

ADMINISTRATIVE & REGULATORY LAW NEWS



Section of Administrative Law & Regulatory Practice

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What's Wrong With Presidential Signing Statements?

Also In This Issue

Rethinking the Tax Code Ban
on Non-Profit Political Activities

Chair's Message



Daniel E. Troy

If you were one of the 700 lucky lawyers who attended our 2006 Administrative Law Conference in Washington, DC, this past October, my message this month will, I hope and trust, transport you back to those pleasant and intellectually stimulating days. If you were unable to attend, then I hope this brief overview will whet your appetite for our future meetings in Miami, Austin, and San Francisco.



(Above) Hon. Jean Cooper
& Hon. Kenneth Starr



(Right)
Solicitor General
Paul Clement

The setting was the National Press Club, a historic and convenient location on 13th Street right off Pennsylvania Avenue. Based on the reviews we have thus far received, we may make the Press Club the regular home for our fall meeting.

There is no way to report on all the programs, which covered topics as diverse as preemption, redistricting, executive power, international election standards, the role of agency general counsels, and, of course, wine (marketing, that is, from a constitutional perspective). A few highlights bear mentioning, however. The George Washington University Law Review is inaugurating an Annual Review of Administrative Law, which will feature articles by prominent administrative law scholars as well as student notes on the topic. To celebrate and announce this event, three eminent scholars presented papers at the conference for the first issue. Former Section Chair and administrative law giant Peter Strauss addressed the role of the president in deciding issues of administrative law.

Vanderbilt Law School Professor Lisa Schultz Bressman attacked the always timely question of the degree of deference due agency decisionmakers by courts. And former Council Member and Ohio State University Law Professor Peter Shane proposed that certain people placed on “watch lists” be accorded due process rights.

Attendees then retired to our annual awards luncheon, in the Press Club’s ballroom – a spot in which Presidents, Kings, Queens, and other newsmakers have addressed the world’s press. The George Washington University Law School was kind enough to sponsor the luncheon, and we were greeted by the school’s dean, Frederick Lawrence. For the first time, the committee in charge of the Mary C. Lawton Award for Outstanding Government Service felt compelled to give the award to two honorees. Program co-chair Michael Herz (Steve Vieux being the other) introduced the recipients. One honoree was U.S. Department of Justice, Deputy Assistant Attorney General for Environment and Natural Resources John C. Cruden. Cruden’s civil service career spans 38 years, and counting. The other honoree was Mississippi Workers Compensation Commissioner Lydia Quarles.

(Right)
FCC Chairman
Kevin Martin

(Below) FERC
Commissioners:
Jon Wellinghoff,
Philip Moeller,
Joseph Kelliher
(Chmn.), &
Marc Spitzer



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ADMINISTRATIVE & REGULATORY LAW NEWS

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Presidential Signing Statement Roundtable

On August 8, 2006, at the annual meeting of the American Bar Association, the ABA House of Delegates adopted a policy recommendation opposing the misuse of presidential signing statements, a compromise position sponsored by the Administrative Law Section as an alternative to the original proposal opposing any use at all. The policy statement generated such controversy both within and without the ABA that Section leadership decided to include a panel on the topic at the 2006 Administrative Law Conference this past October. The following papers ably illustrate why the ABA's action, while laudable, represents merely another step in the evolution of this great debate.

Presidential Signing Statements I

*By Ronald A. Cass & Peter L. Strauss**

The big news from the American Bar Association's annual meeting last August was its resolution condemning misuse of presidential signing statements. This followed a much ballyhooed report by a blue-ribbon ABA task force and statements from its chair, Neil Sonnett, tying the ABA action to criticism of the Bush Administration.

News media reported the action as a slap to the Administration, rebuffing President Bush's prolific use of signing statements as an abuse of office. Sonnett explained the final resolution – changed from a sweeping condemnation of presidential signing statements to a condemnation only of their “misuse” –

as clarifying that any use of such statements to assert the unconstitutionality of elements of a statute, or to direct an interpretation inconsistent with clear congressional purpose, is a misuse of presidential power. Other ABA leaders proclaimed that the Constitution gives the President the simple choice of vetoing laws or signing them, adding that if the President signs a bill into law, he can't qualify that choice. They see signing statements as violations of a constitutionally mandated separation of powers.

A number of prominent conservative critics have condemned this action as politically partisan, noting that the ABA remained silent when President Clinton issued signing statements but is now condemning President Bush. Some liberal groups have seized on the ABA's action as evidence Bush is flaunting the Constitution and undermining the law. Statements by Sonnett and others – refusing to see the change in the final resolution from a sweeping condemnation of presidential signing statements to a condemnation only of their “misuse” as making any difference and continuing to press arguments targeted at the Bush Administration – lend credibility to the conservative criticism.

Whatever the impetus for the ABA action, the actual resolution was not what the news reported. It was not a blanket attack on signing statements, and not simply a slap at President Bush. It may still be ill-advised, but the actual issues surrounding these statements are far more complex and considerably different from media reports.

Constitutionality, Weight and Legal Force

Presidential signing statements are formal documents issued by the President, after wide consultation within the executive branch, when he signs an enacted bill into law. They state the President's understanding of the legislation he is signing and also may give instructions

to the executive branch regarding how the new law's provisions are to be treated. While such views have been formulated for as long as there has been a veto power to be exercised and the President has served as head of the executive branch of government, it is only recently that they have become readily available public documents. On the whole, this is a desirable development; it is always useful for the citizenry (and Congress) to know how the executive branch understands the laws Congress enacts.

On occasion, however, Presidents have used signing statements to express doubts about the constitutionality of elements of legislation they are nonetheless signing into law, or to state interpretations inconsistent with Congress's understanding of the legislation it sent forward to the president. Signing statements like these generate three separate legal questions.

The first and simplest is whether they are constitutional. Although the Constitution says nothing about signing statements, it also is silent regarding the reports regularly written by congressional committees. The President takes an oath to support the Constitution and laws of the United States and has clear authority to explain how he views the legislation he is signing or deciding not to sign, just as congressional committees have authority to explain their views on the legislation they send forward. Claims that signing statements, as such, violate the Constitution and transgress constitutional separation of powers are either silly or radically overbroad.

The harder questions are what weight courts should give presidential statements when interpreting the laws and how signing statements fit rule of law concerns. These are related, but not identical, questions.

The question with judicial interpretation is largely the same as with congressional contributions to legislative history. The best evidence of what a law means almost always is the words used in the law itself. But the size, complexity,

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and mixed parentage of laws today sometimes produces text that, read literally, is difficult to credit as what could have been reasonably understood by those who enacted it. At times, the law is ambiguous and the legislative history clears up a point. At times, the law is clear enough and the legislative history is designed to revise the understanding in ways that never would have commanded majority support in the legislation – which is why lobbyists work so hard to have favorable language that couldn't make it into law inserted into the history.

Presidential signing statements offer the same benefits and the same problems. They can assist in understanding a law; or they can state a view that, while capturing the President's view of good law, could never have commanded majority support in the legislature. Like legislative history, and unlike a veto override vote, there is no clear way of testing the congruence of the President's view with the congressional majority. Unlike much legislative history, the signing statement at least is likely to state the clear view of one essential player in the enactment of law.

Courts have developed principles of construction to sort through what weight to give text and history in particular contexts. These do not provide great clarity as to what courts, or even individual judges, will do in any given case. Nor is any set of general rules likely to be able to resolve the difficult issues respecting actual interpretation of law – that is why the canons of construction have been so effectively ridiculed for many years, by Karl Llewellyn and many more. The point is not that there is a simple answer to the weight to be given presidential signing statements. Rather, it is simply that the problems of construction are similar in the legislative history and presidential signing statement contexts.

There are at least two settings in which the question might arise whether the interpretive view offered in a signing statement has legal, not simply persuasive, force when construction of the law is contested. The arguments in favor of their having such force distinguish presidential signing statements interpreting law from the issues surrounding the use of legislative history. They may help to

understand the ABA's overstated concerns.

The first setting arises from the possible use of signing statements within an administration to resolve disputable questions of interpretation. One common view of the constitutional and practical order of executive life accepts that officials in cabinet departments and other governmental bodies are obliged to accept the President's interpretation of law in carrying out their duties, because as Chief Executive he is entitled to give them instructions of this sort. The President appoints the cabinet members, is the person in whom executive authority is entrusted by the Constitution, and has the authority to remove executive officers who do not carry out their duties to the President's satisfaction. In short, his interpretation governs within the administration because he is the boss. This view of the unitary executive has gained a stronger following over the past two decades. Under it, cabinet officials and other executive officials could be obliged to regard presidential interpretations stated in signing statements as legally binding upon them.

The opposing view is that although the Constitution does make the President chief executive, outside the military and foreign relations contexts its text repeatedly imagines (as is of course the case in practice) that the responsibilities for law administration will be placed in the hands of others. On this view, his duties in respect of ordinary domestic administration are those of an overseer, not decider. With limited exceptions, the President can remove from office those whose administration displeases him – but Congress has placed the responsibilities for decision in their hands and not the President's, removal may carry a high political cost (including notifying Congress about the treatment the President is seeking for its work), and the President will have to get congressional approval of the successor he appoints. People holding this view note the many historical struggles between Presidents and their appointees reflecting this understanding. They fear that if high officials believe that they have a legal obligation to let the President decide disputed points within their statutory

responsibilities, the result will be a concentration of enormous power in one place, and that the President may often be successful in exercising that power confidentially and without public process. This, they see as the road to presidential tyranny. When statutes confer regulatory authority on agencies, not on the President, they conclude, actual interpretation is the business of the agencies and outside the President's authority directly to determine.

Remarkably, the question just how strong is the character of our unitary executive remains contested, after more than 200 years. The growing acceptance, in practice and in the literature, of the view that our Constitution creates a strong, unitary executive gives weight to the argument for presidential control over interpretations of law, but it also helps understand the ABA's concern. It marks only a direction – but not necessarily an endpoint – in the argument about presidential authority.

The second setting in which legal force might be claimed for the President's view can arise in court. Courts have said that when statutory language is ambiguous, and has been reasonably interpreted by an administrative agency charged to administer the statute, the courts must accept that interpretation rather than engage in their own independent analysis. Later decisions have qualified this principle as limited to interpretations that emerge from public procedures or other contexts in which Congress has clearly envisioned the responsible agency exercising such authority. But the exact contours of that limitation are anything but precise.

Given the current state of play on judicial deference to the executive branch's interpretations of law, one can imagine the government arguing that a signing statement announcing the President's reasonable interpretation of an ambiguous provision is entitled to the same treatment as an agency's. Yet such statements are *not* products of public procedures such as are used in agency notice-and-comment rulemaking. Thus, they would seem to fall outside the ambit of interpretations that the courts have

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thus far identified as meriting judicial deference. While this issue has yet to be presented, one Supreme Court decision last year (upholding the Oregon assisted suicide statute in the face of a similar kind of interpretation made by then Attorney General John Ashcroft) suggests that the Court would agree. But three Justices dissented from that holding, and Justice Alito, who in other contexts has voted to uphold strong executive claims, did not participate. Ascendancy of the unitary executive theory would, at the least, make the interpretive effect of signing statements an important issue. This possibility, too – giving the President’s unilateral interpretation legal force – may well underpin the ABA’s overstated alarm.

Selective Non-Enforcement

The greatest controversy, and most serious issue, attaches to statements asserting that provisions of a law the President is signing are unconstitutional and, hence, will not be enforced or respected by the president. The question here is what the President properly may do when he believes a statutory provision is contrary to constitutional command. This is a question of congruence with rule of law precepts, rather than with any express or implied constitutional limitation on the president. But it is a serious question in its own right.

One pole of the controversy is marked by the simple, sweeping assertion that the President should never sign legislation if he believes it has provisions that are unconstitutional. This is the analytical twin to the sweeping assertion of signing statements’ unconstitutionality. It is similarly bold, broad, and wrong. Presidents, just as much as judges, are responsible for upholding the Constitution; they take an oath to do so. They have independent constitutional authority for asserting views of constitutional meaning. And, just like every other officer with similar constitutional authority, they are responsible for doing what best advances their view of constitutional command.

In a world of large, complex laws – some running to hundreds of pages – no official is tied to a simple, two-choice model of possible actions. Legislators

need not vote against a large, complex law because they believe one of its provisions to be unconstitutional. They may support the law and trust that the problematic provision will not be enforced or will be struck down in court in an appropriate case. Judges, similarly, are not always required to invalidate in its entirety legislation that has one or two unconstitutional provisions. So, too, a President is not limited to either vetoing legislation that has one or two provisions he believes to be unconstitutional or signing it without objection. The President – like any individual legislator – well might decide that, on balance, a law is beneficial, even if he believes that one or more provisions violate constitutional strictures.

If that is his view, the President is not then bound simply to go along with every aspect of the law. The President is not obliged to enforce all laws, even those contrary to constitutional command. He should be expected to place constitutional command over legislative command, and decisions by the President and other executive branch officials respecting law enforcement generally have been given extraordinary deference by other branches. He especially should be expected to protect the constitutional powers of the presidency and to tailor executive branch implementation of laws accordingly.

So, for example, if Congress includes a legislative veto provision in a complex law – as it has done numerous times since the Supreme Court ruled such provisions unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983) – the President might properly choose to sign the legislation, but also properly choose not to respect the unconstitutional legislative veto provision. In those circumstances, a signing statement indicating the President’s view that the provision is unconstitutional advances rule of law interests. It puts others on notice of his intentions with respect to the law, accords with respectable views of constitutionality, and comports with institutional interests of the executive branch. All of those elements advance the predictability and legitimacy of the law. In the main, this has been the

pattern of presidential uses of signing statements.

There is, however, a use of presidential signing statements that is properly criticized as undermining the rule of law. If the law put before the President is one that at its core would command conduct that the President believes to be unconstitutional, the President sends a clear message by vetoing the law – he is willing to stand on principle and reject legislation that is fundamentally not in line with his view of the Constitution. If the President signs such a law while suggesting that its core provisions are unconstitutional, he reduces the clarity and predictability of the law.

The line between the proper and improper uses of the veto versus signing statements obviously can be argued. It is not a bright line. But we believe that there are relatively good examples of misuse of signing statements in presidencies of the left *and* of the right.

Consider, for example, President Bill Clinton’s signing the Social Security Independence and Program Improvements Act of 1994, which made the Social Security Administration an independent agency. Although the law made other changes, a central provision – as widely noted in contemporaneous accounts – was to make the agency independent of the President. It gave the agency’s single administrator a six-year term of office – longer than a presidential term – and provided that that administrator could be removed only for cause. President Clinton did not veto the law, but his signing statement indicated that he viewed this change as an unconstitutional encroachment on the power of the presidency.

Similarly, President George W. Bush chose to sign the Detainee Treatment Act of 2005, sponsored by Senators McCain and Graham, among others, despite his clear disagreement with the law’s core provisions. The Act recommits the United States to observance of the Geneva Conventions and other laws respecting torture and the humane treatment of prisoners. In signing the bill into law, President Bush expressed concern that it intruded on constitutionally preserved presidential authority and

reserved the choice to refuse enforcement of key portions of the law. His objection was not to an incidental aspect of otherwise desirable legislation, but went to the very heart of what Congress had done.

In both cases, the Presidents' decisions to sign the laws while condemning central provisions sent decidedly mixed messages, seeming to give with one hand and take back almost as much with the other. In the second case, this concern is compounded by the probability that presidential actions inconsistent with the statute will be taken out of public view, and that judicial review of those actions is unlikely. But this difference is ultimately one of degree. Both actions are hard to defend as preferable to vetoes of legislation the President believes violates the Constitution at its core. Without recourse to a signing statement indicating strong disagreement with the law, it is hard to imagine that the Presidents would have signed these bills.

Such uses of signing statements constitute the limited set that can properly be addressed under the heading of "misuse." We underscore, in light of other pronouncements about the ABA resolution, that this label properly attaches to a small subset of presidential signing statements – and that it is important to avoid tarring other presidential signing statements with an overly broad brush.

Conclusion

After all is said and done, the ABA's resolution can be understood as accepting the use of presidential signing statements as an appropriate, often helpful – and certainly a constitutional – tool of presidential participation in the process of enacting and enforcing our laws. The resolution can be understood as well as properly identifying a smaller set of signing statements that are not consistent with rule of law values. But so long as ABA leaders continue to portray a great many signing statements as suspect, they will seem to be on a political mission divorced from thoughtful analysis of the legal and jurisprudential issues surrounding signing statements.

Presidential Signing Statements II

By John F. Cooney**

An ABA Task Force has criticized recent Administrations for issuing Signing Statements that inform the public of statutory provisions that the President believes are unconstitutional. The Task Force recommended that Congress adopt legislation that would give federal courts jurisdiction over declaratory judgment actions to challenge the validity of the Signing Statements.

The Task Force erred in two fundamental respects. First, it mistakenly focused on one method by which recent Presidents have articulated their constitutional concerns – the Signing Statement – rather than on the merits of their constitutional interpretations. Signing Statements have no legal force and effect. They have the same legal significance as a Presidential speech, a radio address, or an answer to a question at a press conference – none at all.

Second, most constitutional objections in Signing Statements raise separation of powers concerns and state that the President will interpret the offending provision in a manner that will be constitutional, to minimize the risk of an unnecessary confrontation. With rare exceptions, these separation of powers issues are not justiciable. This forces the Legislative and Executive Branches to resolve their differences politically. Successive Presidents have recognized that Congress possesses effective political weapons to compel the Administration to respect its policy preferences.

Under these circumstances, the critical question is whether, in practice, the approach taken by recent Presidents has proved successful in accommodating Congress' institutional interests, while avoiding unnecessary disputes and preserving the Executive Branch's constitutional position. Unfortunately, the Task Force did not address this issue. Rather, it proved the management consultant's adage that when you have a hammer, everything looks like a nail. A group of

lawyers reviewed one manifestation of the struggle between Congress and the President for primacy in national security and international affairs and recommended legislation that would seek to have the courts resolve these sensitive policy disputes.

The public interest would be better served if Congress does not adopt legislation that would seek to have the Supreme Court resolve the core issues of authority in our political system through the backdoor mechanism of review of a Presidential press release that has no legal force. If the President does not respect Congress' expressions of its intent, the better solution is for the Legislative Branch to assert its institutional authorities to compel the President to recognize its coordinate role in formulating national policy.

Legal Status of Signing Statements

A Signing Statement is a press release issued by the White House at the time the President signs a bill into law. It is one of many means by which the President may inform the public of his position. A Signing Statement has no legal standing. While federal courts occasionally have cited Signing Statements, they have not treated these documents as having legal effect or deferred to their constitutional interpretations. For example, the Signing Statement that accompanied the signing of the Detainee Treatment Act of 2005 stated that the Executive Branch would construe the law as precluding federal courts from exercising subject matter jurisdiction over any pending applications for writs of habeas corpus. In *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2762–69 (2006), the Supreme Court rejected, without citation of the Signing Statement, Justice's argument that the law had abolished the courts' jurisdiction over pending habeas corpus actions.

"Routine" Separation of Powers Disputes

The Legislative and Executive Branches have long disagreed about whether the President may refuse to

** Partner, Venable LLP.

continued on next page

implement or defend a provision of law he believes is unconstitutional. The debate over Signing Statements renews this recurring dispute.

The traditional position of Congress is that the President does not have a “dispensing” power to determine which parts of legislation he will or will not enforce. The entire statute becomes law upon his signature, and he is bound to apply all its provisions until a court declares a section invalid. These principles apply whether the President’s objections are founded on constitutional or policy grounds. If the President believes a provision is unconstitutional, his only recourse is to veto the entire bill. Having determined to sign the legislation, the President cannot pick and choose the provisions to enforce.

The traditional Executive Branch position is virtually the same, with a limiting principle. The President has no general privilege to disregard laws he deems unconstitutional; however, in exceptional cases where he believes a statute is unconstitutional on separation of powers grounds and might alter the balance of forces between the Executive and Legislative Branches, the President could determine that he “could best preserve our constitutional system by refusing to honor . . . the Act, thereby creating, through opposition, an opportunity for change and correction that would not have existed had the Executive acquiesced.”¹ With rare exceptions, such separation of powers disputes are not subject to judicial review.²

The vast proportion of separation of powers objections in Signing Statements concern types of provisions that Congress adopts repeatedly and to which the Executive objects consistently. These “routine” separation of powers cases involve Presi-

dential objections to (1) legislative veto provisions; (2) limitations on persons he may appoint to positions; (3) requirements that the Executive submit legislation to Congress; (4) requirements that agencies submit reports to Congress without White House review; and (5) spending earmarks.

The Executive Branch understands that Congress has effective political weapons to force the President to honor its policy preferences. Accordingly, most Signing Statements that raise constitutional objections announce an intention to interpret the offending provision narrowly, to avoid violating the Executive’s understanding of the Constitution, and a parallel intent to seek to implement those sections to carry out Congressional intent, to the extent possible. The Executive thereby seeks to preserve the ability of future Presidents to raise similar objections, while avoiding a political confrontation on the law actually presented for signature.

The Task Force did not consider the critical question whether the “narrow interpretation” approach has been successful in defusing these non-justiciable constitutional disagreements between the Branches. The evidence suggests that Congress is not troubled by this approach, because it continues to enact these provisions despite Executive objections.

Significant Disputes in the National Security Area

A small number of Signing Statements raise separation of powers objections concerning the respective authorities of the Legislative and Executive Branches in critical areas where significant policy disagreements exist. These disputes generally involve: (1) statutes requiring disclosure of Executive Branch deliberative materials or information related to national security or diplomatic negotiations; (2) Presidential control over the conduct of international relations; or (3) the President’s authority to command the armed forces.

The two Branches have longstanding disagreements about their respective powers in the national security area. Since the Supreme Court generally declines to resolve these disputes on justiciability and standing grounds, the

two Branches have been forced to resolve these issues on political grounds. Here, as elsewhere, Congress possesses effective tools to make the Executive Branch respect its position, especially its authority to withhold appropriations. Accordingly, Signing Statements in these areas often recognize the significance of Congressional concerns and state that the Administration will treat them as advisory and will seek to respect the Legislature’s views. Disputes in the national security areas also tend to be resolved politically, but the process may be contentious and protracted.

In analyzing Signing Statements that raise separation of powers issues in the national security area, it is important to understand whether the current President’s position differs materially from those taken by his predecessors and whether, despite his formal position, he in practice has been willing to satisfy Congressional concerns. It is difficult to conduct such an analysis for the Bush Administration. The constitutional positions in its Signing Statements are set forth in such cryptic terms that it is not apparent whether its objections are based on a novel and expansive notion of the President’s authority, an improperly restrictive notion of Congress’ power to control appropriations, or technical grounds.

The Task Force did not undertake an analysis of successive Presidents’ substantive interpretation of the separation of powers in these critical areas. Rather, it focused exclusively on the mechanism, the Signing Statement, by which they have articulated their positions. As a result, its report does not make the case that the proper way to address separation of powers issues in the national security area is to authorize federal courts to exercise jurisdiction over a complaint filed by a Member of Congress based on objections to a constitutional interpretation set forth in a Presidential press release.

If President Bush or his successors do not appropriately respect the policy preferences of Congress in the international relations and national security areas, the better solution is for Congress to assert its institutional authority in a more aggressive manner to compel the President to recognize its coordinate policymaking role. ○

¹ Attorney General Benjamin Civiletti, “The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation,” 4A U.S. Op. Off. Legal Counsel 55 (1980).

² See *Raines v. Byrd*, 521 U.S. 811 (1997) (members of Congress generally lack standing); *DaimlerChrysler Corp. v. Cuno*, 126 S.Ct. 1854 (2006) (individual who suffers no particularized injury lacks standing). *INS v. Chadha*, 462 U.S. 919 (1983) (legislative veto was a notable exception to this rule).

Relaxing the Ban on Political Campaign Intervention by Charities

By Johnny Rex Buckles¹

The November elections are now behind us, but the dust they have stirred has hardly settled. Tax-exempt organizations described in section 501(c)(3) of the Internal Revenue Code (the “Code”) find themselves under a burgeoning administrative cloud that appeared in the previous election cycle. Witness the ongoing project of the Internal Revenue Service (the “IRS”) for examining the political activities of tax-exempt charities (the Political Activities Compliance Initiative). Attracting national attention for its inquiry into the political activities of the NAACP (resolved with little fanfare) and All Saints Episcopal Church in Pasadena (ongoing), the IRS has demonstrated its commitment to enforcing Code section 501(c)(3)’s prohibition of electioneering by charities. Charities can expect the IRS to continue its enhanced enforcement efforts, and to increase revocations of tax-exempt status for participation in prohibited political activity.

Why all the fuss? A charitable organization qualifies for federal income tax exemption under section 501(c)(3) only if it satisfies several statutory requirements, one of which is that it “not participate in, or intervene in ... any political campaign on behalf of (or in opposition to) any candidate for public office.” By its terms, the statutory prohibition is absolute, and has been understood as such by courts, the IRS and Congress. Moreover, the IRS interprets the statutory ban on participation in political campaigns quite sweepingly.

With the political activity of the charitable sector prompting enhanced governmental scrutiny, it is time to reconsider the restrictions imposed upon

charities by current law. This article briefly discusses the major theoretical arguments that have been advanced in support of current law, and proposes an alternative statutory framework. Readers interested in a more developed treatment of this subject should refer to my article which is forthcoming in the Cincinnati Law Review (a draft of which is available on line).²

Theoretical Arguments in Support of the Ban

Case law and legal scholarship contemplate three major rationales in support of current law’s prohibition of political campaign intervention by charities. (A fourth rationale, which I identify and reject in my complete article, is not addressed herein.)

Arguments Based on the Subsidy Theory

A section 501(c)(3) charity receives two major federal income tax advantages – exemption from federal income taxation and the ability to receive contributions potentially deductible by donors in computing their taxable income. If the federal government is, in the first instance, entitled to those foregone tax receipts, the charity income tax exemption and the charitable contributions deduction are justifiable only if they are an effective subsidy to charities from the government.

One argument in favor of the prohibition of participation in electoral politics by charities is based on this subsidy theory. The crux of the argument is that government must not subsidize political activities. The argument has been articulated in various forms (e.g., that government must be neutral with

respect to political speech, that governmental expenditures for campaign-related speech distort open political discourse, and that no taxpayer should be coerced to support political involvement that she opposes). The major problem is that the subsidy theory (and arguments derived from it) may be fundamentally misguided.

An alternative theory of both the charity income tax exemption and the charitable contributions deduction may be superior to the subsidy theory. This theory, which I initially advanced in a previous article,³ is the “community income theory” of the charitable contributions deduction and the charity income tax exemption. The essential elements of the community income theory are as follows. For good reasons, the federal government does not attempt to subject to income taxation numerous forms of benefits (provided by government, business firms, charitable organizations, and even the environment) enjoyed by individual members of the community. These benefits are properly excluded from the individual income tax base because they are properly attributed not to individual community members, but to the community itself, and the community is not an appropriate object of taxation. The community is not taxable because government exists primarily to promote the welfare of the community (rather than the welfare of only selected individuals).

The charity income tax exemption is justifiable under the community income theory. Charities exist only to benefit

³ See Johnny Rex Buckles, *The Community Income Theory of the Charitable Contributions Deduction*, 80 Ind. L.J. 947 (2005), available free of charge by linking through the abstract posted at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=842325

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² The complete article is available, free of charge, by linking through the abstract posted at <http://ssrn.com/abstract=949814>.

continued on next page

the community (i.e., to generate community income). Thus, functioning properly, charities are best conceptualized as agents of the community. Under basic principles of federal income taxation, the income of an agent that is earned for its principal is properly attributed to the principal. Consequently, if the principal (the community) is not an appropriate object of taxation, the income earned by the community's agent (a charity) is likewise not properly included in the tax base. For reasons advanced in my previous article, a similar analysis may justify the charitable contributions deduction.

The community income theory explains why so-called tax "preferences" to charities are not preferences at all; they are essential mechanisms to ensure that "income" is properly calculated. Far from bestowing a governmental subsidy, the charity income tax exemption and the charitable contributions deduction may simply ensure that government refrains from taxing that to which it has no prior claim – community income. If the charity income tax exemption and the charitable contributions deduction are best understood not to impart a governmental subsidy to charities, they do not raise any of the concerns that have been advanced under the various subsidy-based arguments in support of the ban on electioneering.

The Private Interest Theory

Consistent with common law concepts of charity, charitable organizations are entitled to exemption only if they serve a public, rather than a private, interest. A second argument in favor of the prohibition of political campaign intervention by charities is that it is necessary to prevent charities from furthering a private interest. Two types of "private interests" could be served in the absence of the ban on electioneering by charities – the private interest of candidates (who desire to be elected), and the private interests of supporters (who desire to elect candidates who will further their supporters' private agendas).

I believe this concern is legitimate. Granted, as others have argued, certain basic rules of tax law governing charitable organizations help protect against the risk that both candidates and their political favor-seeking financial supporters will receive undue private benefit. Such legal checks include the prohibition of excessive private benefit and the statutory prohibition of private inurement of a charitable entity's net earnings. However, just how effectively these foundational rules of tax exemption would curtail private benefit in the absence of a ban on electioneering is far from certain.

The prohibition of private inurement applies only to transactions between a charity and someone who has some special relationship with the charity pursuant to which she exerts control over the charity. Thus, the prohibition of private inurement does not apply to a charity's support of a political candidate lacking this relationship with the charity, unless some other person (such as the charity's founder, officers, or major donor) stands to benefit from such support. Establishing the presence of such an indirect benefit is no simple task.

The private benefit doctrine also serves a weak, although somewhat better, policing function in this context. As applied to contributors to a charitable organization who anticipate obtaining political favors from the candidates supported by the charity, establishing the presence of private benefit is as difficult as establishing the presence of private inurement. The doctrine does have greater potential as applied directly to political candidates themselves. A "charity" that devotes most of its time and resources to the endorsement of specific candidates for public office would likely run afoul of the private benefit doctrine.

In brief, the private benefit doctrine and the prohibition of private inurement of net earnings probably would foreclose only extensive, flagrant use of charitable organizations to advance the private interests of their donors and managers, and the candidates that they favor. Surely some additional safeguard is necessary.

The Theory that Charity Is Not Political

Another argument in support of forbidding electioneering by charitable entities is that political activities are simply not "charitable" activities under common legal conceptions of charity. However, no compelling reason supports the ban on all political activity by charities merely because "charity" does not necessarily include political activity. The common law does not plainly render "non-charitable" an institution simply because it seeks to further its admittedly charitable purposes in part through non-charitable means. Consider a charity that hires an investment manager to manage its endowment assets. One can hardly object that investment management is not inherently a "charitable" activity. The payment of the investment manager's fees is simply a means to an end – the increased provision of charitable services made possible by the additional funds generated by the endowment. The same may well be true of a charitable organization's endorsement of a political candidate (e.g., one who is likely to support programs serving the charitable class that the charity assists).

Affirmative Reasons to Question the Ban

One may also state a positive case for allowing some political campaigning by charities. First, historically, organizations described in Code section 501(c)(3) have served crucial roles in shaping major social movements with enormous political implications. A case in point is the contribution of churches and other religious organizations and their leaders in helping bring radical societal change (such as the abolition of slavery and civil rights for all races), in part through political means. Secondly, political campaign activity by charities comports reasonably well with the reality that charities and government often cooperate in meeting the needs of the community. In view of such cooperation, it is sensible to permit the charitable sector to participate in the process of choosing its governmental "partners" (which affect charities through funding and regulation). A third reason for questioning the absolute ban

on electioneering by charities is that a charitable organization's participation in the process of selecting the representatives of government functions as a self-defense mechanism. One may argue that charities should be permitted to defend their operations, and indeed their very existence, against hostile acts by government agents (a notion already embedded in federal tax law to some degree).

My Proposed Alternative

The ideal reform of existing law must strike the optimal balance between (1) minimizing the risk that charity will be exploited to further private interests, and (2) minimizing governmental burdens on political activity sincerely intended to accomplish charitable goals. I believe the key to reform is to permit maximum political expression by any charitable organization governed by a board of directors (and managed by officers) primarily independent of one another and the charity's major donors (hereinafter, an "independently controlled" charity).⁴

Consistent with these observations, I propose the following major reforms of existing law. First, I recommend amending Code section 501(c)(3) to eliminate the outright prohibition of electioneering by charities. The ban is unnecessarily restrictive. In its place, I propose a new Code section (set forth in the appendix to my complete article) with the following major features. A charity that is not "independently controlled" (as defined in my proposal) or that makes a political campaign expenditure in a manner that is not completely independent of non-fiduciaries in a position to exercise substantial influence over the organization generally will be subject to an excise tax. The tax, assessed at a rate equal to the highest marginal rate of income tax applicable to individuals, plus 20 percent, is imposed on the organization's "politi-

cal campaign expenditures." A "political campaign expenditure" is any amount paid or incurred in participating or intervening in any political campaign on behalf of (or in opposition to) any candidate for public office.

Under an important exception, expenditures for any oral, in-person communication between a charitable organization's agents and its members would not be subject to tax. Oral communications with members may be a very important component of an exempt organization's operations (as in the case of churches and other organizations whose members regularly meet), yet they are probably less likely to involve private exploitation of charitable resources than are mass communications with the general public.

Entirely apart from this exception, expenditures of independently controlled charities would not be subject to the excise tax, if such expenditures are made completely independently of any "disqualified person" with respect to such organization (within the meaning of section 4958(f)(1)), other than a disqualified person who qualifies as such solely by reason of being an "organization manager" (within the meaning of section 4958(f)(2)). Stated less technically, any decision to authorize a political campaign expenditure must be made completely independently of persons in a position to exercise substantial influence over the organization (other than persons who have such influence solely because they manage the organization), as well as persons related thereto. To meet this requirement of independence generally, it must be true that the decision of the governing board to authorize the political campaign expenditure was not influenced by a disqualified person's communications or transactions with the organization or the members of its governing board. Moreover, under the proposed statutory provision, a political campaign expenditure is not made completely independently of any such disqualified person if the organization's governing board agrees to the making of such expenditure after receiving the advice, expression of preference, or demand (whether or not legally

enforceable) by such disqualified person that the organization make such expenditure.

The Benefits of the Proposed Alternative

The proposed excise tax strikes a better balance than current law. First, it generally frees independently controlled charities, which can be presumed to act primarily in the interests of the community that they represent (at least as long as their actions have not been prompted by non-fiduciaries that exert substantial influence over them), to participate in electoral politics with no adverse tax consequences. Moreover, the proposed excise tax does not effectively prohibit political endorsements by charities that are not independently controlled, or that have decided to expend funds for political purposes with the encouragement of non-fiduciaries that exert substantial influence over their affairs. Legitimate attempts to further charitable ends through political means are permissible without the loss of tax-exempt status. However, because of the potential for exploiting a non-independent board for private gain, the privilege of endorsing candidates must come at an appropriate price. That price is the payment to the government of a tax. I suggest a tax equal to the highest marginal rate of tax on individuals, plus 20 percent, so that (1) the benefit of the income tax deduction resulting from the use of donated funds for political purposes will be more than offset, (2) the tax cost of attempting to influence elections through a charitable organization is greater than the tax cost of doing so directly, and, therefore, (3) prospective donors will be less likely to attempt to advance their private political interests with charitable resources (through their effective control of the charity's board, for example). The tax thereby helps ensure that charities which are not independently controlled or that do not in fact act independently of influential non-fiduciaries will fulfill their role as agents of the community, and does so without completely stifling the political expression of those charities. 

⁴ For a more technical definition of an "independently controlled charity," see subsection (c) of my proposed statutory section set forth in the appendix to the complete version of this article.

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When An Agency Takes Its “Sweet Time” Deciding Whether to Enforce Its Regulations: Citizen Intervention in the Agency Enforcement Process

by Robin Kundis Craig*

As the U.S. Supreme Court begins its 2006–2007 term, there are four cases scheduled for oral argument this fall that are of particular relevance to administrative law practitioners: *BP American Production Co. v. Watson*, 410 F.3d 722 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 1768 (April 17, 2006); *Environmental Defense v. Duke Energy Co.*, 411 F.3d 539 (4th Cir. 2005), *cert. granted*, 126 S. Ct. 2019 (May 15, 2006); *Watters v. Wachovia Bank, N.A.*, 431 F.3d 556 (6th Cir. 2005), *cert. granted*, 126 S. Ct. 2900 (June 19, 2006); and *Massachusetts v. Environmental Protection Agency*, 415 F.3d 50 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 2960 (June 26, 2006).

Limitations Period

BP American Production involves a dispute between BP and the U.S. Department of Interior over the amount of royalties owed under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 et seq., from coal-bed methane production on federal land. Specifically, BP seeks to enjoin the Department's determinations of the royalties BP owes to the federal government. The D.C. Circuit upheld the Department of Interior's calculations. In the process, it held that the Department's policy rule establishing the royalty payment calculation was not subject to the APA's notice-and-comment rulemaking requirements and that the Department's order was not subject to the statute of limitations set out in 28 U.S.C. § 2415(a).

BP sought *certiorari* on two issues: (1) whether the Mineral Leasing Act and/or the regulations promulgated thereunder support the Department of Interior's royalty calculations; and (2) whether the Department's royalty order is subject to the statute of limitations. However, the Supreme Court granted *certiorari* only as to the second, statute of limitations, issue.

The Court heard oral argument in the case on October 4, 2006. Much of this argument focused on the breadth of the word "action" in section 2415 – specifically, on whether, in context, section 2415 and its statute of limitations could apply to "actions" that are administrative actions initiated by a Department of the Interior order rather than a formal court complaint. However, the practical effect of their ruling was also a concern for the Justices, with Justice Alito in particular pointing out that if section 2415 did *not* apply to the administrative ruling at issue, there would be a seven-year statute of limitations for oil and gas lease royalties demands but *no* limitation on Indian claims and mineral royalty demands. Justices Scalia and Ginsburg also expressed concern that exclusion of administrative demands would allow that government to pursue decades-old royalty demands.

Only Justice Scalia, however, seemed particularly troubled by the structural disjunctions required for the alleged integration of administrative and court procedure, emphasizing that BP's argument required the Department of the Interior's administrative order (or perhaps issue letter) to be treated as a "complaint" for statute of limitations purposes and the regulated entity's challenge to that order to be treated as the "answer" rather than as an appeal. Justice Scalia also remarked at one point that the Department of the Interior's process for demanding royalty payments seemed to violate the federal APA regarding the opportunities for recipients to respond.

CAA New Source Performance Standards

Duke Energy is the latest case to raise the issue of the applicability of the Clean Air Act's new source review process to coal-fired electricity generating plants. Specifically, Duke Energy contends that the improvements that it made to its generating plants are not "modifications" that trigger the Clean Air Act's stricter emissions limitations for "modified" stationary sources of air pollutants under the Act's prevention of significant deterioration (PSD) program, which seeks to protect areas with relatively clean air from unwarranted degradation of air quality. The Fourth Circuit held that the improvements were not modifications. Specifically, it overturned the EPA's interpretation of "modification" under a "modified" *Chevron* analysis because the EPA had interpreted identical statutory language differently in the PSD program and the new source performance standards (NSPS) program, which imposes stricter emissions requirements on new stationary sources of air pollution. The Supreme Court granted *certiorari* on the issues of: (1) whether the Fourth Circuit even had jurisdiction over the case under the Clean Air Act's rather stringent provisions governing judicial review of the EPA's implementing regulations; and (2) whether the EPA's test for "modifications" in the PSD program is unlawful.

The Court held oral argument in *Duke Energy* on November 1, 2006. That argument revealed four interlocking concerns among the Justices: (1) the actual correctness of the EPA's interpretation of the Clean Air Act in light of the statutory language; (2) whether the EPA had changed its interpretation and, if so, whether that change was arbitrary and capricious; (3) whether the EPA was entitled to deference under *Chevron* despite interpreting identical statutory language differently in different regulatory programs; and (4) the ability of Duke Energy and other regulated parties to challenge the regulations' interpretation of the statute and the EPA's application of the regulations in enforcement proceedings.

During Environmental Defense's oral argument, Justices Scalia and Alito expressed great concern regarding the clarity of the PSD regulations at issue and those regulations' relationship to the NSPS regulations. Justice Scalia in particular balked at Environmental Defense's argument that the two sets of regula-

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tions could impose completely different tests for “modification” in pursuit of the two programs’ different environmental goals and purposes, even though the statutory trigger was the same. Justices Ginsburg and Breyer, however, seemed more amenable to this argument, with Justice Breyer in particular pointing out during Duke Energy’s argument that different areas of the country have different air quality needs and that the different Clean Air Act programs reflect those different needs.

The United States also argued that the regulations could be different for the two programs and that the Court of Appeals had exceeded its jurisdiction in holding the PSD regulations invalid. Against Chief Justice Roberts’ and Justice Kennedy’s concerns that Duke Energy had never had an adequate opportunity to challenge the regulations and had arguably been misled regarding the EPA’s interpretation because of a confusing memorandum from an EPA official (the Reich memorandum), the United States pointed out that Duke Energy had joined the reopened challenge to the PSD regulations in 2003. The United States also claimed that the EPA was entitled to deference for its differing interpretations of the same statutory phrase in different regulatory programs. Finally, the United States argued that the Court was precluded from issuing an opinion that would invalidate the PSD regulations because of the Clean Air Act’s stringent requirements for challenges to regulations, a proposition that Justice Kennedy challenged vigorously. Several Justices also seemed troubled by the idea that a new company could be bound by regulations with no opportunity to challenge their validity, even in an enforcement proceeding or determination of non-applicability.

Justices Ginsburg and Breyer took the lead in challenging Duke Energy’s arguments that the EPA had arbitrarily and capriciously changed its interpretation 19 years previously in requiring anything less than an increase in capacity before the more stringent emissions requirements would apply. The two Justices emphasized that the EPA had repeatedly espoused the interpretation that Environmental Defense was trying to use against Duke Energy and that various courts had upheld that interpretation. Justice Stevens, in contrast, was more interested in Duke Energy’s view of the EPA’s and Environmental Defense’s two interpretations, and in response to his questioning, Duke Energy conceded that the statutory language could support either EPA interpretation and that the EPA could have changed its interpretation of “modification.” However, Duke Energy strongly insisted that the EPA acted arbitrarily and capriciously when it issued different interpretations of “modification” for the PSD and NSPS programs.

Preemption Under Chevron

The National Bank Act controls national banks established under federal law, but state law generally governs state-chartered, nonbank corporate “operating subsidiaries” of national banks. In 12 C.F.R. § 7.4006, the Comptroller of the Currency

made provisions of federal banking law – specifically, 12 U.S.C. § 484 – applicable to these state-chartered operating subsidiaries just as though they were federal banks. The State of Michigan challenged this regulation, claiming that it is both illegal and unconstitutional. In *Watters*, the Sixth Circuit accorded the regulation *Chevron* deference and held that the regulation validly preempted state banking law. In addition, the court held that the application of federal law to state-chartered operating subsidiaries did not violate the Tenth Amendment.

The Supreme Court granted *certiorari* on two issues: (1) whether the Comptroller’s interpretation of the National Bank Act is entitled to *Chevron* deference; and (2) whether the regulation at issue violates the Tenth Amendment. The Court scheduled oral argument for November 29, 2006, but that argument had not yet occurred as this column went to press.

Regulating Carbon Dioxide Under the CAA

Massachusetts v. EPA involves the EPA’s authority and duty to regulate carbon dioxide and other greenhouse gases under the Clean Air Act. The Clinton Administration’s EPA had claimed such authority, but the Bush Administration’s EPA reversed course, denying that it had such authority under the Clean Air Act, and denying petitions requesting that it regulate carbon dioxide under the Act.

The D.C. Circuit’s opinion on appeal split three ways. Two judges voted to dismiss the litigation – one on the merits, holding that the EPA has the discretion to decline to regulate carbon dioxide even if it has the authority to do so under the Act, which the judge considered doubtful; and one on standing grounds, holding that the injuries resulting from global warming and climate change are too generalized and too widespread to support the petitioners’ standing. The third judge found for the petitioners on both the standing issue and the merits, concluding that Massachusetts, as a coastal state, would suffer injuries particularized enough to support standing and that the EPA had both the authority and a duty to regulate carbon dioxide.

The Supreme Court granted *certiorari* on two issues: (1) whether the EPA can decline to regulate carbon dioxide on the basis of policy considerations not enumerated in the statutes; and (2) whether the EPA has authority to regulate carbon dioxide and other compounds associated with climate change pursuant to section 202 of the Act. Moreover, while standing is not a specific issue raised, the Supreme Court stated just last term that it has an independent obligation to assure itself of plaintiffs’ standing to be in federal court. *DaimlerChrysler Corp. v. Cuno*, — U.S. —, 126 S. Ct. 1854, 1860 (May 15, 2006). Given the prominence of the standing issue in the D.C. Circuit’s opinion, it is likely that the Supreme Court will address the standing issue – and perhaps resolve the litigation on that basis. Oral argument, as in *Watters* was scheduled for November 29, 2006. ○

By William S. Jordan III*

9th Circuit Panel Divides on Meaning of Final Action

Despite (or perhaps because of) its importance, the question of when an agency statement constitutes final agency action continues to bedevil the courts. The answer is vitally important. An undue willingness to find final agency action can interfere with legitimate agency efforts to implement previous decisions and threatens to stifle agency communications that serve to lubricate the regulatory system. But if the courts are too stingy in finding final agency action, agencies have an incentive to avoid review by regulating through detailed informal statements that purport to implement broadly worded regulations. The 9th Circuit's decision in *Oregon Natural Desert Association v. U.S. Forest Service*, 465 F.3d 977 (9th Cir. 2006), illustrates the tension but fails to provide the clarity necessary to protect legitimate agency communications. It is an invitation to seek review of many agency statements providing guidance to regulated parties.

The U.S. Forest Service issues permits authorizing grazing on certain Forest Service lands ("allotments"). Each grazing allotment is subject to an Allotment Management Plan (AMP), which "relates the directives of the applicable forest plan to the individual grazing allotment." The grazing permit then "sets grazing parameters through a ten-year period." Once the permit is in place, the Forest Service issues "annual operating instructions" (AOIs), which "convey these more long-term directives into instructions to the permittee for annual operations." The AOI, which becomes part of the grazing permit, addresses conditions the Forest Service could not previously have anticipated, such as drought conditions or changes in water quality.

In *Oregon Natural Desert Association*, the plaintiffs challenged the AOIs issued for six grazing allotments during the years 2000–2004. The Forest Service moved to dismiss on the ground that the AOIs were not final agency actions, but the mere implementation of the previous final actions that had occurred upon issuance of the permits. Upholding the District Court, the majority disagreed. First, the majority rejected the Forest Service's argument, based upon *Southern Utah Wilderness Alliance*, that the AOIs did not constitute agency action at all. As to this issue, the court relied entirely upon §§ 551(8) and (13) of the APA, the definitions of "license" and "agency action." Since a "license" includes "a part" of an agency permit, and the Forest Service explicitly incorporated the AOIs into the permits, the AOIs were licenses. Since the § 551(13) definition

of "agency action" includes "license," it followed that the AOIs constituted agency action.

More interesting than this formalistic analysis is the question of whether the AOIs should be considered "final agency action" for the purpose of review under the APA. Noting that the "finality element must be interpreted in a pragmatic and flexible manner," the majority emphasized that the permittee could not simply proceed with grazing under the permit. Instead, it had to await the AOI, which preceded the beginning of the grazing season. The AOI then governed day-to-day operations such that a violation of the AOI could trigger the institution of proceedings and the imposition of administrative sanctions. Since "an AOI is the only instrument that instructs the permit holder how those standards will affect his grazing operations during the upcoming season," the majority saw the AOI as imposing "substantial and intricate legal obligations on the permit holder," and thus qualifying as final agency action. The majority buttressed this conclusion by referring to two scenarios. In one, the Forest Service purported to enforce the permit and the AOI, while in the other the AOI identified the actions that would be needed to comply with the Endangered Species Act.

In dissent, Judge Fernandez argued that on these facts the permits constituted final agency action, but the AOIs did not. Acknowledging that one could consider all AOIs to be final action, he argued that this would be "a bit too formalistic because, in a sense, every step by an agency or by a permittee [sic] is the result of a then final decision and can have legal, as well as physical, consequences. Thus, a somewhat narrower and more pragmatic approach is required." Although his emphasis on pragmatism echoes the majority's, his solution is to recognize "the implementation concept." If an agency statement or action "is merely implementing an earlier truly final determination," it is not final action for the purpose of APA review. In the context of grazing permits, AOIs and even telephone calls or encounters in the field addressed only the day-to-day operations of the grazing system, not the principles or standards under which those operations would be judged. He was particularly concerned about the need for prompt communications and guidance to assure that resources are protected and livestock are properly fed.

So where is the line that constitutes finality? The majority's language is overbroad, but attention to the particular facts it discusses may provide useful guidance. According to the majority, the fact that an AOI violation can trigger enforcement action demonstrates that the AOI is final agency action. This language is broad enough to reach informal conversations such as the telephone calls of concern to Judge Fernandez. On the other hand, the majority discusses an AOI that arguably articulates requirements that go beyond the permit. Under those facts, finality is a reasonable conclusion. By contrast, the majority asserts that the fact that an AOI identifies actions needed to

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comply with the ESA renders the AOI final agency action. But the ESA itself is presumably the operable language, enforceable regardless of the AOI. The AOI is merely a form of helpful advice. This is an invitation to broad review.

While the majority's approach could lead to premature review, Judge Fernandez' approach could lead to the abuse of broadly worded permits and regulation through later guidance. Ultimately, the answer to finality must depend in large part upon the earlier action, in this case the permit or other previous binding legal statement. The broader or vaguer the permit language, the more the later statement should be considered final action. But if the permit or other prior language establishes a binding requirement that can be enforced with relatively little dispute as to its meaning, the later statement should not be reviewable.

D.C. Circuit on Using Rulemaking Record to Show Injury in Fact

When an agency issues a safety regulation, does the regulated industry have standing to argue that the agency should have regulated more extensively, thereby preempting more state and local controls? The answer, in light of *American Chemistry Council v. Department of Transportation*, 2006 WL 3316788 (D.C. Cir. 2006), appears to be "maybe, but you'll have to make a very clear and specific showing of prospective injury."

Pursuant to the Hazardous Materials Transportation Act, the Department of Transportation issued regulations to assure the safe transportation of hazardous materials. DOT interpreted the statutory term "transportation" to encompass the "pre-transportation function" necessary to assure safe transportation of the materials and to reach loading, storage, and unloading that are "incidental to movement." The HMTA specifically provided that the DOT regulations would preempt state or local controls if compliance with both would be impossible, if the local controls posed an obstacle to compliance with the DOT regulations, or if the local controls governed certain specific areas that were the same as those addressed by the DOT regulations.

This dispute arose from the fact that DOT's regulations reached unloading only to the point that the materials were deposited at the receiving facility and the shipping company left the premises. This left open the possibility that states or localities would impose additional regulations, which industry argued would impose costs or create hazards, or that there would be dangerous regulatory gaps. Industry groups thus challenged DOT's failure to extend its regulatory jurisdiction beyond the actual unloading of the materials. Their ultimate goal was the broadest federal regulatory scheme to preempt as many state and local regulations as possible.

This effort might well be analyzed as a challenge to agency inaction, which would pose its own obstacles to achieving judicial review, but even without prompting from DOT's counsel,

the panel majority denied review for lack of standing. The initial question with respect to standing in this sort of case is whether standing is, as the dissent argued, "self-evident" since the challengers were the very industry subject to the DOT regulation. But they were not really challenging the DOT regulation as issued. If the DOT regulation directly imposed some burden or created a hazard, they would certainly have had standing to challenge it. Instead, the DOT regulation did not go as far as industry would have liked. Consider the situation on which industry relied: a local government such as Los Angeles could impose a requirement to build a ventilated structure over a tank car left on a rail siding at production facility. This is undoubtedly a costly burden, but in the court's view it was traceable to Los Angeles, not to the DOT regulation. Moreover, the challengers had not shown that invalidating the rule would result in a new requirement that would preempt the Los Angeles code provision.

Beyond that specific example, industry argued that the DOT regulation left a "gap in safety regulation" or "void" such that "members of Petitioners that ship hazardous materials ... cannot rely upon any meaningful federal or state regulations to protect either their products or the tank cars in which those products move." But industry had not submitted any affidavits specifically identifying such burdens. Rather, industry relied upon the rulemaking record which, as the court noted, was not compiled for the purpose of demonstrating their injury-in-fact, and which did not adequately serve that purpose. Again, the court could not determine whether the alleged burdens or risks were traceable to the DOT regulation, rather than, for example, to the industry's own practices. Ultimately, the record was inadequate to support standing, but the majority explicitly did not preclude the possibility that industry could at some point make an adequate showing in such a challenge.

Judge Rogers dissented at considerable length and with considerable heat. She began with the proposition that standing was self-evident since the challenge was brought by the regulated industry. Beyond that, she was more willing to credit industry assertions, and she was prepared to delve more deeply into the administrative record to find support for standing.

Who was right? Probably the majority, unless industry always has standing to argue that federal regulation should be extended still further in order to preempt and thereby avoid the burdens of state or local regulation. The problems of traceability and redressability are very real. Even if a new regulation extended the reach of federal control, there would still be questions of whether it was possible to comply with both state and federal regulations or whether the local requirement posed an obstacle to carrying out the federal regulation. Without detailed and specific descriptions of the burdens or hazards,

continued on next page

these are imponderables sufficient to prevent finding standing. Moreover, the industry is in the best position to make such a showing, which would then define the issues much more sharply. Those who challenge an agency's failure to act need to establish quite clearly how that failure will cause redressable harm.

DC Circuit on Legal Force of Post-Treaty Agreements

The United States is a party to the Montreal Protocol, which requires reductions in the production and use of methyl bromide, an ozone-depleting chemical. The Protocol also provides for a post-treaty process through which exemptions may be agreed to for "critical uses." In Decision IX/6, the parties to the Protocol established guidelines for establishing critical use exemptions. In Decision EX I/3, the parties then agreed to certain critical use exemptions for methyl bromide in the United States. Pursuant to those agreements, EPA issued a rule purporting to implement these critical use exemptions.

In *NRDC v EPA*, 464 F.3d 1 (D.C. Cir. 2006), NRDC challenged the EPA rule as contrary to the decisions that it purported to implement. After initially denying standing on the ground the rule posed only a trivial risk, the D.C. Circuit reversed itself upon a showing that EPA's documents established a lifetime risk that one person in 200,000 would contract non-fatal skin cancer. This represented two of NRDC's approximately 500,000 members, enough to support standing.

NRDC stumbled, however, over the intricacies of international law. Expressing concern about the constitutionality of recognizing post-treaty agreements as binding on courts and agencies, the majority interpreted "the Clean Air Act and Montreal Protocol as creating an ongoing international political commitment rather than a delegation of lawmaking authority to annual meetings of the Parties." Thus, not having been agreed to by Congress, these post-treaty agreements did not become the law of the land. Rather, they were enforceable among the Protocol parties through international negotiations. But there was no basis in law for NRDC's challenge.

Concurring in the result and much of the analysis, Judge Edwards wrote that, "we do not decide here whether, once the United States undertakes a substantive obligation in a treaty, and at the same time undertakes to abide by the result of a specified dispute resolution process before an international tribunal, it is bound by the judgments of the tribunal no less than it is by the treaty that is the source of the substantive obligation." In so doing, he sought to distinguish the Protocol's "agreement to agree" from a circumstance in which the United States agrees in a treaty to accept later resolutions

of disputes over the interpretation of the treaty obligations. Under his approach, that sort of post-treaty decision would have the force of law and could, it seems, be the basis for a challenge such as this one.

3d Circuit – State FOIA May Not Limit Access to Citizens of State

According to the Third Circuit, the Privileges and Immunities Clause prohibits a state from limiting access to state records to citizens of that state. *Lee v. Miner*, 458 F.3d 194 (3d Cir. 2006). Matthew Lee, a journalist and consumer advocate living in New York, sought certain records related to Delaware's handling of alleged deceptive lending practices. The Delaware FOIA provided that "All public records shall be open to inspection and copying by any citizen of the State." Delaware denied Lee's request because he was not a citizen of Delaware.

The Privileges and Immunities Clause, under which Lee challenged Delaware's decision, provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2. As the Supreme Court has said, "[t]he section, in effect, prevents a State from discriminating against citizens of other States in favor of its own."

As simple as that may sound, the Clause does not prohibit all discrimination against citizens of other states. A state may, for example, limit the franchise to its own citizens, and it may charge higher hunting license fees to nonresidents. But it may not discriminate, for example, as to "the pursuit of a common calling, the ownership or disposition of privately held property, and access to the courts." The Supreme Court has established a three-part test to determine whether a state action violates the Clause. A "court must: (1) determine whether the policy at issue burdens a right protected by the Privileges and Immunities Clause; (2) consider whether the state has a 'substantial reason' for the discriminatory practice; and (3) evaluate whether the practice bears a substantial relationship to the state's objectives."

The Third Circuit accepted Lee's argument that his right to engage in the political process as to issues of national and economic importance was protected by the Clause. Since access to information is essential to effective advocacy, Delaware's FOIA limitation burdened a protected right. Delaware argued that the limitation was nonetheless justified by its interest in defining "the political community and strengthen[ing] the bond between citizens and their government." Although this is a legitimate goal, the court could see no reason why limiting access to state citizens would help in achieving it. Prohibiting non-citizen access had no substantial relationship to the goal of strengthening the state's internal political community. ○

Recent Articles of Interest

By Yvette Barksdale*

1. **Douglas A. Kysar and Thomas Owen McGarity, *Did NEPA Drown New Orleans? The Levees, the Blame Game, and the Hazards of Hindsight***, Forthcoming, 56 Duke L.J. ____ (2006). Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=928869. This article examines the claim that a 1970s lawsuit filed under the National Environmental Policy Act (NEPA) caused the failure of the New Orleans levees after Hurricane Katrina. The article examines in detail i) the history of the levee system, ii) the technical reasons the levees collapsed, and iii) the extensive debate over what was to blame. The article attempts a reconstructive analysis of why the levees might have failed, drawing lessons for the difficult problems of uncertainty and complexity that confound both efforts to reconstruct the causes of past catastrophic disasters, and efforts to prevent future ones.
 2. **Eleanor D. Kinney, William M. Sage, *Resolving Medical Malpractice Claims In The Medicare Program: Can It Be Done?***, 12 Conn. Ins. L.J. 77 (2005-6). This article explores the feasibility and legality of Medicare-led malpractice reform. The authors advocate the establishment of a medical malpractice adjudication and compensation system for Medicare beneficiaries to be located in the Medicare program, as an administrative alternative to malpractice litigation. Such a program would use Medicare's existing administrative infrastructure to foster medical-malpractice reform. The article analyzes in detail both the practical feasibility and overall vision of the proposal, including its substantive and procedural components, and legal authority. Such a proposal would 1) improve the efficacy of medical malpractice claims for Medicare beneficiaries, and 2) convert medical malpractice reform from its role as a mere peg in the overall tort reform movement, to a health policy issue which affects the quality, cost and availability of medical care.
 3. **Nancy Staudt, *Redundant Tax And Spending Programs***, 100 Nw. U.L. Rev. 1197 (2006). This article addresses the problem of multiple bureaucracies working on the same problem, often at cross-purposes. One example is an anti-poverty program which subsidizes jobs while another agency cuts the job recipients' benefits because their income has increased. Such interagency coordination problems
- often lead to proposals to consolidate the regulatory system into one institutional structure. The author analyzes the complex choice between the single and multiple regulatory structures, including each structure's benefits and disadvantages. The author also suggests alternative methods of control. One example is a system of performance-based budgeting ("PBB"), which allows parallel committees to continue their design work, while simultaneously forcing legislators to assess their policy output and to undertake necessary reforms.
4. **Douglas A. Kysar, *Discounting, on Stilts***, 74 U. Chi. L. Rev. ____ (2006-7). This article critiques Cost-Benefit Analysis' (CBA) use of present value discounting to account for future costs and benefits. The author argues that such discounting subsumes vital questions of intergenerational equity, and thus significantly undervalues the future consequences of present regulatory action, whether involving human life, or ordinary resources. The author disputes conventional justifications for future discounting such as presumed consumer preferences for having it now rather than later, and presumed investment gains which future generations would reap from present benefits.
 5. **John Cary Sims, *What Nsa Is Doing . . . And Why It's Illegal***. 33 Hastings Const. L.Q. 105 (2006). This article evaluates the constitutionality of the National Security Agency's electronic surveillance program. The article discusses 1) the history of the Foreign Intelligence Surveillance Act (FISA) warrant system, 2) the operation of the National Security Agency (NSA) and 3) how the disputed electronic surveillance program changed prior practice. The article concludes that program as currently constituted is inconsistent with FISA, and is not sanctioned under either the Authorization for the Use of Military Force (the "AUMF") or the United States Constitution.
 6. **Robert Chesney, *Unraveling Deference: Hamdan, the Judicial Power, and Executive Treaty Interpretations***, Forthcoming, ____ Iowa L. Rev. ____ (2007), Available at SSRN: <http://ssrn.com/abstract=931997>. The author, disagreeing with the minimal deference position taken by the Supreme Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), argues that Courts should apply an intermediate level of deference to executive interpretations of foreign treaty obligations. The author 1) discusses current scholarly positions, which include advocates of total judicial deference, "Rule of Law" proponents of a strong judicial role and "middle of the road" advocates of *Chevron*-type judicial deference, and 2) examines frequently inconsistent past Supreme Court approaches to treaty interpretation.

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continued on next page

Recent Articles of Interest

The author concludes that Courts should defer to reasonable executive interpretations of ambiguous treaty language unless the court can specify other evidence establishing a contrary original intent of the treaty parties.

7. **Michael W. McConnell, *Active Liberty: A Progressive Alternative To Textualism And Originalism?***, 119 Harv. L. Rev. 2387 (2006) (reviewing **Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2005)**). Michael McConnell reviews Justice Stephen Breyer's book *Active Liberty, Interpreting our Democratic Constitution*. McConnell applauds Breyer for staking out moderate territory and thus belying misleading media characterizations of the federal judiciary as entrenched in battles between warring conservatives and liberals. However, Michael McConnell argues, Breyer's "active liberty" thesis, in which one constitutional value is to encourage active participation by citizens in government, is much more consistent with limited federal government, and may have adverse implications for strong national government and rights protective positions that Breyer has taken on the bench.
8. **Jack M. Beermann, *Congressional Administration***, 43 San Diego L. Rev. 61 (2006). In this article, the author advocates giving more attention to Congress' legislative and post-legislative formal and informal role in supervising and controlling administrative decisionmaking. The author describes in depth a variety of Congressional supervisory mechanisms such as appropriations, private bills, reporting requirements, advise and consent duties, and informal oversight processes. This strong Congressional role in the day-to-day supervision of administrative agencies has strong implications for a variety of fundamental administrative law principles and doctrines, such as the nondelegation doctrine, *Chevron* and *Vermont Yankee*.
9. **Matthew R. Hall, *Constitutional Regulation of National Security Investigation: Minimizing the Use of Unrelated Evidence***, 41 Wake Forest L. Rev. 61 (2006). This article proposes a method of limiting the potential for abuse of information obtained by the government's expanded post-9/11 national security investigation and surveillance powers. The author describes in depth the vast array of the government's national security investigation powers, fundamental concerns about the scope of such powers, and the likely doctrinal structure under which the constitutionality of these powers would be analyzed. The author then advocates a judicially enforced "use limit" on information obtained through such national security investigations. The "use limit" would prohibit the use of information obtained in such national security investigations for any non-national security purpose, such as prosecution for a non-national

security related crime. The author argues that such a use limit would reduce the incentive for government officials to use national security investigations as a pretext to acquire information for other purposes.

Symposia of Interest

1. **The Contemporary Regulatory State**, 33 Fordham Urb. L. J. 953 - 1319 (2006), includes articles by: i) Graham, John D., Paul R. Noe and Elizabeth L. Branch. *Managing The Regulatory State: The Experience Of The Bush Administration*, p. 953; ii) Viscusi, W. Kip. *Monetizing The Benefits Of Risk And Environmental Regulation*. p. 1003; iii) Scales, Adam F. *How Much Is That Doggy In The Window? The Inevitably Unsatisfying Duty To Monetize*, p. 1045; iv) Ackerman, Frank, *The Unbearable Lightness Of Regulatory Costs*, p. 1071; v) Heinzerling, Lisa. *Statutory Interpretation in the Era of OIRA*, p. 1097; vi) Holman, Keith W. *The Regulatory Flexibility Act At 25: Is The Law Achieving Its Goal?*, p. 1119; vii) Hopkins, Thomas D. *An Assessment Of Cross-National Regulatory Burden Comparisons*, p. 1139; viii) McGarity, Thomas O. *Resisting Regulation With Blue Ribbon Panels*, p. 1157; ix) See, Michael R., *Willful Blindness: Federal Agencies' Failure To Comply With The Regulatory Flexibility Act's Periodical Review Requirement—And Current Proposals To Invigorate The Act*, p. 1199; x) Copeland, Curtis W. *The Role Of The Office Of Information And Regulatory Affairs In Federal Rulemaking*, p. 1257; xi) Katzen, Sally, *Cost-Benefit Analysis: Where Should We Go From Here?*, p. 1313.
2. **Modern Federalism Issues and American Business**, 41 Wake Forest L. Rev. 619 - 912 (2006). Articles include: i) William W. Bratton and Joseph A. McCahery, *The Equitable Content of Corporate Federalism*, p. 619; ii) Martha Chamallas, *Shifting Sands of Federalism: Civil Rights and Tort Claims in the Employment Context*, p. 697; iii) Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, p. 719; iv) Sherry L. Jarrell, Gary Shoesmith, and J. Neal Robbins, *Law and Economics of Regulating Local Economic Development Incentives*, p. 805; v) Robert H. Jerry, II and Steven E. Roberts, *Regulating the Business of Insurance: Federalism in an Age of Difficult Risk*, p. 835; Renee M. Jones, *Does Federalism Matter? Its Perplexing Role in the Corporate Governance Debate*, p. 879; Jennifer B. Lawrence and Jackson W. Prentice, *The SEC Form 8-K: Full Disclosure or Fully Diluted? The Quest for Improved Financial Market Transparency*, p. 913.
3. **War, Terrorism, and Torture: Limits on Presidential Power in the 21st Century**, 81 Ind. L. J. 1139 - 1425 (2006). Includes Foreword by Dawn Johnsen, p. 1139; ARTICLES by i) Harold Hongju Koh, *Can the President Be*

Torturer in Chief?, p. 1145; ii) Neil Kinkopf, *The Statutory Commander in Chief*, p. 1169; iii) Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, p. 1200; iii) Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, p. 1255; iv) Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, p. 1297; v) H. Jefferson Powell, *The Executive and the Avoidance Canon*, p. 1313; vi) Saikrishna Prakash, *Regulating the Commander in Chief: Some Theories*, p. 1319; vii) Christopher H. Schroeder, *Loaded Dice and Other Problems: A Further Reflection on the Statutory Commander in Chief*, p. 1327; viii) William Michael Treanor, *The War Powers Outside the Courts*, p. 1333; and DOCUMENTS, i) *Guidelines for the President's Legal Advisors*, p. 1346; and ii) *The National Security Agency's Domestic Spying Program: Framing the Debate*, p. 1355.

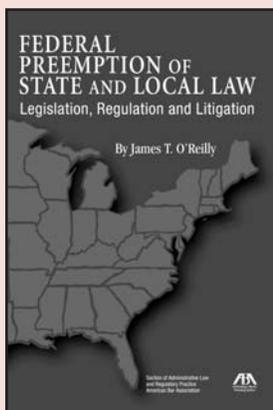
4. **Emergency Powers and the Constitution**, 40 Ga. L. Rev. 699 – 914 (2006) ; Article, Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, p. 699; Comments, Philip Bobbitt, *Waging War Against Terror: An Essay for Sandy Levinson*, p. 753; Kevin Jon Heller, *The Rhetoric of Necessity (Or, Sanford Levinson's Pinteresque Conversation)*, p. 779; Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, p. 807; Kim Lane Scheppele, *Small Emergencies*, p. 835; William E. Scheuerman, *Time to Look Abroad? The Legal Regulation of Emergency Powers*, p. 863; Mark Tushnet, *Meditations on Carl Schmitt*, p. 877; Response, Sanford Levinson, *The Deepening Crisis of American Constitutionalism*, p. 889.

5. **Spies, Secrets and Security: The New Law of Intelligence**, 17 Stan. L. & Pol'y Rev. 233 – 562 (2006), i) Richard A. Epstein, *Our Ignorance About Intelligence*, p. 233; ii) Patricia M. Wald, *Analysts & Policymakers: A Confusion Of Roles?*, p. 241; iii) Craig S. Lerner, *Calling A Truce In The Culture Wars: From Enron To The CIA*, p. 277; iv) Michael Warner, *Legal Echoes: The National Security Act Of 1947 And The Intelligence Reform And Terrorism Prevention Act Of 2004*, p.303; v) Kristan J. Wheaton and Michael T. Beerbower, *Towards A New Definition Of Intelligence*, p. 319; vi) U.S. Senator Ron Wyden, *Law And Policy Efforts To Balance Security, Privacy And Civil Liberties In Post-9/11 America*, p. 331; Martin E. Halstuk, Ph.D., Eric B. Easton, J.D.; vii) *Of Secrets And Spies: Strengthening The Public's Right To Know About The CIA*, p. 353; viii) Tom Lininger, *Federalism And Antiterrorism Investigations*, p. 391; ix) Fred F. Manget, *Intelligence And The Criminal Law System*, p. 415; x) Diane Carraway Piette and Jesselyn Radack, *Piercing The "Historical Mists": The People And Events Behind The Passage Of FISA And The Creation Of The "Wall,"* p. 437; xi) David S. Kris, *The Rise And Fall Of The FISA Wall*, p. 487; xii) Stephen J. Schulhofer, *The New World Of Foreign Intelligence Surveillance*, p. 531.

See also:

6. **Symposia: Looking Backward, Looking Forward: The Legacy of Chief Justice Rehnquist and Justice O' Connor**, 58 Stan. L. Rev. 1661 – 1996 (2006), and **The Jurisprudence of Justice Stevens**, 74 Fordham L. Rev. 1557 (2006). ○

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CA Supreme Court Shuts Off Ex Parte Communication Between Prosecutors and Adjudicators

By Michael Asimow¹

Many agencies mix the functions of prosecution and adjudication. Agency staff members prosecute cases against outsiders and agency heads make the final decision in those cases (usually after an ALJ decision). Agency head decisions are often quite important and are used as the vehicle for announcing principles of law and policy. Agency heads are often part-timers and non-lawyers, and they desperately need staff assistance. However, the principle of separation of functions prohibits ex parte communication between adjudicatory decisionmakers (including agency heads) and agency adversaries (such as prosecutors or investigators in the case under review). Thus only staff members who have no prior involvement in a pending case are permitted to furnish ex parte advice to agency heads.

Under the federal APA, because of the obscure “agency heads” exception in §554(d)(C), it remains unclear to this day whether prosecutors can talk to agency heads off the record about pending cases, but most authorities believe they can’t. Under state law, the 1981 Model Act prohibits such contacts, but unfortunately was adopted in very few states. The 1981 Act was followed on this point by the California APA amendments enacted in 1995. The CA amendments situated separation of functions within an “Administrative Adjudication Bill of Rights” applicable to all agency hearings required by statute or by due process.

Old habits die hard, however, and the California Alcoholic Beverage Control Department didn’t get the message. When the Department loses an ALJ decision, the prosecutor sends an ex parte message to the ABC’s director summarizing the evidence in the case and recommending whether the Director should reject or adopt the ALJ’s decision. In *Quintanar*, a central-panel ALJ tossed out a complaint against several liquor licensees for serving intoxicated patrons. The prosecutor sent the usual memo to the Director (although the ABC refused to disclose its contents). The Director rejected the ALJ decision and imposed suspensions on the licensees.

In a resounding unanimous decision, the Supreme Court told the ABC to get with the program. *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (Quintanar), 06 C.D.O.S. 10464 (Nov. 13, 2006). The California Law Revision Commission, which had recommended the 1995 legislation, wanted to separate the functions of prosecution and adjudication and to prevent prosecutors from bending the ear of adjudicators. The Court’s decision implements that intention and entrenches the principle of internal separation of functions

in California law. The decision recognizes that agency heads can receive off-the-record advice from any agency staff member (even staff who are prosecutors in other cases), “but the one contact that is forbidden is the one contact that occurred here.” The Court wisely declined to decide the case on due process principles (as a lower court had done) and relied solely on the APA.

Florida: Administration Commission Asked To Grant Exemption to APA

By Larry Sellers & Robin Rosenberg²

A little-used provision in Florida’s Administrative Procedure Act (APA) authorizes the Administration Commission—comprised of the Governor and Cabinet—to exempt any process or proceeding governed by the APA from one or more of the requirements of the APA, if certain conditions are met. The Commission may not exempt an agency from any requirement until it establishes alternative procedures to achieve the agency’s purpose, which must be consistent with the intent and purpose of the APA. An exemption and any prescribed alternate procedures terminate 90 days after the then-current or next regular legislative session. See Section 120.63, Florida Statutes.

On August 22, 2006, the Agency for Persons With Disabilities (APD) filed a petition with the Administration Commission seeking an exception to the provision in the APA that generally mandates that all hearings are to be conducted by an administrative law judge from the Division of Administrative Hearings (DOAH), a central panel of administrative law judges. The petition is a direct response to the decision in *J.M. vs. APD*, 31 FL.W.D2121 (Fla. 1st DCA 2006). The *J.M.* decision reversed APD’s order denying J.M. a DOAH hearing on his challenge to APD’s decision to reduce his benefits under the Medicaid waiver for persons with developmental disabilities. Prior to the *J.M.* decision, APD referred all requests for administrative hearings to the hearing officers in the Department of Children and Family Services (DCFS).

The Court ruled that the explicit language in the developmental services statutes, Chapter 393, F.S., required the provision of a DOAH hearing to persons challenging the denial of eligibility for or the reduction of developmental services. The court rejected APD’s assertion that the exception created for social and economic programs administered by the DCFS should be applied to the developmental services that are provided by APD under the Medicaid Waiver. The Court required APD to provide a formal hearing to applicants and clients of the agency.

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² Larry Sellers is a partner with Holland & Knight LLP, practicing in the firm’s Tallahassee office. Robin Rosenberg is pro bono counsel for Holland & Knight’s Florida offices practicing in the firm’s Tampa office.

In its petition for exemption, APD sets forth the grounds for its request for an exception to the requirement that DOAH hear challenges to APD's factual determinations concerning the provision of services to its clients. The petition does not set out the specific alternative requested from the Administration Commission. But the petition concludes by stating that APD "intends to seek an amendment to Chapter 120 during the 2007 Legislative session that would permit the continuation of the current fair hearing process with the DCFS hearing officers and thereby provide the Legislature with the opportunity to determine whether the current system is maintained, or to fund [an] alternative to that system."

The Executive Office of the Governor held a public hearing on the APD petition for exemption on September 25, 2006. As of this writing, the Commission has not yet acted on the petition.

Home Improvement Contractor Takes Bath

By Molly Klapper³

Would the Court support a homeowner deliberately hiring an unlicensed contractor and then refusing to pay anything for three custom-made and installed shower doors and a bathroom mirror – on the grounds that the contractor was unlicensed?

Plaintiff Precision Mirror & Glass learned the hard way that the answer is "yes" under NYC's Administrative home improvement licensing code. After the defendant-homeowner refused to pay for the three shower doors and bathroom mirror he had ordered custom made and installed in the home, plaintiff commenced suit seeking \$6,246.00 for breach of contract damages.

Defendant argued that plaintiff's lack of a home improvement license barred recovery and entitled him to summary judgment as a matter of law and dismissal of the complaint. Plaintiff countered that no such license was necessary because the type of work he performed did not fall within the purview of the code's "home improvement" statute, but rather were cosmetic or aesthetic improvements, in the nature of interior decorating.

While conceding that the "home improvement" code does not specifically refer to shower doors, Judge Kenneth P. Sherman of the New York City Civil Court in Staten Island rejected all of plaintiff's arguments. On the basis of public

policy grounds, the project's cost, and some of plaintiff's own actions, he granted summary judgment in favor of the defendant and dismissed the Complaint.

The Court began by emphasizing that consumer safety lies at the heart of the licensing requirements, and that shower doors may involve serious safety issues not apparent to a consumer's naked eye. The Court further noted that the purpose behind the enactment of the licensing requirements was to protect the consumer from unscrupulous contractors. Since the cost of these shower doors was not de minimis, the Court found unpersuasive plaintiff's rationalization that the doors should be regarded as merely cosmetic.

Finally, the court noted that plaintiff routinely issues a Certificate of Capital Improvement after installing shower doors, for sales tax purposes. New York's Tax Law defines "capital improvement" as an "addition or alteration to real property which substantially adds to the value of the property and becomes a part thereof." Issuance of these Certificates contradicted plaintiff's assertion that the shower doors serve merely aesthetic purposes. To allow the plaintiff to recover under these circumstances would frustrate the legislative intent of the statute.

Unlicensed contractors be forewarned. The Court will not lend its imprimatur to a contract that allows an unlicensed home improvement contractor to undertake work that carries serious safety risks – even where the home owner is aware that the contractor is unlicensed and even where the homeowner planned to take advantage of its absence. See *Precision Mirror & Glass v. DiCostanzo*, 2006 NY Slip Op 50407 (NY Richmond Cty.); 11 Misc. 3d 1066(A); 2006 WL 721285; New York Law Journal, March 30, 2006 (<http://www.law.com/jsp/nylj/index.jsp>).

Not Enough Dynamite

By William S. Morrow, Jr.⁴

On June 23, 2006, over the veto of Republican Governor Robert L. Ehrlich, Jr., the Democratically controlled Maryland legislature passed a bill to remove the sitting members of the Maryland Public Service Commission (PSC) and require the Governor to pick their replacements from a list of candidates

³ Professor, Touro Law Center; Administrative Law Judge, City of New York.

⁴ Editor-in-Chief.

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Section News & Events

Homeland Security Committee Hosts Brown Bag Luncheon with DHS General Counsel Phil Perry

By Joel A. Webber¹

While known to the general public for its large strategic questions, Homeland Security increasingly poses tactical challenges to practicing lawyers. On September 15, the Administrative Law Section's Homeland Security Committee took a vital step toward building and equipping a homeland security bar, by holding the first of a series of brown bag lunches and teleconferences.

Designed to offer direct guidance on this growing body of law by the agency lawyers who are creating and administering it, DHS General Counsel Phil Perry launched this series with a briefing on The SAFETY Act under the Final Revised Rule effective last July. His Associate General Counsel for Rules and Legislation, Joseph Maher, and the Chief of Staff of the DHS Office of General Counsel (and SAFETY Act expert), Mark Robertson participated with Perry.

As Perry describes it, the Statute addresses two post-9/11 legal issues: New sources of legal liability and harmonization with the indemnification traditional to federal contracting. Deliberation on the Final Rule – as General Counsel Perry recounted – focused on two problem areas: 1) Unnecessary bureaucratic hurdles to SAFETY Act applicants; and 2) Lack of clarity on the preconditions and scope of SAFETY Act protections once such applications were granted.

Before coming to DHS as General Counsel, Perry had represented SAFETY Act applicants in private practice, and thereby brought with him a practitioner's set of concerns. Moreover, his boss, DHS Secretary Chertoff, noted publicly after taking office early in 2005 that only six SAFETY Act applications had been granted and targeted operative improvements as a priority.

The following highlights emerge in the Final Rule:

- **Better “procurement shop” interaction with the “SAFETY Act shop”:**

Earlier lack of coordination between procurement operations and DHS' SAFETY Act office could present providers with a bad choice: Submit their technology for a lengthy SAFETY Act review and miss a procurement deadline – or forgo SAFETY Act protection in order to meet that deadline. The frequent result: “No-bid” responses on useful technologies.

Under the Final Rule, a government agency (federal, state or local) can ask DHS for a provisional SAFETY Act response, and under specified circumstances DHS will expedite SAFETY Act review. By enabling parallel paths of

action, the dilemma is avoided, and (hopefully) the need for a “no-bid” response with it.

- **Uncertainty as to scope of SAFETY Act coverage:**

Reflecting on the need to advise a client without unnecessary equivocation, Perry made a couple of observations. First, where a DHS SAFETY Act “designation” or “certification” covered specified technology functionality under the Interim Rule, practitioners feared that a change in that functionality could result in automatic SAFETY Act termination, retroactive to the time of change and without any notice to the firm involved.

Now, as Perry put it: “If you operate outside the scope of designation or certification, let us know.” Notify DHS of such a change under the new procedures, and DHS has the burden to respond. If they do not, SAFETY Act coverage of the technology – as modified – is conclusively established.

Second, in what manner must an “act of terrorism” impact the United States to trigger the SAFETY Act's protections? Earlier DHS guidance in the Interim Rule had stated that “harm” to the United States was the focus, and there was “no geographic requirement in the definition.” In the Final Rule DHS specifies under the Department's definitional powers that such “harm” can take the form of financial impact in the United States – regardless of where an incident took place geographically.

- **Reliable SAFETY Act coverage while that technology itself is undergoing development and change:**

Under the Interim Rule, vendors risked liability if they conducted tests prior to “going final” under SAFETY Act designation or certification. The Final Rule creates a new category of “Developmental Testing and Evaluation”. This will protect developers as they perfect their technologies.

Perry's final comments went to the need for a homeland security bar – a group of practicing attorneys who can explain to private sector and other non-federal parties this new framework of DHS policies embodied in statutes, rules and other sources.

Five years after September 11, the need for such a bar is acute. Lawyers for DHS and other federal agencies struggle to respond to dramatic new threats under severe time pressures, novel circumstances, and the watchful gaze of a demanding Congress. And as terrorism dominates the front page, the Federal response to it presents new quandaries to attorneys counseling businesses, state and local governments, and non-profits.

The Administrative Law Section's Homeland Security Committee took an important step to that goal with this and future monthly meetings. ○

¹ Vice Chair Homeland Security Committee.

drawn up by the President of the Senate and the Speaker of the House.

The occasion for “blowing up” the PSC, as some commentators put it, was the legislature’s discontent with the PSC’s (and the Governor’s) response to a looming 72% electric rate increase proposed by the state’s largest utility following the expiration of a statutory cap on retail rates that had been in place since 1999. Oh. And did I mention it was an election year?

The incumbent PSC chairman, Kenneth D. Schisler, sued and lost at the trial level but won on appeal when Maryland’s highest court, the Court of Appeals, declared the statute “null and void as an unconstitutional usurpation of the removal power granted to the Governor” by the Maryland Constitution. *Schisler v. Maryland*, 394 Md. 519 (Sept. 14, 2006).

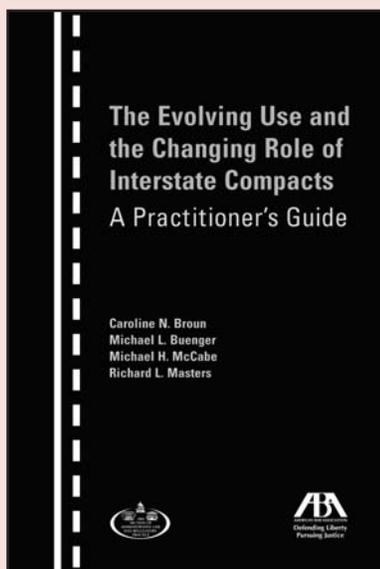
The Court went on to say, however:

The Legislature is free, if it wishes, to abolish or restructure the Public Service Commission, even if that causes the incumbent Commissioners to lose their offices. In restructuring the agency, it may provide a method of appointment other than by the Governor; it may provide for different terms; it may provide for additional or different qualifications for the office; and it may provide for additional or different duties for the agency. What it may not do is to leave the agency more or less intact and simply fire the gubernatorial appointees it does not like by prematurely ending their terms and immediately replacing them with its own choices.

I guess the moral of the story is, next time – if there is a next time – use more TNT. 

From the ABA Section of Administrative Law and Regulatory Practice **The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner’s Guide**

By Caroline N. Broun, Michael L. Buenger, Michael H. McCabe, Richard L. Masters



This book seeks to fill the existing void in this emerging area of law by addressing both the theoretical principles behind interstate compacts and the very practical implications of operating in the compact environment. It is intended to serve not only as a reference for lawyers, but also as a practical guide for legislators, drafters, compact administrators, students, and other parties interested in the development of, or subject to interstate compacts. Thus, some chapters provide a theoretical basis for compacts, while other chapters offer a very practical perspective on compacts and the potential issues one may face in working with interstate compacts or litigating under such agreements. Finally, the book provides both practitioners of the law and others with a perspective on the complexity of compacts and their interaction with other agreements, state laws, and federal laws.

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Chair's Message *continued from inside front cover*

Former Section Chair Randy May announced the first annual Gellhorn–Sargentich Law Student Essay Competition winner with a moving homage to Professors Ernie Gellhorn and Tom Sargentich. The winner, Southern University Law Center student Kari Bergeron, whose winning entry (published in the Fall 2006 issue of the *News*) intriguingly blends the blues, Muddy Waters, and the Clean Water Act, graciously accepted her award while squeezing in a plug for visiting New Orleans and rooting for one of the NFL's most inspiring stories this year, the Saints. FCC Chairman Kevin Martin then talked about the importance of administrative law and lawyers to his agency and shared some interesting thoughts on the Supreme Court's *Brand X* decision, which had been the subject of a morning panel.



*(Left) Lydia Quarles,
Mary Lawton Co-Winner*

*(Below) John Cruden,
Mary Lawton Co-Winner*



Lunch was immediately followed by fireworks galore among ardent advocates on varying sides of battles about: redistricting and the meaning of the Supreme Court's decision in *LULAC v. Perry*; the legality of remaining state constraints on the marketing of wine in the wake of *Granholm v. Heald*; and the authority of federal agencies, particularly the US Food and Drug Administration, to preempt state tort suits.

Later in the afternoon, panelists debated the ABA's controversial resolution opposing the misuse of presidential signing statements and discussed the feasibility of setting international election standards. The latter panel is the first step in what will be an ongoing project to identify the need for and articulate international standards on, among other things, party/candidate identification, election administration,

voting, and contests and recounts. Our plan is that these standards ultimately will be: presented to, and (we hope) adopted by, the ABA; embodied in a book; and, eventually, shared with other countries and perhaps used by those who monitor elections in emerging democracies.

The evening reception and dinner were held in the venerable Willard Hotel, where Abraham

Lincoln stayed while awaiting his inauguration and where Julia Ward Howe penned the "Battle Hymn of the Republic." The reception featured four of the five members of the Federal Energy Regulatory Commission, and U.S. Solicitor General Paul Clement spoke about the work of his office over dessert.

The next morning was occupied by the signal program of the conference, the annual review of recent developments of administrative law. This program, which I find one of the most valuable services offered by our Section, affords busy practitioners an efficient means for keeping abreast of developments in adjudication, rulemaking, and judicial review, and this year included a most humorous presentation on *Chevron*, *Mead*, and *Auer* deference, by William Mitchell Law Professor Richard Murphy.

The afternoon featured a panel in which yours truly participated – as well as current and past general counsels from EPA, OPM, and the Departments of Energy and Commerce. We addressed the delicate balance general counsels must strike in providing both legal and policy advice, as well as seeking to articulate how an agency lawyer can ensure compliance with the rule of law without being cast as the "abominable no-man" (or woman).

We closed the meeting the next day with our Saturday Council meeting in the cozy confines of the ABA's Washington office. We debated the course the Section should take over the next few years, which, it was generally agreed, should focus on Section efforts to achieve sound financial footing, foster improvements to the rulemaking process, and assist general counsels in deciding between rulemaking and guidance.

We invite you to our Miami, Austin, and San Francisco meetings, where the Section will continue its tradition of conviviality and contemplation with (we hope) your help! 



*Kari Bergeron (student essay winner)
& Randy May*

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OFFICERS AND COUNCIL

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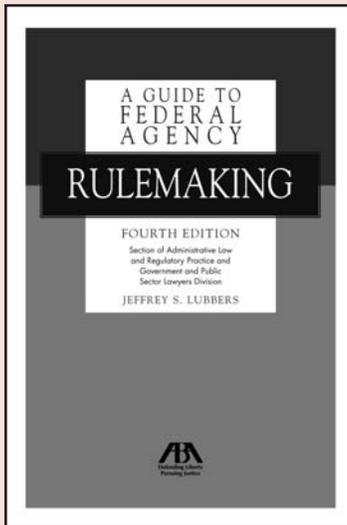
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**New! From the ABA Section of Administrative Law and Regulatory Practice
and the ABA Government and Public Sector Lawyers Division**
A Guide to Federal Agency Rulemaking, Fourth Edition



By Jeffrey S. Lubbers

This fourth edition brings the essential *Guide to Federal Agency Rulemaking*, formerly published by the Administrative Conference of the United States (ACUS), completely up to date. A concise but thorough resource, the *Guide* provides a time-saving reference for the latest case law, and the most recent legislation affecting rulemaking. This manual provides agency rulemakers, participants in rulemaking and judicial review, and private practitioners with valuable insights into how federal rules are made, with an integrated view of the procedural requirements.

The new edition of *A Guide to Federal Agency Rulemaking*, written by Jeffrey S. Lubbers, former ACUS Research Director, retains the basic format of the previous editions while building upon the strong foundation established by ACUS in the previous editions. This fourth edition of *The Guide*, contains an index, and is organized into five parts:

- Part I is an overview of federal agency rulemaking and describes the major institutional “players” and historical development of rulemaking.
- Part II describes the statutory structure of rulemaking, including the relevant sections of the Administrative Procedure Act (APA).
- Part III contains a step-by-step description of the informal rulemaking process, from the preliminary considerations to the final rule, including a discussion of e-rulemaking.
- Part IV discusses judicial review of rulemaking with an expanded decision of the *Chevron* caselaw.
- Part V Appendices include key rulemaking documents.

This is an indispensable guide for anyone developing or drafting federal agency rules. Order your copy today.



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