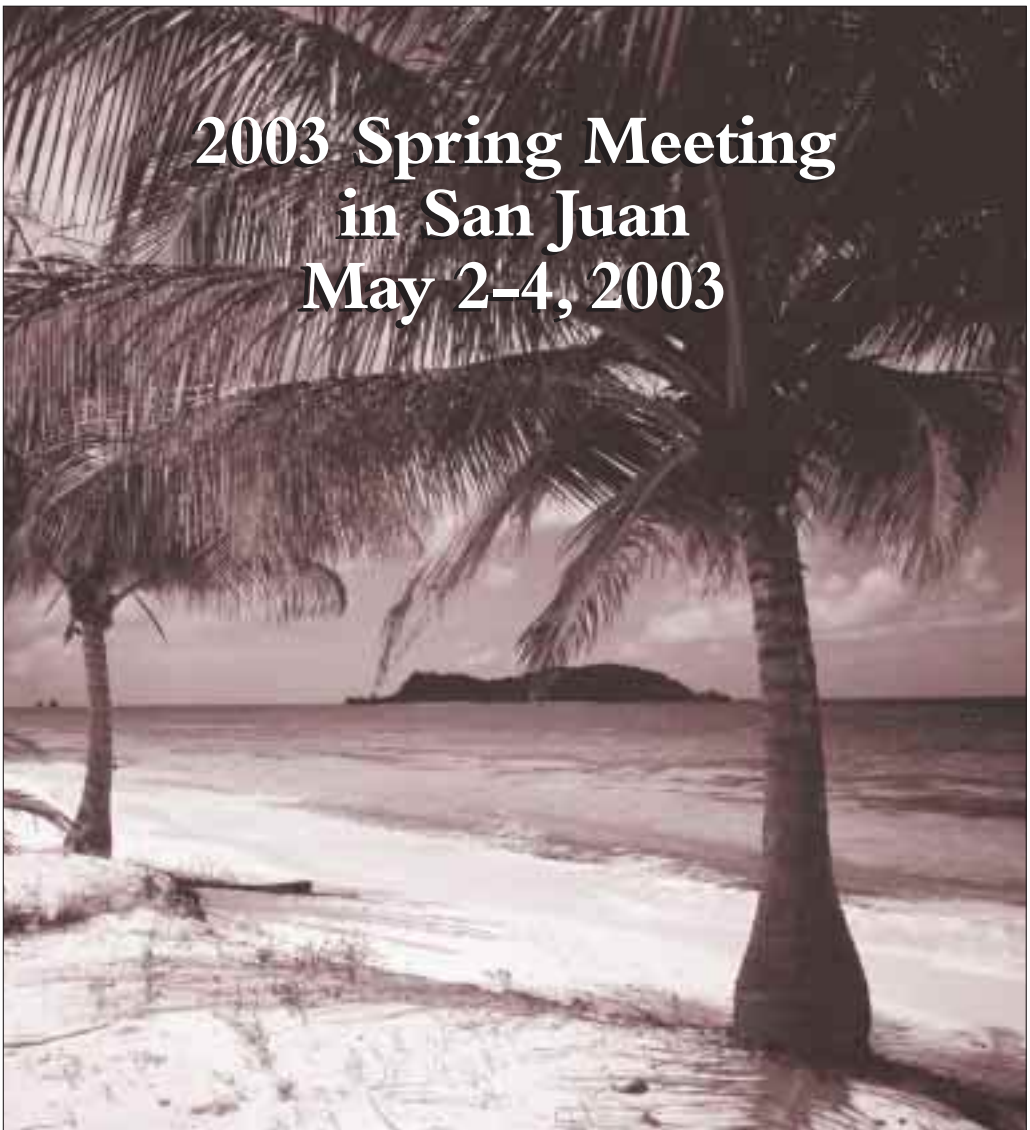
Administrative & Regulatory Law News

Section of Administrative Law & Regulatory Practice

Vol. 28, No. 3 American Bar Association Spring 2003



In This Issue

Chair's Message

Neil Eisner

Our Section's Council Meeting in Seattle this February presented us with an opportunity to debate the merits of issues important to all Americans and especially challenging to lawyers. The issues involved two resolutions presented to the House of Delegates, which were debated in our Section as we decided whether to support them. One resolution urged Congress to conduct regular and timely oversight of the government's use of the Foreign Intelligence Surveillance Act ("FISA") to ensure that FISA investigations do not violate the First, Fourth, and Fifth Amendments to the Constitution. The second one urged that U.S. citizens and residents who are detained within the U.S. based on their designation as "enemy combatants" be afforded the opportunity for meaningful judicial review of their status and that they not be denied access to counsel in connection with the opportunity for such review; in addition, it urged Congress to establish clear standards and procedures governing their designation and treatment. Our Section voted to support both resolutions, and they were subsequently approved by the House. Regardless of the positions taken by the members of our Section in attendance at the meeting, we were all educated by the debate as well as being provided an opportunity to express our views on very important issues.

As further illustration of how Section members can participate in the development of ABA policy, it is also nice to report that a resolution prepared by our Section that the U.S. Court of Appeals for Veterans Claims and Congress take a series of procedural steps to seek faster and more efficient resolution of veteran's disability claims was approved by the House. And at our Council meeting we discussed two proposed resolutions. The first, developed through our Administrative Procedure Act (APA) project, would make a number of improvements to the APA's requirements concerning adjudication. The second concerns the establishment and operation of ombuds offices; specifically, the Section is seeking to address the responsibilities of an ombuds with respect to providing information about a person's rights and whether communication to the ombuds constitutes notice to an entity in which the ombuds operates. We hope to be able to develop final resolutions to present to the House of Delegates in the near future.

Generally, our resolutions are developed through our various committees, and I encourage those of you who wish to get in "on the ground floor" in developing them to get involved in one or more of our committees.

We are planning another great meeting for the Spring, which is described in more detail in this issue and where we hope to debate more proposed resolutions arising out of the APA project. Among other things, we also expect to discuss the significant progress we are making on a proposal to create a new, Administrative Conference of the U.S.-type organization.

I hope to see you in San Juan.

Letter from the Editor

This issue marks another milestone in the evolution of the News – both in form and substance. The new paper stock we are using should give the publication a more magazine-like look, and this issue amply displays the editors' commitment to bringing readers more – and we trust you will find rather provocative – cutting edge articles from recognized regulatory policy experts.

Exhibit one is an article from former Section Chair, Professor James T. O'Reilly that argues for transparency in the pre-NOPR stages of agency rulemaking. As agency rulemaking becomes more ossified and politicized, Prof. O'Reilly's article becomes more and more pertinent.

Professor Lawrence O. Gostin weighs in on the debate over the Model State Emergency Health Powers Act. As one of its authors, Prof. Gostin is uniquely positioned to respond to criticism of the Model Act leveled by both property rights activists and civil liberties defenders and to comment on how the States are caught in the middle.

Professor Brian C. Murchison offers a condensed version of a law review article on the hoped for but yet to materialize cure for administrative deficiencies in processing black-lung claims. Prof. Murchison's article reveals some hard truths about this country's efforts, and at times lack of efforts, at engineering a claims system that is efficient and fair to both mine operators and miners.

Finally, securities practitioners James Gerkis and Rima Moawad take us through the labyrinth that is Sarbanes-Oxley. Their article highlights such perils as the "noisy withdrawal," conflicting certification requirements imposed on senior company management, and the ban on personal loans to officers and directors.

So, while we have not abandoned the traditional Supreme Court News, News from the States, News from the Circuits, etc., this publication is under construction. Watch this space.

Bill Morrow
Editor in Chief

Administrative & Regulatory Law News

Editors
Editor in Chief:
William S. Morrow, Jr.
General Counsel
Washington Metropolitan Area Transit Commission

Advisory Board:
Chair:
John Hardin Young
Counsel
Sandler, Reiff & Young, P.C.

Members:
Cynthia A. Drew
Associate Professor of Law
University of Miami School of Law

Philip J. Harter
Director
Program on Consensus, Democracy and Governance
Vermont Law School

Eleanor D. Kinney
Samuel R. Rosen Professor of Law
Indiana University School of Law

Contributing Editors:
Michael Asimow
Professor of Law Emeritus
UCLA Law School

Yvette M. Barksdale
Associate Professor of Law
The John Marshall Law School

William F. Funk
Professor of Law
Lewis & Clark Law School

William S. Jordan III
C. Blake McDowell Professor of Law
The University of Akron School of Law

(ISSN 0567-9494) Published by the ABA Section of Administrative Law and Regulatory Practice, 740 15th Street, NW, Washington, DC 20005-1002. Staff Director: Leanne Pfautz, (202) 662-1665; FAX: (202) 662-1529; e-mail: pfautzl@staff.abanet.org.

Let's Abandon Regulatory Creationism: The Case for Access to Draft Agency Rules

James T. O'Reilly[1]

Transparency in public policymaking has a well recognized value for our society. The dynamics of federal rulemaking have become much more externally transparent since Congress began requiring notice and comment rulemaking in 1946, despite Congress's limiting the disclosure of agency draft regulations via early Freedom of Information Act (FOIA) legislation in 1963. With the recent and dynamic evolution of rulemaking reviews, evidenced by studies of OIRA and regulatory agendas, the merits of transparency in rulemaking have become more widely recognized.

The time has come to reconsider the basis for our current policy of maintaining permanent secrecy for pre-proposal drafts of federal agency rules. This article advocates a change in both the statutory text and judicial interpretation of FOIA exemption (b)(5). Under this proposal, agency rulemaking drafts that reach the agency's political appointee level would be made public, upon FOIA requests, after the final rule has been promulgated in the Federal Register. It is well known that agency proposed rules evolve from earlier secret drafts and commonly suspected that political forces trump the career expertise of the agency on controversial issues within the rule. Secrecy of the drafts of rules allows several thumbprints of political appointees to be wiped clean before the public first sees the rule. It is as if rules are "created," not "evolved." It's time for us to remove at least part of the secrecy and become Darwinian students of a federal rule's evolution.

Let's disclose a particular subset of an agency's drafts when a final rule is published. That subset would be those drafts which reached officials at the Schedule C level or above, who have political appointment or Senate confirmation status. It is these drafts that have been vetted by the career staff and managers of the agency and that are prepared for the "blessing" of the politically appointed representatives of the Administration position. By the time the working drafts reach this level, the rationale for changing them would be heavily affected by political choices and less capable of being "chilled" by dissemination of the individual employee's working version of a potential future rule. This hierarchical premise is a reflection of the status within agencies of the appointed officials, who can modify or reject the career staff's work so as to better reflect the outcome the Administration would seek.

[1] Visiting Professor of Law, University of Cincinnati College of Law; Former Section Chair and Current Chair of the Government Information and Right to Privacy Committee.

The Context of Secrecy

Ossified, vilified and criticized as they may be, federal agency final regulations remain the "law of the land" within their regulatory ambit. The several generations of *Chevron* progeny have given us a context of wide judicial latitude for agencies to build upon their regulations as a foundation for future guidance, policy documents, etc. Agencies exploit this favorable posture to advantage. They are the ultimate textualists, perhaps buoyed by *Chevron* or the hubris of the bureaucracy, and they tend to treat a final regulation's text as a form of Holy Writ. Sometimes, we seem to forget that rules have histories and that the intentions of the drafters would be illuminated by learning about those histories.

The drafters of agency rules have come to expect that anything they propose to the political level officials within an agency will be shielded from the public by the FOIA exemption at 5 U.S.C. 552(b)(5). That "predecisional privilege," interpreted through perhaps three hundred reported case decisions, shields each draft of a rule from being viewed then or at any later time by persons outside the agency (except those favored recipients of the bureaucratic "leak"). The secrecy remains even after the final rule is in effect.

Benefits of Disclosure

Knowing the actual history of a rule's evolution would help those who explain, those who applaud, and those who merely try to comply with the rule. A student of a federal regulation can read no further back in time than the proposed rule, a text which took months or years to evolve. Subtle changes, deletions and additions occur in a rule's evolution. These changes tell a story about the intent of the agency in crafting a particular rule. Like Sherlock Holmes' dog that did not bark, the fact that the agency considered but did not adopt a provision offers a clue about the nature of the decisions that shaped the rule that ultimately appears in the Federal Register for comments.

This proposal to disseminate past drafts would aid those who would oppose the rule in court, and the agency response is predictable. Such an equalizing disclosure is a change that would draw fiery critiques from the agencies,

but those persons critical of an agency policy are at a double disadvantage; they cannot use FOIA to get drafts, and they are opposed by the favored allies who have supported the evolution of the rule and who have had the leaks and subtle sharings from which Washington advantage seems to flow. This proposal is not in the best interests of the political officials of an agency, but it might be welcomed by career staff whose early drafts were suppressed for reasons of Administration harmony.

Suppressing Evolution

The struggle with the consequences of our current secrecy of agency draft rules is reminiscent of the education battles between Creationism and evolution. Regulatory Creationists would discount the existence of evolution of rules. Secrecy aids their textualist approach by limiting what can be known about the background of the rule. (Of course, the APA itself is of little help for it only requires a "succinct explanation of the reasons" be published with the rule). Because we outside of the agency cannot see those evolutionary changes in drafts at the political level of the agency, we might assume that there are no histories underlying the words which the agency has published. This is a misimpression and a form of legal fiction for which the courts are at least partially to blame.

Each final regulation started somewhere in the bureaucratic bowels of a federal agency, where individual people championed a particular cause (or reluctantly drafted what Congress had forced upon the agency staff). Final rules emerge with an artificially truncated history, even those rules for which an OIRA and agency docket posts comments.

This secrecy of rulemaking drafts, which shields the agency career staff from outside critics, is the direct response to the 1962 demands of the agencies that disclosure under a then-gestating FOIA be limited. Agencies successfully argued that disclosure would discourage candid and frank debates concerning policy outcomes of the particular rulemaking process. Today, the "consumer" of a rule sees the product but can't see into the factory at any point. (FOIA requires the text of the final regulation be published, while the APA calls for publication of the proposed rule.) Of course, official agency documents explaining the decision and made after its adoption will, under the Supreme Court's *Sears* line of cases, be released upon public request, but sometimes only after suits or threats of suits overcome agency resistance.

Today's Climate Increases Need for Access

The power of agencies to conceal their drafts permanently was of very little net consequence in the ancient days when rules were an easy come, easy go form of policy articulation that could be altered easily. No more. Today, rules take on a life of their own; *State Farm* makes it difficult to rapidly amend them, Executive Orders make it complex to amend them; NEPA and the analysis statutes and Orders make it onerous to create new rules. The issuance of significant federal regulations continues to decline, and analysis requirements inhibit agency alterations.

So rules persist and are difficult to revise; the effects of their ambiguities and subtleties are felt by those who live under guidance documents, interpretative bulletins, policy statements and other forms of explication. The deference given to agency interpretations of their own rules is said to be great (except when judges disagree with the outcome and find reasons not to defer). The costs of disagreement with a rule are substantial.

Because the actual history of rule drafts and redrafts is shielded by FOIA exemption (b)(5), the intent and meaning of an agency rule is left to the sole deferentially-accepted power of the agency lawyers. The rules are construed only by textualist tools, because the history of what had been changed within a rule is never revealed by the agency. In short, one never knows what had been considered and rejected before the rule reached the proposal stage. One never knows what the agency management decided about redrafts in response to comments until the actual text of the final rule emerges from the Secretary's or Commissioner's executive office on its way to the Federal Register.

Courts and Oversight

The federal appellate views of FOIA exemption (b)(5) have sliced the topic of disclosing agency draft documents into a vertical form of pre/post decision dichotomy, keeping secret those documents that predate the official decision. This proposal would move the line back to the point at which career staff hand the draft rule to the political appointees. The disclosure would occur at the time of the publication of the final rule; although some might argue for a waiting period like the historical review of presumptively declassified military records.

A federal court immersed in an exemption (b)(5) dispute could impose this change by narrowing the focus of "predecisional" records analysis. The career staff has already made its decision when it sends the draft rule on to the political level; the reasons why a rule would be rebuffed at this level has more to do with Administration policy than it does with the mechanisms or intricacies of the rule's operational aspects. Knowing what that policy change had been could illuminate better the debates over the wisdom of the final rule. At least, it seems to be worth a try in cases where the background of an agency rule took many drafts and much political wrangling before the proposed rule was visible to the public. Want transparent policymaking? Let's ask the D.C. Circuit and Congress to evolve toward a form of wider (b)(5) disclosure that fosters evolution.

When Terrorism Threatens Health: How Far are Limitations on Personal and Economic Liberties Justified?

By Lawrence O. Gostin[1]

Shortly following the terrorist attacks of September 11th and the intentional dispersal of anthrax spores, the Centers for Disease Control and Prevention (CDC) asked the Center for Law and the Public's Health (CLPH) at Georgetown and Johns Hopkins Universities to draft the Model State Emergency Health Powers Act (MSEHPA or Model Act). The Act was written in collaboration with members of national organizations representing governors, legislators, public health commissions, and attorneys general. At the request of the Secretary of Health and Human Services, virtually every state has used MSEHPA as a checklist of powers needed to respond to bioterrorism or other public health emergencies. At least 20 states have adopted the Model Act in whole or in part.

Despite its broad acceptance by policy makers, the Model Act has provoked a storm of controversy, galvanizing the public debate around the appropriate balance between public goods and individual rights. The media has made salient the views of a minority of vocal critics, who claim that MSEHPA is "designed to permit the public health authorities to ignore civil rights under cover of ill-defined threats to public health." Critics suggest that the Act provides a range of "extraordinary measures" that "radically enhance the power of the state." Others characterize it as a "grave threat" and "treacherous government invasion" that affords governors and health officials "unbridled power."[2]

Critics from the two extreme ends of the political spectrum attack the Model Act. The ideological left opposes the Act because it empowers government to restrict personal interests (e.g., autonomy, privacy, and liberty) while the ideological right opposes it because it allows restrictions of proprietary interests (e.g., contract, property, and free enterprise). The Model Act does authorize government to prevent and ameliorate a bioterrorism event. Yet, it is hardly revolutionary: MSEHPA is based largely on the best provisions in existing state laws. Nor does it afford "unbridled" power: MSEHPA safeguards personal and property interests by providing clear standards, procedural safeguards, and by respecting cultural, religious, and ethnic differences.

The Inadequacy of Existing Public Health Legislation

Before offering a defense of the Model Act, it is important to show why current law provides a weak foundation for effective public health action.[3] Critics attack MSEHPA as if it were proposed in a regulatory vacuum. Yet, existing state law is obsolete, fragmented, and inadequate. The Department of Health and Human Services, CDC, and the Institute of Medicine have all recommended reform of public health laws for the reasons provided below.

Most public health statutes had not been systematically updated since the early-to-mid-20th century. State laws predate modern public health science and practice, as well as modern constitutional law and civil liberties. Public health laws are also inconsistent within states and among them. Different rules apply depending on the particular disease in question. And there exists profound variation in the structure, substance, and procedures for detecting, controlling, and preventing disease.

Many current laws fail to provide necessary authority for detecting and responding to bioterrorism or naturally occurring infectious disease. There is no required planning, communication and coordination among the various levels of government (federal and state), responsible agencies, and the private sector. Indeed, due to privacy concerns, many states actually proscribe exchange of vital information across each of these sectors. Thus, in the midst of a potential bioterrorist event, critical information might not be shared among public health authorities, emergency management, and law enforcement.

---

[1] Lawrence O. Gostin, is Professor of Law, Georgetown University; Professor of Public Health, the Johns Hopkins University; and Director, Center for Law and the Public's Health (CDC Collaborating Center Promoting Health Through Law). Prof. Gostin led the drafting of the Model State Emergency Health Powers Act.

[2] *See* Ronald Bayer & James Colgrove, Public Health vs. Civil Liberties, 297 SCIENCE 1811 (2002).

[3] For a systematic account of current public health law see two of the author's books both published by the University of California Press: PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (2000) and PUBLIC HEALTH LAW AND ETHICS: A READER (2002). For a more in depth description and defense of the Model Act, see Lawrence O. Gostin, Public Health Law in an Age of Terrorism: Rethinking Individual Rights and Common Goods, 21 HEALTH AFFAIRS 79-93 (2002).

A CDC study demonstrated that prior to MSEHPA, most states did not even require physicians to report "Category A" (the most dangerous) agents of bioterrorism to state health agencies. Consequently, there would have been no legal requirement for timely notification of pneumonic plague, anthrax, or other health threats. At the same time, states do not require, and may actually prohibit, public health agencies from monitoring data held by hospitals, managed care organizations, and pharmacies. For example, the health department might remain unaware of unusual clusters of patients exhibiting potentially serious symptoms characteristic of bioterrorism or emerging infections.

Even if a health threat could be identified in a timely manner, state laws might not authorize an effective response. Under some laws, for example, it may be unclear whether a state could exercise infectious disease powers (e.g., vaccination, treatment, and quarantine), destroy contaminated property, or gain access to private stockpiles of vaccines, pharmaceuticals, or hospital beds.

The Model Act rectifies these and other deficiencies in existing law, fixing two kinds of error. First, the Act provides the power public health agencies need to plan for, detect, and respond to bioterrorism. Second, the Act modernizes existing law to reflect modern constitutional standards for protection of liberty and property interests. (The text of the MSEHPA may be viewed at *www.publichealthlaw.net).*

A Defense of the Model Act

The controversy surrounding the Model Act can be explained in three ways. First, critics view MSEHPA within the context of President Bush's war on terrorism. Civil libertarians appropriately question the Administration's policies on enhanced intelligence and detention – e.g., military tribunals, immigrant registration and restrictions, and surveillance without judicial oversight. Yet, these largely unchecked powers do not exist in MSEHPA; powers are circumscribed by careful criteria and procedural review.

Second, critics appear unaware that public health statutes already authorize broad deprivations of liberty and property – ranging from compulsory vaccination, treatment, and quarantine to nuisance abatements. Moreover, existing laws afford health officials broad discretion and scant due process. The Model Act, if anything, increases legal precision and safeguards.

Finally, MSEHPA makes explicit the tradeoffs between individual freedoms and common goods that have heretofore been implicit. By opening the door to public scrutiny of hard choices between personal rights and public security, the Model Act becomes a catalyst for the expression of political self-interest. It is unsurprising, therefore, that interest groups of every description lobbied the CLPH to gain preferences under MSEHPA – from civil libertarians and privacy advocates to the health care (e.g., pharmaceuticals, managed care organizations, and hospitals), food, and transportation industries.

Critics express more specific objections to the Model Act based on federalism, declaration of a public health emergency, economic and personal libertarianism, and governmental abuse of power:

Federalism. Critics argue that acts of terrorism are inherently federal matters, so there is no need for expansion of state public health powers. It is certainly true that federal authority is important in responding to catastrophic public health events. Yet, states and localities are the primary bulwark of public health in America. Historically, they have been the predominant public health agencies in communicable disease control; constitutionally, states exercise police powers to protect health and safety; and pragmatically, most public health activities take place at the state and local level. States and localities probably would be the first to detect and respond to a health emergency and would have a key role throughout.

Declaration of a public health emergency. Civil liberties groups argue that a Governor might declare a public health emergency for a low-level risk. However, MSEHPA sets a high threshold for an emergency declaration (a strong probability of a large number of deaths or serious disabilities). Community based organizations similarly claim that MSEHPA could be used against persons with HIV/AIDS or influenza. Yet, the Act specifically does not apply to endemic diseases.

Personal libertarianism. Critics imply that the Model Act should not confer compulsory power at all. In particular, they object to compulsory powers over persons (e.g., vaccination, testing, treatment, and quarantine). Commentators reason that services are more important than power; that individuals will comply voluntarily with public health advice; and that tradeoffs between civil rights and public health are not required and even are counterproductive. Despite the importance of voluntarism, the state undoubtedly needs a certain amount of authority to protect the public's health. Government must have the authority to prevent individuals and businesses from endangering others. It is only common sense, for example, that a person who has been exposed to an infectious disease should be required to undergo testing or medical examination and, if infectious, to be vaccinated, treated, or isolated. Individuals whose movements pose a significant risk of harm to their communities do not have a "right" to be free of interference necessary to control the threat. There simply is no basis for this argument in constitutional law, and perhaps little more in political philosophy. Even the most liberal scholars accept the harm principle – that government should retain power to prevent individuals from endangering others.

continued on page 24

The Black Lung Disability Program: In Search of Due Process

By Brian C. Murchison[1]

The quest for a just solution to the problem of occupational lung disease in America's coalfields is an unfinished story of development and disease, reform and bureaucracy. The most recent chapter began in the final weeks of the Clinton Administration, when a three-year rulemaking of the U.S. Department of Labor culminated in extensive new rules amending the federal black lung disability benefits program. Under that program, miners suffering respiratory disability may apply for benefits from their employers in proceedings before administrative law judges, with review in the Benefits Review Board and the courts of appeals. Noting that the parties to a black lung claim are often ill-matched in terms of financial resources and legal representation, the Department sought to level the playing field by limiting the quantity of medical evidence each party would be permitted to enter into the record of a claim. The rules also amended the regulatory definition of black lung disease (or "pneumoconiosis") and clarified principles for evaluating medical evidence, particularly the opinions of treating physicians.

An association of coal operators and insurers challenged the rules on numerous statutory and constitutional grounds, and the newly-installed Bush Administration undertook a point-by-point defense. In *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit upheld the rules in substantial part. While it found several of the rules impermissibly retroactive, the court rejected all but one of the industry's substantive challenges. This article reviews several of the concerns that drove the Labor Department's massive rulemaking effort and the regulatory solutions that are now in place.

Origins of the Black Lung Program

The new rules left intact the four elements that a coal miner seeking benefits from an operator must establish: (a) that he has pneumoconiosis; (b) that the disease arose out of his coal mine employment; (c) that he is totally disabled in a respiratory or pulmonary sense from working in his last regular coal mine position; and (d) that his pneumoconiosis is at least a contributing cause of his disability. In a typical case, the parties fiercely dispute issues of disease, disability, and causation, each side relying heavily on x-ray readings, other medical data, and written reports by consulting physicians. With an approval rate of under ten percent, it is a system that miners wholeheartedly despise as unjust. They point first to lopsided evidentiary records dominated by submissions of the wealthier party; they cite the unwillingness of lawyers to represent them, given the fact that legal fees are available only after an award of benefits becomes final and the agency approves the fee; and they decry the labyrinthine claims process which too often miners must navigate alone. Despite success in defending most claims, coal operators dislike the system with similar vehemence, largely because losing miners have the right to pursue multiple successive claims, arguing that their lungs have worsened since the denial of a prior application. To many observers, the process mirrors the rancor that divided operators and miners on issues of health and safety over much of the last century.

Congress established the black lung benefits system through the Federal Mine Safety and Health 1969, after a long history of neglect and controversy. Despite the fact that physicians working among English and American miners in the nineteenth century had recognized and called attention to a distinct type of respiratory disease associated with heavy mine dust exposure, their warnings had failed to alter mine operations or public policy. Professor Alan Derickson's political and social history of the disease, *Black Lung: Anatomy of a Public Health Disaster* (1998), impressively chronicles the inconclusive efforts of state and federal bodies in the 1880s and 1890s to grasp either the prevalence or the nature of dust-induced lung disease among U.S. coal miners. The first half of the twentieth century witnessed little or no real progress on either front. Derickson recounts that some company physicians maintained that inhaling coal mine dusts was harmless because the body was naturally equipped to purify itself. Another stance taken by some in the industry was that inhaling carbonaceous dusts was in fact beneficial to miners' health because it caused fibrotic formations that supposedly prevented tubercular bacilli from invading the lungs. Yet another theory was that the only respiratory danger posed by coal mining was inhalation of silica contained in the dusts of certain mines. Equating all coal-dust disease with silicosis became the conventional wisdom; the

[1] Charles S. Rowe Professor of Law, Washington and Lee University School of Law. This is a condensed version of a more comprehensive piece titled, *Due Process, Black Lung, and the Shaping of Administrative Justice*, 54 ADMINISTRATIVE LAW REVIEW, No. 3 1025 (Summer 2002).

only conceded effect of inhaling coal particles without significant silica was anthracosis, which coal interests insisted was not a disease but a discoloration. Because silicosis was visible on x-rays, radiology became the crucial mode of diagnosing miners' lung disease.

The U.S. government in the Progressive period did little to advance knowledge of miners' lung disease other than silicosis, nor did federal agencies break new ground in the New Deal. British authorities, however, moved forward. A comprehensive study of British miners' lung disease led to a report in the 1940s which identified coal workers' pneumoconiosis as a dust-induced disease distinct from silicosis. Soon British social security law included coal workers' pneumoconiosis as a compensable occupational disease. By the mid-1960s, the U.S. Public Health Service finally conducted a large study of respiratory disease suffered by workers in soft coal. The study produced data that for some established a distinction between silicosis and pneumoconiosis.

In 1968, seventy-eight miners died in a blast in a mine of the Consolidation Coal Company in Farmington, West Virginia. Media coverage initially focused on the risk of traumatic death by explosion in underground mines. However, national attention soon broadened to other problems of Appalachian mining, including health risks caused by the workers' regular intake of coal mine dusts. This publicity coincided with increasing demands by West Virginia miners for public benefits. Although their state workers' compensation statute covered silicosis, it omitted any other dust-induced respiratory disease. Frustrated by a noncommittal union, miners formed black lung associations and took their demands to the state capital as well as to Washington. Wildcat strikes swept the state, intensifying a movement that involved 40,000 workers.

Title IV of the Federal Mine Safety and Health Act of 1969 emerged from this bitter history. Establishing a federal benefits program for miners found to be totally disabled by coal dust-induced lung disease, the Act was an undeniable legislative victory for the black lung movement, although some commentators characterized the Act as a dubious re-channeling of intense class antagonism into a complex administrative process of uncertain value.

The immense task of designing a fair adjudicatory system for black lung claims has haunted Congress, the courts, and administrative bodies since passage of the 1969 Act. Distressed by an unexpectedly low approval rate of claims, first by the Social Security Administration and then by the Department of Labor when it took over the program, Congress liberalized eligibility requirements in the 1970s. However, further congressional amendments and rule changes in the 1980s led to a tightening of requirements and a steep drop in awards; by the mid-1990s the approval rate in the Department's district offices was a stunningly low five per cent. For miners who took their claims beyond the district level to hearings before administrative law judges, the approval rate reached only 7.6 percent. By the end of the 1990s, then, it appeared that the federal black lung program had come full circle, returning to its earliest days of providing benefits to a fortunate few.

The Rulemaking: Problems and Solutions

Imbalance of Resources. A key feature of the black lung claims process in the 1980s and 1990s was the disparity in amounts of medical evidence that each side typically submitted to the record of a claim. For example, in *Bethenergy Mines, Inc. v. Henderson*, 2001 WL 133187 (4th Cir. 2001), an operator, having previously conceded that a claimant had black lung disease, was permitted to re-litigate the issue by proffering 41 negative readings of x-ray films, compared with the miner's two positive readings. In another case, *Woodward v. Director*, OWCP, 991 F.2d 314 (6th Cir. 1993), the record consisted of eight x-ray films with a total of thirty-eight readings; of the thirty-eight, the operator submitted twenty-four, and the miner submitted seven. The court in *Woodward* recognized that fairness was at risk when one party had the ability "to hire significantly more experts because it has infinitely more resources." In those circumstances, according to the court, "the truthseeking function of the administrative proceeding is skewed and directly undermined [and] justice will not be served." Holding that the ALJ erred by considering repetitious x-ray evidence, *Woodward* relied on Section 556(d) of the Administrative Procedure Act, which provides: "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence."

However, the Sixth Circuit's decision in *Woodward* has no counterpart in other federal circuits. Although the Fourth Circuit recognized the problem of evidentiary imbalance in *Underwood v. Elkay Mining, Inc.,* 105 F.3d 946 (4th Cir. 1997), the court was more optimistic about "the truthseeking function" and gave ALJs virtually untrammeled discretion to admit cumulative evidence. Moreover, although the Fourth Circuit in an earlier case had condemned as "hollow" the judicial practice of resolving evidentiary disputes in black lung cases by "counting heads (i.e., any two [medical] opinions are better than one)," *Adkins v. Director,* OWCP, 958 F.2d 49 (4th Cir. 1992), subsequent panels of the same circuit showed a capacity to be impressed by one party's quantity of evidence, *e.g., Consolidation Coal Co. v. Latusek,* 1999 WL 592051 (4th Cir. 1999) (unpub.), without questioning the role of money in making the quantity possible.

However, the Department of Labor did note the problem in its recent rulemaking. The agency observed that black lung claimants "must confront the vastly superior economic resources of their adversaries," and that operators and their insurers often "generate medical evidence

in such volume that it overwhelms the evidence supporting entitlement that claimants can procure." The Department concluded that "the fair adjudication of claims" necessitated a rule that would bring "some measure of balance" to the claims process. The following evidentiary limitations were adopted: (a) each party in its affirmative case is limited to two chest x-ray interpretations, the results of two pulmonary function tests, two arterial blood gas studies, and two medical reports; (b) each party may submit rebuttal evidence, but it must be limited to one interpretation of each x-ray, pulmonary function test, or arterial blood gas study submitted in the opponent's affirmative case; and (c) each party may respond to rebuttal evidence, limited to one response per piece of rebuttal evidence, and the responsive evidence must come from the physician whose report or interpretation was the subject of the rebuttal. The final rule also provided that ALJs may permit parties to exceed the limitations on a showing of good cause.

Anticipating a due process challenge from the operators, the Department justified the evidentiary limitations under the analytic framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976), in which Justice Lewis Powell devised a three-factor methodology for questions of procedural due process. On the first element – the private interests at stake – the Department noted the differing financial interests of claimants and operators but indicated a common interest in accurate resolution of claims. On the second element – the existing procedure's propensity for error, compared with the proposed changes – the Department predicted that parity of evidentiary submissions would prevent decision makers from deciding claims based on quantity rather than quality of the medical evidence. In this sense, a more level playing field was thought to enhance the probability that an adjudicator would succeed in accurately determining the merits of a claim. On the third prong – the government's interest – the Department underscored its interest in both actual and perceived procedural fairness. The evidentiary limitations, coupled with the "good cause" exception, would "improv[e] the public's perception of the fairness of the process" and not impede a "full and fair" adjudication of each claim.

Challenging the rules in court, the operators did not answer the Department's application of *Eldridge*. Instead they argued that the evidentiary limitations "give the impression of having been created by an old fashioned totalitarian state to give the illusion that citizens have a right to be heard, but assure that the presiding bureaucrats will not need to hear too much. There is no free world precedent for such a nonsensical scheme." The argument failed in the D.C. Circuit, which upheld the limitations, concluding that they "will enable ALJs to focus their attention 'on the quality of the medical evidence before [them].'" The court noted that at oral argument the operators had conceded "that ALJs have always had discretion to exclude evidence in precisely the manner outlined by the new evidence-limiting rules."

The Department's careful justification of the evidentiary limits suggests a reason for the continuing vitality of Justice Powell's due process framework, despite a wealth of commentary over the years that *Eldridge* reduces too easily to a utilitarian charade. In this case, the Department's analysis evinced a value-based application of Powell's three elements. The first element led to a consideration of a procedural end – the accurate disposition of a complex disability claim – that both private parties would find acceptable. Second-prong analysis focused on means, specifically the adequacy of alternative processes to achieve the value of accuracy. Here, the agency stressed the value of equivalence in the parties' opportunities to present a case and facilitate the ALJ's ability to reach an accurate outcome. As scholars of due process (including Professors Jane Rutherford, Charles Koch, Jerry Mashaw, and others) have eloquently shown, equality is a process value with a rich pedigree, including roots in the Magna Carta, and should assume a more prominent role in judicial and administrative assessments of agency procedure. Finally, analysis under the third *Eldridge* factor generated the agency's identification of its own interest in improving the credibility of the black lung system. Choosing the goal of improved procedural fairness for all involved, the agency engaged in a reflective consideration of the specific problems of truth and perception, thus putting into practice another goal suggested by the Powell opinion: the duty of agencies to engage in continuous self-scrutiny in order to earn the "substantial weight" that courts accord to their "good-faith" procedural judgments.

Other Issues Addressed by the New Rules.

Defining the disease. Another fundamental conflict between miners and operators in the decade before issuance of the new regulations was whether the illness targeted by Congress – pneumoconiosis – was limited to a scarring of lung tissue causing a restrictive defect in pulmonary process and detectable as opacities in x-ray films in many (but certainly not all) instances of the disease, or whether pneumoconiosis also included chronic bronchitis and emphysema, conditions associated with an obstructive defect of the lung and rarely detected on x-rays. The courts of appeals had recognized that obstructive lung disease could be caused by inhalation of coal mine dusts, but industry advocates persisted in arguing that coal-induced obstructive defects, if they occurred at all, could not be clinically significant. Significant obstructive impairment, on this view, could only be attributable to cigarette smoking or other sources unrelated to coal mining. In its recent rulemaking, the Department reject-

continued on page 25

Sarbanes-Oxley Act: Seven Months Later

By James Gerkis and Rima Moawad[1]

On July 30, 2002, President George Bush signed into law the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, one of the most far-reaching and important corporate accounting and governance reforms since the 1930s. The Act looks to revive investor confidence in the U.S. capital markets in the post-Enron environment by enhancing public disclosure obligations of issuers, strengthening both the quality and transparency of financial reporting by issuers and stiffening civil and criminal penalties for securities law violations. The Act generally applies to both domestic and foreign companies that are "issuers". The Act defines an "issuer" as a company that has securities registered under Section 12 of the 1934 Act, that is required to file reports under Section 15(d) of the Securities Exchange Act of 1934, or that has filed a registration statement under the Securities Act of 1933 that is not yet effective but has not been withdrawn.

Many provisions of the Act are self-operative and became effective on July 30, 2002. The remaining provisions require additional rulemaking by the SEC (often under very tight deadlines) to go into effect, some of which already has occurred. While the aims of the Act generally are laudable, it is inevitable that this sweeping piece of legislation, put together in a matter of months with very little legislative history and guidance, generates countless contradictions and confusions that very well may undermine its purposes and efficacy. It perhaps also was inevitable that the expedited rulemaking process of the SEC in the wake of the climate of confusion surrounding the adoption of the Act has resulted in the SEC perpetuating the flaws that exist in the Act, as opposed to correcting or ameliorating them, and possibly may have contributed to the SEC creating new flaws.

This article is not intended to be an in-depth analysis of the Sarbanes-Oxley Act, but rather will focus on certain significant issues (both philosophical and practical) raised by some of the most controversial provisions of the Act and the rules and regulations of the SEC issued (or proposed to be issued) thereunder, specifically, the attorney conduct rules under Section 307 of the Act, the CEO/CFO certifications under Section 906 of the Act and the ban on personal loans to officers and directors under Section 402 of the Act.

The Attorney Conduct Rules

Section 307 of the Sarbanes-Oxley Act requires the SEC to prescribe minimum standards of professional conduct for attorneys appearing and practicing before the SEC in the representation of issuers, as that term is defined in the Act. We believe that Section 307 marks the beginning of an unsettled new era in the administration of justice where a federal administrative agency (rather than state bars) is granted the power to regulate the legal profession and the ethical assumptions under which it operates. Indeed, the proposed rules of the SEC to implement Section 307 released at the end of November 2002 were the subject of an extensive public debate with the SEC receiving 167 timely comment letters, including 44 letters from foreign parties.

The final rules implementing Section 307 (Part 205 of Title 17 of the Code of Federal Regulations), which were adopted on January 29, 2003 (Release Nos. 33-8185; 34-47276), 68 Fed. Reg. 6,295 (Feb. 6, 2003), and will go into effect on August 5, 2003, include the requirement that attorneys "appearing and practicing before" the SEC in the "representation of issuers" report evidence of material violations of law to the chief legal counsel of the issuer or to the chief legal counsel and the chief executive officer and then, if necessary (i.e., if the attorney does not receive a response within a reasonable time that would lead an attorney to believe that there has been no material violation, a past violation has been remedied or a violation about to occur has been stopped), up the ladder to the audit committee or other committee consisting of independent directors or to the entire board of directors of the issuer.

Alternatively, if the issuer has established a qualified legal compliance committee (which must consist of at least one member of the audit committee and two or more independent directors and which also could be the audit committee or other qualifying independent committee), then the attorney that becomes aware of evidence of a material violation may discharge his or her reporting obligations by reporting the violation directly to the qualified legal compliance committee. Under these final rules, in certain circumstances, an attorney is permitted, but is not required to, reveal client confidences to the SEC (including to prevent a fraud on the SEC or significant economic harm to the issuer or to investors or if the attorney's services have been used in connection with an illegal act). The attorney conduct rules apply to foreign attorneys and their client companies, with some limited exceptions, but foreign attorneys would not have to comply with these rules if compliance would be prohibited by applicable foreign law.

[1] James Gerkis is a Partner and Rima Moawad is an Associate at Proskauer Rose LLP in New York City.

In addition, in a companion release issued on January 29, 2003 (Release Nos. 33-8186; 34-47282), 68 Fed. Reg. 6,324 (Feb. 6, 2003)(proposing amendments to Parts 205, 240 and 249 of Title 17 of the Code of Federal Regulations), the SEC has kept open for comments until April 7, 2003, the highly controversial proposed "noisy withdrawal" rule which would require an attorney that has reported evidence of a material violation all the way up the ladder within the issuer and still has not received an appropriate response in certain circumstances to withdraw from the representation, to notify the SEC one day later that the withdrawal is due to professional considerations and to disaffirm any documents filed with the SEC that are tainted by the violation. In the same companion release, the SEC also has proposed for comments until April 7, 2003 an alternative to the original proposed "noisy withdrawal" rule.

"Both the original proposed 'noisy withdrawal' rule and the proposed alternative rule do not apply to an attorney that has satisfied his or her reporting obligations by reporting the material violation directly to a qualified legal compliance committee."

The alternative proposed rule would require an attorney that has reported evidence of a material violation all the way up the ladder within the issuer and who still has not received an appropriate response in certain circumstances (that are triggered by slightly higher standards than those triggering the original proposed "noisy withdrawal" rule) to withdraw from the representation, in which case the issuer must disclose within two business days that the withdrawal is due to professional considerations on Form 8-K, 20-F or 40-F, as applicable. Both the original proposed "noisy withdrawal" rule and the proposed alternative rule do not apply to an attorney that has satisfied his or her reporting obligations by reporting the material violation directly to a qualified legal compliance committee. Once the attorney has reported the violation to the qualified legal compliance committee, he or she is no longer under any obligation to assess the response to his or her reporting or to go up the ladder within the issuer; in such a situation, the qualified legal compliance committee becomes responsible for the process on behalf of the issuer.

Should the SEC decide to adopt some form of "noisy withdrawal" rule, the legal profession would be faced with an insolvable conundrum, that is to have to be both the zealous advocate of its clients and the enforcement agent on behalf of an agency that it often has to defend its clients against. Much has been said about the potential chilling effect of the "noisy withdrawal" rule on the attorney-client relationship resulting in the reduction of client-attorney communication, all of which would contribute to defeat the purpose that Section 307 purports to achieve. The substantive effect of Section 307, however, may be more fundamental than the impact that the adoption of such rule could have on the attorney-client relationship. As one commentator, Richard Hall, puts it in an article published in the December 2002 edition of the International Financial Law Review: "The enduring legacy of Section 307 may not be the rules that the SEC adopts but a system of regulation of the legal profession that reflects a fundamentally different approach to the one that underlies current ethical rules. The three most important philosophical shifts reflected in Section 307 are the regulation of lawyers by an agency that is not neutral, the regulation of lawyers by an agency whose primary focus is not the administration of justice and the regulation of lawyers on an extra-territorial basis." While obviously hyperbolic, it might be useful to keep in mind during this era of corporate governance reform that it was as a result of a deep "philosophical shift" that the legal profession in France was banned for a period of time following the French Revolution of 1789.

The CEO/CFO Certification Under Section 906 of the Act

Since the enactment of the Sarbanes-Oxley Act, law firms have been busy advising their corporate clients on the interpretation of many ambiguous and confusing provisions of the Act. One such provision is Section 906 of the Act (18 U.S.C. § 1350). Section 906 amended the U.S. Criminal Code to require that each periodic report containing financial statements filed by an issuer with the SEC pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934 on or after July 30, 2002, be accompanied by specified certifications by the chief executive officer and the chief financial officer of the issuer. These certifications are to the effect that the periodic report in question fully complies with the reporting requirements of the Securities Exchange Act of 1934 and that the information contained in the report fairly presents, in all material respects, the financial condition and results of operations of the issuer.

Anyone who certifies the statement required by Section 906 "knowing" that the periodic report "does not comport with all of the requirements" of Section 906 is subject to a fine of not more than $1 million and/or imprisonment for not more than ten years. Anyone who "willfully" certifies the statement required by Section 906

"knowing" that the periodic report "does not comport with all of the requirements" of Section 906 is subject to a fine of not more than $5 million and/or imprisonment for not more than 20 years. Lawyers are having a hard time advising their clients on the difference between a certification that is made "knowing" that the periodic report is not compliant (up to a $1 million fine and/or up to ten years imprisonment) and a certification which is made "willfully" "knowing" that the periodic report is not compliant (up to a $5 million fine and/or up to 20 years imprisonment). Also the penalties for not making any Section 906 certifications (as opposed to making false certifications) are unclear.

In addition to (and independently of) the CEO/CFO certifications required under Section 906 of the Act, on August 29, 2002, the SEC adopted rules pursuant to Section 302(a) of the Sarbanes-Oxley Act (Release Nos. 33-8124; 34-46427), 67 Fed. Reg. 57,275 (Sept. 9, 2002) (amending Parts 228, 229, 232, 240, 249, 270 and 274 of Title 17 of the Code of Federal Regulations), that require both the principal executive officer and the principal financial officer of an issuer to make certifications with respect to the financial and other information contained in the issuer's quarterly and annual reports filed under Securities Exchange Act of 1934 after August 29, 2002. These new rules also require issuers to certify as to the adequacy of an issuer's controls and procedures that are required to be put in place to ensure that the information required in reports filed under the Securities Exchange Act of 1934 (for periods ending after August 29, 2002) is recorded, processed, summarized and reported within the time periods specified in the SEC's rules and forms. In connection with the issuance of the new rules under Section 302(a) of the Act, when asked about the interrelation between the 302(a) certifications and the 906 certifications, the SEC has indicated that it had not adopted a position as to whether these two stand-alone certifications could be harmonized.

As a result, the Sarbanes-Oxley Act contains two separate certification requirements by chief executive officers and chief financial officers of issuers, which, in the words of Representative Oxley, the co-sponsor of the Sarbanes-Oxley Act (as quoted in the Vinson & Elkins Corporate Governance & Compliance Bulletin No.17 (November 8, 2002)), "[a]s a result of the speed with which the Act was passed and its complexity,…are perhaps the biggest flaw in the legislation…[S]ince Congress did not intend for there to be two competing certification requirements, these provisions need[] to be revisited and could perhaps be corrected through a technical amendment."

The SEC also has taken the position that because Section 906 is a criminal statute and is not part of the securities laws, the SEC will not be adopting rules in connection with the Section 906 certifications. Due to the ambiguities contained in Section 906 of the Act and the lack of regulatory guidance, the certification requirements of Section 906 of the Act (putting aside the requirements of the Section 302(a) certifications) raise a host of other issues that are left for law firms to give interpretative advice thereon. In general, law firms with significant securities practices seem to be on the same page regarding the handling of many of these issues, although divergent advice has been rendered on issues such as whether inserting a knowledge qualifier in the Section 906 certifications would be permissible or how to file the Section 906 certifications. Law firms are faced with the task of having to advise issuers with little or no guidance as to the content of the certifications, including what it means to certify that a periodic report "fully complies" with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934, (*e.g.*, are those the requirements relating to the particular form being filed? Is there a built-in materiality concept?), what reporting standard is involved in certifying that a company's financial condition and results of operations are "fairly presented" and what type of due diligence process should issuers follow in support of the Section 906 certifications. Other issues relate to whether reports on Form 8-K by U.S. companies or reports on Form 6-K by non-U.S. companies are covered by the Section 906 certification requirements or whether the Section 906 certifications apply to voluntary filers (i.e., companies that file periodic reports with the SEC to fulfill contractual obligations under their debt instruments and not because they are required to do so by the Securities Exchange Act of 1934).

To date, some executives have made the certifications without qualifications as to knowledge while others have included some form of knowledge qualifier. Another ambiguity relates to the requirement of Section 906 that an issuer's periodic report "be accompanied by" the Section 906 certifications. Does this mean that the Section 906 certifications immediately must follow the signature page of the subject report, be filed as an exhibit to the subject report, be sent as a cover letter accompanying the report (and if so should it also be filed promptly as an exhibit to Form 8-K)? Also, are the Section 906 certifications deemed to be "filed" for purposes of anti-fraud liability under Section 18(a) of the Securities Exchange Act of 1934?

Then there is the question of enforcement of the criminal penalties against executives of non-US companies. Several commentators have pointed out that it would be unlikely that the U.S. government would call for the indictment and extradition of a foreign officer. According to those commentators, a more likely response is that the non-U.S. company would be prevented from accessing the U.S. capital markets in some way, although any inability to enforce the Act might seriously undermine its efficacy and credibility.

As indicated above many are the ambiguities of Section 906. How effective can a certification be when sophisticated financial and legal minds are confused as to its meaning?

Ban on Personal Loans to Officers and Directors

Section 402 of the Sarbanes-Oxley Act (entitled "Enhanced Conflict of Interest Provisions") became effective on July 30, 2002 and amends Section 13 of the Securities Exchange Act of 1934 by adding a new Section 13(k) to make it unlawful for any issuer to make or arrange many personal loans to its officers and directors. The prohibition contained in Section 402 applies to both U.S. and non-U.S. public companies (whether the lender is a U.S. company or a non-U.S. company, whether the insider is located in the United States or outside the United States and whether the loan is made inside or outside the United States). Loans outstanding on July 30, 2002 are not subject to the prohibition, so long as the loans are not renewed or materially modified. Limited exemptions are available for certain types of loans, including consumer credit, credit by an SEC-registered broker or dealer to an employee of that broker or dealer that are permitted under the margin regulations of the Federal Reserve System (other than an extension of credit that would be used to purchase the stock of that issuer), and loans made by banks that are insured by the Federal Deposit Insurance Corporation. Ironically, because the exemption for loans made by banks that are insured by the Federal Deposit Insurance Corporation by definition is not available to many non-U.S. banks that are not required to be so insured, Section 402 is broader in scope in its extraterritorial application than its domestic application. It is expected, however, that the SEC will create a similar exemption for foreign banks.

The "substantial ambiguities" contained in Section 402 and the "lack of official guidance" relating thereto caused 24 prominent law firms in the United States to take a most unusual step in issuing a memorandum containing consensus view on a "variety of interpretive issues" raised by Section 402 on October 15, 2002. These law firms clearly have faith in the motto "E Pluribus Unum" when it comes to Section 402 because of the lack of legislative and regulatory guidance. Issues addressed in this memorandum include an analysis of the meanings of "personal loan" and "arranging" as used in Section 402. Basing their interpretation in part on the apparent policy underlying Section 402, i.e., to prevent executive officer and director conflicts of interest, these law firms have concluded that in certain circumstances the following situations involving "personal loan" issues are permissible under Section 402 (subject to certain caveats): travel and similar advances while performing executive responsibilities; personal use of company credit cards or company cars, where reimbursement is required; relocation payments subject to reimbursement; "stay" and "retention" bonuses subject to repayment; indemnification advances; deferred compensation; leveraged co-investments; and tax indemnity payments to overseas-based executive officers. These law firms also addressed situations involving "arranging" issues, such as parent/stockholder loans to an executive officer of an "issuer" subsidiary (who is not also an executive officer or director of the "non-issuer" parent); loans from 401(k) plans; and loans from annuities and other broad-based employee benefit programs. Situations involving both "personal loan" and "arranging" issues, specifically the "cashless option exercise" by an officer or director were analyzed and these law firms concluded that most scenarios relating to the "cashless" exercise of a stock options by a director or an executive officer is permissible or should be permissible. Additional issues were addressed, including what would constitute a "material modification to" or a "renewal of" a grandfathered loan.

While not dispositive, we believe that the SEC has to consider seriously the interpretative view of these 24 law firms. By creating the blueprint, the authors have become the "de facto" regulator when it comes to Section 402. Is "de facto" regulation what the Honorable Sarbanes and the Honorable Oxley had in mind when Section 402 was written? There also remains the issue of the consequences to companies that heed the advice set forth in the blueprint if the SEC ultimately disagrees with one or more of the positions espoused by these law firms.

Conclusion

Hastily enacted, the Sarbanes-Oxley was the result of a swift political reaction to the Enron and other recent corporate scandals. Many of the Act's ambiguities and contradictions would have been avoided and the purposes and effectiveness of the Act would have been better served had the time been taken to think through many of the complex issues covered by this important piece of reformist legislation. Similarly, the SEC should not have been placed in the unenviable position of having to adopt significant substantive regulation on a fast-track basis. The Congress in considering future amendments of the Act and the SEC in the exercise of its rulemaking authority, should bear in mind that overregulation, cost of compliance and lack of flexibility may lead to unintended results. Laws and regulations by themselves may not prevent bad governance. Good corporate governance rules are not a panacea. Unfortunately, fraud and the like can exist even in the most regulated system. Unless individual directors and officers of public companies are motivated by non-legal considerations to perform their duties and responsibilities in a highly ethical way, the Sarbanes-Oxley Act will not be more effective in the long-run than the pre-Sarbanes-Oxley legislation.

Section of Administrative Law and Regulatory Practice

2003 Spring Meeting

(For more detailed information and to register, please visit the Section website at www.abanet.org/adminlaw)

The Ritz Carlton • 6961 Avenue of the Governors • Isla Verde • Carolina, Puerto Rico
Telephone: 1-800-241- 3333 or (787) 253-1700

Friday, May 2

Impact of Non-U.S. Standards Processes on Market Entry of U.S. Technologies

1:00 p.m.–3:00 p.m. • Ritz Carlton • Salon 4, 3rd Floor

The addition to the mix of global market elements of "quasi-standards," ad hoc affiliations of vendors, and joint activities of national or regional industry groups with their host governments is producing challenges to the interests of foreign market entrants in many fields. This panel will examine several anecdotal instances of these pseudo-standards and related practices and their impact on U.S. exporters, particularly in the area of the availability of remedies for parties claiming unfair treatment under these regimes.

Moderator: Michael Aisenberg, V.P., Policy-Government Relations, VeriSign, Washington, D.C.

Panelists:

- Kathleen Kunzer, International Counsel, American Chemistry Council
- Mark Hansen, Partner, Latham &Watkins, Brussels
- Representatives of U.S.Commerce Department and EU Commission (invited)

Just in Time for the 2004 Elections: The new Federal Election Reform Law and its effect on State and Local Administration of Elections

3:30 p.m.–5:00 p.m. • Ritz Carlton • Salon 5, 3rd Floor

A panel discussion on Congress's recent actions to improve the administration of federal elections, and its likely impact on voters and state and local election processes. This will include a review of what Congress did, how it differs from the ABA recommendations, and implementation issues.

Moderator: Trevor Potter, Caplin & Drysdale, Washington, D.C.

Panelists:

- David Cardwell, The Caldwell Law firm, "The Florida Experience"
- Representatives of Election Law (invited)

Section Reception

5:30 p.m.–7:30 p.m. • El Convento, Old San Juan

Saturday, May 3

Membership Meeting

8:00 a.m.–9:00 a.m. • Ritz Carlton

Council Meeting

9:00 a.m.–12:00 p.m. • Ritz Carlton • Salon 4, 3rd Floor

Publications Committee Meeting

12:00 p.m.–1:30 p.m. • Ritz Carlton • Boardroom

Section Dinner

7:00 p.m. • Ocean Bar & Grill • Ritz Carlton

Sunday, May 4

Council Meeting

9:00 a.m.–11:30 a.m. • Ritz Carlton • Salon 4, 3rd Floor

Supreme Court News

By William Funk[1]

As this issue of the News goes to print, the Supreme Court has still not issued any administrative or regulatory law case of note. A potentially important environmental law case, ***Borden Ranch Partnership v. U.S. Corps of Engineers***, 123 S.Ct. 599 (2003), in which the Court granted certiorari to determine whether the deep ripping of wetlands was regulated by the Clean Water Act, although every circuit that had considered it had found the activity subject to the Act, was affirmed by an equally divided court, leaving the issue in even more doubt than before the Court granted cert.

Merging Chevron & Skidmore

Not surprisingly, there were a number of cases involving the interpretation of federal statutes in the regulatory context where the agency's view might have been relevant. Perhaps the most interesting of these was ***Meyer v. Holley***, 123 S.Ct. – (2003), a unanimous decision by the Court delivered by Justice Breyer. The case involved a private lawsuit against the principal officer and sole shareholder of a real estate company, one of whose salesmen had allegedly discriminated on the basis of race against the plaintiffs. The question was whether such an officer or shareholder is vicariously liable under the Fair Housing Act for the acts of an employee of the corporation. The traditional rule is that the employer is vicariously liable for the acts of employees in the scope of their employment but that the employer is the corporation, not an officer or shareholder. This traditional rule normally is abrogated only where Congress specifies a contrary intent.

Here the agency responsible for administering the Act, the Department of Housing and Urban Development, had adopted a regulation specifying against whom HUD might file administrative complaints for violation of the Act. The Ninth Circuit read that regulation to extend liability, as the regulation stated, to "any person who directs or controls, or has the right to direct or control," the employee engaged in the discriminatory conduct. Because the defendant, as President and sole shareholder, had the right to direct or control the employee, the Ninth Circuit found him personally liable absent any evidence that he had actually exercised any control or direction or had any knowledge regarding the discriminatory conduct. The Supreme Court, however, read the regulation in a wholly different manner, providing liability only when the person discriminating acted, in other words of the regulation, "as employee or agent of the directing or controlling person." This language, the Court said, disclaimed vicarious liability. The United States as amicus curiae indicated that the Ninth Circuit's interpretation of the agency's regulation was in error, and that HUD's preamble language explaining the regulation likewise rejected strict, vicarious liability. The Court said that it ordinarily would "defer to an administrative agency's reasonable interpretation of a statute," and thus accepted the agency's interpretation (as the Court and the Solicitor General construed it).

But here's where it gets interesting. For this unremarkable proposition, the Court cited both *Chevron U.S.A., Inc. v. Natural Resources Defense Council* and *Skidmore v. Swift & Co.*, without further elaboration. Those who follow these columns know that the Court in the past several years has engaged in extended discussions as to whether *Chevron* **or** *Skidmore* applies in a given circumstance and as to the importance of distinguishing between them. Here, however, the Court cited to them as if they were clones.

How to explain this? Look to the author of the opinion. Justice Breyer has been notable in his idiosyncratic view of *Chevron*. For example, in *Christensen v. Harris County*, 529 U.S. 576 (2000), in which Justice Thomas writing for the majority held that agency interpretations in opinion letters, policy statements, and enforcement guidelines do not warrant *Chevron* deference but are entitled to *Skidmore* respect, and Justice Scalia concurred in the judgment but vigorously dissented from the limitation of *Chevron* and the revival, in his view, of *Skidmore*, Justice Breyer in dissent (joined by Justice Ginsburg) took a different tack from both, saying that *Skidmore* and *Chevron* do not involve different levels of deference at all, just different bases for affording deference. With this view, his parallel citation to *Chevron* and *Skidmore* in *Meyer v. Holley* is consistent. Of course, one might wonder about the other justices who joined Justice Breyer's opinion, from Justices Thomas and Souter, who have written opinions distinguishing between *Chevron* and *Skidmore*, to Justice Scalia, who denies the vitality of *Skidmore*. Perhaps it is too much to expect the busy justices to flyspeck each opinion for such inconsistencies.

Another interesting aspect of the case is the question whether the statutory provision interpreted by the agency regulation is even subject to the agency's administration, such that its interpretation should carry any weight. Like the dog that did not bark in the night in the Sherlock Holmes tale, this issue was ignored by the Court, but the question in *Meyer* seems on all fours with the question in *Kelley v. EPA*, 25 F.3d 1088 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995). In *Kelley*, EPA had issued an interpretive rule regarding who the agency believed could be liable for clean ups of hazardous waste releases under the

[1] Professor of Law, Lewis & Clark Law School; Section Chair-Elect; and Contributing Editor.

Comprehensive Environmental Response Compensation and Liability Act. Although EPA is the agency responsible for implementing clean ups under the Act and for enforcing the Act against those who do not comply with the Act, the D.C. Circuit held that EPA had no authority to interpret who was liable under the Act in civil suits between private persons. That was simply not part of the Act that EPA administered and hence was left to the courts to interpret. The same could be said of HUD in *Meyer*. As in *Kelley*, the suit was between private parties, and HUD does not administer the Fair Housing Act's private suit provisions. Because the Court did not address this issue, it is difficult to conclude that *Kelley* and its limitation on the applicability of *Chevron* (or *Skidmore*) deference has been undermined.

When a Deadline is not a Deadline

Probably less interesting, but also involving an agency's interpretation of a federal statute is ***Barnhart v. Peabody Coal Co.***, 123 S.Ct. 748 (2003). Here, the Court revisited for the third time the application of the Coal Industry Retiree Health Benefit Act of 1992, by which Congress attempted to provide for the continued benefits originally established by the United Mine Workers Association Pension Plan despite the substantial changes in the coal industry that otherwise would leave many miners and their families without health and death benefits. Under the Act, the Commissioner of Social Security was to assign coal industry retirees whose last employer no longer exists to another coal operator that directly or indirectly had an employment relationship with those retirees. Specifically, the Act stated that the Commissioner "shall, before October 1, 1993," assign the retirees. In fact, the Commissioner was not able to complete all the assignments before October 1, 1993, leaving some 10,000 retirees without assignment on that date. The question in *Barnhart* was whether the Commissioner's authority to assign these retirees expired on that date so that they could never be assigned to any existing operator.

Justice Souter, writing for six members of the Court, acknowledges that there was a statutory duty to complete the assignments by October 1, 1993, but he finds that the violation of that duty does not necessarily mean that the Commissioner loses the ability to make assignments after that date. He notes that the Court has never "construed a provision that the Government 'shall' act within a specified time, without more, as a jurisdictional limit precluding action later." Rather, courts should attempt to determine what Congress intended would be the effect of failure to meet the deadline and give effect to that intent. Here, the failure to assign retirees to an existing company would not mean that the retirees would lose all their benefits. The Act separately had provided a mechanism for funding the benefits of retirees for whom no related extant operator could be found. Thus, if the 10,000 unassigned retirees on October 1, 1993, were not able to be assigned to any extant operator, they would obtain their benefits from a differently funded source. Because the legislative history and structure of the Act clearly indicated a congressional intent that retirees be assigned to extant operators with some relationship to the retirees, the Court believed that assigning such retirees to the general fund, rather than to specific existing companies, simply because the October 1, 1993, date had passed, would be inconsistent with congressional intent.

Justice Scalia, writing for himself and Justices O'Connor and Thomas, dissented. In his view, the statutory deadline by its terms limited the statutory authority of the Commissioner to assign retirees, and he restated the elementary proposition that agencies' authority to regulate private entities must derive from statute. Other statutory deadlines cited by the majority, Justice Scalia maintained, did not involve deadlines that limited the authority of the agency. Rather, the agencies' authorities in those cases derived from sources other than the one that contained the deadline.

Perhaps most notably from an administrative law standpoint, no one attributed any significance to the agency's interpretation of the statute. Perhaps this was due to the fact that the agency had not rendered its interpretation that it retained authority to assign retirees after the deadline in the form of an agency regulation. Instead, it had merely made assignments in accord with its interpretation. Nevertheless, this would at the least have involved informal adjudications, which presumably would normally be accorded some deference. Alternatively, perhaps the ignoring the agency's interpretation turned on the majority's view that congressional intent, rather than the agency's policy, should govern what should follow from the agency's failure to abide by the deadline. Or, perhaps, the issue of the agency's interpretation simply was not considered.

Construing Evidentiary Privileges Narrowly

A conflict between federal regulatory activities and state tort law arose in ***Pierce County, Wash. v. Guillen***, 123 S.Ct. 720 (2003). Under the Highway Safety Act, in order to be eligible for federal highway funds, a state must conduct a survey of its roads to determine the most hazardous locations so that funding decisions can be made on a basis of safety priorities. Because plaintiff lawyers were using the information generated by these surveys as a basis for lawsuits against states and localities and because the U.S. Department of Transportation believed the use of this

information interfered with the states making proper surveys, Congress amended the Act to bar any "data compiled or collected for the purpose of [this survey from being] subject to discovery or admitted into evidence in a Federal or State court proceeding." In *Guillen* there was an attempt by a plaintiff to obtain accident reports from the state regarding accidents at a particular location. Some of these reports were police reports routinely compiled after accidents, but which later were used by a state agency to compile the survey. In addition, there was a report specifically written by the state agency about accidents at that location for purposes of the survey, based on the data in the police reports. The question was which, if any, of these reports were subject to the bar, and to the extent some were, was the bar on their use in a state court within Congress's constitutional authority.

The Court in a unanimous opinion by Justice Thomas began with a canon of statutory construction – statutes establishing evidentiary privileges must be construed narrowly because they impede the search for the truth. In that light, the Court interpreted the Act to bar the discovery and use only of that data actually collected or compiled for purposes of the survey; it did not bar the discovery and use of data collected or compiled for purposes unrelated to the survey, held by agencies not involved in preparing the survey. In other words, the police reports were not barred, but the agency report based on the police reports was.

On the constitutional issue, the Court reiterated that Congress has the power to regulate the use of channels of interstate commerce and to protect the instrumentalities of interstate commerce. The survey requirement itself, intended to protect the safety of the highways, could be enacted under that authority, and the bar on the discovery and use of the survey data, deemed necessary to fully effectuate the survey, likewise was authorized by the Commerce Clause. The Court did not explain, however, why the anti-commandeering prohibition of the Tenth Amendment, as explained in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), did not apply to a requirement for states to make a survey of highway safety for federal purposes. Were the authority for the survey and the bar founded on the Spending Clause, the Tenth Amendment anti-commandeering prohibition would not apply, but the Court expressly stated that having decided that the survey and the bar were both authorized under the Commerce Clause, it need not decide whether they were also a proper exercise of Congress's authority under the Necessary and Proper Clause or the Spending Clause.

Bankruptcy and the FCC

In ***FCC v. Nextwave Personal Communications, Inc.,*** 123 S.Ct. 832 (2003), the conflict was between federal regulatory law and federal bankruptcy law, and the latter won. The FCC had offered licenses for certain broadband personal communications services to small businesses on a competitive bid basis. Nextwave was awarded 90 licenses on winning bids exceeding $4.75 billion. [What kind of small business is that?!] In accordance with FCC regulations, Nextwave signed promissory notes and gave security interests in the licenses to the FCC to secure the loan. In addition, the licenses stated that they were conditioned upon "full and timely payment," and failure to comply would result in "automatic cancellation" of the license. Lo and behold, Nextwave defaulted and filed for Chapter 11 reorganization protection. The FCC tried to cancel the licenses, but a provision of the bankruptcy code states that a "government unit may not…revoke…a license…to…a person that is…a debtor…solely because such…debtor…has not paid a debt that is dischargeable [in bankruptcy.]"

The FCC tried to argue that its actions were "regulatory" in nature and therefore not subject to the bankruptcy code provision. In the FCC's view, it had not cancelled the license because Nextwave had not paid a debt but because Nextwave had not complied with a regulatory requirement – the requirement to pay for its license. In addition, the FCC argued that the bankruptcy provision was really only trying to protect against canceling a license as punishment for filing for bankruptcy, which the FCC was not doing here. The Court in an opinion by Justice Scalia rejected these arguments. Nextwave's requirement to pay for its license was a debt, and the bankruptcy provision actually included exceptions for a couple of specific regulatory programs, indicating that Congress recognized that a "debt" could arise from regulation. Moreover, there is a separate bankruptcy provision prohibiting discrimination against those in bankruptcy, which would already cover canceling a license as punishment for filing bankruptcy. Perhaps most importantly, the Court was unconvinced that barring the cancelling of the license because of failing to pay the debt would interfere with the timely need for these licenses to be exercised and provide broadband personal communications. The Court noted that the FCC could exercise its security interest in the licenses or, if Nextel failed to comply with other conditions in the license, the FCC could cancel the license for those failures. It simply could not cancel the licenses for failure to pay for the licenses.

Justice Breyer dissented, agreeing with the argument that the bankruptcy provision was aimed at stopping agencies from punishing persons for having filed for bankruptcy. Justice Scalia's response to the dissent for the majority was dismissive (*i.e.,* not civil) in its tone and led Justice Stevens not to concur in that portion of the opinion.

News from the Circuits

By William S. Jordan III[1]

Federal Circuit Reinstates Veterans Preference

In the long-awaited "Azdell" case, *Meeker v. Merit Systems Protection Board*, – F.3d –, 2003 WL 359390 (Fed. Cir. Feb. 20, 2003), the Federal Circuit upheld the 1996 scoring formula used by OPM to rate ALJ candidates. Challengers argued that the formula gave undue weight to the Veterans Preference. The court held that MSPB had jurisdiction to review OPM's alteration of the earlier 1993 formula but not to consider application of the Veterans Preference and upheld OPM's action as within the Director's discretion to "grant a variation from the requirements of particular OPM regulations whenever the Director determines that complying with the strict letter of such a regulation would result in practical difficulties and unnecessary hardships." The court emphasized that the standards for granting a variation "are very general," and that their application was intended to be left mainly to the discretion of the Director, not the Board or the court.

Reviewability of Action & Inaction

In the absence of a specific statutory provision for judicial review, Section 704 of the Administrative Procedure Act authorizes judicial review of "final agency action for which there is no other adequate remedy in a court." Three recent circuit decisions address the question of what constitutes "final agency action" under Section 704. One, in particular, finds agency inaction to be reviewable and imposes the creative remedy of forced mediation as to a timetable for the agency to act.

In *Montana Wilderness Ass'n, Inc. v. U.S. Forest Service,* 314 F.3d 1146 (9th Cir. 2003), plaintiffs alleged that the agency had failed to fulfill its statutory duty to "maintain" the wilderness character of the area in question. Plaintiffs argued that various trail maintenance and use activities harmed the wilderness character of the area and thus constituted reviewable final action. Applying the first prong of the two-part test from *Bennett v. Spear,* the Ninth Circuit held that Congress did not intend such routine maintenance to be the "consummation" of the agency's decisionmaking process. Only the ultimate plans for the areas would meet that test. This aspect of the decision hinged largely on fairly specific legislative history concerning the intention to allow continued use and maintenance of the trails at issue.

Having denied review of agency action, the court remanded for trial on question of whether agency inaction justified relief under Section 706(1) of the APA. The court found that the Forest Service had a "duty…to maintain a specified goal," and that "the record does not demonstrate that the Forest Service performed its obligations in an extensive and detailed manner."

Inaction also provided the basis for review in *Public Citizen Health Research Group v. Chao*, 314 F.3d 143 (3d Cir. 2002). Public Citizen challenged the agency's failure "to commence a rulemaking that would lower the permissible exposure limit for hexavalent chromium." Having recognized the cancer hazard in 1993, and announced an initial rulemaking goal of 1995, the agency had prevailed against an earlier challenge to inaction largely in light of a commitment to act by 1999. The agency then lost this second round when it not only failed to act, but also said that it had changed its priorities and put off further rulemaking by ten to twenty years. The court based its decision on a "polestar [of] reasonableness" on the particular facts.

The court's decision depended primarily on the fact that OSHA had recognized the unacceptable cancer hazard in 1993 and consistently predicted forthcoming action for nearly a decade. Three other aspects of the decision are particularly noteworthy. First, the agency relied in part on its desire for peer review of a long-awaited study that had been issued in 2000. Given the long delay, the court rejected this argument on the ground that the study had been peer reviewed at the time it was issued. Second, the long delay from recognition of the hazard overwhelmed agency arguments that various complexities required further delay. According to the court, "the Act virtually forbids delay in pursuit of certainty – it requires regulation "on the basis of the best *available* evidence,"…(emphasis added), and courts have warned that "OSHA cannot let workers suffer while it awaits the Godot of scientific certainty…[W]e cannot allow an imperfect analysis to justify indefinite delay." Third, having held that complexities did not justify further delay, the court ordered the parties to pursue mediation before a federal judge as to a schedule for agency actions. Only if mediation failed would the court impose a deadline of its own making. Since courts are reluctant to impose rulemaking schedules on agencies, the possibility of mediation as a remedy may make future courts more receptive to challenges to agency rulemaking delay.

In both of the previous cases, review of agency inaction hinged on a clear and specific statutory mandate, coupled with proof (or the prospect of proof) of a failure to meet that mandate. By contrast, in *Flue-Cured Tobacco Co-operative Stabilization Corp. v. U.S. EPA,* 313 F.3d 852

[1] Professor of Law, University of Akron Law School; Vice Chair Judicial Review Committee; Contributing Editor.

(4th Cir. 2002), the agency complied with its statutory mandate by issuing a report on the adverse health effects of secondhand smoke. Although the agency had clearly acted as a layperson might see it, issuance of the report was not reviewable as final agency action. Applying *Bennett v. Spear,* the parties agreed that the report constituted the "'consummation' of the agency's decisionmaking process." The disputed centered on the second prong of the *Bennett* test, under which an agency's action is reviewable only if it "gives rise to legal consequences, rights, or obligations."

The District Court had found final action in the practical effects of the report, including a GAO decision to ban smoking in government vehicles. The Fourth Circuit rejected this reasoning. The fact that another government agency or other third parties might take actions based on the report does not give rise to "direct and appreciable legal consequences," particularly where Congress had explicitly stated that EPA could not take any regulatory action based upon the report. Thus, Congress did not "intend to create private rights of actions to challenge the inevitable objectionable impressions created whenever controversial research by a federal agency is published. Such policy statements are properly challenged through the political process and not the courts."

Three Circuits grapple with Chevron

The *Chevron* cauldron bubbled vigorously in three recent circuit decisions. Even when statutory clarity forecloses consideration of *Chevron* deference, judges cannot resist asserting their own understandings of *Chevron* doctrine. In *Krzalic v. Republic Title Co.,* 314 F.3d 875 (7th Cir. 2002), Judge Posner wrote of *Barnhart v. Walton* as having achieved a merger of *Skidmore* and *Chevron* and suggested that *Chevron* itself might be viewed as undemocratic. In judging a private dispute, Judge Posner seemed prepared to apply *Chevron* deference in light of the strength of delegation to the agency. He ultimately avoided the deference problem by holding that the statute "will not bear, as a matter of straightforward judicial interpretation" the interpretation included in the agency statement. In a concurring opinion, Judge Easterbrook argued that "in private litigation *Chevron* does not give any force to a declaration unaccompanied by the formalities of rulemaking or administrative adjudication." He also disputed the proposition that *Barnhart* suggested a merger of *Chevron* and *Skidmore* analyses.

The Ninth Circuit captured the current status of *Chevron* doctrine when it wrote that, "After *Mead*, we are certain of only two things about the continuum of deference owed to agency decisions: *Chevron* provides an example of when *Chevron* deference applies, and *Mead* provides an example of when it does not…In those "other, perhaps harder, cases" that do not clearly track either *Chevron* or *Mead*, we must "make reasoned choices between the two examples, the way courts have always done." *Wilderness Society v. U.S. Fish and Wildlife Service,* 316 F.3d 913 (9th Cir. 2003).

Wilderness Society involved a challenge to a Fish and Wildlife decision to grant a permit for the operation of a salmon enhancement project in a wilderness area. Plaintiffs argued that the action was beyond statutory authority, and particularly that the project constituted a prohibited "commercial enterprise." In upholding the agency's decision, the court granted *Chevron* deference to an interpretation that had been issued by the Interior Department's Solicitor's Office and relied upon in the agency decision granting the permit. The decision is noteworthy because the agency's interpretation was reached in the course of an informal adjudication. The court relied on the following factors to apply *Chevron* deference: (1) a clear statutory delegation to manage the wilderness and issue relevant regulations, (2) the fact that the public had had an opportunity to comment on the Environmental Assessment for the project, (3) the fact that the project was consistent with a Final Plan for the area, which was itself analogous to a rule, and (4) the permit was issued after following procedures under the National Environmental Policy Act, which constitute a "relatively formal administrative procedure tending to foster…fairness and deliberation." It is fair to say that the Ninth Circuit took seriously the Supreme Court's statement in *U.S. v. Mead* that, "Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent." Even agency proceedings under an entirely different statute, NEPA in this case, may suffice to support Chevron deference.

Finally, *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.,* 317 F.3d 1269 (11th Cir. 2003), reveals a deep split among appellate judges with respect to the very nature of *Chevron* deference. The majority in this *en banc* decision deferred to the FCC's view, reached in an earlier adjudicatory decision, that the states had the authority to interpret certain contracts for telecommunications services. The majority granted *Chevron* deference despite the fact that the earlier FCC adjudication had relied on federal court decisions based upon a vacated FCC ruling. Since the FCC had also approved the judicial observation that state commissions were appropriate bodies to reach such interpretations, this reasonable proposition, independent of the earlier vacated FCC ruling, was sufficient to support deference.

Concurring in the decision, Judge Black strongly emphasized that *Chevron* deference derives from the authority granted to the agency: "a valid agency interpretation,…like a statute, which continues to be authoritative even if the reasons for enacting the statute pass. Like a statute, an agency interpretation is entitled to deference

because it has been posited by an institution with authority -- in this case, the FCC, which derives its authority from a Congressional delegation." By contrast, Judge Tjoflat in dissent emphasized that *Chevron* deference is grounded in the expertise of federal agencies: "*Chevron* deference arises out of a tradition of court restraint when encountering complex issues that are best suited for resolution by expert agencies." Thus, Judge Tjoflat was not prepared to defer to the FCC's approval of statements made by other courts on a jurisdictional issue that he considered "uniquely within the province of the judiciary to decide."

Notice & Comment

Two recent decisions emphasize the force of the notice and comment requirements of the Administrative Procedure Act. In the first, NRDC v. Evans, 316 F.3d 904 (9th Cir. 2003), the Department of Commerce had relied upon the "good cause" exception for several years to avoid going through notice and comment before issuing annual "specifications and management measures" related to certain fisheries. The Ninth Circuit rejected this application of the "good cause" exception despite the fact that the agency had to issue a new rule every year. Although the court left some room for "habitual invocation of the good cause exception," it held that "good cause requires some showing of exigency beyond generic complexity of data collection and time constraints; notice and comment must interfere with the agency's ability to fulfill its statutory mandate to manage the fishery." Emphasizing the demanding nature of the "good cause" exception and the need for a fact-specific determination in each case, the court rejected the agency's claim largely on the ground that the agency had made the same claim each year, without adequately explaining why this particular rule met the test. In light of an earlier decision denying "good cause" relief to the issuance of rules on a weekly basis, the court was not moved merely by the fact that the agency had to issue a new rule every year.

In *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003), the FCC tried to avoid notice and comment by characterizing its action as a "Second Reconsideration" of a previously issued rule. The D.C. Circuit would have none of it. After complying with notice and comment requirements to issue a rule governing compensation to telecommunications companies for non-coin calls from pay phones, the FCC issued a First Reconsideration Order in which it clarified the scope of one of the terms in the original rule. After various petitions from affected parties, the FCC issued a Public Notice seeking comment on the petitions. The agency did not, however publish the Public Notice in the Federal Register or issue a Notice of Proposed Rulemaking. Two years later, in a Second Reconsideration Order, the FCC threw out the approach reflected in the First Reconsideration and changed the rules concerning which companies would bear the burden of tracking non-coin pay calls and how compensation would be distributed among the various companies handling these calls. The court rejected the agency's attempt to avoid a new round of notice and comment. In so doing, it noted that there is "a distinction between rulemaking and a clarification of an existing rule. Whereas a clarification may be embodied in an interpretive rule that is exempt from notice and comment requirements,…new rules that work substantive changes in prior regulations are subject to the APA's procedures." The FCC's First Reconsideration Order was a valid interpretive rule because it merely clarified the meaning of the original rule, but the Second Reconsideration Order could not stand because it changed not only the meaning, but the very text of the original rule. The court also refused to accept the agency's argument that the new rule should stand because it was a "logical outgrowth" of the original rulemaking proceeding. Once the first rulemaking proceeding was complete, the "logical outgrowth" theory could not be used to make changes. A new rulemaking proceeding was required.

Policy statements typically fall within the APA definition of "rule," but they may be issued without going through notice and comment. The tradeoff for this ease of issuing policy statements is that the statements have no legally binding force. They do not have the "force of law." *Consolidated Edison Co. of New York v. FERC*, 315 F.3d 316 (D.C. Cir. 2003), addressed the significance of policy statements in an agency adjudication. In its initial ruling, FERC relied upon a policy statement that it had issued in 1995. After a request for rehearing in the adjudication, FERC also issued a new policy statement in 1999. In ruling on the rehearing request, however, FERC relied upon the earlier, 1995 policy statement.

Challengers argued that FERC had to apply the new policy statement to the new resolution of the disputed adjudication. The court disagreed. If a new policy statement has the "force of law," typically by being issued in a legislative rule or a formal adjudication, the court will presume that the position applies retroactively. Not so of a mere policy statement that has not been issued through one of the agency's lawmaking mechanisms. As to the type of policy statement at issue in *Consolidated Edison*, "there is no legal principle that mandates retroactive application of the new policy statement to pending cases. Retroactive application to pending cases may be permissible, but it is not required. An agency may decide to apply a pre-existing policy to resolve a pending case, so long as that policy is not otherwise arbitrary and the agency provides a reasoned explanation for its decision." On the facts of *Consolidated Edison*, the agency's application of the earlier policy statement was justified by administrative convenience.

Rubbing Salt in the Wounds: Forcing a Licensee to Pay Investigation and Prosecution Costs

By Michael Asimow[1]

Can an agency order a disciplined licensee to pay the agency's costs of investigating and prosecuting him? You bet, declares the California Supreme Court.

In *Zuckerman v. Bd. of Chiropractic Examiners*, 124 Cal. Rptr.2d 701 (2002), the Board revoked Zuckerman's license for sexual misconduct toward his patients, and for good measure, socked him with $17,500 in investigation and prosecution costs. Ouch! And it's not just chiropractors – all of California's licensing agencies have the power to recover these costs from unsuccessful licensees. CA Bus. & Prof. Code §125.3. As a result, agency investigators and litigators, including the deputy Attorneys General who do most of the prosecuting, must keep meticulous time sheets to justify later cost recoveries.

Zuckerman's due process claim seemed pretty solid. It was based on the Supreme Court's recent decision in *California Teachers Ass'n v. State*, 84 Cal. Rptr. 2d 425 (1999) (CTA), which was noted in a previous issue of the News. *See* ASIMOW, *News From the States*, 24 ADMINISTRATIVE & REGULATORY LAW NEWS, No. 4 (Summer 1999). In CTA, a statute allowed the agency to recover half the costs *of the ALJ* if the teacher's dismissal was upheld at the hearing. The Court held that making the litigant pay the cost of the judge violated due process because of the chilling effect on the teacher's decision to contest the dismissal.

But surprise: In *Zuckerman*, the Court distinguished *CTA* and upheld the agency's ability to order reimbursement of investigation and prosecution costs. These cost recoveries help to finance the agency and thus assure that it can do its job – a perfectly reasonable goal (especially in a state that seems to be going broke, although one equally present in *CTA*). In part, the distinction was based on custom – making the loser pay investigation costs is routine in other states, but making the loser pay for the judge was virtually unprecedented. In part it was based on the fact that a licensee is stuck with paying prehearing costs even if he fails to request a hearing and loses his license by default. Therefore the chilling effect is not as significant as in *CTA*.

In deference to *CTA*, however, the Court required agencies to exercise discretion in whether to impose the full amount of the costs. If the licensee won a dismissal of some of the charges against him, or managed to reduce the severity of the penalty, full cost reimbursement would be inappropriate. The agency must consider the licensee's "subjective good faith in the merits" of his position. It must consider whether the licensee can afford to pay. Finally, it should not recover the full costs when the agency conducted "a disproportionately large investigation to prove that a chiropractor engaged in relatively innocuous conduct." And these exercises of discretion will be reviewable in court under California's independent judgment test!

Given what the dissent called the "miserably inexact" nature of these standards and the certainty of judicial review, agencies will probably hesitate to impose cost reimbursement in all cases except the very clearest ones, where discipline is imposed on the "worst of the worst." This will greatly undermine the purpose of using cost recoveries to finance agency budgets and will sharply decrease the resources available to agencies to investigate violations. Reading *CTA* and *Zuckerman* together suggests (if it wasn't already clear) the utter indeterminacy of due process analysis under *Mathews v. Eldridge*, which seems to allow the judge to come up with whatever conclusion the judge wishes to reach.

[1] Professor of Law Emeritus, UCLA Law School; Council Member; and Contributing Editor.

Can a Former Prisoner Get a Barber's License? Catch 22 in New York

By Myles E. Eastwood[2]

According to a recent web posting, Marc La Cloche was convicted of robbery in 1991 and served about 11 years in various New York correctional facilities. During his time in prison, he completed a barber vocational program and became a barber's assistant and then a professional barber.

In August 2000, when he was anticipating parole, La Cloche applied to the New York Secretary of State's division of licensing services for a certificate of registration as a barber apprentice. La Cloche's request was denied within a few months, solely on the ground that his "criminal history indicates lack of good moral character and trustworthiness required for licensure."

Manhattan Supreme Court Justice Herman Cahn ruled that the state could not deny him a barber apprentice license solely on the basis of his prior conviction. Justice Cahn noted the contradiction inherent in La Cloche's predicament: the state has taught him a trade so he can earn an honest living, but will not allow him to practice it because, as a convicted felon, he lacks the requisite moral character. *Matter of Marc La Cloche*, 401468/02 (unreported as of the time this article is written). The judge granted La Cloche a hearing before an ALJ on whether he is of sufficient moral character to receive the license.

[2] Chair, Membership Committee; Vice Chair, Defense and National Security Committee.

Suggested Improvements for APA's Adjudication Provisions[1]

The Admin Law Section has been working for several years on its APA project. The project has resulted in a series of reports describing all aspects of the APA and a set of "black letter" statements about the law of the APA. It also resulted in a recently published book entitled, "A Guide to Federal Agency Adjudication," which is now for sale by the ABA.

The APA project always contemplated a "prescriptive" phase to follow this "descriptive phase." The prescriptive phase would offer suggestions to Congress for improving the APA. At its midyear meeting in Seattle, the Council debated a series of proposed prescriptive recommendations for the adjudication sections of the APA. Hopefully, this set of suggested improvements will result in a recommendation adopted by the ABA's House of Delegates.

The suggested recommendations discussed by the Council covered the definition of adjudication in the APA and clarified the separation of functions provisions. It includes a new section providing for an informal "conference" type procedure to supplement the APA's existing provision for a formal hearing. It also proposes, for the first time, a series of baseline provisions for "informal adjudication," the vast black hole of administrative law. Readers should be able to find a revised version of these recommendations on the Sections website at www.abanet.org/adminlaw/apa.

Midyear Resolutions

The House of Delegates adopted at the midyear meeting three section-sponsored, or cosponsored, resolutions aimed at snipping the seemingly endless mobius strip of veterans claims appeals, defending access to counsel and judicial review for U.S. citizens and residents deemed "enemy combatants" – subject to the needs of national security, and construing the USA Patriot Act's expansive amendments to the Foreign Intelligence Surveillance Act as sustaining some separation between foreign intelligence gathering and domestic law enforcement.

Veterans Claims

This resolution sponsored by the Admin Law Section (Recommendation No. 102) urges the U.S. Court of Appeals for Veterans Claims ("CAVC") to determine and decide all questions of law presented to it after appropriate briefing, rather than declining to hear legal claims not expressly argued before the Board of Veterans' Appeals ("BVA"), and to exercise its statutory authority to expedite Department of Veterans Affairs ("VA") decisions in appropriate cases when it remands a case for further administrative proceedings by VA.

The resolution also supports federal legislation to require the CAVC to resolve all dispositive allegations of error presented and briefed by an appellant that are capable of resolution without regard to either issue preclusion or exhaustion, to authorize the CAVC to certify class actions and authorize the United States Court of Appeals for the Federal Circuit to transfer a case to the CAVC in which class relief is warranted, and to require the Secretary of Veterans Affairs to appoint members of the BVA through procedures that ensure merit selection and decisional independence.

The cosponsoring National Conference of Administrative Law Judges was persuaded to accept the BVA appointment language over wording calling for selection procedures modeled on those used for the selection of administrative law judges and Board of Contract Appeals administrative judges. As Delegate Judy Kaleta and council member Michael Asimow convincingly argued in obtaining council support for the change, adopting ALJ selection procedures for appointment of BVA members was a bad idea because such procedures are overly mechanical and do not assure appointment of the best qualified judges.

Enemy Combatants

This resolution cosponsored by the Admin Law Section (Recommendation No. 109) urges that U.S. citizens and residents who are detained within the United States based on their designation as "enemy combatants" be afforded the opportunity for meaningful judicial review of their status, under a standard according such deference to the designation as the reviewing court determines to be appropriate to accommodate the needs of the detainees and the requirements of national security; and

It also urges that U.S. citizens and residents who are detained within the United States based on their designation as "enemy combatants" not be denied access to counsel in connection with the opportunity for such review, subject to appropriate conditions as may be set by the court to accommodate the needs of the detainees and the requirements of national security.

It further urges Congress, in coordination with the Executive Branch, to establish clear standards and procedures governing the designation and treatment of U.S. citizens, residents, or others who are detained within the United States as "enemy combatants."

[1] By Contributing Editor Michael Asimow.

Finally, it urges that, in setting and executing national policy regarding detention of "enemy combatants," Congress and the Executive Branch should consider how the policy adopted by the United States may affect the response of other nations to future acts of terrorism.

As originally proposed, the resolution applied to U.S. citizens and other persons lawfully present in the United States, and the judicial review and access to counsel paragraphs offered no accommodation for the requirements of national security. After hearing from Delegates Ernie Gellhorn and Judy Kaleta, council members Michael Asimow, David Vladek and David Roderer, and others, including Suzanne Spalding from the Task Force on Treatment of Enemy Combatants, the council agreed to cosponsor the resolution with appropriate limiting language. Council member Leonard Leo argued eloquently but unsuccessfully for watering down the resolution to urge access to assistance in preparing habeas petitions rather than access to counsel.

FISA

This resolution cosponsored by the Admin Law Section (Recommendation No. 118) urges the Congress to conduct regular and timely oversight, including public hearings (except when Congress determines that the requirements of national security make open proceedings inappropriate), to ensure that government investigations undertaken pursuant to the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 et seq. ("FISA" or "the Act") do not violate the First, Fourth, and Fifth Amendments to the Constitution and adhere to the Act's purposes of accommodating and advancing both the government's interest in pursuing legitimate intelligence activity and the individual's interest in being free from improper government intrusion.

The resolution also urges the Congress to consider amendments to the Act to clarify that the procedures adopted by the Attorney General to protect United States persons, as required by the Act, should ensure that FISA is used when the government has a significant (i.e., not insubstantial), foreign intelligence purpose, as contemplated by the Act, and not to circumvent the Fourth Amendment and to make available to the public an annual statistical report on FISA investigations, comparable to the reports prepared by the Administrative Office of the United States Courts, pursuant to 18 U.S.C. § 2519, regarding the use of Federal wiretap authority.

The original proposal made no provision for closing oversight hearings in the interests of national security and contemplated that the Attorney General have a bona fide, as opposed to a not insubstantial, foreign intelligence purpose when seeking warrants and sharing information. After hearing from Delegate Ernie Gellhorn, council members Renee Landers and Leonard Leo, and others, including Suzanne Spalding from the Task Force on Treatment of Enemy Combatants and Mark Agrast from the Section of Individual Rights & Responsibilities, the council agreed to cosponsor the resolution provided the other sponsors agreed to these or similar changes. ◆

When Terrorism Threatens Health

continued from page 7

Economic libertarianism. Critics suggest that businesses should not be subjected to burdensome regulation, even in a public health emergency. Yet, if businesses are engaged in an activity that poses a health threat, government has always had the power to abate the nuisance. Businesses must comply with all manner of health and safety regulations that interfere with economic freedoms. Those who believe in the undeterred entrepreneur may not agree with health regulations, but they are necessary to ensure that business activities do not endanger the public. Government has also always had the power to confiscate private property for the public good. In the event of bioterrorism, for example, it may be necessary for the state to have adequate supplies of vaccines or pharmaceuticals. Or, government may need to use health care facilities for medical treatment or quarantine of persons exposed to infection.

Governmental abuse of power. Finally, critics argue that Governors and public health authorities would abuse their authority. This kind of generalized argument could be used to refute the exercise of compulsory power in any realm because executive branch officials may overreach. However, such general objections have never been a reason to deny government the power to avert threats to safety and security. The answer to such general objections is to adopt checks and balances to prevent abuse of power. Under the Model Act: (1) the Governor may declare an emergency only under strict criteria and with careful consultation with public health experts and the community; (2) the legislature, by majority vote, can override the Governor's declaration at any time; and (3) the judiciary can terminate the exercise of power if the Governor violates the standards or procedures incorporated into MSEHPA or acts unconstitutionally. The Model Act, therefore, is hedged with safeguards. The Act, moreover, declares the importance of respect for individuals and tolerance of groups in the preamble and

throughout. It adheres to the civil liberties principles of significant risk, the least restrictive alternative, and humane care and treatment of persons. This goes far beyond the safeguards in existing public health statutes, reinforcing the importance of dignity and equality in a constitutional democracy.

In summary, MSEHPA provides a modern framework for effective identification and response to emerging health threats, while guarding against the potential excesses of government. Indeed, the CLPH agreed to draft the law only because a much more draconian approach might have been taken by the federal government and the states acting on their own and responding to public fears and misapprehensions. This is not to suggest that the Model Act strikes the perfect balance between personal freedoms and public goods. But it does recognize the inherent tradeoffs necessary and seeks a fair weighing of values. The MSEHPA was designed to defend personal as well as collective interests. In a country so tied to rights rhetoric on both sides of the political spectrum, any proposal that has the appearance of strengthening governmental authority was bound to travel in tumultuous political waters.

Black Lung Disability

continued from page 10

ed this thesis and amended the regulatory definition of the disease to include both restrictive and obstructive lung disease caused by coal dust.

Considerable conflict also swirled around the question of whether pneumoconiosis can be a progressive disease – more specifically, whether an ALJ has discretion to discredit a medical opinion that is premised on a belief that the disease is never progressive after a worker's exposure to coal dust ceases. The Department of Labor's longstanding position – "that pneumoconiosis is a latent and progressive disease" – had been invoked and followed for years by the Supreme Court and the courts of appeals. Nevertheless, operators insisted to the contrary that the disease cannot progress once exposure ends, and that "mythology" was the only basis for believing that pneumoconiosis is progressive. The parties' battles over this issue throughout the 1990s signaled the need for definitive guidance by the Department of Labor. In its rulemaking, the Department amended the regulatory definition of pneumoconiosis to make clear that it is a "progressive disease which may first become detectable only after the cessation of coal mine dust exposure." On review, the D.C. Circuit held that the revised definition of pneumoconiosis – including its obstructive form and its progressive nature – was neither arbitrary under the Administrative Procedure Act nor inconsistent with black lung legislation.

Treating physicians. Confusion has also marred another part of the black lung claims process: the evaluation of physicians' opinion evidence, particularly the process of weighing the opinion of a miner's treating physician against opinions of other physicians of record. In many cases, the miner relies heavily on the probative strength of his treating physician's diagnoses of disease, disability, and disability causation, in effect arguing what a dissenting judge articulated in *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1101 (4th Cir.1993): "[W]e should not forget that the treating physician knows his patient as a human being rather than as a claim number, and his opinions are generally developed in an attempt to treat the patient rather than to provide an opinion for hire." However, the weight permissibly given by ALJs to the medical opinion of a treating physician has not always been clear. In its rulemaking, the Department adopted criteria for assigning controlling weight to the opinion of the treating physician "in appropriate cases." The Department recognized the intrinsic value of the treating relationship; at the same time, it acknowledged the danger of mechanical deference and the importance of "critical analysis" in assessing the nature and duration of the relationship as well as "whether the physician's opinion is reasoned, documented, and credible." The D.C. Circuit upheld the rule, recognizing that the interest in administrative accuracy supported a focus on knowledge and interpretation arising from a certain kind of physician-patient relationship. The rule guides adjudicators in probing whether that kind of relationship exists in a given case.

Conclusion

The central dilemma of the black lung claims process, at least since the early 1980s, has been a lack of equity. By limiting the items of evidence in a black lung claim, the new rules implement a new approach to fairness. Other changes codify appellate court decisions on the meaning of pneumoconiosis and guide the adjudicator's rational evaluation of medical evidence. The success of these important reforms will depend in large measure on the receptivity of decision makers to the regulations' spirit and letter. The concept of due process is now a more prominent part of the legal (and moral) landscape of the coalfields, but a true understanding of the terrain must await the experience of the rules in action.

A Complete List of Titles from the ABA Section of Administrative Law and Regulatory Practice

Developments in Administrative Law and Regulatory Practice 2001-2002

By Jeffrey S. Lubbers

Provides a comprehensive ready reference for private practitioners, government counsel, judges, and academics concerning the past year's significant developments in administrative law and regulatory practice.

2003, 556 pages, 6 x 9, paperback
Product code: 5010036
$64.95 Administrative Law and Regulatory Practice section member price
$99.95 Regular price

A Guide to Federal Agency Adjudication

By Michael Asimow

Assists government and private counsel engaged in administrative adjudication under the federal Administrative Procedure Act (APA).

2002, 246 pages, 6 x 9, paperback
Product code: 5010034
$34.95 Administrative Law and Regulatory Practice section member price
$54.95 Regular price

Guide to Medicare Coverage Decision-Making and Appeals

By Eleanor D. Kinney

Describes the Medicare coverage policy-making and appeals process, including the changes in theses processes enacted in the Benefits Improvement and Protection Act of 2000.

2002, 220 pages, 6 x 9, paperback
Product code: 5010033
$49.95 Administrative Law and Regulatory Practice section member price
$69.95 Regular price

The Cost-Benefit State: The Future of Regulatory Protection

By Cass R. Sunstein

Examines new trends in Cost-Benefit Analysis and how courts are responding in contested cases. The book analyzes the legality of actions taken by the EPA, OSHA, CPSC, and other agencies.

2002, 200 pages, 6 x 9, paperback
Product code: 5010031
$59.95 Administrative Law and Regulatory Practice section member price
$69.95 Regular price

Developments in Administrative Law and Regulatory Practice 2000-2001

By Jeffrey S. Lubbers

Provides a comprehensive ready reference for private practitioners, government counsel, judges, and academics concerning the past year's significant developments in administrative law and regulatory practice.

2002, 515 pages, 6 x 9, paperback
Product code: 5010032
$64.95 Administrative Law and Regulatory Practice section member price
$89.95 Regular price

Federal Administrative Dispute Resolution Deskbook

By Marshall J. Breger, Deborah Schick Laufer, Gerald S. Schatz

Describes the breadth of alternative dispute resolution processes within the federal government and demonstrates the ways in which agencies have approached alternative dispute resolution.

2001, 763 pages, 6 x 9, paperback
Product code: 5010030
$89.95 Administrative Law and Regulatory Practice section member price
$109.95 Regular price

Federal Administrative Procedure Sourcebook, Third Edition

By William F. Funk, Jeffrey S. Lubbers, Charles Pou Jr.

Contains all the significant statutes, Executive Orders, memoranda, and other materials relating to the major aspects of administrative law and regulatory practice. Includes pertinent legislative history, numerous citations to related sources, and the editors' insightful commentary on each of the source documents.

2000, 1012 pages, 6 x 9, paperback
Product code: 5010024
$49.95 Administrative Law and Regulatory Practice section member price
$79.95 Regular price

The Realists' Guide to Redistricting – Avoiding the Legal Pitfalls

By J. Gerald Hebert, Donald B. Verrilli Jr., Paul M. Smith, Sam Hirsch

Designed to warn the reader of legal pitfalls related to redistricting. Includes: the "one person, one vote" standard, Sections 2 and 5 of the Voting Rights Act, and the constitutional limits on racial and partisan gerrymandering that flow from the Equal Protection Clause of the Fourteenth Amendment.

2000, 68 pages, 6 x 9, paperback
Product code: 5010025
$19.95 Administrative Law and Regulatory Practice section member price
$29.95 Regular price

A Guide to Federal Agency Rulemaking, Third Edition

By Jeffrey S. Lubbers

This third edition brings you the most up-to-date information on case law, and the legislation affecting the rulemaking process.

1998, 443 pages, 6 x 9, paperback
Product code: 5400001
$54.95 Admin. Law & Regulatory Practice/Government Public Sector Lawyers section member price
$84.95 Regular price

The Lobbying Manual: A Compliance Guide for Lawyers and Lobbyists, Second Edition

By William V. Luneburg

Describes the changes brought about by the Lobbying Disclosure Act of 1995 as well as more recent legislation. Provides a "how-to" for the wide range of issues involving paid, professional lobbyists at the federal level.

1998, 500 pages, 8.5 x 11, paperback
Product code: 5010022
$119.95 Administrative Law and Regulatory Practice section member price
$129.95 Regular price

References may be kept up to date through periodic supplementation, revisions and companion volumes sent on approval. Any supplementation issued within three months of purchase will be sent at no additional charge. You may change or cancel any upkeep service at any time by notifying the American Bar Association in writing.

ORDER TODAY!

Visit our web site to learn more about these books and all our other publications.

AMERICAN BAR ASSOCIATION

www.ababooks.org
Phone: 1-800-285-2221
Fax: 1-312-988-5568

Publications Orders
P.O. Box 10892
Chicago, IL 60610-0892

Officers, Council and Committee Chairs

Officers, Council, and Past Chairs

Officers

Chair	Neil Eisner★
Chair-Elect	William Funk★
Vice Chair	Randolph May★
Secretary	Jonathan Rusch★
Budget Officer	David W. Roderer★
Assistant Budget Officer	Daniel Cohen
Section Delegates	Judith Kaleta★
	Ernest Gellhorn★
Last Retiring Chair	C. Boyden Gray★

★ *Executive Committee Member*

Council

Member 2003	John F. Cooney
	David C. Frederick
	Renee M. Landers
	Lisa Whitney
Member 2004	John F. Duffy
	Leonard A. Leo
	Sidney A. Shapiro
	David C. Vladeck
Member 2005	Michael Asimow
	Anne E. Dewey
	Anna W. Shavers
	Loren A. Smith

Ex-Officio

State Administrative Law	Jim Rossi
Executive Branch	Viet Dinh
Judiciary	Merrick Garland
Legislative Branch	Patricia Mack Bryan
Adm. Judiciary	Ann Marshall Young

Liaisons

ABA Board of Governors	Hunter Patrick
Young Lawyers Division	Lori Davis
Law Student Division	Elise Hoffman

Administrative Process Committees

Adjudication
Chair: Jodi Levine

Constitutional Law and Separation of Powers
Co-Chairs: Thomas O. Sargentich, Daniel E. Troy

Corporate Counsel
Chair: Richard J. Wolf

Dispute Resolution
Chair: Charles E. Pou

E-Rulemaking
Chair: Peter Strauss

Government Information and Right to Privacy
Chair: James T. O'Reilly

Judicial Review
Chair: Mark B. Seidenfeld

Legislative Process and Lobbying
Chair: Wright H. Andrews, Jr.

Ratemaking
Chair: Steven A. Augustino

Regulatory Initiatives
Co-Chairs: Jonathan J. Rusch, Sidney A. Shapiro

Regulatory Policy
Co-Chairs: Robert W. Hahn, Cass R. Sunstein, Richard Parker

Rulemaking
Chair: Michael Herz

State Administrative Law
Co-Chairs: Michael R. Asimow, Edward J. Schoenbaum

Government Functions Committees

Agriculture
Co-Chairs: Robert G. Hibbert, Philip C. Olsson

Antitrust and Trade Regulation
Chair: Thomas C. Arthur

Banking and Financial Services
Co-Chairs: David W. Roderer, Charlotte M. Bahin

Benefits
Chair: Rudolph N. Patterson

Beverage Alcohol Practice
Chair: Richard Blau

Communications
Chair: Margaret L. Tobey

Consumer Products Regulation
Co-Chairs: David H. Baker, Peter L. Winik

Criminal Process
Chair: David L. Douglass

Defense and National Security
Chair: Thomas E. Crocker, Jr.

Education
Chair: Julie K. Underwood

Elections
Co-Chairs: Trevor Potter, Joseph E. Sandler

Energy
Chair: Kenneth G. Hurwitz

Environmental and Natural Resources Regulation
Co-Chairs: James O. Neet, Jr., Wendy Wagner

Food and Drug
Co-Chairs: I. Scott Bass, Nick Littlefield

Government Personnel
Co-Chairs: Joel P. Bennett, Lynne K. Zusman

Health and Human Service
Chair: Michael J. Malinowski

Homeland Security
Chair: Lynne Zusman

Housing and Urban Development
Chair: Otto J. Hetzel

Immigration and Naturalization
Chair: Anna W. Shavers

Insurance
Chair: Janet E. Belkin

Intellectual Property
Chair: Kenneth R. Corsello

International Law
Co-Chairs: Charles H. Koch, Jr., Kathleen Kunzer

International Trade & Customs
Chair: Lindsay Meyer

Labor and Employment
Chair: Nancy E. Shallow

Ombuds
Chair: Sharan Lee Levine

Postal Matters
Chair: Senny Boone

Public Contracts and Procurement
Chair: John W. Chierichella

Securities, Commodities and Exchanges
Chair: Alan L. Dye

Transportation
Chair: Thomas Newton Bolling

Treasury, Revenue and Tax
Chair: James R. Hagerty

Veterans Affairs
Co-Chairs: Michael P. Horan, Ronald Smith

Section Activities Committees

Barton F. Stichman

Annual Awards

Subcommittee on Outstanding Government Service
Co-Chairs: Fred Emery, Cynthia Farina, Robert A. Shapiro

Subcommittee on Scholarship
Co-Chairs: Jack M. Beermann, David C. Frederick, Daniel R. Ortiz

Fellows
Chair: Philip Harter

Law Student Outreach
Co-Chairs: John Hardin Young, Elise B. Hoffman

Membership and Outreach
Chair: Myles Eastwood

Nominations
Chair: Ronald M. Levin

Pro Bono
Co-Chairs: Lori Davis, Christine Monte

Professional Education
Chair: Susan Beth Farmer

Publications
Chair: Randolph J. May

Administrative and Regulatory Law News

Editor in Chief: William S. Morrow, Jr.
Advisory Board:
John Hardin Young, Chair
Eleanor Kinney
Philip Harter
Cynthia Drew
Contributing Editors:
William Jordan, III
William Funk
Yvette Barksdale
Michael Asimow

Long Range Planning
Chair: Charles Pou

AD-HOC Committees

Sponsorship
Chair: Harold Bruff

Review of Recruitment of ALJ's by OPM
Chair: John T. Miller, Jr.

ADMINISTRATIVE & REGULATORY LAW NEWS

Volume 28, Number 3, Spring 2003

Published by the Section of
Administrative Law and Regulatory Practice
American Bar Association
740 15th Street, NW
Washington, DC 20005

ABA Defending Liberty Pursuing Justice

Non-Profit Org.
U.S. Postage
PAID
Permit #8118
Washington, DC
American Bar
Association