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 veterans’ 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 committee 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.
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 criticisms 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 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.

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

James T. O'Reilly

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.

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 these 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 "professional 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 it is a necessary change. The Administration should seek only to chill, not create, the rules it proposes.
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 looks and subtle shufflings from which Washington advantage seems to flow. This proposal is not in the best interest 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 dealt with 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. The 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 of "predecisional" records analysis. The career staff has been required to redraft rules in response to comments at the point at which career staff hand the draft rule to political appointees. The disclosure would occur at the time of publication of the final regulation, 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 agreement with a rule are substantial.

Thus, 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 well, under the Supreme Court's first line of cases, be released under 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 effect 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 formal reasons not to defer). The cost 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 differentially-accepted power of the agency lawyers. The rules are sometimes 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 sketched the topic of disclosing agency draft documents into a vernacular form of pre/post decision dichotomy, keeping secret those documents that predate the official document. The 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 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 agreement with a rule are substantial. The deference given to agency interpretations of their own rules is said to be great (except when judges disagree with the outcome and formal reasons not to defer). The cost of disagreement with a rule are substantial.

From the Fed's perspective, the evolution of the rule and who have had the looks and subtle shufflings from which the Washington advantage seems to flow. This proposal is not in the best interest 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.
S\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. 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 prescribe 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.

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

By Laurence O. Gostin1

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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, those largely unchecked powers do not exist in MSEHPA; powers are circumscribed by careful criteria and standard for protection of liberty and property interests. (The text of the MSEHPA may be viewed at www.publichealthlaw.net.)

Second, critics appear unaware that public health statutes already authorize broad deprivations of liberty and property—ranging from compulsory vaccination, treatment, and quarantine to seizure of property. 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 trade-offs 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 libertarians 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 need 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.

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The Black Lung Disability Program: In Search of Due Process

By Brian C. Murchison

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 US 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 expert testimony, medical records, x-ray readings, 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 upended evidentiary records dominated by submissions of the wealthier party; they cite the unwillingness of lawyers to represent them, and 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 divides 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 Act 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 dust was harmless because the body was naturally equipped to purify itself. Another stance taken by some in the industry was that inhaling carbonaceous dust 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
only concealed effect of inhaling coal particles without sig-
ificant silica was anthracosis, which coal interests insisted
was not a disease but a deceleration. Because silica was
visible on x-rays, radiology became the crucial mode of
diagnosing miners' lung disease.

The U.S. government in the Progressive period deli-
tate to advance knowledge of miners' lung disease other
than silica, and federal agencies break new ground in
the New Deal. British authorities, however, moved forword. 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 dis-
"tinct from silica." Soon British social security law
included coal workers' pneumoconiosis as a comparable
occupational disease. By the mid-1950s, the U.S. Public
Health Service finally conducted a large study of respira-
tory disease suffered by workers in soft coal. The study
produced data that for some established a distinction
between silica 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
carried 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 associa-
tions 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 fed-
eral benefits program for miners found to be totally dis-
abled by coal dust-induced lung disease, the Act was an
undoubtedly legislative victory for the black lung move-
ment; 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 sys-
tem for black lung claims has haunted Congress, the
courts, and administrative bodies since passage of the
1969 Act. Distilled by an unappreciated 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 amend-
ments 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 to the Department's district
offices was a stunningly low five per cent. For miners
who took their claims beyond the district level to hear-
ings 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
close full circle, returning to its earliest days of providing benefi-
to a formof...
in such a way that it overshadows the evidence supporting entitlement that claimants can present.” 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 short x-ray interpretations, the result 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 responses 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 interest 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 procedures’ propensity for error, compared with the proposed changes—the Department predicted that parties of evidentiary submissions would prevent decision makers from deciding claims based on quantity rather than quality of the medical evidence. In this sense, a less biased 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 “impro[v]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 analyses 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 ALJs’ ability to reach an accurate outcome. The final rule also included a “full and fair” procedure (including Professors Jane Flathenford, 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 disease targeted by Congress—pneumocarcinosis—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 rejected...
Sarbanes-Oxley Act: Seven Months Later

By James Gerkis and Rima Moawad

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 seeks 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 in the wake of the climate of confusion sur- rounding 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) theretofore, specifically, the attorney conduct rules under Section 307 of the Act, the CEO/CFO certifications under Section 306 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 bar) has 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 367 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 executive officer 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 evi- dence 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.

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; M-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.

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 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.

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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.

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“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 “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 filings (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 would be unlikely that the U.S. government would call for the indictment and extradition of a foreign officer.

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 interpretations advice thereon. In general, law firms with significant securities practices seem to be on the same page regarding the handling of many of those 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 filings (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 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 would be unlikely that the U.S. government would call for the indictment and extradition of a foreign officer.
As indicated above many are the ambiguities of Section 406. 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 any personal loan 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 issuer 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, as 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 than the pre-Sarbanes-Oxley legislation.

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 "more 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 legal 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) 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 reimbursement; 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/insider/issuer loans to an executive officer of an "insider" subsidiary (who is not also an executive officer or director of the "non-insider" parent); loans from 401(k) plans; and loans from annuities and other broad-based employee benefit programs. Situations involving both "personal loans" and "arranging" issues, specifically the "cashless option exercise" by an officer or director were analyzed and these law firms concluded that most scenarios involving the "cashless" exercise of a stock option 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 interpretive view of these 24 law firms. By creating the Blueprint, the authors have become the "de facto" regulator when it comes to Section 402. It "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 purpose 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.
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)

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 Fink

A thin issue of the News goes to press, the Supreme Court has not issued any administrati or regulatory law case of note. A potentially important environmental law case, Border Ranch Partnership v. U.S. Corp of Engineers, 123 S.Ct. 359 (2003), in which the Court granted certiorari to determine whether the deep ripping of wetlands was regulated by the Clean Water Act, although every court that has 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. 599 (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 solicitors had allegedly discriminated on the basis of race against the plaintiff. The question was whether such an officer or shareholder is vicariously liable under the Fair Housing Act for an act of an employee of the corporation. The traditional rule is that the employer is vicariously liable for the acts of an employee of the corporation. The traditional rule normally is deregulated 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 in a manner consistent with the Department’s interpretation. The Supreme Court, however, read the regulation in a manner consistent with the Department’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 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 on the Act and the rental, 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 Justice Thomas and Justice Scalia to Justice Breyer, who wrote opinions diminishing between Chevron and Skidmore, to Justice Scalia, who denies the vitality of Skidmore. Perhaps it is too much to expect the busy justices to flock each opinion for such inconsistencies.

This is an interesting case because it involves the question whether the regulatory proceeding interpreted by the agency regulation is even subject to the agency’s interpretation, such that an 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 is all the more so with the question in Kelley v. EP/LS EM 1008 (DC, Cir. 1994), cert. denied, 513 U.S. 1101 (1995). In Kelley, EPA had issued an interpretation regarding who the agency believed could be liable for clean ups of hazardous waste releases under the parent.” This language, the Court said, disclaimed vicarious liability. The United States in an amicus curiae indicated that the Ninth Circuit’s interpretation of the agency’s regulation was in error, and that HUD’s plausible language explaining the regulation likewise supported 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 in the Court and the Solicitor General concurred in it).

Perhaps it is too much to expect the busy justices to flock 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 interpretation, such that an 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 is all the more so with the question in Kelley v. EP/LS EM 1008 (DC, Cir. 1994), cert. denied, 513 U.S. 1101 (1995). In Kelley, EPA had issued an interpretation regarding who the agency believed could be liable for clean ups of hazardous waste releases under the
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 Dowel was whether the Commissioner’s authority to assign those retirees expired on that date so that they could never be assigned to any existing operator.

Janice Scalla, 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 unsigned 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.

Janice Scalla, writing for herself and Justices O’Connor and Thomas, dissented. In her view the statutory deadlines by their terms limited the statutory authority of the Commissioner to assign retirees, and he rested the majority’s 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 the issue 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.

Constraining Evidentiary Privileges Narrowly

A conflict between federal regulatory activities and state tort law arose in Pierce County Wash. v. Gallion, 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 those surveys as a basis for lawsuits against states and localities and because the U.S. Department of Transportation believed the use of this

Comprehensive Environmental Response Compensation and Liability Act. Although EPA is the agency responsible for implementing clear up 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 v. Merida. As in Kelly, 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 Kelly and its limitation on the applicability of Chevron (or Skidmore) deference has been undermined.
information interfered with the states making proper surveys. Congress amended the Act to bar any “data compiled or collected for the purpose of surveys from being subject to discovery or admitted into evidence in a Federal or State court proceeding.” In Goodyear, 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. The Court held that the police reports were not barred, but the agency report based on the police reports was.

On the constitutional issue, the Court noted that Congress has the power to regulate the use of channels of interstate commerce. The survey requirement itself was intended to protect the safety of the highways, and the bar on their use in a state court with respect to 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 of that data actually 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.

In Bankruptcy and the FCC

In Bankruptcy and the FCC

The Federal Court in a unanimous opinion by Justice Thomas determined that the bankruptcy provision was aimed at stopping the bankruptcy process. 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.
One, in particular, finds agency inaction to be reviewable for the areas would meet that test. This aspect of the agency's decisionmaking process. Only the ultimate plans 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." These 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 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 requirements of the respective OPM regulations is not feasible." The court remanded the case for the District Court to 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 Elco-Carl Tobacco Co-operative Stabilization Corp v. U.S. EPA, 314 F.3d 1146 (9th Cir. 2002), Plaintiffs alleged that the agency had failed to fulfill its statutory 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." 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.
The doctrine or deference in light of the strength of deference applied, and does not give any force to a doctrine when it wrote that, “After Bennett v. Spear, the parties agreed that the report constituted the ‘consummation’ of the agency’s decision-making process.” The decision 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 D.C. Circuit had found final action in the practical effects of the report, including a GOA decision to ban smoking in government vehicles. The Fourth Circuit reversed this reasoning. The fact that another government agency or other third parties might take actions based on the report, 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 calculus ballooned exponentially in three recent circuit decisions. Even when statutory clarity foreclosed consideration of Chevron defenses, judges are not immune from asserting their own understandings of Chevron doctrine. In Kaskadden v. Republic Title Co., 314 F.3d 675 (7th Cir. 2002), Judge Posner wrote of Barnett v. Holewe as having achieved a merger of Skidmore and Chevron and suggested that Chevron might be viewed as undeniably “injudgmental. In judging a private dispute, Judge Posner seemed prepared to apply Chevron deference in light of the strength of delegations 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 concurrence opinion, Judge Easterbrook argued that “in private litigation, Chevron does not give any force to a declaration unaccompanied by the formalities of rule-making or administrative adjudication.” He also disputed the proposition that Barnett 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 very court 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 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 well analogous to a rule, and (4) the permit was issued after following procedures under the National Environmental Policy Act, which constitutes 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 “essentially different statute, NEPA in this case, may suffice to support Chevron deference.”

Finally, BitWise Telecommunications, Inc. v. McClure-Access Transmission Services, Inc., 317 F.3d 1205 (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 reason for treating the statute pan. Like a statute, an agency interpretation is entitled to deference.
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 drew on 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 trouble for this case was that FERC relied upon the “good cause” exception for several years to avoid going through notice and comment. 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. The court disagreed. If a new policy statement is “the substance of an existing rule,” it must go through notice and comment. "It is not enough that the two statements are similar, even if the later statement covers a broader range of topics." The court held that the 1995 statement was not a rule and the new statement was not valid as an interpretive statement.

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

By Michael Asimow1

Can an agency order a disciplined licensee to pay the agency’s costs of investigating and prosecuting him? Yes, declares the California Supreme Court. In Zuckerman v. Bd. of Chiropractic Examiners, 124 Cal. Rptr.2d 710 (2002), the Board revoked Zuckerman’s license for sexual misconduct toward his patients, and for good measure, socked him with $17,501 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. The severity of the penalty, full cost reimbursement would be inappropriate 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 CIPA 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.

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

By Myles E. Eastwood2

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 these exercises of discretion will be unreviewable in court under California’s independent judgment test!

But surprise! In Zuckerman, the Court distinguished CIPA 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 CIPA). In part, the distinction was based on custom—making the loser pay investigation costs is routine in other states, but making the loser pay hearing 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 CIPA.

In deference to CIPA, 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 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 license 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 unreviewable in court under California’s independent judgment test!

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 (interpreting as of the time this article was written) on whether he is of sufficient moral character to receive the license.

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By Myles E. Eastwood2

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 these exercises of discretion will be unreviewable in court under California’s independent judgment test!

But surprise: In Zuckerman, the Court distinguished CIPA 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 CIPA). In part, the distinction was based on custom—making the loser pay investigation costs is routine in other states, but making the loser pay hearing 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 CIPA.

In deference to CIPA, 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 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 license 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 unreviewable in court under California’s independent judgment test!

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 (interpreting as of the time this article was written) on whether he is of sufficient moral character to receive the license.
Suggested Improvements for APA’s Adjudication Provisions

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 the “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 recommenda-
tions for the adjudication sections of the APA. Hopefully, this set of suggested improvements will result in a recommend-
ation 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 clipping 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 specify Department of Veterans Affairs (“VA”) decisions in appropriate cases when it deems a case for further administrative proceedings to be justified.

The resolution also supports federal legislation to require the CAVC to resolve all dispositive allega-
tions 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 from procedures that ensure merit selection and decisional independence.

The compelling 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 Kaler and council member Michael Asimow convinc-
ingly 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” 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.

It further urges Congress, in coordination with the Executive Branch, to establish clear standards and proce-
dures governing the designation and treatment of U.S. citizens, residents, or others who are detained within the United States as “enemy combatants.”
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 threat to public health, 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 unregulated entrepreneur may not agree with health regulations, but they are necessary to ensure that businesses do not endanger the public. Government has 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.

Amendments to the Constitution and adherence 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. § 2039, regarding the use of Federal wiretap authority.

The original proposal made no provision for closing oversight hearings in the interest of national security and contemplated that the Attorney General have a bona fide, not insubstantial, foreign intelligence purpose when seeking warrants and sharing information. After hearing from Delegate Ernie Gellhorn, council member 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 amendments to the Act to clarify that the procedures 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. § 2039, regarding the use of Federal wiretap authority.

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approach might have been taken by the federal govern-
draft the law only because a much more draconian
excesses of government. Indeed, the CLPH agreed to
health threats, while guarding against the potential
for effective identification and response to emerging
constitutional democracy.
reinforcing the importance of dignity and equality in a
beyond the safeguards in existing public health statutes,
human care and treatment of persons. This goes far
significant risk, the least restrictive alternative, and
throughout. It adheres to the civil liberties principles of
moment and the states acting on their own and responding
to public fear and misapprehensions. This is not to sug-
gment that the Model Act strikes the perfect balance
between personal freedoms and public good. But it
does recognize the inherent tradeoffs necessary and asks
a fair weighing of values. The MSEHPA was designed to
defend personal as well as collective interests. In a coun-
try so tied to rights rhetoric, on both sides of the political
spectrum, any proposal that has the appearance of
strengthening governmental authority is bound to
travel in tumultuous political water.

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 swirlled 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 long-
standing 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 does not progress once exposure ends, and that
“mythology” was the only basis for believing that pneu-
moconiosis is progressive. The parties’ battles over this
issue throughout the 1990s signaled the need for defini-
tive guidance by the Department of Labor. In its rule-
making, 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
was not arbitrary under the Administrative Procedure Act
or inconsistent with black lung legislation.

Treating physicians. Confusion has also marred anoth-
er 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 diagnosis of disease, disability,
and disability causation, in effect arguing what a disquieting

judge articulated in Grizzle v Pickands Mather & Co., 994
F2d 1093, 1101 (4th Cir.1993): “[W]e should not forget
that the mining physician knows his patient as a human
being rather than as a claim number, and his opinion is
generally developed in an attempt to treat the patient
rather than to provide an opinion for hire.” However, the
weight permissibly given by ALJ to the medical opinion
of a treating physician has not always been clear. In its
ruling, 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
to medical judgment. 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 could affect 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
readiness of decision makers to the regulations’ spirit and
letter. The concept of due process is now a more promi-
nent part of the legal (and moral) landscape of the coal-
fields, but a true understanding of the terrain must await
the experience of the rules in action.
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