

ADMINISTRATIVE & REGULATORY LAW NEWS

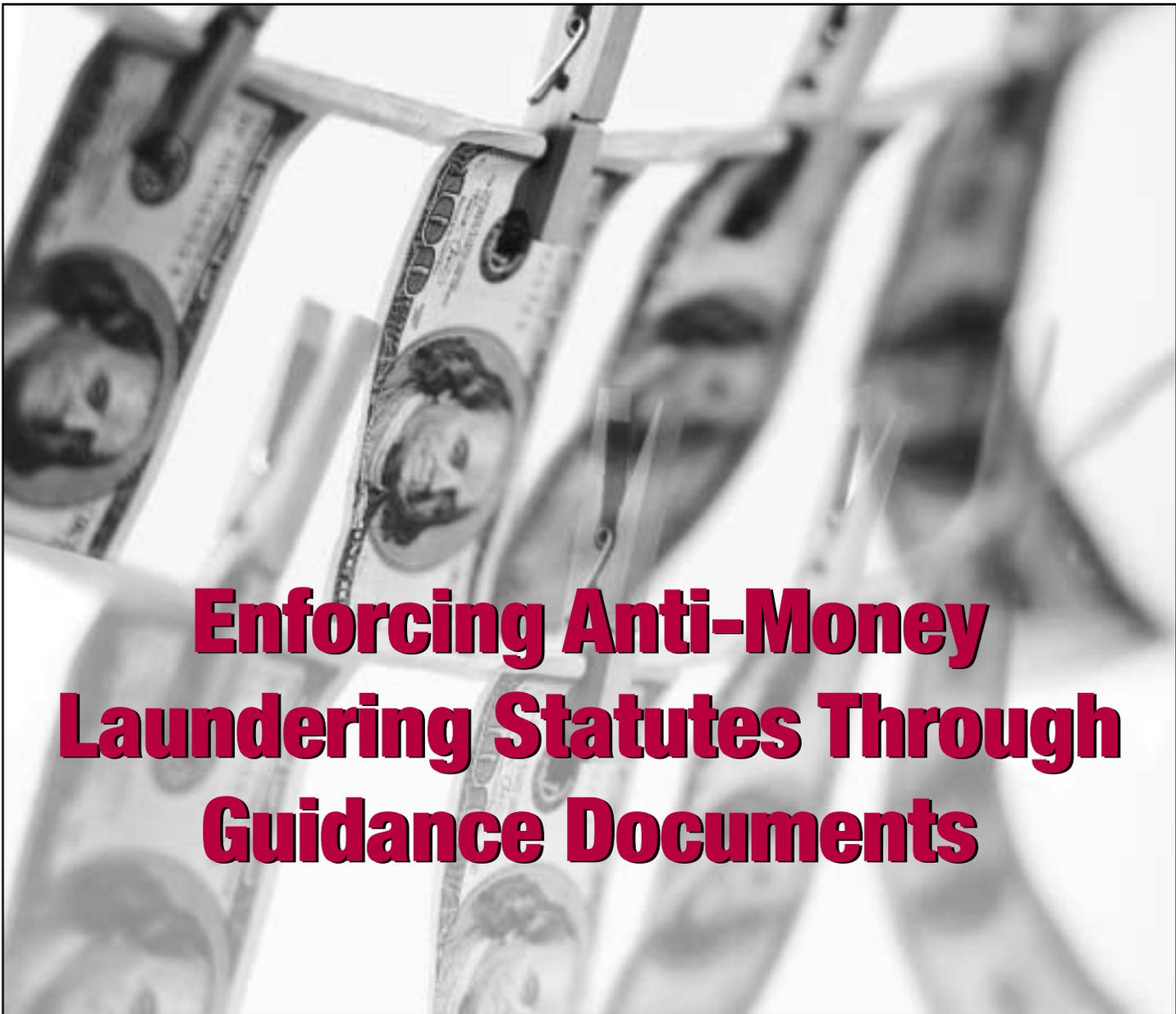


Section of Administrative Law & Regulatory Practice

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Enforcing Anti-Money Laundering Statutes Through Guidance Documents

Also In This Issue

- *Vermont Yankee* Revisited
- Using Student ALJs for Unemployment Insurance Appeals
- 2005 Administrative Law Conference
- Law Student Essay Competition

Chair's Message



Eleanor D. Kinney

This Section is at its best when debating policy issues that confound policymakers, the bar and the public. The current and incoming Section chairs share the goal of increasing the Section's policy making activities. While fun, these policy making activities are an enormous public service. This section with its unique composition, political diversity and incredible intellectual talent can really provide sound expert advice that reflects superior thinking on administrative law issues.

Shortly, the Section will submit comments on the Office of Management and Budget (OMB) Proposed Bulletin for Good Guidance Practices. OMB provides a definition of guidance, describes the legal effect of guidance documents, establishes practices for developing guidance documents and receiving public input, and establishes ways for making guidance documents available to the public. Also, the proposed Bulletin clarifies that guidance documents are nonbinding and should not include mandatory language unless the agency is describing a statutory or regulatory requirement.

The Section's comments addressed the problems associated with mandating a process for making major guidance documents. The comments admonished that making it difficult for agencies to give guidance on routine matters might discourage them from doing so. The comments also expressed concern that the proposed Bulletin does not adequately distinguish among the different types and impacts of guidance documents in determining when the policy making procedures apply. The Section's comments went on to discuss background legal principles governing interpretive rules and policy statements, among the most complex in administrative law. The Section comments also suggested that the Bulletin address other aspects of the guidance process such as required steps under the Administrative Procedure Act (APA) when guidance documents are issued, such as, publication requirements in § 552 of the APA. Finally the comments point out that the Bulletin avoids two more problematic issues associated with guidance documents — how to communicate effectively to the public that policy statements are not binding on regulated entities or the agency that issued them, and how to advise members of the public that they may rely on the guidance.

The e-mail debate among the Section leadership in developing the comments was splendid. Professor Bob Anthony immediately started the perennial debate over whether agency guidance documents were binding. Professor Peter Strauss fired back that guidance documents in the form of staff manuals and the like were binding on the agency employees but could not be enforced by regulated parties. Such guidance is desirable information to regulated parties even though nonbinding in effect.

Dan Troy, Chair Elect and former General Counsel of the Food and Drug Administration (FDA), offered the experience of the FDA guidance development process. In the FDA's process, which the OMB Bulletin acknowledged as a model,

the word "should" meant "we recommend" and guidance documents clearly indicated their non-binding character. More importantly, FDA clearly invites regulated entities to talk to the agency about different approaches to compliance (21 CFR Sec. 10.115, Good guidance practices).

Then some government attorneys jumped into the fray with concerns about the practical implications of guidance documents for their agencies. And the law professors argued the fine points of the complex administrative law on non-legislative rules. At this point, an e-mail from a former chair came across the wires:

I have to say that this great debate is simply fun to observe from afar — the Section at its prime. ... [T]here is so much good material here. Have at it!!

Also at this point, a consensus began to emerge. Commentators acknowledged that debates over first principles and theory would not generate needed Section consensus nor really benefit OMB. What resulted was a final thoughtful letter, crafted primarily by Professor Sid Shapiro, Co-Chair of the Regulatory Policy Committee, which pointed out some of the theoretical and practical difficulties with the proposed OMB Bulletin. As this column goes to press, the Section is preparing the final comment letter which will be on the Section website soon.

This year has been rich in opportunities for the Section to comment on important administrative law and policy issues. Earlier this fall, through the fine work of the Adjudication Committee and Benefits Committee with Jeff Lubbers pulling the comments together, the Section submitted excellent comments on the proposed rule reforming the Social Security Administration's disability appeals system. The Section also has a recommendation before the ABA House of Delegates this February urging the Attorney General to issue a memorandum to Freedom of Information Act (FOIA) officials at federal agencies clarifying that the designation of agency records as "sensitive but unclassified" cannot be a basis for withholding agency documents from release. And there is more to come.

Also to come are several excellent programs. At the midyear meeting, we have an antitrust program on Antitrust Liability for Deceptive Comments in Rulemaking—The Unocal case, another antitrust program on the Antitrust Modernization Commission, and a third program of program of Seventh Circuit judges entitled "Law, Fact, and Discretion: Seventh Circuit Judges Talk about Deference." We also have great plans for the Section dinner on Saturday night and a Sunday morning breakfast program on Updating Lobbying Regulation.

Our first annual Homeland Security Institute is on January 20th with an array of strong speakers. In April we have our second Administrative Law Institute focusing on lobbying. Then it is on to Bermuda for our spring meeting at the Elbow Beach Club and on Hawaii for the ABA Annual meeting. ○

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The Hazards of Enforcing Guidance

By John F. Cooney*

The federal Anti-Money Laundering program presents a fascinating case study of the unintended consequences that can arise when an agency attempts to enforce compliance standards that were established by informal guidance, rather than through a rule promulgated under the APA.

The agencies that supervise depository institutions implemented the AML laws in the same manner that they conduct safety and soundness regulation, by adopting rules of sweeping generality and then elaborating the actual standards with which institutions must comply in detailed guidance and examination manuals. Whatever its success in traditional bank regulation, this approach created substantial problems when the agencies sought to enforce the AML guidance after the 9/11 attacks.

The government failed to anticipate how banks would respond to the combination of ambiguities in the guidance and aggressive civil and criminal enforcement. Many institutions quickly changed their behavior in response to the threats presented by the enforcement regime. Their reaction impaired the overall effectiveness of the AML program, and the government was forced to back pedal. To persuade banks to reverse their changes in behavior, the six principal regulatory agencies were forced to negotiate and publish a joint 300-page long guidance document that set forth in minute detail the standards upon which future enforcement actions would be premised.

This experience demonstrates the programmatic risks of attempting to base a complicated regulatory scheme on informal guidance and the possible consequences if government officials underestimate the industry's need for

certainty in the face of regulatory risks presented by an enforcement program.

Creation of the AML Program

The Bank Secrecy Act of 1970 required financial institutions to file reports on large-scale currency transactions, to provide law enforcement with an after-the-fact tool to prosecute money laundering connected to drug trafficking. The BSA vested Treasury with responsibility for overall policy formulation but provided for implementation through the corps of examiners maintained by the five financial supervisory agencies (the Federal Reserve, the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corp., and the National Credit Union Administration).

The agencies incorporated the AML requirements into their existing safety and soundness-based compliance programs, which generally require institutions to identify the risks they face and to focus their prevention programs on the greatest risks. In safety and soundness regulation, the agencies rely heavily on informal guidance and even less formal manuals for field examiners. Large banks appreciate the flexibility provided by this informal approach; small banks tend to prefer the certainty provided by precise standards. Few banks, however, have found it in their self-interest to file an APA challenge to a "requirement" imposed through guidance. A safety and soundness regulator possesses vast, and largely unreviewable, discretion. The agency has multiple ways to persuade the bank that it would be wise to comply with the agency's wishes, regardless of the format in which the obligation was articulated.

By the mid-1990s, advances in computer technology allowed the supervisory agencies to refocus the AML

program on the systematic detection of money transfers associated with major financial crimes. The new system was built on two pillars: (1) a Customer Identification Program, which makes banks responsible for understanding the identity, business, and expected activities of their customers, thereby establishing a baseline against which actual transactions could be compared to identify anomalies that might warrant investigation; and (2) a requirement that banks file Suspicious Activity Reports (SARs), to notify supervisory and law enforcement agencies of potential illegal activity. FinCEN, the Office in Treasury responsible for administering the AML program, and the five supervisory agencies undertook a multi-year effort to promulgate common rules that would impose these requirements. Progress was slow, however, due to difficulty in breaking these broad concepts down into concrete provisions. The process had not been completed by September 2001.

Adoption of the USA Patriot Act

Title III of the USA Patriot Act (Pub. L. No. 107-56), adopted in the immediate aftermath of the 9/11 attacks, changed the AML program in fundamental ways. First, Congress added the goal of preventing terrorist financing to the purposes of the BSA. To comply, financial institutions had to make significant investments, especially in new technology and training, to develop the capacity for real-time detection and reporting of potentially suspicious transactions. Second, the supervisory agencies were required to expand the scope of their rules (e.g., greater coverage of correspondent banking and wire transfers) and were given tight deadlines for adoption of a large number of significant rules (notably the long delayed Customer Identification Program rule).

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The new rules followed a risk-based approach. They directed banks to conduct internal reviews of the products and services they offered, their customer base, and the geographic regions in which they operated; identify the risks presented; make an explicit determination that they could address the risks with their personnel and technology; and focus their prevention and audit resources on the greatest risks. Each supervisory agency expanded upon the rules by issuing separate implementing guidance and adopted detailed examination procedures that were applied on an institution-by-institution basis through the periodic examination process.

Aggressive Enforcement

In 2004, FinCEN and the supervisory agencies undertook a series of BSA enforcement actions based on the “requirements” established by the guidance. Formal enforcement actions involved coordinated application of the Cease and Desist power of the bank regulator and the overlapping authorities of FinCEN and the regulator to impose Civil Money Penalties. Enforcement focused on international correspondent banking, money transfers through Money Service Businesses (non-depository institutions that cash checks and make wire transfers), and banks in southern Florida. Further, prompted by their superiors, the field examination staffs took informal enforcement actions for AML violations against an unprecedented number of institutions.

Banks were hopeful that, as in other risk-based areas such as credit risk, they would be allowed to exercise informed judgment about the size of various AML risks and the best means of managing them; and that they would not be found to have violated the BSA if an isolated customer engaged in a suspicious transaction, as long as the overall program was sound. The general perception within the industry, however, was that whatever the agencies stated at a policy level, the examination staffs disregarded the risk-based approach and followed a “zero tolerance” approach, under which enforcement action would be taken if

any suspicious transaction occurred and was not reported, even in low-risk areas.

The Department of Justice complicated the situation by bringing two major criminal prosecutions against banks for AML violations: (1) a deferred prosecution agreement with AmSouth, which resulted in a \$50 million Civil Money Penalty; and (2) a guilty plea by Riggs Bank to violation of the BSA in its Embassy Banking operations, which resulted in a criminal fine of \$16 million, a \$27 million Civil Money Penalty, and ultimately in the demise of the bank as an independent institution.

The Market Reacts

Banks do two things: they collect deposits and assess risks. Faced with the threat of aggressive enforcement of ambiguous and informal compliance standards, many banks concluded that they did not want to bear the apparent regulatory risks presented by certain products and certain types of customers, and therefore exited those market segments.

Embassy Banking. When Riggs was forced to close accounts for foreign Embassies, other banks refused to pick up those relationships, due to the perceived regulatory risks in those accounts and the enhanced degree of regulatory scrutiny that would accompany opening these relatively small accounts. The inability of foreign governments to obtain banking services led to complaints to the State Department, which in turn pressed Treasury and the Federal Reserve to issue public statements assuring banks that it was permissible under the BSA for them to maintain Embassy accounts.

Money Service Businesses. Many banks decided to close their MSB accounts, due to the intense scrutiny that field examiners gave these relationships. Their withdrawal from the market created a substantial risk that many money transmitters would be driven out of the formal banking system and would be forced to go underground. This response threatened to compromise the overall federal effort to police a part of the financial industry that is particularly susceptible to money laundering. Senior

federal officials repeatedly attempted to reassure banks that it was permissible to maintain MSB accounts, as long as the risk could be managed properly. Many banks, however, feared the punitive reactions of their examiners more than they trusted policy statements from Washington, and continued to close MSB accounts.

SAR Overreporting. Many banks responded to the AmSouth and Riggs prosecutions by deciding to file a SAR on any anomalous transaction, regardless of its significance. In light of examiner pressure to enforce the reporting requirements, many banks concluded that the cost/benefit ratio was weighted in favor of filing a SAR, an inexpensive ministerial act, rather than attempting to exercise subjective judgment as to whether a transaction actually was suspicious and important. As a result, SAR filings in 2004–2005 reached unprecedented levels. Senior federal officials complained repeatedly that this wave of defensive filings significantly changed the signal-to-noise ratio, and was impeding the ability of law enforcement and intelligence agencies to identify the small number of filings that actually warranted investigation.

Public Criticism of Justice. Mirroring industry complaints, Federal and State supervisory agencies publicly criticized Justice for *de facto* criminalizing regulatory violations by being overly zealous in bringing prosecutions for AML violations. In response, Attorney General Gonzales rescinded the delegation of authority that previously had allowed individual U.S. Attorneys to bring the criminal charge involved in AmSouth and Riggs, failure to file a SAR, without prior authorization from Washington. Justice thereby centralized policy control of criminal prosecutions to permit system-wide calibration of the enforcement threats faced by banks.

In response to the industry reaction, senior government officials initiated a public campaign to persuade financial institutions that they misperceived the risks of AML enforcement and should stop acting in ways that threatened to

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undermine the effectiveness of the BSA program. Those efforts largely failed. Banks objected that: (1) individual institutions did not have sufficient notice of the actual standards to which they would be held and were unwilling to expose themselves to the risk of enforcement actions; and (2) administration of the AML program was producing competitive inequalities among industry segments, because examiners in various agencies implemented the few rules that existed in different ways.

Damage Control by the Government

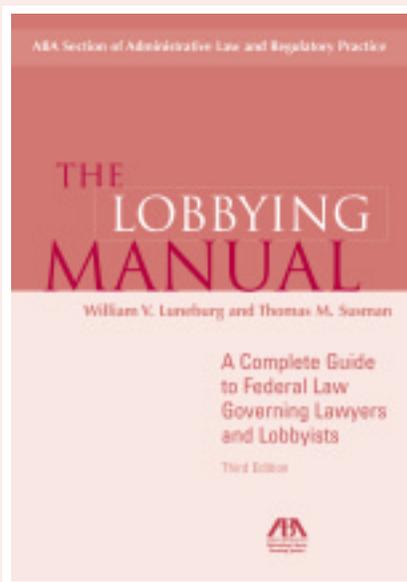
The unintended consequences resulting from AML enforcement forced the government to respond comprehensively to industry concerns. The agencies addressed complaints of excessive reliance upon, and inconsistent application of, guidance by issuing more guidance. FinCEN and the five supervisory agencies undertook a complicated and time-consuming effort to negotiate common guidance. The resulting BSA

AML Examination Manual, made available on June 30, 2005, exceeds 300 pages. It sets forth in great detail the standards to be applied by field examination staffs in all industry segments. The Manual also conveys an implicit commitment that future enforcement efforts will adhere to the “requirements” it establishes.

It is too soon to tell if this unprecedented joint guidance will affect the banks’ risk calculus and will satisfy a sufficient number of institutions that it is safe to reverse the defensive policies that, taken collectively, harmed the overall effectiveness of the AML program. The outcome depends in large measure on whether future civil and criminal enforcement actions respect the implicit commitment in the Examination Manual not to penalize a bank for the exercise of informed judgment, and whether field examiners can resist the temptation to sanction good faith disagreements about risk assessments.

The broad lesson that can be drawn from the AML experience is a warning

to regulatory agencies of the potential harm that can result from attempts to regulate complex economic behavior through informal guidance, which does not give the regulated industry the certainty provided by a formal rule. When the threats presented by a guidance-based scheme become excessive through enhanced enforcement, regulated entities can change course in a manner that protects individual institutions, but collectively threatens to defeat the underlying government policy. While the scale of the effort to implement the AML laws through guidance and the responsiveness of the industry to changes in the risk assessment may be atypical, this case study illustrates a limit on the use of guidance as a regulatory tool. At a minimum, in order to govern based on guidance, agencies must carefully integrate the enforcement component into the regulatory program and must consider carefully the proper balance between the agency’s desire for flexibility and the industry’s need for certainty about the governing standards. 



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From the Files of the Supreme Court: The Hidden Story of *Vermont Yankee*

By Gillian E. Metzger*

Tucked into Vermont's southeast corner, the small town of Vernon might seem an unlikely backdrop for one of the most important decisions interpreting the Administrative Procedure Act ("APA"). But in 1966 the Vermont Yankee Nuclear Power Corporation applied for a permit to start building a nuclear reactor along the banks of the Connecticut River in Vernon, and three years later applied for an operating license to run it. Thus were set in motion the agency proceedings that ultimately culminated, in 1978, in the Supreme Court's decision in *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council*, 435 U.S. 519 (1978). There, the Court instructed federal judges that, except in extremely rare circumstances, they should not embellish on the informal rulemaking procedures contained in the Administrative Procedure Act (APA) and codified at 5 U.S.C. § 553.

Vermont Yankee's rejection of judicial procedural impositions was an important milestone in the development of judicial review of agency action. Lower courts continued to impose procedural requirements on agencies, but as a result of *Vermont Yankee*, they have done so by rooting their procedural demands (however implausibly) in the text of § 553, and some procedural impositions such as cross-examination were clearly placed out-of-bounds. Perhaps more importantly, *Vermont Yankee* reinforced a trend towards more searching substantive

scrutiny of agency decisionmaking, with significant ramifications for the way in which agencies approach rulemaking.

So far, this is a familiar tale. What is less familiar, and only apparent from examination of Justice Marshall's papers at the Library of Congress, is the story of how close we came to not having the *Vermont Yankee* decision at all.

The Familiar Tale of *Vermont Yankee*

The roots of *Vermont Yankee* lie in the environmental movement and the changing nature of the administrative state. With the Atomic Energy Act of 1954, the federal government embarked on a policy of fostering commercial uses of nuclear power, but it was only in the 1960s that significant numbers of commercial plants began to be built. By the early 1970s, the problems involved in dealing with the wastes generated by nuclear power—in particular, the highly radioactive elements contained in spent nuclear fuel, some of which retain their toxicity for up to millions of years—were gaining public attention. Indeed, commercial use of nuclear power generally was becoming increasingly contentious.

As the number of licenses issued and public concerns about nuclear power increased, environmental and citizen groups started to intervene in AEC licensing proceedings to oppose new plants, and they began raising nuclear waste concerns as part of their arguments. Only one environmental group had sought to intervene in the hearing the AEC held on Vermont Yankee's application for a construction permit in 1967. But, as a sign of the changing climate for nuclear power, seven such organizations intervened when Vermont Yankee's subsequently applied for an operating license for the plant in 1969. Relying on

the newly-enacted National Environmental Policy Act of 1969 (NEPA), the intervenors' main argument was that the environmental effects associated with the "back end" of the nuclear fuel cycle—the transportation, reprocessing, and storage of spent fuel from a plant—had to be considered in determining whether to award Vermont Yankee's license.

The AEC rejected the intervenors' challenge in the *Vermont Yankee* hearing, but shortly thereafter it proposed issuing a rule on the question of whether—and how—environmental effects of the nuclear fuel cycle should be considered in individual reactor proceedings. Even though not required to do so by '553, the AEC held a two-day hearing on the fuel cycle rule at which interested persons could submit oral or written testimony, but were not allowed to engage in discovery or cross-examination. Ultimately, the AEC decided that the appropriate approach was for the AEC's regulatory staff to include in its environmental impact statements certain preset values for environmental effects associated with different stages of the fuel cycle. However, AEC concluded that the only environmental effect associated with long-term waste storage and disposal was the commitment of land for a storage facility, and thus assigned no value to reflect potential release of radioactivity from these activities.

The rule then came before the D.C. Circuit. At the time, a debate reigned on that court regarding the appropriate judicial response to burgeoning federal regulation. The main protagonists in this debate were Chief Judge David Bazelon and Judge Harold Leventhal. On many issues, the two were in accord; both accepted the need for enhanced judicial scrutiny of agency decisionmaking and for expansive readings of the APA's

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* Associate Professor., Columbia Law School. This article is a much-shortened version of my chapter on *Vermont Yankee* in *Administrative Law Stories*, a collection of essays Foundation Press will have published by the time you read this, edited by my colleague and former Section Chair Peter Strauss. The Marshall papers, as well as those of Justice Blackmun, have permitted similarly revealing stories to be told about a number of major administrative law decisions.

requirements for informal rulemaking. Where they disagreed was over whether the courts should impose procedural requirements on rulemaking beyond those listed in the APA or required by other statutes, agency regulations, or due process. Bazelon advocated such judicial procedural impositions, believing that courts were not competent to address the merits of the complex technological issues often involved, while Leventhal contended that courts should limit themselves to rigorous substantive scrutiny of agency decisionmaking.

This debate was evident in the D.C. Circuit's review of the fuel cycle rule. In an opinion by Bazelon, that court concluded that the AEC had failed to "thorough[ly] ventilat[e]" the issues of long-term storage and reprocessing of nuclear waste, and remanded the rule to the agency. The question left hanging was precisely where the court thought the NRC had gone astray. Was it the failure to allow cross-examination, discovery, or other procedures that Bazelon suggested would have provided an opportunity for such ventilation? Or was it instead the agency's failure to produce a record that demonstrated such ventilation, however obtained—the view of Judge Tamm, who concurred in the result? The opinion is a masterpiece of obfuscation on this point.

This confusion over the basis for the D.C. Circuit's ruling did not, however, prevent the Supreme Court from granting review and soundly reversing in a unanimous decision written by then-Justice Rehnquist. Acknowledging that "the matter is not entirely free from doubt," the Court read the D.C. Circuit as invalidating the fuel cycle rule because of procedural deficiencies. It proceeded to sternly rebuke the lower court for suggesting that the AEC faced procedural requirements in the fuel cycle rulemaking beyond those contained in the text of the APA: "[T]his much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."¹ Nonetheless, the Supreme Court ultimately remanded rather than reversing

the D.C. Circuit outright, to allow that court to determine whether the administrative record was substantively adequate to support the fuel cycle rule.

The Hidden Story of *Vermont Yankee*

That the Court rebuffed Bazelon's proceduralist approach was not much of a surprise. The Court's precedent allowing agencies to forego formal adjudicatory or formal rulemaking procedures, even in contexts where it was originally expected formal procedures would be used, presaged this result. So did the Court's decisions upholding an agency's broad discretion to control its mode of procedure in the absence of statutory (or constitutional) mandates. *Vermont Yankee* was also an early exemplar of the Court's move towards formalism statutory construction and away from more open-ended judicial development of administrative law, a trend which became more prevalent in subsequent decades in response to growing opposition to judicial policymaking.

What was surprising about *Vermont Yankee*, however, was the unanimity with which the Court spoke. Joining the Court's decision without reservation were Justices Brennan and Marshall, hardly thought of as opponents of judicial activism. While the animosity between Chief Justice Burger and Judge Bazelon was well-known, Justices Brennan and Marshall were good friends with Bazelon; indeed, Justice Brennan was a regular at the lunches Bazelon organized at Milton Kronheim's liquor warehouse. Particularly given that the Court ended up remanding rather than reversing the D.C. Circuit and that NRC was committed to revising the fuel cycle rule regardless of the Court's decision, it seems odd that none of the Justices who participated in the case at least challenged the Court's decision to reach the merits.

¹ 435 U.S. 519, 540–41, 543 (1978).

² See Brennan First Printed Draft at 8–9 (Feb. 17, 1978), *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) (on file with the Library of Congress, Manuscript Room, Papers of Justice Thurgood Marshall (Box 201)).

³ See Memorandum from Justice Brennan to Justice Rehnquist, (Feb. 28, 1978), *id.*

Review of Justice Marshall's papers at the Library of Congress reveals, however, that they did. Justice Brennan led the charge, quickly drafting an opinion that would dismiss the grant of certiorari as improvidently granted (or DIG, in the Court's parlance) once it became apparent after oral argument and supplemental briefing that the NRC intended to go forward with a new rulemaking. Like the Court's published opinion, Justice Brennan's draft stated that the Court of Appeals had erred "[i]f the Court of Appeals had decided that NEPA requires procedures in rulemaking in excess of those expressly required by the [APA]" and that the occasions for judicial imposition of hybrid rulemaking procedures are "severely limited." However, Justice Brennan was far more generous in his reading of the D.C. Circuit's opinion, rejecting the procedural interpretation advocated by *Vermont Yankee* and the NRC: "Instead, we understand the Court of Appeals to have held only that the original spent fuel rule was inadequately supported by the rulemaking record." And review of this factbound determination—unlikely to warrant Supreme Court consideration in any event—was particularly inappropriate given that the NRC was committed to revising the rule.²

Justice Brennan's efforts proved unavailing. In a responding memorandum, Justice Rehnquist made clear he would dissent from any effort to dismiss the grant of certiorari, stressing the continuing impact of the D.C. Circuit's decision on the licenses of the two plants involved and reactor licensing generally. His views carried the day with Chief Justice Burger, Justice White and Justice Stevens, so that in the end four of the seven justices who heard the case voted against dismissal. After unsuccessfully turning his renowned powers of persuasion to tempering the tone of Justice Rehnquist's proposed draft, Justice Brennan ultimately acknowledged defeat, remarking to Justice Rehnquist: "[Y]ou are a damned good fisherman. Indeed, so good that I now give up the sporting fight and 'acquiesce' in your catch in these cases."³ ○

Student Administrative Law Judges: New Dimensions in Education and Efficiency

By Cynthia Baker* and James M. Davis**

Discovery: In early 2005, the US Department of Labor cites Indiana's Unemployment Insurance (UI) appeals backlog as the worst in the nation. The backlog is approximately 5,500 appeals.

Action Taken: IDWD has entered into an agreement with Indiana University Law School, in which tenured law students receive credit for serving as non-paid intern Administrative Law Judges (ALJs). Beginning in mid-May, the use of ten full-time student ALJs reduced the backlog to 2,200 cases and saved the state government over \$ 250,000. In addition the UI Review Board appeals backlog has been entirely eliminated.¹

Collaboration between two Indiana University law schools and the Indiana Department of Workforce Development (IDWD) has introduced new dimensions in education and efficiency in the realm of executive branch adjudication. In May 2005, ten law students began work as Administrative Law Judges as a part of their formal legal education. Since then, student ALJs have devoted over 3,500 hours to conducting unemployment insurance (UI) benefit appeals and rendering decisions based on those hearings.

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¹ Indiana State Government's Performance Report, 57 (August 19, 2005), also available at http://www.in.gov/gov/media/Performance_Report-Final.pdf (last visited October 19, 2005).

² 42 U.S.C. § 302(a), 42 U.S.C. § 303(a)-(b).

³ 42 U.S.C. § 303(a)(1).

⁴ Ind. Code 2-4-17-4(a).

Part I of this article describes the legal and logistical landscapes permitting law students to preside as student ALJs for IDWD. Part II describes the training, adjudication, and learning experiences arising from Indiana's student ALJ initiative. Part III suggests considerations for law schools and state administrative agencies interested in developing similar student ALJ initiatives.

I. Legal and Logistical Landscape

Can a law student serve as an unpaid administrative law judge? For the IDWD initiative, federal law, state law, and policy considerations coalesced for a resounding "yes." The resulting collaboration provides a unique learning opportunity for law students and has introduced new efficiencies into the UI hearing process at IDWD.

The IDWD, like similar state agencies around the country, runs its unemployment insurance appellate process under the oversight of the U.S. Department of Labor. The Social Security Act provides for payments to the states to assist in the administration of their unemployment compensation laws if the Secretary of Labor certifies that certain conditions have been met.² These include mandates that the administration of the appellate processes be "reasonably calculated to insure full payment of unemployment compensation when due and that appellate process for individuals whose claims are denied include an "[o]ppportunity for a fair hearing, before an impartial tribunal."³

The Handbook for Measuring Unemployment Insurance Lower Authority Appeals Quality sets the criteria for states to obtain the Secretary of Labor's certification. The criteria are silent regarding the qualifications of the hearing officers for unemployment insurance appeals. The IDWD checked with the U.S. Department of Labor and the Depart-

ment's Region 5 administrator concerning the use of student ALJs. Neither office voiced objection to Indiana's student ALJ pilot program.

At the state level, Indiana law requires that IDWD administrative law judges be "full-time salaried employees."⁴ However, the same law indicates that the unemployment insurance board may authorize employment of part time administrative law judges for limited periods. Based on this statutory law, the prospective supervising attorneys and judges for the student ALJ pilot program obtained the unemployment insurance board's authorization to host up to twenty law student ALJs.

II. Training, Doing, and Learning

The student ALJ initiative focuses on three factors: intensive student ALJ training, the effectiveness and efficiency of the students' administrative adjudication work, and students' experiential and substantive learning.

A. Student ALJ Selection and Training

Considering applicants from the two participating law schools, IDWD selects prospective student ALJs based on professionalism, leadership skills, and academic achievement. An intensive, forty hour training program preceded the students' ALJ work last summer. A pared down twenty hour training program, integrated into the students' full academic schedules, was tried in the fall semester. Feedback from all involved indicates that the forty hour training in conjunction with a full-time summer effort for the student ALJs accomplished more than the abbreviated fall training. Consequently, the student ALJ initiative will be suspended in the Spring of 2006 and only the summer program will continue.

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Student ALJs at Indiana's DWD and Indiana's Governor, Mitch Daniels, Summer 2005
 Front row: Michael Hult, James Davis, Brian Bobb; 2nd row: Andrija Samardzich, Brandee Chanin, Indiana Governor Mitch Daniels, Jennifer Winton-Denniston, Jay Bhat; 3rd row: Dan Adams, Levi Harris (not pictured: Doug Skelley). James Davis, front row, center, is the co-author of the article.

The forty hour training opens with a review of two full UI administrative appellate opinions to explore the length, writing style, and traditional format of IDWD administrative opinions. Substantive review encompasses Evidence, Administrative Law, Indiana's Administrative Orders and Procedures Act, and a review of current, applicable Indiana case law. Additional training sessions include how to conduct an unemployment insurance appeals hearing and how the administrative appeals process fits into the Social Security system.

A series of mock hearings serves as the centerpiece of the training and culminates with the students taking the ALJ roles. Current ALJs and program leaders critique each participant as to: the neutral's role, substantive law, dealing with belligerent disputants, and lawyer preparedness.

The students also meet with current ALJs, observe two or three actual hearings, and interact with other employees of the Department. Written materials—

reference guides, templates for decisions, and scripts for conducting hearings—supplement the training.

B. Doing

Since its inception, the initiative has enabled each summer student ALJ to conduct over one-hundred and fifty hearings and craft nearly as many decisions. While, the law students' adjudicative work necessarily involves review and critique by permanent ALJs, it also presents opportunities to test technologies, and unique docket management systems.

During the first week of actual hearings, the student ALJs meet as a group with program leaders after each case. This time for feedback and reflection gives student ALJs the opportunity to ask questions, clarify and discuss the topics and procedures covered in training, and to consider their forthcoming judicial opinions. Following the group meeting, student ALJs write their decisions and submit them to the team leaders, who critique and return them to the students

for final revision. After the first week, meetings are generally held on an as-needed basis. In addition, IDWD's Chief ALJ Robert Robisch reviews and signs every student ALJ opinion. Neither Judge Robisch nor the team leaders instruct the student ALJs how to rule in any particular case.

The student initiative allows the agency to experiment with new technologies. For example, prior to the student ALJ initiative, IDWD ALJs complied with Indiana law requiring that UI appeals hearings be "recorded and placed into the record" by recording each hearing on cassette tapes. This cumbersome system was difficult to use, required hearings to be interrupted, and created very thick case files. With the influx of student ALJs, the agency implemented a digital recording system allowing the student ALJs to continuously record their hearings, download the recording onto their computers, and duplicate the hearing onto a CD for filing. The test proved a great success and resulted in more available storage space, cost savings, and the ability to provide the Review Board (and the public) with electronic audio copies of UI appeals hearings.

The student initiative also provided an opportunity to implement a new docket management system for UI appeals. For example, prior to the student ALJ initiative, UI appeals hearings were assigned to a particular ALJ for a particular time. When a party failed to appear, which happened approximately 25% of the time, the case would be dismissed and the ALJ would not have a hearing until the next scheduled hearing. Under the panel system used by the student ALJs, twelve to fourteen cases are called for a particular time period. The ten student ALJs then choose a case and call the parties. In the event a appealing party fails to appear, the student ALJ dismisses the case and calls another. This panel system allows more cases to be handled each day and ultimately reduces the time between filing a UI appeal and the scheduled appearance for the appeal hearing.

C. Learning

The student ALJ initiative provides an excellent vehicle for learning about law,

lawyering, and governance. One former student ALJ remarked, "No other summer experience could have better prepared me for a career in law." Another student ALJ said, "The most valuable part of the experience was the opportunity to watch other lawyers practicing. Each day different lawyers came to my office and presented their cases in front of me. It was invaluable."

In Indiana UI appeals hearings, the ALJ as fact finder asks the questions of both parties. As a result, the UI appeals hearings present student ALJs with many practice and training opportunities to question witnesses about the facts of a case. Student ALJs quickly learn how to ask appropriate questions, how to limit the party's answers to what is asked, what types of questions will elicit the responses they need, what questions to ask to bolster or challenge witness credibility, what questions to ask to elicit particular facts, and, perhaps most importantly, what questions to avoid.

Student ALJs learn organizational skills, time management, and how to write judicial decisions in a concise and timely manner. Writing three to four decisions every day, student ALJs leave their experience knowing how to write crisp, concise, and focused legal prose. The environment of student camaraderie and enthusiasm also provided inherent rewards for students' use of effective organizational and time management skills.

The IDWD student ALJ initiative also gives the law students opportunities to meet leaders and lawyers within other state agencies, departments, and branches of Indiana's state government. One highlight of the summer program included an opportunity for the student ALJs to meet Indiana's Governor Mitch Daniels. The Governor led a roundtable discussion about the program, the selection process, and the value of the students' work to the citizens of Indiana. Students find they have become a part of the valuable network of the legal community within state government.

⁵ See John M. Greacen, *How Fair, Fast, and Cheap Should Courts Be?*, 82 JUDICATURE 287 (1999).

Standing alone, the opportunity for a law student to serve as an ALJ offers much in the way of experiential learning—applying legal concepts taught in doctrinal courses of law school, professionalism, and the legal system in which those future lawyers will work. However, in the context of the multitude of deep learning experiences attenuated to the student ALJ work, the learning opportunities expand beyond the students' adjudicative role. Learning from the lawyers before them, learning to work "on stage" in a professional setting, and learning about law as a part of a larger context of government policy and design also inform and educate law students in a meaningful way.

III. Advice for Those Considering Similar Initiatives

While this collaborative effort provides excellent learning opportunities for students and reduced costs of administrative adjudication work for state government, all involved should be mindful of the impact of such collaboration on administrative justice. That is, how fair, fast, and how cheap should an executive judiciary be?⁵ The answers to that question will inevitably have different contours for different state agencies, different areas of administrative law, and different law schools. For those interested in exploring implementation of student ALJ initiatives, some considerations follow:

A. Agency Considerations

- Before contacting law schools, agencies should confirm that no legal or personnel authority precludes creating a student ALJ initiative and obtain approval for the proposed initiative from, or, at least, begin the approval process before, the governing administrative board.
- Agencies should ensure that the proposed student ALJ initiative comports with applicable code of judicial conduct for the state's administrative law judges.
- Agency leadership, legal counsel, and ALJs should be prepared to develop training for the incoming student ALJs that will include substantive law, skills training, simulated hearings, and shad-

owing actual hearings. The IDWD experience indicates that an interactive, forty hour training with ten or more law students provides a quality dynamic for substantive training and team building.

- Agencies should carefully consider logistical ramifications of inviting student ALJs to the executive branch judiciary. Hearing space, office space, computers, printers, administrative support, docket control, parking, security all raise issues worth planning for before the law students arrive for their first day of training.
- Agencies should consider the student qualifications for accepting student ALJs into the program. Do the agencies want students who have completed a particular course (e.g., administrative law), a certain number of credit hours toward their law degree, only students who have obtained certification to practice law under the state's student practice rule, or some other qualification?
- Prospective supervising ALJs should understand the scope and nature of any additional responsibilities in advance of the students' arrival to the agency.
- Agencies should prepare for frank and full discussions between agency leadership and the professional ALJs concerning professionalism and morale issues in connection with the idea of bringing on law students as unpaid ALJs to contribute to the adjudicative workload facing the agency.
- Finally, the agency and its executive judiciary may want to consider how such a pilot student ALJ project could play a role in improving law, the legal system, or the administration of justice. For example, a student ALJ initiative could inform discussions regarding funding methods for administrative adjudication, central panels of administrative law judges, shared neutral programs, public policy mediation, or centralized offices of dispute resolution.

B. Law School Considerations

- A law school considering participation in a student ALJ opportunity for its law

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students will have to consider whether the law school will permit its law students to earn law school credit for the proposed experience. Applicable ABA standards point to consideration of the goals and the methods of the proposed student ALJ experience, how the students' work will be evaluated, and how opportunity for reflection on the students' ALJ work will be afforded.

- Possibilities for incorporating this experience into a law school curriculum include offering the student ALJ opportunity as a part of an existing clinical externship course, as a separate clinical course, or as a clinical experience in conjunction with a doctrinal course (e.g., administrative law, employment law, jurisprudence, labor law).
- If offered through the clinical curriculum, the law school should consider issues of professional responsibility and conflict of interest with other clinical opportunities available through the law school's clinic.
- Prospective faculty advisors for this opportunity should consider taking this opportunity to introduce to participating student ALJs the Model Code of Judicial Conduct for State Administrative Law Judges. The

canons of the Model Code provide a starting point for exploring issues of administrative adjudication that may be beyond the purview of an administrative law course or an established externship course. Such rules may provide appropriate language to begin conversations about executive branch adjudication and the administration of justice.

- If law school credit will not be awarded to students participating as student ALJs, law schools could consider promoting student ALJ opportunities through the schools' respective offices of professional development.

IV. Conclusion

Offering law students an opportunity to learn to be lawyers through adjudicative experience promises rich rewards in terms of teaching how the law works to deliver justice to the citizens seeking it within the modern administrative state. In Indiana, the student ALJ initiative has begun a new dialog between the state government and the legal academy. The resulting conversations have encompassed the art of adjudication, the shape of dispute resolution, and questions of government design. Using the IDWD experience as a model, state

agencies and law schools have an opportunity to explore new dimensions of efficiency and education in mutually beneficial ways.

From every perspective, the student ALJ experience at Indiana's Department of Workforce Development has borne fruit. "I couldn't imagine a better experience to bring all that I have learned in law school together," said one student. "The law students have done great work, a lot of work," says Chief Unemployment Insurance Administrative Law Judge Robert Robisch. "This has been an amazing teaching opportunity," says Administrative Law Professor Eleanor Kinney. The Indiana student ALJ experience stands as example of the great rewards that can be gained through innovative collaboration between state governments and law schools.

State governments and law schools considering student ALJ initiatives should carefully consider the legal, governmental, and curricular ramifications of allowing students to do the work of administrative law judges as a part of the law students' formal legal education. Doing so will pave the way for engaged, mutually beneficial, efforts toward delivering administrative justice in a fair, professional, and efficient manner. ○

ABA CONNECTION

The Identity Theft Crime Wave

On March 15, 2006 at 1:00 pm Eastern, the ABA Connection is presenting a one-hour CLE teleconference titled, "The Identity Theft Crime Wave."

The incidents last year in which millions of credit card accounts were compromised by breaches of computer systems at data companies highlights the growing threat of identity theft. This ABA-CLE teleconference focuses on how identity theft affects individuals and businesses, how to patch up personal finances after an identity theft and ways to deal with the perpetrators. Actions now being taken against companies that maintain data after breaches occur will also be discussed.

The program is sponsored by the ABA Journal, Membership and Marketing, and the Center for Continuing Legal Education and cosponsored by the Section of Administrative Law and Regulatory Practice.

CLE credit has been applied for in states that accept the teleconference format. To register, call the ABA at **800/285-2221** from 8:30 a.m. to 6:30 p.m. Eastern weekdays, beginning Monday, February 20th or register online by Friday, March 10th www.abanet.org/CLE/connection.html. There is a nonrefundable \$9.75 phone line charge for the teleconference. If you are unable to participate in the live teleconference, the program is available, at no cost, for one month, on the ABA CLE Web Site at <http://www.abanet.org/CLE/connection.html>. CD's of the program are available to ABA members for \$50.00 two weeks after the program. To order a CD call the ABA Service Center at **1-800-285-2221**.

2005 Administrative Law Conference



Former Section Chair Peter Strauss and current Section Chair Eleanor Kinney confer with OIRA Administrator John Graham (center). All photos in this article furnished by Kim Knight.

2005 has proven to be a standout, perhaps pivotal, year for Administrative Law. The failure of government at all levels to adequately cope with Hurricane Katrina, the ongoing anti-terrorism debate over national security vs. civil liberties, and the Supreme Court decisions in *Kelo* and *Raich* — the first equating economic development with “public purpose” under the Takings Clause and the second embracing home-grown medicinal marijuana as a commodity subject to federal regulation under the Commerce Clause — have fueled widespread popular reevaluation of the government’s role in delivering basic services while protecting the public and preserving democracy. The life-altering events of 2005 have similarly sparked a reexamination of the methods government may employ during times of duress.

Considering the domination of these issues in the popular and legal press, it is no wonder that the 2005 Administrative Law Conference produced the usual strong turnout for the Section’s flagship meeting.

Contributing to the Conference’s success were the diverse range and large number of programs fielded by Conference Co-Chairs Sharan Levine and Kathleen Kunzer, the unflagging efforts of Section Staff Director Kim Knight, and Conference co-sponsors: Foley & Lardner LLP; Haynes & Boone LLP; Paul Hastings Janofsky & Walker LLP; Ropes & Gray LLP; Sidley Austin Brown & Wood LLP; Wiley Rein & Fielding LLP; and Wilmer Hale LLP.

Following are condensed versions of the keynote remarks of John D. Graham, Ph.D., Administrator, Office of Information and Regulatory Affairs, and remarks of Morton Rosenberg of the American Law Division, Congressional Research Service, in acceptance of the 2005 Mary C. Lawton Award for Outstanding Government Service. [Ed. Note: A condensed version of the winning paper for the 2004 Award for Scholarship in Administrative Law, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004), by M. Elizabeth Magill, John V. Ray Research

Professor, University of Virginia School of Law, appeared in the Fall 2004 issue of the *News*. ADMIN. & REG. LAW NEWS, Vol. 30, No. 1, at 15.]

John D. Graham: The “Smart Regulation” Agenda: Progress and Challenges

My topic today is the Bush Administration’s “smart-regulation” agenda. The good news is that we are improving the economic efficiency of major rulemakings. The bad news is that we are now facing a series of new challenges in regulatory policy that are more difficult than what we have faced in the past.

The “Soft” Benefit-Cost Test

Our role at OIRA is to review new rulemakings and stimulate modernization of existing rules. We do our regulatory oversight with a team of about 30 career OIRA analysts who apply what I call a “soft” benefit-cost test. We ask whether the quantified benefits of a rule exceed the quantified costs but we also strive to be sensitive to important “intangible” considerations. These unquantified factors may reflect basic issues of fairness, such as civil rights, or they may reflect a key efficiency concern that cannot yet be fully measured and expressed in monetary units (e.g., homeland security). Considering both matters of efficiency and fairness, we ask whether the benefits of a rule justify its costs.

Regulatory Benefits and Costs in the USA, 1981-2005

Since OIRA was created in 1981, we have assembled agency estimates of the costs and benefits of major rules. In our 2005 Report to Congress, we reviewed what is known about trends in major rule activity at the Cabinet agencies (e.g., Labor, Interior, Transportation, Treasury, Health and Human Services, Housing and Homeland Security) and EPA (excluding the independent agencies). Counting only the rules for which we have cost estimates, we found that about 190 major rules of this type have been adopted since 1981, resulting in a \$117 billion projected burden on the American people. These new regulatory burdens were added to the pre-existing burden of several hundred billion dollars per year.

The good news is that the average annualized cost of major rulemakings has declined by 70% during this Administration (2001–2004) compared to the annualized figures for the previous 20 years. The [other] good news is that annual net-benefits from major rulemakings appear to have roughly doubled during this Administration. In fact, if you compare major-rule activity for the past three Administrations, you will see that the average costs of major rules were highest under Bush 41 (1989–1992), considerably higher than the Clinton years (1993–2000).

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2005 Administrative Law Conference

Explanations for Progress

My career staff inform me that the explanation for our performance is straightforward: we are issuing fewer major rules than previous Administrations but those we are issuing tend to have a stronger benefit-cost rationale than has been true historically. Moreover, by approving — indeed, by encouraging — a small number of highly beneficial rulemakings, this Administration has established a strong record of net benefits.

Progress has been made without doing anything fancy. We did not seek and have not received any new authority from Congress to reform regulations. Nor have we issued a new executive order and, in fact, we have simply implemented the requirements of President Clinton's 1993 executive order on regulatory planning. We have done five things differently, [however].



Section Chair Eleanor Kinney presents Mary C. Lawton Award to Morton Rosenberg.

First: We have done our work more openly.

We have an open-door policy at OMB for people who care about rules and have an analytic case to make to us. On a daily basis, you can track these meetings on OMB's web site, including basic data on the rule being discussed and the names and affiliations of the participants. We also invite the affected agencies to join these meetings. We do not disclose minutes of our discussions because we want people to be able to speak candidly about their concerns.

Second: We have buttressed our staffing in science and engineering.

Historically, OIRA staff have had strong backgrounds in economics, statistics and policy analysis. However, the nature of federal regulation has changed since we were created in 1981. Most classic economic regulation has been rescinded or moved into independent agencies. The growth area has been public health,

safety and environmental regulation, or what I call science-based regulation. In order to respond to this trend, our latest hires at OIRA have been in fields such as environmental science, engineering and epidemiology. Indeed, OIRA's first hire in toxicology has been among our busiest staffers over the past four years. Although these handful of new staff may seem modest, they have substantially improved our ability to ask tough questions of regulators.

Third: We have raised our analytic expectations of agencies.

In an admittedly obscure but readable document called OMB Circular A-4, we have written down — in less than 50 pages — what we expect to see in a regulatory analysis. This guidance document was developed through an open process that included public comment, expert peer review and formal interagency review. The changes were important refinements, not a revolution.

For example, on time preference for present versus future benefits and costs, we expect agencies to present results using annual discount rates of 3 and 7 percent. We no longer insist on 7% as if it is the only legitimate perspective, especially when future generations are at risk. Lifesaving gains from rules are to be valued in the range of \$1 million to \$10 million per statistical life saved; we do not pretend to have a more precise answer. Rules projected to have billion-dollar impacts must be accompanied by formal, probabilistic uncertainty analysis. Health and safety rules also must be accompanied by cost-effectiveness analysis that accounts for reductions in both mortality and morbidity. We are now working with federal agencies and the Institute of Medicine to define common measures of effectiveness that all health and safety agencies shall use. We have also shined a new spotlight on information quality (IQ). Our new IQ policy says three things to agencies: you must have minimum information-quality goals, you must use peer review before you release official scientific information, and you must give the public an opportunity to correct information that has been disseminated in error.

Fourth: We have chosen our OMB priorities carefully.

We began in 2001 by reviving the dreaded "return letter." In the first six months on the job, I issued over 20 return letters to agencies, suggesting that specific rulemaking proposals need to be reconsidered. You can read these letters on OMB's web site.

This rate of return, while modest, was more than the total number of return letters in eight years of the Clinton Administration. Four years later, we find that we rarely need to issue a return letter. Agencies work with us to fix problems or they persuade us that there is no problem to fix. We also invented a new tool called the “prompt” letter. This is a public letter to an agency suggesting that they should consider adopting a new regulation. We have issued roughly a dozen such letters. Through prompt letters and more informal mechanisms, we believe we can save more lives in a cost-effective manner. Making new rules smarter is one thing; making sense of the sea of existing rules is a more humbling challenge. In 2001 and 2002 we used a public-nomination process to identify about 100 rules that agencies are now reforming. In 2004 we launched a more targeted effort to streamline rules impacting the manufacturing sector of the US economy; about 76 such rules have been targeted by agencies for reform.

Fifth: We have not been reluctant to take risks — even take “hits” — when our technical case is strong and the stakes are significant.

[For example,] in 2001 our House appropriations subcommittee informed us that we should consider rescinding a Clinton-era executive order. This order required many organizations in society — actually, any receiving federal funds — to provide foreign language assistance to people living in this country who have a different native tongue and do not speak English effectively. We re-examined this order but did not find the case for repeal to be compelling. Needless to say, our position led to a persistent stream of criticism from the “English-first” advocates and their allies in Congress.

In 2002 we worked with EPA on a rule that irked several large businesses that supply diesel engines for use by heavy truck makers. The rule imposed non-compliance penalties on companies that chose to delay their compliance with a rule to cut diesel exhaust from new heavy trucks. We saw this rule as an important signal for technology innovators, since there were companies that were risking investment capital on cleaner engines that would be implemented on schedule. In an unusual twist, we found ourselves helping defend EPA against a barrage of [industry] complaints.

In 2003 we worked with EPA on another rule to reduce mercury emissions from coal plants by 70%.



Section Chair Eleanor Kinney presents Scholarship Award to M. Elizabeth Magill.

Unlike the plant-by-plant rules preferred by many environmental groups, EPA designed an innovative cap-and-trade rule, one of the first ever issued for a so-called “hazardous” air pollutant. We believe EPA made a strong case that cap-and-trade would likely do more to reduce localized “hot spots” than the uniform technology requirement that the greens were advocating. After many months of rhetorical attack from the greens, we are pleased that EPA recently won a key vote in the Senate against disapproval of the rule.

More Difficult Challenges Remain

Without question we face a huge task on the issues of homeland security and disaster response. 9/11 and Katrina have revealed weaknesses in many aspects of our society, and that includes the way we do regulatory analysis. Homeland security regulations account for about half of our major-rule costs in 2004 but we do not yet have a feasible way to fully quantify benefits.

A moment’s reflection will reveal some of the perplexing issues: How do we identify targets of potential terrorist attacks, the probability of attacks and associated damages, and the effectiveness of various countermeasures in reducing risk? Given that such information would be of obvious use to terrorists, how should we respect the need for secrecy with the need to justify to the public the burdens of the rules we are imposing? My own view is that we are still at the beginning of a decade-long effort to build a rigorous homeland security rulemaking process. I admire the people at the Department of Homeland Security who are tackling this huge challenge.

On disaster response, the experience with Katrina has raised important questions about how the federal government should

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Former Section Chair and current nominee as U.S. Ambassador to the European Union (EU), C. Boyden Gray, and current EU Ambassador to the United States, John Bruton, pause at fall section dinner.

evaluate low-probability, high-consequence events. Should these events be evaluated based on expected damages, or should a risk premium be added to reflect the public's risk aversion? As we learn more about what actually happened in the Gulf Coast and what measures might have made a difference, we need to feed that knowledge back into improved analytic systems for anticipating and responding to future disasters.

The Need to Validate Regulatory Analysis

Given the more important role played by benefit and cost information, we need to learn more about the validity of benefit and cost estimates made by agencies before a regulation is promulgated. There is a small but growing body of literature comparing these projected benefits and costs and to what was actually experienced after rules took effect. What we are finding is that agencies tend to overestimate both the costs and benefits of rules, though the errors seem to be larger on the benefit side.

Cooperation with EU Regulators

Since US and European rules tend to have a huge influence around the world, it is especially important that we accomplish cooperation with the EU. Our track record is very mixed. After years of unsuccessful dialogue, we have sued the EU in the World Trade Organization because we believe that their regulators, without any scientific justification, have blocked access to bioengineered seeds pioneered in the United States. Meanwhile, the EU has repeatedly expressed concern to us that the new Sarbanes-Oxley legislation — and associated SEC rules — have imposed unintended costs on European-based firms seeking to do business in the United States.

Our inability to find common ground with the EU has become comical. The two sides of the Atlantic cannot even agree on the proper design of crash dummies for use in automobile crash tests. That means that vehicle manufacturers doing business both here and in Europe face the prospect of undertaking separate crash tests using American and European dummies. And can you believe this: the European dummy wears safety belts in crash tests; the American dummy does not.

Let me conclude on a positive note. The quality of dialogue between the European Union and the Bush Administration is

improving on a wide range of issues. At OMB, we recently hosted a three-day visit by twelve senior career officials from the European Commission. We compared notes on how our regulatory systems are evolving and how we do regulatory analysis. I was amazed at how serious the EC has become about regulatory reform. We agree that better regulation is a key to more jobs and prosperity. We are determined to make more tangible progress on the challenge of regulatory cooperation, because we see joint gains for both the American and European economies.

Morton Rosenberg Remarks on Receiving the Mary C. Lawton Award

I am deeply honored by the award you are bestowing on me today. That I am the first legislative branch attorney to receive this Award has become a source of pride in the Congressional Research Service (CRS) generally, and in the American Law Division in particular, and also amongst the legal professionals on congressional committees and in congressional support agencies. There is a sense that the ABA has recognized that legislative attorneys do different but real legal work.

I cannot imagine another law job, in or out of government, that could equal the freedom, excitement, responsibility, and satisfaction my position at CRS has provided me for over three decades. Where else could I come to work in the morning on the Metro and read about some emerging issue in the Post that I was certain to receive phone calls about that day? Or a place in which I would be asked to advise on sensitive matters that even the Post or Times had not yet become aware of?

It took me 12 years to find CRS. Early on I decided that traditional private practice wasn't for me and at graduate school I realized that teaching was okay as an avocation but lacked the pragmatic, problem solving immediacy of real world challenges. But I did meet my life-long partner, Aileen, at graduate school and started a family, so something good did come of it. I bounced around four departments and agencies for several years, doing trial and appellate litigation and writing agency appeals opinions in private and public sector labor matters, until I came across my invitation to the promised land: a posting for a job in the Library of Congress that required only a law degree and a desire to serenely contemplate the vagaries and varieties of constitutional and statutory law and to share the product of those contemplations with Members and Committees of Congress. At least that's the way I read it. I tarted myself and my resume up, presented my best lawyer-like self, and got the job. I informed my long suffering wife that we were set: no more long hours, no trips, no litigation stress, and lots more money.

And for a week, between December 26, 1972 and January 3, 1973, that was true. 1973 was the year of Watergate, the Saturday Night Massacre, presidential impoundments, the demise of OEO, the debacle of L. Patrick Gray as head of the FBI, the resignation of Spiro Agnew, the selection of Gerald Ford as Vice

President. These and a myriad of lesser issues were dumped on my plate with a rapidity that made my head spin.

I produced over 70 memos and reports that year but one stands out because it made me understand the true nature of the work I was doing. It was a Friday afternoon in November, just a few weeks after the Saturday Night Massacre. Nixon desperately needed to install a new, uncontroversial Attorney General after Elliott Richardson's resignation and the firing of Bill Ruckelshaus. He picked an obscure Senator from Ohio, William Saxbe, a certainty to pass Senate muster.

The Chief of my Division walked in and dropped a request on my desk. "The Majority Leader," he said, "wants to know if Saxbe is ineligible to be appointed Attorney General under the Emoluments Clause. He wants the answer by Monday afternoon. OK?" Sure I said, and he left. As the door closed my mind went right to the heart of the crucial questions I was about to confront: What the heck is the Emoluments Clause and what am I going to tell Aileen.

By Monday afternoon I had absorbed whatever learning there was from Farrand, the Federalist Papers, Story's Commentaries, several obscure 19th century Attorney General opinions I had found, and a 1909 Senate precedent involving Philander Knox's nomination to be Secretary of State. I concluded in a 39 page report that Saxbe was disqualified because the pay of the Attorney General had been raised during his tenure as Senator and that any law that attempted to remedy the disqualification by lowering the pay violated not only the spirit but the letter of the prohibition.

I was very proud of myself, and was particularly happy that per CRS policy my name appeared prominently as the author of the report. On Wednesday I picked up the Congressional Record to see the results of my efforts and was shocked. The Majority Leader took the floor and said "I have been thinking all weekend about the constitutional problems posed by the

Saxbe nomination and this is what I have concluded" and then proceeded to read my wonderful piece verbatim into the Record, without attribution.

I was mortified and livid that my first brief opportunity for a place in the congressional sun had been denied. The elder statesman of the Division in those days took me aside and explained in his gentle but firm way that I had to understand who we worked for and why. We work for the institution of Congress, they use our products and advice as they wish, and their individual or collective wisdom trumps our individual wisdom and egos every time.

I learned that lesson well and it has guided me ever since. It is Congress as an institution that we at CRS are working for. From that premise flow the injunctions of objectivity and nonpartisanship that characterize our work. I also believe it encompasses the notion that the constitutional integrity of Congress, as an institution, must be protected.

As an attorney advising Congress, I have been careful not to understate the limits of congressional authority vis-à-vis the executive or the courts, but I have been mindful of the need of my congressional clients to understand the scope of the institution's legislative, oversight, and investigative powers and the importance and necessity for vigilance and consistency in exercising those constitutional prerogatives in order to protect and sustain them. Congressional oversight, in particular, must be understood as not simply a constitutional prerogative but as a constitutional duty. The consistent, vigilant and aggressive fulfillment of that duty preserves and vindicates that prerogative. A Congress quiescent for an extended period can lead to an unhealthy imbalance in the powers of the political branches. In such times the prerogatives may not be irrevocably lost but they may not be easily retrieved. And often the process of retrieval can be in an extreme form and can be seen by the public, and the courts, as excessive and perhaps illegitimate. 

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help you get more involved with Section activities.*



2006 Midyear Meeting of the ABA Section of Administrative Law and Regulatory Practice



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PROGRAMS

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- **Federal Lobbying Disclosure: Is Reform Needed?**
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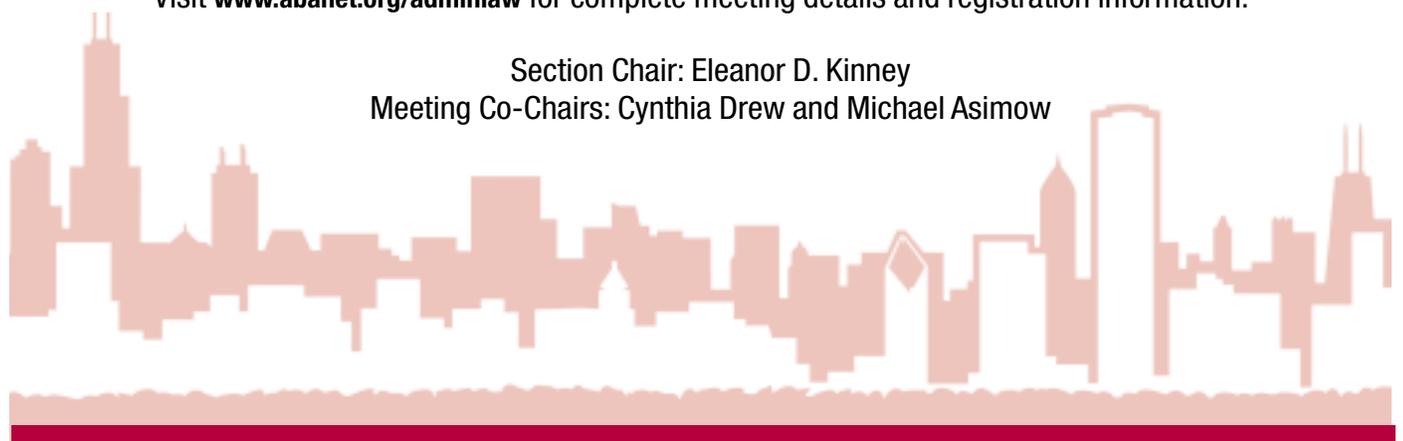
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by Robin Kundis Craig*

Assigning the Burden of Persuasion in Administrative Hearings

In November 2005, the Supreme Court determined 6–2 (new Chief Justice Roberts took no part in the decision) that, in administrative “due process” hearings pursuant to the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.*, the parent of a child with disabilities has the burden of proof/persuasion when challenging a school district’s individualized education program (IEP) for that child. *Schaffer v. Weast*, — U.S. —, — S. Ct. —, 2005 WL 3028015 (Nov. 14, 2005). This decision fills a gap in IDEA’s otherwise fairly specific requirements for such “due process” hearings. See *id.* at *3 (discussing the procedural requirements in 20 U.S.C. § 1415). The majority’s opinion, authored by Justice O’Connor, affirmed the divided Fourth Circuit’s assignment of the burden of persuasion to parents, despite the district court’s conclusion that the burden of proof more properly belonged with the school district. *Id.* at *4.

Because “[t]he plain text of IDEA is silent on the allocation of the burden of persuasion,” the Supreme Court majority “beg[an] with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.” *Id.* Interestingly, the majority cited to section 556(d) of the federal Administrative Procedure Act (APA) as evidence of Congress’ adoption of this “ordinary default rule” for administrative adjudications, *id.* at *5, even though the APA in fact puts the burden of proof on “the proponent of a rule or order” (generally the acting agency), regardless of whether that proponent is the “plaintiff” or the “defendant.” 5 U.S.C. § 556(d). Closer analogy to the APA in this IDEA case thus would have placed the burden of proof on the proponent of the challenged IED — *i.e.*, on the school district.

Nevertheless, the Court concluded that, “[a]bsent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.” *Schaffer*, 2005 WL 3028015, at *5. It rejected the plaintiffs’ analogy to constitutional due process hearings and *Mathews v. Eldridge* balancing, noting that the burden of persuasion is not part of that constitutional balancing. *Id.* at *6. Nor was the Court persuaded by plaintiffs’ argument that placing the burden of proof on the school district would provide a procedural safeguard that would help to ensure that school districts effectuated IDEA’s purposes of providing appropriate education to all disabled students. Instead, characterizing the plaintiffs’ argument as, “in effect,” “ask[ing] this Court to assume that every IEP is invalid until the school district

demonstrates that it is not,” the Court cited to financial considerations and IDEA’s “stay put” provision, under which students remain in their then-current placements during the IEP “due process” hearing, as evidence that the normal default rule was the better approach. “Congress appears to have presumed instead that, if the Act’s procedural requirements are respected, parents will prevail when they have legitimate grievances.” *Id.*

The Court was less dismissive of the plaintiffs’ argument that school districts should bear the burden of proof based on districts’ greater access to the relevant information. However, although it acknowledged that “[s]chool districts have a ‘natural advantage’ in information and expertise,” the majority again concluded that Congress’ procedural safeguards in IDEA were sufficient to resolve the disparity. *Id.* at *7. Specifically, “IDEA hearings are deliberately informal and intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence,” and the statute guarantees parents access to the school district’s information. *Id.* Thus, “[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” *Id.* at *8.

In deciding *Schaffer*, the Supreme Court majority relied on *federal* law to reach its decision, assuming without explanation that federal law dictates the procedures used to adjudicate rights created by federal statute, despite the fact that *state* and *local* officials conduct the IDEA IEP “due process” hearings and despite majority’s acknowledgement that the IDEA is based on cooperative federalism. *Id.* at 2. Moreover, the decision it reached appears to be fairly definitive on the assignment of the burden of proof, despite the fact that the school district and several *amici* states argued that that states “may, if they wish, override the default rule and put the burden always on the school district.” *Id.* at *8. Because neither party had argued that point in the courts below, the majority declined to reach it. *Id.*

Nevertheless, Justice Breyer dissented specifically to argue that because Congress “did not decide that ‘burden of persuasion’ question,” “it left the matter to the States for decision.” *Id.* at *13 (J. Breyer, dissenting). Because Maryland had state rules of administrative procedure in place at the time of the IEP hearing, Justice Breyer would have remanded to the state ALJ for a determination of how *state* law would have resolved the burden of persuasion issue. *Id.* at *14 (J. Breyer, dissenting). The *Schaffer* decision thus raises a converse-*Erie* issue that is increasingly appearing in federal administrative schemes that are based on federal delegations of programs to state governments: To what extent must federal procedural requirements accompany state implementation of federal programs? See, e.g., *Legal Environmental Assistance Foundation, Inc. v. U.S. EPA*, 400 F.3d 1278, 1281

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(11th Cir. 2005) (challenging the EPA's delegation of Clean Air Act permitting programs to Florida and Alabama on the grounds that the state requirements for standing would not match the federal requirements).

It remains to be seen whether the Supreme Court will be willing to revisit the burden of proof issue with regard to any of the states that have explicitly assigned the burden of proof in IDEA "due process" hearings to school districts. Nevertheless, the *Schaffer* Court was ambiguous regarding whether its assignation of that burden is a rule of law based on its construction of the IDEA or merely a default gap-filler that states are free to change as they see fit. As such, the next case, if accepted, might prove an interesting test of many of the limits of the Supreme Court's June 2005 decision in *National Cable & Telecommunications Association v. Brand X Internet Services*, — U.S. —, 125 S. Ct. 2688, 2700–01 (2005), discussed in the Fall 2005 *Supreme Court News*, in which the Supreme Court indicated that, under *Chevron*, federal agencies were free to revise court interpretations of statutes so long as the court interpretation was not the only possible reading of the statute.

Justice Ginsburg also dissented in *Schaffer*, arguing that the burden of proof should always be on the school district in IDEA "due process" hearings. While acknowledging the majority's default rule, she was "persuaded that 'policy considerations, convenience, and fairness' call for assigning the burden of proof to the school district in this case." *Id.* at *9 (J. Ginsburg, dissenting). Unlike most civil rights and social welfare statutes, Justice Ginsburg pointed out, IDEA "casts an affirmative, beneficiary-specific obligation on the providers of public education." *Id.* As a result, "[t]he proponent of the IEP, it seems to me, is properly called upon to demonstrate its adequacy." *Id.* Moreover, as a practical matter, Justice Ginsburg argued, "[p]lacing the burden on the district to show that its plan measures up to the statutorily mandated 'free appropriate public education,' 20 U.S.C. § 1400(d)(1)(A), will strengthen school officials' resolve to choose a course genuinely tailored to the child's individual needs." *Id.* at *10. She emphasized that in the *Schaffer* case itself, "[n]ot until the District Court ruled that the school district has the burden of persuasion did the school design an IEP that met Brian Schaffer's special educational needs," *id.*, and that "nine States, as friends of the Court, have urged that placement of the burden of persuasion on the school district best comports with IDEA's aim." *Id.* at *11.

Stare Decisis in Statutory Construction

For the second time in five months, the Supreme Court discussed the role of stare decisis in statutory interpretation. As was discussed in the Fall 2005 *Supreme Court News* and above, in June 2005 the Supreme Court indicated that, under the *Chevron* doctrine, federal agencies are free to

change federal courts' interpretations of the statutes that the federal agencies administer, so long as the federal courts have not determined that the statute is unambiguous. *National Cable*, 125 S. Ct. at 2700–01. As result, the Ninth Circuit erred in preferring, on *stare decisis* grounds, its own prior interpretation of the statute at issue to the federal agency's subsequent interpretation of that statute, because the Ninth Circuit precedent had merely suggested the "best" reading of the statute – not that its construction was the only interpretation possible. *Id.* at 2701–02.

Nevertheless, a unanimous Court indicated in November 2005 that *stare decisis* – at least with respect to the Supreme Court's own interpretive precedents – is still important to statutory interpretation, even in federal agency administered regulatory programs. In *IBP, Inc. v. Alvarez*, — U.S. —, — S. Ct. —, 2005 WL 2978311 (Nov. 8, 2005), the Court addressed the issues of whether the federal Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended by section 4 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 254, required employers in meat and poultry processing plants to pay workers for the time that: (1) meat workers spent walking from the locker rooms to the production areas after donning special protective gear and clothing; (2) poultry workers spent waiting to doff such protective gear at the end of the work day; and/or (3) poultry workers spent waiting at the beginning of the work day to don protective clothing. The unanimous Court held that walking time for the meat processors and end-of-the-day waiting time for the poultry workers were not "preliminary or postpreliminary" activities excluded from FLSA coverage by the Portal-to-Portal Act but instead were "integral and indispensable" to the "principal activities" for which the workers were paid and hence were included in the workday under the "continuous workday" rule. In contrast, the time that the poultry workers spent waiting to don special clothing at the beginning of the work day *was* "preliminary or postpreliminary," and hence the Portal-to-Portal Act *did* exclude that time from the FLSA's coverage.

In interpreting the FLSA and the Portal-to-Portal Act, however, the Supreme Court focused almost entirely on its own prior interpretations of the FLSA and Congress' reactions to those interpretations; the Department of Labor's regulations implementing the Act's played little role in the discussion. *See, e.g., IBP, Inc.*, 2005 WL 2978311, at *3 (discussing the Supreme Court's early FLSA decisions and Congress' reaction to them in the Portal-to-Portal Act), *4 (discussing the Supreme Court's interpretation in *Steiner v. Mitchell*, 350 U.S. 247, 248, 252–53 (1956)). The Court also emphasized that, "consistent with *our prior decisions* interpreting the FLSA, the Department of Labor has adopted the continuous workday rule These regulations have remained in effect since 1947" *Id.* at *4 (emphasis added;

citing 29 C.F.R. § 790.6(b), 12 Fed. Reg. 7658 (1947)).

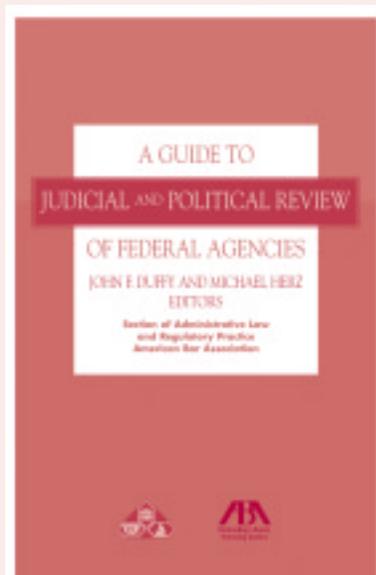
In this context, the Court stated, “[c]onsiderations of *stare decisis* are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for several decades.” *Id.* at *6. Facing the employer’s argument that some of the Department of Labor’s regulations suggested a different result, moreover, the Court characterized those regulatory provisions as “ambiguous (and apparently ambivalent),” emphasizing that they were “not sufficient to overcome the statute itself, whose meaning is definitively resolved by *Steiner*.” *Id.* at *8.

IBP, Inc., presented the Court with a fairly easy resolution of any possible tensions between the Department of Labor regulations and its own precedent, given that the regulations

did not directly address the issues that the Court was deciding. However, the Court’s casual assertion that its prior interpretations were “definitive” is in tension with the Court’s emphasis on the Ninth Circuit’s lack of specific finding of non-ambiguity in the Ninth Circuit’s precedent in *National Cable*. 125 S. Ct. at 2701–02. Notably, Justice Stevens, who had concurred specifically in *National Cable* to emphasize that the non-ambiguity requirement might not apply to the *Supreme Court*’s pre-regulation interpretations of statutes, *id.* at 2712 (J. Stevens, concurring), authored the *IBP, Inc.*, decision. One therefore suspects that additional discussions of the relationship between federal court principles of *stare decisis* and agency re-interpretations of federal statutes will be forthcoming. ○

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by William S. Jordan III*

Decisions Applying *Brand X* Reveal New *Chevron* Complexities

At first glance it seemed simple enough. The Supreme Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S.Ct. 2688 (2005), made it clear that a prior judicial ruling does not, through *stare decisis*, prevent an agency from reaching a contrary position on an issue of statutory interpretation that qualifies for *Chevron* deference. Two recent decisions reveal that this will require careful attention to the precise basis for such prior judicial decisions. One suggests that *Brand X* has significantly changed the nature of decisions at so-called *Chevron* Step One.

In *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.*, 423 F.3d 1056 (9th Cir. 2005), a payphone operator sought compensation from a long distance provider whose services were accessed through the payphone by using a free access (e.g., "1-800") connection. FCC regulations required such compensation, but the 9th Circuit had previously held in the same litigation that "There is no private right of action for the relief that PSPs seek, to recover damages for [a carrier's] alleged failure to pay compensation for dial-around calls as required by FCC regulations promulgated pursuant to § 276 of the Telecommunications Act." The court had based its decision on the proposition that private right of action can arise from a statutory obligation, but not from an obligation arising from a regulation. Since § 276 had merely authorized the regulation, it could not serve as a basis for a private action.

After that decision, the payphone operator amended its complaint to assert a claim under §§ 201(b) and 416(c) of the Act, which address "unjust and unreasonable practices" and the duty to comply with FCC orders. The question in *Metrophones Telecommunications* was whether the previous decision's broad language precluded the new claims. In the interim, the FCC had adopted a legislative rule stating that, "[a] failure to pay in accordance with the Commission's payphone rules...constitutes...an unjust and unreasonable practice in violation of section 201(b) of the Act." Thus, under the FCC's new interpretation, § 201(b) of the Act could be a source of private action even if § 276 were not.

Although the previous 9th Circuit decision's language was broad enough to cover any private effort to enforce the obligations of the § 276 regulation, it was at most an "implicit" ruling about the scope of § 201(b). As such, the

court said in *Metrophones Telecommunications*, it was not enough to constitute a binding precedent in the wake of *Brand X*. Somewhat surprisingly, the court then struggled a bit with whether, given its brevity, the FCC's rule qualified for *Chevron* deference. After describing the history of the rule, the court concluded that it constituted the "fair and considered judgment" of the agency.

These rulings suggest two areas for argument in *Brand X* or *Chevron* analysis. First, just what was the nature of the previous judicial decision? If it was merely "implicit," it would not bind the agency. This might well follow from *Chevron* itself, with no need for *Brand X*. Second, does the language of the agency's later legislative rule really count as part of the rule for *Chevron* purposes? Agencies may now have to argue that particular regulatory language (or other *Chevron*-qualified interpretive language) constitutes the "fair and considered judgment" of the agency. Surely the answer should be that if the statement is in the regulation, it counts as "fair and considered" for *Chevron* purposes.

Having decided to apply *Chevron*, the court upheld the agency's interpretation of § 201(b), but rejected its interpretation of § 461(c) as overly broad. The court also provided a useful discussion of implied preemption of state law, addressing both "field" preemption and "conflict" preemption.

In *AARP v. Equal Employment Opportunity Commission*, No. 05-CV-509 (E.D. Pa., filed Sept. 27, 2005), the AARP had obtained an injunction against an EEOC rule that would permit employers to terminate health plans for older workers once they qualified for Medicare. In issuing that injunction, the District Court had considered itself bound by a previous Third Circuit decision: "the Third Circuit has already determined that Congress has expressed a clear and unambiguous intent with regard to the precise question at issue." Despite that seemingly definitive language, the EEOC moved for relief from judgment in light of the *Brand X* decision.

One might wonder why there was any room for the EEOC even after *Brand X*. If Congress had "expressed a clear and unambiguous intent with regard to the precise question at issue," wasn't that the end of it? The District Court is correct in stating that, "Crucially, *Brand X* makes it clear that where a court's holding states merely the "best" interpretation of a statute, not the "only permissible" interpretation, the court decision does not foreclose a later, differing agency interpretation." But the court's characterization of the Third Circuit's earlier decision reads as "only permissible."

In addressing the earlier Third Circuit decision, the court noted that the Third Circuit did not explicitly say that it had reached the "only permissible reading of the statute," and that the Third Circuit had stated that a different congressional intent was "possible," and that the one it chose was "more likely." The Third Circuit also noted that it had "a

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difficult task of statutory interpretation,” and it discussed ambiguities in the statute. Both points were significant to the District Court’s conclusion that the Third Circuit had not settled on the only possible interpretation.

Remarkably, the District Court then decided that the Third Circuit’s reliance on legislative history established that the statute was ambiguous for the purpose of *Chevron* Step One analysis. This is consistent with the familiar canon that legislative history is to be considered only if the statute is ambiguous, but it is inconsistent with *Chevron*’s famous fn. 9, under which a *Chevron* Step One decision is to be made using “traditional tools of statutory construction” which include legislative history. If this approach is widely adopted, strict textualism will dominate *Chevron* Step One analysis.

When Does a New Interpretation in a Preamble to a Final Rule Violate the “Logical Outgrowth” Requirement?

EPA, in implementing the Clean Air Act, has adopted two rules governing monitoring for compliance by those subject to the Act. As its name suggests, the “periodic monitoring” rule requires periodic monitoring to provide “reliable data” to assure compliance with applicable requirements. The “umbrella rule” requires that each air pollution permit include monitoring requirements “sufficient to assure compliance with the terms and conditions of the permit.” The rules together raise the question of whether the “umbrella rule” constitutes a source of monitoring requirements over and above those of the “periodic monitoring rule.”

In two permit proceedings, EPA decided that the “umbrella rule” was a separate source of authority under which states could impose monitoring requirements on a case-by-case basis independent of the requirements of the “periodic monitoring” rule. EPA then proposed to delete some regulatory language to clarify this point. After notice and comment, EPA reversed course. Not only did it decline to adopt its proposal, it stated in the preamble to its final rule that the two rules were not “separate regulatory standard[s],” with the result that states were now prohibited from adding new monitoring requirements under the “umbrella rule.”

In *Environmental Integrity Project v. EPA*, 425 F.3d 992 (D.C. Cir. 2005), the D.C. Circuit held that EPA’s reversal did not constitute a “logical outgrowth” of its proposal. The decision illustrates the interaction of the “logical outgrowth” rule with the *Paralyzed Veterans* principle that an agency may not change a previously stated interpretation without going through notice and comment. Since EPA had stated a contrary interpretation in its previous two permit decisions, it could not state a new interpretation without notice and comment. Thus, the case is distinct from one in which EPA simply proposed one interpretation but adopted another. Here, EPA could not

adopt its desired interpretation without successfully pursuing notice and comment.

As to the “logical outgrowth” question, EPA argued that it had met its notice obligation “because its final interpretation was also mentioned (albeit negatively) in the Agency’s proposal.” The court rejected this proposition because, “If the APA’s notice requirements mean anything, they require that a reasonable commenter must be able to trust an agency’s representations about *which particular* aspects of its proposal are open for consideration.” Having been mentioned negatively, EPA’s later interpretation did not appear to be “open for consideration.” “Whatever a ‘logical outgrowth’ of this proposal may include, it certainly does not include the Agency’s decision to repudiate its proposed interpretation and adopt its inverse.”

The lesson is that an agency must carefully consider whether its proposed rule has left open the possibility of adopting an outcome at odds with the proposal. In this case, the agency was free not to adopt the proposed change in regulatory language, but it could not go beyond that to a definitive statement of contrary interpretation without alerting the public to that possibility.

Tenth Circuit Denies Deference to BLM in “Primary Jurisdiction” Referral

In the days before both urban sprawl and modern federal agency processes, an 1866 statute provided for an open-ended grant of “the right of way for the construction of highways over public lands, not reserved for public uses.” County governments, for example, could build roads across public lands without so much as an application to do so, much less the approval of a federal agency. Congress repealed this provision in 1976, effectively freezing all such rights of way at their status in 1976.

In 1996, several Utah counties graded what the counties called roads, but the Bureau of Land Management termed “primitive trails.” The rights of way crossed highly valued lands, including a National Monument and wilderness areas. The counties claimed the right to take this action without consultation or approval from the BLM. The Southern Utah Wilderness Association (SUWA) challenged the counties in Federal District Court and also urged the BLM to act against the counties.

The District Court held that the counties did not commit trespass, but otherwise it referred issues related to the validity of the counties’ actions to the BLM. The BLM then conducted informal adjudications with respect to each of the disputed rights of way, ruling that fifteen were invalid claims, and that in one other case the county had exceeded the scope of its right of way. The District Court then reviewed the BLM decisions on the record, refused to accept additional evidence from the

continued on next page

counties, and affirmed the BLM decisions in their entirety as supported by substantial evidence and Skidmore deference.

In *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005), the Tenth Circuit first held that anything beyond mere maintenance of existing rights of way would constitute trespass, and it discussed the distinction between construction and maintenance. The central question, however, was whether the District Court had properly applied the doctrine of “primary jurisdiction” in such a way as to give essentially binding effect to the BLM decisions.

The Tenth Circuit held that the BLM decisions were not entitled to such status. First, the court addressed the standard of review of the District Court’s decision to refer the matters for binding primary jurisdiction. With no analysis, the court adhered to an “abuse of discretion” standard, noting that “any error of law is presumptively an abuse of discretion and questions of law are reviewed de novo.”

On the merits of the referral, the court noted that the prudential doctrine of primary jurisdiction is a means of allocating authority between agencies and courts. The central question is whether “the issue is one ‘that Congress has assigned to a specific agency.’” If so, the court may stay its own proceeding and direct the parties to seek resolution by the agency in question.

If Congress has assigned the matter to the agency, the question becomes whether referral would serve the two-fold purposes of the doctrine. First, would it contribute to regulatory uniformity? Second, would it make appropriate use of the agency’s expertise?

The Tenth Circuit rejected the BLM’s argument that its general statutory authority over the public lands constituted authority with respect to the right of way grants in question. The court distinguished between “a land agency’s responsibility for carrying out the executive function of administering congressionally determined procedures for disposition of federal lands [and] the authority to adjudicate legal title to real property once those procedures have been completed.” BLM had only administrative authority in this instance, by contrast to its authority to grant patents under the mining laws. As a result, the District Court had abused its discretion by referring the matter to the BLM for binding primary jurisdiction and limited judicial review.

Note, however, that it would not be an abuse simply to refer the matter to the BLM for the agency to develop its own internal position and apply its factual expertise, both of which are of use to the court. The Tenth Circuit remanded to the District Court for a de novo proceeding in which the parties could introduce evidence, including the record of the BLM decisions. The court also addressed a number of legal issues related to the decision, noting that the BLM’s interpretive views are entitled to Skidmore deference, but that the agency’s

reversals of position in recent years would bear on the degree of persuasiveness.

This decision is unusual in addressing a particularly strong type of primary jurisdiction, one under which the agency’s decision is binding and subject to limited review. As emphasized in *Chevron* and its progeny, such deference to agency views is primarily a function of the authority delegated to the agency. It follows that where there has been no such delegation, there can be no such deference. This does not mean, however, that it was entirely inappropriate to refer the matter to the BLM. As the court notes, careful BLM development of its own position and application of its expertise to the facts could be helpful to the court. But any BLM contribution could not, in effect, substitute for a de novo decision by the court itself.

All that Work for Peanuts

In an era of marketable pollution permits and similar efforts to harness market forces to serve regulatory goals, we might expect regulators (and government budget analysts) to shudder if such permits or quotas were found to constitute property rights for which compensation might be required. It might well become practically impossible to implement a declining-cap trading program or otherwise to reduce or eliminate allowances. The adopted scheme could be frozen in place by fiscal realities.

In establishing the nation’s largest such scheme, the acid rain allowance trading program, Congress addressed this issue by providing that, “Such allowance does not constitute a property right.” But what if Congress did not address this point clearly? And what if allowances or quotas are found to constitute property rights? The Federal Circuit addressed these questions in *Members of the Peanut Quota Holders Ass’n, Inc. v. United States*, 421 F.3d 1323 (Fed. Cir. 2005).

Plaintiffs held peanut quotas under legislation enacted in 1996. The quota system served to support peanut prices and also enabled plaintiffs to obtain loans at favorable rates. These particular peanut farmers did not work in the fields. Instead, they leased their quotas to others to produce peanuts. In 2002, Congress enacted legislation limiting quotas to those actually farming or otherwise sharing in the risk of farming peanuts. Plaintiffs then claimed a taking of the loan rate they would have been able to obtain in 2002 and of future quotas.

Reciting the familiar litany that property rights arise from sources other than the Constitution, the court first recognized that no property rights arise if the relevant legislation specifically so provides, as with the acid rain program. The Federal Circuit then articulated the following test for deciding whether legislation has given rise to property

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2006 Gellhorn-Sargentich Law Student Essay Competition

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The competition is open to currently enrolled students of ABA-accredited law schools who are also members of the ABA Section of Administrative Law and Regulatory Practice.

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Essays must not exceed 12 pages, including title, citations, and any footnotes. The text of the essay must be double-spaced, with twelve-point font and one-inch margins.

Entries should reflect the style of Administrative Law News articles rather than law review style. Entrants are encouraged to review past copies of the News available at www.abanet.org/admin-law/news/backpage.html - prior to drafting their submissions. Citations must be embedded in text or in footnote form; essays with endnotes will be disqualified. Cites must conform with the 18th Edition of The Bluebook: A Uniform System of Citation.

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Each submission must include a SEPARATE COVER PAGE with the entrant's name, law school, year of study, mailing and email address, and phone number. The contestant's name and other identifying markings, such as school name, MAY NOT appear on any copy of the submitted essay. Send three copies of the essay, a digital copy in Word format on an IBM-formatted diskette or CD-ROM. Submissions must be postmarked no later than March 31, 2006 and mailed to American Bar Association, Admin Law Essay Competition, 740 15th Street NW, Suite 900, Washington, D.C. 20005

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Recent Articles of Interest

By *Yvette M. Barksdale**

- 1. Dan M. Kahan, Paul Slovic, Donald Braman, and John Gastil, *Fear and Democracy or Fear of Democracy?: A Cultural Evaluation of Sunstein on Risk*, 119 Harv. L. Rev. _____ (forthcoming 2006); <http://ssrn.com/abstract=801964>.** This article critiques Professor Cass Sunstein's recent book, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press 2005). Sunstein's book analyzes how social and cognitive mechanisms cause the public to generate and fixate on wildly inflated estimates of societal risk. The reviewers describe the book as an impressive contribution to the study of risk perception, but argue that Professor Sunstein ultimately misses the impact of cultural cognition or "cultural world view" on the public's perception of risk. These cultural world views cause people to attach "despised" or "valued" social meanings to various activities, such as firearm possession, nuclear power generation, and red-meat consumption. These social meanings in turn can determine how individuals emotionally react to those activities (e.g. with anxiety or calmness, dread or admiration). Relying on existing and original empirical research, the authors develop a "cultural evaluator" model, which they argue explains individual variation in risk perception, differences of opinions among experts, and the intensity of political conflict over risk better than Sunstein's "irrational weigher" approach.
- 2. Liza Heinzerling, *The Accidental Environmentalist: Judge Posner on Catastrophic Thinking*, 94 Geo. L. J. _____ (Forthcoming 2006), <http://ssrn.com/abstract=770326>.** In this article, Liza Heinzerling reviews Judge Richard A. Posner's book, *Catastrophe: Risk And Response*, (Oxford University Press 2004). Professor Heinzerling concludes that Judge Posner's book, which advocates greater attention to the potential for catastrophic events, i.e., those which pose a "small, but plausible, risk of extinction for the human race," is a very fine description of catastrophic risks and the limits of conventional risk assessment in addressing them. Indeed, Judge Posner's catastrophic risk analysis turns him into a closet environmentalist, who embraces pollution control, acknowledges the indeterminacy of calculating a dollar value for human life, and advocates regulation in the face of substantial scientific uncertainty – the basic insight underlying the precautionary principle, an environmentalist tool. However, she argues, the book is flawed by its dogged commitment to cost-benefit analysis (CBA), which Heinzerling argues is inconsistent with the conclusions Judge Posner draws regarding catastrophic risks. Thus, even though he implicitly embraces environmental values, Heinzerling argues, the book in the end is patently hostile to environmentalists and environmentalism. Instead Posner should have taken his catastrophic risk positions to their logical conclusions and rejected using CBA to evaluate catastrophic risks.
- 3. Gregory N. Mandel, *Technology Wars: The Failure of Democratic Discourse*, 11 Mich. Telecomm. Tech. L. Rev. 117 (2005), available at <http://www.mttl.org/voleleven/mandel.pdf>.** The author argues that individual opinion formation, behavior, psychology, and perception each play a considerable role in creating and perpetuating public conflict over technology, such as in disputes over genetically modified products, nuclear power, and nanotechnology. The author combines original empirical research and a multi-disciplinary body of scholarship from the fields of law, behavioral economics, psychology, and political science to provide insight into inefficiency and polarization in technology conflict, and into the related democratic and market failures that inhibit resolution of these conflicts. Some relevant factors are 1) socio-cultural risk preference formation, 2) behavioral economics and cognitive and social psychology, 3) the destabilization of science, and 4) the lack of compromise advocacy. The author uses that framework to provide more productive bases for resolving technology conflict. The author hopes to reduce polarization by helping people to identify 1) the actual preferences underlying their beliefs, and 2) ways of advancing these preferences by mutually achievable, or at least reconcilable, means.
- 4. Roberta Romano, *The Sarbanes-Oxley Act And The Making Of Quack Corporate Governance*, 114 Yale L.J. 1521 (2005).** Professor Roberta Romano strongly critiques the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (2002). The author argues that the legislation was adopted despite a considerable body of scholarly research indicating that the Act's reforms would not achieve their intended goals. Focusing on those provisions of the Act that 1) require independent audit committees, 2) restrict corporations' purchases of non-auditing services from their auditors, 3) prohibit corporate loans to officers, and 4) require executive certification of financial statements, the author comprehensively analyzes the legislative process which led to the Act's passage and the political dynamics which caused such flawed legislation to nevertheless be adopted. Drawing on historical examples, the author concludes that the Act

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demonstrates the problem of emergency or crisis legislation in which “policy entrepreneurs” are able to market prepackaged policy prescriptions to solution-hungry legislators who lack the time or incentive to adequately reflect. The author advocates amending the legislation to make these Sarbanes-Oxley requirements optional instead of mandatory. The author also advocates automatic legislative sunset provisions for similarly panicky emergency legislation.

5. **Edward Rubin, The Conceptual Explanation for Legislative Failure**, 30 Law & Soc. Inquiry 583 (2005). In this brief essay, Edward Rubin comments on a book by Noga Morag-Levine, *Chasing the Wind: Regulating Air Pollution in the Common Law State* (Princeton University Press, 2003). The book’s author argues that the failure of the Clean Air Act to control individual sources of noxious emissions was caused by Congress’ error in adopting “risk-based” rules, rather than the European—“best available technology” model. Relying on strong empirical evidence, the author Morag-Levine concluded that Congress’ decision was the result of a conceptual error caused by Congress’ overreliance upon common law analytical models. Rubin remarks that such “conceptual” explanations for failed legislation are rare. Instead, commentators usually rely on public choice, deliberative democracy and similar political models of legislative decision-making to critique legislation. Rubin argues that the kind of conceptual errors identified by the book’s author may be more frequent than is normally thought. Rubin discusses the Truth-in-Lending Act as another example of such legislative conceptual error.
6. **James J. Brudney and Corey Ditslear, Canons Of Construction And The Elusive Quest For Neutral Reasoning**, 58 Vand. L. Rev. 1 (2005). This article catalogs the results of an extensive empirical bivariate and regression analysis study of the Justices’ use of canons of legislative constructions. The authors conducted the study to empirically test competing theoretical explanations of judicial use of the canons, including public choice and legal process accounts. The authors’ database consists of every decision addressing workplace law matters since the start of the Burger Court era: 632 cases with written opinions from 1969 to 2003. The authors identified the outcomes as liberal (pro-employee) or conservative (pro-employer), and determined the Justices’ judicial reasoning techniques by coding the textual and contextual sources the Justices relied upon in their written opinions. 25% of the majority opinions (160) relied upon legislative canons to some extent. The authors found, expectedly, that reliance on canons almost doubled from the Burger to the Rehnquist court. Among other conclusions was that the empirical data more strongly supported the pessimistic view of some theorists that the Justices used canons to support ideological interpretations of

the statute, often at the expense of conflicting evidence of legislative preferences. Although both liberals and conservatives used the canons in this way, the most frequent such use was to achieve conservative outcomes in close cases (with one or two vote margins). Additionally, the use of the canons in cases where the dissent invokes legislative history (all of which cases occurred after 1988), yielded overwhelmingly conservative results.

7. **Cass A. Sunstein, Breyers’ Democratic Pragmatism**, ____ Yale L.J. ____ (Forthcoming, 200_) http://ssrn.com/abstract_id=166326845064. This article is a review of Justice Stephen Breyer’s recent book, *Active Liberty: Interpreting Our Democratic Constitution* (Alfred A. Knopf, 2005), in which Breyer, responding in part to Scalia’s originalism, discusses the proper role of the judiciary in constitutional interpretation in a democracy. Describing Breyer’s book as brisk and lucid, Sunstein analyzes Breyer’s concept of “active liberty”—a form of participatory democratic self-governance, and evaluates some of Breyer’s applications of his interpretive approach to constitutional law issues such as free speech, affirmative action and privacy. Sunstein concludes that Breyer’s consequentialist argument is convincing insofar as it challenges the “originalist” approach on pragmatist grounds, but is more vulnerable insofar as it downplays the inevitable role of judicial discretion in the characterization of purposes and evaluation of consequences that is necessary to implement Breyer’s theory.
8. **Michael J. Gerhardt, The Constitutionality of the Filibuster**, 21 Const. Comment. 445 (2004). Essay intended as a basic discussion of arguments for and against the constitutionality of the filibuster. The author sketches some solutions for redressing problems with constitutional argumentation in, and theorizing about, the Senate. The author also develops a theory of non-judicial precedent that will clarify how much deference senators and perhaps members of other institutions (including courts) ought to give to the Senate’s historical practices.
9. **Edward Rubin, The Myth Of Accountability And The Anti-Administrative Impulse**, 103 Mich. L. Rev. 2073 (2005). In this article, Edward Rubin reconstructs the concept of government accountability. The author argues although that the concept has been recently in vogue, these discussions often lack conceptual and empirical rigor and are improperly used in opposition to the administrative state. The author critiques as ill-founded both the view that elected officials are accountable to the public, and the view that state and local officials are more accountable than federal ones. Rather, both are vestiges of pre-analytic hostility to the

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Recent Articles of Interest

administrative state. The author argues that the only coherent concept of accountability is that it is intrinsically bureaucratic or administrative in character.

10. In Brief: Some recent War on Terror and Iraq articles.

a. Robert M. Chesney, *Leaving Guantanamo*:

The Law of International Detainee Transfers, ____ U. Rich. L. Rev. ____ (Forthcoming 2006), <http://ssrn.com/abstract=827604>, analyzes the legal issues relevant to the transfer of prisoners from Guantanamo Bay, particularly transfers to countries who might practice torture.

b. Gregory H. Fox, *The Occupation Of Iraq*, 36 Geo. J. Int'l L. 195 (2005), discusses the tangled legal framework relevant to the legality under international law of the United States' occupation of Iraq and role in Iraq's reconstitution and reconstruction.

c. M. Cherif Bassiouni, *Post-Conflict Justice In Iraq: An Appraisal Of The Iraq Special Tribunal*, 38 Cornell Int'l L.J. 327 (2005) a self-described "insider's" legal, historical, political and occasionally informal discussion of the Iraq Special Tribunal, the Iraqi court which adjudicates some human rights and other criminal charges brought by the Iraqi government against Saddam Hussein.

RECENT SYMPOSIA OF INTEREST, In Brief.

1. Federal Trade Commission 90th Anniversary Symposium, 72 Antitrust L.J. 745 – 1206 (2005).

Includes articles by: i) William F. Adkinson, Jr. 745, ii) Deborah Platt Majoras, 755, iii) Judge Richard A. Posner, 761, iv) Tim Morris and Bob Pitofsky, 773, v) William E. Kovacic, 861, vi) Marc Winerman, 871, vii) Edward F. Cox, 899, viii) Sidney M. Milkis, 911, ix) William MacLeod, Elizabeth Brunins and Anna Kertesz, 943, x) Jodie Z. Bernstein and David A. Zetony, 969, xi) Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker and Ernest A. Nagata, 975, xii) John E. Kwoka, Jr., 997, xiii) Kathryn M. Fenton, 1013, xiv) Jonathan B. Baker, 1029, xv) Hillary Greene, 1039, and xvi) Howard J. Beales, III, 1057.

2. Environmental Regulation, Energy and Market Entry, 15 Duke Env'tl. L. & Pol'y F. 163 – 339 (2005).

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3. *The European Union*, 28 Fordham Int'l L.J. vi – ix, 919 – 1215 (2005). Includes articles by: i) Roger J. Goebel, p. vi, ii) Joseph C. Sweeney, p. ix, iii) Ian S. Forrester, 919, iv)

Eleanor M. Fox, 952, v) Eric Gippini-Fournier, 967, vi) Francis G. Jacobs, 1049, vii) William E. Kovacic and Andreas P. Reindl, 1062, viii) Jeremy Lever, 1091, ix) Christian Ahlborn, David S. Evans and A. Jorge Padilla, 1109, x) James S. Venit, 1157, Bo Vesterdorf, 1179.

4. *The D. C. Circuit Review: Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit* (July 2003 – June 2004), 73 Geo. Wash. L. Rev. 709 – 948 (2005). Includes a) Article by Cass R. Sunstein, 693; b) Topical Student Surveys [i) Administrative Law, 709, ii) Civil Procedure, 767, iii) Communications Law, 792, iv) Constitutional Law, 802, v) Energy Law, 827, 851, vi) Environmental Law, 851, vii) Health Care Law, 864, viii) International Law, 880, ix) Labor Law, 896, x) Property Law, 918, xi) Telecommunications Law, 931]; c) Biographies of the Judges of the D. C. Circuit, 943; and d) Index of Principal Cases, 948.

5. *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit*, 54 Am. U.L. Rev. 821–1239 (2005). Includes a) Forward by Judge Pauline Newman, 821; b) Article by Joseph Scott Miller and James A. Hilsenteger, 829; and c) 2004 Area Summaries (various authors) for i) Patent Law Decisions, 941, ii) Trademark Law Decisions, 1181, and iii) Government Contract Law Decisions, 1205.

6. National Security and Telecommunications after 9/11, 57 Fed. Comm. L.J. i – v, 351 – 478 (2005).

Includes articles by: i) Michael K. Powell, p. i; ii) Jamie S. Gorelick, John H. Harwood II, and Heather Zachary, 351, iii) Christopher Guttman-McCabe, Amy Mushahwar and Patrick Murck, 413, and iv) James A. Lewis, 457.

7. Calabresi's The Costs of Accidents: A Generation of Impact on Law and Scholarship, 64 Md. L. Rev. 1 – 754 (2005).

Includes articles by: i) Donald G. Gifford, 1, ii) Judge Richard A. Posner, 12, iii) Adam Benforado (student) and Jon Hanson, 24, iv) Keith N. Hylton, 85, v) Francesco Parisi and Vincy Fon, 108, vi) Frank I. Michelman, 136, vii) Gregory C. Keating, 159, viii) Ugo Mattei, 220, ix) Hanoch Sheinman, 250, x) Anita Bernstein, 303, xi) Jules Coleman, 337, xii) Justice (ret.) Izhak England, Israel Sup. Ct., 355, xiii) John C. P. Goldberg and Benjamin C. Zipursky, 364, xiv) Catherine M. Sharkey, 409, xv) Michael L. Rustad, 461, xvi) Anthony J. Sebok, 541, xvii) Kenneth S. Abraham, 573, xviii) Donald G. Gifford, 613, xix) Robert L. Rabin, 699, xx) Oscar S. Gray, 734, and xxi) Judge Guido Calabresi, 736.

*Edited by Edward J. Schoenbaum**

Attorney's Fees For Public Interest Litigation: A Bridge Too Far

By Michael Asimow

By statute (Code of Civil Procedure §1021.5), California awards a successful party attorneys' fees in public interest litigation. (Federal law is exactly the opposite and awards attorneys' fees only pursuant to specific statutes). Sometimes, as in *Bowman v. City of Berkeley*, 31 Cal.Rptr.3d 447 (Crt. App. 2005), the public interest that's vindicated seems pretty marginal.

In *Bowman*, neighbors tried to stop construction of a subsidized four-story senior living facility on various esthetic and environmental grounds. The City approved construction and the neighbors went to court to stop it. They lost on all of their environmental and land use arguments, but won a brief victory under due process (the City Council had failed to further notify the neighbors that the matter was on the evening agenda). After remand, the City reconsidered the project and again approved it. Thus the litigation achieved only delay in building the project, a delay that jeopardized funding for the facility's construction. It must have cost the developers dearly, not to mention the seniors who wanted to move into the facility.

To get attorney's fees, a plaintiff must have been "successful." The court held that the "success" test had been met even though plaintiffs lost on all of their substantive theories and achieved only a new consideration of the issue (which

they lost). In addition, plaintiff must establish that the litigation conferred a "significant benefit on the general public." This test was met because a lot of people participated in the rehearing before the City Council (to no avail). Finally, plaintiff must establish that the cost of the litigation "transcends the claimant's personal interest," but since nobody was litigating except people who lived in close proximity to the project and who didn't want a high rise on their street, it is difficult to see what interests other than the claimants' were at stake.

As a result, the taxpayers in the small city of Berkeley were saddled with payment the neighbor's attorneys' fees (totaling \$70,000). Perhaps this liability will result in Berkeley's having to cut one or two staff positions for a year. Yet the protracted litigation achieved nothing of significance for the neighbors or anyone else. While the concept of public interest attorneys' fees is a noble one, courts should confine it to cases of genuine success and public benefit.

Pennsylvania Supreme Court Strikes Down Portion of Slots Statute as Improper Delegation of Legislative Power to Gaming Commission

By John L. Gedid

The Pennsylvania legislature enacted a statute that legalized slot machine gambling at limited locations in the state. The Gaming Act (Act) contained elaborate provisions for licensing and continuing close regulation of the gaming industry by a newly created agency, the Gaming Commission. A coalition consisting of state legislators and nonprofit organizations opposed to gambling brought an action that challenged the constitutionality of the Act on numerous grounds that included unlawful delegation of legislative powers to the Gaming Commission. The Pennsylvania Supreme Court held that the zoning provisions of the Act were an unconstitu-

tional delegation of legislative power to the Gaming Commission.

The Act contained numerous, detailed provisions providing for the issuance and regulation of licenses. The Act provided for a limited number of gaming licenses in the state, and also included provisions for the Gaming Commission to license the sites for each casino license. The Act empowered the Gaming Commission in its discretion to preempt local zoning ordinances in connection with approval of a gaming site license; however, the affected municipality was given the right to comment upon the Commission's siting plan.

The Commonwealth argued that this provision, read in conjunction with the extensive provisions for the issuance of gaming licenses in the Act, established a sufficient standard to withstand the delegation attack; and that the Act established basic policy and set primary standards, which the Commission was merely carrying out.

The Supreme Court acknowledged that its precedents recognized that broad delegations were permitted as long as the legislature made basic policy. However, the court explained that legislation must contain adequate standards to guide the agency and the courts in reviewing agency action, even though the legislature has set the basic policy. In the present case, the Pennsylvania legislature established basic policy regarding gambling and the issuance of licenses, and also established the basic policy that the Commission could overrule local zoning ordinances.

However, the Supreme Court noted that, although the Act provided for input from local municipalities on issues of siting of casinos, the matter of location of casino sites in Pennsylvania was left entirely to the discretion of the Commission. The court could find no standards or principles anywhere in the Act that provided guidance about how the Commission was to exercise its authority to license specific casino sites in Pennsylv-

continued on next page

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vania. Thus the court held that the Act's zoning provisions were an unconstitutional delegation of legislative power to the Commission, severed those provisions from the balance of the Act, and affirmed the constitutionality of the Act.

In the Gaming Act, the Pennsylvania legislature attempted to use the Kenneth Culp Davis approach that substitutes procedural safeguards in legislation to protect against arbitrary agency action, such as the requirement for agency rule-making to establish standards to administer a regulatory statute, in place of the traditional delegation standards.

The provision in the Act for comment on the Gaming Commission's siting decisions by any affected municipality constitutes an attempt to create a procedural safeguard. The Pennsylvania Supreme Court was unwilling to recog-

nize that this provision constituted adequate protection against arbitrary Gaming Commission behavior.

The court was correct. In the present case, the procedure that the legislature created was inadequate protection against arbitrary commission behavior because, although the local municipality could comment, there was no Gaming Commission duty to read or to accord any weight to municipal comment. Moreover, the Gaming Commission was not instructed to establish or create any principles for siting; the discretion of the commission was totally unfettered.

Drafting Committee for the Model State APA

Those interested in the Model State APA have been asked to submit their ideas to Professor John Gedid, reporter

for the drafting committee. You are encouraged to check out the latest draft as well as comments and who is involved in this project by going to <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=234>.

State Administrative Law Committee Seeking Input on Bar Networking

The State Administrative Law Committee is also seeking input on how we can network better with committees of State bar associations so that all of us can benefit from the experiences in the States. A survey is available at www.IAALJ.org for all interested in giving information to establish a network and resource list. ○

News from the Circuits

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rights: "In the absence of express statutory language, this court has looked to whether or not the alleged property had the hallmark rights of transferability and excludability, which indicia are part of an individual's bundle of property rights."

The peanut quotas constituted property rights because they could be transferred to others (as through the leases), and they could be protected from intrusion by others. Various limitations on transfer (e.g., to farms in the same county) were comparable to legislative restrictions on firearm or alcohol ownership and did not prevent the quotas from being property rights. Quotas were distinct from fishing licenses (which do not constitute property rights) because their values are fixed once they are allocated. The issuance of more fishing licenses reduces the value of the original license, but once a quota is allocated there is a fixed payment, creating what the court termed "a market exclusive to the quota holder.... The peanut quota holders possessed an excludable interest, because the peanut quota program isolated their particular interest from competition."

Having scaled that cliff, the plaintiffs discovered the view wasn't really worth the effort. Their property right was not compensable. Since "the peanut quota is entirely the product

of a government program unilaterally extending benefits to the quota holders, and nothing in the terms of the statute indicated that the benefits could not be altered or extinguished at the government's election," Congress may eliminate the value of the quotas without providing compensation. Noting property concepts such as a lack of "vesting" in the property and the absence of "investment-backed expectation of maintaining a continuing right to the property," the court emphasized that unless Congress has made a property right irrevocable, it retains the power to amend legislation and eliminate benefits that it had previously created.

The net result is that the quota holders have the same status as the welfare recipients in *Goldberg v. Kelly*. For somewhat different reasons, each group has a property interest in the government-created benefit, but neither could claim a taking if the interest were eliminated through later legislation. On the other hand, individuals in both groups are entitled to procedural due process before government could withdraw their particular benefit without changing the underlying statutory scheme. ○

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