automatically to cover financial transactions that constitute an essential part of a different underlying crime.” *Id.* at 2034 (J. Breyer, dissenting). However, he concluded that Justice Scalia’s construction of “proceeds” would create “serious logical and practical difficulties” and instead would resolve the problem not through the definition of “proceeds” but through a larger understanding of what the money-laundering statute was trying to accomplish and its relationship to other crimes. *Id.* at 2034–35 (J. Breyer, dissenting).

Finally, Justice Alito, in his dissent, criticized Justice Scalia’s plurality because “it makes no serious effort to interpret this important statutory term.”

Ignoring the context in which the term is used, the problems that the money—laundering statute was enacted to address, and the obvious practical considerations that those responsible for drafting the statute almost certainly had in mind, that opinion is quick to pronounce the term hopelessly ambiguous and thus to invoke the rule of lenity. Concluding that “proceeds” means “profits,” the plurality opinion’s interpretation would frustrate Congress’ intent and maim a statute that was enacted as an important defense against organized criminal enterprises.

*Id.* at 2035 (J. Alito, dissenting). Focusing on the purposes of the money-laundering statute and the treatment of “proceeds” under state and international law, Justice Alito concluded “that the term ‘proceeds’ in the money laundering statute means gross receipts, not net income. And contrary to the approach taken by Justice Stevens, I do not see how the meaning of the term ‘proceeds’ can vary depending on the nature of the illegal

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By William S. Jordan III\*

## D.C. Circuit – Clean Air Act’s State-by-State Text Trumps EPA’s Regional Solution

EPA’s attempt to craft a regional solution to an undoubtedly regional air pollution problem conflicted, according to the D.C. Circuit, with a Clean Air Act provision designed to protect air quality within particular states. In *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir 2008), the court insisted on strict compliance with the statutory scheme even as it deferred to EPA’s judgment in determining the pollution levels that would constitute a violation of existing standards.<sup>1</sup>

The Clean Air Act is an exercise in cooperative federalism. Although EPA sets the maximum levels for certain pollutants in the air (so-called “ambient standards”), the Act provides that these standards will be enforced through State Implementation Plans (SIPs) developed by each of the states. In essence, each state is to regulate its own factories and other sources of pollution in order to assure that its own air meets the ambient standards set by EPA. This scheme might well work if air pollution respected state boundaries. Each state could control its own pollution sources and thereby control the quality of its own air.

But pollution knows no boundaries, as shown quite dramatically by the effects of acid rain caused by Midwestern coal-fired power plants on the lakes and forests of the Northeast. Responding to this problem in Title IV of the Clean Air Act Amendments of 1990, Congress authorized the acid rain program, under which each source of sulfur dioxide (SO<sub>2</sub>) and nitrous oxides (NO<sub>x</sub>) received pollution “allowances” essentially at its existing level of pollution. Congress authorized pollution sources to buy and sell the allowances in order to take advantage of market efficiencies. A source that could reduce its emissions relatively cheaply could sell allowances to another source for which reductions were more expensive. The total number of allowances was capped at a certain level and even designed to decline over time. Under a widely accepted theory, this “cap-and-trade” system would enhance productivity and reduce emissions as efficiently as possible. The key to the scheme is the ability to take advantage of a nationwide market for these allowances.

Unfortunately, the acid rain program, apparently successful in various ways, has not assured that the air in the downwind states complies with the ambient standards. In order to meet the standard for ozone, for example, it is necessary to control SO<sub>2</sub> and NO<sub>x</sub>, so-called precursors to ozone pollution. Under Title I of the Clean Air Act, which requires compliance with the ambient

standards, EPA issued the Clean Air Interstate Rule (CAIR), which sought to implement a modified cap-and-trade program involving states contributing to the particular air pollution problems and states affected by the pollution. EPA sought to emulate the regional air pollution allowances market of the acid rain program.

However sensible the policy, EPA’s effort foundered on the language of Title I. Addressing interstate air pollution, Section 110 provides that each state’s SIP must prohibit emissions “within the State” that will “contribute significantly to non-attainment in, or interfere with maintenance by, any other State.” Although a cap-and-trade program might accomplish this goal, it would have to address the specific linkage between the polluting state’s facilities and the receiving state. The CAIR made no attempt to measure these effects. Thus, as the court put it, an Alabama source could purchase allowances to cover all of its current emissions in compliance with the CAIR, but it would still contribute to air quality standard violations in Davidson, North Carolina. Thus, the CAIR, however sensible in the aggregate, did not comply with Section 110.

On a related issue, the court held that “All the policy reasons in the world” could not justify EPA’s method of identifying sources that “interfere with maintenance” of compliance with the ambient standards. EPA limited the rule to sources affecting areas projected to be out of compliance at the time the rule took effect. North Carolina argued that the rule must include upwind states whose pollution would reach areas projected to barely meet attainment standards at the time the rule took effect. EPA argued as a matter of policy that its position would eliminate the downwind state’s incentive to allow pollution to increase to the level of the ambient standard. Despite a seemingly sensible policy concern, the court held that in order to give independent meaning to the term “interference with maintenance,” EPA must require control beyond merely preventing violations of the ambient standards.

In these and other areas, the court stringently applied the statutory language to defeat EPA’s efforts. The central problem was that EPA pursued a regional solution to a problem addressed by the statute as involving conflicts between particular states. EPA could not shoehorn the square peg of regionalism into the round hole of state-by-state relationships.

Despite this seeming inflexibility, the court deferred to EPA’s decision to set an air quality threshold of 0.2 <<math>\mu\text{g}/\text{m}^3</math> for certain particulates when it had originally proposed a threshold of 0.15. Although EPA did not fully explain its choice of the larger number, it had asked for comment on the issue and had responded to some of the comments. The court held that EPA’s position was not wholly unsupported by the record, hardly a demanding standard, and that EPA’s choice was reasonable.

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## D.C. Circuit – Dissent’s Literalism Strives to Revive the Nondelegation Doctrine

Despite being battered even by Justice Scalia, (“the doctrine of unconstitutional delegation . . . is not an element readily enforceable by the courts,” *Mistretta v. U.S.*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting)), the nondelegation doctrine once again returns to the fray. In *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23 (D.C. Cir. 2008) (referred to as “*MichGO*”), Judge Janice Rogers Brown in dissent articulates limiting principles that could well revive the doctrine.

In *MichGO*, the D.C. Circuit upheld the action of the Department of the Interior in taking 147 acres in trust for an Indian tribe to operate a casino. In so doing, the majority found no violation of either the National Environmental Policy Act or the nondelegation doctrine. As to the latter, the majority held that the statutory authority to obtain lands “for Indians” was no broader than other statutes authorizing regulation “in the public interest,” a standard previously held to comply with the nondelegation doctrine. In so doing, the majority emphasized that the “statutory and historical context” of the Indian Reorganization Act and its legislative history established an intelligible principle that the agency was to exercise this authority to further Indian economic development and self-governance.

Judge Brown disagreed. Rejecting the majority’s reasoning as a “tautology on steroids,” she could not, applying ordinary tools of statutory construction, find any intelligible limits in the statute. In her view, when a standard is not ambiguous, but absent, it cannot be derived from the legislative history or other tools of construction. “Even if a mood of self-sufficiency can be said to permeate” the statute, such mood is not a standard to guide an agency’s decisions. Having been given by the statutory language unfettered authority to acquire land for Indians “in his discretion,” the Secretary unambiguously had unbounded discretion.

Judge Brown’s approach would not so much make the nondelegation doctrine more enforceable as it would significantly reduce the arsenal of weapons available to an agency defending against a nondelegation attack. The more the court’s analysis is limited to the particular statutory language (e.g., “for Indians” and “in his discretion” in this case), the more difficult it will become to find the intelligible purpose that has often been available in the legislative history.

## 9<sup>th</sup> Circuit Takes a Softer “Hard Look” at Forest Service Methodology

Overruling its prior decision in *Ecology Center, Inc. v. Austin*, 430 F.3d 1057 (9<sup>th</sup> Cir. 2005), the 9<sup>th</sup> Circuit in *Lands Council v. McNair*, 2008 WL 2640001 (9<sup>th</sup> Cir. 2008) (*Lands Council II*), upheld a Forest Service forest-thinning project against challenges to the reliability of the agency’s scientific methodology and to the agency’s consideration of uncertainty. The court’s

succinct summary signals a shift to a softer “hard look” in reviewing agency judgments:

In essence, *Lands Council* asks this court to act as a panel of scientists that instructs the Forest Service how to validate its hypotheses regarding wildlife viability, chooses among scientific studies in determining whether the Forest Service has complied with the underlying Forest Plan, and orders the agency to explain every possible scientific uncertainty. As we will explain, this is not a proper role for a federal appellate court. But *Lands Council*’s arguments illustrate how, in recent years, our environmental jurisprudence has, at times, shifted away from the appropriate standard of review and could be read to suggest that this court should play such a role.

The *Lands Council* challenged the Forest Service’s proposal to conduct selective logging and thinning in the Mission Brush area, arguing that the agency had failed to demonstrate the reliability of its conclusions about the effect of the project on flammulated owl populations because the agency had not verified its predictions with on-the-ground analysis. The *Lands Council* relied upon *Ecology Center*, which had articulated a rule requiring such verification. *Ecology Center*, in turn, had relied upon a previous decision involving the *Lands Council* (*Lands Council I*), in which the court had required on-the-ground verification as to certain soil analysis.

In *Lands Council II*, the 9<sup>th</sup> Circuit emphasized at length the need for non-scientist judges to defer to an agency’s technical judgment and to avoid discussion of fine-grained technical issues. Since the agency had used some studies that it considered reliable, had done some on-the-ground analysis, and could point to studies supporting its conclusions about the owls, that was enough despite conclusions as to possible disruptions. The court accepted a “habitat as proxy” approach to making the judgment that the habitat would enhance the owl population even though some cases had rejected “habitat as proxy” on particular facts. In upholding the agency’s treatment of uncertainty, the court held that the agency did not have to discuss every uncertainty, but it did have to respond to comments. The ultimate lesson of this decision is twofold: (1) the courts’ review of agency technical decisions should be highly deferential, and (2) a judgment about whether an agency action is arbitrary and capricious depends upon the particular facts, not upon some principle articulated in a previous decision (e.g., *Ecology Center* or *Lands Council I*) involving arguably similar facts.

## D.C. Circuit – Agency Head Deviation from Prior Staff Decisions Not Arbitrary and Capricious

Much to practitioners’ dismay, agency heads sometimes take actions that are inconsistent with actions that the agency staff had previously taken with respect to the same issues. That was the source of Comcast’s complaint about the FCC’s denial of a request for a waiver of certain requirements.

As directed by Congress, the FCC issued regulations requiring the security aspects of direct broadcast receivers (i.e. the means of assuring receipt of certain broadcasts but not others) to be distinct from other aspects of such receivers (e.g., channel tuners), and banning integrated boxes that provided both functions. The limitations are designed to create a market for the new devices. The agency authorized waivers of the ban for “low cost, limited capability” boxes. During the regulatory process, the FCC staff issued waivers for some integrated boxes.

When Comcast sought a waiver for its own integrated boxes – with the lowest cost on the market and some exactly the same as those for which waivers had previously been issued by the Media Bureau of the FCC – the Media Bureau denied the request on the ground that Comcast’s box did not meet the waiver criteria. Comcast appealed to the Commission itself, which confirmed the denial.

In *Comcast Corp. v. FCC*, 526 F.3d 763 (D.C. Cir. 2008), the D.C. Circuit rejected Comcast’s argument that inconsistency between the agency’s waiver decisions rendered the denial arbitrary and capricious. Emphasizing its “well-established view that an agency is not bound by the actions of its staff if the agency has not endorsed those actions,” the court refused to insist that the FCC justify the differential treatment. The central point was that the agency itself (the Commissioners in this case) is not bound by the earlier actions of its staff. Comcast complained that it had had no incentive to appeal the earlier waiver grants because it had agreed with those outcomes, but this was irrelevant. Without appeals from the earlier waiver grants the court could not know whether the Commissioners

would have agreed with those decisions. Unchallenged staff decisions are simply not agency precedent and cannot create inconsistency with a later decision by the head of the agency.

### 8th Circuit – No Absolute Right to Cross-Examination in Formal Agency Adjudication

In *Richardson v. Perales*, 402 U.S. 389 (1971), the Supreme Court held that hearsay reports from various physicians could constitute substantial evidence to support a conclusion that a claimant is not disabled. The Court created an ambiguity by noting that the claimant in that case had not subpoenaed the physicians in question, so he could not complain of inability to cross-examine them with respect to their reports. In *Passmore v. Astrue*, 533 F.3d 658 (8th Cir. 2008), a disability claimant sought to exploit this opening by requesting a subpoena of and opportunity to cross-examine a reporting physician. When the ALJ denied the subpoena and the claim, Astrue argued that he had an absolute right to cross-examine, relying upon a 5th Circuit decision to that effect.

The 8th Circuit, however, joined the 6th Circuit in rejecting this argument. First, the court noted that the applicable regulations authorized cross-examination “when reasonably necessary,” so there was no regulatory basis for Astrue’s claim. Second, the court applied a *Mathews* balancing test to conclude that due process did not require the right to cross-examination on the particular facts. Finally, the court concluded for essentially the same reasons that denial of cross-examination was not an abuse of discretion. ○

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activity that produced the laundered funds.” *Id.* at 2044 (J. Alito, dissenting).

Beyond the basics of how to interpret statutes, the Supreme Court also considered the role of federalism and other tools of statutory interpretation in *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.*, — U.S. —, 128 S. Ct. 2326 (June 16, 2008). This 7-2 decision (Justices Breyer and Stevens dissented) involved the Bankruptcy Code’s provision exempting assets transferred under a plan confirmed under Chapter 11 of the Code from the imposition of stamp taxes and similar taxes. Specifically, the Court held that the tax exemption does not apply until after the plan is confirmed.

The Court considered a number of interpretive tools in reaching this conclusion. For example, while emphasizing that “a subchapter heading cannot substitute for the operative test of the statute,” the Court nevertheless noted that “statutory titles

and section headings ‘are tools available for the resolution of a doubt about the meaning of a statute.’” *Id.* at 2336 (citations omitted). Moreover, the Court approved Florida’s invocation of three canons of statutory construction. First, Florida invoked the canon that “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change.” *Id.* (quoting *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)). Second, Florida argued that courts should “proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed.” *Id.* at 2336-37 (citations omitted). Finally, “Florida notes that the canon also discourages federal interference with the administration of a State’s taxation scheme.” *Id.* at 2337. As such, the Court remains consistent in its use of federalism principles to interpret federal statutes. ○

## Florida Amends APA to Further Discourage Unadopted Rules

By Larry Sellers\*

Last year, the Florida Legislature approved a number of changes to Florida's Administrative Procedure Act (APA).<sup>1</sup> Among other things, the 2007 bill would have provided for additional restrictions on the use of unadopted rules, based largely on recommendations by the Joint Administrative Procedures Committee (JAPC). The Governor vetoed this measure because of concerns regarding unintended consequences. Specifically, the Governor's veto letter mentioned the provision in the bill that would have limited an agency's authority to rely on unadopted statements that are subject to pending legal challenges.

Currently, agencies respond to challenges to unadopted statements by initiating a rulemaking to adopt the challenged statement because the initiation of such rulemaking usually results in a stay of the challenge, and the subsequent adoption of the rule moots the challenge. In such cases, the agency may continue to rely upon the challenged statement if the statement meets the requirement in s. 120.57(1)(e) that the agency demonstrate —“prove up”— that the unadopted rule is not an invalid exercise of delegated legislative authority and that the rule is not being applied without due notice.

The 2007 bill would have made significant changes to these provisions. In particular, it provided that upon the *filing* of a petition for administrative determination that an agency statement violates the rulemaking requirement, the agency must *immediately* discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action until one of four specified events occurred. This feature of the 2007 bill proved to be the most controversial, and the Governor specifically mentioned it in his veto message, claiming that “such a provision amounts to an injunction against the agency in the absence of any allegation of harm by the challenger and halts enforcement or implementation of laws.” As a result, this provision was deleted.

During the 2008 Regular Session that ended in early May, the Legislature revised the measure to resolve the Governor's concerns and enacted SB 704, the Open Government Act. Much of the Act reflects the Legislature's continuing effort to assert its preference that agencies adopt their policies pursuant to the rulemaking procedures in the APA. This preference is based on the Legislature's view that key goals of the APA are to combat “phantom government” by providing notice of agency policy, encouraging public participation in the development of that policy, and ensuring legislative oversight of delegated

authority. Here are some of the highlights relating to unadopted statements meeting the definition of a “rule”.

*Reliance on Unadopted Rules Prohibited.* Effective January 1, 2009, the Act provides that an agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule.

*Exception for Recently-Enacted Statutes.* The Act carves out an exception requested by the Governor's office that allows an agency's action to be based on unadopted rules, subject to review of the administrative law judge, if an agency demonstrates: (1) that the statute being implemented directs it to adopt rules, (2) that the agency has not had time to adopt those rules because the requirement was so recently enacted, and (3) that the agency has initiated rulemaking and is proceeding expeditiously and in good faith to adopt the required rules.

*Revised Procedures for Staying Challenges.* The Act provides that upon notification to the administrative law judge before final hearing that the agency has published a notice of rulemaking, such notice shall automatically operate as a stay of proceedings pending adoption of the statement as a rule. The administrative law judge may vacate the stay for good cause shown. Such a stay shall remain in effect so long as the agency is proceeding expeditiously and in good faith to adopt the challenged statement as a rule.

*Revised Attorney's Fees.* While the APA always has included a limit on the attorney's fees that may be awarded in cases involving challenges to *proposed* or *existing* rules, there is no limit on attorney's fees that may be awarded in cases involving challenges to *unadopted* rules. However, agencies typically avoided the risk of paying attorney's fees in such cases by initiating a rulemaking to adopt the challenged unadopted statement. Effective January 1, 2009, the Act makes three notable changes to the provision governing attorney's fees in cases involving challenges to *unadopted* rules.

First, the Act provides that attorney's fees and costs may be awarded in challenges to unadopted statements only upon a finding that the agency received notice that the statement may constitute an unadopted rule at least 30 days before the petition was filed and that the agency failed to publish the required notice of rulemaking that addresses this statement within that 30-day period.

Second, the Act provides that, if prior to the final hearing (but after the 30-day notice described above) the agency initiates a rulemaking and requests a stay of the proceedings pending the rulemaking, the administrative law judge shall award reasonable costs and reasonable attorney's fees accrued by the petitioner prior to the date the agency published notice of rulemaking, unless the agency proves that it did not know and should not have known that this statement was an unadopted rule. Given the new 30-day notice requirement, it may be quite difficult for

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<sup>1</sup> See HB 7183 (2007) (vetoed June 27, 2007). For a summary of the 2007 bill, see Larry Sellers, *Florida Amends APA*, Vol. 32 ADMIN. & REG. L NEWS, No. 4 at 27-28 (Summer 2007).

*continued on page 28*



# Section News and Events

## New Section Director

The Section welcomes **Anne Kiefer** as its new Section Director, replacing Kim Knight who has moved on to the Dispute Resolution Section. Anne's background includes more than 10 years in a comparable role at a trade association in Chicago, the Steel Tank Institute and Steel Plate Fabricators Association. She has a Bachelor's Degree in Management, and experience with administration and licensing, membership recruitment and retention, meetings and education management, and technology management.

## Mary C. Lawton Award

**Peggy R. Mastroianni** is the winner of the 2008 Mary C. Lawton Award for Outstanding Government Service. Peggy is associate legal counsel in the Office of Legal Counsel (OLC) at the Equal Opportunity Commission. Peggy has headed the OLC on several occasions due to vacancies at the top. Peggy is best known for her extensive contributions to the development of regulations and guidance documents on the Americans with Disabilities Act.

## Scholarship Award

**Reuel E. Schiller**, Professor of Law, University of California, Hastings College of the Law, is the winner of the Section's 2007 Scholarship Award for his article, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399 (2007). The article examines the effect Roosevelt's judicial appointees had in the development of modern administrative law, particularly the development of the doctrine of judicial deference.

## NYC Corporation Counsel Remarks

*The following are excerpts from a speech given at the Annual Meeting by Michael A. Cardozo, Corporation Counsel of the City of New York.*

If you listened closely to the comments introducing me you might have asked yourselves: "Why in the world is this guy Cardozo speaking to us? He never practiced before a federal administrative agency in his life. Where is his experience before the SEC or the FTC or HUD or any of the other alphabet soup agencies in DC before whom we practice? What the heck does representing Mayor Bloomberg or the City of New York, have to do with administrative law?"

Well the fact is that, while I certainly can't claim to be an administrative law expert, a significant part of the work of the New York City Corporation Counsel's Office deals with administrative law. ★ ★ ★

For New Yorkers and other city dwellers, administrative law is nothing less than the enforcement of rules that shape the quality of every day life. Parking tickets, waste disposal, air pollution, noise, building and fire safety, and taxes are just a few examples. How administrative disputes in these and numerous other areas are resolved has a direct and immediate impact on the quality of life of everyday New Yorkers. ★ ★ ★ Each year

the City holds approximately one million hearings — live or by mail — for parking violations. That's right, I said one million hearings. Each year in New York City there are approximately 200,000 administrative hearings for quality of life violations such as street cleanliness, pollution, and fire violations. Last year the City's Office of Administrative Trials and Hearings, which conducts administrative hearings for other City agencies, such as disputes between City agencies and city employees, resolved by trial or settlement almost 2,000 cases. In 2007, the City Tax Commission, which hears challenges to real estate tax assessments, reviewed 42,118 applications seeking reductions in assessed values. The value of the properties for which reductions were sought totaled over \$120 billion. ★ ★ ★

In the modern era, New York City, like most cities across the country, has delegated to administrative tribunals appeals of zoning determinations, employee disciplinary decisions, and other issues. But over time New York City, and to some extent other municipalities as well, have created other administrative tribunals that deal with matters formerly handled in the criminal, and to some extent the civil, courts.

Starting in the 1970s, the City recognized that many issues, primarily those involving quality of life complaints, were overwhelming the dockets of already overburdened courts. In response, the City moved many issues that traditionally had been resolved in the City's criminal courts into administrative law tribunals. Of particular note, the City established the misleadingly titled Environmental Control Board, which handles not only environmental complaints such as noise and air pollution, but also the gamut of quality of life violations, such as street cleanliness, waste disposal, and fire, building, and parks violations.

Another innovation was the creation of a central tribunal where fully independent administrative judges hear cases from other agencies. In 1979 the City became the first municipality in the country to create such a central tribunal. Central panels have become a feature of modern administrative law and now exist in about half of the states in the country and in New York City, Chicago, and the District of Columbia. New York City's Office of Administrative Trials and Hearings began by handling disciplinary and discrimination decisions involving most of the City's approximately 300,000 city employees and now hears a wide array of cases from other agencies, such as contracts, licenses, and vehicle forfeitures. ★ ★ ★

Unfortunately, we have become a victim of our own success. The literally hundreds of thousands of cases transferred from the criminal courts no longer clog court dockets. And the flexibility of a non-criminal proceeding frequently means that the deterrent effect of an administrative sanction is far preferable and fairer to all concerned to a conviction in criminal court. But these cases and the large number of other administrative

*continued on next page*

## Section News and Events *continued from previous page*

cases place an enormous burden on the administrative tribunals and the over 500 City administrative law judges.

The volume of matters faced by these local administrative agencies raises three pressing challenges: voluminous case loads, ethical conduct by administrative judges and hearing officers, and the rights of pro se litigants. A fundamental principal underlying all these issues and related aspects of administrative law in cities is due process.

A cousin of mine, whom some of you may have heard of, Benjamin Cardozo, has instructed us, in essence, that “due process is the process that is due.” In all due respect to cousin Ben, that is not very helpful guidance. It certainly does not tell us what due process means in an administrative law system with the volume in New York City.

Obviously, the process that is due for a small parking ticket is less extensive than for a more complicated case with more severe consequences. But it is important to keep in mind that for most New Yorkers, administrative tribunals are the only way they interact with City government. The Administrative Law Judge or hearing officer thus becomes the face of justice in the city. The litigant at risk of paying a parking or noise pollution fine, or being assessed higher taxes, must feel and know that he or she is being afforded due process.

The City has sought to protect due process by statute. The New York City Charter sets minimum standards of due process for all City administrative tribunals, including, for example, notice of hearings, findings of fact based solely on the record, and a written decision. Parties have the right to a hearing with due process, including the opportunity to be represented by counsel, issue subpoenas, call witnesses, cross examine, and present oral and written arguments.

Technology is obviously one way to address volume. \*\*\* Today New Yorkers can contest parking tickets by mail or on line. Eventually, proceedings should be able to be conducted back and forth via the internet. Obviously modern technology, properly utilized, offers numerous other ways to deal with the volume. But no matter how efficient the administrative proceeding is, there must be an assurance that the administrative law judge or hearing officer is fair and unbiased. \*\*\*

Last year the City adopted a Code of Conduct providing uniform rules for administrative law judges that enhance accountability and increase professionalism. Since most city administrative law judges and hearing officers work part time or on a per diem

basis the Code of Conduct addresses questions such as: What can administrative law judges and hearing officers do when not serving as a judicial officer? Can they be engaged in politics? Are they limited in the kinds of outside legal work they can undertake? \*\*\*

These rules are a good start. And given the economic realities cities face, and the need to have part time, not full time, administrative judges, is it necessary – and is it realistic – to place more ethical restrictions on ALJs limiting what they can do when not serving as administrative judges? The organized bar, I suggest, should be looking at the issue and offering constructive advice. \*\*\*

Since most local administrative proceedings typically involve small sums, it follows that most litigants represent themselves. Indeed, one benefit of proceedings before administrative tribunals, as distinct from the criminal courts, is that they are less formal and intimidating and more readily allow a pro se litigant to give an effective presentation

At the same time, however, an additional responsibility is placed on the administrative law judge or hearing officer to ensure that the pro se litigant receives due process. The City’s recently adopted Code of Conduct for administrative judges establishes an affirmative responsibility for the administrative law judge or hearing officer to ensure that pro se litigants have the opportunity to present their cases.

In addition, the Code of Conduct suggests a number of appropriate steps to advance a pro se litigant’s ability to be heard, such as requiring the ALJ to explain the nature and process of the hearing and to question witnesses to elicit general information and to obtain clarification.

Should more be done to safeguard the rights of pro se litigants in administrative proceedings? Can this be done without making the administrative process even more bureaucratic and even more expensive to the municipality? Scrutiny from the outside world, I suggest, would help us answer these questions.

I want to conclude with these final thoughts.

It is easy to underestimate the importance of municipal administrative law. Rarely, if ever, will a city’s administrative tribunal decide one case that is worth billions, or that will make the front page headlines of the day. But taken together the millions of cases heard by administrative tribunals are responsible for making America’s cities and their residents healthier, safer and more prosperous.

The questions I raised tonight deserve the serious attention of academics and the bar. I hope you will lead in that endeavor.

Thank you.. ○

## News from the States *continued from page 26*

an agency to make such a showing. An award of attorney’s fees under this new provision may not exceed \$50,000.

The Act also makes changes that are designed to provide for an award of attorney’s fees if the agency initiates rulemaking, but the proposed rule addressing the challenged statement is determined to be invalid.

Third, the Act provides that, if the agency prevails in the proceedings, the administrative law judge or appellate court shall award reasonable costs and attorney’s fees against the party if: (1) the party participated in the proceedings for an improper purpose; or (2) the party or the party’s attorney knew or should have known that a claim was not supported by the material facts necessary to establish

the claim or would not be supported by the application of then-existing law to those material facts. This latter ground was added at the request of the Governor’s office in an effort to “close the gap” between the different attorney’s fees standards that apply depending upon whether the agency or the challenger is the prevailing party.

### Conclusion

Governor Crist signed the Open Government Act into law on June 10, 2008. It remains to be seen whether the Act strikes the right balance between an agency’s need to issue informal guidance documents and the public’s right to have a say in the rules that govern their affairs.. ○

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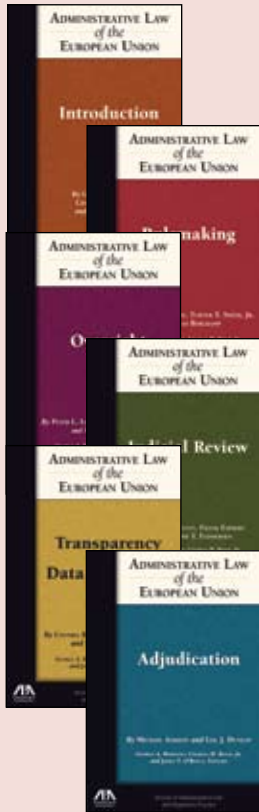
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