Administrative & Regulatory Law News

Section of Administrative Law & Regulatory Practice

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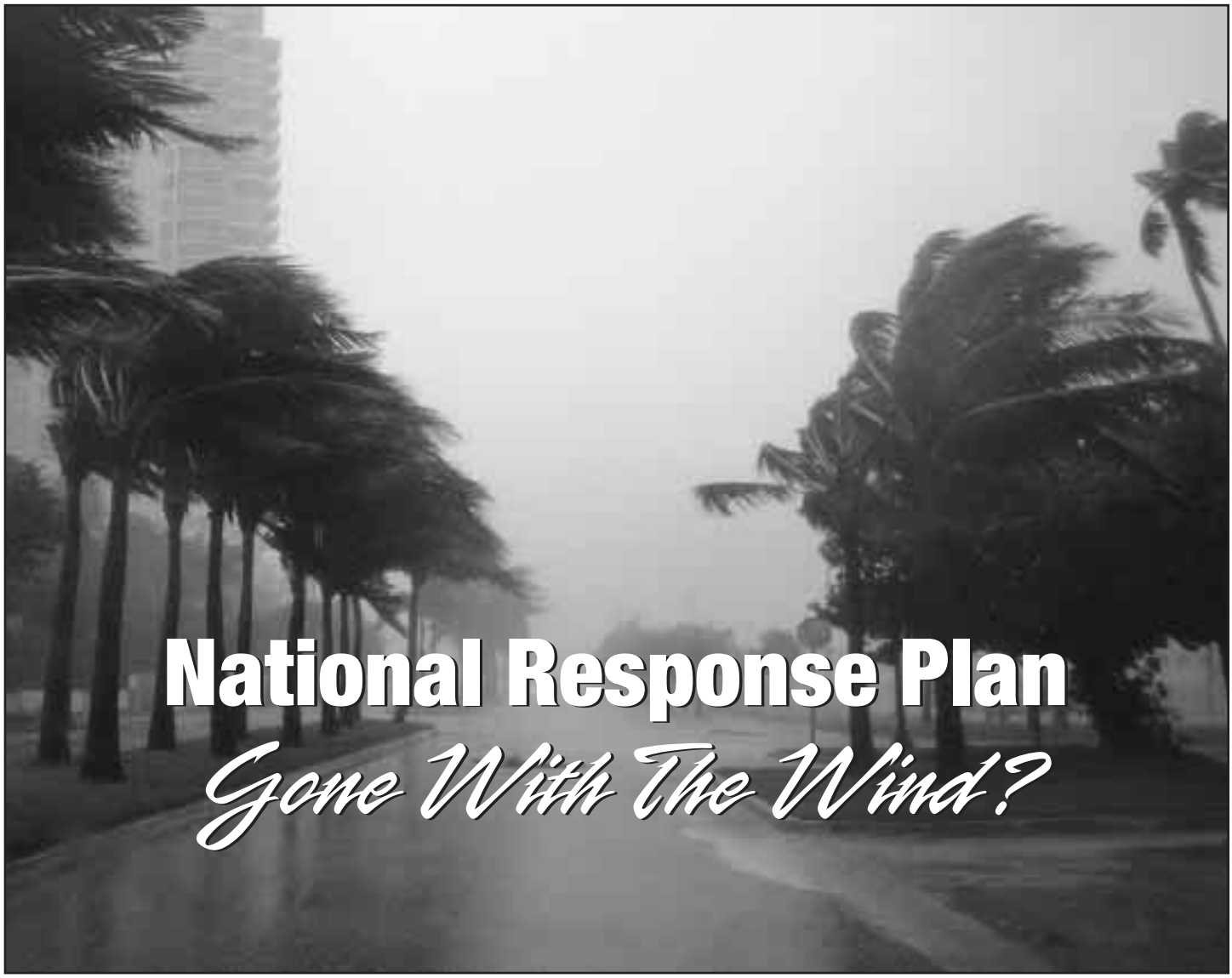

National Response Plan
Gone With The Wind?

Also In This Issue

2006 SPRING MEETING ■ BERMUDA ■ APRIL 28-30, 2006

Chair's Message

Eleanor D. Kinney

This year, the section launched its First Annual Homeland Security Law Institute in Washington DC on January 20th. Last fall, section member Joe Whitley and former General Counsel of the US Department of Homeland Security (DHS) approached the section and its Homeland Security Committee to host the institute. The result was a terrific educational program and a wonderful opportunity for section growth and advancement.

This institute is a key development for the section for many reasons. First, it implements the section's educational mission. More importantly, it provides an opportunity to assist in the development of law and policy in the new and emerging field of homeland security law. Daily, DHS is developing policies, rules and guidance for the protection of installations within the United States in uncharted areas of federal regulation. The field of homeland security law touches on national security, public health protection, and regulation. Lawyers in private practice in Washington DC and around the country are forming a new homeland security bar to translate the policy, rules and guidance from DHS to their clients.

Our Section is well positioned to make a considerable contribution to the development of sound homeland security policy, law and regulation that protects the public while not impeding civil liberties or business progress. Repeatedly, the opening session of the institute, with its panel of the leading attorneys in the general counsel's office of DHS, emphasized the importance of a strong homeland security bar to interpret the agency's regulatory mandates to regulated parties. The section has the type of expertise – namely constitutional, administrative and regulatory law – to provide a sounding board for DHS and the homeland security bar on law, policy and guidance proposed by DHS. [Ed. Note: see "Founding the Homeland Security Bar" in this issue].

In April 2006, the the section will hold its second annual institute on Administrative Law in Washington, DC. This year's institute will focus on the most timely topic of the law of lobbying. This institute coincides with the section's publication of the 3rd edition of Lobbying Manual edited by Professor Bill Luneburg of the University of Pittsburgh School of Law and Tom Susman of Robes & Gray (Washington, DC).

Switching gears, the section is poised to have a very interesting spring and summer. The section meets in Bermuda the last weekend in April. The Bermudian law firm Appleby Spurling Hunter, named offshore Law Firm of the Year by Chambers Global in 2005, will host the section for educational programs on off-shore regulatory issues and a reception following. We also look forward to a wine tasting and barbecue dinner on the beautiful Bermudian beach at the Elbow Beach Club.

The ABA's annual meeting is in Hawaii in August. The section's summer council meeting will be July 19-20 in Washington, DC. Despite the fact that the council will not meet in Hawaii, the section plans a fine array of programs and activities with the section and other sections within the ABA. We hope you will join us for our spring and summer meetings.

Table of Contents

Administrative & Regulatory Law News

The Administrative & Regulatory Law News (ISSN 1544–1547) is published quarterly by the Section of Administrative Law & Regulatory Practice of the American Bar Association to provide information on developments pertaining to administrative and regulatory law and policy, Section news, and other information of professional interest to Section members and other readers.

The Administrative & Regulatory Law News welcomes a diversity of viewpoints. From time to time, the editors may publish articles on controversial issues. The views expressed in articles and other items appearing in this publication are those of the authors and do not necessarily represent the position of the American Bar Association, the Section of Administrative Law & Regulatory Practice, or the editors. The editors reserve the right to accept or reject manuscripts, and to suggest changes for the author's approval, based on their editorial judgment.

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False Conflict: Who's in Charge of National Public Health Catastrophes

By Michael Greenberger[*]

Hurricane Katrina's devastation renewed an old debate: which level of government is in charge of catastrophic disaster with national impact? Wild finger-pointing among different levels of government after Katrina has been premised upon many theories about what went wrong during those fateful days. Certainly a major focus of that debate was the federal government's failure to implement effectively the Department of Homeland Security's (DHS') December 2004 National Response Plan.[1] This plan is designed to coordinate capabilities and resources of all levels of government into a unified, all-discipline, and all-hazards approach to domestic incident management.

To be sure, states and localities are undeniably the primary responders to a traditional public health emergency. This notion is well established by precedent going back to the 1824 Supreme Court decision in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), which firmly stated that "health laws of every description, as well as laws for regulating the internal commerce of a State," were under the authority of the individual states, pursuant to their police powers. That precedent was confirmed in the early twentieth century in the landmark case of *Jacobson v. Massachusetts*, 186 U.S. 11 (1905), in which the Supreme Court upheld Massachusetts legislation authorizing the City of Cambridge's board of health to compel smallpox vaccinations pursuant to state police powers.

Reacting to criticism of the federal government's response during Katrina, federal officials, including President Bush, have since suggested federalizing response operations to national public health catastrophes, including deployment of military forces. Addressing the nation about Hurricane Katrina on September 15, 2005, President Bush stated, "[i]t is now clear that a challenge on this scale requires greater federal authority and a broader role for the armed forces." Karl Rove, President Bush's chief advisor and Deputy White House Chief of Staff, reportedly opined that "the only mistake that we made with Katrina was not overriding the local government."

As we show below, the federal government in fact has a broad panoply of powers to respond to a catastrophic public health emergency. Although this point has been debated in the past, recent Supreme Court authority has seemingly settled the issue of whether there can be federal supremacy in dealing with these kinds of public health matters. For example, in the 2005 case of *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), the Supreme Court held that the Controlled Substances Act, a federal public health provision enacted under the Commerce Clause, properly preempted the California Compassionate Use Act of 1996, allowing access to and distribution of marijuana to seriously ill patients. Specifically, the Court held that the federal government could regulate the purely *intra*state commerce of marijuana in California, because this activity has *inter*state effect. Similarly, the federal government must surely be able to supervise the response to events such as a catastrophic health emergency affecting the nationwide movement of food, fuel, clothing, medicine, and people, because this kind of event would also clearly impact interstate commerce.

In the wake of Katrina, and statements about the need for federal control in this area, localities and states have sharply criticized claims of federal supremacy. For example, Governors Mike Huckabee (R–Ark.), and Janet Napolitano (D–Ariz.), on behalf of the National Governors Association, recently stated that "[s]tate and local governments are in the best position to prepare for, respond to, and recover from disaster and emergency." Representative Peter T. King (R–NY), chairman of the House Committee on Homeland Security, has argued that "local and State governments – and not the Feds – are primarily responsible for responding to natural disasters and other emergencies."

It is the thesis of this paper, however, that this ongoing argument between the federal government and its state and local counterparts presents a false dichotomy. The solution to these seemingly contradictory views can be found in the National Response Plan (NRP). Although, concededly, states and localities are the primary responders to public health emergencies, response to emergencies on a catastrophic and nationwide scale similar to Katrina require many more resources, both in quantity and diversity, than a state and/or city can provide. It is these catastrophic situations that the NRP addresses. The NRP is activated when the Secretary of the DHS declares a catastrophe to be an "incident of national significance," *i.e.*, "an actual or potential high-impact event that requires a coordinated and effective response by an appropriate combination of Federal, State, local, tribal, nongovernmental, and/or private-sector entities in order to save lives and minimize damage, and provide the basis for long-term community recovery and mitigation activities."

Contrary to the beliefs of many, however, activation of the NRP is not necessarily a green light for the federal government to supersede the response efforts of local and state authorities. In fact, a fair reading of the NRP is that it

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[1] DHS, National Response Plan (NRP) (Dec. 2004), *available at* **http://www.dhs.gov/interweb/assetlibrary/NRP_FullText.pdf** (last visited Jan. 19, 2006).

contemplates a coordinated, real time response with the states and localities working together with the federal government, deploying federal assets as a supplement to state and local supervision of an emergency response. Only in a worst-case scenario would the federal government find it necessary to direct and supervise the relief effort.

The NRP was promulgated by DHS in December 2004 under direction of Congress, through the Homeland Security Act (Pub. L. 107-296), and the President, through Homeland Security Presidential Directive 5. It is "an all-discipline, all-hazards approach to domestic incident management…built on the template of the National Incident Management System (NIMS), which provides a consistent doctrinal framework for incident management at all jurisdictional levels, regardless of the cause, size, or complexity of the incident." The NRP provides "mechanisms for the coordination and implementation of a wide variety of incident management and emergency assistance activities," such as "Federal *support* to State, local, and tribal authorities; interaction with nongovernmental, private donor, and private-sector organizations; and the coordinated, direct exercise of Federal authorities, when appropriate." (Emphasis added.) The NRP recognizes that any time the President makes a declaration of an emergency under the Stafford Act (the legislation establishing programs and processes for the federal government to provide all-hazards disaster and emergency assistance to states and localities), the emergency automatically becomes an "incident of national significance," calling into play a broad range of federal assistance.

For example, the NRP emphasizes the importance of deploying the federal National Disaster Medical System (NDMS), a coordinated effort by DHS, the Department of Defense (DOD), the Department of Health and Human Services (DHHS), and the Department of Veteran Affairs. The NDMS works in collaboration with the states and other appropriate public and private entities in providing medical response, patient evacuation, and definitive medical care to victims and responders of a public health emergency. This federal medical assistance is deployed through Emergency Support Function (ESF) Annex #8, "Public Health and Medical Services," within the NRP. ESF #8 provides for federally directed medical assistance to supplement state and local resources in response to an incident of national significance.

The NRP provides for federal law enforcement assistance and immediate response authority for "[i]mminently serious conditions [when] time does not permit approval from higher headquarters." When this situation exists, the NRP clarifies that DOD has authority to use local military commanders and responsible officials from DOD components and agencies to "take necessary action to respond to requests of civil authorities consistent with the Posse Comitatus Act," the statute making it illegal to use the active military to enforce laws.

Yet it is clear that all of this can be done as a *supplement* to state and local supervision. Every coordination effort contemplated by the NRP has a state coordinating officer or official at the top level of planning. Such command structures ensure that States' rights and interests will not be put to the side. Accordingly, the NRP expressly and repeatedly recognizes that states and localities know their jurisdictions and their needs more intimately than their federal counterparts, while simultaneously providing for those states and localities to utilize federal resources to which they would not otherwise have access.

The organizational charts for the federal response under the NRP (at pages 29-32) foster an image of a war room central processing or executive operation unit with cabinet or sub-cabinet level participation under the direction of the Secretary of Homeland Security at the table, planning strategy in a constant and real-time communication with state and local authorities. Coordination of this type, if skillfully provided as a supplement to state and local leadership, may very well ensure that the question of "who's in charge" need not be reached. As Federal Emergency Management Agency (FEMA) Regional Director John Pennington puts it:

> Most emergency incidents are handled on a daily basis at the local level, but the challenges we face as a nation are far greater than the capabilities of any one community or state…. In any disaster, the coordination, planning, and unity of our response are the key determinates of success, and are in fact the guiding principles of the new National Response Plan.

It is now widely acknowledged that the NRP was triggered quite belatedly during Katrina. On a practical basis, however, there is every indication that it was never implemented as intended, *i.e.*, there was almost certainly no central federal operations unit composed of cabinet or sub-cabinet level representatives sitting in an executive operations center communicating on a real-time basis with state and local government. Instead, the federal response, even after the NRP was enacted, was mostly ad hoc, and to the extent it was centralized, the federal representatives were not sufficiently high-level.

Even when belatedly triggered, the eventual federal response to Katrina exemplifies the potential of the NRP, as a supplement to state efforts. For example, FEMA deployed more than fifty-seven NDMS teams and twenty-eight search and rescue teams with nearly 1,800 personnel to save lives and render medical assistance. Over 5,000 Coast Guard personnel worked to save or evacuate 33,520 lives. Through Emergency Management Assistance Compacts, more than 320,000 National Guard members from throughout the country were made available to support emergency operations, including augmenting civilian law enforcement. In addition to shipping basic first aid materials and supplies to the devastated area, DHHS established a network of forty medical shelters, staffed by 4,000 medical personnel, with a collective capacity of 10,000 beds. The Department of Agriculture's Food and Nutrition Service provided food at shelters and mass feeding sites, issuing

continued on page 14

The Nondelegable Duty to Govern

By Paul R. Verkuil[*]

Privatization poses a governance dilemma. Any organization, whether public or private, wants the freedom to decide how to make decisions. This includes decisions about whether to perform functions directly (in house) or indirectly (outsource). All firms, including government, confront this classic make or buy choice. The "best" choice is the most efficient one determined by an organization's core mission. But even though government shares aspects of private firm behavior, it operates under different constraints. Unlike private firms, government cannot outsource the governance function itself. Under principles of democratic theory, the public is connected to the governance function. Public control is assured by making that function a nondelegable duty under the Constitution.

The most troubling consequence of the privatization movement is a function of its success – the ability to outsource can include functions that relate to the constitutionally imposed duty to govern. In a world where government has been downsized dramatically, privatization can become addictive: its use accelerating with the number of duties or services outsourced. Consultants are attractive – they often have an edge over in house personnel in terms of flexibility, creativity, response time, and obedience. These characteristics appeal to many government officials, especially political appointees with short time horizons for whom the bureaucracy is often a pejorative term.

Privatization thus exerts a centrifugal force on government, moving the formulation of policy away from the center of public control. For a government official, the private role in the formulation of government policy is rarely acknowledged directly. But in both the civilian and military settings such delegations are occurring, often in subtle ways, with increasing frequency. Some seemingly unrelated examples might help define the broad contours of the problem. Take the following: inviting selected members of an industry subject to regulation to help the White House formulate policy on an off-the-record basis; contracting with established "policy shops" like RAND to formulate plans of action which could have originated in house; permitting private contractors to perform military duties normally required of officers of the United States; allowing private contractors to make policy decisions for FEMA about hurricane preparedness before and after disasters such as Katrina occur; and even using consultants to review and evaluate informal rulemaking submissions and compile records for review, or to formulate potential new regulations and guidelines for regulatory agencies.

These situations can be explained and even justified on an individual basis. But when they occur simultaneously and join with a commitment to diminish the size of government, a pattern of privatized governance emerges. At this point, the question of "who's in charge?" requires us to remember the constitutional arrangements that established the duty to govern in the first place.

Defining Policy Officials

To avoid confusion with legitimately outsourced functions, attention must be concentrated on officials who operate at the policy level. These are officials who are often designated as Officers of the United States or members of the Senior Executive Service (SES). These are the people, in John Rohr's words, who run our Constitution. In this key governance category, the downsizing trends are increasingly problematic. The number of presidential appointments has remained constant while their oversight responsibilities have grown with the expanded privatization movement. And the crucial category of career policy officials (the SES) is not keeping up with added responsibilities. At the same time, the number of political appointees to career officials seems to be growing, which raises issues of performance quality and mission drift. FEMA's ability to deal with Hurricane Katrina is a dramatic example in this regard. The ineffectiveness of presidential appointees, combined with increased responsibilities of all policy officials due to downsizing, created a "governance gap" of critical dimensions.

With senior leadership in short supply, oversight, accountability and operational control are jeopardized at a time when government's role has become more challenging. In the military setting, operations in Iraq and Afghanistan have exposed serious leadership deficiencies that can be at least partially attributed to outsourcing. The creation, in P.W. Singer's words, of a "privatized military industry" that has become a sophisticated provider of strategic as well as tactical services to the United States reflects the problem. Our military leadership increasingly uses private military services for battlefield as well as logistical support. Outsourcing is part of the military readiness paradigm and, with personnel pressures on the military, it could become more central in the future.

Downsizing of the civilian workforce affects the military independently of the size of our "public" armed forces. The military is subject to civilian control through the President as Commander in Chief, so it is civilian policy makers who ultimately make military policy. The Pentagon has been hard hit by civilian retirements and personnel cutbacks, even as the defense budget has expanded. In fact, the growing shortage of civilian

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[*] Professor of Law, Cardozo Law School, Yeshiva University; fellow and former chair, Section of Administrative Law and Regulatory Practice. This article is excerpted from a forthcoming book entitled OUTSOURCING THE UNITED STATES (Martha Minnow & Jody Freeman, eds.) (Harvard University Press 2006). *See also* Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397 (2006).

contracting officers at the Pentagon comes precisely at the time when contractual oversight is most needed, as the Government Accountability Office (GAO) has demonstrated. Private contractors have been able to reap single-sourced, noncompetitively bid multi-billion dollar contracts in Iraq. Similar contracts have been awarded in connection with hurricane disaster relief. Emergencies, it seems, are never in short supply.

The Case for Constitutional Governance

If the President assigns duties to private contractors that are normally performed by either principal or "inferior" officers of the United States, the vertical dimension of separation of powers is triggered. Under *Buckley v. Valeo*, 424 U.S. 1 (1976), officers of the United States exert "significant authority"; this authority is inherent and exclusive to the executive function. Transfer of this kind of functions to private hands, whether intentional or not, violates the authority delegated to the executive under the Constitution. For example, the President appoints military officers subject to senatorial concurrence. Their duties are within the constraints of the Constitution. When these officers conduct military operations they are exercising command authority. When private contractors perform these functions, such as interrogation of prisoners in Iraq, the constitutional connection is broken. Significant duties cannot devolve to private contractors under *Buckley* any more than they can be performed by congressionally appointed officials. Indeed, without congressional authorization all combat military actions involving the use of force would arguably be nondelegable actions by the President. In this setting, the phrase "private military" becomes an oxymoron offensive to our Constitution.

On the civilian side the vertical dimension is not as well articulated. An Office of Legal Counsel Memorandum in the Bush I Administration (14 Op.O.L.C. 94, 98 (Apr. 27, 1990)), discussing the horizontal/vertical dichotomy cites only two "vertical" cases, *Schechter Poultry* and *Northern Pipeline*, neither of which really applies to outsourcing. What is needed is precedent that forbids delegations by the President of significant government authority to private hands. A better case is *Carter v. Carter Coal,* 298 U.S. 238 (1936), which forbade as a matter of due process the transfer of public decisionmaking power to the private sector. The paucity of such cases is not surprising. It can be due to the absence of any instances of policy delegations to private hands (which may be a recent phenomenon); to the assumption that such delegations are within the executive power (a question explored here); or, just as likely, to limitations on justiciability and standing that inhibit such precedents from emerging. The lesson of the *Morgan* cases[1] also inhibits courts from looking behind an administrator's decision to outsource significant government functions.

The principle of public responsibility for public acts thus relies on a constitutional rule that is searching for explanatory force. What is needed is a corollary to the "anti-aggrandizement" principle which limits Congress's ability to usurp the President's appointing and removal authority. The corollary principle (the "anti-devolution principle") would prevent the President from aggrandizing power by devolving it to non-constitutional officers at the expense of the executive power (the Take Care Clause) and Congressional limitations expressed in the Appointments Clause.

With the current urge to privatize, such a principle is ripe for development. In the military setting, the President is overseeing unprecedented delegations of combat authority to private hands. (Not just Iraq, but Colombia and other countries where the private military is in place.) Where Congress has not acted to authorize such delegations, the President's authority is at its "lowest ebb," as *Youngstown* teaches.

In terms of public accountability, privatized actions are often non-transparent. Sidney Shapiro has noted the inapplicability of the Federal Advisory Committee Act and the Freedom of Information Act to private contractors as a deficiency of democratic control. The new anti-devolution principle would connect the President's transfer of policy-making authority to private hands to the Appointments, Opinion in Writing and Take Care clauses in ways that protect Congress and ultimately the President from loss of policy control.

The Subdelegation Act and OMB Circular A-76

The arguments presented here are not just constitutionally based. The Subdelegation Act, Pub. L. No. 82-248, 65 Stat. 710, 713 (1951), *codified at* 3 U.S.C. §§ 301-03 (2004), may have a surprising role to play. It makes delegations by the President to subordinates presumptively valid. The Act reflects a sophisticated understanding of presidential management growing out of the work of the Hoover Commission in the 1950s. By granting power to subdelegate, however, the Act also sets limits and such delegations can only be made to Officers of the United States. This presumption in favor of delegations to officers or other high government officials excludes delegations to other entities outside the bounds set by the Act, for example, state officials or private contractors. It makes sense that Congress would limit implicit delegations to Officers of the United States, since these are the officials that the Senate has approved through the advise and consent process. Therefore Congress still retains some control over the exercise of power by those officials, if only through the impeachment process. Delegations to those outside this category have to be expressly provided for by statute, which ensures Congress some continuing oversight of the delegation process.

This aspect of the Subdelegation Act has a constitutional dimension. If no statute grants the President or a head of department the power to subdelegate to private contractors, that delegation could well exceed the executive power. Indeed, even when such a statute exists, the question still remains whether inherent functions of government are being delegated.

continued on page 11

[1] *Morgan v. United States*, 298 U.S. 468 (1936), and *Morgan v. United States*, 304 U.S. 1 (1938).

Roundtable: Statutory Interpretation in the Executive Branch

The 2005 Administrative Law Conference featured a panel on "The structure of Statutory Interpretation Within the Executive Branch." The News invited the panelists and others to share their thoughts on this timely topic. Professors Mashaw and Herz, Associate Professor Stack, and Assistant Professor Morrison weigh in.

Exploring Agency Statutory Interpretation

By Jerry Mashaw[*]

Chevron v. Natural Resources Defense Council validated agency statutory interpretation as an autonomous enterprise over two decades ago. Yet since that time virtually no one has even asked, much less answered, some simple questions about agency statutory interpretation: As a factual matter, how do agencies interpret statutes? Are there distinctive interpretive methodologies that appeal to administrators? In what contexts? With what effects? And, on the normative side, how should administrative agencies approach their interpretive task?

These are not idle questions. *Chevron* legitimates agency law making on the basis of political accountability. But does agency interpretive practice suggest that it is systematically sensitive to political oversight? We do not know. More importantly for this brief essay, there may be a paradox at the heart of *Chevron* deference. To see why we must first explore the appropriate normative commitments of agency interpreters.

Lawyers and legal academics argue endlessly and inconclusively about the norms that should guide judicial interpretation of federal statutes. This conversation often has a constitutional flavor. It focuses on the separation of powers and the appropriate role for courts in the elaboration of the legal order. Much of that literature is also directed to what I will call "prudential" normative concerns. Because "ought" implies "can," we argue incessantly about the competence of courts when approaching the task of interpreting legislative utterances. Exploration of the normative dimensions of administrative interpretation can usefully be organized around these same themes of constitutional demand and prudential concern.

Constitutional Demands

In some sense the position of agencies as "faithful agents" of the legislature has a constitutional clarity that exceeds that of the judiciary. Yet the meaning of "faithful agency" is never uncomplicated. What about agencies' relationship to the President? Presidents attempt to shape administration by a host of actions both formal and informal. And given the President's constitutional responsibility to see that the laws are "faithfully executed" (executive) agencies would seem bound to follow presidential direction to the extent that it is consistent with their statutory authority.

Much judicial statutory construction is based on principles of constitutional comity that counsel courts to avoid constructions of statutes that would raise serious constitutional questions. Agencies, by contrast, have no general responsibility for constitutional review of congressional action. Indeed, were agencies intensely attentive to avoiding constitutional questions when interpreting the statutes entrusted to their care, they would often foreclose authoritative resolution of constitutional questions by the judiciary. And obviously administrators who fail to pursue implementation any time a constitutional issue looms on their horizon could not possibly carry out their legislative mandates effectively. Constitutionally timid administration both compromises faithful agency and potentially usurps the role of the judiciary in harmonizing congressional power and constitutional command.

Courts repeatedly suggest that interpretation designed to lend coherence to the general legal order is one of their most important responsibilities as custodians of the rule of law. But if we believe with Hamilton that the executive branch is meant to give energy to governance, we should also believe that an agency that seeks to harmonize its actions with the whole of the legal order risks forgetting that agencies are created precisely to carry out special purpose missions. Other legal institutions have responsibilities for coherence and balance.

In recent years, much controversy about statutory interpretation has centered on the evidentiary materials that should be relevant to the judicial task. But, whatever one thinks of judicial use of non-statutory, legislative material, Peter Strauss has argued persuasively that these materials are critical to the interpretive task of agencies. Agencies have a direct relationship with Congress that gives them insights into legislative purposes and meaning that are likely to be much more sure-footed than those available to courts in episodic litigation. For a faithful agent to forget this content, to in some sense ignore its institutional memory, would be to divest itself of critical resources in carrying out congressional designs.

Post enactment politics also matters. Agencies are subjected to both presidential and legislative oversight of their implementing activity. Indeed, agencies' continuous interaction with both executive branch offices and sub-parts of Congress provides us with constitutional security concerning the political accountability of our administrative insti-

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[*] Sterling Professor of Law & Management, Yale University. This article is drawn from *Agency Statutory Interpretation*, **www.bepress.com/ils/iss3/art9** (2002), a revised version of which was published as *Norms, Practices and the Paradox of Deference: A Preliminary Inquiry Into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005).

tutions. Should not all of this political context be constitutionally relevant to administrators when pondering the appropriate interpretation of their statutory mandates?

Consider finally the matter of the constitutional status of judicial precedent. A judicial interpretation ignoring prior authoritative interpretations of higher courts would be considered constitutionally illegitimate and deeply inappropriate almost anywhere. Yet, there are numerous instances where non-acquiescence in judicial constructions may be necessary for the proper exercise of an agency's constitutional mandate. Agencies often confront conflicting interpretations of their statutes by district and circuit judges. In these situations there is no consistent judicial precedent to follow. More importantly, agencies are not inferior courts. They are a part of the executive branch. A court ruling is binding on the agency in the litigated case, but as a technical legal matter, not otherwise. The agency is legally free to maintain its prior position and litigate the matter further.

Prudential Considerations

Prudential approaches to statutory interpretation seem to have three major purposes: (1) increasing the interpreter's capacity to avoid error; (2) increasing or maintaining the legitimacy of the interpreter as an interpreter; and (3) enhancing the interpreter's capacity to make its interpretations effective. All of these prudential considerations are relevant with respect to agency interpretation of statutes as well.

For example, an agency that has been heavily involved in the negotiation of statutory language, privy both to formal and informal legislative debates, and is cognizant of the multiple motives that have prompted particular legislative utterances, may feel that its capacity to avoid error in statutory interpretation is enormously advanced by its utilization of pre- and even post-enactment legislative history

Similarly, the question when interpreting is often not just how to avoid error, but in what direction to skew errors given irresolvable interpretive uncertainty. Considerations of institutional legitimacy may, however, reverse the interpretive default rules. Courts have long been viewed as rights-protecting, institutional brakes, while executive agencies are institutional accelerators. A prudent court may say to itself: "When in doubt protect the constitutional commitment to a government of limited powers." A prudent administrator might be better advised to adopt the counsel: "When in doubt make the statutory scheme effective." Judicial legitimacy is more often called into question by activism than by avoidance. Almost the opposite might be true for administrators.

Finally, agencies may have much more reason than courts to look at interpretation from the perspective of internal bureaucratic or hierarchical control. If the Social Security Administration is going to regulate the interpretive discretion of thousands of adjudicatory personnel, it had better have some hard-edged regulatory policy. "Rulishness" may not make a statute "the best that it can be," but it guards against the best defeating the good. Obviously, courts too are influenced by needs for hierarchical control over lower court judgments. But, courts can strive for the "best" interpretation with less risk that they will thereby drive out "good."

Summing Up

There is – I hope – much to quarrel with and argue about in the preceding discussion. But, from that discussion it seems fair to conclude that judges and administrators interpret, indeed should interpret, within divergent normative contexts. A set of "Canons of Responsible Interpretive Practice" would look different if addressed to administrators than if addressed to judges. Table 1 suggests, in an oversimplified bi-polar fashion, how great that divergence might be.

To return to the question with which we began, my construction of parallel universes of interpretive discourse on the foundation of divergent institutional roles seems to undermine the very possibility of an authentically deferential judicial posture. How can a court's determination of "ambiguity" or "reasonableness" at

continued on next page

TABLE 1 Canons for Institutionally Responsible Statutory Interpretation

		Agency	Court
1.	Follow presidential directions unless clearly outside your authority.	+*	-*
2.	Interpret to avoid raising constitutional questions.	-	+
3.	Use legislative history as a primary interpretive guide	+	-
4.	Interpret to give energy and breadth to all legislative programs within your jurisdiction.	+	-
5.	Engage in activist lawmaking.	+	-
6.	Respect all judicial precedent.	-	+
7.	Interpret to lend coherence to the overall legal order.	-	+
8.	Pay particular attention to the strategic parameters of interpretive efficiency.	+	-
9.	Interpret to insure hierarchical control over subordinates.	+	-
10.	Pay constant attention to your contemporary political milieu.	+	-

* "+" means appropriate; "-" inappropriate. Given my discussion, many of these notations might realistically be more nuanced, "++" or "+/", or even "+/?", for example.

Chevron's famous two analytical "steps" be understood as deferential when that determination emerges from the normative commitments and epistemological presumptions of "judging" rather "administering"? And how could *Mead's* resuscitation of *Skidmore* deference make sense as deference at all when the discourse, to be persuasive, would presumably have to be within the terms of a judicial conversation about meaning that ignores, if not falsifies, the grounds upon which much administrative interpretive activity is appropriately and responsibly premised? We cannot pursue these matters here, but I hope to have convinced you that there is indeed something interesting to talk about and that the conversation has hardly begun.

Agencies, Courts, and Statutory Purpose

By Michael Herz[**]

Judge Learned Hand once wrote that statutory "interpretation is the art of proliferating a purpose." Until not so long ago, purposivism was the dominant approach to statutory interpretation, largely under the direct or indirect influence of the "Legal Process" school associated with Professors Henry Hart and Albert Sacks. Over the last few decades, though, purposivism has yielded a great deal of ground to textualism in the federal courts.

The litany of objections to reliance on statutory purpose is long and familiar. However, it is always directed at *judges*. My claim here is that in almost every respect this critique loses much of its power when applied to agencies.

There are, I think, five standard objections to reliance on purpose in statutory interpretation. Let's consider each in turn.

First, it is often said that inquiring into purpose is simply not the court's job. If the words of the statute seem inconsistent with its purpose, that only means the legislature did not do a very good job in writing the statute. It is not up to the court to rewrite it; courts lack that sort of legislative authority. This is a particular application of the general textualist position that the law is the text and nothing else.

Accepting the premise, this criticism loses much of its force when applied to agencies precisely because agencies *do* have an indisputable and uncontroversial legislative function. Even those dubious of *judicial* lawmaking, such as Justice Scalia, accept the legislative function of agencies, although they insist that this power exists only as an incident of executive functions. And, of course, *Chevron* honestly embraces the legislative role of agencies. Therefore, the objection that statutory *construction* (as opposed, if you will, to statutory *interpretation*) based on purpose goes beyond the proper interpretive role has much less purchase applied to agencies than applied to courts.

Second, even if legislative purpose is theoretically relevant, the argument goes, it just does not exist. Congress is a they, not an it; its members have varying degrees of familiarity with any particular bill and divergent goals in mind. If valid (which is contestable), this is a powerful critique of purposive interpretation. The response has to be that it is acceptable, even valuable, for the interpreter to "*attribute* a purpose" to the statute, as Hart and Sacks put it. *See* HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374, 1377 (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994). And if that is what's happening, once again the agency is in a better position to do so than a court. The reasons are the same as those that underlie *Chevron* deference: accountability, expertise, and delegation from Congress.

Next, one might say that even if legislative purpose (a) exists and (b) matters, it is just too hard to determine. The historical record is malleable and often conflicting. As a result, purposivism "risks attributing to the legislation not the purposes reasonably inferable from the legislation itself but the judge's own conception of the public interest," as Judge Posner wrote in THE FEDERAL COURTS (p. 288).

This critique is again less powerful as applied to agencies than to courts. For one thing, agencies' closeness to the legislative process gives them an advantage in determining what the legislative purpose was. Agencies propose legislation; they testify at hearings; they are participants in the legislative process. An agency's hands-on involvement and institutional memory give it insight into statutory goals that a court lacks. (This is essentially Peter Strauss's argument for why agencies may rely on legislative history, convincingly elaborated in *When the Judge is not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History,* 66 CHI.-KENT L. REV. 321 (1990).) And even if one still fears that the agency interpreter will be pursuing her own conception of the public interest, we return to the point that doing so is more legitimate for agencies than for courts.

Fourth, one can object that even if there is such a thing as an identifiable legislative purpose, courts are ill-equipped to determine which interpretation of a statute will most effectively advance that purpose. For example, the *purpose* of rent control is to ensure a reasonable stock of affordable housing; what interpretation of a rent control law will best achieve that goal requires making controversial policy choices as to which a court lacks expertise, information, or a democratic mandate.

Yet expertise, information, and a (concededly dilute) democratic mandate are exactly what an agency does have. Recall the *Chevron* case itself. The Court described the purposes of the Clean Air Act generally, and the nonattainment provisions in particular, as being to reduce air pollution to acceptable levels from the point of view of human health without crippling American industry. Whether the bubble policy advanced or retarded those goals was just not something that the judiciary could determine. But, teaches the Supreme Court, the EPA administrator could.

The last objection to purposive interpretation is the one where the call is much closer, and the edge may even go to the judiciary. The objection is that reliance on purpose can be seductive and misleading, resulting in too devoted or single-minded a pursuit of congressional purpose. For example, the civil rights fee-shifting provision in 42 U.S.C. § 1988 was designed to encourage civil rights litigation by increasing the expected value of such a lawsuit. The more expan-

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sively one reads "attorney's fees," the more that goal is furthered. If all one wants to do is encourage such litigation, one would read attorney's fees to include expert witness fees, which seems plausible, *see Friedrich v. City of Chicago*, 888 F.2d 511 (7th Cir. 1989), or double fees, or a million dollar bonus, which do not. But Congress did not want to do everything possible to achieve its purpose; it chose a specific means. The concern is that in focusing on the end, the interpreter will lose sight of the means. *See West Va. U. Hospitals, Inc. v. Casey,* 499 U.S. 83 (1991) (Scalia, J.) (holding that expert witness fees are not recoverable under § 1988 and observing that "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone").

Is this danger (however overstated) of greater concern with regard to courts or agencies? Here we may have a tie. On the one hand, the agency is closer to the legislative process, and will have a keener sense of what compromises it produced and the limits of the legislative pursuit of a particular goal. On the other, the agency's specialization may make it less sensitive to the compromises and tradeoffs that would stop the legislature shy of full achievement of a goal. Perhaps the EPA would focus on Congress's desire to achieve clean air in the Clean Air Act and do anything to get there, or the EEOC would overemphasize equality concerns and downplay employer's interests. As generalists, not committed to a particular program, courts might be less likely to abuse purposive interpretation in this way. (A related justification is often offered for White House control of rulemaking or general oversight of agency activity.)

Notwithstanding this concern, at the end of the day it seems to me that agencies are less susceptible than courts to the critique of purposivism. (I say agencies intentionally; the same conclusions do not necessarily hold if the executive branch interpreter is the President.) I do not mean to endorse that critique as applied to courts, nor do I mean to say it is wholly inapplicable to agencies. My goal has been modest, and relative rather than absolute; it is only to establish that agencies are in a better position to interpret statutes in light of their purpose than are courts.

The Priority of Statutory Interpreters Within the Executive Branch: The President, the Agency, and Congress' Choice of Delegate

*By Kevin M. Stack****

Because presidents are held politically accountable for the actions of administrative agencies, they have strong incentives to exercise control over agency action. One means of exerting that control is the presidential order, including executive orders and other presidential directives. As to the import of these orders for agency statutory interpretation, one can readily assent to the general view expressed by Professor Jerry Mashaw that "[a]gency recalcitrance in the face of a valid executive order is neither politically prudent nor constitutionally appropriate."[1] But under what conditions do the President's orders legally bind agency officials?

I argue that in the absence of an independent source of constitutional authority to sustain the validity of a presidential order, an order legally binds agency officials' discretion only when it follows from a grant of statutory authority to the President in name. If that view is correct, then agency officials are frequently confronted with an intriguing question of statutory interpretation: How should they treat presidential orders that lack legal authority to bind their discretion? I argue that agency officials acting under statutes they administer have an obligation to consider the President's position on the statute at issue, with a rebuttable presumption in favor of adopting the President's view.

The Scope of the President's Statutory Powers

One strain of American legal thought embraces the view that any statute that grants power to an executive official implicitly confers power to the President to direct the official's action under the statute. Defenders of a strongly unitary theory of the executive, under which the Constitution requires all law-implementing power to be vested in the President, take this view. Based on statutory arguments, Dean Elena Kagan also has contended that statutes granting power to executive officials should be read to include the President as an implied recipient of directive authority.[2]

I challenge this position. Proponents of reading delegations to executive officials as conferring directive authority on the President have not adequately attended to Congress's enduring practice of granting power to officials subject to the President's control. From the time of the Founding through the present, Congress has expressly and frequently conditioned grants of authority to executive officials "with the approval of the President," "with the approbation of the President," "under the direction of the President," or words to similar effect. These statutes, which I call "mixed agency-President delegations," support a negative inference that when Congress grants authority *solely* to an executive official, a "simple delegation," it should be presumed that Congress does not seek to grant the President directive authority. Rather, when Congress aims to grant the President authority to act, or to act through a specified official, it names the President, either alone or in a mixed agency-President delegation.

This negative inference is strongest when applied to simple delegations that appear in statutes that also contain mixed agency-President delegations. But it also applies when simple and mixed agency-President delegations do not appear in the same statute—even if one is cautious as a general matter about making inferences from statutory usage. First, the

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[1] Jerry L. Mashaw, *Norms, Practices and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 506 (2005).

[2] Elena Kagan, *presidential Administration*, 114 HARV. L. REV. 2245, 2326–31 (2001).

choice of statutory delegate is a critical decision; Congress knows that the content of the policy that is implemented, and its continuing control over that policy, depends in part on the entity to whom it grants power. Second, the choice of delegate is a recurrent issue, arising whenever Congress grants authority; this recurrence strengthens the grounds for a presumption of congressional knowledge of its own practices. Mixed agency-President delegations are part of Congress's vocabulary of delegation—a kind of convention—from which negative implications can be drawn for reading simple delegations. On this view, only statutes that grant power to the President in name confer directive authority to the President.

Proponents of a strongly unitary executive, therefore, must either argue that simple delegations are sufficiently ambiguous to invoke constitutional avoidance or clear statement rules, or rest with the startling conclusion that statutes conferring authority on officials other than the President are unconstitutional.

Agency Treatment of Nonbinding Executive Orders

This central statutory conclusion further implies that agency officials often confront presidential orders that do not legally bind their discretion. Of course, as a practical matter, the President has great influence over agency officials. But this fact does not eliminate the need to clarify the underlying framework through which agency officials should view the President's orders.

As to agency officials' duties with regard to presidential orders that do not legally bind their discretion, the officials clearly have an obligation to consider the President's position. The President's constitutional responsibility for oversight of the executive branch suggests not only an obligation of consideration, but that the President's view should be the starting point of the analysis, with a rebuttable presumption in favor of adopting it. What considerations should inform the agency official's judgment as to when this presumption is overcome?

Several circumstances might strengthen the presumption in the President's favor. For instance, if the President's order pertains to the coordination of policy among different agencies—something the President is particularly well positioned to do—it may warrant more substantial weight, and thus increase the burden on the agency official seeking to overcome it. Likewise, if the order reflects an issue or policy that played a role in the President's campaign for office, or which the President has publicly embraced, the order would merit added weight. These considerations should inform the agency official's judgment about whether to follow the President's statutory constructions; they do not justify the President's directive authority under delegations to executive officers as Dean Kagan suggests.

The principle that statutory delegation to an official vests that official with an independent duty and discretion, not a duty to the President, creates a check on the President's claims of authority internal to the executive branch. The fact that Congress is ill-equipped to police the President's adventurous assertions of statutory authority—in part because it is driven to protect constituents' interests and the partisan interests of the majority party, rather than its own institutional prerogatives—helps to justify that check and the conclusion that the President may claim statutory authority only under statutes that grant power to the President in name.

Executive Branch Statutory Interpretation and the Canon of Constitutional Avoidance

By Trevor W. Morrison[****]

How do executive branch actors interpret statutes, and how should they? The prevailing, largely unexamined assumption appears to be that when executive actors interpret statutes, they can and should use the tools that courts use. But is that assumption sound?

Consider the canon of constitutional avoidance, which the Supreme Court has described as a cardinal principle of judicial statutory interpretation. It provides that where statutory meaning is uncertain, and where one possible reading would raise serious constitutional concerns, the statute should be construed to avoid such concerns unless doing so would be plainly contrary to Congress's intent. Interestingly, avoidance appears quite frequently in the work of at least some executive components. Indeed, in recent years it has played a central role in many of the most controversial episodes of executive branch legal interpretation, including the Justice Department's defense of the NSA's warrantless surveillance of communications involving U.S. citizens within the United States. It also appears in a range of matters not reaching the front pages of the newspaper, including in the more routine interpretive activities of agencies like the FCC, EPA, and FERC. Yet in virtually all these cases, the question whether the avoidance canon should apply at all in the executive branch receives no real attention. Instead, the fact that the courts employ avoidance is treated as a complete justification for its use in the executive branch.

Of course, knowing that a court will employ avoidance when reviewing executive action provides a powerful tactical incentive for the executive branch to follow suit. But our analysis should not stop there. First, many executive branch statutory interpretations are not subject to judicial review, either because the interpretation does not affect any particular individual, because those affected have no cause of action or lack standing to sue, or because the case is otherwise nonjusticiable. Second, even in cases where judicial review is likely, it is worth examining whether the executive use of avoidance is justifiable only on the tactical ground that courts will later apply it, or is also justifiable because the underlying values served by avoidance apply in the executive as well as judicial branch. We need to consider, then, the values underlying the avoidance canon.

The avoidance canon started out as a rule that courts should avoid interpreting statutes in ways that render them *actually unconstitutional*. Then in *United States ex rel. Attorney General v. Delaware & Hudson Company* 213 U.S. 366 (1909), the Supreme Court became concerned that when a court engages in the original form of avoidance, it provides what

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amounts to an advisory opinion. Consider: A court is faced with a statute that could mean either *X* or *Y*. Although both readings are plausible, conventional tools of statutory interpretation suggest that *X* is the best reading. But *X* also raises serious constitutional concerns. The court proceeds to examine those constitutional concerns and concludes that *X* is indeed unconstitutional. At that point, the original avoidance rule directs the court to read the statute to mean *Y* instead, thus arguably transforming its pronouncement of *X*'s unconstitutionality into an advisory opinion. To avoid those and related problems, the Court over time embraced the modern rule that courts should construe statutes not just to avoid actual unconstitutionality, but also to avoid *serious constitutional doubts.*

The critical point here is that the modern avoidance canon emerged out of a set of concerns specific to the federal judiciary—the rule against advisory opinions and, more broadly, concerns about the countermajoritarian nature of judicial review. Whatever we think of those concerns on their own terms, they have virtually no purchase outside the judiciary. Thus, if the avoidance canon is understood on these terms, it would seem entirely out of place in the executive branch.

There is, however, an alternative account of avoidance. On this account, the avoidance canon is simply a means of enforcing the underlying constitutional provision. The idea is that as Congress approaches constitutional boundaries, it activates a constitutional interest in keeping government within them. The avoidance canon guards those boundaries by making it more difficult for Congress even to approach them. This account of avoidance is especially forceful in areas where the underlying constitutional provision is not susceptible of robust direct enforcement. In those circumstances, the avoidance canon provides an indirect means of enforcing whatever norm is embedded in the constitutional provision.

On this alternative account, avoidance would seem to apply just as well in the executive branch as in the courts. Enforcing constitutional norms is not an exclusively judicial task; the President has an independent duty, reflected in his oath of office, to preserve and protect the Constitution. Thus, if the avoidance canon is understood as providing a statutory means of enforcing constitutional norms, then it should be a tool of executive as well as judicial statutory interpretation.

Even on this alternative account, however, it may not be appropriate for executive actors to employ avoidance in every circumstance where a court would do so. The avoidance canon is a tool for managing statutory ambiguity by assigning a particular consequence to the ambiguity. Whether it is appropriate to assign that consequence depends on the interpreter's ability to resolve the ambiguity by other, more direct means. Thinking about the executive branch in particular, the point to emphasize is that executive actors may often have access to sources of statutory meaning not available to courts. This is particularly true of administrative agencies. Because they have an ongoing responsibility to implement certain statutory regimes, and because they interact frequently with Congress in the course of discharging that responsibility, agencies often have a very nuanced, detailed sense of the congressional intent underlying a statute.

In sum, an examination of avoidance in the executive branch needs to consider both the values the canon is designed to serve and the precise institutional context of the interpretation. In some cases, the executive actor will be so intimately involved in the framing and implementation of the statute in question that the meaning of an otherwise facially ambiguous provision will be entirely clear. In those cases, avoidance is unnecessary, even inappropriate. But in circumstances where genuine statutory ambiguity persists, and where one available reading would raise serious concerns, it may well be appropriate—depending on one's view of the theoretical basis for avoidance—for the executive branch to employ the avoidance canon.

The Nondelegable Duty to Govern

continued from page 5

The phrase "inherent government function" is contained in OMB's Circular A-76. That circular creates an ideal framework for evaluating appropriateness of contracting out government functions. Contracting out is legislatively contemplated under the Federal Activities Inventory Reform Act (FAIR Act), Pub. L. No. 105-270, 112 Stat. 2382 (Oct. 19, 1998). Agencies submit biannual inventories of jobs that can be "competitively sourced" to private contractors, as against those that are inherently governmental. When competitive sourcing under Circular A-76 applies, government officials whose jobs are listed for outsourcing can challenge the agency decision by establishing the superiority of their services. This creates a competition over whether the private sector is more competitive than the public sector. This process has been encouraged and expanded by the Bush Administration. It has clear limits, however. Competitive sourcing can never include "inherent government functions." These are the jobs performed by those officials who exercise government authority that is nondelegable; in effect, jobs exercising "significant authority" in the *Buckley* sense.

The Circular A-76 process sets up an administrative mechanism for resolving the inherent government function question. First, it requires agencies to decide what functions are inherently governmental and then it provides process whereby competitive sourcing can be resolved. Government employees often prevail in these contests.

The A-76 process does not come into play in the vast number of outsourcing decisions, only those opening up new competitive sourcing opportunities. But its concerns and format are instructive in the larger setting. If government would take the "inherent function" requirement seriously, the fate of many outsourced jobs would be determined by the impact they would have on the power and duty to govern.

Insights from the SEC's Decision to Regulate Hedge Funds

By Troy A. Paredes ⋆⋆

Critics have characterized hedge funds as "secretive" investment vehicles that "escape" regulation by "exploiting loopholes" in the federal securities laws. There is something to this bad rap. Hedge funds, for example, were implicated in the mutual fund market timing and late trading scandals; concern arose that hedge funds might be buying votes in takeover contests; and the Securities and Exchange Commission has brought some notable enforcement actions against hedge funds for fraud.

Many start out skeptical of hedge funds because they do not understand them. Others are troubled because hedge funds often bet against the market. Others balk because hedge fund managers earn a hefty fee of around two percent of assets under management plus around 20% of fund profits.

If hedge funds occupied a small corner of the market, there would be no need to worry. In fact, estimates put the number of hedge funds at about 7,000 with around $1 trillion in assets. Aside from concerns over malfeasance, people still point to the 1998 collapse of Long-Term Capital Management (LTCM) to illustrate the impact hedge funds can have on financial markets – so-called "systemic risk."

Yet concerns about the hedge fund industry should be kept in proper perspective. The abuses punctuating the industry are not representative of hedge fund behavior. Most hedge funds are not behaving illegally, and most fund managers are not rogue traders playing with other people's money. Whether it is because we are still in a post-Enron climate, or because attention rarely focuses on banks that were not robbed, the reality that hedge funds provide investors with legitimate opportunities to earn above-market returns is downplayed. Additionally, LTCM was singular in its leverage. More recent hedge fund collapses have posed no systemic risk, although investors have lost money. Further, hedge fund trading spins off important benefits by leading to more efficient and liquid securities markets.

Admittedly, hedge funds are secretive. There is a difference, though, between secrecy and engaging in illicit or undisciplined behavior. More to the point, to say that hedge funds "escape" regulation by "exploiting loopholes" leaves the misimpression that hedge funds have evaded the law's reach in sneaky ways, straining to fit their funds within obscure legal openings. Hedge funds have been lightly regulated as a result of the design of the federal securities laws, not hedge fund shenanigans. There are well-established exclusions from the key mandates of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, and (until recently) the Investment Advisers Act of 1940. Hedge funds have been structured in an aboveboard fashion to take advantage of the exclusions built into the law. Still, in recent years, the cumulative effect of a $1 trillion industry falling outside the scope of the registration and disclosure mandates of the federal securities laws troubled regulators.

Against this backdrop, the SEC reversed course in regulating hedge funds. In 2004, the SEC, over the dissents of Commissioners Atkins and Glassman, adopted a new rule requiring hedge fund managers to register as investment advisers under the federal Investment Advisers Act beginning in February 2006.[1] (Notably, a hedge fund manager does not have to register if the fund's investors are blocked from withdrawing their capital for two years after investing.) Among other things, investment adviser registration means that a hedge fund must make certain disclosures with the SEC; make specified books and records available to the SEC for examination and inspection; adopt procedures governing proxy voting; and appoint a chief compliance officer.

Criticisms of the new hedge fund regulation include that it will drive hedge funds offshore; that compliance costs will keep new funds from launching; that it will chill fund managers from undertaking innovative investment strategies; that it opens the door to future regulation; and that in any event, regulation was unwarranted because hedge fund investors are wealthy individuals and institutions (so-called "accredited investors" under the federal securities laws) who can fend for themselves.

The particular costs and benefits of regulating hedge funds are not my focus. My inquiry is broader. What can we learn more generally about SEC decision making and securities regulation from the Commission's decision to regulate hedge funds now when it had not done so in the past? Since the SEC consciously shifted direction in deciding to regulate hedge funds – and in so doing overstepped the traditional boundary of securities regulation by looking past the ability of accredited investors to protect themselves – the hedge fund rule prompts a reconsideration of SEC decision making, particularly in the aftermath of Enron and WorldCom.

Although nobody knows for sure what motivates a regulator, the SEC's decision to regulate hedge funds is consistent with

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[1] Registration Under the Advisers Act of Certain Hedge Fund Advisers, Release No. IA-2333 (2004).

two views, both of which have broader implications for securities regulation: first, that the Commission did not want to get caught flat footed and embarrassed again, as it had been by the scandals at Enron, WorldCom, and elsewhere, by taking a lax stance regarding hedge funds; and second, after the earlier scandals, the risk of fraud and other hedge fund abuses loomed disproportionately large at the Commission, prompting it to act when in the past the agency had not. In reassessing whether hedge fund investors should be left to fend for themselves, the SEC, this time, concluded "no."

Although the following is anchored in the SEC's decision to regulate hedge funds, the discussion focuses on the broader consequences of politics and psychology at the SEC.

Politics at the SEC

The SEC was criticized for not doing more to prevent the recent wave of corporate and accounting scandal, and it was rebuked for not catching the mutual fund market timing and late trading abuses. At the same time, New York Attorney General Eliot Spitzer aggressively went after corporate corruption and was lauded for it.

Over the past few years – including, I believe, in regulating hedge funds – the SEC has responded to this one-two punch with aggressive regulation and enforcement. There was, in short, a widespread demand for securities regulation. The attitude of regulators and the public turned in favor of stiffer government oversight.

Even though commissioners and staff at the SEC are not political players like elected officials, individuals at the agency, to some degree, are presumably interested in shoring up their own reputations (and the agency's) and are influenced by public clamoring and media attention. Any such concerns play out against a background sensibility that regulators "do good" by acting. Further, the SEC has reason to want to assure its predominance in regulating securities markets against incursions by Congress or the states. And recent history shows that the SEC will face harsh criticism for being passive after some attention-grabbing abuses. Yet the agency will face only mild criticism for being too aggressive, even if markets are overburdened.

On the bright side, competition from Spitzer, coupled with increased public scrutiny, might have spurred an overly lax SEC. The concern, though, is that the SEC, impacted by these influences, became too active in protecting investors.

The general point is this. An administrative agency has a comparative advantage regulating given its subject matter expertise and relative insulation from politics and public clamoring. Such comparative advantage is compromised when any agency responds to political pressures and headlines in regulating, effectively undercutting the agency's independence and impartiality. In such cases, the underlying merits are no longer the only basis upon which regulators set their agency's agenda. Accordingly, an administrative agency, such as the SEC, should avoid being influenced by political and reputational pressures. The SEC should not cave to pressure from business interests not to regulate. But neither should the Commission be swayed by pressure from the public to regulate or by concerns that the agency will be criticized for not doing more. Such influences on securities regulation lay the foundation for excessive investor protections that overly burden business, the capital formation process, and the operation of securities markets.

Psychology at the SEC

The "precautionary principle" of risk regulation says that it is better to be safe than sorry – a regulatory policy of anticipation and preemption. Precautionary regulators will take prophylactic steps instead of waiting until problems materialize. Regulators are often criticized for being at least one step behind, chasing yesterday's problems instead of anticipating tomorrow's. But therein lies the risk of a precautionary regulatory approach: the risk of overregulation as regulators try to avoid some harm. Plus, prophylactic steps often are not informed by the insight of experience. Delay can be problematic, but so can acting too soon.

Moreover, the precautionary principle is misleading in practice. As Professor Cass Sunstein has stressed, precautionary steps with respect to one risk lead to other risks.

The question is what risks weigh most heavily in the regulatory balance? What risks do regulators regulate to avoid, and what risks do regulators tolerate? The answer, in part, depends on value judgments. But it also depends on psychological biases that affect decision making by making certain risks more fearful, even if, in fact, they are not as threatening as they seem.

Investor losses, hedge fund collapses, and jarring frauds are salient events that are readily recalled when regulating. Thus, these events are likely to feature more prominently in regulators' decision making than the actual magnitude of the events warrant. This disproportionate impact of especially salient events on decision making is associated with the so-called "availability heuristic," whereby salient risks are more available to one's mind and thus receive more attention, as well as the "representativeness heuristic" and "probability neglect," according to which people tend to overstate the probability of some bad recent event reoccurring. Plus, regulators may be inclined to respond aggressively to a perceived risk, since, after all, regulators regulate. The costs of securities regulation, including greater SEC oversight of hedge funds, are not nearly as salient as the perceived costs of not regulating. Perhaps the regulatory calculus would be different if the risk of overregulation was defined concretely in terms of fewer jobs, a lower return for investors, or fewer investment opportunities. Instead, the costs of regulation are usually characterized in terms of sterile concepts like "market efficiency," "capital formation," and "liquidity."

The bottom line is that securities regulators, as well as the public and the media, often have an exaggerated concern over fraud and investor losses and a dulled sensitivity to the costs of investor protection, particularly after periods of crisis and scandal. This is not to say that the costs of regulation are unaccounted for; only that they

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frequently do not receive their appropriate due in assessing whether to regulate.

As Chairman Donaldson put it, "I want us to become better equipped to see over the hills and around the corners for problems that may be looming in the distance."[2] The decision to regulate hedge funds was just one instance of this proactive approach. In Enron's wake, the SEC regulated hedge funds – over the cautions of Federal Reserve Board Chairman Greenspan and others regarding the costs of regulating the industry – largely on the basis that it had become a $1 trillion industry and future abuses might occur.

Designing a "goldilocks" regulatory regime that does not go too far or do too little is hard. To craft an effective regime, regulators have to appraise objectively and rationally the costs and benefits of regulating; regulators' judgment cannot be obscured by cognitive biases. An unbiased, more probabilistic assessment of the consequences of risk regulation should result in more effective regulation that better achieves whatever goal is set out. An SEC that emphasizes protecting investors against fraud may by its own lights crack down too heavily if it irrationally fears another series of scandals.

A Suggestion

Because securities regulators have imperfect information and thus regulate under uncertainty, the SEC cannot escape the risk that it will get it wrong. The impact politics and psychology can have on regulatory decision making exacerbates the risk that the SEC will get it wrong by overregulating, at least after periods of crisis.

If overregulation is a risk – because of imperfect information, politics, and/or psychology – what can be done about it?

Policymakers often see themselves as having two choices: adopt mandates or do nothing. A third option exists. Instead of an all-or-nothing approach, the Commission should increasingly consider default rules that parties can opt out of. Defaults allow parties room to order their affairs to fit their needs. The ability to opt out also provides a safety valve against overregulation. This approach would have been particularly appropriate for regulating hedge funds since hedge fund managers and investors are sophisticated parties who negotiate. Instead of mandating that a hedge fund manager register as an investment adviser, the SEC could have required a hedge fund manager to register or disclose to the fund's investors why the manager has chosen not to. Investors could then evaluate the importance of investment adviser registration against the backdrop that managers must register as a default.

Precedent exists for a default-rule approach. Two examples under the Sarbanes-Oxley Act include the requirement that public companies adopt a code of ethics for senior financial officers or explain why no code was adopted and the requirement that public companies have a financial expert on the audit committee or explain why not. In early 2005, the SEC demonstrated the use of defaults when it authorized, but did not require, mutual funds to impose a redemption fee on short-term trading.

The SEC could consider an even less intrusive approach. The SEC, in appropriate cases, could simply articulate best practices to guide securities markets. The Commission could express its view of best practices formally through releases or informally through the speeches of commissioners and division directors. For example, instead of the new hedge fund rule, the SEC could have emphasized particular best practices for the hedge fund industry that hedge fund managers and investors would have been encouraged, but not required (even as a default matter), to follow. By emphasizing best practices, the Commission can provide investors concrete guidance that facilitates market discipline. Such guidance provides a yardstick against which investors can evaluate directors, officers, mutual funds, hedge funds, etc. to see how they measure up. Investors can then allocate their capital as they see fit.

A best-practices approach presents challenges. One could easily imagine best practices as roadmaps for the plaintiffs bar. Second, there is no guarantee that commissioners would agree on best practices. Still, such an approach merits consideration.

Conclusion

Although I believe that the SEC should have stayed the course and abstained from regulating hedge funds, I understand regulators' discomfort with standing by in the post-Enron era as the hedge fund industry ballooned to $1 trillion.

When the SEC regulates in the future, the agency increasingly should consider a more restrained style of securities regulation that relies more on default rules. In some cases, the SEC should consider doing nothing more than recommending best practices that market participants can evaluate for themselves.

[2] SEC Chairman William H. Donaldson, Remarks Before the Practicing Law Institute, Mar. 5, 2005, available at **http://www.sec.gov/news/speech/spch030504whd.htm.**

False Conflict *continued from page 3*

emergency food stamps and infant formula, and distributing food packages directly to needy households.

In sum, the NRP is a well-thought out, all-hazards plan that addresses the necessity of a delicate balance between different levels of government. If implemented as intended, with true coordination between stakeholders from all levels of government in a classic war room-like setting, the NRP should end the false dichotomy about whether state and local units or the federal government supervises the response and recovery effort.

Due Process in Land Use Decisions: Point/Counterpoint

Due Process in Local Land Use Decision Making

By Michael Asimow[1]

This article concerns the interface between due process and local land use decisionmaking. Procedural and substantive due process (hereinafter PDP and SDP) is generally applied to land use applications such as zoning variances, environmental permits, and a wide array of other required permissions. However, due process presents both legal and practical difficulties.

Legal Problems with Due Process and Land Use.

When the Supreme Court finally grants a desperately needed review of how PDP and SDP apply to land use, I believe that the Court will hold either that due process is inapplicable or (as discussed below) that due process is satisfied by judicial review in state courts under state law.

PDP probably does not apply to many or even most zoning application disputes. Under the "new property" analysis of Bd. of Regents v. Roth, 408 U.S. 564 (1972), PDP applies only to entitlements (like a job protected by civil service), not to discretionary benefits (like at-will employment). But zoning standards are loaded with discretion so that local decisionmakers can make wise and politically acceptable decisions. However, it may be that land use permissions involve "old" rather than "new" property, in which case PDP would apply. The issue is unsettled.

American Manufacturers Mutual Ins. Co. v. Sullivan, 526 U.S. 40 (1999) signals that PDP does not apply to a rejected application, only to a revocation of an existing status, though this issue is also far from settled.

PDP applies only to decisions of particular rather than general applicability. This adjudication v. rulemaking distinction plagues land use law because many such decisions are, or might be, of general application.

Mathews v. Eldridge balancing is needed to ascertain whether a particular element normally associated with PDP (such as cross-examination, the oath, or separation of functions) applies. This balancing is even more problematic in land use cases than elsewhere because the typical dispute involves a developer up against a pack of angry neighbors. The trial-type process used in civil service or professional licensing cases just won't work.

SDP barely applies anymore to economic regulation cases, yet it enjoys a spectral existence in land use cases. The standard (and the rationale) for applying SDP is completely unclear.

continued on page 16

[1] Professor of Law Emeritus, UCLA School of Law; section vice chair; and Administrative and Regulatory Law News advisory board chair. A longer version of this article is published in 29 Zoning & Planning Law Report No. 1 (Jan. 2006).

Rootless Review – A Reply to Professor Asimow

By Edward J. Sullivan[★]

There is much with which to agree in Professor Asimow's analysis of local land use decision making. Neither administrative law nor local government law is free of the hyperbole and cant of extravagant versions of due process, often thrown into cases by lawyers incensed at the treatment of their clients by non-lawyer planning commissions or local governing bodies or to convince a reviewing court that a local land use decision was evil, or stupid, or both.

Our colleagues specializing in administrative law appear to have largely left local government law generally, and land use law in particular, to others. That is unfortunate, for while discussing the latest nuance of *Chevron* deference, or the role of White House Counsel, there is little attention given to an area in which there is much need for comment or criticism. Many more local government land use decisions are made than those in federal contested cases, and these decisions are more visible and affect far more people.

Review of local land use decisions for violation of the Federal Due Process Clause is indeed often an exercise in futility. Let us examine the two alternate uses of the Clause.

As most law students know, substantive due process is a concept invented by the elder Justice Harlan in *Mugler v. Kansas* 123 U.S. 623 (1887). *Mugler*, and subsequent cases, gave that doctrine respectability, invited judges to review the means and ends of legislation, and added a further review criterion, i.e. whether the law would be "unduly oppressive" to the plaintiff. The doctrine had a lively history of judges deciding public policy matters, while concealing their political and economic preferences in constitutional jargon.

After a constitutional crisis brought the national government to a virtual standstill in the mid-1930s when the Supreme Court overturned portions of the New Deal, President Franklin Roosevelt threatened to "pack" the court. Although he was unable to expand the number of seats on the Court to create a friendly majority, Roosevelt was able to name seven new justices within 18 months, a result which changed the direction of the court and spelled the end – almost – of substantive due process. While rising from the grave on occasion when no other constitutional ground comes to mind, as in the privacy and family cases, the Supreme Court generally avoids that doctrine because of its past associations in masking judicial preferences.

continued on page 17

★ Owner, Garvey Schubert Barer, Portland, Oregon; and chair-elect of the ABA Section of State and Local Government Law. A longer version of this response is published in 29 Zoning & Planning Law Report No. 1 (Jan. 2006).

 continued from page 15

Land Use Cases are Political as well as Legal Disputes.

In my view, heavily contested zoning applications are political contests as well as legal disputes. In that respect, they differ sharply from other PDP cases (such as those involving civil service employment or professional licensing). The typical highly contested land use case involves a dispute between a developer and a group of neighbors. Typically, after a hearing before a board of zoning appeals, the final decision is made by elected officials (such as a city council). Both sides play political as well as legal games.

Both developers and neighbors have personal or social relationships with the planners or the elected officials. Developers, architects, and other experts are repeat players with undue influence on planning staffs.

Ex parte contacts are common, especially to elected officials who are going to talk to constituents rather than turn them away.

Both sides engage in grass roots organizing to maximize their clout. They employ phone trees to assemble a financial war chest or turn out a big and raucous crowd at the meeting.

Both sides mount a print and electronic media campaign, using PR consultants, letter-writing campaigns, front groups and so on.

Both sides make strategic campaign contributions to elected officials. The officials, in turn, may give campaign speeches that suggest prejudgment.

It seems to me that we delude ourselves if we think that heavily politicized land use planning disputes can be treated like the sort of judicialized trials that are mandated in other PDP contexts.

Problems of Taking PDP Too Seriously.

Recent California decisions vigorously apply PDP to land use disputes. This has created serious practical problems, especially for small cities and counties where land use decisionmakers tend to be inexperienced, work only part time, and have small staffs, and where elected officials have many conflicting obligations. These cases apply rules of separation of functions and decisionmaker impartiality that don't work in a small city context, especially in politicized disputes. *See, e.g., Nightlife Partners v. City of Beverly Hills*, 133 Cal. Rptr. 2d 234 (Cal. Ct. App. 2003); *Nasha LLC v. City of Los Angeles*, 22 Cal. Rptr. 3d 772 (Cal. Ct. App. 2004). Illinois requires cross-examination of experts in a land use hearing conducted in a high school auditorium, without proper attention to the costs and delays attendant on doing so. *People v. Village of Lisle*, 781 N.E.2d 223 (Il. 2002).

An Alternative to Land Use Due Process.

A line of Supreme Court PDP cases could well be applied to land use decisionmaking. In these cases, the Court assumed (without deciding) that PDP applied to an agency decision, but it did not require an agency-level hearing. Instead, PDP is satisfied by *state court review of the merits of the decision under state law.*

Government contract disputes. Government believes that a private party has breached a contract so it terminates the contract and refuses to pay. The private party claims that it has been deprived of money and thus is entitled to a hearing before termination of the contract. Not so, said the Supreme Court. Review by a state court of the merits of the contract dispute satisfies PDP requirements, even though it might take years to get into court. Lujan v. G&G Fire Sprinklers, 532 U.S. 189 (2001).

Paddling students. A high school teacher paddles students as a disciplinary measure. Corporal punishment deprives the student of liberty, but no pre-paddling hearing is required. PDP is satisfied because a state court tort action will determine whether the teacher used unreasonable force. *Ingraham v. Wright*, 430 U.S. 651 (1977).

Destruction of prisoner's property. A prison guard destroys a prisoner's property, which is a deprivation of property. But PDP is satisfied by the availability of a subsequent state court action for conversion. Parratt v. Taylor, 451 U.S. 527 (1981); Hudson v. Palmer, 468 U.S. 517 (1984).

These situations are obviously different from land use disputes, but each case represents a utilitarian calculus that the trial-type hearing model doesn't work and state court review provides a sufficient remedy. I suggest that this approach would work in land use cases. The court might assume, rather than decide, that due process applies to a disputed land use decision, but it would not *actually* apply PDP and SDP *if* the land use decision is judicially reviewable by a state court on both procedural and substantive grounds.

Local ordinances always provide the procedures to be followed in resolving land use disputes. These procedures may be more like rulemaking than adjudication. State courts review whether these procedure were followed, and PDP would be satisfied if an agency complied with them. (The court might want to require that such procedures be at least equal to that provided in rulemaking—adequate notice, opportunity to comment orally or in writing, and statement of reasons).

Similarly, a party can challenge the substance of a land use decision in state court judicial review. For example, state courts will review the decision for errors of law or failure to satisfy the substantive standards laid down by state or local law. State courts will also consider whether the decision is unsupported by substantial evidence or whether discretionary aspects of the decision flunk the arbitrary/capricious test. This substantive judicial review would be a substitute for applying the nebulous standards of SDP.

A variation of this approach might be to utilize a statewide agency to consider appeals from local land use decisions, like Oregon's Land Use Board of Appeals. Such review could be an acceptable alternative to PDP and SDP requirements.

For a number of reasons, reliance on state court judicial review might be an attractive alternative to due process review.

This approach would cut right through the complexities of existing law. It wouldn't matter whether the legal standard was an entitlement or discretionary or whether denial of permission triggers "old" rather than "new" property analysis. The court wouldn't have to distinguish applications from revocations or distinguish general from particular applicability, since state law normally provides for judicial review of all government decisions. No Mathews balancing would be needed. Finally, the courts would be spared the question of figuring out just what (if anything) SDP calls for.

The legislature could easily change local procedural rules if they furnish either excessive or inadequate protection to private parties. In fact, if local law supplanted due process, states and cities would be encouraged to reform their procedural rules in accordance with modern law reform proposals. In contrast, of course, PDP requirements cannot be altered by the legislature.

Courts and zoning administrators could stop trying to adapt the PDP trial-type hearing model to essentially political struggles.

Small cities would be spared from infliction of PDP procedures that just don't work on the ground.

Federal judges could stop acting as zoning boards of appeal; which irritates them greatly. Instead, local judges who are familiar with local conditions would decide the disputes.

A possible downside to this proposal is that it would cut off the ability to collect monetary damages under 42 U.S.C. §1983 for a due process violation (unless the government action amounted to a taking or other constitutional violation or unless local law provided for a damage remedy). I believe that few people actually recover damages under §1983, but it is a possibility. The loss of the damage remedy must be balanced against the advantages of dispensing with PDP and SDP in land use cases.

Conclusion. All of us believe in the rule of law and we treasure the procedural protections afforded by due process. But these due process models, so vital in other sectors such as government employment, professional licensing, or welfare, may not work well in the politicized environment of local land use decisionmaking. Indeed, the Supreme Court may well hold due process wholly inapplicable to land use applications. As a result, we should consider whether ordinary state court judicial review under state law might provide the necessary protection without the dysfunctional aspects of existing constitutional law. In any event, it's time for a new look at due process in land use cases.

Rootless Review – A Reply to Professor Asimow

continued from page 15

The trouble is that the Supreme Court used substantive due process to decide the first four land use cases in the mid-1920s and then did not take another such case for almost 50 years. Two of those cases are often cited and came to different results. *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 388 (1926) upheld a zoning ordinance which purported to advance the public health, safety and welfare, while *Nectow v. Town of Cambridge*, 277 U.S. 183 (1928) invalidated the application of a zoning ordinance on substantive due process grounds. Because substantive due process allows a court to choose the result of its liking and justify the same by a constitutional incantation – that such a regulation, or its application, is "arbitrary and capricious," "unreasonable," or other similar empty formula – most lower federal and state courts used that formula because it followed what precedent there was in the land use field, allowed lawyers to argue the cases as creatively as they wished, and did not tax judicial consciences over whether the correct result had been reached. Since every lawyer believes that his or her case is, or is not, in that category, there is little incentive to discuss the methods by which those decisions may be reached or reviewed.

Professor Asimow decries (correctly in my view) the frequent attempts to "constitutionalize" arguments in these cases – arguments which generally amount to disagreement over policy, procedural error, or violations of "rights" not recognized by the federal or state constitutions.

Professor Asimow is correct in his observations regarding procedural due process that this basis for challenge often fails because a court finds no property interest in a permit sought by a developer or because the proceeding in which the permit is sought is discretionary in nature and the property interest cannot be labeled as an "entitlement."

However, Professor Asimow goes further to suggest plenary state court review of such decisions is the solution without adequately dealing with the more difficult questions of substance and procedure necessarily involved in such review. Moreover, neither his original presentation in a program on this issue jointly sponsored by the Sections of State and Local Government Law and Administrative Law and Regulatory Practice, nor his subsequent articles consider or analyze adequately previous efforts to bring a cogent and consistent system of review to these areas of local government decision making.

While I agree that the Due Process Clause is generally not an adequate basis for a challenge, whether procedural or substantive, to local government land use decisions, I am unwilling to abandon the field to whatever a state court might deem adequate. Students of legal history may recall the days preceding the adoption of the Federal Administrative Procedure Act, with its division of most legal issues into the policy-making and policy-application categories, and its positing of judicial review jurisdiction, venue, and standards. The Federal APA became the model for most state APAs.

continued on next page

Local government land use decision making calls for the same, or even greater, efforts on the part of the bar to bring a rational consensus to everyday practice. This difficult work includes delineating standards for local government actions on permits, adoption and application of policy, and administrative and judicial review. The local comprehensive plan adopted consistently with state enabling legislation, in my view, should provide these substantive standards.

To some extent it is the fault of public law practitioners that the state of state and local government planning law is as sorry as it is. State and local government practitioners seem to like the notion that the lack of clarity in this area may work to their advantage in individual cases. And those involved in administrative law may find land use law too messy, too balkanized, and too political for their tastes. So little has been done. In his articles, Professor Asimow emphasizes the difficulty of providing traditional adjudicative processes to local land use proceedings, where the issues are "politicized." The hopelessness of reform and the relegation of change to a balkanized state-by-state process, without any general theory of either substance or process, characterize Professor Asimow's views on the subject. I disagree.

Previously, Professor Asimow suggested that there is no clear distinction between local government decisions that are quasi-judicial (i.e., typically proceeded by notice hearing and subject to substantive standards) and those that are quasi-legislative (i.e., without such a process and subject to a more deferential review). Because both involve some element of discretion, a distinction may not be useful in any event for due process purposes.

However, there may be a discernible legislative/quasi-judicial distinction, which may well have an effect on the kind of judicial review involved. That distinction has been around in Oregon since *Fasano v. Board of County Commissioners*, 264 Or. 574, 507 P.2d 23 (1973), without any major difficulty. The practice in Oregon is that the policy is set out through a rulemaking-like process in the local comprehensive plan and land use regulations, which are applied to particular lands through a quasi-judicial administrative process with statutorily-mandated procedures.

Moreover, Professor Asimow's other claims bear more scrutiny. First, while local land use decisions are frequently controversial and "political," that does not mean that there are no generally applicable rules for the conduct of those proceedings or that they should be relegated to whatever procedures may be conjured up in each state.

The call for reform of local administrative decision making and judicial review thereof in the land use field is not made for the first time by Professor Asimow. Interest in the area has been apparent in the works of Charles Haar, Richard Babcock, and Daniel Mandelker dating from at least 1955 and culminating in the American Planning Association's *Growing Smart*™ report recommending a replacement for the two standard planning and zoning acts, drafted in the 1920s and adopted by many states, with a wholly new code which establishes the local plan as the standard, leaves room for the option of using additional standards, establishes procedures for local government actions, and provides for judicial review of those actions.

These recommendations have caused a number of state legislatures to revise their state enabling legislation and establish a credible and transparent decision making process, in addition to appropriate judicial review. See Sullivan and Richter, *Out of the Chaos: Towards A National System of Land Use Procedures*, 34 URB. LAW. 449 (2002). These efforts, rather than simply stating that whatever satisfies any state court, have a much better chance of bearing fruit in reforming local decision making.

The final claim deals with the concern that application of "due process principles" will tie local governments in knots. Professor Asimow seems already to have answered the question – neither procedural nor substantive due process is generally applicable to land use proceedings. If due process does not apply, neither do due process "principles." Concerns such as ex parte contacts, bias, and political contributions are not new to local government decision making and can be dealt with legislatively. In Oregon for example, ex parte contacts and campaign contributions must be reported, and extra-record knowledge and potential predisposition can be dealt with on the local record; these problems do not require a constitutional solution.

Our Sections can and should review local government land use law and learn from each other. Professor Asimow's article is a significant contribution to this common effort.

Founding the Homeland Security Bar

By Joe Whitley and Lynne Zusman[*]

As the American Bar Association moves steadily forward providing legal leadership in the post – 9/11 world, the Section of Administrative Law and Regulatory Practice can be proud of the commitment of time, energy, and creative endeavor that its members have brought to this effort.

Over a decade ago, our section established a Defense and National Security Committee largely devoted to issues of interest in the administrative personnel process available to military and civilian employees of the U.S. Department of Defense (DOD). Within a few years, then Section Chair Phil Harter, Professor of Law, University of Missouri and Vermont Law Schools, expanded the range of issues for this committee to address. Ensuing years brought Adlaw programs on weapons of mass destruction, technology transfer, the pre-emptive strike doctrine, narco-kingpin federal legislation and the "stovepipe" limitations on the Office of Foreign Asset Control at Treasury, as well as other critical topics. In one of the very first ABA programs following 9/11, the Section was proud to present in mid-January, 2002, to an overflow gathering captured live by C-Span, a landmark program on military tribunals, featuring numerous experts on the Uniform - Code of .Military .Justice. and introduced by Eugene Fidell. In the Spring of 2002, Harold Koh, Dean of the Yale Law School, debated legal counsel from DOD and the Department of Justice (DOJ) on enemy combatant issues.

In early 2003, then Section Chair Neil Eisner established the Homeland Security Committee and led the Adlaw Section to the forefront of the Homeland Security Law field within the American Bar Association. The first Section program on Homeland Security was held on March 31, 2003 in Washington, D.C., before an unusually large audience. Attendees were privileged to meet Counselor to the Secretary, Lucy Clark, of the new Department of Homeland Security (DHS) and other speakers. The following fall, the Section on Individual Rights and Responsibilities co-sponsored a major program with this Section on the civil liberties issues in the War on Terror. Speakers included DOD and DOJ attorneys, as well as Professor David Cole of Georgetown Law School, John Payton, past president of the D.C. Bar, and Professor Michael Greenberger, Director of the newly established Center for Health and Homeland Security at the University of Maryland Law School.

Later that fall, after his confirmation as first General Counsel of the DHS, the Honorable Joe D. Whitley was the speaker at the Section's 2003 Administrative Law Conference Dinner, describing the incredible opportunities and challenges of that position.

The Section continued to highlight the extensive legal problems involved as the legal community became aware of the multifaceted nature of our country's dealing with homeland security.

This focus eventually led to the Section's First Annual Homeland Security Law Institute on January 20, 2006, in Washington, D.C. Approximately one hundred and seventy-five people gathered for the day to hear four panels of speakers, and a luncheon address by former Governor Frank Keating of Oklahoma. The panels addressed DHS 101; Emergency Management and Federalism; Critical Infrastructure Protection; and Information Privacy and Protection. Moderators of the panels were Jason Klitenic, McKenna, Long, and Aldridge; Conference Co-Chair Michael Greenberger; Jamie Conrad of the American Chemistry Council; and Jim O'Reilly, professor at the University of Cincinnati Law School and a former Section Chair.

Current DHS General Counsel Philip Perry set the tone for the day at the outset, noting that the Homeland Security Law Bar was critical to the success of the Department and to the mission of homeland security. Mr. Perry acknowledged the Section for its leadership and warmly encouraged further efforts.

The emerging practice of Homeland Security law proceeds from the basic understanding that the private sector owns and operates approximately eighty-five percent of the nation's critical infrastructure, including: agriculture, food, water, public health, emergency services, government operations, the defense industrial base, information and telecommunications, energy, banking and finance, transportation, chemicals and postage and shipping. In addition, five categories of key assets of "key assets" pose additional security concerns that necessitate more individual attention: national monuments and icons; nuclear power plants; dams; government facilities; and commercial facilities such as sports stadiums and shopping malls. Each critical infrastructure and key asset sector has unique vulnerabilities to terrorism. And each sector displays a different level of preparedness.[1]

Inconsistent levels of preparedness result from a confluence of multiple factors. Federal law, much of which has been passed by congress since 9/11, requires certain critical infrastructure sectors to take specific steps to increase security. For example, as a result of the Maritime Transportation Security Act of 2002 (MTSA), a majority of ships calling on U.S. ports must prepare security plans, among other requirements. Congress passed the Energy Policy Act of 2005 in an effort to improve the reliability of the

continued on page 24

[*] Co-Chairs, First Annual Homeland Security Law Institute. Mr. Whitley is a partner at Alston & Bird and former General Counsel at DHS. Ms. Zusman is a sole practitioner and chairs the Section's Homeland Security Committee.

[1] Excerpted from Joe D. Whitley, *Homeland Security: Preparing for Legal and Policy Changes*, (Bloomberg, Jan., 2006).

E-Rulemaking and Small Local Governments: Barriers to Participation

*By Christine M. Reed**

According to Fred Emery and Andrew Emery's fall 2005 article, the federal government's reform of the rulemaking process through use of the internet has resulted in strategies being used by interest groups to "outsmart" the electronic docket management system. Their point is that agency officials and IT contractors need to consider how a web-based notice and comment process may negatively affect the quality of public comments.[1] They remark on the irony of designing a web-based notice and comment system to expand public access only to see the new system being manipulated by advocacy groups using e-mail distribution lists to send their members boiler-plate comments on proposed rules. In anticipation of these strategies, IT consultants to the eRulemaking Initiative have designed data mining programs to ferret out identical comments. What seems to be unfolding is an IT "arms race" in which federal officials and advocacy groups escalate their efforts to stay one step ahead of each other.

Small local government officials and administrators are a key stakeholder group in the federal rulemaking process; however, they have never been active players and the eRulemaking Initiative is unlikely to enhance their participation. While many small local governments (<50,000 population) have access to high-speed internet what they lack is the time and expertise to monitor and respond to the **regulations.gov** web site. In other words there are underlying systemic barriers to participation in rulemaking by small local governments. Most small local government officials rely on their municipal leagues to alert them to salient issues, but state leagues tend to monitor legislation more often than rules. These officials also rely on state government to inform them about changes in federal regulations, especially environmental rules. Small local governments are thus in a reactive posture and miss opportunities to influence the shape of proposed rules.

Pre-Notice Consultation with Small Entities

The Regulatory Flexibility Act of 1980 and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) have created procedural requirements designed to identify significant economic impacts of proposed regulations on small entities, including local governments, prior to publication in a Notice of Proposed Rulemaking. EPA in particular has used the period prior to the NPRM to consult with small entities on issues of importance to them. The opportunity for small local government officials to offer alternatives to a one-size-fits-all approach designed with larger entities in mind is crucial to them. Once a proposed rule is published it becomes very difficult to make major changes. Moreover, small entities lack the political clout of organized interest groups once proposed rules are open for public comment. Pre-notice consultation is the major opportunity for small entities to influence the outcome in a proactive way.

These points often get lost in discussion and debate about the eRulemaking Initiative. Creating the new portal, **regulations.gov**, and the new Docket Management System have consumed much time, energy and money dedicated to the notice and comment stage of the rulemaking process. In addition to taking steps designed to improve the quality of public comments, federal officials should make pre-notice consultation with small entities, including local governments, a priority. Pre-notice consultation requires federal rulemakers to seek out small local government officials through town hall meetings and other innovative approaches, such as EPA's Small Communities Outreach Project for Environment Issues administered until 2005 through the National Association of Schools of Public Affairs and Administration. That project has operated since 1998 using Public Administration faculty members who are familiar with local officials, as well as the scientific and technical content of rules under development, to conduct focus group sessions around the country and report back to EPA.

Conclusion

Some scholars view rulemaking as an extension of the legislative process, implying that active participation by organized interest groups is a legitimate aspect of the notice and comment process. Others view the interest representation model as a pluralist struggle excluding those who do not already belong to organized interest groups and limiting the possibilities of new information and different perspectives. The poor quality of public comments may be exacerbated by the eRulemaking Initiative, but the root cause may be the interest representation model itself. There is no electronic substitute for give and take between federal and small local governments, especially at the pre-notice stage when critical distance from organized interest groups is made possible by the procedural and analytical requirements of the Regulatory Flexibility Act and SBREFA.

*Professor of Public Administration, University of Nebraska at Omaha. Dr. Reed has been a principal investigator and project mentor for the SCOPe project referenced in this article.

[1] Fred Emery and Andrew Emery, *A Modest Proposal: Improve E-Rulemaking by Improving Comments*, ADMIN. & REG. LAW NEWS, Fall 2005 at 8.

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*By Robin Kundis Craig**

On January 17, 2006, the U.S. Supreme Court decided *Gonzalez v. Oregon*, — U.S. —, 126 S. Ct. 904 (2006), concluding 6-3 that the U.S. Attorney General had no authority under the federal Controlled Substances Act (CSA), 21 U.S.C. §§ 801 *et seq.*, to criminalize the conduct of physicians who dispensed prescription medications in conformance with the Oregon Death With Dignity Act (ODWDA), otherwise known as the Oregon right-to-die statute. The Court's decision addressed issues both of deference to the Executive agent and of the extent of Executive authority under the CSA, examining both issues in a context of federalism. Justice Kennedy authored the majority opinion; Justice Scalia dissented, joined by Justice Thomas and new Chief Justice Roberts. Justice Thomas also dissented separately.

Deference to the Attorney General's Interpretation

Oregon voters approved the ballot measure that enacted the ODWDA in 1994, and that Act survived another vote in 1997. The ODWDA "exempts from civil and criminal liability state-licensed physicians who, in compliance with the specific safeguards in ODWDA, dispense or prescribe a lethal dose of drugs upon the request of a terminally ill patient." *Gonzalez v. Oregon*, 126 S. Ct. at 911.

The federal CSA regulates the drugs that Oregon-licensed physicians prescribe to fulfill the purposes of the ODWDA. Pursuant to a 1971 regulation, the CSA "requires that every prescription for a controlled substance 'be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'" *Id.* at 912 (quoting 21 C.F.R. § 1306.04(a) (2005)). On November 9, 2001, then-Attorney General John Ashcroft issued an Interpretive Rule announcing that "'assisting suicide is not a "legitimate medical purpose" within the meaning of 21 C.F.R. 1306.04 (2001), and that prescribing, dispensing, or administering federally controlled substances to assist suicide violated the Controlled Substances Act.'" *Id.* at 913-14 (quoting 66 Fed. Reg. 56,608 (2001)). The State of Oregon challenged this Interpretive Rule in federal court and won at both the district court and the U.S. Court of Appeals for the Ninth Circuit.

At the Supreme Court, the first issue that the Court addressed was how much deference the Attorney General and the Interpretive Rule were entitled to receive. Relying on *Auer v. Robbins*, 519 U.S. 452, 461-63 (1997), the United States argued that the Interpretive Rule was entitled to "substantial deference" because it was the Attorney General's interpretation of his own regulation. The Court majority disagreed, distinguishing the interpretive processes at issue in *Auer* from those in the Interpretive Rule:

> In *Auer*, the underlying regulation gave specificity to a statutory scheme the Secretary [of Labor] was charged with enforcing and reflected the considerable experience and expertise the Department of Labor had acquired over time with respect to the complexities of the Fair Labor Standards Act. Here, on the other hand, the underlying regulation does little more than restate the terms of the statute itself. The language the Interpretive Rule addresses comes from Congress, not the Attorney General, and the near-equivalence of the statute and regulation belies the Government's argument for *Auer* deference.

Id. at 915. In other words, an Executive agent cannot receive increased deference by purporting to interpret a regulation that itself merely parrots statutory language:

> Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.

Id. at 915-16. Moreover, because the regulation that the Attorney General was purportly interpreting has existed since 1971 but the Attorney General's authority to issue the Interpretive Rule derived from the 1984 amendments to the CSA, which added provisions allowing the Attorney General to register and deregister physicians in the public interest, "the Interpretive Rule cannot be justified as indicative of some intent the Attorney General had in 1971," another reason for denying *Auer* deference. *Id.* at 916.

Nor, according to the majority, was the Interpretive Rule entitled to *Chevron* deference. While the majority noted that "[a]ll would agree, we should think, that the statutory phrase 'legitimate medical purpose' is a generality, susceptible to more precise definition and open to varying constructions, and thus ambiguous in the relevant sense," *id.*, the Attorney General lacked the requisite appropriate rulemaking authority that would have entitled the Interpretive Rule to *Chevron* deference. Specifically, while "[t]he Attorney General has rulemaking power to fulfill his duties under the CSA," "[t]he specific aspects in which he is authorized to make rules… instruct us that he is not authorized to make a rule declaring illegitimate a medical standard for cure and treatment of patients that is specifically authorized under state law." *Id.* The Court emphasized that the CSA rather precisely divides functions between the Attorney General and the Secretary of Health, with the Attorney General's functions – and rulemak-

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ing authority – being limited to the "control" of scheduled/listed substances and the registration of physicians. As the Court noted, moreover, "control" is a defined term in the CSA that refers to adding drugs to the schedules of controlled substances or transferring drugs between schedules, and the Attorney General must promulgate rules regarding such "control" through formal rulemaking. "The Interpretive Rule now under consideration does not concern the scheduling of substances and was not issued after the required procedures for rules regarding scheduling, so it cannot fall under the Attorney General's 'control' authority." *Id.* at 917. In turn, rules regarding physician registration and deregistration "in the public interest" must "consider five factors, including: the State's recommendation; compliance with state, federal, and local laws regarding controlled substances; and public health and safety." *Id.* at 918. As a result, "[t]he Interpretive Rule cannot be justified under this part of the statute" because "[i]t does not undertake the five-factor analysis and concerns much more than registration." *Id.* Specifically, the Interpretive Rule "purports to declare that using controlled substances for physician-assisted suicide is a crime, an authority that goes well beyond the Attorney General's power to register or deregister." *Id.*

The *Gonzalez v. Oregon* majority therefore indicated that both actual rulemaking authority and compliance with statutory rulemaking requirements are important factors in deciding whether an agency interpretation will receive *Chevron* deference. Equally important for this case, however, was the majority's profound skepticism that Congress had authorized the Attorney General to make independent judgments about the medical profession and to criminalize doctors' behavior when that behavior was legal under state law. Emphasizing the Attorney General's limited registration authority, for example, the majority declared that "[i]t would be anomalous for Congress to have so painstakingly described the Attorney General's limited authority to deregister a single physician or schedule a single drug, but to have given him, just by implication, authority to declare an entire class of activity outside 'the course of professional practice,' and therefore a criminal violation of the CSA." *Id.* Moreover, the fact that the Attorney General must evaluate compliance with the federal CSA in making enforcement decisions did not entitle his interpretations to *Chevron* deference, because execution of his statutory functions "is quite a different matter [from saying that] the Attorney General can define the substantive standards of medical practice as part of his authority." *Id.* at 919-20. That claimed authority "is inconsistent with the design of the statute in other fundamental respects": for example, the CSA gives the Secretary of Health authority to make whatever medical judgments are required for scheduling, and it gives the Secretary the authority to determine appropriate medical practices for the treatment of narcotic addiction. *Id.* at 920. Overall, "[t]he structure of the CSA… conveys unwillingness to cede medical judgments to an Executive official who lacks medical expertise," and the Attorney General lacked authority "to make quintessentially medical judgments." *Id.* at 921. That the Interpretive Rule was in fact a medical judgment was evidenced by its extensive reliance on the views of the medical community.

As a result, "[s]ince the Interpretive Rule was not promulgated pursuant to the Attorney General's authority, its interpretation of 'legitimate medical purpose' does not receive *Chevron* deference. Instead, it receives deference only in accordance with *Skidmore*." *Id.* at 922.

The Interpretive Rule's Power to Persuade: Statutory Structure and Federalism

Skidmore deference depends on the persuasiveness of an agency interpretation, and the Court found the Interpretive Rule unpersuasive for many of the same reasons that it denied that Rule *Chevron* deference. Thus, "[t]he deference here is tempered by the Attorney General's lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment." *Id.*

In addition, however, the Court emphasized that the CSA's purpose was not to regulate medical practice but rather to control addictive substances that could lead to drug abuse. "It comes as little surprise, then, that we have not considered the extent to which the CSA regulates medical practice beyond prohibiting a doctor from acting as a drug 'pusher' instead of a physician." *Id.*

Federalism considerations and the traditional powers of states to regulate physicians supported this limited focus of the CSA, and while "[t]he statute and our case law amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood," "the statute manifests no intent to regulate the practice of medicine generally." *Id.* at 923. Instead, the CSA relies on the existing structure of *state* regulation of doctors and even expressly disavows any congressional intent to occupy the field, allowing state regulation to co-exist unless there is a direct conflict between state and federal law.

As a result, the Court found the Interpretive Rule unpersuasive under *Skidmore*. "In the face of the CSA's silence on the practice of medicine generally and its recognition of state regulation of the medical profession it is difficult to defend the Attorney General's declaration that the statute impliedly criminalizes physician-assisted suicide. This difficulty is compounded by the CSA's consistent delegation of medical judgments to the

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Secretary and its otherwise careful allocation of powers for enforcing the limited objects of the CSA." *Id.* at 924.

The Dissents

In his lengthy dissent, Justice Scalia, joined by Justices Roberts and Thomas, argued that: (1) the Interpretive Rule was entitled to *Auer* deference; (2) even if it wasn't, the Interpretive Rule "is by far the most natural interpretation of the Regulation – whose validity is not challenged here"; and (3) the Attorney General's interpretations of "public interest" and "public health and safety" were entitled to *Chevron* deference. *Id.* at 926 (J. Scalia, dissenting). Regarding *Auer* deference, Justice Scalia challenged both the existence of an "antiparroting canon" and the fact of parroting in the regulation that the Interpretive Rule purported to interpret. Regarding the Interpretive Rule's substantive validity, Justice Scalia would have upheld a *federal* standard of legitimate medical purposes for the CSA rather than deferring to state law. Moreover, he emphasized, "[v]irtually every relevant source of authoritative meaning confirms that the phrase 'legitimate medical purpose' does not include intentionally assisting suicide." *Id.* at 931 (J. Scalia, dissenting). Finally, regarding *Chevron* deference, Justice Scalia emphasized the Attorney General's prescription authority as a sufficient statutory basis for promulgating the Interpretive Rule.

In his dissent, Justice Thomas argued that *Gonzales v. Oregon* creates a conflict with the Court's decision last term in *Gonzalez v. Raich*, 545 U.S. —, 125 S. Ct. 2195 (2005) (the "medical marijuana case"). Specifically, Justice Thomas emphasized that the *Raich* Court "determined that the CSA effectively invalidated California's law [allowing for medical use of marijuana] because 'the CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medicinal purposes, *and in what manner.*'" *Id.* at 939 (J. Thomas, dissenting) (quoting *Raich*, 125 S. Ct. at 2211 (emphasis added)). Justice Thomas also argued that the federalism principles espoused by the majority in *Gonzalez v. Oregon* had been expressly rejected in *Raich*.

Founding the Homeland Security Bar

continued from page 19

electric power grid. Though previous attempts to pass a federal chemical security law have failed, a bipartisan Congress, together with chemical industry support, appears poised to act and will likely pass legislation soon. Forthcoming standards will make cyber security an important part of overall grid reliability.[2]

Corporate transactions are impacted significantly by the Exxon – Florio Amendment subjecting any merger, acquisition or takeover that results in the foreign control of a U.S. company and which may impair U.S. national security, to U.S. government scrutiny. It may be necessary for a company to seek review from the Committee on Foreign Investment in the U.S. (CFIUS).

The DHS U.S. Bureau of Customs and Border Protection (CBP) monitors international trade activities of U.S. firms (including foreign subsidiaries) to ensure strict compliance with export/import laws. The CBP has implemented a new twenty-four hour advance reporting requirement for inbound and outbound cargo shipments to facilitate inspections and prevent unwanted goods from entering the supply chain. New international supply chain initiatives have also been formed, such as the Customs Trade Partnership Against Terrorism (C-TPAT), and the U.S. Canadian free and Secure Trade (FAST) program.[3]

The financial services industry is confronting a myriad of new homeland security laws and regulations regarding money laundering and terrorist financing. The USA Patriot Act requires, *inter alia*, that certain entities implement anti-money laundering policies and procedures pursuant to rules issued by the Treasury Department and other federal regulators, such as the Securities and Exchange Commission. Among the additional legal areas comprising Homeland Security law as a practice area, are the diverse transportation legal issues, such as those relating to transportation of hazardous materials, collection of airline passenger information, maritime safety regulations, government mandated port and vessel security requirements and background checks on airport personnel. Finally, the enforcement of immigration law has become an increasingly important issue for U.S. companies that hire foreign nationals to work in the United States.

Many of these areas were touched on in the First Annual Homeland Security Law Institute. The comments and evaluations of the registrants - across the board, from private industry to the government and academia - reflect a desire for as much information as possible on these and other homeland security legal concerns, as well as enthusiasm for future sessions of the Homeland Security Law Institute.

2 Id
3 Id

News from the Circuits

By William S. Jordan III[*]

Seventh Circuit slams Immigration Adjudications

Judge Posner's opinion for the Seventh Circuit in *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir., 2005), begins by spending well over half a page criticizing the administration of immigration adjudications by the Department of Homeland Security and the Department of Justice (through the Immigration Court and the Board of Immigration Appeals). He notes a 40% reversal rate on review of the Board's decisions, as compared to an 18% reversal rate in civil cases in which the United States is the appellee.

Citing several highly critical Court of Appeals decisions reaching back to 2000, Judge Posner asserts that these losses are not a result of judicial hostility or a failure to apply the appropriate standard of review. Rather, they are "due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice." Noting that such frequent reversals "cannot be in the interest of the immigration authorities, the taxpayer, the federal judiciary, or citizens concerned with the effective enforcement of the nation's immigration laws," he places the responsibility for improvement firmly in the hands of DHS and DOJ.

The case prompting Judge Posner's outrage is a tale of seemingly inexcusable bureaucratic ineptitude, including (shades of Katrina) failure of communication within the very agency responsible for these decisions. Benslimane had both overstayed his visa and married an American citizen. As a result, he was involved in two proceedings, one to contest his deportation, the other to establish the bona fides of his marriage (strictly speaking, his wife's petition). Although the INS said the marriage decision would take 26 months, the removal proceeding went forward. The Immigration Judge said that if the two petitions had been filed jointly, he could have continued the removal petition until the other was resolved. In fact, they had been filed together, but in the separate marriage adjudication track. The IJ continued the proceeding so that the government lawyer could report back on the status of the marriage visa petition. When the proceeding resumed, the government lawyer reported that the marriage proceeding was being handled by another agency within DHS, and that she had no information from that agency. The IJ then ordered Benslamine to file with the IJ the same petition that had earlier been filed in the marriage related proceeding. Due to some confusion about requirements, Benlamine's lawyer did not make this filing, and the IJ denied a motion for continuance to allow that do be done. As a result, as Judge Posner put it. Benslamine was ordered removed "because he failed to submit a duplicate of the Form I-485 that had been filed six months earlier, that (according to the government's lawyer at the argument in our court) had not been lost, but that the government lawyer at the removal proceeding had no copy of." There was also some question of ineffective assistance of counsel.

Strictly speaking, the order appealed from was not the removal, but the IJ's highly discretionary decision to deny the request for a continuance, which is normally not reviewable. Here, however, Judge Posner held that the arbitrary denial of the continuance could not be allowed to "thwart the congressional design." Ultimately, he concluded that, "We are not required to permit Benslimane to be ground to bits in the bureaucratic mill against the will of Congress."

Four on Standing

Two recent decisions illustrate the courts' continuing insistence upon a clear connection between the agency action at issue and harm to the plaintiff. A third demonstrates quite clearly how an allegation of "procedural harm" can be written to survive a standing attack. And a fourth finds taxpayer standing to challenge the Bush Administration's faith-based initiatives.

In *Grassroots Recycling Network, Inc. v. U.S. EPA*, 429 F.3d 1109 (D.C. Cir. 2005), the plaintiffs challenged an EPA rule that would authorize states to waive various requirements governing sanitary landfills in order to stimulate the development of new technologies and alternative operational approaches to the disposal of municipal waste. Plaintiffs alleged that they lived near a municipal landfill and that their property values would be harmed by the "bioreactor" that would allegedly be permitted by the rule. But they missed several crucial links. Wisconsin, where they lived, had not yet adopted and obtained EPA's approval (2 missing steps) to implement the waiver approach. The owner of the nearby landfill had not applied for a waiver. An even if the owner did seek a waiver, property values might not be affected because EPA still requires equivalent protection of the public health. This "multi-tiered speculation" was simply too much conjecture to support a claim of injury.

In *The Wilderness Society v. Norton*, 2006 WL 89195 (D.C. Cir. 2006), there may well have been injury, but with one exception judicial action could not redress the alleged violations. The Wilderness Society charged the Department of the Interior with failing to comply with various requirements related to the designation and management of potential future wilderness areas. The Society asked the court to order DOI to forward certain completed wilderness recommendations to the President and to comply with a statutory requirement to review certain other lands for wilderness suitability. The Society lacked standing with respect to both of these requests because the agency itself was not the ultimate decisionmaker. The fact that

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compliance with these requirements would increase the likelihood of wilderness designation was not enough. Since only Congress has the power to designate a wilderness area, the likelihood of redress was too speculative. As to the latter claim, the Society sought, in effect, to enforce an agency policy statement that it argued required management of the lands so as not to diminish wilderness values. But policy statements are not binding, and in any case the court did not agree with the Society's reading of the statement.

In a separate claim, the Society sought to enforce a requirement to complete wilderness area maps of Death Valley, which was already 95% wilderness. Although the Society's affidavit described specific instances of degrading use of Death Valley, the court found that it was too speculative to assume that the mere completion of maps would affect such uses of the area. Finally, the Society achieved standing with respect to a demand that DOI complete management plans for areas already designated as wilderness. Here, because wilderness areas are required to be managed in a way that prevents adverse uses, enforcement of the requirement would provide redress. But the Society lost on the merits.

Perhaps the most interesting recent standing decision related to injury-in-fact is *Sierra Club v. Johnson*, 2006 WL 146230 (11th Cir. 2006), in which the Sierra Club challenged EPA's failure to object to certain air pollution permits issued by the Georgia Environmental Protection Division. The Sierra Club argued that EPA was required to object to the permits because Georgia had failed to establish a required mailing list and use it in the permitting process. Ironically, both the Sierra Club and the member on whose affidavit it relied were aware of the permitting process and of the information that would have been sent to the mailing list. Thus, implementation of the mailing list would not have improved their ability to affect the permitting decision. But they crafted the alleged harm in a way that connected the absence of notice to others to the prospect of environmental harm to the member in question. The absence of the mailing list, they said, reduced the opportunity for public input that "could have led to improvements in the King Finishing permit, which, in turn, could have reduced the harm caused by the air pollution emitted by the King Finishing plant." The court distinguished this assertion from allegations of harm to plaintiffs' rights to information and informed decision-making. The latter did not support standing because they were not tied to concrete harm. The Sierra Club's allegation, however, linked the procedural violation to the ultimate environmental act. The theory is quite comparable to standing under the National Environmental Policy Act. In both cases, the flaw is procedural and there is no assurance that the actual environmental harm will be avoided, but the purpose of the procedure is to avoid or minimize the harm. The key is to connect the procedural violation to the actual or concrete harm addressed by the statute.

Finally, in a very different realm, the Seventh Circuit in *Freedom from Religion Foundation, Inc. v. Chao*, 433 F.3d 989 (7th Cir. 2006), upheld taxpayer standing to challenge the Bush Administration's funding of faith-based initiatives through general congressional appropriations. Judge Posner's opinion for the majority and Judge Riddle's dissent thoroughly canvas the complex history and theory of taxpayer standing. Judge Posner relied upon the line of prior decisions finding standing to challenge specific congressional appropriations that supported religion. He concluded that the fact that the funding decision was made by executive decision, rather than by specific congressional authorization made no difference to the outcome. Judge Riddle, on the other hand, perceived this as a "dramatic expansion of current standing doctrine." He argued that *Flast v. Cohen* and its progeny represent a very narrow exception to the general rule against taxpayer standing. Ultimately he was concerned that finding standing to challenge executive branch funding decisions would make "virtually any executive action subject to taxpayer suit." His solution is to limit taxpayer standing to challenges to congressional action under the Taxing and Spending Power.

D.C. Circuit – The FTC May Not Regulate Practice of Law.

On facts that seem to cry out for discussion of finality or ripeness, the D.C. Circuit in *American Bar Association v. Federal Trade Commission*, 430 F.3d 457 (D.C. Cir. 2005), went straight to the merits, rejecting the apparent possibility (and that's all it really was) that the Gramm-Leach-Bliley Financial Modernization Act authorized the FTC to reach attorneys whose activities fell within the term "financial institution." The Act imposes certain privacy requirements on "financial institutions," which are defined as "any institution the business of which is engaging in [certain] financial activities," as defined elsewhere in the Bank Holding Company Act. The FTC referred to Regulation Y in its effort to define "financial institution." Regulation Y, among other things, identifies several non-bank activities that may be engaged in by banks. These include "[p]roviding real estate settlement services," and "[p]roviding tax-planning and tax-preparation services to any person." These, of course, are activities commonly engaged in by lawyers.

The ABA asked whether the FTC considered lawyers to fall within the reach of the Act. It also asked for an exemption for lawyers. The Director of the Bureau of Consumer Protection rejected the request for an exemption and stated that "entities" are covered by the Act if they fall within the definition of "financial institution." The Director did not directly answer the question of whether the Act reached lawyers. Nor did the Director indicate whether the FTC intended to enforce the Act against lawyers.

Had this position been fully developed within the agency? Did it have the imprimatur of the Commissioners? Is it possible

that there are lawyers who clearly fall within the statutory definition of "financial institution?" These questions pose issues of finality and ripeness, neither of which was mentioned by the D.C. Circuit.

Rather, the court could not imagine Congress regulating the practice of law without saying so directly. Citing *Whitman v. American Trucking Ass'n* and *Brown & Williamson v. FCC*, in particular, the court said that Congress "does not…hide elephants in mouseholes." Regulation of the practice of law was just such an elephant. Although the term "financial institution" was arguably ambiguous with respect its application to lawyers, ambiguity alone is not enough to trigger *Chevron* deference. Rather, "The ambiguity must be such as to make it appear that Congress either explicitly or implicitly delegated authority to cure that ambiguity." The court could find no such delegation with respect to "the regulation of the profession of law-a profession never before regulated by 'federal functional regulators'-and never mentioned in the statute." To the D.C. Circuit, moreover, law firms do not fit comfortably within the term "institutions," and even if they did, they are engaged in the practice of law, not activities comparable to those of recognized financial institutions. The decision, in effect, creates a clear statement rule under which federal statutes will not be read to reach attorneys unless Congress has clearly indicated that attorneys should be reached.

Ripeness – Low Bar in the D.C. Circuit

The D.C. Circuit did discuss ripeness in two other recent decisions. The net effect of their decisions is that there is not much left of the so-called "hardship" test from *Abbott Laboratories*. In *Sabre, Inc. v. DOT*, 429 F.3d 1113 (D.C. Cir. 2005), DOT promulgated a rule deregulating Computer Reservation Systems (CRSs) due to increased market competition. In so doing, DOT said that an independent CRS (one not owned by an air carrier) is a "ticket agent" under the statute, and therefore subject to enforcement of unfair practices provisions and possible civil penalties.

Sabre, an independent CRS, challenged this statement. DOT argued that Sabre had no standing because there was no actual or imminent enforcement proceeding. But Sabre had to decide whether to continue a lucrative business practice that was a clear target of DOT. This was a "palpable injury." Turning to ripeness and emphasizing the *Abbott Laboratories* presumption of reviewability, the court noted the agency's detailed factual observations in the final rule were "sufficient to inform the court of the contours of a merits decision [such that] further factual development in an as applied context, for example, would not provide the court with a significantly richer record." Thus, the case presented a purely legal question.

There remained, however, the question of whether Sabre faced sufficient hardship to justify judicial review at this stage. Noting that it had "repeatedly held that absent institutional interests favoring the postponement of review, a petitioner need not show that delay would impose individual hardship to show ripeness," the court held Sabre's challenge to be ripe in the absence of any showing by DOT why review should be delayed. The following statement from the opinion appears to capture current ripeness doctrine in this area: the challenge was ripe because it involved "a facial jurisdictional challenge to the Department's interpretation of statute that the Department is charged with administering, and the impact of the Final Rule on Sabre's business strategy seems clear and relatively imminent." Finding the challenge ripe, the court then upheld DOT on the merits under standard *Chevron* analysis.

In *National Ass'n of Homebuilders v. U.S. Army Corps of Engineers*, 2006 WL 250234 (D.C. Cir. 2006), the D.C. Circuit applied a similarly lenient ripeness test to a challenge to the Corps' so-called Tulloch II rule. In its long running effort to protect wetlands, the Corps issued a rule under which any fallback of dredged materials would be considered to be a "discharge" into the waters of the United States, unless the actor could show project-specific evidence that the fallback was only incidental. This seems an obvious candidate for a ripeness challenge since the outcome seems to depend upon particular quantities. The NAHB's complaint, however, is a good example of careful drafting presumably intended to address just that point. The NAHB asserted that the volume of the fallback is irrelevant to whether the fallback constitutes a "discharge." This rendered the challenge a purely legal issue, well within the principles discussed in *Sabre* and reiterated here. Moreover, the choice between applying for a permit and facing possible enforcement was a classic hardship under *Abbott Laboratories*.

News from the States

Edited by Edward J. Schoenbaum[★]

A number of prominent members of the State Administrative Law Committee have stepped forward in response to the Winter 2006 issue's request for volunteers to work on a special task force with members of the State and Local Government Law (SLGS) Section. The task force is chaired by Ed Sullivan of the SLGS Section and will focus on the review and improvement of local land use procedures, as well as state review of local land use decisions. Those who are interested in this area of the law should read the point/counterpoint article in this issue of the News. The task force includes SLGA members: Bryan Wenter; Bob Foster; Tom Pelham; Jim Godlewski; and Dan Mandalket; and Admin Law Section members: Michael Asimow; David Cardwell; John Gedid; Christine Monte; and Judge Alexander White. Room is still available if anyone else wants to be involved.

Florida Legislative Committee Releases Report on Unadopted Rules

By Larry Sellers[1]

The Florida state legislature has expressed a strong preference that agencies adopt their policy statements in accordance with the rulemaking procedures set out in the Administrative Procedure Act (APA). The Joint Administrative Procedures Committee recently conducted a review of various reports of unadopted agency rules in an effort to determine whether this continues to be a matter of widespread concern. The staff also solicited the views of interested parties. The results of this analysis are reflected in the Committee's Report on Unadopted Rules. The report recommends that the Committee continue to monitor the use of unadopted rules and to explore possible legislative remedies. Notably, the report identifies several proposals for future consideration, including the following: (1) amend the APA's definition of "rule;" (2) amend the unadopted rule challenge provisions; and (3) amend the rule adoption procedures in the APA. No action is expected on these issues during the 2006 legislative session, but look for these to receive more attention in 2007.

Colorado's Central Panel Becomes Office of Administrative Courts

By Michael S. Williams and Ed Felter[2]

Colorado has been in the forefront of the central panel movement, both in its commitment to judicial independence and to high quality adjudication. On June 3, 2005, Colorado took another major step forward when the Governor signed Senate Bill 05-185 into law. The Bill creates the Office of Administrative Courts to replace the Division of Administrative Hearings. The new law strengthens the judicial independence and accountability of Colorado's central panel. It provides that the Director and Chief Judge assign cases in a manner appropriate to the needs of the agencies whose cases the Office hears and decides. It also vests the Office with the authority to issue subpoenas and control the course of proceedings before the Office. It specifies that the Office's judges shall meet the same qualifications as district court judges (five years of practice). Finally, the new law provides statutory authority for the Office to engage in alternative dispute resolution (there has been a very successful mediation program in the Office for several years and most judges have been trained as mediators).

New Mexico Supreme Court Requires Environmental Justice Analysis in Permit Decision

By Bill Brancard[3]

The New Mexico Supreme Court has reversed a state agency decision to grant a landfill permit and on the ground that the agency failed to consider testimony from the local community on environmental justice issues. While *Colonias Development Council v. Rhino Environmental Services, Inc.*, 138 N.M. 133, 117 P.3d 939 (2005), only applies to the New Mexico Solid Waste Act, the language in the case can easily be used to require consideration of environmental justice issues under other environmental laws.

The New Mexico Environment Department conducted a lengthy and contentious public hearing on a proposed landfill. Local citizens offered testimony on the social impacts of the landfill and on the cumulative impacts of numerous nearby industrial sites, but the hearing officer, while admitting much of the testimony, openly stated that such evidence was ultimately irrelevant and recommended granting the permit based on the applicant's compliance with technical permitting requirements. The agency head granted the permit, and a community group appealed.

The state Court of Appeals upheld the agency decision but the state Supreme Court reversed. The Supreme Court considered the expansive role of public participation in the permitting process and noted that the state solid waste laws require the agency to consider whether the facility will be a public nuisance or a hazard to public health and welfare. The Court ordered the Department to hold an additional public hearing on the impact of the proliferation of landfills on the community's quality of life. The Secretary must consider the public testimony opposing the landfill, and, if the Secretary rejects such evidence, explain his rationale for doing so.

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