

ADMINISTRATIVE & REGULATORY LAW NEWS

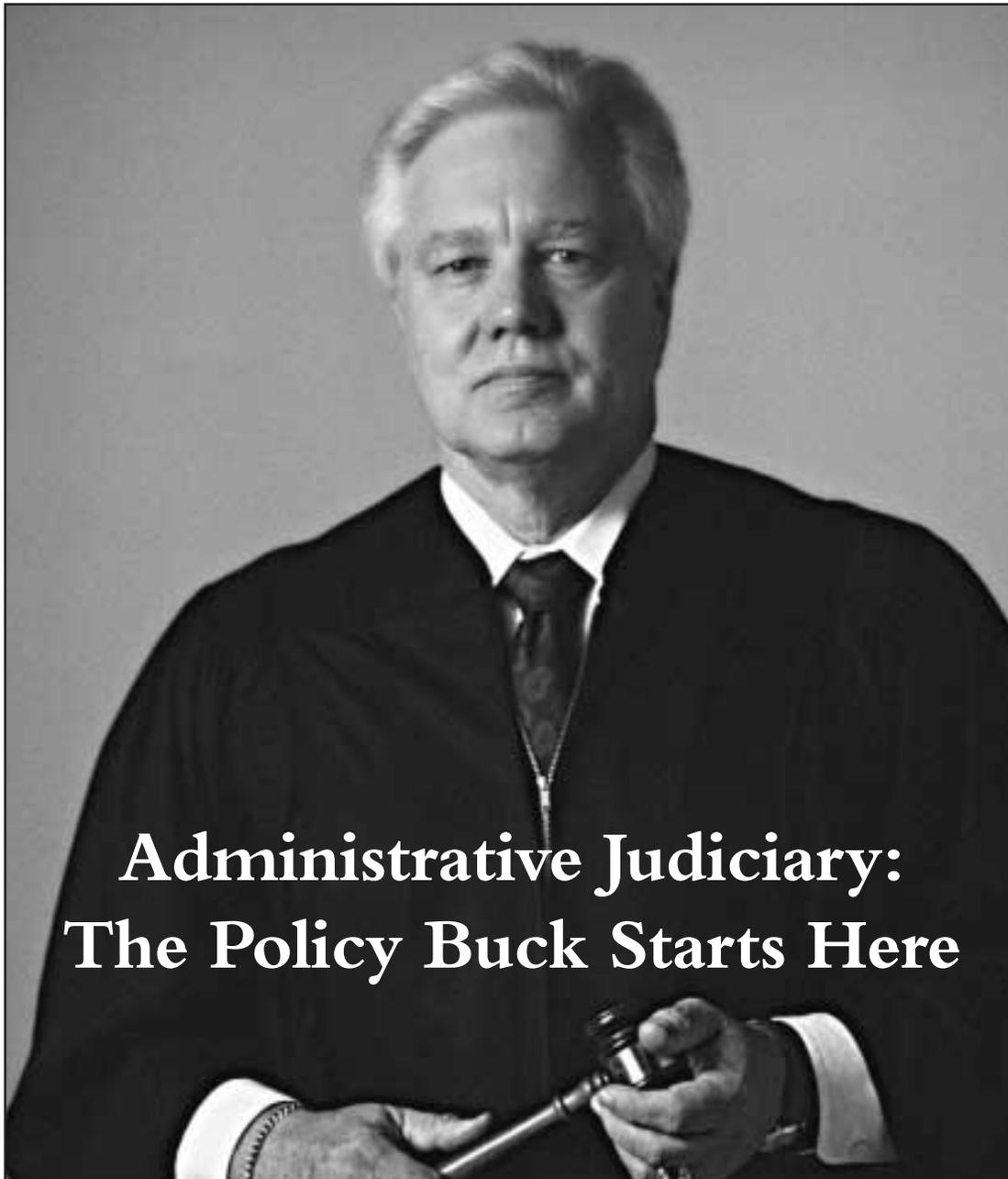


Section of Administrative Law & Regulatory Practice

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Administrative Judiciary: The Policy Buck Starts Here

Also In This Issue

- Randy May on OMB's Peer Review Proposal
- Eleanor Kinney on Medicare Appeals Reform
- Peter Strauss on the Section's E-Rulemaking Survey
- Michael Fitzpatrick on Emergency Rulemaking After 9/11

Midyear Meeting Scrapbook



Crockett's Last Stand



Riverdance out. Riverwalk in.



Council member John Duffy, Tom Morgan and Section Chair Bill Funk pose for the camera at the Riverwalk reception.



Chair-Elect Randy May and Council member Sid Shapiro deep in discussion at the Riverwalk reception.



A light-hearted moment for Homeland Security panelists Daniel J. Metcalfe, Prof. Wendy Wagner, Jamie Conrad, moderator Lynne K. Zusman, and Past Section Chair James T. O'Reilly.

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ADMINISTRATIVE & REGULATORY LAW NEWS

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Policymaking by the Administrative Judiciary

by Charles H. Koch, Jr.¹

Administrative agencies usually have significant policymaking responsibilities, and they may use their adjudicative processes as well as rulemaking and other general policy pronouncements to develop that policy. The authority to use adjudication for this purpose is well established but the understanding of the internal process for doing so is somewhat underdeveloped. This article takes a look at the allocation of policymaking function within the adjudicative process and the roles of adjudicators at all levels. Analyzing the policy role of the initial adjudicator, the administrative judge, is particularly vital because the administrative judges' function determines the role of the other adjudicators in the adjudicative hierarchy, including the agency head.

Comprehensive understanding of this process has become more urgent in recent years because of a growing movement to insulate adjudicators from the agency policymakers. In the federal system, that movement has generally taken the form of the "split-function" system in which one agency division makes policy and another adjudicates the application of that policy. In the states, the movement has taken the form of "central panels" in which administrative judges are taken from the policymaking agency and housed in an independent hearing agency. More troubling in that context is the emerging trend to eliminate the policymaking agency from the adjudicative process altogether. To understand the practical implications of this movement, it is necessary to understand

the role of administrative judges in adjudicative policymaking.

Since *Chenery II*,² as confirmed by *Wyman-Gordon*,³ the Supreme Court has recognized not only the legality but the advantages of allowing agencies to make policy through adjudication. Of course, policymaking in the judicial process is a signature characteristic of the common law, but the general acceptance of policymaking in administrative adjudication is based on more than tradition. Unlike courts, agencies generally possess procedures specifically designed for general policy development, such as the power to adopt various types of rules.

Indeed, Justice Jackson in *Chenery II* and Justice Douglas in *Wyman-Gordon* would have limited agencies to policymaking in this form. Jackson argued that it is fairer to announce a policy before it is applied, and Douglas urged that adjudicative policymaking circumvents participatory rights fostered by rulemaking. Courts and commentators have accepted adjudicative policymaking despite these persuasive arguments because they recognize the operational sensitivity and individualizing impact of interstitial adjudicative policy development and the dynamic force adjudications add to the administrative policy arsenal. Thus, neither view has gained traction in the federal system, although some state statutes and court decisions have "required" rulemaking in limited circumstances.

Precedent is one form of expression of agency policy. To some extent, administrative judges must obey the superior authority represented in prior agency decisions. While *stare decisis*, in the sense of strict obedience to precedents, has not been applied to administrative decisions, the values of consistency, predictability and equal treatment require that administrative judges not ignore precedent. On the other hand, a certain amount of

disobedience allows the process to be dynamic, to change with circumstance, and to show sensitivity to individual cases. Policy initiatives at the hearing level percolate up through the adjudicative machinery and thereby enhance the agency's ultimate policy decisions. While recognizing the benefit of some disobedience by lower level adjudicators, however, commentators generally counsel caution. Administrative judges lack the information and broad perspective necessary to finally determine general policy. In the end, the system works best when administrative judges selectively venture policy disobedience, with the administrative review authority (either the agency head or its representative) assuring consistency and uniformity.

The policy role of administrative judges is also defined by agency rules and other policy pronouncements. Agencies must obey their own rules, and administrative adjudicators must do so as well. In general, administrative judges must obey not only legislative rules (meaning those made pursuant to delegated authority) but non-legislative rules also. However, this principle is not without exceptions. Agencies may change their rules or the interpretation of their rules if they can justify those changes. Thus, when a rule is applied in adjudication, administrative judges must have some authority to disobey that rule for the same reasons they may disobey superior precedent when initiating adjustments in specific adjudications as compelled by unforeseen consequences. Witness the Supreme Court's decision in *Morton v. Ruiz*⁴ prohibiting agencies from relying on their rules in the face of demonstrable individual unfairness. Fulfillment of this command must begin at the hearing level, and hence, again, it is the administrative judge who identifies opportunities for improvements in agency policy. As with precedents, some reluctant disobe-

¹ Dudley W. Woodbridge Professor, College of William and Mary, Marshall-Wythe School of Law.

² *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

³ *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

⁴ 415 U.S. 199 (1974).

dience seems necessary to dynamic and sensitive adjudicative policy development. But, as with precedent, this process demands a single authority to maintain stability, consistency, and equal treatment.

Administrative judges perform another crucial policy related role: development of the policy portions of the adjudicative record. The judicial process, in the administrative context as well as the conventional, is not the best way to develop a policy oriented record and hence administrative law generally prefers rulemaking. When policy issues are confronted in adjudication, however, resolution of those issues require the requisite information. The onus is on the agency and, if the record is inadequate for policy resolution, the agency cannot justify its decisions. Yet, in our system, the parties are generally responsible for making the record, and they cannot be expected to develop the legislative facts and range of opinion that might contribute to the resolution of policy issues tangential to their case. Thus the judge must take responsibility for assuring an adequate policymaking record. Doing so requires the judge to balance the litigation rights of the parties with the general policymaking needs of the agency.

So administrative judges have crucial roles in the development of policy in adjudication. For this reason, potential influences on judges must be confronted and analyzed. Behavioral studies of judges provide some understanding of judicial decisionmaking. We know something of the potential cognitive distortions in judicial decisionmaking. For example, we know that judges are affected by their careers, both past and future. On the other hand, somewhat surprisingly, studies suggest that judges are not influenced by social factors or naked partisanship, although these characteristics go to make up the person. The best news is that judges will likely behave with integrity and competence if we expect them to, and agencies should be guided by this finding in their treatment of administrative judges. If administrative judges are to deviate on occasion from the agency's

policy, they must understand where they *should* find their own policy perspective and what biases and improprieties need to be avoided.

Each level of the administrative adjudicative machinery contributes to the success of agency policymaking. In essence, hearing level judges identify defects, suggest adjustments, and assure an adequate record for making adjustments. The administrative review authority assures broader perspective, uniformity, and predictability. Administrative law for generations has recognized the value of allowing agencies a variety of policymaking vehicles, including adjudicative policymaking. Unfortunately, some state systems now empower the hearing level adjudicators to make the "final decision" without distinguishing specific, adjudicative facts from policy and the legislative facts that support it. These systems rob the administrative process of much of its richness and cut agencies off from a major policymaking resource. Evidence suggests that it also frustrates administrative adjudicators in their desire to contribute to agency policy.

Policymaking is the defining task of the administrative process. But this process becomes vulnerable when policymaking is conflated with statutory interpretation. For generations, administrative law has relied on a working distinction between policymaking and statutory interpretation. When Justice Stevens in *Chevron*⁵ distinguished between a category of pronouncements which when "fairly conceptualized, really centers on the wisdom of the agency's policy" and those which purport to be "a reasonable choice within a gap left open by Congress," he was calling up a distinction that has been fundamental in administrative law since *Chenery I*.⁶ The policy against insider trading in *Chenery* was no more an interpretation of the Public Utility Holding Company Act than the Holding Company Act was an interpretation of the Commerce Clause. Courts interpret and apply statutory language, but specially empowered agencies become necessary when more is required—when policy must be made not merely found. If this special competence and authority of administrative agencies is denied, agencies

become just another type of interpreter. Yet, in adjudicative policymaking, as in rulemaking, agencies are not to parse language, delve into legislative history, or engage in the other interpretive techniques. Instead, their task is to implement the statutory scheme, to make permissible but not mandated judgments based on legislative facts. In carrying out this responsibility, agencies should employ every resource, including the special perspective and expertise of hearing level judges. These judges can make a vital contribution short of assuming final policymaking authority. This article therefore champions that contribution and advocates that each program develop techniques for facilitating it. ○

In Memoriam

The Section mourns the passing of long-time Section leader Stephen Frederick Owen, Jr.

Mr. Owen was born in Springfield, Massachusetts on April 9, 1934, and resided in Bethesda, MD, at the time of his death on February 27, 2004.

Mr. Owen was an active member and leader of the Section, serving as Chair and Vice Chair of the Postal Matters Committee, for many years.

Those who knew Mr. Owen appreciated his hearty sense of humor.

Mr. Owen was the beloved husband of Mary Lani Owen; father of Tara A. Owen, Stephen F. Owen, III, Meredith D. Owen and Jonathan J. Owen.

Mr. Owen is also survived by his granddaughter Bailey G. Owen.

⁵ *Chevron USA Inc. v. NRDC*, 467 U.S. 837 (1984).

⁶ *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

OMB's Peer Review Proposal — Swamped By Science?

by Randolph J. May¹

With my deregulatory bent, I view proposed new regulations with a healthy dose of skepticism, asking myself whether they will achieve their regulatory objective in the most cost-effective, least burdensome manner. Especially with respect to health, safety, and environmental regulations, I also ask whether they are based on sound science and reliable technical information. Nevertheless, I still question whether the Office of Management and Budget's pending proposal to implement a government-wide mandatory peer review requirement to vouchsafe scientific and technical information used to support federal agency regulatory actions makes sense.²

For major regulatory actions — generally those that have a substantial impact on important public policies or private sector decisions with a possible impact of more than \$100 million in any one year — OMB proposes that agencies engage in a “formal, independent, external peer review” of scientific information. The peer review must comply with very specific requirements. Despite what I grant are worthy intentions, I'm concerned that the costs of OMB's proposal in aggravating an already rigid

and time-consuming rulemaking process outweigh its benefits, at least as it is currently formulated.

OMB'S Peer Review Rationale

OMB points out that for decades, academic and scientific communities have withheld approval from scientific studies that have not been subject to independent peer review, which it defines as “a scientifically rigorous review and critique of a study's methods, results, and findings by others in the field with requisite training and expertise.”³

To provide transparency to a process that generally has occurred on a confidential basis, OMB would require that the identities, qualifications, and affiliations of the peer reviewers be made public, along with the information provided to the peer reviewers by the agency. The new regulations would also require that the public be allowed to comment on the information made available to the peer reviewers before they prepare their report. Then, the agency itself must prepare and disseminate a written response to the peer review report. Finally, all of these materials must be included in the administrative record of any related rulemaking proceedings.

The peer review proposal is part of what John Graham, the Administrator of OMB's Office of Information and Regulatory Affairs, has described as the OMB's expanded “information policy” function to improve the quality of information that agencies disseminate to the public.⁴ Along with more openness in deliberation and better regulatory analysis, improving information quality is a key element in the cause of Dr. Graham's “smarter regulation” initiative.

I commend Dr. Graham's various efforts to achieve “smarter regulation”. For example, he has taken steps to

further enhance the transparency of OMB's regulatory review process and adopted new techniques, such as “prompt” letters, to call attention to regulatory issues warranting agency attention. Trying to ensure that proposed agency regulations are based, as much as possible, on reliable scientific information is an important regulatory objective. Unlike some others, I recognize that the OMB has an important, if nevertheless delicate, role to play in coordinating the administration's regulatory policies among the various agencies, each with its own statutory delegations.

An Invitation For Regulatory Ossification

On one level, of course, OMB's peer review proposal embodies good common sense. In theory, no one wants regulations to be based on “junk science.” In practice, however, it's not so easy to draw the line between science and politics. In recent years, we've witnessed the hurling of the “junk science” epitaph back and forth by all sides regarding studies submitted in many high-profile policy disputes. For example, those favoring and opposing regulation don't agree whether the scientific studies demonstrate that global warming is a real phenomenon, much less whether anything humankind is doing is responsible for any change. They also don't agree about the science behind the Food and Drug Administration's recent warning concerning the health impacts of eating fish with higher mercury concentrations. And they certainly don't agree about the science behind the ergonomics rule adopted by the Occupational Safety and Health Administration, which Congress then overturned.

What nags at me about the wisdom of the OMB's proposal is the formalizing of

¹ Randolph J. May is Section Chair-Elect and a Senior Fellow at The Progress & Freedom Foundation, Washington, DC. The views expressed are his own. A substantially similar version of this article appeared in *Legal Times* on January 19, 2004.

² See Proposed Bulletin on Peer Review and Information Quality, Office of the Management and Budget, 68 Fed. Reg. 54,023 (Sept. 15, 2003). For a more comprehensive description of the proposal, see Jeffrey S. Lubbers, *OMB to Require Peer Review for Regulatory Science Documents*, ADMINISTRATIVE & REGULATORY LAW NEWS, Fall 2003, at 3.

³ 68 Fed. Reg. at 54,024.

⁴ See the excerpt from the remarks of John D. Graham in Randolph J. May, *The 2003 Administrative Law Conference*, ADMINISTRATIVE & REGULATORY LAW NEWS, Winter 2004.

yet another government-wide mandatory regulatory analysis requirement. It likely represents another step toward what University of Texas law professor Thomas McGarity in a 1992 Duke Law Journal article called the “ossification” of the rule-making process.⁵ “Ossification” refers to what by 1992 already had become a quite rigid and burdensome rulemaking process that made the adoption of new regulations increasingly time-consuming and costly. McGarity attributed the ossification, in large part, to new analytical requirements imposed on agency rulemaking activity by Congress, the executive branch, and the courts, above and beyond the simple notice-and-comment rulemaking model contained in the Administrative Procedure Act.

Today the list of mandatory analytical requirements with which agencies must comply before issuing new rules (or getting rid of outdated or unnecessary ones) has grown even longer. Consider this partial compendium: The Paperwork Reduction Act’s information collection assessments; the Regulatory Flexibility Act’s assessments of small business impacts and regulatory alternatives; the Unfunded Mandates Reform Act’s assessment of unfunded mandates on state and local governments and the private sector; Executive Order No. 12,866’s costs-benefit analysis requirements; and still other executive orders requiring assessments of federalism, takings-clause, and litigation impacts.⁶ Some of these impact analyses overlap, and to some extent agencies may minimize redundancy and resource burdens by combining them into a larger regulatory impact document. Nonetheless, the plethora of existing mandates should caution against formalizing new across-the-board rulemaking requirements in ways that may add unnecessary delay and expense to the regulatory process without countervailing benefits.

In its proposal, OMB acknowledges that most agencies already have peer review policies in place, but says that some do not always follow their own policies. Rather than imposing a uniform government-wide mandate, OMB should allow individual agencies to continue improving their own peer review policies. Then, in carrying out its legitimate regulatory oversight function, OMB could pay particular attention to those agencies it believes need the closest scrutiny regarding their peer review practices.

Equally important, even in rulemaking proceedings with major impacts, there may well be scientific information used by the agency that is not really controversial or novel. It is unnecessarily time-consuming and burdensome to apply the formal external peer review requirements to this information, as the OMB proposal apparently requires.

Reforming the Review

Apart from these overbreadth concerns, there are some specific ways OMB’s proposal can be improved. For example, OMB states that peer reviewers should be selected primarily on the basis of possessing necessary expertise and that the agencies should select reviewers who are independent of the regulating agency, do not possess conflicts of interest, and are capable of approaching the subject matter in an unbiased manner. All good points. In listing factors relevant to satisfying these criteria, however, OMB refers only to whether the individual is currently receiving or seeking funding from the agency, not from industries regulated by the agency. While neither should be absolutely disqualifying in my view, the fact that a potential reviewer has received industry funding is as relevant a factor as the receipt of agency funding.

On a related note, OMB proposes that if it is necessary to select a reviewer who is or appears to be biased in order to obtain a panel with appropriate expertise, a reviewer “with a contrary bias” must be appointed. This notion of balancing contrary biases, and the fighting likely to ensue over the panel’s composition, illustrates why, as a practical

matter, overly formalized mandatory procedures are likely to lead to a more time-consuming rulemaking process. This strict bias-balancing requirement should give way to the more flexible notion that it is sufficient for the panel to be broadly representative.

Finally, while in one sense it is commendable that the OMB proposes to provide for public comment on the information to be peer-reviewed before the reviewers prepare their report, again, as a practical matter, this additional step in the regulatory process will lead to further rulemaking delays.

So, while I certainly agree that agencies should, to the maximum extent practicable, ensure their regulations are based on reliable information and sound science, I’m not convinced that OMB’s proposal, as currently formulated, makes sense. Typically, in rule makings there are at least two rounds of public comment, and then back-and-forth *ex parte* submissions right up to decision day, all available electronically. Also, we now live in an age of easy and widespread public dissemination of regulatory information on the Internet through agency Web sites. Interested parties on all sides generally have ample opportunity to challenge — in other words, to peer review — controversial scientific information in the context of the existing notice-and-comment rulemaking process before new policies are adopted. In the Internet Age, do we really need to mandate a new formally structured peer review process on top of existing rulemaking procedures and protections?

While some may suggest that further ossification of rulemaking is actually desirable because it delays or inhibits unwise or unduly burdensome new regulations, there are better ways to accomplish that worthy goal. For starters, Congress can provide agencies with more specific deregulatory guidance in statutory delegations and engage in more forceful oversight. And the president can appoint regulators committed, where feasible, to market-oriented solutions. After all, it is ultimately the responsibility of the agencies and of the reviewing courts, rather than of outside parties such

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⁵ Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 1992 DUKE L.J. 1385.

⁶ For more on the various regulatory impact analyses now required, see Jeffrey S. Lubbers, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 160-179 (ABA Publishing, 3d ed. 1998).

Changes in the Adjudication of Medicare Beneficiary Appeals in the New Medicare Prescription Drug Legislation: Reform or Retreat?

By Eleanor D. Kinney¹

The new Medicare prescription drug legislation authorizes the transfer of the functions of administrative law judges (ALJs) hearing Medicare appeals from the Social Security Administration (SSA) to US Department of Health and Human Services (HHS) by Oct. 1, 2005.² By April 1, 2004, the Secretary of HHS and the Commissioner of SSA must submit a plan to Congress on how this transfer of functions will occur. The United States General Accounting Office (GAO) must evaluate the plan and report to Congress on its evaluation before transfer occurs.

The statute proceeds with unusual detail to specify what the transfer plan should address. For example, the plan must specify the number of ALJs and support staff needed to handle cases in a timely manner accounting for anticipated claims volume, appeals, beneficiary

increases and statutory changes. The plan must include development of a unified case tracking system. The plan must analyze the feasibility of giving HHS Departmental Appeals Board decisions addressing broad legal issues binding and precedential authority. Further, the plan must address the feasibility of filing appeals with ALJs electronically, and also conducting hearings using teleconferencing or video-conference technologies. Finally, the plan must address the independence, geographic distribution and training of ALJs.

Once the transfer occurs, the statute requires that HHS assure the independence of ALJs from Centers for Medicare and Medicaid Services (CMS) and its contractors by locating Medicare ALJs in an office “organizationally and functionally separate” from CMS. The ALJ office will report the Secretary but “shall not report to, or be subject to supervision by” any other officer in HHS. The Secretary must also provide for an appropriate geographic distribution of ALJs performing ALJ functions throughout the U.S. to ensure timely access for beneficiaries.

What is going on here? Clearly Congress distrusts HHS and particularly CMS to develop and implement a fair and adequate system for the adjudication of disputed beneficiary claims under the Medicare program. These mandates are out of ad law 101 and hardly seem necessary in a simple transfer of adjudication functions between agencies.

This distrust is completely understandable. Medicare is an extremely popular program that guarantees access to increasingly expensive health care to the elderly and severely disabled. Its costs are

escalating and a consensus on solutions illusive. In February, Federal Reserve Board Chairman Alan Greenspan estimated that Medicare would constitute 12 percent of the federal budget in 2030.³ CMS is vigilant in trying to control Medicare program expenditures and clearly believes that many ALJ decisions are not consistent with this important goal.

This transition has been brewing for years as CMS and its predecessor the Health Care Financing Administration (HCFA) have sought to get control over Medicare appeals. In 1985, Congress expanded appeal rights for Medicare beneficiaries and established administrative review for Part B claims of \$500 and above and judicial review for claims of \$1,000 or above.⁴ Following this expansion, HCFA sought to create an ALJ corps within HCFA and stop using the SSA ALJ corps, which are ALJs under the Administrative Procedure Act (APA).

Under this early proposal, a centralized Medicare ALJ corps would handle all Medicare appeals, with up to 50 percent of hearings being held over the telephone. HCFA reasoned that a central ALJ corps would be more expert in Medicare law, regulations and policies, and therefore would make better decisions both for beneficiaries and the Medicare program. HCFA maintained that the central corps would reduce adjudication costs by half and allow decisions, which had to wait in line in the SSA system, to be resolved faster. GAO, required by law to review the proposal, opposed the proposal, particularly because the proposed procedures for

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² Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), Pub. L. No. PL 108-173, § 931, 17 Stat. 2066 (2003) (to be codified at 42 U.S.C. §1935 ff note).

³ Hearing before the Committee on the Budget, U.S. House of Representatives on Economic Outlook and Current Fiscal Issues (Feb. 25, 2004) (Testimony of Chairman Alan Greenspan, Chairman, Federal Reserve Board).

⁴ Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9341(a), 100 Stat. 1874 (1986) codified at 42 U.S.C. § 1395ff(b)).

telephone hearings among others had not been tested.⁵

Since 1985, HCFA and now CMS have maintained their concerns about the adjudication of Medicare appeals. CMS and HCFA have always maintained that SSA ALJ reversal rates are too high because the ALJs are too independent and out of touch with the realities, e.g., escalating costs, facing the Medicare program. Also, as the ALJs were only bound by the law, legislative rules and HCFA rulings, ALJs often disregarded HCFA manuals as well as national and local coverage determinations in their decisions. Yet CMS' proposals for a central Medicare ALJ corps in CMS have seemed more disposed toward controlling the outcomes in Medicare appeals rather than achieving justice for beneficiaries. Indeed, in March 2003, the *New York Times* had a front page article criticizing CMS proposals as compromising fairness in the beneficiary appeals process.⁶ The SSA ALJs, whose independence is protected under the APA, are proud of their independence and also of their work for the Medicare program. A thoughtful article by an SSA ALJ has praised the current system of

Medicare appeals as quite just and fair to beneficiaries.⁷

The controversy over the design and location of the Medicare appeals process is a fight for control between CMS and the constituencies that want a more generous Medicare program. For the Medicare Part B beneficiary appeals process is the battlefield where issues over Medicare coverage of new medical technologies and procedures are fought. CMS wants more control over the appeals process to lower costs. Beneficiaries and the health industry manufacturers prefer the current process with more independence of critical decision-makers.

In 2000, largely responding to concerns from medical device manufacturers, Congress enacted major changes in the Medicare coverage decision-making and appeal processes, including a requirement that ALJs follow national and local coverage decisions.⁸ In the new Medicare prescription drug legislation, Congress has continued the effort to reform the processes by which Medicare makes decisions about coverage of new medical technologies and procedures as well as adjudicates disputes over coverage in the cases of individual Medicare beneficiaries in the new prescription drug legislation.

Whatever one might say about the substantive merits of this legislation, the provisions pertaining to the procedural changes for Medicare coverage decision-making and appeals strengthen these processes, which face formidable challenges. In addition to the transfer of the ALJ function to HHS, the legislation establishes expedited judicial review for beneficiaries and, remarkably, the beneficiaries' providers or suppliers, where the ALJ or other adjudicator determines that there are no material facts in dispute and the HHS Departmental Appeals Board has no authority to decide the question of law or regulation relevant to the matters in controversy⁹. At that point, the beneficiary, provider or supplier may sue in the local federal district court.

This extraordinary provision opens up challenges to Medicare coverage determinations and other issues to providers or suppliers who have not had such direct appeal rights to date. The provision

accommodates the reality that suppliers of new medical devices and providers offering new medical technologies also have important and ongoing interests in disputed coverage issues. The new procedure allows these interests to be frankly vetted in a forum in which CMS can also forthrightly respond.

In addition, the new legislation makes some changes in the Medicare coverage decision-making process¹⁰. Effective January 1, 2004, requests for national coverage determinations (NCD) that do not require a formal technology assessment or review by the Medicare Coverage Advisory Committee, must be made within six months of the completed request. Otherwise, determinations must be made within nine months. For all requests, CMS must mount a draft of the proposed decision on its CMS website (or other appropriate venue) for a 30 day public comment period. CMS must issue the final NCD within 60 days with a summary of the public comments received and CMS' responses to the comments. This reform can only enhance the accountability of the CMS' decision on an NCD and make it easier for providers, ALJs, and, most importantly, beneficiaries to accept the NCD as authoritative.

A final procedural reform of great interest is the establishment within HHS of a Medicare Beneficiary Ombudsman with expertise and experience in health care.¹¹ The Medicare Beneficiary Ombudsman can assist Medicare beneficiaries with complaints, grievances, and requests for information with respect to any aspect of the Medicare program, including appeals from adverse determinations by Medicare contractors. However, the Ombudsman shall not serve as an advocate for any increases in payments or new coverage of services but may identify issues and problems in payment or coverage policies. Nevertheless, the new Ombudsman is an important enhancement for the protection of beneficiaries' interests in the Medicare program.

In closing, whether these new Medicare procedures represent a reform

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⁵ U.S. General Accounting Office, Medicare Claims: HCFA Proposal to Establish an Administrative Law Judge Unit, GAO/HRD-88-84BR (Apr. 1988).

⁶ Robert Pear, *Bush Pushes Plan to Curb Medicare Appeals*, NEW YORK TIMES (Mar. 15, 2003).

⁷ Jeffrey Scott Wolfe, *Alternative Dispute Resolution In The Twenty-First Century: Across The Ripple Of Time: The Future Of Alternative (Or, Is It "Appropriate?") Dispute Resolution*, 36 TULSA L.J. 785 (2001).

⁸ Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000, Pub. L. No. 106-554, Consolidated Appropriation — FY 2001, Appendix F, §§ 521& 522 (2000), 114 Stat. 2763, 2763H-72 – H-85 (to be codified at 42 U.S.C. §1935 ff). See ELEANOR D. KINNEY (ED.), GUIDE TO MEDICARE COVERAGE DECISION-MAKING AND APPEALS (Chicago: ABA Publishing, 2002).

⁹ MMA § 932 (to codified at 42 U.S.C. § 1395ff).

¹⁰ MMA § 731 (to codified at 42 U.S.C. § 1395y).

¹¹ MMA § 923 (to codified at 42 U.S.C. § 1395b-9).

The ABA Ad Law Section's E Rulemaking Survey

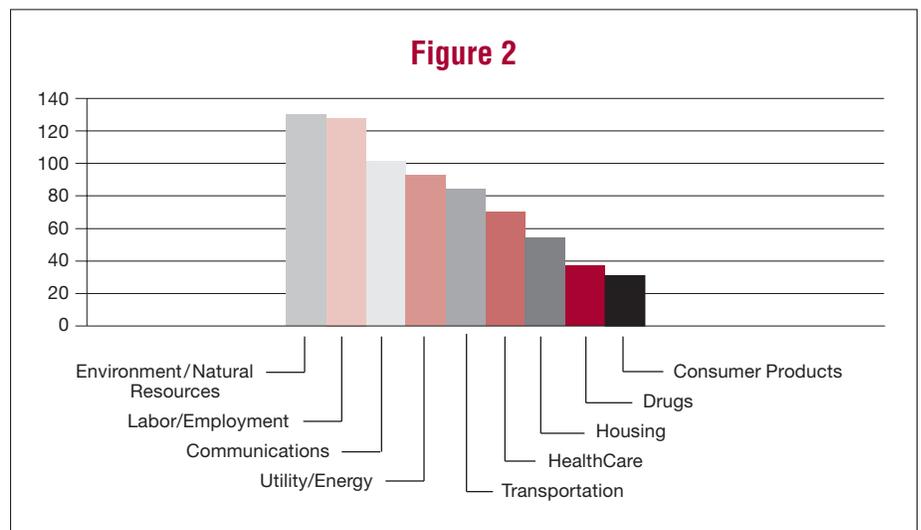
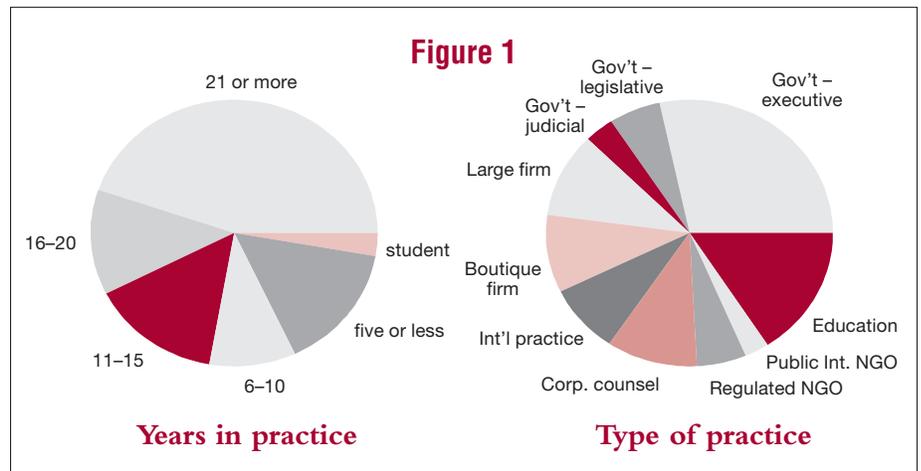
By Peter Strauss¹

This article summarizes the results of a survey taken last spring among members of the ABA's Section on Administrative Law and Regulatory Practice. There has evidently been much change since then, and the survey did not purport to cover all areas of possible concern — for example, whether and in what ways the creation and administration of a government-wide standard might, desirably or undesirably, enhance White House controls over rulemaking processes. Nonetheless, the reports should be interesting to Section members, and suggest some lines worthy of further consideration as the government continues to develop its E-Rulemaking initiative.

Three hundred twenty section members responded to the Survey, which was posted on the Section website, and used a proprietary, web-based survey software known as Survey Gold. As figure one shows, respondents were about equally divided between attorneys in private practice, and government attorneys or academicians; almost half had been in practice for more than 20 years.

Members reported a wide range of practice areas; had financial regulation (and other possibilities) been listed, one may be confident even greater diversity would appear (Figure 2).

Use of electronic resources, unsurprisingly, is widespread (Figure 3). Asked to estimate the frequency with which they used the Internet for research, more than a third (117) reported doing so 9 or more times a day; less than half that number (41), twice or fewer. More than three quarters asserted that they used government electronic resources, when available, predominantly (31%) or often



(47%). Figure 3 shows the relative frequency of their visits to various types of information resources available from the government.

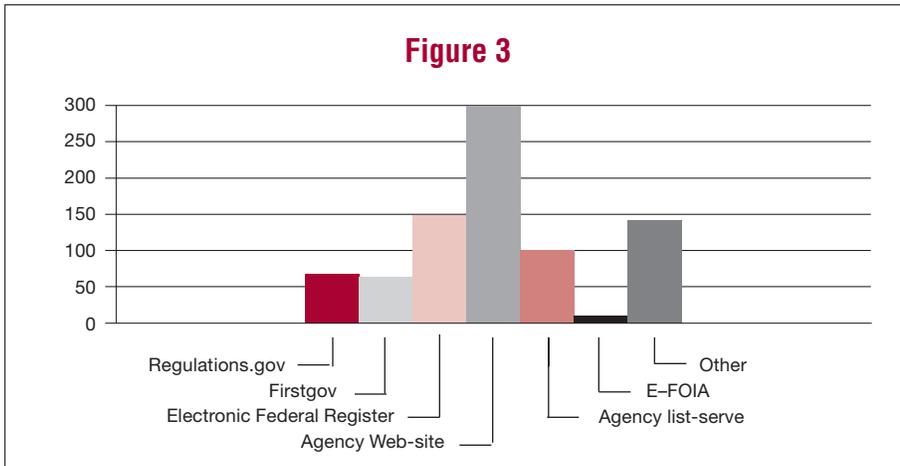
Rulemaking is not a central element of practice for most respondents — rulemaking is less than 10% for more than half; but almost 20% (59) reported that rulemaking constituted half or more of their work. To the same effect, 176 respondents (55%) had not filed rulemaking comments in the past three years; but 76 in (about one fourth) had

filed comments in more than 3 rulemakings during the same period. Not surprisingly, perhaps, 73 respondents reported making at least some filings electronically — the bulk once or twice, but 16, 5% of respondents, in more than five rulemakings. Twenty-one respondents who had not filed electronically reported concerns about limitations (11), agency evaluation (4), excessive availability to the public (3) and reliability (3).

Perhaps the greatest transformation worked by putting rulemaking on line

¹ Betts Professor of Law, Columbia Law School, and past Section Chair.

Figure 3



lies in the change in transparency. Depending, of course, on how agencies approach the matter, one can transform not only the mechanics of delivering notice of a proposal and filing a comment, but the visibility of the process as a whole. In good part at Neil Eisner's urging, the Department of Transportation has been a particular leader in making interpretive materials as well as proposals and rules on line, and as well putting in readily accessible electronic format the whole docket of pending rulemakings (as well as other departmental matters).² One series of questions in the survey asked respondents about what

characteristics they thought an agency rulemaking docket should have. Because the resulting graphic is a bit busy, it seems relevant to present these results in both graphic and tabular form.

Notice the particular importance, in our estimation, of hyperlinking, both in the overall index, and between docket documents and other relevant agency documents. Least important, among these alternatives, is that the electronic docket contain all documents an agency would be obliged to release under FOIA. Less than half the respondents reported consulting an electronic docket; forty-four of those who did consult such a

docket did so for more than 5 rulemakings; 38, for 3–5, and 46, for 1–2. For the docket they referred to most frequently, about a third each consulted it 6 or more times, 3–5 times, and 1–2 times. The reasons most frequently given to look at rulemaking dockets were for general information or to explore all comments (190); 61 reported examining particular comments, 52 examining agency data or reports, and 30 help in preparing second round comments.

A second set of “wish-list” questions explored the pro-active potential of internet connections. If attorneys could register with an agency or central server for automated notice of various events — a so-called “list-serve” function, what kinds of notice would they like automatically to receive?

Here, the most desired capacities were to be able to sign up of automatic notice of rulemakings triggering specified keywords or topics — knowing that you could be sure of getting email notice whenever the Department of Agriculture proposed a rule reaching Muscovy Ducks — and of new filings in a specified docket. An associated question asked people to identify the type of document they would like to be able to use keywords to specify for list-serve notifi-

Wish-list for agency electronic dockets in Rulemakings

	Essential	Important	Preferable	Useful	Unneeded
Overall index with brief description and hyperlinks to individual rulemakings	83	103	39	50	11
Hyperlinks to relevant agency documents outside the docket	59	119	52	44	12
Docket permits subscription to a list-serve for notification of new filings	36	96	83	59	12
Contains all public filings, whether electronically filed or not	81	89	51	46	16
Contains all documents agency would have to release under FOIA as relevant to a rulemaking	48	83	66	57	30
Index identifies source and nature of each document	68	73	72	56	13
Sophisticated full-text searching of a single docket, reaching all documents in all common electronic text formats	72	91	64	47	10
Sophisticated full-text searching of a single docket, reaching all documents, including scanned	57	90	71	53	12

² See <http://dms.dot.gov>.

Table of expressed wishes respecting list-serve use

	Extremely Important	Frequently	Occasionally	Rarely	Not at all
Having some form of list-serve	47	116	117	29	9
of given agency publications	40	97	107	56	18
of any filings in a docket	76	85	93	46	18
of given agency rulemakings	59	75	111	53	19
of all rulemakings by specified keyword or topic	70	110	96	34	9
for interactive discussions	27	54	125	79	31

cation. Strikingly, relevant interpretive materials (213) was a close second to rulemakings (221); other options were considerably less interesting.

People were asked more general questions, not readily tabulated, but a reviewer can report his sense that ease and predictability of navigation — user friendliness — are important values; also, the breadth and thoroughness of search capacities available. The variation of search engines used from agency to agency — sometimes, from subagency to subagency — may be the most frequently criticized aspect of the current provision of e-government.

Where might one go from here? A January 8 conference held at American University under the auspices of Neal Kerwin heard federal officials and others discuss the emerging shape of e-rulemaking. The present practice, the first phase of a three-stage plan, takes matters no further than providing a single site, www.regulations.gov, where one can find posted all open notices of rulemaking by federal agencies. (It is much more successful in this regard than agency web-sites; a 2003 GAO study found that, for a three-month period in early 2003, only 20 of the 63 proposed rules for which EPA published an NPRM in the Federal Register could be found on EPA's site; but all were findable on regulations.gov.)

The second phase, planned for implementation early in 2005, is to provide a government-wide docket for all rulemakings, assuring uniform (and powerful) search capabilities and broad availability of materials, such as others' comments, that until now have been

discoverable only with considerable effort and, often, out of time. This phase is still in development, and it is unclear how far it will reach — how assiduously, for example, agencies will be encouraged to post not only their proposals but supporting studies; how rapidly comments will be posted (electronic comments can appear immediately, but those filed in hard copy will have to be scanned in); to what extent and in what respects list-serve capacities will be developed. Section members have an obvious interest in promoting the maximum development of these capacities.

Beyond this, it will be interesting and important to see if and how the development of these capacities transforms rulemaking. An obvious and perhaps welcome transformation will be the growth of the “reply comment,” as others' comments become instantly and cheaply available, and readily searched and analyzed for matters of possible interest. Rulemaking can be far more deliberative if it becomes more readily iterative.

Past enhanced deliberation, however, may lie more questionable political effects. When commenting can be as easy and cheap as a keystroke, one must perhaps expect that the possibilities of comment will not only be open to a broader range of the populace, but also open to exploitation. Even legitimate grassroots campaigns can serve to push rulemaking towards a more political, plebiscitary character; and it is not hard to imagine manipulative campaigns exploiting the tools of spam to proliferate comments dramatically.

Further politicization of rulemaking seems at least equally threatened from within. A centralized docket would offer much in the way of convenience — knowing one organization, search engine, etc. But it will also dramatize and enhance OMB's and OIRA's already central role. Together with information specialists at EPA, they are the ones creating this new apparatus; and to have all information travel through their gateway only adds to the possibilities of their influence. Indeed, one might suppose that this would occur with or without a single, central docket. As agencies become more transparent, they become more transparent to the President as well as to the public; the docket is equally available to him, and politics will give him the incentive to attend to it. Several times during the Washington conference, presenters voiced the idea that rulemaking had become the most important means by which government now generates law — more important than legislation, or than judicial development of law. If increasingly we come to see that this is the President's political law, not the “expert” product of an agency intermediary between President, Congress and courts, deliberating with the relevant public and answering to all three, the President will have become our chief lawmaker (Justice Black's pithy denial in *Youngstown Sheet & Tube v. Sawyer* to the contrary notwithstanding). Such a development would raise sharp questions about the nature of our government, worthy of the most serious attention. 

Code Orange: Will It Be Used to “End-Run” Federal Rulemaking Requirements?

By Michael Fitzpatrick¹

The legislative reaction to the traumatic events of September 11, 2001, has been swift and far-reaching, with Congress passing a flood of new statutes intended to address terrorism and promote homeland security. The legislation includes: the USA PATRIOT Act (P.L. 107–56); the Public Health Security and Bioterrorism Preparedness and Response Act (P.L. 107–188); the Terrorism Risk Insurance Act (P.L. 107–297); the Enhance Border Security and Visa Entry Reform Act (P.L. 107–173); the Maritime Transportation Security Act (P.L. 107–295); the Aviation and Transportation Security Act (P.L. 107–71); and the Agricultural Bioterrorism Protection Act (P.L. 107–188). Perhaps most significantly, the Homeland Security Act (P.L. 107–296) created a vast new Department of Homeland Security charged with protecting the nation against emerging terrorist threats. Embedded in this expansive legislation were at least three other formerly free-standing bills – the Homeland Security Information Sharing Act (“HSIA”), the Critical Infrastructure Information Act (“CIIA”) and the Support Anti-Terrorism by Fostering Effective Technologies Act (“SAFETY Act”).

Through this wave of legislation, Congress has substantially driven the nation’s regulatory agenda over the past two years. The full effects will not be felt, or clear, for several more. What is already apparent is that these new laws implicate important and sensitive policy issues in the areas of privacy rights, civil liberties, freedom of information, unfunded mandates and the scope of tort liability. Many set tight deadlines for the issuance

of implementing regulations and substantially limit agency discretion.

In this new regulatory environment, a critical question is the extent to which agencies are, and will be, employing existing administrative rulemaking provisions that relax procedural requirements for “emergency” rules when promulgating the many new regulations impacting government policy and spending priorities, civil liberties and personal privacy. In an era of perpetual emergency — with the country vacillating between Threat Level Yellow and Threat Level Orange as it engages in a real but indeterminate war on terrorism — will the federal rulemaking process be honored or abused? Will it remain relatively transparent, deliberative and participatory, with the public able to provide input on important agency actions, or evolve into a more closed and secretive process of emergency rules driven by risk-averse government officials?

For decades, procedural and analytical safeguards contained in the Administrative Procedure Act (“APA”) and other statutes, such as the Unfunded Mandates Reform Act (“UMRA”) and the Regulatory Flexibility Act (“RFA”), have helped ensure that agency rulemaking remains transparent, inclusive and well-reasoned. Among the benefits of these requirements are greater agency accountability, more analytically robust decision making, enhanced trust and buy-in by regulated entities and the general public, and increased public-private cooperation. The APA, however, also contains exceptions for notice and comment rulemaking and delayed effective dates when an agency must respond quickly to a legitimate emergency. *See* 5 U.S.C. §§ 553(a)(1), 553(b)(B) & 553(d) (2000). Likewise, statutes that place analytical and other procedural requirements on agency rulemaking contain similar exceptions for emergency

rules. *See, e.g.*, 2 U.S.C. § 1503(4)–(6) (2000) (UMRA emergency exemptions); 5 U.S.C. § 608(a)–(b) (RFA emergency exceptions); 49 U.S.C. § 114 (1)(2)(A) & 6 U.S.C. § 552(d) (Aviation and Transportation Security Act emergency exemptions); 46 U.S.C.S. § 70101 note (Maritime Transportation Security Act emergency exemptions). Even the Executive Order under which the Office of Management and Budget (“OMB”) reviews “significant” proposed and final agency actions contemplates abbreviated and relaxed procedures in emergency situations. *See* Executive Order 12866, 58 Fed. Reg. 51,735, 51,741 (October 4, 1993). While agencies must be free to carry out their mandate to protect the public from harm, they must not be permitted to degrade the quality of — and public confidence in — federal rules by relying on the tragedies of September 11 and the continuing war on terror to “end-run” important rulemaking requirements.

The limited empirical and anecdotal evidence available to date indicates that this may indeed be occurring, although it is difficult to assess the extent of the problem. Discussions with agency and OMB officials, and with private sector attorneys, have yielded examples of apparent abuse, where emergency designations and anti-terrorism justifications were used to sidestep procedural requirements and expedite the promulgation and OMB review of rules that, in reality, had little to do with terrorism or homeland security and for which there was little temporal expediency. One well-respected organization, representing many regulated entities, sounded the alarm in a report published last summer: “Continued use of emergency rulemaking – more than a year after the tragedy of September 11 – to circumvent open procedures not only keeps the public and the business community from contribut-

¹ Michael Fitzpatrick is Vice-Chair of the Section’s Homeland Security Committee and practices in the Washington, DC office of Akin Gump Strauss Hauer and Feld LLP.

ing refinements to the proposed measures, but it also inhibits establishment of a coherent, nationwide, prioritized security program.” THOMAS SUSSMAN, THE BUSINESS ROUNDTABLE, TERRORISM: REAL THREATS. REAL COSTS. JOINT SOLUTIONS 32 (June 2003) (available at <http://www.businessroundtable.org/publications>). Moreover, a regulatory analysis published by OMB in summer 2003 revealed that of the 69 terrorism- and homeland security-related regulations submitted for White House review since September 11, almost half (31) were classified as interim (emergency) final rules. Agencies quantified costs for only 18 of the 69 rules, and benefits for only 3, indicating less than robust underlying analysis. See Office of Management and Budget (Office of Information and Regulatory Affairs [“OIRA”]), *Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, at 68–78. It is important to note that this is not a uniformly held view, as some believe that tight statutory deadlines have driven interim designations on several regulations and that emergency rulemaking procedures generally have been used by agencies to advance legitimate efforts to respond quickly to emergent dangers.

The fact that OMB reviews all major significant agency actions, including designations of emergency rules, provides some comfort that agencies will be held accountable. In this regard, discussions with OMB and agency officials indicate that OIRA is aware of this issue and has been scrutinizing agency submissions for rules that should not properly be exempted from notice and comment and other procedural requirements. OMB review remains an important feature of the Bush Administration’s regulatory agenda, and has been implemented quite aggressively by OIRA Administrator John Graham. Yet OMB should not be the only filter or screen for improper emergency designations. Members of the public and interested legal practitioners must be vigilant in examining agency actions for signs of abuse for several reasons. Chief among them is that regulated entities or members of the public

may disagree with OMB’s determination that an agency’s emergency designation is justified. Conversely, an OMB finding that an agency designation is not justified may still be overruled by senior White House and agency officials driven in part by political and public relations considerations. In either situation, the public must make its views known to officials at OMB, the issuing agency and the White House.

To hold agencies accountable, practitioners should look for one or more red flags which might indicate abuse of an emergency designation.

■ **A delay in issuing the emergency rule after the problem arose.** The longer the delay, the greater the danger that there is abuse. Key questions include how much time has passed since the initiating incident or legislation? Have circumstances changed in the interim? If no additional incidents have occurred, is there still an emergency? Given the delay, what priority is the agency placing on addressing this problem, and why didn’t the agency solicit and consider public comments? See *Air Transport Association v. Department of Transportation*, 900 F.2d 369, 379 (D.C. Cir. 1990) (invalidating emergency rule where the agency waited almost nine months to implement authority).

■ **A delay in the effective date once the emergency rule issues.** A delayed effective date for compliance could raise questions regarding the imminence of the threat and the severity of the exigency.

■ **A security or anti-terrorism rationale that appears secondary to the primary purpose of the rule.** For example, many public health and safety rules (e.g., food safety or drug packaging) or even law enforcement regulations can be “dressed up” as necessary to respond to a terrorist threat, no matter how remote it may be. Most of these rules would have been issued anyway pursuant to proper rule-making procedures. While not dispositive, greater scrutiny may be given to rules issued by agencies not traditionally responsible for addressing homeland security issues, including USDA, EPA, HHS/FDA and OSHA. See *American Acad. of Pediatrics v. Heckler*, 561 F.Supp. 395, 401 (D.D.C. 1983) (rejecting HHS

emergency designation of rule relating to treating newborn babies because HHS’s arguments regarding potential harm “could as easily be used to justify immediate implementation of any sort of health or safety regulation, no matter how small the risk . . . or how long-standing the problem”). A variation on this theme would be a rule where an anti-terrorism requirement and justification is attached to other objectives and requirements clearly not driven by security exigencies in an effort to exempt the entire regulation from notice and comment. See *United States v. Garner*, 767 F.2d 104, 120 (5th Cir. 1985) (ruling that every provision in the emergency rule must be justified by the exigency).

■ **The rule addresses a repeated, preexisting problem.** Why has the stated problem only now become an emergency? Why was it not an emergency at an earlier point? Is the emergency designation now being driven by politics, perception and public relations?

■ **The absence of a statutory deadline or judicial mandate for agency action.** Many emergency rules are not driven by statutory deadlines or court-ordered action. But the absence of these justifications removes one obvious basis for an emergency exemption. An agency’s exercise of its discretion to forego procedural requirements should be scrutinized.

■ **The use of direct final rules.** The favored method for agencies to address emergencies is through interim final rules, whereby an agency solicits and responds to public comments regarding the emergency rule even after it issues and goes into effect. Direct final rules do not seek *post-hoc* comments or contemplate any post-issuance adjustments by the agency. As a result, direct final rules should be used only where an agency is issuing a non-controversial, non-substantive procedural rule. Rules addressing homeland security or terrorism are highly unlikely to meet this test. While there is no evidence agencies have attempted thus far to misuse direct final rules, few of the post September 11 interim final rules have been reissued in final-final form after consideration of public comments. If they are not eventu-

ally reissued, the agencies will have issued *de facto* direct final rules under the guise of interim final rulemaking.

The federal courts can also be used by practitioners to hold agencies, and indeed the OMB review process, accountable. Federal courts have generally construed agencies' exercise of emergency rule-making narrowly, case by case, in order to prevent its use as an "escape clause" from notice and comment and other analytical requirements. See generally AMERICAN BAR ASSOCIATION, A GUIDE TO FEDERAL AGENCY RULEMAKING, 75-88 (3d ed. 1998); Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 719-24 (Summer 1999); CHARLES H. KOCH, JR., ADMIN. L. & PRACTICE, § 4.1 (2d ed. Supp. 2003/2004). Thus, the D.C. Circuit has stated that "[b]ald assertions that the agency does not believe comments would be useful cannot create good cause to forego notice and comment procedures. To hold otherwise would permit the exceptions to carve the heart out of the [APA]." *Action on Smoking and Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 800 (D.C. Cir. 1983) (citations omitted).

A review of relevant case law indicates that, in their highly contextual reviews of agency emergency designations, federal courts are guided by the following considerations:

■ **Has the agency presented concrete factual evidence of the existence of an actual emergency?** The more specific the evidentiary record, the greater the

chances the court will uphold the designation. See, e.g., *Tennessee Gas Pipeline v. Federal Energy Regulatory Comm'n*, 969 F.2d 1141 (D.C. Cir. 1992) (invalidating interim regulation because FERC provided only generalized discussion of emergency and little specific factual basis for the designation).

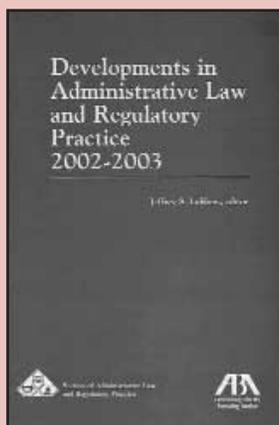
■ **Has the agency shown that actual harm will result from the delay caused by notice and comment procedures?** Even if an agency demonstrates an exigency, it still must show that any delay is unacceptable. See, e.g., *Natural Res. Def. Council, Inc. v. Evans*, 316 F.3d 904 (9th Cir. 2003) (invalidating National Marine Fisheries Service emergency regulation because agency did not show that the delay for comments would result in harm to fish stocks); but see *Hawaii Helicopter Operators Ass'n v. Federal Aviation Ass'n*, 51 F.3d 212 (9th Cir. 1995) (upholding emergency rule where agency provided evidence that harm would result from delayed implementation); *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741 (10th Cir. 1987) (same).

■ **Does the regulation actually address the emergency that justifies the exception?** In virtually every instance where federal courts have upheld emergency rules, the regulation has been carefully tailored to address the identified exigency.

■ **Is the emergency designation necessary for the agency to fulfill its statutory mission?** Courts have invalidated emergency rules where they found that the

waiver of notice and comment was unnecessary for the regulation to have its intended effect. See, e.g., *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479 (9th Cir. 1992).

For their part, agencies should consider taking steps to mitigate the impact of emergency rulemaking and maximize public participation. As stated earlier, it is imperative that agencies seek, consider and respond to the public comments on interim rules after they issue. But these *post-hoc* efforts are poor substitutes for properly developed rules. Agencies should consider creative new options that balance their need to respond quickly and responsibly to new homeland security realities with maintaining opportunities for public input and participation. In his Business Roundtable report, Thomas Sussman suggests that agencies seriously consider negotiated rulemaking processes that bring together interested stakeholders to develop consensus-based rules. In addition, agencies can seek immediate public comments as soon as a problem is identified or a legislative mandate imposed. This would provide an opportunity for consideration of some public comments during development of the emergency rule. Finally, agencies can conduct expedited public hearings or workshops on the identified problem, again even before the rule is drafted. Even some public input is better than none at all. ○



Developments in Administrative Law and Regulatory Practice 2002-2003

Jeffrey S. Lubbers, Editor

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

This publication is provided free of charge to section members. Additional copies may be ordered by members and nonmembers through www.ababooks.org or by calling 1-800-285-2221.



Section of Administrative Law and Regulatory Practice

2004 Spring Meeting

Kiawah Island Resort, Kiawah Island, SC

April 30 – May 2, 2004

For registration information phone (202) 662-1528, or email KnightK@staff.abanet.org

Thursday, April 29, 2004

- Guest arrivals; check-in time is 4:00pm.
- Group dinner(s).
- Evening tours and activities on the Island.

Friday, April 30, 2004

7:30 am – 8:30 am

Continental Breakfast

Gallery Foyer, Ryder Cup Conference Center

8:30 am – Noon

Section Long-Range Planning Session

Ryder Cup Conference Center

Noon to 1:00 pm

Committee on Projects and Programs Meeting

Ryder Cup Conference Center

1:00 pm – 2:30 pm

Harmony in the Historic Low Country: The Delicate Balance Between Energy and Environment

Ryder Cup Conference Center

Beautiful and historic South Carolina is economically dependent on a secure, cost-effective energy supply. This program brings leaders from the area's major utilities together with environmental leaders and city planners to discuss how South Carolina has balanced historical and natural preservation along with economic development. What tensions exist, and what lies ahead for the state? Panelists will include:

- **T. Graham Edwards**, Former President and Chief Executive Officer Santee Cooper
- **Sheila S. Hollis**, Duane Morris LLP
- **Randolph R. Mahan**, Director, Corporate Environmental Services and Special Projects, SCANA Services, Inc.
- **Leslie Stidham**, Chief Counsel, Ocean and Coastal Resource Management South Carolina Dept. of Health and Environmental Control

3:00 pm – 4:00 pm

Securities, Commodities and Exchanges Committee Meeting

Ryder Cup Conference Center

6:00 pm – 9:00 pm

Island BBQ

Sail Deck – Ryder Cup Conference Center

Bring your guests and enjoy a Southern BBQ and outdoor games including a putting contest. Putters will be provided and prizes will be awarded!

Saturday, May 1, 2004

8:00 am – 9:00 am

Continental Breakfast

Ryder Cup Conference Center

9:00 am – 10:30 am

Section Council Meeting Part I

Ryder Cup Conference Center

10:30 am – 10:45 am

Break

10:45 am – Noon

Section Council Meeting Part II — The Controversy Over Regulatory Science

Ryder Cup Conference Center

The Center for Progressive Regulation (CPR) has produced a set of “Clean Science Principles” in answer to what they consider some of the problems of politicization and conflict of interest in regulatory science. Representatives from CPR will discuss the Principles and provide background on what prompted CPR to develop them. Additional panelists as well as the audience will provide perspectives from industry and agencies as well as other feedback on the Principles. Finally, the Section will consider whether it would be appropriate to develop its own recommendations in this area.

Panelists:

- **Sidney Shapiro**, University of Kansas School of Law
- **Wendy Wagner**, University of Texas at Austin School of Law

Noon – 1:00 pm

Membership Committee Meeting

Ryder Cup Conference Center

1:00 pm – 2:00 pm

Budget Meeting

Ryder Cup Conference Center

9:30 pm

Chairman’s Reception

Sunday, May 2, 2004

8:00 am – 9:00 am

Continental Breakfast

Ryder Cup Conference Center

9:00 am – Noon

Section Council Meeting

Ryder Cup Conference Center

Adjourn

DRESS CODE

Dress for all meetings and programs is resort casual. Some restaurants on the Island and in Charleston require a dinner jacket. The average high temperature for Kiawah in May is 82 degrees; the average low is 62 degrees.

LODGING AT KIAWAH ISLAND

Meeting attendees will be housed in the **West Beach Villas** – with the choice of a 1, 2, or 3-bedroom villa at the nightly rate of \$209 plus tax. There is a resort fee of \$12 per night. The rate will be honored for two days prior and two days after the meeting. Come early or stay later! Villas are equipped with a kitchen, living room and dining room. Some villas have a washer

and dryer. Please call and make your reservation early to ensure your best selection: 1-800-654-2924. When calling request the ABA Administrative Law Section Meeting rate. Complimentary island shuttles are available to transport you to any destination on the island. Section meetings and programs will be held in the Ryder Cup Conference Center in the West Beach Village. **The special meeting rate expires on March 29, 2004. Please reserve prior to this date.**

TRANSPORTATION

Travel discounts are available through the ABA’s online travel service. Visit www.abanet.org and click on Member Tools – ABA Online Travel. The ABA member discount code for Hertz Rental Car is CDP# 13000. Contact Hertz at 1-800-654-2230.

Airport transportation to and from Kiawah Island Golf Resort is available through their shuttle service. 48-hour advanced reservations are required, or a surcharge will apply. Arrangements should be made by calling (843) 768-2771 or visiting their website at www.islandshuttle.com. Please mention the group code **AMBAR** (American Bar) when booking via phone or online. Rates are \$45.00 for the first passenger and \$25.00 each additional passenger.

Kiawah Island provides shuttle service into Charleston, SC at approximately \$35 per person round-trip. The shuttle will depart at the following times:

- Saturday, May 1st: Noon, 3:00 pm, 6:00 pm, and 9:00 pm.
- Sunday, May 2nd: Noon, 3:00 pm and 5:00 pm.

For the departure location and additional times contact the concierge.

ACTIVITIES AVAILABLE AT KIAWAH ISLAND

- **Golf:** Tee Times have been reserved at each of the courses listed below as follows: Friday, April 30th – 9:00 am and 1:00 pm; Saturday, May 1st – 1:00 pm; and Sunday, May 2nd – 1:00 pm.



Ocean Course – \$231.00; Osprey Point – \$153.00; Turtle – \$153.00; Cougar – \$140.00; and Oak Point – \$78.00.

- **Tennis:** Tennis courts have been reserved on Saturday, May 1st – 1:00 pm and 3:00 pm; and Sunday, May 2nd – 7:00 am, 1:00 pm, and 3:00 pm.

If you are interested in either of the above activities please indicate in the space provided on the registration form and you will be contacted with further details. If tee times and courts are not booked at least 24 hours in advance the resort reserves the right to release the times to the Island guests.

You can search through the resort’s hundreds of scheduled activities for April and May 2004 by visiting their website at: <http://recreation.kiawahresort.com/activities.html>

By William Funk¹

Alaska Dept. Of Environmental Conservation v. EPA, 124 S.Ct. 983 (2004), is an interesting case in that it may have said something significant about final agency actions even though the issue was not properly before the Court. In this case EPA issued an order to a mining operation in Alaska not to install certain new generators at one of its mines even though the state had granted it a permit authorizing the installation. Under the Clean Air Act states may be approved to issue permits to new polluting facilities in areas where the air is clean subject to certain requirements in the Act. One of those requirements is that the permit mandates the use of “best available control technology,” which is defined as an emission limitation that the permitting authority determines on a case-by-case basis reduces emissions to the maximum degree achievable, taking into account energy, environmental, and economic impacts and other costs. Alaska is an approved state, and it issued a permit to the mine, finding that a particular technology was BACT. EPA, however, believed that a different technology was BACT and that Alaska had not provided any rational basis for not requiring that technology.

Unlike the Clean Water Act, which specifically provides that when a state issues a permit under that Act EPA has authority to veto the permit upon certain findings, the Clean Air Act does not specify any particular role of EPA in reviewing or approving state-issued permits. It does, however, contain provisions that generally authorize EPA to issue orders prohibiting installation of new sources of pollution when either a state is not complying with a requirement of the Act or the installation would not comply with the requirements of the Act. Invoking these authorities, EPA ordered the mine not to install the new generators permitted by the state. The state and the mine challenged that order in the Ninth Circuit in accordance with a provision of the Clean Air Act providing for appeals to a court of appeals of “any . . . final [EPA] action.” Their argument was that the two provisions EPA pointed to only authorized orders when a “requirement” of the Act was not met, but here the “requirement” of the Act was for the permit issuer to make a determination of BACT, which Alaska had. EPA’s complaint was not that a “requirement” of the Act was not met, but that it disagreed with the permit issuer’s determination.

In the court of appeals EPA first argued that its order was not a “final action” but an interlocutory order that would not be appealable unless and until EPA brought an enforcement action. It should be noted that EPA has a general practice under various environmental laws of issuing orders unilaterally with no prior adjudicatory procedure. Moreover, it routinely argues that these orders are not reviewable — sometimes arguing on finality grounds and sometimes on ripeness grounds — and these argu-

ments have often been successful in the lower courts. It was not successful in the Ninth Circuit, which held that the order was the agency’s last word on the subject, and it “effectively halted construction of the . . . generator.” In the Supreme Court, EPA acceded to the Ninth Circuit’s decision on finality, perhaps hoping to avoid a Supreme Court opinion undercutting its general position on the unreviewability of its unilateral orders. The Court, however, addressed the issue, saying that the Ninth Circuit “correctly applied the guides set out” in previous Supreme Court decisions. In addition, the Court noted that no one had questioned the due process adequacy of the absence of pre-order adjudicatory procedures and that EPA had not had an adequate administrative record for judicial review of its order. On the merits, the Court split 5–4, but on the finality issue, the dissent did not take issue with the majority’s conclusion. Rather it too seemed somewhat disturbed with the agency process, describing its order as an “administrative fiat.”

It may perhaps be reading too much into the tea leaves of judicial language, but the fact that the Court raised issues that were no longer before it suggests a conscious choice to speak to the agency and to express the Court’s concerns with the agency’s practice of issuing unilateral orders without any pre-order adjudicatory procedures and then attempting to avoid judicial review of those orders. On the merits, EPA asked the Court to defer to its longstanding interpretation of the Act authorizing an order such as that here. The problem was that its interpretation was only made in internal guidance memoranda, which the Court stated did not qualify for *Chevron* deference. Nevertheless, the Court said, cogent agency interpretations “warrant respect.” The Court then went on to conclude that it was not persuaded that “EPA’s longstanding, consistently maintained interpretation” was “impermissible,” but rather it was a “rational interpretation” that was “surely permissible.” Of course, as noted by the dissent, this language is the hallmark of *Chevron* deference, not the mere respect associated with *Skidmore* deference.

Ultimately, it is a close question whether EPA’s or Alaska’s reading of the Clean Air Act is the better one; neither is wholly without its problems. The dissent’s greatest sense of outrage, that allowing a federal agency to overturn a state judgment “relegat[es] States to the role of mere provinces or political corporations, instead of co-equal sovereigns entitled to the same dignity and respect,” seems a bit overblown. After all, the dissent was not suggesting that this was unconstitutional, only that the “cooperative federalism” found in the environmental statutes should not be construed to give EPA such authority. Yet, the Clean Water Act has expressly provided such federal authority for over 30 years; all the federal environmental statutes subject states to the substantive environmental standards which then are enforced by EPA; and any state not wishing to subject itself to the type of oversight involved in the Alaska case is free to reject the Clean Air Act permitting authority, leaving it up to EPA to enforce directly.

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General Dynamics Land Systems, Inc. v. Cline, 124 S.Ct. — (2004), is a particularly fascinating case of statutory construction. The Age Discrimination in Employment Act makes it unlawful for an employer to “discriminate against any individual . . . because of such individual’s age,” if the individual is over the age of 40. The question in the case was whether an employer’s discrimination in favor of an older worker to the disadvantage of a younger worker over the age of 40 is within the statutory prohibition, or whether the prohibition only acts to protect workers over the age of 40 from discrimination in favor of younger workers. Until the Sixth Circuit ruled to the contrary in the case below, virtually every court over the past thirty years had held the latter. The Supreme Court by a 6–3 margin reversed, affirming the majority view that the law only protects against discrimination in favor of younger workers.

The Court believed that the word “age” could carry two possible meanings: “pointing to any number of years lived, or as common shorthand for the longer span and concurrent aches that make youth look good,” as in “age has left him a shut-in.” However, the Court went on, the former possible meaning “does not . . . square with the natural reading of the whole provision prohibiting discrimination,” and “Congress’s interpretive clues speak almost unanimously to an understanding of discrimination as directed against workers who are older than the ones getting treated better.” The Court described the history leading up to the ADEA, where the concern was clearly only with discrimination against older workers in favor of younger workers. In addition, while Congress had amended the ADEA several times, it had never disturbed the heretofore consistent judicial interpretation that the Act only banned discrimination against older workers in favor of younger workers.

Justice Scalia dissented on the grounds that the statutory language was ambiguous and the agency charged with administering the Act, the Equal Employment Opportunity Commission, had adopted a regulation in 1981 specifically stating that discrimination against anyone over the age of 40 on the basis of age, whether in favor of younger or older workers, was a violation of the Act. The Court’s response to this argument was to note that there was no need to defer in any way because “the Commission is clearly wrong.” “Here, regular interpretive method leaves no serious question.”

Justice Thomas, joined by Justice Kennedy, took issue with that conclusion. Conceding that the word “age” could have two possible meanings, Justice Thomas pointed out that the word “age” was used in a number of places in the Act, some of which could not possibly bear the meaning of “age” as old age. Moreover, Justice Thomas noted that a colloquy on the floor of the Senate involving one of the sponsors of the ADEA specifically answered the question posed by the case, saying that the law would prohibit discrimination on the basis of age without regard to who was older or younger.

The Court’s response was that the presumption that a word has the same meaning in different places in the same statute is a weak presumption, especially when the word can carry more than one meaning, each of which is obvious in context. This was the case here, it said. As for the Senate floor statement, the Court acknowledged that it had given weight to the floor statements of the sponsor of the ADEA in previous cases, here “a single outlying statement cannot stand against a tide of context and history, not to mention 30 years of judicial interpretation producing no apparent legislative qualms.”

Finally, Justice Thomas reminded the Court that Title VII, banning discrimination on the basis of race and sex, although based upon a history of discrimination against minorities and women, had always been interpreted to prohibit discrimination against whites and men as well. Thus, the fact that the motivation for the ADEA may have been discrimination against older workers in favor of younger workers, that was not a reason to limit its more open-ended text to such discrimination. The limitation of eligibility to those over 40 years old could be explained by Congress’s findings that after the age of 40 workers were more greatly disadvantaged in trying to find work. All these factors strongly suggested to Justice Thomas that the Act must be interpreted to prohibit discrimination on the basis of age, without regard to whether the disadvantaged worker was younger or older than the advantaged worker. At the least, he insisted, they established sufficient ambiguity to justify attention to the EEOC’s interpretation.

The Court was not convinced. It returned to the idea that “age” can have two meanings, unlike race and sex, so the text of Title VII compels an interpretation that discrimination on the basis of race and sex include discrimination against men and whites, unlike the ADEA’s use of the word “age,” which can have two possible meanings.

Doe v. Chao, 124 S.Ct. — (2004), is another case in which the agency’s interpretation seemed to count for naught. The Privacy Act provides a cause of action to an individual who suffered an adverse effect from an agency’s intentional violation of the Act by an agency, and it states that the amount of liability will be the “actual damages sustained by the individual . . . , but in no case shall a person entitled to recovery receive less than the sum of \$1000.” Mr. Doe was the victim of an intentional violation of the Privacy Act who sued under the Act, but he entered no evidence of actual damages. The trial court awarded \$1000, interpreting the Act to set \$1000 as a statutory damage amount in the absence of any actual damages. The Fourth Circuit reversed, interpreting the statute to require at least some actual damages in order for the plaintiff to receive any award. This decision was at odds with what other courts of appeals had held, so the Supreme Court granted certiorari. By a 6–3 vote, the Court in an opinion by Justice Souter affirmed the Fourth Circuit.

The Court believed that the plain text required a plaintiff to have actual damages in order to recover, reading the phrase “person entitled to recovery” to refer back to person who showed actual damages, rather than merely to someone who proved an intentional violation. Moreover, the Court believed it found legislative history suggesting a decision not to include a presumed damages provision. Finally, the Court found nothing inconsistent in providing that a person who shows *some* actual damages, even as little as \$10, receive a minimum of \$1000 in damages from the government, but that a person who shows adverse effect, but no actual damages, may not receive anything.

Justice Ginsburg, writing for herself and Justices Breyer and Stevens, disagreed. She believed the plain text provided that any person adversely affected by an intentional violation of the Act was entitled to their actual damages but not less than \$1000 in presumed damages, and she noted that most courts of appeals before this case had so interpreted the provision. She also referred to the legislative history to support her reading, and she cited other statutes, which although they used somewhat different statutory language, utilized a similar framework of actual damages *or* \$1000 in presumed damages.

These dueling plain language and statutory construction arguments as well as a split in the circuits might have led the Court to consider the view of the agency formally tasked by the statute to develop guidelines and regulations for the use of agencies in implementing the Act, but it did not. Justice Ginsburg’s dissent raised the fact that the Office of Management and Budget in 1975, the year following the passage of the Privacy Act, included in its Privacy Act Guidelines the statement that intentional violations of the Act would require the United States “to pay actual damages or \$1000, whichever is greater.” The Court dismissed this fact in a footnote by saying that: “the dissent does not claim that any deference is due this interpretation, however, and we do not find its unelaborated conclusions persuasive.” A better answer probably would have been that, although OMB was the responsible agency for interpreting how agencies should implement the Act, the issue here was liability in court, not any question of agency implementation. OMB had no responsibility or authority to opine on provisions of the Act only applied by courts, not agencies.

The subtext in the case was the fear that, absent proof of actual damages, too many persons might sue for technical violations of the Privacy Act and each receive at least \$1000. While recovery for damages is limited to intentional or willful violations, the case in hand suggested that courts were willing to find an “intentional” violation merely when an agency intentionally engaged in an action that was later deemed to be a violation of the Act, rather than the more restrictive standard of when the agency intentionally violated the Act. Justice Breyer in a separate

dissenting statement addressed this fear by noting that the Solicitor General had conceded at oral argument that lower courts in fact construed the standard to be a strict one: “could a reasonable officer in this person’s position have believed what he was doing was legal.” Such a standard, Justice Breyer argued, posed little threat to the public fisc.

Certainly the longest Supreme Court case this term is the two-hundred-plus page decision in *McConnell v. Federal Election Commn.*, 124 S.Ct. 619 (2003), in which the Court upheld most of the provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) against a First Amendment challenge.² However, the Court also dismissed several claims for lack of standing. Because of the complexity of the case, the challenges to Titles I and II of BCRA were assigned to Justices Stevens and O’Connor, Titles III and IV to Chief Justice Rehnquist, and Title V to Justice Breyer. In Chief Justice Rehnquist’s portion, a number of challenges were dismissed for lack of standing, and while the opinions of Justices Stevens, O’Connor, and Breyer upholding contested provisions of BCRA garnered only a bare majority of the Court, the Chief Justice’s opinion dismissing two challenges was unanimous and his opinion dismissing one more challenge gathered six votes. The overwhelming support for his standing decisions and the relative brevity of his opinion suggest that its conclusions were routine.

One of BCRA’s provisions amended the Federal Election Campaign Act’s limits on contributions to candidates by increasing the amount allowed and indexing that amount for inflation. Two groups of plaintiffs challenged this amendment. One group consisted of voters, their organizations, and candidates; this group, whose candidates eschew large contributions because of the view that they create an appearance of unequal access and influence, alleged that increases in the contribution limits deprived them of an equal ability to participate in the election process and caused them competitive injury in the electoral process. These allegations were insufficient, according to the Court, for two reasons. First, the fact that the law allows their opponents to accept larger contributions and thereby raise more money would not involve an injury to any “legally cognizable right” of these plaintiffs. Second, any competitive injury suffered by these plaintiffs would not be “fairly traceable” to BCRA; rather it would stem from the plaintiffs’ “own personal ‘wish’ not to solicit or accept large contributions.”

The other set of plaintiffs maintained that their election activities involving public interest advocacy constituted traditional press activities and that contribution limits which economically burden them but not traditional media violated the First Amendment’s Free Press Clause. This group failed the third prong of the standing test, the Court said, because a favorable court decision would not redress its alleged injury. It was FECA, not BCRA, that imposed contribution limits; the complained of

² *McConnell* is not in good company; apparently the only longer Supreme Court opinion is the *Dred Scott* case.

BCRA provisions merely increased the limits, and this was a suit brought under BCRA, not FECA. Setting aside the increases would merely lower the limit, exacerbating the alleged injury.

Another BCRA provision, known as the Millionaire Provision, raises the limit on contributions if a candidate's opponent spends a triggering amount of his personal funds. Here, the Court held, the voters, their organizations, and candidates who voluntarily eschew large donations likewise failed to allege "a cognizable injury that is 'fairly traceable' to BCRA." Moreover, none of the plaintiffs was a candidate in an election in which an opponent was spending the triggering amount of personal funds, "and it would be purely 'conjectural' for the court to assume that any plaintiff ever will be."

The one challenge that divided the Court involved an amendment to the Communications Act of 1934. That Act has required that broadcast stations must sell time to candidates at their lowest rate in the last days of an election; the BCRA amendment would deny that low-cost benefit to a candidate unless he certifies either that he will not name another candidate in the advertisement or that, if he does, he will identify himself and his approval of the advertisement. This amendment was

challenged by Senator McConnell, who stated that he planned to run advertisements that would trigger this provision. The Court, however, noted that Senator McConnell's term in the Senate runs until 2009, so that his alleged injury is "too remote temporally to satisfy Article III standing." Justice Stevens, joined by Justices Ginsburg and Breyer, disagreed. He stated his belief that Article III does not impose "such a strict temporal limit." He did find some problem with traceability, however. Justice Stevens pointed out that the amendment does not require stations to charge a higher rate; it merely permits them to do so. Whether they would or not is unclear. It is possible that the Senator's injury would be the result not of government action but of a third party's independent choice. Nevertheless, Justice Stevens said he would entertain the challenge but uphold the amendment.

While *McConnell v. FEC* provides a clear and unremarkable restatement of the law of standing, the brevity of the Court's application to the complicated facts involved leaves the possibility that some rather broad language regarding traceability and legally cognizable rights might be used later in a wholly different and more contentious context. ○

Call for Nominations Administrative Law Section Awards

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All nominations should be typewritten and should include the name and period of government service of the nominee, the departments or agencies in which he or she has served and is currently serving, and the specific contributions of the nominee that you think warrant his or her selection.

2003 Administrative Law Section Annual Award for Scholarship

Publications worthy of the Section's Award for Scholarship should:

- be well written, since publications that are informative and develop new ideas need not be difficult to read;
- be tightly reasoned, with a clear analysis that does not detour from development of the main thesis of the argument;
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- provide a new and timely insight into a current issue of administrative law;
- provide a new theoretical construct that will aid in the understanding or development of administrative law or develop a practical recommendation for solving a problem of administrative law; and
- contain a minimum of repetition of recitation of existing work.

Please submit nominations to Kim Knight, Section of Administrative Law and Regulatory Practice, American Bar Association, 740 15th Street, N.W., Washington, D.C. 20005-1022 or fax it to 202-662-1529. All nominations must be received by May 7, 2004. Direct questions regarding the Outstanding Government Service Award to Robert A. Shapiro, 202-693-5505; and questions about the Scholarship Award to Fred Emery, 202-628-1408.

By William S. Jordan III¹

Rulemaking: Two circuits stymie Bush Administration attempts to derail regulatory efforts of previous administrations.

The Bush Administration sought to weaken appliance efficiency standards that had been issued in the waning days of the Clinton Administration. It also sought to withdraw a proposed mine safety rule that had been issued during the first Bush Administration in 1989. Both efforts failed for reasons that relate to the specific provisions of the relevant statutes, but that may be more broadly applicable to attempts to derail the rulemaking efforts of previous administrations.

NRDC v. Abraham, 355 F.3d 179 (2d Cir. 2004) addresses both the availability of *Chevron* deference and several aspects of the rulemaking process. The case involved appliance efficiency standards that had been issued by the Clinton Administration and published in the Federal Register on January 22, 2001. The rule had an “effective date” of February 21, 2001, and a compliance date of January 23, 2006. On February 2, 2001, the Bush Administration’s Department of Energy issued, without notice and comment, a final rule delaying the effective date of the appliance efficiency rule to April 23, 2001. DOE justified the failure to seek notice and comment by characterizing the extension of the effective date as a procedural rule and asserting that the need to act before the established effective date constituted good cause to avoid notice and comment. The agency then completed a notice and comment rulemaking in which it suspended the earlier standard, issued an interpretation of the relevant statutory provision, and issued standards weaker than those adopted by the Clinton Administration.

Although the case hinges on an unusual provision prohibiting the weakening of appliance efficiency standards once they have been issued, it serves as something of a primer on several aspects of the rulemaking process. As it sought to throw out “midnight regulations” that had been issued by the Clinton Administration, the Bush DOE must have known it would have a problem with the appliance efficiency standards. Section 325(o) (1) of the Energy Policy and Conservation Act provides that DOE “may not prescribe any amended standard” that is weaker than an energy efficiency standard that is already in place. The problem for DOE was to find a way to weaken the standard without seeming to amend the previous standard. Its solution was twofold. First, take the position that the provision did not apply until after the “effective date” of the standard. Second, issue an interpretive rule to that effect, on which the agency would then rely in arguing for *Chevron* deference.

DOE lost on all counts. Although Section 325(o)(1) is ambiguous as to when a standard becomes so fixed that it cannot

be changed, the court found the statute as a whole to be clear in establishing that a standard became fixed once it was published in the Federal Register. This conclusion derived from various other provisions setting dates for publication of the standards. Despite finding that the Congress had spoken clearly on the question, the court addressed DOE’s attempts to rely upon *Chevron* deference. First, citing *Brown and Williamson*, it held that “common sense” dictated that Congress did not intend to delegate to the agency the authority to interpret a provision that was designed to restrict the agency’s discretion. In language that will undoubtedly be quoted in future efforts to narrow the scope of *Chevron* deference, the court said,

“Given that the question at issue here is the degree to which DOE’s discretion has been circumscribed by Congress, we are mindful of another court’s passing observation that ‘it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power.’” Second, citing *U.S. v. Mead*, the court also held that the delegation of authority to issue appliance efficiency standards did not include authority to interpret this aspect of the statute. Thus, the agency’s interpretation did not qualify for *Chevron* deference despite having been issued after notice and comment. Finally, the court also held that it could not give *Chevron* deference to an interpretation so clearly issued in anticipation of litigation.

Although addressed to an unusual statutory provision, the court’s ruling that publication of the rule triggers Section 325(o) (1) should inform other decisions concerning when a rule becomes so firm that the agency must amend it to change it, rather than simply reconsidering it. Despite appearances, the lesson is not that the publication date governs. Rather, the lesson appears to be that the court must look to the provisions of the relevant statute to determine when the rule becomes fixed. While publication seems the most likely date, another statute might support some other conclusion, such as the date the rule was signed by the agency head, the date the rule was transmitted to the Federal Register, or (as sought by DOE, but seemingly quite unlikely) the effective date of the rule.

Three other aspects of the court’s ruling more clearly apply to agency rulemaking generally. First, the extension of the effective date of a rule is not a procedural rule, at least where the extension has a substantive effect. Second, agency failure to act quickly enough to take notice and comment before a deadline does not constitute good cause for extending the deadline. Third, agencies do not generally have inherent authority to reconsider rules that they have already issued.

It is not surprising that an agency would have difficulty, as DOE did, in trying to reconsider a rule that had already been published in the Federal Register. More surprising, perhaps, is the Department of Labor’s difficulty in trying (in 2002) to withdraw a proposed rule that had been issued in 1989. *International Union, United Mine Workers of America v. U.S. Dep’t of Labor*, 2004

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WL 314904 (D.C. Cir. Feb. 20, 2004), involved a proposed mine safety rule that had been issued by the first Bush Administration. In 1994, the agency had adopted some aspects of the proposed rule, but others had remained untouched. When the son took office, DOL withdrew the rest of the proposal, asserting that agency priorities had changed, the record had grown stale, and that it would be difficult to issue the rule in light of a judicial decision that had come down in the interim.

On review, the court first addressed the question of jurisdiction. The Mine Safety and Health Act provides for review of safety standards issued by the agency, but the agency had not yet issued the rules in question, so the court had to look elsewhere for a source of jurisdiction. The court determined that it had jurisdiction under the All Writs Act, which had previously been held to authorize review of undue agency delay in the issuance of rules. Since, as with delay, the withdrawal of a proposal could simply avoid review on the merits, review of the withdrawal was necessary to preserve the court's jurisdiction.

Turning to the merits, the court first found that the outcome was governed by a somewhat unusual provision authorizing the Secretary to withdraw a proposed safety standard if she publishes the reasons for her actions. The court then held that the agency's reasons failed to meet the arbitrary and capricious standard of review. An unexplained assertion of a change in agency priorities was not enough. While stale evidence might justify not going forward immediately, it supported only supplementation of the record, not withdrawal of the proposal. And the unexplained assertion of the difficulties of complying with a judicial decision did not justify withdrawal of the proposal. The hard look doctrine prevailed in the arena of withdrawing a proposal, just as it had prevailed two decades earlier in the attempt to eliminate the passive restraint requirement in a rule that had already been issued.

Rulemaking: Recent hard look decisions, *Chevron* analysis, and remanding without vacating.

Four recent decisions illustrate the courts' application of hard look review and *Chevron* analysis together in challenges to highly technical rules. In *Sierra Club v. EPA*, 356 F.3d 296 (D.C. Cir. 2004), environmentalists challenged EPA's approval of the ozone control plan for the Washington, D.C. area. The primary issue was whether EPA could conditionally approve a plan based upon state assurances that they would implement the necessary controls. In a fairly straightforward ruling, the court held that a statutory requirement of a "commitment of the State to adopt specific enforceable measures" was not met by mere promises to act in the future. On a separate issue, the decision includes an interesting interplay between *Chevron* analysis and hard look analysis. The statute requires that ozone decisions be "based on" photochemical grid modeling. EPA used such a model, but the application of the model itself revealed too many exceedances to

allow approval. Upon making adjustments to the model for technical reasons, EPA then approved the outcome. This raised two questions: (1) whether EPA was authorized to adjust the model, and (2) if it was so authorized, whether EPA had adequately explained its decision. Finding the phrase "based on" to be ambiguous, the court applied *Chevron* deference to the interpretive question and upheld the agency. The court then applied hard look review to the technical question of whether the adjustments were appropriate and upheld the agency on that ground, as well. These rulings provide a useful contrast between *Chevron* reasonableness analysis and hard look analysis under the arbitrary and capricious standard. Both essentially pose the question of whether the agency can adequately explain its actions. On the statutory issue, the analysis related to whether the interpretation was sufficiently related to the purposes of the statute. On the technical question, however, the analysis related to the validity of technical judgment, not to the purposes of the statute.

Sierra Club v. EPA, 353 F.3d 976 (D.C. Cir. 2004) involved a challenge to hazardous air pollution standards issued by EPA for copper smelters under Section 112 of the Clean Air Act. The rule survives hard look review and seems to benefit from *Chevron* deference to EPA's interpretation of the term "non-air quality health and environmental impacts." Of particular note, the court states that it will follow an "every tub on its own bottom" approach to evaluating these standards. This means that the standards will be reviewed in light of the record of this rulemaking proceeding, without regard to alternatives that might be suggested on a different record or a standard for a different industry.

Public Citizen, Inc. v. Mineta, 340 F.3d 39 (2d Cir. 2003), is something of a modern *State Farm* decision, with the court applying hard look analysis to strike down an attempt to adopt a weak auto safety standard. The statute required the agency to require a system on new vehicles to give a warning "when a tire is significantly under inflated." The agency adopted a rule that would allow the manufacturer to use either of two systems. The "indirect system" would show when one tire is 30% under inflated (but not necessarily if others were under inflated at the same time), while the "direct system" would show when one or more of the tires is 25% under inflated. The agency permitted the first of these in order to allow certain indirect measurement systems to remain on the market. The major issues were (1) whether a standard measuring only one tire at a time met the statutory requirement, and (2) whether the agency had adequately justified its decision. On the first point, the court relied upon statutory context and purpose to read the statute as clearly dictating that the warning system alert the driver to any tire that was under inflated, rather than only to one tire at a time. Thus, the agency lost at *Chevron* Step One. Then, assuming the agency's interpretation could prevail, the court found the decision wanting for failure to provide a reasoned justification. For example, the agency's assertion that the indirect system was

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cheaper was inadequate because the agency failed to take into account the concomitant reduction in safety benefits. The court also rejected the agency's argument that permitting the indirect system would create incentives to improve that system. To the court, precisely the opposite was true. Finally, the court considered another justification, the purported greater robustness of indirect systems, to be a post-hoc rationalization by counsel that could not be considered as support for the rule. The court did uphold the agency on some minor points, including increasing from 20% to 25% the under inflation necessary to trigger the direct measurement system.

EPA survived industry challenges in *Northeast Maryland Waste Disposal Authority v. E.P.A.*, 2004 WL 330011 (D.C. Cir., Feb. 24, 2004), which involved air pollution standards for municipal waste incinerators. EPA prevailed under *Chevron* Step 2 in a challenge to its creation of industry subcategories. On a second issue, EPA convinced the court that the statute was ambiguous, but industry had not presented an argument that EPA should fail under *Chevron* Step 2. Accordingly, the court went directly to arbitrary and capricious review, in which it said that it was, "frankly, stunned," that EPA had not offered a word of explanation. Thus, the court had to remand the issue to EPA, but it did so without vacating the rule. The court provided a useful example of the reasons to remand with vacating, including the fact that it expected the agency to be able to provide an adequate explanation and that vacating the rule could seriously disrupt the regulatory program. Finally, the court rejected an industry argument that the final rule was not the logical outgrowth of the proposal, and it found no error in EPA's having added a document to the closed record where the document was little more than a description of the comments that EPA had received. Having prevailed against industry, EPA lost to the Sierra Club on hard look review of two highly technical aspects of the standards in question.

"Got milk?" - Agency Ad Campaigns – Are they reviewable? Can industry be forced to pay?

You thought those famous people in milk mustache ads were shills for the dairy industry? Turns out they were part of an agency-generated ad campaign that violates the First Amendment. In *Cochran v. Veneman*, 2004 WL 333103 (3d Cir. Feb. 24, 2004), an organic milk producer challenged the USDA's authority to impose a fee on milk producers to support such advertising campaigns. The producer was concerned that the ads in question create the impression that milk is a generic product, with little distinction among producers, while the particular producer made a point of following practices quite different from those of most of the dairy industry. It argued that its freedom of expression was being violated by the requirement that it pay for advertising with which it disagreed, and that its freedom of association was violated by being forced to associate with the rest of the dairy industry. The court agreed. It is impor-

tant to note, however, that not all such fee requirements are unconstitutional. The court distinguished this case from previous ones where producers' actions were already restricted by participation in coops and similar marketing arrangements. Judge Rendell, in a concurring opinion, captured the distinction quite succinctly: "First, are the plaintiffs part of a group that is 'bound together and required ... to market their products according to cooperative rules?' Second, is the assessment regulation related to and in furtherance of other non-speech purposes, carrying out other aspects to further other economic, societal, or governmental goals?" If both tests are met, the fee is constitutional.

In *Invention Submission Corp. v. Rogan*, 2004 WL 243353 (4th Cir. Feb. 11, 2004), the challenger stumbled over the need for final agency action. This case involved an ad campaign by the Patent and Trademark Office to alert the public to invention promotion scams. The ad in question identified a particular inventor who expressed his distaste for his treatment by a company that offered to promote his invention. It did not, however, identify the company. A journalist then discovered, with the help of a telephone number provided by the PTO, the company referred to by the inventor in the ad. The result was very unfavorable publicity in the resulting article. Too bad, says the Fourth Circuit. Where there is no attack on the veracity of the ad, and there is no challenge to the outcome of an agency proceeding determining the rights of the parties, there is no final agency action, and no review.

Access to judicial review – cases on finality, ripeness, preclusion, and standing

Two other recent finality decisions are worthy of note. The first, *Air Brake Systems, Inc. v. Mineta*, 2004 WL 239834 (6th Cir. Feb. 11, 2004), involved facts in some ways similar to *Invention Submission Corp.*, but perhaps more troubling in that the agency made a negative statement about the product of a particular company. In response to a potential customer of Air Brake Systems, the Chief Counsel of NHTSA sent a letter stating his opinion that Air Brake's particular system did not comply with the applicable safety standard. The opinion was also posted to the agency's web site, allegedly causing economic harm to the company.

There were three issues: (1) whether the particular interpretation of the standard (as requiring a warning light) was valid, (2) whether the Chief Counsel's application of that standard to Air Brake's product was valid, and (3) whether the Chief Counsel had the authority to issue such interpretations. The court held that the first two issues were not reviewable because they did not constitute final agency action. It held the third issue to be final and reviewable, and it upheld the agency's authority. As to the first issue, the court recognized that the interpretation was authorized by statute and was not tentative, but it was not final because it did not have sufficient impact on the challenger. The court stated that the availability of *Chevron* or *Seminole Rock*

deference would be an indicator of finality (on the theory that *Chevron* deference, at least, is due only to statements with the “force of law”). Since the agency had explicitly stated that its Chief Counsel opinions were not entitled to any deference, the opinion did not affect rights or obligations and was not final. It seems, perhaps appropriately, that an agency statement declining deference may be an effective way to avoid judicial review.

As to the second issue, the application of the standard to Air Brake’s product, the court noted that the letter was tentative in nature, merely responding to an inquiry, rather than serving as the culmination of agency proceeding, and was stated in tentative language. It was not the result of the sort of process that would precede the usual recall action sought by the agency, and it was issued by a subordinate official to whom there had been no delegation to decide this sort of issue (by contrast to the legal interpretation addressed above, which was the subject of a clear delegation). Finally, the issue of authority to issue such letters was final action, essentially because the creation of the authority was not tentative, the Secretary, who delegated the authority, was not a subordinate official, the decision to make the delegation qualified for *Seminole Rock* deference, and the Chief Counsel had been issuing such interpretations since 1967.

The other noteworthy finality decision is *Alsea Valley Alliance v. Department of Commerce*, 2004 WL 343587 (9th Cir. 2004), which involved the finality of a district court order for purposes of review. The district court had remanded an Endangered Species Act listing to the agency for further consideration. When it became clear that the agency would forego an appeal, a party sought and was granted leave to intervene solely for the purpose of appeal. The court applied the following test to the issue of finality: “A remand order will be considered ‘final where (1) the district court conclusively resolves a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable.’” While noting that the agency would have been able to appeal the court’s decision, the Ninth Circuit held that the district court decision was not sufficiently final as to other parties. Those parties could still participate in the agency proceeding and would be entitled to review at the conclusion of that proceeding.

Ripeness was the barrier to review in *AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003), which involved a statement made by the agency in response to a primary jurisdiction referral from the federal district court. In the original litigation, Sprint sought compensation from AT&T for use of Sprint’s wireless network. The court referred two questions to the FCC: (1) whether Sprint may charge access fees to AT&T, and (2) whether Sprint’s fees were reasonable. After various filings and receipt of public comments, the FCC held that Sprint was entitled to collect fees from AT&T only to the extent of any contractual agreement that might exist between the two of them. The FCC declined to

address the reasonableness of Sprint’s fees until after the court had resolved the issue of whether there was a contractual obligation. Both Sprint and AT&T challenged the FCC’s decision. AT&T argued aspects of state law should be held preempted by federal law, while Sprint challenged certain details of the FCC statement. The court held that neither challenge was ripe. With the district court still to decide the threshold contractual issue, and matters concerning the reasonableness of the fees to be addressed by the agency at a later time, neither challenge was fit for review. There were too many judgments yet to be made, factual and otherwise, for the court of appeals to become involved at this point.

Ammex, Inc. v. Cox, 351 F.3d 697 (6th Cir. 2003) is a fairly straightforward ripeness decision denying review of a notice of intent to enforce that had been issued by the Michigan Attorney General. Although the case itself is unremarkable, the opinion, written by newly minted judge and former law professor John Rogers, provides a carefully crafted discussion of ripeness doctrine, as well as useful material on both mootness and subject matter jurisdiction.

Several other decisions should be noted related to access to judicial review. As to preclusion of review, see *Riverkeeper, Inc. v. Collins*, 2004 WL 343516 (Feb. 24, 2004) (following *Heckler v. Chaney* in refusing review of the NRC’s refusal to take certain actions to protect a nuclear plant against terrorist attack), and *Amgen, Inc. v. Smith*, 2004 WL 257042 (D.C. Cir., Feb. 13, 2004) (denying review of a Medicare refusal to pay for a particular drug). As to standing, see *Baur v. Veneman*, 352 F.3d 625 (2d Cir. 2003) (finding standing to challenge the agency’s refusal to ban downed cattle from the food chain, with a strong dissent that would have denied standing for lack of a particularized interest), and *Sierra Club, Inc. v. E.P.A.*, 2004 WL 309142 (7th Cir. Feb. 19, 2004) (easily finding standing for the affected power company in a Sierra Club environmental challenge, but denying standing to the Chamber of Commerce as a mere “officials intermeddler,” whose interests were, in any case, adequately represented by the power company). ○

Miscitations of the APA

According to annual developments editor Jeffrey Lubbers, based on his research using the Westlaw database, federal judges and law review authors mistakenly refer to the federal APA as the “Administrative Procedures Act” over 10% of the time. Judges fared comparatively better with an 11% error rate vs. a 12.4% error rate for authors.

Recent Articles of Interest

By Yvette M. Barksdale^{1,2}

1. Beth Simone Noveck, *The Electronic Revolution in Rule-making*, Forthcoming, 2004 *Emory L. J.* ____ (2004).

This article argues that technological changes, including E-rule-making, the initiative for conducting notice and comment rulemaking over the Internet at a centralized website under the direction of the Office of Management and Budget, will transform citizen participation in the rulemaking process. The author argues that the technological design of E-Rulemaking will substantially affect whether the transformative changes are for better or worse. The author advocates seizing this unique opportunity to design E-rulemaking technology to enable democratic practices that broaden and restructure the practice of participation, anchoring that practice in the theory of participatory democracy and collective action. The author argues for cost-effective speech tools and dialogic methodologies to promote more collaborative, less hierarchical, and more sustained forms of interactive participation by communities of regulatory practice, or "policy juries." The article also includes guidelines for Office of Management and Budget (OMB) to evaluate the success of these deliberative, participatory practices.

2. Michael Gerrard and Michael Herz, *Harnessing Information Technology to Improve the Environmental Impact Review Process*, Forthcoming, 12 *N.Y. U. Envtl. L. J.* ____ (2004).

The authors argue that National Environmental Policy Act (NEPA) environmental impact statements (EIS) should be, and perhaps legally must be, made available on line over the Internet. Otherwise, NEPA is chained to the technology of the 1970s, when the statute was adopted. Instead, strong policy reasons, including accessibility, availability, and ease of use, among others, favor computerizing the EIS. Several statutes, including NEPA itself, the Paperwork Reduction Act, the Electronic Freedom of Information Act, and the E-Government Act of 2002, properly interpreted, require EIS to be made available on-line. The article also discusses current federal and state practice regarding the on-line availability of Environmental Impact Statements.

3. Ellen Goodman, *Spectrum Rights in the Telecom to Come*, Forthcoming, 41 *San Diego L. Rev.* ____ (2004.)

This article evaluates regulatory models for resolving interference disputes in spectrum management of access to radio frequencies. The author discusses the efficacy of various regulatory models for spectrum control, including current FCC

command and control licensing models, and proposed property rights, and open access models. The author argues that none of these proposed models adequately addresses the major difficulty raised by spectrum allocation – resolving interference disputes. Instead, the author advocates a hybrid model which would combine both open access, property rights and a regulatory presence.

4. Frank S. Bloch, Jeffrey S. Lubbers, & Paul R. Verkuil, *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals For Improving Social Security Disability Adjudications*, 25 *Cardozo L. Rev.* 1 (2003).

This article revisits the issue of reform of administrative adjudicatory procedures for Social Security Administration (SSA) disability decisions, in light of SSA's increasing administrative caseload and the rise in private representation of disability claimants. With a focus on the twin controversial issues of government representation, and closing the administrative record, the article discusses prior studies, overviews the SSA disability determination process and describes current and past practice regarding record closing and government representation. Concluding the central adjudicatory problem is the incompleteness of the decision record, the authors recommend, among other reforms, introducing a nonadversary Counselor who would work closely with the claimant, the ALJ and the SSA to identify, and quickly and efficiently fill, gaps in the evidentiary record.

5. Gary E. O'Connor, *Restatement (First) of Statutory Interpretation*, Forthcoming, 7 *N.Y. U. J. Legis. & Pub. Pol.* ____ (2004).

The author supports unifying the law of statutory interpretation, but argues that a "Restatement of Statutory Interpretation" by the American Law Institute is preferable to a legislatively adopted "Federal Rules of Statutory Interpretation." The author argues that a Restatement would retain the advantages of the federal rules plan (internal coherence, prospective application, uniformity, and legitimacy), without its disadvantages (remote likelihood of tripartite passage and separation of powers concerns). The author also concludes that the process for the adopting a Restatement is, for these purposes, preferable to that required to adopt federal rules.

6. Louise G. Trubek and Maya Das, *Achieving Equality: Healthcare Governance in Transition*, 29 *Am. J. L. & Medicine* 395 (2003).

The authors argue that new health-care governance models hold great promise for improving health care quality and equity. These models focus on outcome quality and substitute decentralized and collaborative methods for traditional top-down, centralized command and control techniques. The

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² These abstracts are drawn substantially, sometimes primarily, from the authors' introductions to their articles. To avoid duplication, the abstracts do not include articles from the *Administrative Law Review* which *Administrative Law Section* Members already receive.

new methods improve quality and equity with evidence based medicine, standard-setting, patient participation, and information sharing "disease management" techniques. The authors discuss two successful projects involving community health centers and physician led managed care plans. However, structural governance barriers, such as fragmented regulatory structures, traditional federalism and public/private divisions, over-specialization, "narrow knowledge", and inflexible and punitive administrative and judicial rules, hinder the development of these collaborative, interdis-

ciplinary approaches. The authors advocate 1) shifting operational decisions to local entities, while using national, regional and state entities for supervisory roles, such as standard-setting, compliance monitoring, and incentive structuring, and 2) facilitating "horizontal learning" between professional, geographical, and cultural communities. The authors also encourage health care advocates, including lawyers and non lawyers, to shift their reform efforts from litigation and regulation to monitoring and assisting these new health-care delivery systems. ○

**The Association for Transportation Law, Logistics & Policy
Announces its
DIAMOND ANNIVERSARY ANNUAL MEETING
To be held June 26-30, 2004
Jackson Lake Lodge, Grand Tetons National Park, Wyoming**

Presented in cooperation with the Transportation Committee of the American Bar Association's Section of Administrative Law and Regulatory Practice

Educational Sessions for Continuing Legal Education credit will include:

- The In-House & Outside Counsel Relationship: What In-House Lawyers Need vs. What They Get
- Litigating and Managing Fatigue Issues Involving Transportation Providers
- Ethics in an Electronic Era – Ethical Management of Electronic Information to Prevent Unwitting Disclosures and to Assure Proper Preservation in Litigation
- Has the Tide Turned Against Individual Negotiation of Truck, Rail and Air Cargo Shipping Arrangements?
- Marine Service Contracts – Their Construction, Value and Use
- Balancing Security and Efficiency – The Latest from the Front Lines

Topics will be presented by widely-known practitioners in the field, from both business and regulatory agencies.

Meanwhile, enjoy the beautiful setting of the Grand Tetons and of nearby Yellowstone National Park. With Jackson Hole, Wyoming also celebrating its 75th Anniversary only a short distance from the Lodge, recreational opportunities abound. Enjoy an evening float down the Snake River for supper; a Sunday night reception with the opportunity to attend the opening concert of the Festival Orchestra of the Grand Teton Music Festival. Take a ride on the Jackson Hole Aerial Tram for some spectacular views of the surrounding area; join the day trip to Yellowstone and witness the certainty of Old Faithful. For a conclusion to this fantastic experience, join the final evening's Dinner Dance as ATLLP celebrates its Diamond Anniversary as the leading organization in North America serving transportation and logistics professionals.

For further information, please contact the Association's Headquarters (410) 267-0023 or check on the Internet at WWW.ATLLP.COM.

Exhausting Administrative Remedies in Discrimination Cases: Double Trouble?

By Michael Asimow¹

No administrative law principle is more venerable than the requirement that a litigant exhaust administrative remedies before seeking judicial remedies or judicial review. But what happens when the law provides two different sets of administrative remedies for the same injury?

Schifando claimed that the City of Los Angeles discriminated against him on the basis of disability. He complained to the state Fair Employment and Housing Commission (FEHC) which investigated his complaint and issued a "right to sue" letter enabling him to sue the City in court. Trouble is, the City had its own remedy system. The Charter required employees who claimed illegal discharge to file a grievance and pursue it before the Board of Civil Service Commissioners (Board) before seeking judicial review. Schifando ignored the City's remedy scheme.

The Supreme Court's 5–2 decision held that Schifando could choose between the FEHC remedy and the Board remedy and was not required to pursue both. *Schifando v. City of Los Angeles*, 6 Cal.Rptr.3d 457 (2003). The Court pointed out that the legislature intended the FEHC law to supplement existing remedies for discrimination, not to supplant them or be supplanted by them. On a practical level, a requirement that employees pursue both remedies would create a procedural minefield involving conflicting statutes of limitation. In addition, if the employee pursued both remedies, the result could easily be a decision by the Board before the employee could get to court — and the Board's decision would then be res judicata, effectively precluding an FEHC action.

The FEHC/judicial remedy is often far superior from the employee's point of view because FEHC performs investigation and conciliation services (and occasionally pursues the claim for free before its own adjudicatory board). More important, the FEHC scheme allows a court to award much more generous remedies than are available under the City charter. The FEHC law also requires the defendant to pay a successful plaintiff's attorney's fees. As a result, *Schifando* insures that employees with solid discrimination claims against local government will shun the local remedy scheme and pursue FEHC remedies instead. As the dissenters pointed out, this result will drastically undercut the constitutionally based personnel systems of local government. ○

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

The American Bar Association's Government and Public Sector Lawyers Division is accepting nominations for its three national awards that will be presented at the ABA's Annual Meeting in August 2004, in Atlanta.

- The Dorsey Award honors an outstanding public defender or legal aid lawyer. Eligible recipients are lawyers who serve indigent persons, in the employ of legal aid bureaus, public defender offices, or Legal Services Corporation funded legal organizations providing legal service to the disadvantaged.
- The Hodson Award recognizes sustained outstanding service or a specific extraordinary accomplishment by a government or public sector law office. Eligible nominees include all government or public sector law offices (including military law offices, legal aid bureaus, public defender offices and other legal organizations funded by the Legal Services Corporation) at the federal, state and local levels. Departments or units within offices are also eligible.
- The Nelson Award, recognizes outstanding contributions to the ABA by an individual government or public sector lawyer. All government and public sector lawyers are eligible and the Division will consider an individual's specific extraordinary accomplishments as well as sustained superior contributions to the American Bar Association over a number of years.

These awards offer a rare opportunity to recognize the outstanding work accomplished in the public sector. By highlighting the extraordinary abilities of public lawyers, the awards afford the legal and lay communities a better understanding and appreciation for their vital work.

Nominations must be received in the Division's office by April 9, 2004. To obtain a nomination brochure, contact Theona Salmon at 202-662-1023 or e-mail her at salmont@staff.abanet.org. All nomination information can also be found on the Division's webpage. <<http://www.abanet.org/govpub/annual.html>>

OMB's Peer Review Proposal —Swamped By Science?

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as panels of experts, to ensure that regulations are based on solid science rather than on “political science.”

As a general matter, rulemaking is already time-consuming and costly

enough without mandating, at least in an overly rigid way, new analytic requirements. And there is one final point to consider for those, like me, with a deregulatory bent: The same ossification that

may deter the adoption of new regulations may also deter the repeal or relaxation of those unnecessary or unwise ones already on the books. ○

Changes in the Adjudication of Medicare Beneficiary Appeals in the New Medicare Prescription Drug Legislation: Reform or Retreat?

continued from page 7

or retreat depends. As usual, the devil is in the details. These new procedures do have the potential for constituting a major reform. CMS should approach the development of an ALJ corps as an opportunity to create an interface between beneficiaries and the program where problem areas in the program emerge and can be resolved justly and humanely while maintaining the fiscal integrity of the Medicare program with

genuine integrity. If CMS does so and implements reforms in coverage policy making in the same vein, then the procedures are in place to meet the incredible challenges that new medical technologies and procedure will present to the federal government and society.

For in the end, the debate is fundamentally about how much of society's resources do we want to command for the care and treatment of disease and injury

when the promise of medical science and pharmaceutical advance have never been greater. The debate is compounded by the fundamental ideological issue of whether we want the federal government to command these resources or whether we want private actors in the economy to use those resources to create value elsewhere – perhaps for younger, healthier generations. ○

The ABA/UNDP International Legal Resource Center Enters Fifth Year

December 1, 2004 marks the fifth anniversary of the ABA/UNDP International Legal Resource Center (ILRC), a partnership project of the ABA and the United Nations Development Programme (UNDP) based upon their common commitment to support and promote good governance and the rule of law throughout the world.

Housed within the Section of International Law and Practice (SILP), the ILRC identifies pro bono legal experts to fulfill the requirements of UNDP requests relating to legal technical assistance projects worldwide. Additionally, the ILRC serves as a depository of relevant rule of law and governance documents and other materials. Upon UNDP request, the ILRC also provides specialized assistance, including assessment of draft laws and regulations as well as substantive advice on policy formulation.

To date, the ILRC has responded to more than 150 requests for technical legal assistance from 60 UNDP program countries throughout Asia, Africa, Latin America and the Caribbean, the Commonwealth of Independent States, and the Middle East. Further, since its inception, ILRC's Registered Legal Expert Database has experienced dramatic growth. Currently, the database boasts a total of over 900 attorneys from more than 80 countries, with an average of 18 years of experience and fluency in 50 languages – all interested in providing technical legal assistance to UNDP on a pro bono basis.

Recognized for program excellence in furthering the ideals of the United Nations, the ILRC has generated from UNDP member countries some of the highest regards for the ABA as an organization truly committed to the rule of law around the world. UNDP's 2003 Annual Report featured the ABA as a “key institution” representing all other partnerships UNDP has forged globally. The ILRC looks forward to further expanding the mutually enriching collaboration between the ABA and UNDP in its fifth year of operations.

The ILRC welcomes more attorneys to participate in its activities! Please visit the ILRC website at www.abanet.org/intlaw/ilrc, where you can readily find an online-registration form. Please forward your questions and inquiries to Ms. Hongxia Liu, the ILRC Staff Director, (202) 662-1662 or liuh@staff.abanet.org. You can also contact the members of the ILRC Steering Committee: Timothy L. Dickinson at tdickinson@dllaw.com; Don S. DeAmicis at ddeamicis@ropesgray.com; and James R. Silkenat at silkenaj@arentfox.com.

Section News & Events

Fullbright Lectureship

Bill Funk, Section Chair and Professor of Law at Lewis & Clark Law School, has been awarded a Fullbright Lectureship for the academic year 2004-05 at the Center for American Studies at the University of Heidelberg in Heidelberg, Germany. He will teach a course on American Public Law and a seminar on race, gender, and sexual orientation discrimination.

Section Couniys EU Project Seed Money

Funding is always a sure sign of progress, and the Section's European Union project is no exception. The Council voted at the midyear meeting to authorize an initial funding level of \$12,500. The project is co-sponsored by the Sections of Antitrust; Environment, Energy and Resources; and International Law. The immediate purpose of the project is to create a reliable and reasonably comprehensive resource for U.S. practitioners whose practice or interests necessitate an understanding of the EU's regulatory processes. A more complete description is posted on the Section's website at <http://www.abanet.org/adminlaw/eu/home.html>.

Section Seeks Input On Proposals To Reform APA Adjudication Provisions

By Michael Asimow

The Section has been working on proposals for legislative reform of the adjudication sections of the APA. These proposals will eventually be voted on by the ABA's House of Delegates. If adopted by the HOD, they will become formal ABA policy.

The most fundamental change is to extend some APA procedural protections to the hearing schemes not presently covered by the APA. These schemes include veterans' benefits, immigration, government contracts, some civil penalties, IRS collections, and dozens of others. These hearings are not conducted by administrative law judges (ALJs) but by a broad class of officials generally referred to as presiding officers. There are probably well over half a million such non-ALJ hearings each year.

The proposal would extend to non-ALJ hearings the APA provisions relating to ex parte contacts, separation of functions, impartiality, rights to notice and hearing, and other basic procedural protections. The proposals would not change the existing system of ALJ hearings. Nevertheless, if adopted, they would be the most important change in the APAs adjudication sections since that statute was adopted in 1946.

At the Section's winter meeting, there was an extensive discussion of these recommendations. ALJ groups are particularly interested in the proposals, and they wanted additional time to furnish input. As a result, the Council deferred consideration of a "circulation draft" of the proposals. Interested persons have until April 15 to comment on the proposals. If the Council approves a modified version of the circulation draft at its spring meeting, the

proposals will be circulated to government agencies that would be affected. Probably, the proposals won't be in shape to go to the HOD until its winter meeting in 2005.

Civil Penalties Resolution

Jamie Colburn presented his draft ABA resolution and report supporting the agency assessment of civil penalties by administrative hearing. The Council took the report and proposed resolution under consideration after a discussion of, among other things, the potential reactions from other ABA sections, in particular the Business Law Section.

The resolution as discussed at the Mid-Year Meeting states that "the American Bar Association supports the use of administratively-imposed civil money penalties as one part of an administrative enforcement program that includes civil or criminal sanctions" and that the ABA recommends that, "in cases involving such administratively-imposed civil money penalties, the opportunity for a formal adjudication pursuant to the Administrative Procedure Act's provisions, 5 U.S.C. §§554, 556-558, be available to parties." The project began as a response to a Business Law Section sponsored resolution and report from summer 2003 broadly attacking the use of administrative hearings in the assessment of civil penalties as incompatible with due process and the Seventh Amendment's guarantee of a trial by jury.

Discussion also centered on the relative amounts of civil penalties in issue and the necessity of a formal adjudication where the amount is significant under the circumstances of the case. The report is currently being redrafted to support the amended version of the resolution which now urges that "in cases involving significant administratively-imposed civil money penalties, the opportunity for a formal adjudication pursuant to the Administrative Procedure Act's provisions, 5 U.S.C. §§554, 556-558, be available to parties." (emphasis added). Once redrafted, the Section will begin the process of circulating the proposed resolution to other sections, including the Business Law Section, for comment.

ABA adopts Revised Ombuds Standards

After years of effort by various section members, including among others Phil and Nancy Harter, Sharan Levine, and Judy Kaleta, the ABA House of Delegates has finally approved a section-sponsored resolution endorsing Standards for the Establishment and Operations of Ombuds Offices (Standards), as revised February 2004.

The Standards provide guidance on the structure and operation of ombuds offices so that ombuds may better fulfill their functions and so that individuals who avail themselves of their aid may do so with greater confidence in the integrity of the process. At the same time, the Standards recognize that all ombuds must operate with certain basic authorities and essential characteristics.

The Standards are the result of collaboration among several ABA entities. These include the Sections of Administrative Law and Regulatory Practice, Business Law, Dispute Resolution, Individual Rights and Responsibilities, Labor and Employment, and State and Local Government Law; the Government and Public Sector Lawyers Division, and the Commission on Law and Aging.

The Standards are meant to apply to federal, state and local governments, academic institutions, for profit businesses, non-profit organizations, and sub-units of these entities that have established ombuds offices, regardless of the type of ombuds involved, such as legislative, executive, organizational and advocate ombuds. While the basic authorities of these persons called ombuds and the independence, impartiality, and confidentiality with which they operate vary, they share essential characteristics which the Standards address.

The Standards underscore the need for ombuds independence and confidentiality. In addition, the Standards address establishment and operations of ombuds, their qualifications, limitations on their authority, removal from office, and notice.

Because an ombuds is intended to supplement, not replace, formal procedures, the Standards recognize that the person contacting the ombuds for assistance needs to understand the difference between working with an ombuds and seeking formal redress. The Standards are designed to make sure that a person coming to the ombuds will be aware that legal rights might well be at stake and that the person may have to take action beyond working with the ombuds to protect those rights.

The Standards draw a clear distinction between communications to an ombuds when the ombuds makes no further communication to the entity and those situations where the ombuds communicates with agents of the entity. In the former case, the Standards would provide that it is not appropriate to impute the communication to the entity in the form of notice since it has no way of learning what was communicated. But in the second instance, whether or not the entity has notice depends on the facts relayed and the applicable law.

Ultimately, the Standards are designed to ensure that ombuds can help protect individual rights and interests against the excesses of public and private bureaucracies. The Standards and Report may be read and downloaded at www.abanet.org/adminlaw/ombuds/

House Financial Services Committee Director Draws Large Lunch Crowd

By Mark A. Goodin*

On January 13, 2004, Bob Foster, the Majority Staff Director of the House of Representatives Financial Services Committee, shared his views of that Committee's accomplishments from the First Session of the 108th Congress, as well as its agenda for the Second Session. Foster's lunch-time discussion drew a large

audience of attorneys in private and government practice, in addition to financial services industry representatives and law students. It was sponsored by the Banking and Financial Services Committee of the Section of Administrative Law and Regulatory Practice, and was moderated by Warren Belmar, Co-Chair of the Banking and Financial Services Committee, at Balch & Bingham LLP.

Foster began his presentation by noting that his Committee has been busy over the past two years with subjects ranging from corporate scandals to money laundering to terrorism risk insurance. He stated that, despite its large size (70 members), and the high-profile issues that it faces, the Committee has developed "unusually cooperative bipartisan relationships." Foster attributed this characteristic not only to his assessment that the Committee's issues are not necessarily "partisan," but also to his view that the members share a common orientation toward economic growth and consumer protection.

Foster reviewed a number of Committee accomplishments from the First Session, including the passage of bills addressing such diverse issues as deposit insurance, national flood insurance, mutual funds, and internet gambling. These bills now await either Senate action or House-Senate conference committee action.

Looking forward to the Committee's agenda for the Second Session, Foster said that there probably will be additional hearings regarding the regulation of Government Sponsored Entities. Foster noted that although he did not view this as "must-pass legislation," it is "something that we should do," and that both GSEs and the marketplace would benefit from regulatory reform. Foster also said that there may be a hearing on the role of attorneys in "investor confidence" issues. In addition, the Committee agenda will likely include an examination of RESPA and insurance industry regulatory reform.

In response to audience questions, Foster predicted that insurance regulatory reform will be considered before the **summer**, but that it is likely to be limited to interim proposals, rather than more extensive reform, such as federal charters for insurance companies. Noting that 2004 is an election year, one audience member asked Foster to assess the Committee's interaction with the Bush Administration. Foster praised the relationship. Although the White House stays in regular contact with the Committee, and provides assistance when asked, it rarely gives unsolicited advice. "We like it," said Foster. "The White House mostly leaves us alone." ○

* Staff attorney, Federal Election Commission

Includes information on the new BIPA legislation!

Guide to Medicare Coverage Decision-Making and Appeals

Thomas D. Kinney, Editor

Section of Administrative Law and Regulatory Practice American Bar Association

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