Administrative & Regulatory Law News

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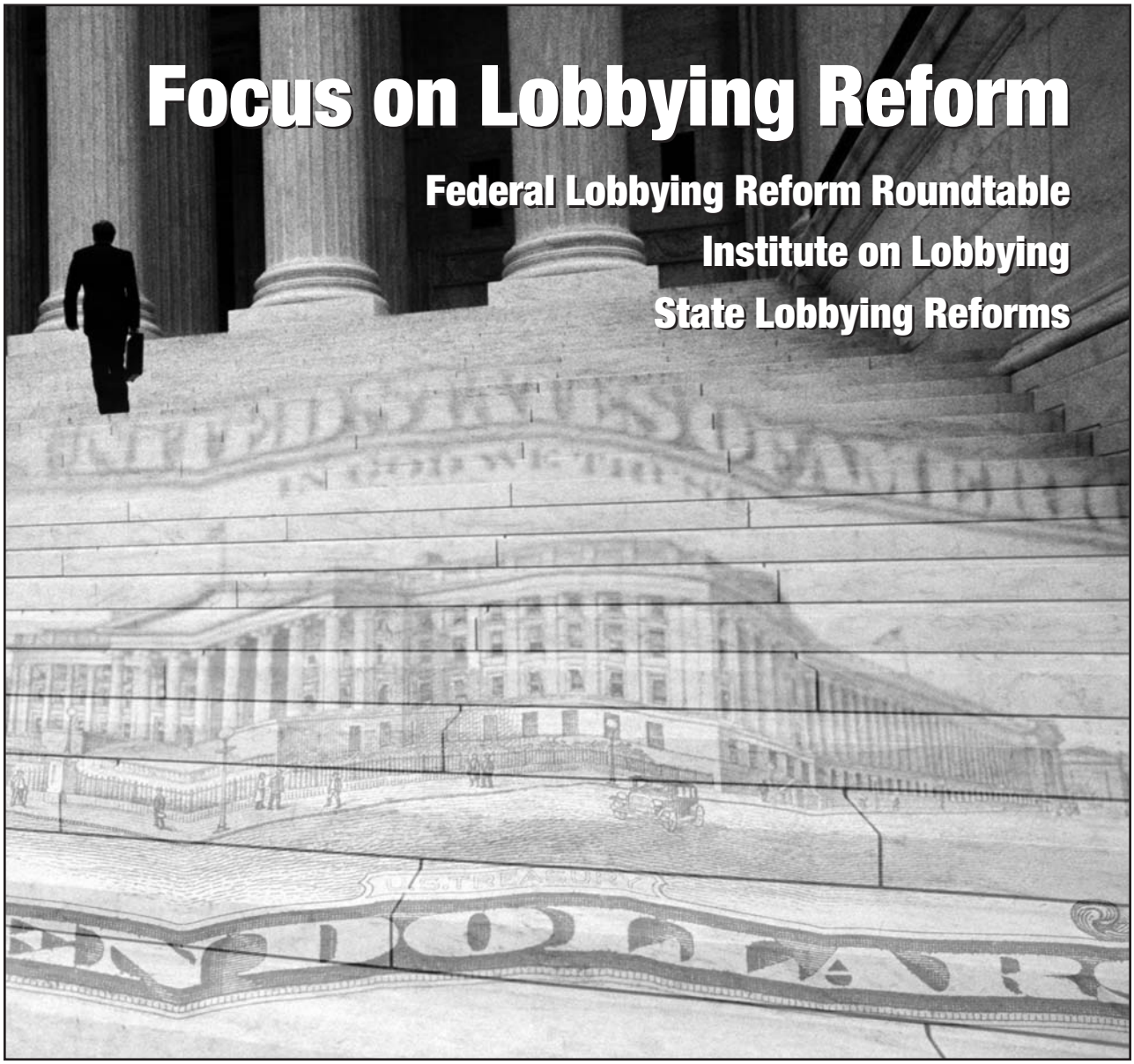

Focus on Lobbying Reform

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Chair's Message

Eleanor D. Kinney

We have had a productive year with more to come. The Section has continued to be active in our policymaking activities. The Section also offered detailed comments on the Office of Management and Budget's proposed bulletin on agency risk analysis among other letters of comment to other agencies. We are especially grateful to Sid Shapiro and his colleagues on for their work on two letters commenting on two OMB proposed bulletins this year.

This year, the Section will have had two proposed recommendations before the ABA House of Delegates. Last February, the ABA House of Delegates adopted the Section's resolution calling on the Attorney General to affirm that designating a record as "sensitive but unclassified" does not provide a legal basis for withholding that record. Our recommendation also called for standard policy for all federal agencies regarding the meaning and impact of the designation of "sensitive but unclassified" to clear up confusion over the status of SBU designated records. This recommendation received considerable attention in government including a favorable report in the *Secrecy News* of the Federation of American Scientists. We thank Steve Vieux, Jim O'Reilly and Tom Susman for their work on this resolution. [Ed. Note: See *Secrecy* article this issue.]

The Section has also proposed a resolution for the upcoming meeting of the ABA House of Delegates in August 2006. This resolution addresses two issues regarding lobbying disclosure that have surfaced in recent years: coverage of grassroots lobbying and identification of members of lobbying coalitions. This recommendation and report follows the Section's letter for relevant congressional committees commenting on the Lobbying Disclosure Act of 1995 this last March. We are especially grateful to Professor Bill Luneburg for his work on this resolution and his other great contributions to our programs on lobbying this year. These activities followed the Section's second annual Administrative Law Institute which focused on lobbying this year. The Institute was a tremendous success. [Ed. Note: See *Roundtable* and Lobbying Institute articles this issue.]

The Section is up to an active summer. The council will meet in Washington, DC on Friday, July 21, 2006. The day before on Thursday, July 20, 2006, the Section will offer a CLE program in collaboration with the DC Bar Agency Law Section and the Federal Bar Association DC Chapter. We will have a joint reception with the DC Bar Agency Law Section and the Federal Bar Association DC Chapter on Thursday evening.

Then in August, the Section will be presenting and co-sponsoring a host of programs at the ABA's annual meeting in Honolulu, Hawaii. The Section will be presenting a program on Birthright Citizenship and the Fourteenth Amendment with the Section on Individual Rights and Responsibilities and the Commission on Immigration. In addition, the Section is co-sponsoring a host of programs ranging from banking regulation, administrative law in China and the role of the judge in contemporary society. We will have a joint reception at the US Army Museum of Hawaii with the other ABA sections.

This is my last column as chair. I would like to emphasize that it has been an honor and privilege to be your chair this year.

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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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Roundtable: Lobbying Reform

The 2006 Mid-Year Meeting featured a panel on federal lobbying reform. The Admin Law News invited the panelists and others to share their thoughts on this timely topic.

Proposals to Amend the Lobbying Disclosure Act of 1995

By William V. Luneburg[*]

There had been almost a decade of experience under the Lobbying Disclosure Act of 1995 ("LDA") when the scandals associated with Jack Abramoff began to surface in 2004. Prior to that time, various proposals to strengthen the LDA had been floated now and again, though none successfully other than a "technical" amendments bill in 1998. As the revelations of lobbying abuses continued unabated and Congress started its own investigations during the spring and summer of 2005, two major reform proposals were introduced on the Democratic side, one by Representative Marty Meehan and the other by Senator Russell Feingold. These were followed in December by a Republican initiative led by Senator John McCain and Representative Christopher Shays. When, in January 2006, Abramoff pled guilty to charges of fraud, tax evasion and conspiracy to bribe public officials and agreed to provide evidence about Members of Congress, the legislative "hoppers" overflowed with lobbying reform bills.

Slowdown

With the expectation of further disclosures and prosecutions, the congressional processes for consideration and passage of legislation seemed to be poised for a quick response. However, perhaps not surprisingly, differing perspectives regarding political advantage ultimately had their impact. While the Senate approved a set of LDA amendments almost unanimously (90-8) on March 29, the House produced a significantly different version by a partisan vote of 217-213 on May 3. The momentum for reform was slowing, if not entirely disappearing, and it was unclear whether the important differences between the Senate (S.2349) and House (H.R. 4975) bills could be reconciled in conference (assuming there was one).

For those versed in the history of efforts at federal lobbying reform, an unsuccessful effort during the 109th Congress, though disappointing, would not come as a great surprise. As recently as 1994, in the face of a bipartisan effort to replace the toothless Federal Regulation of Lobbying Act of 1946 (FRLA) with more effective legislation, Republican leaders, sensing an opportunity to gain control of Congress in the upcoming mid-term elections and unwilling to offer the Democrats a victory to brag about, were able to derail the reform effort in the Senate after a conference committee reported a compromise bill. If attempts to amend the LDA fall short this year, this same history gives some hope that the Congress elected in November 2006 might possibly show continued support for lobbying reform, as did the Contract With America Congress in enacting the LDA.

It will be unfortunate if the reform impulse leaves the LDA unchanged. While the sheer number of registrants and amount of disclosure under the LDA dwarf those under the FRLA, ten years of experience has demonstrated that the LDA contains significant loopholes and is inadequate as a disclosure statute in a variety of ways. Moreover, the lack of resources for effective oversight afforded to the Secretary of the Senate and the Clerk of the House of Representatives, who jointly administer the LDA, together with apparent Department of Justice disinterest in enforcement have replicated the situation that existed under the FRLA.

Coalition Membership

Two of the most significant gaps in LDA coverage relate to disclosure of coalition membership and grassroots lobbying efforts. With regard to the former, a coalition or association is generally deemed to be the LDA client. Aside from foreign entities with certain relationships to a registrant, disclosure of coalition members is restricted to those who contribute over $10,000 in a six-month period to the lobbying activities of the coalition and, in addition, play a major part in controlling, planning or supervising those lobbying activities. Not surprisingly, coalition members are more than willing to surrender the ability to control for anonymity, knowing that, in any event, their hired lobbyists will work to further their interests. Since coalitions are a crucial element in most important lobbying strategies, without the disclosure of coalition members having a significant stake in lobbying campaigns, the purposes of the LDA to expose those who seek to influence federal decision-making processes cannot be achieved.

Privacy of association is a First Amendment protected interest (*NAACP v. Alabama* (1958)). Yet, in various cases, starting with *Buckley v. Valeo* (1976), the Supreme Court has indicated that there are important limits on that protection in an analogous context, the disclosure of contributors to federal election campaigns. The likelihood, not the mere possibility, of harassment or other adverse effects flowing from disclosure is the touchstone for protection. Accordingly, reducing the membership contribution triggering LDA disclosure to, for example, $5,000 and eliminating the control requirement would seem to be entirely consistent with existing First Amendment precedent since particularly vulnerable groups can always present "as applied" constitutional challenges to protect their interests.

[*] Professor of Law, University of Pittsburgh School of Law; Chair, Legislative Process and Lobbying Committee.

Grassroots

Grassroots lobbying was common in 1995; it is omnipresent today, particularly through the Internet. The attempt to extend LDA coverage to include grassroots solicitations was the ostensible reason for the Senate filibuster that prevented enactment in 1994 of the conference committee proposal for lobbying disclosure reform. The LDA was adopted the next year only after all remnants of grassroots disclosure had been eliminated. However, the only Supreme Court case to consider federal lobbying disclosure law, *United States v. Harriss* (1954), indicated that, while disclosure of efforts to "propagandize the general public" might not pass constitutional muster, the same fate would not befall disclosure related to at least "artificially stimulated letter campaign[s]." This leaves room for expanding the LDA to cover grassroots lobbying. Moreover, since the purpose of many grassroots campaigns is to increase the leverage of professional lobbyists in furthering their clients' interests, there is no reason that LDA coverage should be limited to "direct" lobbying.

In view of the fact that the effectiveness of a grassroots campaign is dependent on the ability of the legislative or executive branch official to know that there is a real person who wrote the letter or e-mail (as opposed to a machine somewhere generating fictitious irate comments), the anonymity of the responder to a grassroots solicitation is not sought—or desired by the persons in charge of the lobbying campaign. Accordingly, the constitutional protection of privacy of association is irrelevant to disclosure of grassroots advocacy even where directed to the members, shareholders or employees of the lobbying entity. The focus of grassroots disclosure proposals is, moreover, on the identity, not of the persons communicating to Congress or the Executive Branch, but of those who run the campaigns, the issues addressed, and the amounts of money spent. To exempt from disclosure grassroots solicitations directed to members, shareholders, and employees would eliminate coverage of the very campaigns likely to have the most impact since, by definition, such persons are more likely to respond than members of the public generally who may have little or no direct interest in the legislative or administrative issues presented.

Comparison and Contrast

The Senate and House bills that await a conference committee include a variety of important changes to the LDA. Both proposals require quarterly (as opposed to the current semiannual) reporting by registered entities; electronic filing of periodic reports (the House bill mandates electronic filing of both registrations and reports); the creation of an Internet accessible and more comprehensibly searchable database of the information required on registrations and reports linked to reports filed with the Federal Election Commission; increased penalties for LDA violations; and additional oversight with regard to LDA compliance. While both bills would increase the maximum civil penalty for LDA violations from $50,000 to $100,000, the House, but not the Senate, bill would impose criminal penalties (including imprisonment). The House bill directs the Office of Inspector General of the House to audit LDA reports and refer cases for prosecution as well as to review the activities of the Clerk in carrying out the LDA and make recommendations for improvement (including additional resources). S. 2349 directs the Secretary and Clerk to report to various congressional committees the number of lobbyists and lobbying firms referred to DOJ for LDA violations and the US Attorney for the District of Columbia (the sole prosecutorial authority) to report to the committees the number of enforcement actions taken and the fines collected. Moreover, the Senate bill directs the Comptroller General to audit registrations and reports and to report the results to Congress and make recommendations for improving compliance.

With regard to disclosure obligations to be added to the LDA, the Senate and House bills include provisions that require listing of prior legislative and executive positions held by lobbyists beyond the current two year look-back period. They also mandate reporting of contributions by lobbyists to federal candidates, officeholders, PACs, and political committees; funds paid to entities named for or established, financed or controlled by covered officials; and the amounts of gifts made by lobbyists to those officials. The bills differ, however, with regard to the specifics of many of these new disclosure obligations. In addition, the Senate, but not the House, bill requires disclosure of funds paid by lobbyists for events to honor or conferences for executive and legislative officials or to reimburse travel and related expenses of those officials.

The Senate and House bills differ also on two crucial topics. S.2349 broadens coalition membership disclosure a bit (diluting the control requirement from "major" to "substantial"), while the House bill does not change current disclosure requirements regarding coalitions. H.R. 4975 has no provision dealing with grassroots lobbying. However, the Senate bill requires LDA registration by lobbying firms that earn or expend $25,000 or more in a three-month period on grassroots lobbying (defined as efforts to encourage communications by the public with regard to *specific* government actions and to exclude grassroots solicitations directed to members, employees, officers, and shareholders of the lobbying entity). Moreover, registered lobbying firms and organizations that lobby on their own behalf must report the amounts of money earned or spent on covered grassroots lobbying and the issues to which that lobbying is directed.

Conclusion

Final adoption of either the Senate or House bill or a compromise incorporating the common features of both would work a significant—and beneficial—change to the LDA. However, without broadened disclosure of coalition membership and coverage of grassroots efforts, the LDA will remain a disclosure statute that fails to capture crucial information on the impact of lobbying on federal decision-making.

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Lobby Reform as Window Dressing

*By Meredith McGehee***

The scandals involving Washington super-lobbyist Jack Abramoff and still undisclosed Members of Congress, as well as the resignation and incarceration of Randy "Duke" Cunningham, have put lobbying reform on the nation's radar screen. It certainly belongs there.

In response to these scandals, both the Senate and House have passed their versions of lobbying and ethics reform. But these bills are not the sweeping reforms that Congress promised the public in January when the scandals were fresh news. Neither bill sufficiently addresses the problems with the current system. Both bills have been panned by independent groups and those Members of Congress interested in genuine reform. The weak legislation and the criticism it has received beg the question: what are the most important steps towards meaningful lobbying reform and what other reforms are necessary to deal with the problems that have surfaced? This article outlines some of the elements that are most vital to effective lobbying reform and explains why these are needed. As explained below, the current lobbying scandals are *not* simply a problem of lobbyists run amok. Thus, comprehensive congressional ethics reforms are needed to ensure the integrity of the ethics process and indeed the House itself.

Increased disclosure of lobbyists' activities is a primary feature of both the House and Senate bills. The bills call for increasing the frequency lobbyists must file disclosure reports from semiannually to quarterly. Lobbyists must also now disclose campaign and PAC contributions on their lobbying reports. These were needed changes to the lobbying laws. Lobbyists' contact with Members will be easier to track and more transparent. In addition, with lobbyists' political contributions included on their reports, these reports will provide a more consolidated and accurate picture of lobbyists' activities.

While these steps to increase disclosure and more thoroughly track lobbyists' activities address some of the problems with current lobbying laws, and are a good start, there are several key additional areas that real reform needs to address.

- **Disclosure of Members and Staff Contacted:** The quarterly lobbying reports contained in both the House- and Senate-passed bills are an improvement over the current semiannual reporting requirement. More frequent reporting is a step in the right direction. However, these reports will still fall short because they lack important substantive information. Currently, lobbyists merely designate the congressional body they have lobbied during the period: the House or the Senate. This information is too vague to be useful. For the reports to actually disclose what a lobbyist has been doing, reports should include a list of Member offices personally contacted (meaning a meeting or visit, personalized email or phone call) during the reporting period.
- **Strengthening Current Revolving Door Restrictions by Increasing the Cooling-Off Period to Two Years and Covering Lobbying Activities:** The current one-year cooling off period is insufficient to address the concerns of Members and high-ranking staff using the inside contacts and information they obtained as public officials to the benefit of private interests. With a two-year restriction, an election would intervene before Members would return to lobby their former colleagues. Also, lobbying activities, not just actual lobbying contacts, should be prohibited during the cooling off period. Even if the former lawmaker does not make specific contact with a sitting Member of Congress, he or she often pulls the strings from behind a transparent screen. The cooling-off period is ineffective if lobbying activities are not prohibited in addition to actual lobbying contacts.
- **Disclosure of Grassroots Lobbying Activities:** The bill that passed in the Senate includes a crucial provision requiring disclosure of grassroots lobbying activities. It has been well documented that Mr. Abramoff recommended the services of his business partner, Michael Scanlon, to conduct grassroots lobbying and letter writing campaigns. Because Scanlon's activities were considered grassroots lobbying, expenditures in the millions went undisclosed to the American people. Without disclosure of such grassroots lobbying efforts, citizens will continue to be left in the dark and unable to obtain an accurate record of lobbyists' efforts and expenditures in their attempts to influence lawmakers.
- **Events and Parties in Honor of Members:** Another major loophole in the current lobbying laws is that while there are restrictions on the gifts that lobbyists can give Members, lobbyists are not required to disclose events *in honor of* Members. Currently, lobbyists and their clients can legally finance parties to "honor" or recognize Members at national conventions which often cost hundreds of thousands of dollars, yet cannot give a gift valued at more than $50. This is a major loophole in the current law; these events should be disclosed by both lobbyists and Members if not prohibited altogether. An attempt in the House to require meaningful disclosure of these activities was gutted by the leaders as the bill moved through the House.

Increasing disclosure of lobbyist activities plays the very important role of detailing how lobbyists gain access to and influence lawmakers. Disclosure alone, however, is not enough. The now infamous golfing trips to Scotland sponsored by Jack Abramoff were disclosed. While these trips were questionable in terms of congressional ethics standards, they were in fact properly disclosed. To appropriately address the problems associated with these scandals, there must be changes that go beyond disclosure.

Further, the recent lobbying scandals are not simply a problem of a few

** Policy Director of the Campaign Legal Center and head of McGehee Strategies, a public interest consulting business.

corrupt lobbyists, even though that is where Congress is attempting to lay the blame. Lobbyists have been able to effectively exploit the rules in their favor because there are lawmakers who are willing to play along, and ethics committee members have proven unwilling to censure or even seriously investigate their colleagues. The passed legislation, however, makes only minor changes to the day-to-day business of lobbyists, while barely touching lawmakers. This is a multi-faceted problem and the legislation passed in both the House and Senate only addresses a small fraction of the problem.

In order for lobbying reforms to be truly meaningful, Congress must also reform the way Representatives and Senators conduct their business; primarily in the form of congressional ethics reform. The House and Senate ethics committees are charged with the constitutional responsibility to discipline Members. This in-house system of Members acting as investigator, prosecutor, jury and judge to other Members, simply is not working. The congressional ethics committees in both the House and Senate have long histories of late and lax enforcement at best, and complete inaction at worst. Efforts have been made in the past, most recently in 1997, to improve this system but a more substantial reform is necessary. The key to fixing the congressional ethics committee process is to change the process.

The most effective way to reform the process would be to introduce a more independent voice by creating an office within the legislative branch that would be responsible for receiving and investigating allegations of wrongdoing. Such an office could be headed by a single administrator similar to the Office of Government Ethics in the executive branch, and would make recommendations to the ethics committee as to the disposition of allegations. If the Office decided a complaint was frivolous or unfounded, it would dismiss the complaint. Such a dismissal would have greater credibility because it was from a more independent process. Senators Susan Collins (R-ME) and Joe Lieberman (D-CT), and Representatives Chris Shays (R-CT) and Marty Meehan (D-MA) offered an amendment to create such an office during consideration of lobby reform legislation, but they were not adopted.

The recent scandals involving lobbyists and lawmakers are the result of failures both in the lobbying laws and congressional ethics rules. In order to effectively change the system and help prevent corruption scandals of this magnitude, changes must be made to the rules and laws governing lobbyists *and* the lawmakers themselves. The American public will know for sure when meaningful reform has taken place because they will see a change in the process. What has passed the House and Senate is mere window dressing for real lobbying reform.

Disclosure Is Fine, But Genuine Lobbying Reform Must Focus on Behavior

*By Craig Holman****

The Lobbying Disclosure Act (LDA) of 1995 was passed after decades of effort to make the regulation and disclosure of lobbying the federal government more effective. Earlier lobbying regulation laws, most notably the Federal Regulation of Lobbying Act of 1946, became virtually obsolete soon after passage.

The first attempt at comprehensive lobbying reform at the federal level was the Foreign Agents Registration Act (FARA) of 1938. The foreign agents act arose specifically in response to a perceived propaganda drive by Adolph Hitler to fan the Nazi movement in the United States. FARA sought to lessen the influence of foreign propagandists by requiring that an "agent of a foreign principal" register as such with the Secretary of State and that any literature or information disseminated by the foreign agent be labeled as such.

Immediately in the footsteps of World War II, Congress also approved the nation's first comprehensive lobbying disclosure law for domestic lobbyists: the Federal Regulation of Lobbying Act of 1946. The primary objective of the 1946 Act was to establish a system of lobbyist registration and disclosure. Like FARA, the Act did not attempt to regulate the conduct of lobbying or the financial activity of lobbyists.

The Federal Regulation of Lobbying Act failed largely because of its inattention to definitions. The Act never clearly defined a lobbyist or lobbying activity, leaving most of those who influenced the federal government immune from the registration and disclosure requirements. The law was eventually replaced by LDA, which provided more concise definitions and vastly increased the registration and disclosure of lobbying activity. [FARA remains on the books, but it is administered by a reluctant Department of Justice, which has no intention of developing an electronic reporting system for FARA records.]

Both lobbying laws have emphasized disclosure as a means of keeping the potentially corrupting influence of lobbyists in check. But recent experience strongly suggests that disclosure is no longer enough. The business of lobbying has become so lucrative, and so critical to the fortunes of businesses and special interests, that genuine lobbying reform today must venture into the regulation of the *conduct* of lobbyists and the ethical *behavior* of members of Congress and their staff.

Breaking the Nexus

First and foremost among the behavioral problems that need be addressed is the potentially corrupting nexus between lobbyists, campaign money and lawmakers.

As a matter of course in Washington, lobbyists are expected to make extensive campaign contributions from their own pockets, solicit even more contributions from their clients and arrange lavish fundraising events, all to get special access to members of Congress. Lobbyists and the PACs associated with their firms have contributed at least $103.1 million to members of Congress since 1998.[1]

*** Craig Holman, Ph.D., governmental ethics lobbyist, Public Citizen.

[1] Public Citizen, The Bankrollers: Lobbyists' Payments to the Lawmakers They Court (May 2006).

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No other single reform would do as much to prevent the corruption and the appearance of corruption in lobbying than to break the nexus between lobbyists and campaign money for officeholders.

> Several states already prohibit direct contributions from lobbyists to officeholders and candidates. South Carolina has had a ban on campaign contributions from lobbyists to state candidates on the books since 1991. California implemented a narrowly drawn statute, prohibiting lobbyists from making campaign contributions to those whom they lobby. Cal. Govt Code §85702. Kentucky prohibits those who lobby the legislature from making contributions to legislative candidates, and Alaska allows lobbyists to make campaign contributions but only to their own representatives. On February 15, 2006, Tennessee joined these four states when it approved its own reform legislation prohibiting direct campaign contributions from lobbyists to state candidates and officeholders.

Even more important is to restrict lobbyists from soliciting or arranging campaign contributions using "other people's money" – OPM in lobbyist parlance – which does not entail similar constitutional issues.

Public Citizen documented the vociferous activities of one lobbyist, Mitch Delk of Freddie Mac, arranging fundraising events for officeholders and candidates. In the 2002 election cycle alone, Delk hosted 45 fundraising events for federal officeholders, candidates and party committees. Nineteen of these events were held explicitly for the benefit of congressional members with oversight responsibility over Freddie Mac. Delk had risen in stature to be considered one of the most influential lobbyists with the House Financial Services Committee.[2]

Immediately following Public Citizen's complaint, however, Delk was fired as Freddie Mac's lobbyist. The complaint resulted in the largest civil penalty ever levied in FEC history, fining Freddie Mac (rather than Mitch Delk) $3.8 million on April 18, 2006 for corporate involvement in federal elections.

None of the states or court decisions discussed above focused on restrictions of particular classes of persons soliciting or arranging campaign contributions from others. However, there would appear to be a fairly firm constitutional basis for restricting comparable classes of persons from soliciting or arranging campaign contributions with other people's money.

The *McConnell* decision explicitly upheld the bans on party committees and federal officeholders soliciting and raising "soft money" and directing these contributions to others. As stated in *McConnell*:

> "Section 323(d)'s restriction on solicitations is a valid anti-circumvention measure. Absent this provision, national, state, and local party committees would have significant incentives to mobilize their formidable fundraising apparatuses, including the peddling of access to federal officeholders, into the service of like-minded tax-exempt organizations that conduct activities benefiting their candidates. All of the corruption and the appearance of corruption attendant on the operation of those fundraising apparatuses would follow."[3]

Closing the Revolving Door

A second area of behavioral problems that can breed corruption is the revolving door between public service and private employment as a lobbyist on behalf of the same companies that have business pending before Congress.

Under the Ethics Reform Act of 1989, members and staff of the federal executive and legislative branches are subject to restrictions on post-government lobbying activities. The most prominent restriction is a one-year cooling off period during which retired public officials cannot make direct "lobbying contacts" with their former colleagues. But this restriction only applies to lobbying contacts; a former public official can conduct all other lobbying activity immediately after leaving public service.

As a result, retiring public officials are a very hot commodity for lobbying firms. A Public Citizen study in 2005 found that 43 percent of retiring members of Congress (including 50 percent of U.S. senators) spin through the revolving door and become lobbyists.

The current one-year cooling off period is a failed policy. Extending it to two years will make little difference. In order to slow the revolving door it is imperative that the policy also prohibit paid "lobbying activity" as defined by the LDA during the cooling off period, which includes research, strategizing and supervising activity for pay designed to facilitate a lobbying contact.

Improving Oversight

Last but not least is the issue of monitoring and enforcement. The current mechanisms for monitoring and enforcing the nation's lobbying and ethics laws are sheer folly. Lobbyists reports fall under the jurisdiction of two entities that expressed little interest in lobbying disclosure: the Clerk of the House and the Secretary of the Senate. Congressional ethics are monitored and enforced by members of Congress themselves.

During 1995 congressional hearings on LDA, Congress debated the issue of which governmental agency should be responsible for carrying out the disclosure requirements, including the mandate for a modern computerized disclosure system. Neither the Office of Governmental Ethics nor the Justice Department wanted the task of serving as the lobbyist filing and disclosure agency for LDA.[4]

[2] To read more about Public Citizen's complaint against Delk, go to: **http://www.citizen.org/congress/campaign/issues/electadmin/articles.cfm?ID=10582**

[3] McConnell v. FEC, 540 U.S. at 100 (2003).

[4] House Subcommittee on Administrative Law and Government Relations, Committe on the Judiciary, Hearing on the Lobbying Disclosure Act of 1993, Testimony of Stephen Potts, Office of Governmental Ethics (March 26, 1993).

The Federal Election Commission, however, was willing to carry out the mandate of public disclosure of lobbyist financial reports. Scott Tomas, Chair of the Federal Election Commission (FEC), testified that the elections agency was quite prepared to take over the filing and disclosure responsibilities of the Act.[5] This made Congress nervous, and so it turned responsibility over to two agencies directly under Congress' control and that never asked for it.

Worse yet, the ethical behavior of members of Congress and their staff is the jurisdiction of congressional ethics committees – committees run by and for members of Congress. Neither the Senate nor the House ethics committees have much of a record. In fact, when they have acted, it has often been following an investigation and conviction conducted separately by the Department of Justice (DOJ). It is worth noting that there has never been, and continues not to be, any known ethics committee investigation of any scandal associated with disgraced lobbyist Jack Abramoff. The ethics committees are not just leaving this investigation to DOJ; they were never even watching their colleagues before DOJ stepped into the fray.

No matter how good the lobbying and ethics law may be – and not much is expected to emerge from this Congress – the law doesn't mean a thing if no one is watching. If we are to take lobbying and ethics laws seriously, a reasonably-independent Office of Public Integrity must be established, charged with receiving complaints, initiating investigations, and making recommendations to the ethics committees for final action.

Disclosure is not enough.

The LDA debate as a lesson for campaign finance reform?

*By Mike B. Wittenwyler*****

The proposed amendments to the Lobbying Disclosure Act of 1995 (the "LDA") have been widely criticized for not being "real reforms." "Bogus," "sham," "watered-down," "window dressing," and "snow job" are all terms used by some editorial writers to describe the LDA amendments passed by Congress earlier this year.

Disappointed members of Congress and the organizations that support their "reform" efforts have called for "better" amendments to the LDA. For example, Common Cause and several other organizations released a letter on April 24, 2006, advocating "strong, effective and comprehensive reform measures" that better address the "corruption and lobbying scandals in Congress." There are measures that these organizations believe would "greatly strengthen" the LDA amendments, turning them into "acceptable legislation":

- permanent restrictions on privately-financed trips;
- requiring that Congressional air travel on chartered flights be charged at charter rates;
- strengthening Congressional gift rules;
- enhanced revolving door prohibitions; and
- comprehensive disclosure requirements.

Like other proposals by reform organizations to further amend the LDA, these suggested changes focus on increased disclosure and preventing any perceived quid pro quo between members of Congress and the organizations that lobby them. Comprehensive disclosure (through more frequent and detailed reports filed in standardized formats and available in searchable databases via the Internet), it is argued, would improve the public's awareness of who is lobbying, what is being lobbied and at what cost. These organizations assert that the additional information and the additional barriers to the perceived quid pro quo would significantly change the way business is done on Capitol Hill.

Absent from these lobbying reform proposals, however, are any suggestions to limit the amount of spending on lobbying. That is, unlike recent discussions on campaign finance reform, the lobbying reform debate has not included any proposals to cap or limit lobbying expenditures. Instead, even the amendments to the LDA proposed by reform organizations assume that spending on federal lobbying will continue unchecked, subject only to disclosure and other peripheral regulations.

In the campaign finance law context, however, many of the same reform organizations involved in the debate over the LDA have advocated limits on campaign spending in an effort to reduce the overall amount of money being spent in connection with elections in the United States. In briefs submitted to the U.S. Supreme Court earlier this year in *Randall v. Sorrell* (Case No. 04-1528, oral argument on Feb. 28, 2006), for example, campaign spending limits have been touted as a way to "enhance democracy," "foster greater public participation in matters of government," "increase electoral competition, and "reduce the appearance of impropriety in the electoral process." The less money in the system, it is argued, the better the system becomes.

The lack of any effort to limit lobbying expenditures cannot be tied to a lack of spending on lobbying. A recent report by the Center for Public Integrity concluded that the amount spent on lobbying Congress routinely exceeds the amount spent on federal elections. According to the report, in 2001-02, $3.4 billion was reported paid to lobbyists while $1.6 billion was raised during the same time period by federal candidates. In the 1999-2000 election cycle, $2.3 billion was spent on federal elections with $2.9 billion on federal lobbying. See "Industry of Influence Nets More Than $10 Billion," *Center for Public Integrity* (April 7, 2005, updated March 31, 2006) (http://www.publicintegrity.org/lobby/report.aspx?aid=675).

Given this data, why isn't the reform community pursuing LDA amendments that would limit spending on lobbying to reach the same stated goal: to enhance democracy and reduce the appearance of impropriety in the legislative process?

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[5] House Subcommittee on Administrative Law and Government Relations, Committee on the Judiciary, Hearing on the Lobbying Disclosure Act of 1993, Testimony of Scott Thomas, Federal Election Commission (March 26, 1993).

***** Godfrey & Kahn, S.C.

Guidance Documents and Regulatory Beneficiaries

By Nina A. Mendelson[1]

The World of Guidance Documents

Federal agencies rely heavily on guidance documents, and their volume is massive. The Environmental Protection Agency and the Occupational Safety and Health Administration recently catalogued over 2000 and 1600 such documents, respectively, issued between 1996 and 1999. These documents can range from routine matters, such as how employees should maintain correspondence files, to broad policies on program standards, implementation, and enforcement. Documents in the latter category include Education Department policies on Title IX implementation, Environmental Protection Agency policies on hazardous waste cleanup, the Food and Drug Administration's policies on food safety and broadcast advertising of pharmaceuticals, and many more. Although these documents often resemble informal rules, agencies generally avoid Administrative Procedure Act notice-and-comment requirements because guidance documents arguably qualify under the statutory exceptions for general policy statements, interpretative rules, or both.

These policies now typically are express in disclaiming any binding effect upon regulated entities or upon the agency itself, a response to some recent judicial decisions requiring notice-and-comment rulemaking for a guidance accorded binding effect, as well as to congressional concern about uncertainty. Nonetheless, a guidance document often evokes a significant change in behavior by those the agency regulates. And if the document includes an interpretation of law, that interpretation may also receive limited *Mead/Skidmore* deference in court. Finally, despite the lack of formal legal binding effect, agencies are increasingly stating they will usually conform to positions taken in guidance documents.

Consequently, a number of commentators have called for procedural reform of agency issuance of guidance documents. Over the years, the Administrative Conference has issued multiple recommendations, including calling generally for greater participation and for notice-and-comment for guidance documents with a "substantial impact." Other commentators, however, have guardedly defended the current state of affairs because of a desire not to deter the creation of guidance documents, which help agencies supervise low-level employees and supply valuable information to regulated entities regarding how an agency will implement a program. Moreover, they argue that a regulated entity at least retains a formal opportunity to challenge the agency's policy at the time an enforcement action is brought.

The Interests of Regulatory Beneficiaries

Thus far, however, the debate has largely ignored the distinct and substantial interests of those who might (inelegantly) be called indirect regulatory beneficiaries. These are people whose behavior is not directly regulated or who receive no government subsidy or payment, but nonetheless reasonably expect to benefit from government regulation of others – pharmaceutical consumers, women seeking opportunities in college athletics, environmental users, workers seeking safe workplaces, to name a few. Regulatory beneficiaries may have been specifically named in a statute or it may simply have been widely understood that the statute was meant to regulate one segment of the public to indirectly benefit another group. These latter groups have obvious and substantial interest in the way an administrative agency "fills in the blanks" of such a regulatory program.

Regulatory beneficiaries do sometimes benefit from agency guidance documents, if the guidance happens to be favorable in substance. Such a guidance can prompt useful changes in the behavior of regulated entities. Guidance document policies can certainly be unfavorable, however. For example, the FDA's 1999 guidance document advising that pharmaceutical companies may advertise prescription drugs to consumers without supplying detailed risk information prompted a significant and highly controversial increase in television advertising. The Education Department's 2005 "Dear Colleague letter" to universities suggesting that on-line surveys of students could be sufficient to document insufficient interest by the "underrepresented sex" in a varsity athletic team has also been controversial.

Generally, regulatory beneficiaries suffer distinct procedural losses when an agency issues policy in this way, inhibiting their ability to hold the agency accountable for its policy decisions. Regulatory beneficiaries lose access both to judicial review and to the process of agency decision making. First, with respect to judicial review, even if the regulatory beneficiary has standing, a guidance document may not be considered final agency action or ripe for review at the time it is issued, especially if the document expressly disclaims a binding effect. This obstacle, of course, plagues both regulated entities and regulatory beneficiaries. At least in theory, however, regulated entities can choose not to follow the guidance, wait for agency enforcement, and obtain judicial review of the agency's policy or statutory interpretation at that time. Unlike regulated beneficiaries, however, regulatory beneficiaries generally lack any such later opportunity to obtain judicial review. In many cases, the aspect of the policy of

[1] Professor of Law, University of Michigan Law School. This essay is adapted from *Regulatory Beneficiaries and Informal Agency Policy Making*, 92 Cornell L. Rev. ___ (forthcoming, 2007).

concern to a regulatory beneficiary will be realized through agency inaction. For example, in the food safety context, a Food and Drug Administration guidance saying that it will consider ready-to-eat food "adulterated" under the Federal, Food, Drug and Cosmetic Act if the food contains foreign objects of larger than 7 millimeters in maximum dimension will mean that the FDA is unlikely to bring an enforcement action against, say, a manufacturer selling baked beans or pickles with 5 millimeter foreign objects. Needless to say, challenging a decision not to file a particular enforcement action is very difficult. Meanwhile, a choice by a regulated entity to comply with a guidance – such as by sifting out sharp 7-millimeter long objects – will also foreclose enforcement actions and with that the prospect of judicial oversight. Even if there is enforcement litigation, a regulatory beneficiary will have a difficult time intervening for the purpose of arguing that the underlying policy should be more stringent, since a court generally will be able to resolve a particular enforcement action without reaching such arguments.

Second, when an agency issues a policy in a guidance document, regulatory beneficiaries are likely to have significantly less access to the agency decision making process. Assuming the guidance document qualifies for the APA exceptions to notice-and-comment rulemaking, the agency has no obligation to seek outside views, disclose data, or respond to comments. Some agencies indeed seek no public input at all on guidance documents. Especially when the guidance document announces a significant policy, however, an agency may well seek outside comment. The agency may hope to gather new information, identify significant feasibility problems, or flush out any political controversy early, to minimize later executive or legislative oversight. Indeed, agencies often claim greater legitimacy for these policies as a consequence of seeking public input.

A draft guidance might be posted on the Internet or published in the Federal Register for comment, but very often, agencies do not widely solicit comment. Instead, agency employees make ad hoc decisions regarding public outreach and to whom to "float" a guidance document. When this happens, regulatory beneficiaries can lose valuable opportunities to participate. Agency employees often try to include those who are frequent communicators with the agency. One agency reportedly uses as its starting point for public outreach lists of organizations that have commented on past rulemaking, or lists of contacts developed through agency meetings on other topics. Again, however, this process is often highly arbitrary. Among regulated entities, for example, a recent study of industry involvement in FDA guidance document development found that some industry representatives felt closed out of the process, finding it "opaque," while others found access to FDA staff to be easy, and the staff to be "very responsive."[2]

Turning to regulatory beneficiaries, agency participation decisions sometimes overtly advantage regulated entities. For example, the Federal Aviation Administration has explicitly adopted an exclusionary approach in its development of "advisory circulars," a major category of its guidance documents concerning aviation safety. The FAA has posted on the Internet an exclusive list of 17 associations, nearly all associations of regulated entities and related businesses, from which it welcomes comments on draft advisory circulars. The FAA's posting explains, "[W]e generally accept comments only from recognized industry organizations. If you would like to comment on a Draft Advisory Circular, please submit your comments to one of the organizations listed below, as appropriate."[3] The list includes no airplane passenger or consumer safety organizations. EPA's policy on circulating its small entity environmental regulatory compliance guides is to focus the circulation on small business representatives. Finally, the FDA has recently committed to seek public input in advance of issuing especially important guidance documents, except where those documents are presenting a "less burdensome policy that is consistent with public health."[4] Without suggesting any across-the-board criticism of the FDA, one could imagine that regulatory beneficiaries might sometimes have a comment on whether a less burdensome FDA policy remains consistent with public health.

Finally, without any conscious exclusivity whatsoever, agencies that consult ad hoc on draft guidance documents will tend to deemphasize participation by regulatory beneficiaries. Because of direct contact with regulated entities in permitting, licensing, inspection, and enforcement matters, an agency, as a rule, will know and have more regular relationships with regulated entity groups. Given time and resource constraints upon the agency, it is comparatively convenient and inexpensive to reach out to these same entities as a sounding board for policy development. The agency also may have a greater interest in a good long-term relationship with these entities, since it will want to procure their cooperation and compliance with the statutory regime. By contrast, the statute generally will not create any direct relationship between an agency and indirect regulatory beneficiaries such as food consumers, environmental users, or workers in hazardous workplaces. An agency official may have greater difficulty identifying the appropriate people to contact and less interest in maintaining a long term relationship. Moreover, regulated entities, in particular, are likely to have valuable information – often superior to that of the agency or of regulatory beneficiaries – regarding a new policy's cost and feasibility. Finally, regulatory beneficiaries are relatively diffuse and unorganized, compared with regulated entities, and thus will have fewer resources and less ability to find out about a guidance before it is finalized or to obtain executive or Congressional oversight. In short, unless the agency itself chooses to

[2] See Erica Seiguer & John Smith, Perception and Process at the Food and Drug Administration: Obligations and Trade-Offs in Rules and Guidances, 60 Food & Drug L.J. 17, 30 (2005).
[3] See "How do I comment on a Draft Advisory Circular?" posted at www.faa.gov/arp/publications/acs/draftacs.cfm#comment (Last visited Aug. 11, 2005).
[4] See 62 Fed. Reg. 8968 (Feb. 27, 1997) (noting that FDA will seek public input after issuance of these guidances); 65 Fed. Reg. 7321, 7324 (Feb. 14, 2000) (confirming same position).

continued on next page

give public notice of a draft guidance or initiates contact with regulatory beneficiary groups, these groups are likely to have less of an opportunity to participate in guidance development.

Possible Solutions

The procedural costs imposed upon regulatory beneficiaries as well as upon regulated entities when agencies issue policies in guidance documents clearly call for greater regulation. Such regulation is unlikely to lead agencies to a world of "secret law," as some commentators have speculated. Even with more required procedures, agencies will have significant incentives to go public with their policies relating to compliance and enforcement. These incentives will range from a desire to provide regulated entities with some certainty regarding a program's implementation (a desire likely to be reinforced by members of Congress interested in certainty and compliance assistance) to a wish to avoid losing enforcement actions because the agency failed to provide "fair notice" of the requirements it is enforcing, following cases such as *General Electric v. EPA*, 53 F.3d 1324, 1332 (D.C. Cir. 1995).

Nonetheless, requiring notice-and-comment rulemaking for all guidance documents, which would include routine instructions to employees, is clearly overkill. Nor does a proposal to require guidance documents to have "precedential effect" – and to require an agency to give reasons for departing from a guidance document's policy – help the problems I am discussing here. While this approach would clearly reduce uncertainty for those dealing with an agency, it also implicitly presumes that the guidance itself is valid and has properly implemented the statute. It thus does comparatively little for regulatory beneficiaries, because it affords them no opportunity to argue, say, that the agency's choice is not adequately justified or that the agency should be more aggressively interpreting the statute.

Instead, some other intermediate solutions seem appropriate. Space and time constraints will permit me to briefly overview only three. One occasionally discussed solution is to amend the APA to require an agency to use notice-and-comment rulemaking for "important" interpretations or policy statements, or, in the words of the Administrative Conference, those with "substantial impacts." That would mean that a court could invalidate such a guidance document for failure to comply with the requirement. Moreover, regulatory beneficiaries could more fully engage an agency on a policy before it is finalized, which could in turn increase the information to the agency about public policy preferences and technical issues, and the final rule would be subject to judicial review. The major difficulty here is the burden on courts to distinguish the "important" policies from the others. Judges have typically shied away from this sort of decision because it requires so much programmatic expertise.

Agencies could also make procedures more inclusive as a matter of self-regulation. The FDA has done this to some degree in its "Good Guidance Practices," and the Office of Management and Budget has suggested it in its "Proposed Bulletin for Good Guidance Practices," posted on the Internet for comment in November, 2005. For a significant or controversial policy decision, an agency would give advance notice and collect public comment. Neither policy requires an agency to respond to comments, however, and neither appears to subject an agency's compliance with its policy to judicial review. What is thus unclear from these sorts of proposals is whether an agency will meaningfully engage the comments it gets. Comments from an entity with the clout to mobilize political oversight will, of course, receive attention, as such comments would in any event. Well-intentioned civil servants will undoubtedly try to read comments. However, agency resources and time would remain tight, and regulatory beneficiaries could invoke no new external controls in the event agencies do not fully consider their comments.

A third intermediate process-focused option would be a new right to petition to repeal or revise a guidance document that did not undergo notice-and-comment rulemaking. No court has so far construed the APA to afford such a right. A citizen petition could give substantive reasons for an agency to repeal or revise such a document; in response the agency could modify the guidance document or give reasons why the document should remain unchanged. (To avoid multiple successive petitions, an agency perhaps could publish a notice inviting the filing of all related petitions.) The agency's response to the petition would be subject to judicial review.

Any citizen, including a regulatory beneficiary, could thereby engage the agency on a guidance document's substance. By requiring an agency to supply crystallized reasons for its decision, this process would likely make judicial review more effective, and the inquiry on judicial review would be a familiar one: is the agency's decision arbitrary or capricious? Although it provides only a belated opportunity to engage the agency, it might prompt agencies to use a more thorough participatory process at the outset for significant or controversial policies.

On the other hand, depending on how many petitions are filed, the proposal does have the potential to impose significant costs on agencies. Those costs would surely be lower than requiring notice-and-comment rulemaking across-the-board, but it is unclear how the costs would compare to a more limited notice-and-comment requirement for "important" rules.

Conclusion

The debate over agency guidance documents has been incomplete because of the failure to adequately consider the interests of regulatory beneficiaries. When an agency chooses to issue a policy in a guidance document rather than a rule, indirect regulatory beneficiaries in particular can lose critical access to the agency decision making process and to judicial review. This is so even though the agency may be implementing statutes enacted in order to help those beneficiaries. While empirical research would surely be useful in documenting the extent of these costs, procedural reforms that would confer greater procedural rights on regulatory beneficiaries seems clearly worth considering. Such reform would also represent a significant step toward ensuring the agency procedures better recognize and incorporate the legitimate, immediate interests of regulatory beneficiaries in agency policy.

Secrecy Is the Kudzu of the Bureaucracy: Are You Authorized to Read This Article?

By Prof. James T. O'Reilly[1]

Secrecy is the Kudzu vine of the bureaucracy; you can cut it at the root but it blossoms elsewhere. American press freedoms led to the adoption of our Freedom of Information Act in 1966, and those freedoms have expanded exponentially since the feeble first steps of the newspaper editors toward a Freedom of Information Act ("FOIA") four decades ago. The creative tension that always underlies any FOIA debate is the sometimes-subtle, sometimes-vigorous struggle between necessary secrecy and desirable transparency. The excessive marking of records as sensitive for homeland security reasons is only the latest manifestation of that conflict. Now "*Pseudo-Secrets*," the March 2006 report of the private National Security Archive, a policy advocacy group, has stirred the fight with some remarkable statistics.

Information "control" is legally distinct from information "non-disclosure". The latter depends on agency interpretations of FOIA to exercise the option to withhold records as "exempt" under 5 U.S.C. 552(b)(1-9). About 5,100 federal court cases deal with these nine exemptions and the nuances of the FOIA disclosure processes. The former, information "control" with markings like "Sensitive But Unclassified" (SBU), "Sensitive Security Information" (SSI), or "For Official Use Only" (FOUO), is a swamp that few novices dare to cross, as there is no roadmap, no consistency and no oversight. Does control lead to exemption under FOIA? Not as a matter of law, but probably yes as a matter of agency practice. Does control keep off the Internet some publicly available records that had been readily available? Yes, but in the absence of centralized supervision, no one could discern the government-wide impacts of these constraints, until reading the Archive's 2006 report.

The statistics-rich but very readable paper reached several key conclusions. Nobody is in charge of these control markings; no monitoring or reporting of SBU occurs; and no challenges can be brought in court until and unless a FOIA denial occurs. The percentages are alarming:

- 29% of agency policies allow any agency employee to designate information as "sensitive but unclassified";
- 43% of agency polices are unclear or do not specify how to remove a control designation such as " sensitive but unclassified";
- 75% do not include restrictions that prohibit the use of control designations for an improper purpose, such as concealing agency nonfeasance or misfeasance.

A chilling sense of déjà vu comes over a scholar who reads the Archive report three decades after the disputes over these issues that birthed FOIA. Bureaucratic self-preservation imbues secrecy with a mystique government outsiders often see as a mistake. ABA Delegate Tom Susman, then a Senate staffer, helped negotiate the 1974 FOIA amendments to break through a similar cloud of obfuscation. Those amendments, extirpated the worst extremes of FOIA abuse. Congress channeled positive changes into the FOIA system that we have today, a model for many other nations that followed us in the 1993-2003 wave of international FOIA adoptions.

The use of SBU, SSI, and FOUO designations has been attacked by the eminent experts in the field, such as Harold Relyea of the Congressional Research Service, but they have not been normalized into a system for control markings, and without a system there will not be an effective control mechanism. Congress will need legislation adopted after a record of hearings, but given its present secretive leadership, the Congress lacks the political motivation to challenge secrecy. There are no PACs generously contributing in favor of more transparency in government, so the prospects for legislative change are on the shelf until public outrage is sufficiently manifest.

The terms of Executive Order 13392 (70 Fed. Reg. 75371, Dec. 19, 2005) apparently drafted earlier in 2005 to deal with FOIA operational problems, were a partial step toward encouraging agency plans for streamlining information procedures; its planning obligation did not squarely address SBU, SSI, FOUO and other control mechanisms. It should be read in conjunction with the recent Congressional Research Service report on sensitive but unclassified document controls (http://www.fas.org/sgp/crs/secrecy/RL33303.pdf).

The Federal Information Security Management Act, Pub. L. 107-347, requires FOIA decisions to be made by agencies under a new statutory framework, but the implementing steps have been slow or overlooked. The latest Homeland Security appropriations bill, Public Law 109-90, §537, requires DHS to designate a central official to coordinate the markings of 'sensitive security information' in federal records. More congressional actions could occur in a piecemeal fashion.

Our Section's Committee on Government Information & Privacy shepherded the adoption of the 2006 ABA House of Delegates recommendation and report on "Sensitive but Unclassified" federal records, with the able assistance of delegates Tom Susman and Judy Kaleta, and it is now official ABA policy. The Archive's report, available from www.nsarchive.org, illustrates in depth that these special markings and segregations of records are inconsistent, unclear and unaccountable. The ABA's opposition and that of the media organizations might actually produce change in this most secretive of recent Administrations. But it will take news media attention, sustained election-year criticism of the Administration's flaws, and devoted congressional champions, to move from the blossoming of the Kudzu to some determined weed-killing results.

[1] University of Cincinnati College of Law; Former Section Chair; and Advisory Board Member, Administrative & Regulatory Law News.

Second Administrative Law and Regulatory Practice Institute Addresses Hot Topic: "Lobbying, Law, Ethics, and Strategy in Today's Legislative Environment"

By Otto J. Hetzel[*]

Almost 150 persons attended the Section's Second Institute on April 6-7, 2005, in Washington, D.C. that provided a practice-oriented program on legal requirements applicable to lobbying, reviewed ethical dilemmas that will be encountered, and provided practical techniques and tactics that need to be understood to function effectively before Congress. The Institute was opened by the Section Chair, Eleanor Kinney, and the Institute's Program Chair, John Hardin Young.

The substantive program started with William V. Luneburg, a Professor at the University of Pittsburgh Law School and an author of the Section's popular Lobbying Manual (3rd Edition). He led participants through the often complex requirements applicable to the Lobbying Disclosure Act (LDA) by using the forms that must be submitted as a discussion vehicle to convey the various legal issues that must be confronted by those who need to determine if they must file. He also covered the potential impact of amendments to LDA requirements that are currently pending before the Senate and House.

Interest in the topics covered had been heightened by the publicity given to current lobbying scandals prominent in the media, the various investigations underway, and pending criminal prosecutions of lobbyists and Members of Congress. To the lawyers, lobbyists, government relations specialists, and government attorneys who attended, the need to understand how to comply with applicable requirements was manifest. The complexity of the requirements and the potential changes being considered highlighted the issues that must be confronted. Those involved in lobbying are all potentially affected by these legal requirements and they need to understand fully the laws under which they must function. The consequences of not doing so have become apparent and have raised the stakes for failure to comply. Over 200 matters have been referred to the Department of Justice for consideration of possible prosecution for failure to comply with these laws this past year, representatives from the Government Accountability Office in the audience reported.

The program focused as well on how to improve lobbying tactics and carry on effective lobbying campaigns. Lobbying strategy and specific successful techniques were also addressed. Several of the speakers provided considerable grist for thought on policy issues affecting lobbying restrictions, particularly Tom Susman, who gave the Institute's Distinguished Lecture, as discussed below.

Moving from compliance with registration requirements, Linda Gustitus, former Chief of Staff to Senator Carl Levin (the primary sponsor of LDA), drawing on her experience on Capitol Hill focused on tactics and techniques needed to lobby effectively. Currently teaching Lobbying and Legislative Process at American University's Washington College of Law, where students actually design and develop lobbying campaigns as part of work in her course, she discussed a number of practical approaches that can be used in lobbying. She also provided critical observations of what to do and what not to do if one is to be effective in advocacy before Members of Congress and their staff.

Congressman Marty Meehan, a seven-term Congressman (D. Mass.) who has been active in developing LDA policies, provided a Congressional perspective on current lobbying practices, reviewed changes in applicable restrictions currently being contemplated, and discussed the considerations applicable to the scope and effectiveness of proposed rules of conduct being developed that may affect both Members of Congress and those lobbying them.

Abner J. Mikva, the Luncheon Keynote Speaker, gave a unique perspective on lobbying issues having served in all three branches of government: as White House Counsel to President Clinton, a Judge on the D.C. Circuit Court of Appeals, and as a Congressman from Illinois. His review of many of the ethical dilemmas and problems encountered in the legislative arena, including how to interpret such measures once enacted, both as judge and government counsel, captivated his audience with examples of his salient experiences in this field.

Three lawyer-lobbyist practitioners, Penny Farthing, Jody Trapasso, and Joseph Sandler, shared their extensive lobbying experience through a series of questions and answers with those attending, ranging from compliance issues experienced with applicable lobbying restrictions, practical advice on lobbying effectively, and complying with rules of professional conduct and restrictions on professional activities of those entering and leaving public service.

Attendees then broke into a number of small groups to discuss issues raised by questions prefacing a Case Study of Lobbyist A, the designation of the

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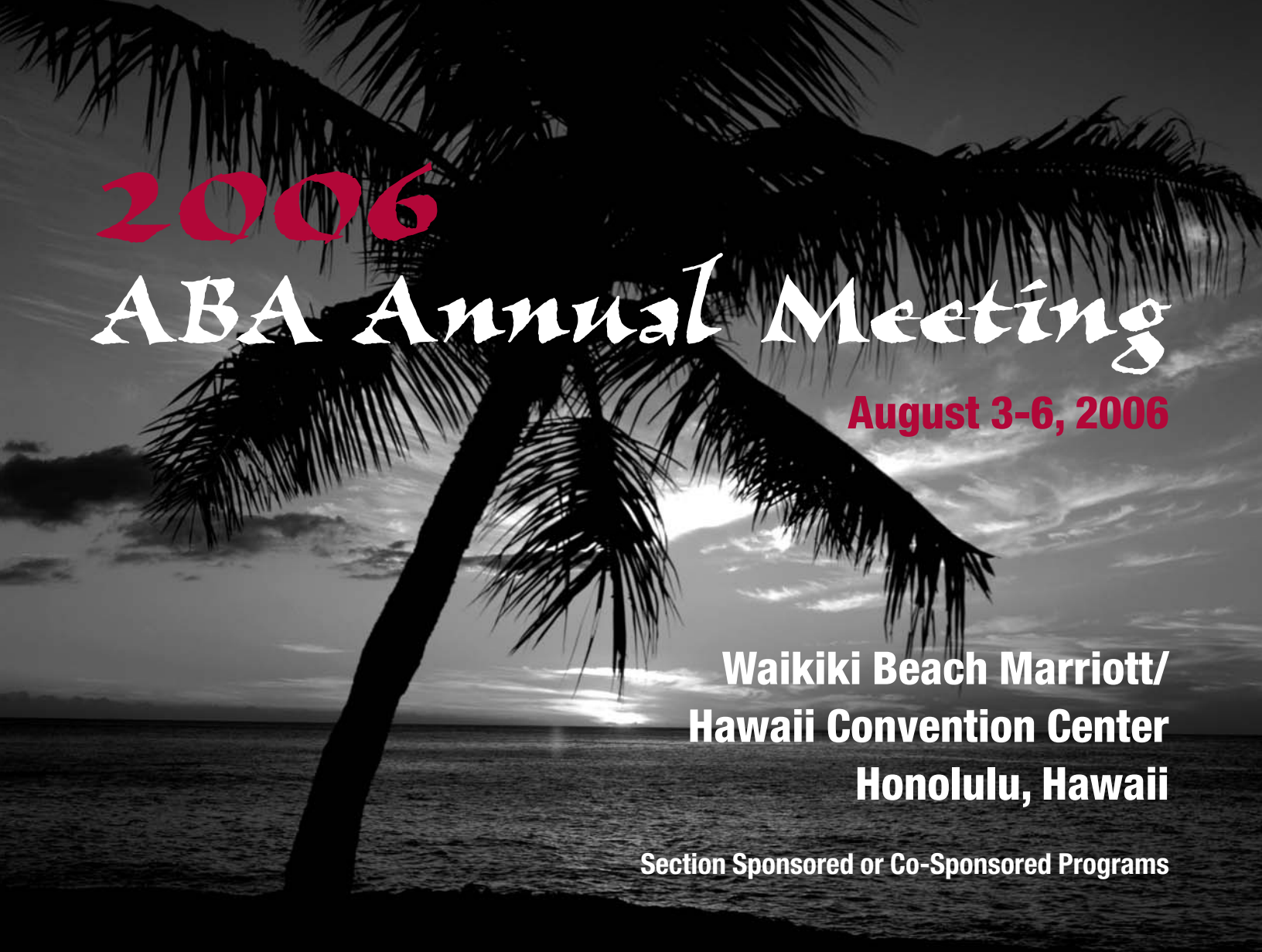

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Supreme Court News

By Robin Kundis Craig★

The Supreme Court decided a variety of administrative law-related issues this quarter, including issues related to the scope of judicial review of agency action, the applicability of sovereign immunity when states delegate state powers, and, as usual, the role of statutory interpretation in the application of legislation.

Scope of Review

In the *per curiam* decision of *Gonzalez v. Thomas*, — U.S. —, 126 S. Ct. 1613 (April 17, 2006), the Supreme Court summarily reversed the Ninth Circuit's *en banc* decision to grant asylum to South African immigrants on the basis of persecution as a members of a family group. Legally, the Ninth Circuit *en banc* decision held that a family group may constitute a "social group" for the purposes of refugee status under the Immigration and Nationality Act. *Thomas v. Ashcroft*, 409 F.3d 1177, 1187 (9th Cir. 2005) (*en banc*) (overruling, e.g., *Estrada-Posadas v. INS*, 924 F.2d 916 (9th Cir. 1991)). Nevertheless, because the Ninth Circuit went ahead and also decided that the facts of the immigrants' case met this standard, the Supreme Court held that the Ninth Circuit had committed "obvious" legal error in light of the "ordinary remand" rule announced in *INS v. Orlando Ventura*, 537 U.S. 12, 18 (2002) (*per curiam*).

Both *Ventura* and *Thomas* were immigration cases in which the Ninth Circuit, in the course of reviewing the final decisions of the Board of Immigration Appeals (BIA), decided questions of fact regarding asylum eligibility that the BIA had not considered. Quoting extensively from *Ventura*, the *Thomas* Court emphasized that "[w]ithin broad limits the law entrusts the agency to make the basic asylum eligibility decision," and that "judicial judgment cannot be made to do service for an administrative judgment." *Thomas*, 126 S. Ct. at 1615 (quoting *Ventura*, 537 U.S. at 16 (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943))). As a result, "[a] court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry'"; instead, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Id.* (quoting *Ventura*, 537 U.S. at 16 (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985), and citing *SEC v. Chenery Corp.*, 332 U.S. at 196)). Because the BIA had not yet considered "whether Boss Ronnie's family presents the kind of 'kinship ties' that constitute a 'particular social group,'" and because the Court could "find no special circumstance here that might have justified the Ninth Circuit's determination of the matter in the first instance," remand to the BIA was required. *Id.*

State Sovereign Immunity

A unanimous Supreme Court, in an opinion by Justice Thomas, overturned precedent in the Fifth and Eleventh Circuits that allowed municipalities to claim "residual" common law sovereign immunity based solely on delegations of state power even when the municipality in question did not qualify as an "arm of the state" for Eleventh Amendment purposes. *Northern Insurance Co. of New York v. Chatham County, Georgia*, — U.S. —, 126 S. Ct. 1689 (April 25, 2006) (overruling *Broward County v. Wickman*, 195 F.2d 614 (5th Cir. 1952). In this case, Chatham County owned, operated, and maintained the Causton Bluff drawbridge under authority delegated from the State of Georgia. When a party whose boat was injured by the malfunctioning bridge and that party's insurance company sought damages in admiralty against the County, Chatham County defended on the basis of state sovereign immunity. The district court awarded and the Eleventh Circuit upheld summary judgment to the County, relying on *Broward County v. Wickman*, 195 F.2d 614 (5th Cir. 1952), and the common-law doctrine of "residual immunity," which the County argued was broader than the state sovereign immunity afforded under the Eleventh Amendment.

The Supreme Court acknowledged its "recognition of preratification sovereignty as the source of immunity from suits," but it emphasized that all remaining state sovereign immunity is encompassed within the Eleventh Amendment. *Chatham County*, 126 S. Ct. at 16__ (citations omitted). As a result, there exists no common-law "residual immunity" test that is broader than the Eleventh Amendment. Id. Moreover, "this Court has repeatedly refused to extend sovereign immunity to counties," "even when, as respondent alleges here, 'such entities exercise "a slice of state power."'" Id. (quoting *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979)). The *Chatham County* Court also refused to create a special immunity for suits in admiralty. *Id.* at 16__. Therefore, because "[t]he County conceded below that it was not entitled to Eleventh Amendment immunity, and both the County and the Court of Appeals appear to have understood this concession to be based on the County's failure to qualify as an arm of the State under our precedent," the County enjoyed no immunity from suit. *Id.* at 16__.

Statutory Interpretation and Application of Statutes

The Federal Torts Claims Act (FTCA) specifies that its provisions, including its waivers of federal sovereign immunity, do not apply to "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C. § 2680(b). Seven members of the Supreme Court (Justice Thomas dissented; Justice Alito did not participate), in an

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opinion by Justice Kennedy, decided that this FTCA provision does *not* shield the U.S. Postal Service from claims that a postal carrier acted negligently in leaving mail on a porch, causing the plaintiff to trip and fall, resolving a conflict between the Second and Third Circuits. *Dolan v. U.S. Postal Service*, — U.S. —, 126 S. Ct. 1252 (Feb. 22, 2006).

What is most interesting about this case is that the seven-Justice majority consciously rejected a plain meaning interpretation of "negligent transmission." This phrase, the majority acknowledged, could "in isolation" "embrace a wide range of negligent acts committed by the Postal Service in the course of delivering mail, including creation of slip-and-fall hazards from leaving packets and parcels on the porch of a residence. After all, in ordinary meaning and usage, transmission of the mail is not complete until it arrives at the destination." Id. at 1257 (citing *Webster's Third New International Dictionary* 2429 (1971)). However, context was more important than the isolated plain meaning of this phrase:

> The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis. Here, we conclude that both context and precedent require a narrower reading, so that "negligent transmission" does not go beyond the negligence causing mail to be lost or to arrive late, in damaged condition, or at the wrong address.

Id. First, looking at context, the Court emphasized that "negligent transmission" appears in the context of "loss" and "miscarriage," both of which terms "refer to failings in the postal obligation to deliver mail in a timely manner to the right address . . . ." *Id.* Thus, under the canon of *noscitur a sociis*, "negligent transmission" should also be so limited. Second, prior Courts had characterized the postal exception as specific, not general, and hence as preserving the Postal Service's liability for ordinary accidents such as vehicle collisions. *Id.* at 1257-58 (discussing *Kosak v. United States*, 465 U.S. 848, 855 (1984)). As a result, the majority concluded that "Congress intended to retain immunity, as a general rule, only for injuries arising, directly or consequentially, because mail either fails to arrive or arrives late, in damaged condition, or at the wrong address." *Id.* at 1258. Finally, the majority declined to apply the usual rule that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign," id. at 1260 (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996)), because the very purpose of the FTCA is to waive the federal government's sovereign immunity, and overly strict constructions threaten to defeat that purpose. *Id.*

Justice Thomas, the lone dissenter, would have applied the broad plain meaning of "negligent transmission." *Id.* at 1261 (J. Thomas, dissenting). Moreover, if that phrase is ambiguous, Justice Thomas would have resolved the ambiguity by applying the normal rule that waivers of the federal government's sovereign immunity should be construed narrowly and in favor of the government. *Id.* at 1263-64 (J. Thomas, dissenting).

Similarly, the Court unanimously (Justice Alito did not participate) determined that a restrictive reading of the Hobbs Act was appropriate, despite canons of construction that might have argued for a broader reading. *Scheidler v. National Organization for Women, Inc.*, — U.S. —, 126 S. Ct. 1264 (Feb. 28, 2006). The Hobbs Act confers criminal liability on "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, *by robbery or extortion* or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section . . . ." 18 U.S.C. § 1951(a). The question for the Court was whether the violence had to further a plan or purpose to affect commerce by robbery or extortion, or whether the violence simply had to further a plan or purpose to affect commerce. *Scheidler*, 126 S. Ct. at 1270.

The Court determined that the former reading was preferable for several reasons. First, "the language of the statute makes the more restrictive reading the more natural one" because the statute "forbids *obstructing, delaying, or affecting commerce 'by robbery or extortion*.'" *Id.* (quoting 18 U.S.C. § 1951(a); emphasis in original). Second, "Congress often intends such statutory terms as 'affect commerce' or 'in commerce' to be read as terms of art connecting the congressional exercise of legislative authority with the constitutional provision (here, the Commerce Clause) that grants Congress that authority," not as completely independent elements. *Id.* at 1271 (citations omitted). Third, "the statute's history" – dating back to 1934 – "supports the more restrictive reading," because the statute had always linked violence to "a plan to injure commerce *through coercion or extortion*." *Id.* (emphasis in original). Fourth, "[t]he Act's legislative history contains nothing to the contrary." Id. at 1272. Fifth, "respondents' Hobbs Act interpretation broadens the Act's scope well beyond what case law has assumed. It would federalize much ordinary criminal behavior, ranging from simple assault to murder, behavior that typically is the subject of state, not federal, prosecution." *Id.*

Respondents argued that the broader interpretation was required by the canon of statutory construction "that favors interpretations that give a function to each word in a statute, thereby avoiding linguistic superfluity." *Id.* at 1273. Specifically, they argued that because the Act's definitions of "robbery" and "extortion" already included robbery and extortion that take

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place through acts of violence, the second part of § 1951(a) had to create a separate offense. The Court, however, determined that the words both extended criminal liability to violent acts that were not necessarily part of a conspiracy and allowed the government to bring multiple charges for the same conduct. As a result, the language did have a function, although the Court conceded that the "additional work" that it performed "is small." *Id.* However, because Congress' intent was clear, "[t]he canons of statutory construction cannot lead us to a contrary conclusion. Those canons are tools designed to help courts better determine what Congress intended, not to lead courts to interpret the law contrary to that intent." *Id.* at 1273-74 (citing *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001)).

Finally, in contrast, a unanimous Court (Justice Alito again not participating), in an opinion by Justice Stevens, broadly interpreted the Securities Litigation Uniform Standards Act of 1998 (SLUSA) to preempt state-law class actions by securities holders as well as purchasers and sellers, regardless of whether the plaintiffs had a federal claim. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, — U.S. —, 126 S. Ct. 1503 (March 21, 2006). SLUSA provides that "'[n]o covered class action' based on state law and alleging 'a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security' 'may be maintained in any State or Federal court by any private party.'" *Id.* at 1506-07 (quoting 15 U.S.C. § 78bb(f)(1)(A)). The Second Circuit had held that SLUSA pre-empts state-law claims only if the plaintiffs have a federal remedy, while the Seventh Circuit held that SLUSA preempts *all* covered state-law claims. The Court agreed with the Seventh Circuit's reading, holding that "[t]he background, the text, and the purpose of SLUSA's pre-emption provision all support the broader interpretation adopted by the Seventh Circuit." *Id.* at 1507.

The Second Circuit had concluded that SLUSA's language must be read narrowly so as to meet the purchaser-seller requirement established in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), and hence to preempt only lawsuits in which the alleged fraud occurred "in connection with the purchase or sale of securities," as alleged by a purchaser or seller of the securities. *Merrill Lynch*, 126 S. Ct. at 1508. According to the Second Circuit, because the class action in question "alleged that brokers were fraudulently induced, not to sell or purchase, but to retain or delay selling their securities, it fell outside SLUSA's pre-emptive scope." *Id.*

The *Merrill Lynch* Court disagreed, holding that *Blue Chips Stamps* had been a policy decision rather than a decision that interpreted the relevant statutory language. *Id.* at 1512-13. Moreover, multiple court cases and SEC rulings in other contexts that *had* interpreted the "in connection with" language had given it a broad interpretation. *Id.* at 1513. As a result, "Congress can hardly have been unaware of the broad construction adopted by both this Court and the SEC when it imported the key phrase – 'in connection with the purchase or sale' – into SLUSA's core provision. And when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations, as well.'" *Id.* (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)). Moreover, a narrow interpretation would "run contrary to SLUSA's stated purpose" of preventing certain class action law suits from frustrating the objectives of the 1995 Reform Act.

The Court acknowledged the "general 'presum[ption] that Congress does not cavalierly pre-empt state-law causes of action.'" *Id.* at 1514 (quoting *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996)). However, it explained that broad preemption was still appropriate because "that presumption carries less force here than in other contexts because SLUSA does not actually pre-empt any state cause of action. It simply denies plaintiffs the right to use the class action device to vindicate certain claims. The Act does not deny any individual plaintiff, or indeed any group of fewer than 50 plaintiffs, the right to enforce any state-law cause of action that may exist." *Id.*

Roundtable

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Is it a recognition by all involved in the LDA debate of two central facts: first, the clear and unequivocal right under the First Amendment to "petition the Government for a redress of grievances" and, second, any attempt to limit spending on lobbying would be quickly (and successfully) challenged as a severe infringement on the ability to effectively petition those who govern? There shouldn't be any dispute on these principals.

But aren't both lobbying and campaign spending protected forms of speech at the heart of the First Amendment? Shouldn't any limit on campaign spending be as constitutionally suspect as a limit on lobbying expenditures given that "speech concerning public affairs is more than self expression; it is the essence of self government"? *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

While the U.S. Supreme Court's *Randall v. Sorrell* decision, this term, will provide answers to many of the questions on the role of spending limits in campaign finance law, the recent Congressional debate on the LDA amendments is a very current reminder that the best regulation of speech is disclosure, not eliminating speech itself. Comprehensive disclosure requirements and preventing a quid pro quo – whether in context of lobbying or campaign finance – are all that are needed to "reform" the law.

News from the Circuits

*By William S. Jordan III**

1st Circuit Abandons Hearing on the Record Presumption

Section 554(a) of the APA provides that when a statute requires an agency adjudication to "be determined on the record after opportunity for an agency hearing," the hearing must comply with the requirements of §§ 556 and 557 of the APA (misleadingly referred to as "formal adjudication"). For nearly thirty years, *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir.1978), stood, in the 1st Circuit, for the proposition that when a statute requires a hearing in an adjudication, the court will presume that the test of § 554(a) has been met unless the contrary is clear from the statute. *Seacoast* followed similar decisions in two other circuits, *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1264 (9th Cir.1977), and *U.S. Steel Corp. v. Train*, 556 F.2d 822, 833-34 (7th Cir.1977). In holding that the APA dictated "formal adjudication," these three decisions relied upon the adjudicatory nature of the decision (examining the specific facts of a particular party) and the need for a written record for judicial review.

Seacoast, the most prominent of the three decisions, is no longer good law in the 1st Circuit. In *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006), the court held that the Chevron "sea change" in 1984 dictated that the court defer to EPA's interpretation of the term "opportunity for public hearing" in the Clean Water Act. Factually quite similar to *Seacoast, Dominion Energy* involved the question of whether §§ 556 and 557 of the APA applied to NPDES permit hearings. In the wake of *Chevron*, EPA had adopted a rule to the effect that the CWA did not trigger formal adjudication for NPDES permits. In so doing, EPA had explained at some length why it considered formal adjudication to be inappropriate for such proceedings.

The combination of *Chevron* and EPA's new rule allowed the 1st Circuit to avoid its own precedent and uphold EPA's denial of formal process. The court's approach was relatively simple: (1) the CWA is ambiguous with respect to the nature of the required hearing, (2) *Chevron* requires deference to agency interpretations, and (3) EPA had issued a rule adopting the interpretation in question. The interesting twist was that the court needed to find a way around its own precedent in *Seacoast*. The route was provided by *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S.Ct. 2688 (2005), in which the Supreme Court had held that *Chevron*-entitled agency interpretations trump prior judicial decisions unless the prior decisions had explicitly adopted the only possible interpretation. Since *Seacoast* itself had reflected the ambiguity of the statute, it did not preclude the agency from reaching a different conclusion as long as, under *Chevron*, the agency could demonstrate that its interpretation was reasonable. Once that point was reached, *Dominion* had lost because it had conceded the reasonableness of EPA's position. Interestingly, EPA, with the court's apparent approval, relied upon the three factors of *Mathews v. Eldridge*, 424 U.S. 319 (1976) (the private interest, the risk of error, and the government interest) in arguing that its interpretation was reasonable. The court did not cite *Mathews* or explain why this reliance was appropriate in the statutory context.

The issue of whether a statutory hearing provision triggers § 554(a) of the APA may seem trivial in light of *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338 (1st Cir.2004), in which the 1st Circuit held that even very informal procedures may comply with the requirements of §§ 556 and 557 of the APA. But however informal such procedures may be, they must include at least the vital protections of an independent neutral decisionmaker and a prohibition on *ex parte* contacts. The crucial question is whether Congress would have intended to allow the agency to avoid these protections.

The 1st Circuit ignored *U.S. v. Mead*, which might be considered an ebb tide in the *Chevron* sea. *Mead* held that *Chevron* deference does not apply unless Congress has delegated to the agency the authority to make rules with the force of law with respect to the issue in question. While EPA clearly had the power to issue such rules with respect to the substantive aspects of the Clean Water Act, it is not entirely clear the Congress would have intended the courts to defer to an agency's interpretation of a procedural provision that was arguably meant as a check on the agency's power. Neither *Dominion Energy*, nor its spiritual ancestor *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989), adequately explains why an agency should be able to control the question of whether a statute requires it to follow procedures whose purpose is to protect the interests of individual private actors.

D.C. Circuit Rejects SEC Independent Directors Rule

One of the more hotly contested issues at the SEC in recent years is whether the agency should require mutual funds to have 75% independent directors and an independent chair in order to carry out certain activities. In theory, the purpose of the requirement is to prevent or reduce conflicts of interest that could harm the investing public. After the SEC adopted the rule on a 3-2 vote, the D.C. Circuit remanded for failure to consider the costs that would arise from the requirement. The remand came only days before the Chairman, who had supported the rule, was due to leave the Commission. Acting with remarkable speed, the SEC reissued the rule without reopening the record. In so doing, it relied upon the breadth

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of the original Notice of Proposed Rulemaking and upon certainly widely-available but extra-record information concerning the costs of independent directors and chairs. The D.C. Circuit rejected this effort in *Chamber of Commerce of the United States of America v. SEC*, 2006 WL 890669 (D.C. Cir. 2006).

The court quickly dispensed with two threshold issues. First, the Chamber argued that the SEC had no jurisdiction over the rule until the court had issued its mandate. Although this would be true of a lower court awaiting the issuance of an appellate court mandate, it is not true of an agency. Agencies are not constrained by the case-and controversy requirement. Generally, an agency may decide *sua sponte* to revise its own rule.

Second, the court upheld the Chamber's standing where the Chamber asserted that the rule would deprive it of the opportunity to invest in mutual funds that did not meet the standards of the rule, and where "historical data in the rule-making record indicat[ed] that management-chaired funds may have performed marginally better then independently chaired funds." The court considered itself bound by the original remand decision, *Chamber of Commerce of the United States of America v. SEC*, 412 F.3d 133 (D.C. Cir. 2005), which had recognized the Chamber's standing. Even if there are alternatives to the desired product, "the inability of consumers to buy a desired product" constitutes injury-in-fact.

On the merits, the court took the agency to task for relying on extra-record information. The SEC had relied upon a "widely used industry survey" of mutual fund directors, and "extra-record salary surveys by the Securities Industry Association." Both were publicly available and readily accessible. Although it is sometimes permissible for an agency to rely upon extra-record information on this sort of remand, the SEC's actions went beyond the bounds. The central question is whether "at least the most critical factual material that is used to support the agency's position on review ... [has] been made public in the proceeding and exposed to refutation." Where new extra-record information merely confirms existing information in the record, or where the agency generates information using a methodology that was in the record, the agency's reliance upon the information is acceptable. Here, however, the information was entirely new. Rather than using new information to confirm what was already in the record, the agency in effect tried to use what was in the record to confirm the new information.

The SEC also tried to argue that the Chamber was not prejudiced because it had not shown the information to be inaccurate and because the information was publicly available. The court was not sympathetic. There is no need to make a "particularly robust showing of prejudice in notice-and-comment cases. . . . [A]n utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure." Since the Chamber had shown enough to create uncertainty as to whether its comments would have affected the outcome, the SEC's action could not stand.

Finally, the court rejected the proposition that the need to move quickly with the existing majority constituted "good cause" sufficient to avoid notice and comment. The court said that the risk of delay from the change in Commission membership was "hardly atypical."

4th Circuit: No Private Right of Action to Enforce Information Quality Act

When the National Heart, Lung, and Blood Institute issued reports stating that reduced consumption of sodium would lower blood pressure in all Americans, the Salt Institute (a trade association for the salt industry) petitioned the agency to correct what the Salt Institute considered to be inaccurate information. The Salt Institute said the NHBLI's general statement was not true of all Americans, and that the information had to be broken down by various groups in order to be accurate. When the NHBLI refused to release the raw data or correct the statement, the Salt Institute sued under the Information Quality Act, 44 U.S.C. § 3516, note.

The IQA directed the Office of Management and Budget to issue guidelines "for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." The Salt Institute alleged that the NHBLI's reports violated the requirements of the IQA. The guidelines were to include a requirement that agencies "establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency."

But the IQA said nothing about a private legal right to access to the information or to its correctness. Thus, there was no injury-in-fact and no standing.

The Salt Institute relied upon *FEC v. Akins*, 524 U.S. 11 (1998), in which the Court had found standing to challenge the FEC's failure to designate a particular organization as a political action committee, which would have required the disclosure of information desired by the plaintiffs. In *Akins*, there was no question that the agency was required to make the information available to the public, so it was not relevant here.

D.C. Circuit Recognizes Substantive Due Process Right

In a remarkable decision with a powerful dissent, the D.C. Circuit held in *Abigail Alliance for Better Access to Developmental Drugs and Washington Legal Foundation v. Von Echsenbach*, 2006 WL 1147758 (D.C. Cir. May 2, 2006), that mentally competent terminally ill adult patients have "the right . . . to access potentially life-saving post-Phase I investigational new drugs, upon a doctor's advice, even where that medication carries risks for the patient." Plaintiffs, an alliance of terminally ill patients,

challenged the FDA's refusal to allow the use of potentially life-saving drugs that had passed the Phase 1 investigation and been found to be safe enough to justify further study. Ultimate approval would require a finding of effectiveness and confirmation of the safety of the drug for the particular use.

The majority identified two lines of Supreme Court authority with respect to substantive due process claims. The first, represented by *Griswold*, *Roe*, and *Casey*, emphasizes personal dignity and autonomy. As in *Casey*, the question is whether the claim involves "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." The second, apparently more restrictive, focuses on the nation's history and legal traditions and has two "features": (1) an inquiry into whether the fundamental right asserted is "objectively, 'deeply rooted in this Nation's history and tradition'" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed," and (2) a requirement that the court articulate a "careful description of the fundamental liberty interest."

Reaching back to Blackstone, the court found an important tradition of personal autonomy in protecting life and limb, particularly represented by the defense of necessity in the tort context. The court also noted that government control of drugs is a relatively recent phenomenon, and even then physicians may prescribe drugs for non-approved purposes. Thus, the long-standing tradition of personal autonomy trumps the more recent government control of potentially life-saving drugs. Ultimately, the majority relied heavily upon *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), in which the Supreme Court recognized a due process right to refuse life-sustaining treatment. According to the majority, whether the matter involves ending life or prolonging it, "In both instances, the key is the patient's right to make the decision about her life free from government interference."

Judge Griffith in dissent distinguished *Cruzan* as involving the refusal of forced treatment, quite different from seeking access to potentially harmful drugs. More important, he noted the array of questions raised by the majority's decision: "Would the majority's right guarantee access to federally-funded stem cell research and treatment? Perhaps most significantly, what potential must a treatment have in order for the Constitution to mandate access?" And he noted the tension between the majority's conclusions and the Supreme Court's recent decision upholding federal control of medical marijuana in the face of patient desire and state approval. See *Gonzales v. Raich*, 545 U.S. 1 (2005). Prediction: Judge Griffith will prevail, either on direct review (which has not yet been sought) or when the issue later reaches the Supreme Court.

EPA Loses Two Plain Meaning Challenges.

In two recent decisions, the D.C. Circuit held EPA to the apparent plain meaning of the Clean Water Act and the Clean Air Act, refusing to accept policy arguments or to find ambiguity sufficient to avoid the import of the statutory language. In *Friends of the Earth, Inc. v. Environmental Protection Agency*, 2006 WL 1071660 (D.C. Cir., April 25, 2006), the court held that the Clean Water Act requirement that states establish a "total maximum daily load" for certain water bodies did not permit loads to be determined on an annual or seasonal basis. "Daily," it seems, means "daily." In addition to relying on the dictionary, the court offered the following: "And no one thinks of "[g]ive us this day our daily bread" as a prayer for sustenance on a seasonal or annual basis. *Matthew* 6:11 (King James)." EPA's assertion, however correct, that some pollutants are unsuited to setting daily loads was irrelevant. Given the plain meaning of the statute, such concerns are for Congress, not the courts. And EPA's reliance on the absurdity principle failed because the principle imposes an "exceptionally high burden. . . . [F]or the EPA to avoid a literal interpretation ... it must show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it." Since many pollutants are well suited to determining daily loads, EPA could not meet this burden.

Providing an interesting discussion of determining ambiguity, the D.C. Circuit in *New York v. EPA*, 2006 WL 662746 (D.C. Cir. March 17, 2006), struck down part of EPA's New Source Review regulations as contrary to the plain meaning of the Clean Air Act. When a CAA permit holder "modifies" a permitted source, the Act imposes New Source Review. The question is what constitutes a modification. According to the statute, a modification is "any physical change . . . which increases the amount of any air pollutant." After years of judging these matters on a case-by-case basis, EPA adopted a regulation excluding from the term "modification" any changes that did not cost more that 20% of the replacement value of the unit and that met certain other requirements. New York and others challenged the regulation as contrary to the plain meaning of the definition of "modification."

EPA tried to shoehorn itself into *Chevron* deference by arguing that "physical change" is ambiguous. Indeed, all agreed that "physical change" can have various meanings. It could, for example, mean to "make different in some particular," "make over to a radically different form," or "replace with another or others of the same kind or class." But "the sort of ambiguity giving rise to *Chevron* deference 'is a creature not of definitional possibilities, but of statutory context.'" Although it hardly seems necessary, the court emphasized that the statutory term was "*any* physical change," which would encompass all of the above possibilities and any others. Thus, the fact that a term may present some ambiguities does not necessarily mean that it is ambiguous for the purposes of *Chevron* deference. EPA's position was outside the boundaries of the available ambiguities.

News from the States

Edited by Edward J. Schoenbaum[*]

Model State APA Drafting Committee Develops New Draft

The National Conference of Commissioners on Uniform State Laws Drafting Committee wants input from State Administrative Judiciary, academicians, government attorneys, and private practitioners. Please check out the latest draft at the web site http://www.nccusl.org/update/CommitteeSearchResults.aspx?committee=234 and send your comments ASAP to Prof. John Gedid, reporter, jlghome@comcast.net with copies to Prof. Jim Rossi, ABA Advisor jrossi@law.fsu.edu and ALJ Ed Schoenbaum, NCALJ Advisor, E.Schoen@Insightbb.com.

Joint Land Use Task Force Update

The Joint Task Force on Local Land Use Law of the Administrative Law & Regulatory Practice and State and Local Government Law Sections had a very successful first conference call meeting on May 22, 2006. We are seeking "best practices" provisions that can be reviewed by the Task Force and will share drafts with all of you through our website when we have materials for review and comment. If you are interested in participating in this effort, it is not too late to volunteer. Please send an e-mail to E.Schoen@Insightbb.com to let him know of your interest or to share things that work in your jurisdiction.

State Lobbying Reform
Indiana's New Executive Branch Lobbying Rule

Cynthia A. Baker[1]

The first question asked in The Center for Public Integrity's 2003 survey addressing state lobbying laws is, "In addition to legislative lobbyists, does the definition recognize executive branch lobbyists?" In 2003, Indiana's answer to that question was "no." See www.publicintegrity.org. Today, if asked the same question, Indiana can answer "yes."

After a spate of executive orders addressing executive branch lobbying issued by three different Indiana Governors, Indiana's first rule on executive branch lobbying took effect January 1, 2006. 25 Ind. Admin. Code 6-1-1 (2005). The rule imposes a registration requirement on executive branch lobbying activity, defined as, "any action or communication made to delay, oppose, promote, or otherwise influence the outcome of an executive branch action." § 6-1-1(7). The rule's exceptions to the definition of executive branch lobbying activity include grant proposals, tax audits, projects negotiated by the Indiana Economic Development Corporation, and responses to procurement proposals. *Id.*

The Indiana Department of Administration (IDOA) promulgated and administers the new rule. Since its effective date, over five hundred executive branch lobbyists have registered their initial Executive Branch Lobbyist Registration Statement with the IDOA. Jeff Gill, Esq., the Executive Director of the IDOA and the primary contact for the rule's implementation, expects to receive many more initial registrations as the impact of the rule becomes felt and understood throughout Indiana's state government in the coming months.

"The main idea is to bring transparency to Indiana's government with respect to every communication concerning rulemaking or spending taxpayer dollars," said Gill. With one exception, all of the rule's provisions burden executive branch lobbyists. Those who "receive financial consideration" in an amount over $1,000 annually to "influence an executive branch action" or "conduct any executive branch lobbying activity" must file an initial registration statement within fifteen business days of making any contact with an agency regarding an action covered by the rule. § 6-1-1(5). Beginning in 2007, registered executive branch lobbyists will also be required to submit annual reports of their lobbying activity to the IDOA. § 6-2-2. Violations of executive branch lobbying rules, complaints concerning unlawful executive branch lobbying activity, or violations of state ethics rules committed by executive branch lobbyists will be enforced by the Commissioner of the IDOA working in tandem with Indiana's newly created Office of the Inspector General. § 6-5-1.

The one rule provision placing an additional recordkeeping burden on administrative personnel addresses "public or private testimony or communication solicited by an agency." § 6-1-1(7)(G). The rule requires the soliciting agency to keep a written record for four years "detailing with particularity the public policy purpose for extending each such invitation." *Id.* Gill notes that agency personnel who solicit or invite such communication, and state employees generally, have no obligation to check or ensure that the people they are dealing with are registered executive branch lobbyists. In addition, agency solicitation of individuals' input does not make such individuals executive branch lobbyists under the rule. In fact, the rule's single imposition on agency personnel exists to identify those persons solicited by Indiana's state government who may not otherwise be subject to the registration burden imposed by the rule.

Gill suggests that agency personnel use their discretion and best judgment in recording the policy reason for the solicitation. The rule does not limit a policy maker's ability to solicit information or expertise when contemplating a policy decision. Rather, the rule aims to make public why such

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solicitations are made and who, ultimately, receives invitations to the public policy table. Executive branch lobbyists' registrations are available to the public under Indiana's Access to Public Records Act. The IDOA anticipates changes to the website, http://www.ai.org/idoa/eblr/index.html, that will enable multiple agencies, employers, lobbyists, and interested citizens to search for information concerning executive branch lobbying activity.

The new rule comes in the midst of several other new laws and proposed legislation addressing transparency in government. Since Governor Mitch Daniels took office on January 10, 2005, Indiana has created the Office of the Inspector General, established more stringent gift and reporting requirements for all Indiana government employees, and tightened so called "revolving door" laws addressing potential conflict of interests created by post state government employment. Currently, the Indiana General Assembly is considering legislation that would change the definition of "business relationship" to include the relationship a lobbyist (registered or unregistered) has with a state agency. In addition, House Bill 1397, if passed into law, would create a new chapter complementing the existing executive branch lobbying rule and clarifying how the IDOA will work with the Office of the Inspector General in the implementation of the new rule.

Indiana's steps toward greater transparency in the area of executive branch lobbying add to an explosion of ethics laws passed by state and local governments in the last twenty years. Taken as a whole, this flurry of activity in the area of ethics, registration, disclosure, and state government transparency, aims to meet citizens' rising expectations of knowing exactly who is influencing, or being asked to influence state government. Whether such steps will translate into an increase in public trust, an increase in integrity in public service, or both will be hard to measure. However, in light of the first question in The Center for Public Integrity's 2003 survey for purposes of issuing State Lobbying Law Report Cards, Indiana has put itself in a position to gain a few points before the next report card is published.

Florida Enacts Lobbyist Disclosure Requirements

By Larry Sellers[2]

The Florida Legislature recently enacted new requirements for all lobbyists and lobbying firms and their principals. The measure, Chapter 2005-359, Laws of Florida, became effective on January 1, 2006.

The new law received considerable attention in the popular press because it generally bans gifts or other expenditures to legislators and many other government employees by any lobbyist or principal. However, the new law includes a number of additional disclosure and reporting requirements. The law requires lobbying firms to provide additional information when registering (such as a principal's main business) and to periodically disclose the compensation paid by the principal to the lobbying firm for lobbying.

The new law also requires lobbying firms to maintain all records, papers and other documents to substantiate the compensation paid for lobbying. The new law provides that these documents may be subpoenaed for audit by either house of the Legislature, and that the subpoena may be enforced in circuit court. In addition, the new law provides for audits of three percent (3%) of lobbying firms by independent auditors to determine compliance with the new compensation disclosure requirement.

The new lobbyist disclosure provisions require those lobbyists who are lawyers to disclose confidential information about the client, and thereby implicate the Rules of Professional Conduct. The Florida Bar has provided guidance on these matters. Among other things, the Bar notes that lawyers who are lobbyists must obtain the consent of each client for whom the lawyer provides lobbying services in order to comply with the statute's disclosure requirements. See Questions and Answers on Ethical Implications of the New Lobbyist Disclosure Statute, available online at www.floridabar.org.

The new law imposes disclosure requirements on both those who lobby the Legislative branch as well as those who lobby the Executive branch.

As of this writing, the Legislature has released little guidance for complying with these new requirements for those who lobby the Legislative branch, and most of what has been issued deals only with the ban on expenditures. With respect to the Executive branch, the Florida Commission on Ethics has amended its current rules, Chapters 34-7 and 34-12, Florida Administrative Code, to conform to the new law, but many questions remain unanswered.

A federal judge recently rejected a legal challenge to the new law. The Plaintiffs unsuccessfully argued that the new law was invalid and should be stricken because it: (1) was not validly enacted; (2) invades the exclusive jurisdiction of the Florida Supreme Court to regulate lawyers; (3) violates the right to freedom of speech and association, to petition government and to equal protection by prohibiting expenditures for lobbying, and by prohibiting contributions to candidates and committees; (4) violates the right to freedom of speech and association, to petition government and to equal protection by imposing vague or standardless regulations, and by imposing special burdens on lobbyists; (5) violates the right of privacy by compelling disclosure of private information; (6) violates the right to due process and jury trial; and (7) violates the separation of powers doctrine. *Florida Ass'n of Professional Lobbyists, Inc. v. Division of Legis. Info. Servs. of the Fla. Office of Legis. Servs.*, Case No. 4:06cv123-SPM/WCS (Order, May 12, 2006).

[2] Partner, Holland & Knight LLP, Tallahassee, FL.

In Memoriam

Victor G. Rosenblum

The Section mourns the passing of Victor G. Rosenblum, Professor of Law Emeritus at Northwestern University School of Law, on March 13, 2006, at the age of 80.

Professor Rosenblum was a nationally recognized scholar in political science, administrative law, and constitutional law at Northwestern University for almost 50 years. As author, scholar, and member of the Administrative Conference of the United States, as well as leader of this Section, including Section Chair in 1977-78, he was for decades a leading figure in American administrative law — a mentor to many leaders of this Section; one who consistently strove to blend the teachings of political science and administrative law, to make our administrative procedures fairer to the underprivileged, to improve the techniques of legal education, and to make the legal profession a noble and honorable one.

Professor Rosenblum also served as a college president, counsel to the U.S. House of Representatives, president of the Association of American Law Schools, and as a visiting professor in Belgium and China and numerous law school in the U.S.

We are honored to call him friend and colleague.

* * *

James O. Freedman

The Section sadly notes the passing, on March 21, 2006, of James Oliver Freedman, administrative law scholar, former President of Dartmouth College and the University of Iowa, and former Dean and Professor at the University of Pennsylvania Law School.

President Freedman graduated from Yale Law School in 1962 and clerked for Judge Thurgood Marshall on the United States Court of Appeals for the Second Circuit. After spending a year as an associate at Paul, Weiss, Rifkind, Wharton, and Garrison, he joined the University of Pennsylvania Law School faculty in 1964, where he specialized in administrative law. In 1979, he became Dean of the University of Pennsylvania Law School, and in 1982, President of the University of Iowa. After five years in that position he became President of Dartmouth College in 1987, where he served for eleven years.

Freedman's administrative law scholarship during his tenure as a professor and Dean of the University of Pennsylvania Law School was extensive and distinguished. He published numerous law review articles on Administrative Law subjects, including *Crisis and Legitimacy in the Administrative Process*, which he subsequently expanded into a book.

He will be greatly missed.

* * *

David I. Harfeld

The Section deeply regrets the passing of David I. Harfeld on May 7, 2006.

Judge Harfeld graduated from the University of Richmond in 1956 and received his JD from the University of Michigan in 1959. He was an Administrative Law Judge at the Federal Energy Regulatory Commission for many years, chaired the American Bar Association's National Conference of Administrative Law Judges in 1989-90, and served as president of the Federal Administrative Law Judges Conference in 1996-97.

Our deepest sympathies to his family.

Recent Articles of Interest

By Yvette Barksdale[*]

1. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 Yale L. J. 1256 (2006). This article is a detailed historical account of federal administrative organization and practice during the early post-founding period. This history challenges both i) the conventional wisdom that a vigorous federal bureaucracy did not seriously begin until the creation of the Interstate Commerce Commission in the late 19th Century, and ii) the view that the founders centralized full control of administration in the Presidency. Instead, Mashaw concludes, the Republic in its early years pragmatically created a substantial working federal bureaucracy, and incorporated significant oversight by Congress and the Judiciary, in addition to the President.

2. Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 Geo. L.J. 619 (2006). This article bemoans Congress' recent abandonment of environmental legislation. This abandonment has occurred notwithstanding significant environmental problems, such as global warming. In contrast, in its heyday in the 1970s and 1980s, Congressional environmental policymaking benefited from vigorous congressional committees and more open and deliberative legislative processes. Now, environmental policy is consigned to backdoor appropriations processes. Some environmental prescriptives are even buried in mere appropriations committee reports. These current practices, troubling for the development of environmental policy, also exemplify larger problems with deliberative democracy in the legislative process as a whole.

3. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 1 (2006). The authors advocate modifying constitutional law and institutional design to better reflect the effect of political party dynamics on the operation of government. Describing traditional Madisonian separation of powers theory as "anachronistic," the authors note that party structure (divided and competitive, or unified and cooperative) overwhelmed the Madisonian design almost from the country's inception. Party structure analysis 1) better explains inter-branch political dynamics than does the traditional constitutional distinction between the branches, and 2) casts various structural and doctrinal issues in a new light. The authors suggest some possible reforms, such as recognizing minority party opposition rights in eras of party-unified, cooperative, government.

4. Jill E. Fisch, *How Do Corporations Play Politics?: The Fedex Story*, 58 Vand. L. Rev. 1495 (2005). This article uses an in-depth case study of the corporate political activity of a single company, Federal Express ("FedEx"), during a 40 year period, to explore the role of corporate money and influence in federal politics. The author concludes that political activity is such an essential part of a corporation's operating strategy, that attempts to corral corporate donations in politics will simply cause corporations to shift their focus to other activities. For example, FedEx used a broad range of practices and strategies, beyond political contributions, to increase political capital. These included, among other things, placing Washington insiders on the company's board, and favors, such as the use of corporate planes, etc. The author recommends that reformers focus on increasing the transparency and efficiency of corporate political activity, rather than trying to eliminate it altogether.

5. Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 Nw. U. L. Rev. ____ (2006); http://papers.ssrn.com/sol3/papers.cfm?abstract_id=895604. This article continues the authors' critique of expansionist methods of statutory interpretation, such as "dynamic statutory interpretation." The authors, using insights from positive political theory, blame expansionist judicial interpretations of 60s and 70s progressive social legislation for the dearth of such progressive legislation today. These expansive judicial interpretations upended the political compromises which attracted moderate votes. Once burned, twice shy, these moderates simply rejected future progressive legislation outright. Thus, such expansionist interpretive methods paradoxically reduce the likelihood of passing socially progressive legislation in the future. Instead, these methods radicalize moderates, and increase polarization in Congress.

6. David Zaring, *Best Practices*, 81 N.Y.U. L. Rev. 294 (2006), http://ssrn.com/abstract=899149. This article examines "best practices" regulation in which legislators or administrators establish aspirational model standards in lieu of command and control regulation. Such "best practices" regulations have risen exponentially since 1980 (from three appearances in the 1980 Federal Register, to 300 appearances in the 2004 Federal Register.) However, because compliance is generally voluntary, traditional administrative law doctrine

continued on next page

[*] Associate Professor of Law, The John Marshall Law School, Chicago, IL; former Vice-Chair, Constitutional Law and Separation of Powers Committee; and Contributing Editor. These abstracts are drawn primarily from the authors' introductions to their articles. To avoid duplication, the abstracts do not include articles from the Administrative Law Review which Administrative Law Section Members already receive.

provides little constraints. For example, best practices rules generally are not subject to judicial review. The author discusses how "best practices regulation" fits within administrative law and scholarship. The author includes a case study of best practices regulation in the Clean Water Act's non-source pollution regime, and other examples from welfare reform to homeland security. The author concludes that best practices regulation should be cautiously tolerated, with Congressional or regulatory supervision to ensure best practices regulations are publicized, and, when necessary, subject to informal comment by interested parties.

7. Michele Estrin Gilman, *Poverty and Communitarianism: Toward a Community-Based Welfare System*, 66 U. Pitt. L. Rev. 721 (2005), the author argues that communitarian theory should devote more attention to poverty issues, because the insights of communitarian theory have special applicability to poverty and social welfare issues. Current welfare law is based on the idea that individual behavior and choices cause poverty. Instead, the author describes an alternative, pragmatic vision for welfare that builds upon the social capital that exists within distressed urban communities as a way to improve individual outcomes.

Institute on Lobbying

continued from page 12

lobbyist-defendant in a recent, widely publicized, criminal prosecution. The Case Study was put together by Professor Emeritus Otto Hetzel and David Schnare, who is with EPA's Counsel's Office. They led several of the group discussions allowing participants to raise issues and comment upon practices that were identified in the press articles in the case study that raise a number of practical and ethical questions concerning the activities of this lobbyist, that also arise in the criminal indictment to which he plead guilty. (The Case Study is still available on the Section's website at: http://www.abanet.org/adminlaw/institute/lobbying.html)

Thomas Susman presented the Institute's Distinguished Lecture on "Lobbying in the 21st Century—How Have Things Changed, and Why" to open the Program's second day. His career, both as a prominent lawyer-lobbyist, former Senate Committee Counsel, and Professor at American University's Washington College of Law, provided the base for his comments on the changing mores applicable to lobbying and particularly the need to grapple with and control the impact of the concept of reciprocity that permeates much of what occurs in lobbying. His identification of the considerations that drive success in lobbying and the need to confront the effects of reciprocity norms if decisions are to be determined on the merits were intended to generate discussion about the standards for the lobbying profession in which he plays a major role. He also examined the role that fund-raising for political campaigns plays in achieving lobbying objectives.

A panel of seasoned practitioners, Frank Clements, Fred McClure, Antoinette Cook Bush, Even Morris, and Paul Miller, then shared their real life lobbying experiences and related how they achieved success in specific lobbying campaigns. They also described the tactics and techniques they had found to be effective, and discussed how to do function effectively within the current rules applicable to lobbying.

The Institute's final panel was rich in practical experience in lobbying campaigns: David Lytel, Mike Fulto, Cheri Jacobus, and Meredish McGehee. They provided insights into their experiences in using the media, including the internet, to lobby effectively. They described the role of integrated lobbying campaigns that use online, mail, and phone banks to achieve grassroots support as part of lobbying campaigns.

The program was extremely well received by the participants and the time for questions and comments and the responses of the panelists, along with the opportunity for all to participate in the small group discussions, made the program interactive and extremely informative for the participants.

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