

ADMINISTRATIVE & REGULATORY LAW NEWS

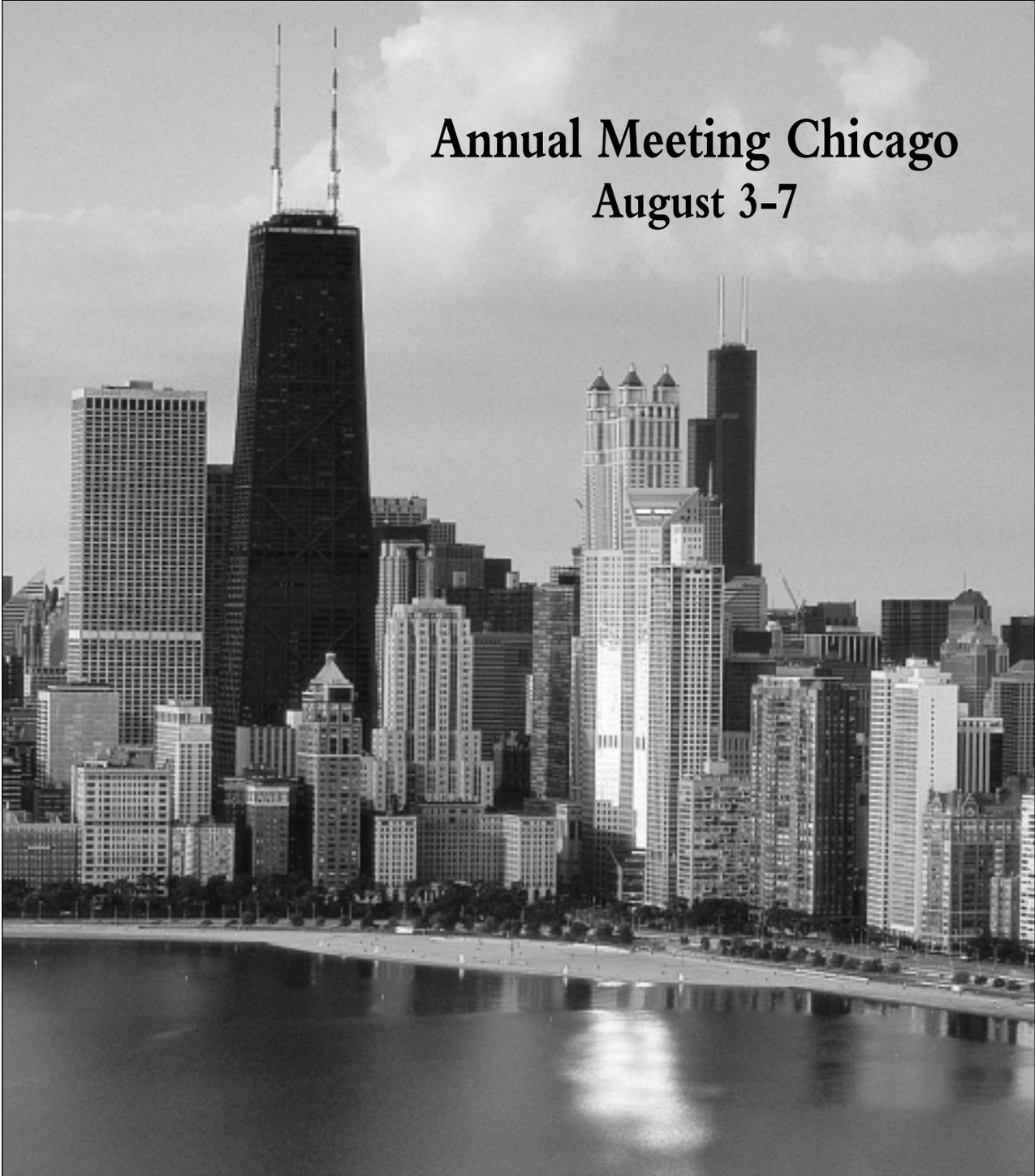


Section of Administrative Law & Regulatory Practice

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Annual Meeting Chicago August 3-7

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Chair's Message



Ron Levin

One Last Haul, via American Trucking

One of the principal missions of our Section is to lead the way toward modernization of government in light of new realities. Several of this year's major Section policy initiatives reflect this theme. As has been chronicled at greater length elsewhere in these pages, we are sponsoring in the House of Delegates a resolution, drafted by Peter Strauss, to promote best practices for the use of Internet technology at regulatory agencies. Also headed for House action this summer is a resolution, spearheaded by Sid Shapiro, to facilitate public participation in inter-country efforts to harmonize domestic and foreign regulations. Still another notable initiative is our project to articulate standards defining the role of ombudsmen in both the public and private sectors. Phil Harter and Sharan Levine have played major roles in the Section's painstaking negotiations over these standards, which we hope will culminate in ABA adoption at the Annual Meeting.

Closely related to the need to adapt to new technological and social realities is the need to prune away features of administrative law that have proved obsolescent. The latter objective brings me to the main subject of this message. My point of departure is a case that was billed for months as the major administrative law event of the current Supreme Court Term. In *Whitman v. American Trucking Ass'ns*, (*American Trucking*), 121 S.Ct. 903 (2001), the Supreme Court had an opportunity to do some serious housecleaning of out-of-date doctrine — although it passed up the opportunity, apparently because it was not ready to admit to the obsolescence.

Initially in *American Trucking*, the D.C. Circuit had raised the possibility of major doctrinal change when it held that the EPA's regulations on ozone and fine particulates were invalid under the nondelegation doctrine. That opinion triggered considerable discussion, at our Section's programs and elsewhere, among observers who hoped — or feared — that the Supreme Court would follow suit. Had the Court done so, *American Trucking* could have become the first Supreme Court case since 1935 to strike down a statute on nondelegation grounds. In the end, the Court's ruling was fairly conventional. The Court decided that the relevant section of the Clean Air Act contained an "intelligible principle," and thus was not unconstitutional. The lower court's creative approach to the nondelegation

doctrine — using it as a basis for commanding the agency to write standards to narrow the scope of its own discretion — was curtly dismissed in a single paragraph.

Although I agreed with the outcome of *American Trucking*, I have a modest suggestion as to a broader ground by which the Court might have reached it: the Court should overrule the nondelegation doctrine completely.

Let us posit, as we begin to contemplate this possibility, that the validity of *delegation itself* is not the issue. Proponents of a vigorous nondelegation doctrine acknowledge as much — despite their fondness for quoting Locke's aphorism that the legislature's power is "to make laws, and not to make legislators." In a society of over a quarter billion inhabitants, the idea that Congress could make all the important decisions is sheer fantasy. No advanced industrialized country exists without policymaking by a bureaucracy, nor could any possibly do so.

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Correction:

The Spring issue of the News reported that in the Section's February 27 debate on "midnight regulations," Sally Katzen and Jay Plager agreed that "incoming administrations should have some opportunity to review midnight regulations, even if it means amending the Administrative Procedure Act." Ms. Katzen agreed that an incoming administration should have the opportunity to review its predecessor's regulations, but did not believe this required amending the APA.

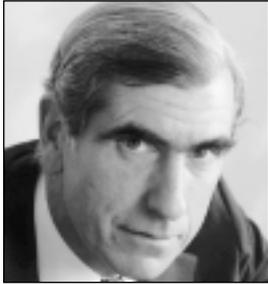
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The views expressed in the *Administrative & Regulatory Law News* are not necessarily those of the Section of Administrative Law and Regulatory Practice, the American Bar Association, or the Editors.

Nominations for 2001-2002



Chair: C. Boyden Gray (Washington, DC) – private practice with the law firm of Wilmer, Cutler & Pickering. Boyden served as the Section Vice Chair and Chair-Elect the past two years and has been a speaker on several Section programs.

Chair-Elect: Neil R.

Eisner (Washington, DC) – Assistant General Counsel for Regulation and Enforcement at the U.S. Department of Transportation. Neil served as Vice-Chair of the Section during the past year and has also been the Vice Chair of the Rulemaking and Transportation Committees, Co-Chair of the Mary C. Lawton Government Service Award Committee, and a frequent speaker at Section programs.



Vice Chair: Thomas Morgan (Washington, DC) — Oppenheimer Professor of Law at George Washington University. Tom has served on the Section's Council. Recently, he has been our representative to the Ethics 2000 and other related ABA efforts respecting professional

responsibility. He is a former Dean at Emory Law School, past-President of the Association of American Law Schools, and a widely respected scholar on regulation and administrative law issues. He is an author or co-author of casebooks on regulation (with Paul Verkuil), antitrust, and professional responsibility.

Budget Officer: David Roderer (Washington, DC) — Office of Federal Housing Enterprise Oversight. David has been serving as the Section's Assistant Budget officer, as well as co-chair of the Section's committee on Banking and Financial Services. David worked for Treasury and practiced with Goodwin Procter (in the Washington, DC, office). He has been an active participant in Section meetings and activities and an author of works on banking law and securitization.

Assistant Budget Officer: Dan Cohen (Washington, DC) — Office of General Counsel, Department of Commerce. Dan has served as chair of the Section's Rulemaking Committee and has worked on several action items that have involved electronic information.

Secretary: Cynthia Drew (Washington, DC) — Environmental and Natural Resources Division, Department of Justice. Cynthia has been the Section's Secretary and has been co-chair of the annual meeting and also served as chair of our membership committee. She has been active in our Environmental and Natural Resources committee as well.

Council:

John Duffy (Williamsburg, VA) — Professor of Law, William & Mary's Marshall-Wythe School of Law. John has been working on the APA Project as Assistant Reporter. He also serves as Vice-Chair of the Intellectual Property Committee. John is a veteran of the Office of Legal Counsel and of Covington & Burling, and clerked for two former Council members.

Cynthia Farina (Ithaca, NY) — Professor of Law, Cornell Law School. Cynthia was the reporter on our government ethics project of a few years back and also serves as reporter on part of the judicial review portion of the APA Project. She is a co-author of the Gellhorn & Byse's Administrative Law casebook.

Leonard Leo (Washington, DC) — Vice-President of the Lawyers Division of the Federalist Society. Leonard has served as the Section's assistant budget officer and then budget officer. Leonard has also served as chair or co-chair for two of our annual meetings, has chaired the Section's Committee on Government Organization and Separation of Powers, and also chaired our working group on congressional oversight of executive branch prosecutorial activity.

Sidney Shapiro (Lawrence, KS) — John Rounds Professor and Associate Dean for Research at the University of Kansas Law School. Sid has served previously as the Section's Secretary, is co-chair of our committee on regulatory initiatives, and is vice-chair of our committee on regulatory policy. Sid worked at both the FTC and HEW. He is co-author of books on administrative law, on administrative procedure and practice, and on regulatory practice. ◆

Council Capsules

A Brief Digest of Council Highlights From the 2001 Spring Meeting in Sanibel

Report of the Chair

Section Chair Ron Levin thanked Sharan Levine for putting together the Spring Meeting. He also thanked the program chairs and speakers. He said that the “buzz” after the international administrative law program was, what can the section do to build on the project? He noted there will be another program at the Administrative Law Conference in Washington, DC, in November, and perhaps a law review symposium. Levin announced that the Council’s ex-officio legislative branch liaison, James Ziglar, has been appointed to head the Immigration and Naturalization Service.

APA Project

The Council approved, subject to minor revision, a draft black-letter statement of law covering the Freedom of Information Act, the Government in the Sunshine Act and the Federal Advisory Committee Act, as presented by Tom Susman, co-reporter on openness. The Council deferred approval of a draft black-letter statement of law on standing to seek judicial review of agency action. The reporters felt the statement, introduced by Cynthia Farina, co-reporter on access to judicial review, needed a bit more work. Draft black-letter statements may be viewed at <http://www.abanet.org/adminlaw/apa>. Comments on the standing statement may be directed to Professor Farina at CRF7@cornell.edu. The reporters anticipate that statements on scope of judicial review and government management will be ready this summer in time for the annual meeting in Chicago. All black-letter statements are expected to be completed by the Administrative Conference meeting this coming November. Anyone interested in commenting on the work that has been done so far may email the section at adminlaw@abanet.org.

Publications

Randy May gave the report of the Publications Committee. He said that sales of section books are going well and that the section had the third highest book sales revenue of all sections for the month of March. He said the section has a monograph in the pipeline on the Sunshine Act. The Council approved a budget item for a brochure advertising the *Federal Administrative Procedures Sourcebook*, the *ADR Deskbook* and the *Guide to Federal Agency Rulemaking*.

New Section Leadership Directory

The Council approved a proposal introduced by Judy Kaleta for an interactive section leadership directory. The new directory will be accessible through the section’s web page, and members will have access to an online form for listing and updating their information. The directory will continue to be published in hard copy format, as well.

Amicus Briefs

Section Chair Ron Levin reported on the efforts of the Section Officers Conference Committee on Amicus Curiae Briefs (SOC Amicus Committee) to amend the ABA’s policy prohibiting individual sections from filing friend-of-the-court briefs on their own. Currently, except for statements on rules of procedure, the ABA’s blanket authority rules permit a section to present statements on matters within its primary or special expertise and jurisdiction to legislative and executive bodies only. The SOC Amicus Committee, at the behest of the Section Officers Conference, has drafted a recommendation and report that proposes an expansion in the blanket authority rules to permit the filing of amicus briefs with state and federal courts on specialized issues that the ABA would be unlikely to address as a whole but as to which a brief from a section with expertise would be of benefit to the Court.

The ABA’s Standing Committee on Amicus Curiae Briefs (Standing Amicus Committee) has thus far opposed the SOC Amicus Committee’s proposal on the grounds that (1) courts will not necessarily distinguish between the ABA as a whole and a particular section; (2) a multiplicity of briefs might dilute the prestige of the ABA’s name; (3) current policy assures that briefs filed in the name of the ABA truly represent the views of its membership; and (4) allowing section briefs would run the risk of a filing that reflects a policy contrary to the views of a large segment or majority of the ABA.

The SOC Amicus Committee has responded that, based on experience with blanket authority statements, it is their belief that the blanket authority rules will prove a sufficient safeguard against the concerns raised by the Standing Amicus Committee.

Council members generally favored the proposal, assuming that appropriate safeguards would be incorporated into it. Past Section Chair Tom Susman echoed the Council’s concerns, noting that there must be standards defining when a section may step in and that there must be stringent conflict of interest provisions. Levin noted that the SOC Amicus Committee has invited the

Standing Amicus Committee to exercise quality control. Levin said he would keep the Council informed on the progress of the proposal's progress.

Harmonization Recommendation

Sidney Shapiro, co-chair of the Regulatory Initiatives Committee, presented the committee's proposed revisions to the report and recommendation on harmonization of U.S. regulatory standards with global regulatory standards approved by the Council at the 2000 Administrative Law Conference for adoption by the ABA House of Delegates. (See *Council Capsules*, ADMINISTRATIVE & REGULATORY LAW NEWS, Winter 2001). The revisions respond to concerns raised by the International Law and Practice Section, the Department of Commerce, and the Food & Drug Administration. The principal substantive revision to the recommendation makes clear that it only applies to significant harmonization activities "that may require new regulations or the amendment of existing regulations." The Council approved the report and recommendation as revised. Shapiro anticipates the International Law and Practice Section will agree to act as cosponsor at the annual meeting in Chicago this coming August. The revised recommendation reads as follows.

RESOLVED, that the American Bar Association recommends, concerning significant agency efforts to harmonize domestic and foreign regulations through international negotiations that may require new regulations or the amendment of existing regulations, that:

(1) the President seek to ensure effective public participation by encouraging federal agencies to:

(a) list at an appropriate time significant proposed and ongoing harmonization activities in their annual regulatory agendas or equally widely available medium; and

(b) prepare impact statements already required by statute or executive order as near as is practical to the time of the agency's consideration of a decision to engage in negotiation of significant harmonization, and

(2) federal agencies take into consideration public input concerning significant agency efforts to harmonize domestic and foreign regulations through international negotiations by:

(a) inviting the public periodically to comment on new and ongoing significant harmonization activities and to attend public meetings concerning such activities;

(b) referring significant harmonization issues to

advisory committees where appropriate and possible; and

(c) establishing a public docket of documents and studies available under the Freedom of Information Act (FOIA) pertaining to each significant harmonization activity.

Judicial Nomination Process

Section Delegate Ernie Gellhorn advised the Council that the ABA House of Delegates was likely to be presented with a resolution at the annual meeting this coming August urging the President to reconsider his exclusion of the ABA's Standing Committee on Federal Judiciary from pre-nomination participation in the judicial appointments process.

In seeking the Council's advice on how to proceed if such a resolution is introduced, Gellhorn proposed the following guiding principles. Any resolution the House passes should be non-confrontational in tone and focus on the service that the Standing Committee can provide the President. The resolution should make the express commitment that the Standing Committee shall focus solely on the professional qualifications of the candidates and avoid any political or ideological judgments. The resolution should emphasize that the process shall be confidential and that only the final vote of the Standing Committee shall be made public.

The consensus of the Council was that, if the House passes a resolution, it should be restrained in tone.

Administrative Judiciary Resolution

Edwin L. Felter, Jr., chair of the National Conference of Administrative Law Judges, briefed the Council on a resolution that the ABA's Judicial Division intends to propose for adoption by the House of Delegates concerning the independence and impartiality of the "administrative judiciary."

The resolution proposes that federal and state "members of the administrative judiciary be held accountable to the highest ethical standards based on the *ABA Model Code of Judicial Conduct* (1990), and that any discipline or removal of a member of the administrative judiciary for violation of any such standards or for any other reason occur only after the opportunity for a hearing under the federal or a state administrative procedure act before an independent tribunal, with full right of appeal." The accompanying report notes that some provisions of the Model Code would not be applicable in some situations.

The consensus of the Council was that the section

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Section Program Plumbs Shortcomings of the Kingpin Act

By William S. Morrow, Jr.*

The United States expanded its war on illegal drugs in 1999 with enactment of the Foreign Narcotics Kingpin Designation Act (“Kingpin Act”), Pub. L. No. 106-120, tit. VIII, 113 Stat. 1626 (Dec. 3, 1999), (codified at 21 U.S.C. §§ 1901-1908), which provides for the use of economic sanctions that target foreign narcotics traffickers and their associates. The Act was patterned on a 1995 sanctions program targeting Colombian drug traffickers instituted by a Clinton Administration executive order under authority of the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. 1701 et seq.).

The Kingpin Act precludes judicial review of designations of foreign parties under the Act and provides for heavy criminal and civil penalties against U.S. persons that deal with such designated parties. Section 810 of the Act, however, established a “Judicial Review Commission on Foreign Asset Control” to conduct (1) “a review of the current judicial, regulatory, and administrative authorities relating to the blocking of assets of foreign persons by the United States Government,” and (2) “a detailed examination and evaluation of the remedies available to United States persons affected by the blocking of assets of foreign persons by the United States Government.”

The Commission finished its work last year and submitted its report to Congress on January 23 of this year. The Section of Administrative Law and Regulatory Practice cosponsored a program on the report shortly after. This article briefly reviews the statute, the Commission’s report and the panelists’ remarks and concludes that the Commission’s recommendations face an uncertain fate in Congress.

The Statute

The Kingpin Act charges the president with reporting to Congress on an annual basis the names of “significant foreign narcotics traffickers (“foreign Kingpins”) . . . whose activities threaten the national security, foreign policy, and economy of the United States.” 21 U.S.C. §§ 1902, 1903. The Act freezes (“blocks”) foreign Kingpin assets located in the United States and in the

hands of any “United States person.” 21 U.S.C. § 1904(b)(1). The Act prohibits transactions or dealings in foreign Kingpin assets by anyone within the United States and by any United States person anywhere, as well as “any transaction or dealing by a United States person, or within the United States, that evades or avoids, or has the effect of evading or avoiding, and any endeavor, attempt, or conspiracy to violate, any of the prohibitions” contained in the statute. 21 U.S.C. § 1904(c).

The Act applies these same blocking provisions and prohibitions to foreign persons found by the Secretary of the Treasury to be: (1) “materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of” a foreign Kingpin or foreign Kingpin accomplice; (2) “owned, controlled, or directed by, or acting for or on behalf of,” a foreign Kingpin or foreign Kingpin accomplice; or (3) “playing a significant role in international narcotics trafficking.” 21 U.S.C. § 1904(b)(2)-(4). The Commission report refers to these persons as “Tier II designations,” the Kingpins themselves being “Tier I designations.”

The Act generally authorizes the Secretary of the Treasury to issue orders and prescribe regulations for the purpose of carrying out the statute — by means of instructions, licenses, or otherwise — with respect to persons and property subject to the jurisdiction of the United States. 21 U.S.C. § 1905(a). Specific powers include the authority to investigate, regulate or prohibit transactions in foreign exchange, currency, or securities and transfers of credit or payments involving a banking institution to the extent such transfers or payments involve the interests of a foreign country or foreign national. 21 U.S.C. § 1905(a)(1).

The Secretary also may “investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent, or prohibit any acquisition, holding, withholding, use, transfer, withdrawal, transportation, placement into foreign or domestic commerce of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.” 21 U.S.C. § 1905(a)(2).

The Secretary is not required to observe the requirements

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*Associate Editor for Section News; Chair, Transportation Committee; General Counsel, Washington Metropolitan Area Transit Commission. The author thanks the panelists for reviewing this article and suggesting improvements.

Congress Enacts Sweeping Changes in Medicare Procedures

by Eleanor D. Kinney*

On December 21, 2000, Congress enacted sweeping changes in the Medicare coverage policymaking and appeals processes after years of controversy. These changes were in the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 ("BIPA"), enacted as part of Pub. L. No. 106-554, Consolidated Appropriations Act, 2001.

Since the inception of the Medicare program, Medicare coverage policymaking has been controversial, because it is in the context of making coverage policy and adjudicating disputes over coverage that the issue arises of whether and when elderly and severely disabled Americans will have access to new and often costly medical technologies and medical devices. The Health Care Financing Administration (HCFA), which administers the Medicare program, has consistently sought to retain tight control over coverage policy to maintain control over costs.

Beneficiaries, health providers, and the manufacturers of new medical technologies and devices are vitally interested in Medicare coverage policymaking and appeals processes. If Medicare does not pay for a new technology or device, as a practical matter, the technology or device will be unavailable to Medicare beneficiaries and the physicians, hospitals, and other providers that serve them. The suppliers of durable medical equipment, who make and distribute many new medical technologies and devices, only handle covered technologies and devices. Further, failure to obtain coverage of new medical technologies and medical devices has a devastating impact on the ability of manufacturers and their investors to make money and recoup product development costs. In sum, the stakes involved in Medicare coverage decisionmaking are quite high and of interest to all the main constituencies of the Medicare program.

There has been substantial criticism of the Medicare coverage policymaking and appeals processes over the years. The medical technology and device manufacturers and durable medical equipment suppliers have been particularly vocal and increasingly effective critics of Medicare coverage policymaking. Indeed, manufacturers of medical technologies and devices have been the major advocates for the new legislation for reforming the

Medicare coverage policymaking and appeals processes.

Background

The concept of coverage refers to the amount, duration, and scope of benefits that the Medicare program (or any insurance plan) will pay for. The Medicare statute expressly states: "no payment may be made under Part A or Part B for any expenses incurred for items or services" that are "not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member." 42 U.S.C. §1395y(a)(1)(A). Since Medicare's commencement in 1965, local insurance companies with which Medicare contracts to handle Medicare claims make most coverage policy decisions and adjudicate disputes over coverage policy in the context of denied claims for benefits.

By the early 1980s, the Medicare program issued Medicare coverage policies at the national level through the development of National Coverage Determinations (NCDs), in addition to the coverage policy made by local carriers and fiscal intermediaries. At first HCFA made national coverage policy internally with the advice of physicians working for HCFA. HCFA would consult with the technology assessment authorities in the Public Health Service for needed medical advice on a new medical technology. Many Medicare constituencies objected to the closed and secret nature of these procedures. The American Bar Association and the Administrative Conference of the United States, among others, voiced similar criticisms and recommended procedural reforms to open the Medicare policymaking process.

The Medicare statute has always allowed beneficiaries to challenge adverse Medicare coverage decisions and policy in the context of individual beneficiary appeals. Only the Medicare beneficiary has a right to appeal. Health care providers and suppliers of durable medical equipment can only appeal if they accept assignment of the beneficiary's claim. Providers, suppliers, and even device manufacturers can represent beneficiaries in appeals but with substantial limitations on payment for representation. Understandably, Congress and HCFA have designed the beneficiary appeals process to address the concerns of beneficiaries in an accessible and expeditious review process with only an occasional need for

* Samuel R. Rosen Professor of Law & Co-Director, The Center for Law and Health Indiana University School of Law – Indianapolis.

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Charting the Course of Election Reform After *Bush v. Gore*

By William S. Morrow, Jr.*

Whether or not you agree with the outcome of the latest U.S. presidential election, it is difficult to defend the process that carried George W. Bush to the White House. Under-trained election workers were sorely tested by massive voter turnout and malfunctioning equipment. First-time voters, and even some veteran voters, found themselves perplexed by confusing ballot layouts. Eligible voters were turned away from the polls, and ineligible voters were allowed to register their choices. The candidates armed themselves with hordes of lawyers and teams of media advisers as they jockeyed for position in the courts and the public eye. And all this in just one county in one state — Florida. I am pretty sure this is not what is meant by government in the sunshine.

The question is “What Lessons Does the Florida Voting Process Have for the Future?” That also is the title of the election law program sponsored by the Section of Administrative Law and Regulatory Practice at its 2001 Midyear Meeting in San Diego this past February. The program was co-sponsored by the Section of State and Local Government Law and the Standing Committee on Election Law.

The panel included one lawyer from the Bush team, George Terwilliger, one lawyer from the Gore team, Joseph Sandler, and former Florida elections director, David Cardwell. Trevor Potter, former chair of the Federal Elections Commission, served as moderator.

Terwilliger characterized the post-election contest in Florida as a “fair fight” but one that never needed to happen and something that can be avoided in the future by focusing on devising voting systems that work, an endeavor that transcends political and ideological lines. This means establishing clear, objective standards for counting votes — standards that:

- Are well articulated and uniform throughout the state;
- Do not require interpretation as you go along;
- Are tailored to the different types of voting equipment in use;
- Are consistent with the instructions voters are given; and
- Include procedures for resolving disputes in a pre-

cise and uniform manner.

Terwilliger said reforming the system also requires more clearly defining the jurisdiction of the courts. He acknowledged that courts have a role to play in the elections process but one that is principally limited to remedying voter fraud. They should not supervise elections and should not be the ultimate arbiters of who won. He noted that courts are not equipped to resolve questions of voter intent and that who won the election is “not a question of law to be decided by a judge.”

For Sandler, the issue is one of voting rights. He cited statistical studies indicating that level of technology, training of election workers, maintenance of machines and assistance to voters vary district by district according to voter income and ethnicity — giving some voters a better chance of having their vote counted than others.

He maintained that no matter what system is used, a close election will require a manual recount. Election codes therefore must include a provision for manually counting ballots in close contests. He agreed that manual recounts require standards for counting votes. These could be established through model legislation or administrative rules, but he also argued that common law vote counting standards are well known and sufficient to the task.

Cardwell put the Florida race in historical perspective. He said the voting equipment industry had been predicting a disaster for years. The problem of “hanging chad” surfaced in the 1970s. In 1988, the Connie Mack Senate race produced a similar result. The Florida legislature was informed that there was no recount process in place and that canvassing boards needed more money, staff and training to avoid a repeat. Unfortunately, that advice was not heeded.

Cardwell was quick to point out, however, that the Florida experience could have happened anywhere. Elections are at the bottom of funding priorities. When it comes to roads or voting machines, roads get the money.

Cardwell believes one of the greatest challenges for Florida will be responding to the Equal Protection rule laid down by the U.S. Supreme Court in *Bush v. Gore*, 121 S. Ct. 525 (2000). Cardwell said this is because the Florida elections code does not speak to statewide races and will need to be supplemented to comply with the court’s decision. He said this may mean creating a

* Associate Editor for Section News; Chair, Transportation Committee; General Counsel, Washington Metropolitan Area Transit Commission.

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International Administrative Law Program

By William Funk*

At the Spring Meeting at Sanibel Island, Florida, the Section presented a program on the Emerging Field of International Administrative Law: Its Content and Potential. Professor Eleanor Kinney of the University of Indiana Law School at Indianapolis, who recently spent a year in Argentina, was the moderator of the program and introduced the topic with short primer on public international law. She explained that there are four general types of public international law organizations:

- Organizations within the United Nations, such as the United Nations Environmental Program (UNEP),
- Specialized UN agencies, which are autonomous but with a connection to it, such as the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Bank,
- Regional intergovernmental organizations, such as the Organization of American States and the Council of Europe,
- Supranational Organizations, such as the European Community.

She then explained how some of these organizations have law-making powers, such as the World Health Organization; some engage in adjudication; and some involve judicial review, such as the International Court of Justice. International administrative law, Professor Kinney said, is in its infancy.

With that background, Kathleen Kunzer of the Chemical Manufacturers Association addressed the nascent administrative processes under the World Trade Organization (WTO) and the North American Free Trade Agreement (NAFTA). The WTO is comprised of several agreements, of which the most well known is the General Agreement on Tariffs and Trade (GATT) but which also includes the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary Measures (SPS). Information on the WTO may be found at its web page: <http://www.wto.org>. These agreements themselves foster the development of basic administrative law procedures in developing nations. For example, Article X of the GATT requires that members publish all "laws, regulations, judicial decisions and administrative rulings of general application" pertaining to trade

restrictions. Thus, in a sense, Article X in the international trade arena accomplishes what the publication requirements of the Administrative Procedure Act require in the domestic context. Moreover, Ms. Kunzer suggested that the developing case law of the WTO dispute resolution Appellate Body is requiring adequate notice and an opportunity to comment before a nation may adopt measures that restrict trade. Similarly, the TBT agreement and the SPS agreement require countries to publish proposed rules and provide an opportunity to comment. As to the WTO itself, Ms. Kunzer indicated that there was only the barest glimmer of allowing interested persons to participate in its proceedings. She noted that some dispute resolution bodies had allowed the filing of amicus briefs, albeit apparently only with the consent of one of the party states. The practice under NAFTA, however, was much more hopeful. Chapter 11 of NAFTA specifically provides that affected private entities may challenge unfair regulation of private investment activity that is inconsistent with NAFTA provisions, and the North American Agreement on Environmental Cooperation (NAAEC), NAFTA's environmental side agreement, sets up an innovative forum for direct public involvement. Any person may file submissions asserting that a party is failing to enforce its environmental law effectively, and this triggers a process by which the Commission on Environmental Cooperation (CEC) investigates and can make non-binding rulings on the basis of a published factual record. Ms. Kunzer noted, however, that the NAAEC story is not all one of openness; the CEC holds its business sessions behind closed doors.

Professor Sidney Shapiro of the University of Kansas Law School, who has spearheaded the Section's attempt to move the ABA to a resolution on harmonization, focused his comments on the adoption of global regulatory standards and their intersection with our administrative law. Professor Shapiro explained that there are three ways that international standards become established as domestic standards. One involves a dispute adjudicated by the WTO dispute resolution bodies upon a claim that a United States regulatory standard is a disguised trade barrier because it is stricter than a recognized international standard. While technically an

* Professor of Law, Lewis & Clark Law School; Editor-in-Chief, *Administrative & Regulatory Law News*.

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Bush Order on Energy Regulations

On May 18, President Bush issued Executive Order 13211, 66 Fed. Reg. 28355, concerning regulations that significantly affect energy supply, distribution, or use. President Bush's order builds on the framework of President Clinton's Executive Order 12866 by requiring that executive agencies prepare a Statement of Energy Effects with regard to a "significant energy action." A significant energy action is a significant regulatory action under E.O. 12866 that is either "likely to have a significant adverse effect on the supply, distribution, or use of energy" or designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

A SEE is to contain a "detailed statement" (the same words used by the National Environmental Policy Act to describe Environmental Impact Statements) relating to "any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increased use of foreign supplies)" that would result from adopting a proposed significant regulatory action. In addition, SEEs are to contain "reasonable alternatives" to the proposed action and the "expected effects of such

alternatives on energy supply, distribution, and use." Agencies are to provide SEEs to OIRA together with their related submissions under E.O. 12866 prior to the proposal and final adoption of the significant regulatory action. Agencies must also publish the SEE or a summary in the Federal Register with the notice of proposed rulemaking and the final rule. The order states that it does not create any judicially enforceable right or duty.

Like President Clinton's orders on federalism, environmental and safety impacts on children, and civil justice reform and President Reagan's orders on takings, federalism, and the family, President Bush's order appears to be responsive to a particular political problem. Commentators generally have been skeptical as to the benefits of the earlier orders, and the Section sponsored an ABA resolution that called upon the President and Congress to think twice before adding to the proliferation of specialized impact studies. At the least, the new order would seem to confirm that the new administration is not interested in wholly rewriting the Presidential oversight mechanisms that have remained essentially the same since President Reagan. ◆

New ABA Website for House of Delegates Matters in the Works

The ABA House Committee on Technology and Communications at its San Diego meeting approved two new initiatives, which they hope to have ready for the Chicago Annual Meeting: a live webcast of the House debate, and a web-based discussion board (or "webboard") for agenda items.

Webcast

The intent is to provide a real-time streaming video of the House debate in Chicago, which will be accessible by any member (or the public) from the ABA's web site. The goals in doing so are: to increase member awareness of the workings of the House, to allow constituents to see their representatives in action, to allow lawyers to watch the debate, and to demonstrate the potential of streaming video as a means of providing content to members. Hopefully, this would be in place for the Chicago meeting for two primary reasons: the Ethics 2000 debate should generate a lot of

interest from the membership, and Chicago as the home base for the ABA should facilitate making the necessary arrangements.

Webboard

The webboard will be a place on the ABA site where members of the House can discuss agenda items listed for the upcoming meeting. It will allow for threaded conversations, so that members can follow a discussion as people post their thoughts, proposed amendments, etc. The site will be able to be viewed by anyone, although only House members will be allowed to post. The board will be configured so that House members who wish to be notified of new posts about particular threads can receive emails notifying them. The desire is to organize the webboard with separate threads for each agenda item, with the first message containing a link to the proposed recommendation (once it has been calendared). ◆

Bush v. Gore: Section Members Square off in the Courts and on the Air, but Not after Work

by Warren Belmar*

For many years now there has been a longing in Washington for the “good old days” when participants in strong and highly partisan political debates would thereafter renew their friendships over drinks and dinner while discussing family, sports, and the issues of the day. This longing exists as well for many within the nation’s legal community, where the intensity of opinions and feelings on complex and controversial legal issues have often marred the civility of discourse among academics, practitioners, and judges.

As members of the Administrative Law and Regulatory Practice Section of the American Bar Association, we are lucky to be a part of a group that offers its members the opportunity to satisfy these longings by providing a venue for the friendly sharing of differing views between and among colleagues. Whether at scholarly programs and debates, or intellectually stimulating quarterly meetings of our Section’s Council, our members have always looked forward to the next opportunity to continue unfinished dialogues on cutting edge issues with friends, colleagues, and even strangers. Never has this feeling of camaraderie and respect for the ideas of others been more challenged, and its strength proven to be more worthwhile, than during the 38 hectic days following the presidential election.

During November and December of last year, many current and former members of our Section were called upon to play important roles on the Bush and Gore legal teams. Others were called upon to help explain and/or opine upon the legal issues as commentators on television, radio, and in the press. And, still others were called upon to help resolve those legal issues as members of the judiciary. The following is a list of some of those individuals who in recent years have either been active in the Section, participated in a Section program, or attended one or more Section events:

The Bush-Cheney Legal Team

- *Theodore Olson*, Former Council Member and Section Delegate, who successfully argued both Supreme Court cases
- *Ben Ginsburg*, Former Elections Committee Advisory Member, who as General Counsel to the Bush-Cheney Campaign Committee coordinated the efforts of the Florida legal team

* Managing Partner, Capitol Counsel Group, LLC; former Section Chair; and Chair, Section Fellows Committee.

The Gore-Lieberman Legal Team

- *John Hardin Young*, Former Section Chair, who counseled the Florida legal team on election law issues and strategy, and represented Vice President Gore in the actual recount process
- *Joseph Sandler*, Co-Chair of Elections Committee, who as General Counsel to the Democratic National Committee, was a senior advisor to the Gore-Lieberman legal team

Television, Radio and Press Commentators

- *C. Boyden Gray*, Chair-Elect of the Section, who was Counsel to Vice President and then President George Bush
- *David Cardwell*, Former Council Member, who served as Director of Florida’s Division of Elections and as Staff Director for Ethics & Elections, Florida House of Representatives, was CNN’s regular commentator on Florida election law issues
- *Trevor Potter*, Former Council Member and current Co-Chair of Elections Committee, who is a former Chair of the Federal Election Commission
- *Lyn Utrecht*, Elections Committee Advisory Member, who served as General Counsel to the Gore-Lieberman Campaign Committee
- *Thomas Josefiak*, Elections Committee Advisory Member, who serves as Chief Counsel to the Republican National Committee
- *Jamin Raskin*, Co-Chair of the Elections Committee, who served as legal adviser on Presidential Debate issues to the Nader Campaign Committee

The Judiciary

- *Chief Justice William Rehnquist*, Former Council Member
- *Justice Antonin Scalia*, Former Section Chair
- *Justice Stephen Breyer*, Former Council Member

None of the individuals listed above are thought of as “shrinking violets” when it comes to articulating views on complex or controversial legal issues. Neither are those individuals who have been honorees at our last four Annual Dinners honoring, respectively, all former Solicitors General, Attorneys General, Counsels to the President, and Assistant Attorneys General for The Office of Legal Counsel. And, neither are all of the other past and present members of the Section. Maybe that common factor, coupled with a chance to socialize after a good debate, is the secret of our success. Come see for yourself at one of our upcoming meetings! ◆

Supreme Court News

by William Funk*

Court Rejects “Catalyst Theory” for Qualifying for Attorneys Fees

In *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Services*, 121 S.Ct. 1835 (2001), the state had ordered a nursing home closed because some of its patients were not able to remove themselves from the building in case of fire. The home sued the state agency, arguing that the state law being enforced violated the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act. The next year, while the case was pending, the state repealed the law. The court dismissed the case as moot, but the home sought attorneys fees as prevailing parties under the FHAA and the ADA according to the “catalyst theory.” The catalyst theory posits that a plaintiff is a prevailing party if it achieves the desired result because the lawsuit induced a change in the defendant’s conduct. Every court of appeals except the Fourth Circuit to have considered the issue has upheld the catalyst theory, but the Supreme Court by a 5-4 split found that the term “prevailing party,” the term used in almost every attorneys fee statute, cannot include a person who does not receive a judgment on the merits or a consent decree. The Court acknowledged that there were policy arguments both in favor of the catalyst theory and against it, but it believed that the meaning of prevailing party, a legal term of art, was so clear as to preclude any resort to policy considerations or legislative history. This was particularly true because the Court had previously held that, given the “American Rule” with respect to attorneys fees, attorneys fees will only be awarded when there is “explicit statutory authority.”

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, dissented. Noting that nine different courts of appeal had approved the catalyst theory, the dissent found it hard to believe that the term “prevailing party” clearly precluded it. The dissent also found the legislative history and policy arguments supporting the catalyst theory overwhelming.

Whatever the merits of the legal arguments, the practical effects of the decision may be significant. A defendant may now drag out the litigation as long as possible and then comply before decision on the merits and avoid attorneys fees, if it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *United States v. Concentrated Phosphate Export Assn.*,

393 U.S. 199, 203 (1968). For example, an agency may delay in releasing material under the Freedom of Information Act notwithstanding a plaintiff’s suit for release, but so long as it releases the information before judgment on the merits, the plaintiff will apparently under *Buckhannon* be unable to recover attorneys fees. Cash-poor plaintiffs attorneys are likely to be disinclined to bring litigation in which a defendant may force it to incur significant litigation expenses that may not be reimbursed if the defendant complies before judgment. On the other hand, the decision will certainly alleviate the concern expressed by the Court that the possibility of large attorneys fee awards was an incentive for plaintiffs to bring questionable claims.

Court Explains Limits of Equitable Discretion in Enforcing Regulations

In *United States v. Oakland Cannabis Buyers’ Cooperative*, 121 S.Ct. 1711 (2001), the United States brought an action to enjoin an organization from distributing marijuana pursuant to California’s law allowing distribution of marijuana for medical purposes. The organization claimed that the federal Controlled Substances Act prohibiting the distribution of marijuana for any purpose (other than for government-approved research) should be construed to contain a defense of medical necessity. The Court unanimously agreed that the Act did not admit of such a defense. The Court stated that it is not clear that there can ever be a necessity defense not recognized by statute, but it is clear that a necessity defense cannot exist when the statute itself forecloses such a defense. Moreover, there is no requirement that the statute explicitly foreclose the defense. The Court found that the provisions of Controlled Substances Act “leave no doubt that the defense is unavailable” under that Act.

The organization also argued that even if there was no defense under the Act to distribution of marijuana for medical purposes, courts have discretion under their equity powers not to enjoin the distribution for medical purposes. In support of its argument, the organization cited cases in which courts had refused to issue injunctions to persons found violating regulatory laws. See, e.g., *Amoco Production Co. v. Gambell*, 480 U.S. 531 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982); *Hecht v. Bowles*, 321 U.S. 321 (1944). The Court agreed that a statute that gives courts the power to enjoin violations does not, absent more specific language, require a court to issue an injunction. However, a court’s discretion is limited by the policy decisions made by Congress. If Congress has decided that the dis-

* Professor of Law, Lewis & Clark Law School; Editor-in-Chief, *Administrative & Regulatory Law News*.

tribution of marijuana is not allowed, then courts do not have discretion to allow it. “Their choice (unless there is statutory language to the contrary) is simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all.” Thus, a court could not in the exercise of its equity jurisdiction decide that non-enforcement of the Controlled Substances Act with respect to the distribution of marijuana for medical purposes was appropriate. Its only choice was whether enforcement was more appropriate by means of injunction or by means of normal criminal enforcement, the other means of enforcement provided by the Act.

Prisoner Must Exhaust Administrative Remedies Even if Such Remedies Cannot Provide the Relief Requested

Under the Prison Litigation Reform Act of 1995 (PLRA), no prisoner may file a Section 1983 action in federal court with respect to prison conditions “until such administrative remedies as are available are exhausted.” In *Booth v. Churner*, 121 S.Ct. 1819 (2001), the prisoner alleged that prison officials had mistreated him, and he sued in federal court under Section 1983 for monetary damages. The prisoner did not exhaust the administrative grievance process provided by the prison system, but monetary damages were not an available remedy. The question presented was whether his suit should be dismissed because he had not exhausted administrative remedies as required by the Act. The Supreme Court unanimously held that the suit should be dismissed for failure to exhaust.

The parties were agreed that, if an administrative grievance process could not provide any relief whatsoever for the claimed problems, the statutory language would not require exhaustion. The parties were also agreed that the prison’s grievance process could provide certain forms of relief for the types of mistreatment the prisoner alleged, although it could not provide the one form of relief, monetary damages, sought by the prisoner.

The Court noted that in *McCarthy v. Madigan*, 503 U.S. 140 (1992), it had held that a prisoner suing for monetary damages need not exhaust administrative remedies that would not provide the requested relief. But that case predated the PLRA. Indeed, in that case the Court had interpreted a predecessor provision that allowed a court to require exhaustion when an administrative remedy would be “effective.” The Court said that, if a person sought monetary damages and the prison grievance system did not provide for damages, whatever relief that prison system might grant would not be “effective.” Because Congress changed the law by,

among other things, deleting the reference to “effective” remedies, the Court in *Booth* believed that Congress “meant to preclude the *McCarthy* result.”

In language that could be equally relevant to exhaustion questions under the APA, the Court noted in a footnote that because Congress in the PLRA had mandated exhaustion notwithstanding the presence of common-law exceptions to the exhaustion requirement, courts are not free to excuse a failure of exhaustion.

Court Holds That There Is No Private Right of Action for Disparate Impact Discrimination under Regulations Issued under Title VI of 1964 Civil Rights Act

In 1990 Alabama amended its constitution to declare English as the official language of the state. Subsequently, pursuant to this provision and to advance public safety, the state began to administer all of its drivers’ license examinations only in English. Persons whose native language was not English brought suit, claiming that it had the effect of subjecting them to discrimination on the basis of their national origin.

Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d *et seq.*, prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal funds. Alabama’s Department of Public Safety, which administers the examinations, receives federal funds. The Court has construed Section 601 of the Act, 42 U.S.C. § 2000d, the section containing the actual prohibition, as creating a private right of action but only prohibiting intentional discrimination, not disparate impact discrimination. Thus, the fact that the English-only examination might have a disparate impact on persons from certain other countries would not constitute a violation unless the purpose of the requirement was to discriminate against those persons because of their origin. However, agencies have adopted regulations under Section 602 of the Act, 42 U.S.C. § 2000d-1, that go beyond the prohibitions of Section 601 and prohibit even disparate impact discrimination. The question in *Alexander v. Sandoval*, 121 S.Ct. 1511 (2001), was whether a person has a private right of action to enforce those regulations or whether only the agency may enforce its regulations. The Court, by the same 5-4 split that is becoming increasingly familiar, held that there is no private right of action to enforce any regulations that go beyond the prohibitions of Section 601.

The Court assumed for purposes of argument that the agency regulations themselves were lawful under Title VI, but it noted that the Court has never held that the regulations are valid to the extent that they prohibit

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Section of Administrative Law and Regulatory Practice 2001 Annual Meeting

Co-Chairs: Timothy Donovan, Cynthia Drew, Judith Kaleta

The Drake Hotel
140 E. Walton Place
Chicago, IL 60611-1545
Telephone: (312) 787-2200
Guest Fax: (312) 787-1341

FRIDAY, AUGUST 3

Ethics Issues for Environmental Practitioners

9:30 a.m. – 11:30 a.m. The Presidential CLE Centre, Hyatt Regency Hotel, Atlanta Room, Ballroom Level, West Tower. Presented by the Environmental and Natural Resources Regulation Committee.

A panel will use a format of short presentations and case studies to address particular ethics issues often encountered by environmental law practitioners. Attendees will be engaged in the case studies and follow-up discussions. Panelists come from U.S. EPA, private practice and academia. CLE Credit will be available.

The Cost-Benefit State

2:00 p.m. – 5:00 p.m. The Drake Hotel, The Georgian Room. Presented by the Regulatory Policy Committee.

To a greater or lesser degree, and in fits and starts, America seems to be becoming a cost-benefit state. Prominent executive orders require agencies to produce information on the costs and benefits of regulatory action. Courts of appeals have created a series of cost-benefit default rules, permitting and perhaps requiring agencies, in the face of statutory silence, to ensure that the benefits of regulation justify the costs of regulation. Congress itself has showed considerable interest in requiring agencies to produce information of regulatory costs and benefits, and even to base outcomes on cost-benefit balancing. The Bush administration has endorsed cost-benefit balancing, especially as a way of accommodating both environmental and energy goals, but also more broadly.

This panel will address a range of questions about the apparent emergence of a cost-benefit state. Is cost-benefit balancing an obstacle to desirable protection of health, safety, and the environment? What does it overlook? How should we incorporate the rights of future generations? What are the likely effects of cost-benefit analysis? Does cost-benefit analysis neglect the interests of the poor? Most generally: Does cost-benefit analysis pass, or fail, cost-benefit analysis?

The program will begin with a presentation to Professor Sunstein of the Administrative Law Section's Annual Award for Scholarship for 2000, honoring his articles on the Clean Air Act and on informational standing to sue. Professor Daniel Ortiz will make the presentation.

A Reception Honoring Victor Rosenblum and His Contributions to Administrative Law

5:30 p.m. – 7:00 p.m. Northwestern University School of Law, 357 East Chicago Avenue

Section Dinner

7:30 p.m. – 9:30 p.m. Sullivan's Steakhouse, 415 N. Dearborn Street

We would like to thank Bowne Printing for its generous sponsorship of this event.

SATURDAY, AUGUST 4

Section Continental Breakfast

8:00 – 9:00 a.m. The Drake Hotel, The Drake Room

Section of Administrative Law and Regulatory Practice Council Meeting

9:00 a.m. – 12 noon. The Drake Hotel, The Drake Room

Publications Committee Meeting

Noon – 1:30 p.m. The Drake Hotel, The Florentine Room

Saturday Afternoon Activities

2:00 p.m. – 5:00 p.m., The Drake Hotel

Opening Assembly for the ABA Meeting

5:30 p.m. – 7:00 p.m., Symphony Center, 220 S. Michigan Avenue
Keynote Speaker, Supreme Court Justice Stephen Breyer
(Separate Registration to the ABA Annual Meeting Required)

ABA President's Reception

7:00 p.m. – 9:00 p.m. The Field Museum, 1400 S. Lake Shore Drive
(Separate Registration to the ABA Annual Meeting Required)

SUNDAY, AUGUST 5

Section Continental Breakfast

8:00 – 9:00 a.m. The Drake Hotel, The Drake Room

Section of Administrative Law and Regulatory Practice Council Meeting

9:00 a.m. – 12 noon. The Drake Hotel, The Drake Room

Fourth Annual Regulatory Update and Forecast for Labor and Employment Lawyers

9:30 a.m. – 11:30 a.m. The Presidential CLE Centre, Hyatt Regency Hotel, Columbus Hall I/J, Ballroom Level, East Tower. Presented by the Labor and Employment Law Committee

Panelists will highlight significant recent regulatory developments affecting labor and employment issues and will discuss the anticipated focus and direction of the Department of Labor, EEOC, and other agencies. A question and answer session will follow. CLE credit will be available.

MONDAY, AUGUST 6

So your Client/Organization Wants to set up an Ombudsman's Office?

2:00 p.m. – 3:30 p.m. The Presidential CLE Centre, Hyatt Regency Hotel, Columbus Hall E/F, Ballroom Level, East Tower. Presented by the joint Ombudsman Committee.

What should you advise your client or organization about setting up an ombudsman's office? The panel will discuss the kinds of conflicts that can be effectively addressed by an ombudsman and how the ombudsman's office might fit in different types of organizations, including those with employees who are represented by a union. The panel will also address the risks and legal issues you should anticipate, such as those related to confidentiality, the question of an ombudsman's privilege and the retention of data. This program goes beyond recent programs on ombudsmen and ombuds' standards, focusing on the application of the standards in different settings.

News from the States

By Michael Asimow*

Lightning Strikes The California Coastal Commission

California's Coastal Commission is the Goliath of land use planning agencies. Within 1000 feet of the mean high tide line, all along California's vast coastline, nobody can add a deck to their house, much less build a new one, without first obtaining a permit from the Commission (or, in some cases, from local zoning agencies over which the Commission has appellate power). Needless to say, the Commission has made plenty of enemies.

In April, in the case of *Marine Forests Society v. Coastal Commission*, a trial court decision threatened to put the Commission out of business. The flaw was the composition of the Commission: two-thirds of its members are appointed by legislators (the speaker of the Assembly and the President pro tempore of Senate each appoint 4 of the 12 members). This, the court held, violated separation of powers.

Under federal law, the *Marine Forests* case would surely be correct. *Buckley v. Valeo*, 464 U.S. 1 (1976), and its progeny, preclude Congress from retaining the power to appoint rulemakers or adjudicators. California law, however, is much less clear. In *O'Brien v. Jones*, 999 P.2d 95 (2000), the California Supreme Court upheld a scheme in which the two houses of the legislature appointed 2 of the 5 members of the State Bar Court. The State Bar Court is the agency that decides lawyer discipline cases, a traditional function of the Supreme Court itself.

If the legislature can seize from the Supreme Court the power to choose State Bar Court judges, it is difficult to see why the legislature cannot appoint the members of the Coastal Commission. After all, land use planning is a function traditionally carried out by elected officials at the local level; it is inherently a highly politicized form of adjudication in which an applicant is pitted against his neighbors. Many permitting decisions are potentially takings for which compensation must be paid. The parameters of due process are uncertain in the area of land use planning. It would seem that some separation of powers latitude should be available in the land use arena.

The *Marine Forests* decision is also dubious in the California context. Unlike the federal system, the California constitution has no appointments clause and it does not have a unitary executive. Moreover, it has a considerable tradition of legislative representation on

various kinds of administrative bodies.

The *Marine Forests* decision has been stayed pending appeal. If the trial court decision is upheld, however, the practical consequences would be substantial. Without the Commission in place, persons who wish to build near the coast can do so under ordinary local zoning rules which impose no special restrictions on coastal development. Presumably, even the Commission's past decisions denying permits could be reopened. Whether the legislature or a voter-approved initiative could bring back the Commission in a form that would withstand constitutional analysis remains to be seen.

Idaho Supreme Court Rules on Ex Parte Communication to City Council¹

The Idaho Supreme Court continues to struggle to create a modern administrative law. In *Idaho Historic Preservation Council, Inc. v. City Council*, 8 P.3d 646 (Idaho 2000), a developer sought a permit from the Boise City Historic Preservation Commission to demolish an historic building in an officially designated historic district; the Commission denied the permit. The developer appealed the denial to the City Council, which reversed the Commission's decision and granted the permit. At the beginning of the hearing, however, some Council members stated that they had received numerous telephone calls concerning the matter; one Councilor stated that he had refused to accept any calls on the question. The case thus presented the court with the question of what standards are applicable to an elected council when that body makes a judicial decision.

Relying upon its earlier decision in *Cooper v. Board of County Commissioners*, 614 P.2d 947 (Idaho 1980), the court held that, when acting in a judicial capacity, the City Council is required "to confine its decision to the record produced at the public hearing." 8 P.3d at 649. The *ex parte* contacts thus violated procedural due process by depriving the Historic Preservation Commission of the opportunity to rebut the evidence and arguments made in the telephone calls. The City Council argued, however, that its subsequent evidentiary hearing cured any procedural defects. Since the record was not closed, the City Council argued, the Historic Preservation Commission did have the opportunity to participate fully in the decisionmaking process. The court was not persuaded: "the City Council's receipt of phone calls violated due process of law." *Id.* at 650.

The court's subsequent statements, however, create

* Professor of Law, UCLA Law School; Co-Chair, State Administrative Law Committee; Reporter for Adjudication, APA Project.

¹ The information in this portion of the article was supplied by Dale Goble, Professor of Law, University of Idaho College of Law.

uncertainty. The City Council urged the court to adopt the standards employed in Oregon which, in sum, require disclosure of *ex parte* contacts and focus judicial review on the fundamental issue of the bias of the tribunal. See *Neuberger v. City of Portland*, 607 P.2d 722 (Or. 1980); *Tierney v. Davis*, 536 P.2d 435 (Or. App. 1975). The court appears to have accepted this approach, but its statements are ambiguous.

Justice Kidwell (with Justice Schroeder) dissented, arguing that “[l]ocal government official who have been elected have a necessary obligation to be receptive to constituent concerns.” *Id.* at 651. The dissenters felt that a requirement that *ex parte* communications be logged was not only unduly burdensome but also would do little to reduce the risk of bias. They were willing to accept the statements of the councilors that they had not been affected.

A rule holding that any *ex parte* communication to an elected official such as a city councilor who exercises judicial power on occasion is too rigid. Due process, as is often noted, requires basic fairness not perfection. But the dissent also overstates its case — after all, district court judges are “[l]ocal government official who have been elected.” The requirement that conversations be logged that the court may have adopted is, of course, the federal resolution of the issue and does provide the court with additional information — but it is only indirectly relevant to the issue of bias. A more direct approach to the *ex parte* contact-bias problem would be to do what neither the court nor the dissent attempted: evaluate the decision to permit the razing of the historic structure to determine whether it was a reasonable decision *on the facts in the record* rather than using a procedural device to avoid the difficult issue.

Minnesota’s ALJ Development Program Receives Innovations in Government Award²

Minnesota’s Judicial Development Program has been

honored by the Innovations in American Government Awards Program.

The Innovations Award Program was established by a grant from the Ford Foundation and is run by the Institute for Government Innovation at Harvard’s Kennedy School of Government. This year, the program reviewed over 1300 new government programs and recognized 99 of them. The winning programs are described at www.innovations@harvard.edu.

The Judicial Development Program was developed by Minnesota’s Office of Administrative Hearings which employs 42 ALJs and Workers’ Compensation Judges. It surveys individuals and attorneys appearing before judges and assures that both the responses and the results for any one judge will be confidential by having an independent organization conduct the survey.

Each judge then receives his or her own results and selects a mentor with whom to discuss those results. The Chief Judge receives an office-wide summary of the results. That summary helps identify office-wide professional development topics and is also made public. The Office works with clinical law faculty from the University of Minnesota to provide the judges with professional development opportunities.

Anyone wanting more information about the Minnesota program, including the public summary of the survey results, can find it at www.oah.state.mn.us or call Ken Nickolai, Chief Administrative Law Judge at (612) 341-7640.

Recent Articles

David Heyndericks, *Finding Middle Ground: Oregon Experiments with a Central Hearing Panel for Contested Case Proceedings*, 36 WILLAMETTE L. REV. 219 (2000). ◆

²The information for this paragraph was provided by Ken Nickolai, Chief ALJ, Minnesota Office of Administrative Hearings.

Council Capsules *continued from page 5*

could not cosponsor the proposal as currently worded because: (1) the term “administrative judiciary” is not defined in the resolution or report; (2) the report does not specify when the Model Code would not apply; (3) the requirement of a hearing prior to removal “for any other reason” is too broad; and (4) the report does not adequately describe the problem or the efforts by states to solve it.

Felter responded that making the report brief was a conscious decision on the Division’s part to make it easier

to digest. The omission of examples on when the Model Act would not apply was a conscious decision on the Division’s part, as well. The Division was concerned that readers might wrongly conclude the examples were meant to be exhaustive and including every conceivable example was not feasible. Felter assured the Council that he would convey the Council’s concerns to the Division, but he went on to say that although the Division would prefer the Section to join the list of cosponsors, the Division believes it has enough support from other sections and the state bars to get the resolution and report passed by the House as currently worded. ◆

Recent Articles of Interest

David M. Driesen, *Getting Our Priorities Straight: One Strand of the Regulatory Reform Debate*, 31 ENVTL. L. REP. (Envtl. L. Inst.) 10,003 (2001). Critics of the current system of regulation, including Cass Sunstein and Justice Stephen Breyer, have frequently claimed that the system does not establish sensible priorities. This article aims at establishing a theory of priority setting to help clarify the precise meaning of claims that cost-benefit analysis (CBA) will assist in improving priority setting. The author begins with the premise that regulatory reform advocates infer prioritization defects from evidence of allocative inefficiency. This explains, at least in part, some reformers' endorsement of CBA as a priority-setting mechanism. Yet frequently CBA is endorsed as a means of creating better ordering of regulatory priorities, while what is at stake is a broader reform that involves the actual stringency of regulation. The article explains the law of priority setting, with examples from the law of pollution control. It then analyses Breyer's and Sunstein's claims that regulatory priorities are askew and critiques the assertion that CBA will improve priority setting. The focus by regulatory reform advocates upon priority setting has, the author concludes, diverted attention from important questions such as agency resource availability, public perceptions of risk, and principles to govern government ordering and agency selection.

Robert W. Hahn and Robert E. Litan, *An Analysis of the Third Government Report on the Benefits and Costs of Federal Regulations*, Available from the SSRN Electronic Paper Collection: http://papers.ssrn.com/paper.taf?abstract_id=243534. This paper critically reviews the draft of the Office of Management and Budget's third report on the benefits and costs of federal regulation. The purpose of this analysis is to offer constructive recommendations for improving that report. The authors conclude that the report represents a small improvement over the second report. There is, however, room for even more progress. They suggest that OMB make greater use of its in-house expertise to refine estimates of benefits and costs and that it place greater emphasis on those regulations that do not pass a benefit-cost test based on numbers provided by agencies themselves. Using agency numbers reported by OMB, we calculate that about ten recent regulations would not pass a strict benefit-cost test. The OMB should either suggest eliminating or reforming these regulations or explain why they should be kept in place. We also believe that OMB should assemble a scorecard that would assess

and compare the quality of regulations and provide guidance on standardizing the content and summary of regulatory analyses. Such changes in presentation would make it easier for interested parties to understand the impacts of regulations and to determine agency compliance with legislation, executive orders, and OMB guidelines.

Thomas W. Merrill and Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001). As the two-step Chevron approach to determining when courts should defer to agency interpretations of statutes has expanded in influence, questions about when the Chevron doctrine applies have proliferated. This article identifies fourteen questions about Chevron's domain that remain unresolved. The article argues that two background principles are important in answering these questions, each suggesting that Chevron has a relatively narrow domain. First, there are two deference doctrines – mandatory deference as recognized in Chevron, and discretionary deference as reflected in Skidmore – and Skidmore deference is always available as a fallback when Chevron does not apply. Second, Chevron deference rests most plausibly on implied congressional intent to delegate primary interpretational authority to an agency, and hence the scope of Chevron deference is subject to ultimate control by Congress. These two background principles lead in turn to three more specific operational principles: (1) agencies are entitled to Chevron deference when Congress has authorized them to make decisions under a statute that bind persons outside the agency with the force of law; (2) an agency interpretation is entitled to Chevron deference only insofar as it is rendered in a format having the force of law; and (3) Chevron deference does not apply if the statutory circumstances suggest that Congress had a clear intent to the contrary. The article concludes by showing how these operational principles can be used to provide principled answers to each of the fourteen questions about Chevron's domain that remain unanswered.

Christopher H. Schroeder & Robert L. Glicksman, *Chevron, State Farm, and EPA in Courts of Appeals During the 1990s*, 31 ENVTL. L. REP. (Envtl. L. Inst.) 10371 (2001). The authors present a thorough and systematic analysis of decisions in which U.S. EPA or its administrator was a named party in the federal courts of appeals during the 1990s. Relying on a data base of over 300 cases, the main topics of the study are judicial review of statutory inter-

pretation and of EPA's use of science in its rulemaking proceedings. In both the statutory interpretation and scientific areas, the authors conclude, courts have evidenced a reluctance to overrule agency decisions when doing so requires disagreeing with the agency on questions of degree or questions of trading off different policy considerations against one another. In the scientific area, this reluctance manifests itself in decisions declining to second-guess agency decisions about whether the data upon which EPA relied was inferior to data proposed by petitioners, whether EPA adequately assessed the weight of the evidence, and whether models used by EPA were inferior to other models. On the other hand, the authors note that when attacks on EPA's reasoned decisionmaking with respect to scientific issues could be characterized as pointing to a conclusion reached without any factual support, to a technical model unsuited to the issue, to a link in its reasoning process left completely unexplained, to internally inconsistent reasoning, or to a relevant factor left unanalyzed, those attacks were more successful. The study also provides a comprehensive picture of the kinds of challenges brought under the reasoned decisionmaking doctrine, and of the specific sorts of disagreements in statutory interpretation between the agency and the courts that produce judicial reversals. It provides evidence that, overall, EPA is much more successful in its statutory interpretations than other studies have suggested, with the differences in results attributable to selection bias in other studies. Finally, the study finds that the "Chevron effect" of increased deference to agency interpretation has persisted into the 1990s, at least with regard to EPA. The study refutes the suggestions that EPA fares worse than other federal agencies in the judicial review process and that the agency fails to adequately justify its rulemaking choices.

Richard G. Stoll, *Cost-Benefit Analysis Through the Back Door of "Reasoned Decisionmaking?"*, 31

ENVTL. L. REP. (Envtl. L. Inst.) 10,228 (2001).

The author, examining the D.C. Circuit's decisions in *American Petroleum Inst. v. U.S. EPA* and *Chemical Manufacturers Ass'n v. U.S. EPA*, submits that the court provided a basis for increased judicial scrutiny of cost and benefit actions, using a rationale that may survive *Whitman v. American Trucking Ass'n*. In both cases, the statute in question was silent on whether EPA was required to consider costs and benefits. The court rejected the petitioners' claims that EPA had exceeded its statutory authority, and rejected conclusory findings that were not buttressed by the record. In both cases,

the court based its rejection on *State Farm* reasoned decisionmaking grounds, vacating the rules in question because EPA's decisionmaking process did not adequately evaluate benefits in light of costs. While different than an explicit reversal of *Lead Industries Ass'n v. U.S. EPA*, as sought in *Whitman*, these cases may provide authority to parties seeking increased judicial scrutiny of costs and benefits through application of the reasoned decisionmaking doctrine.

Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum*, Available from the SSRN Electronic Paper Collection: http://papers.ssrn.com/paper.taf?abstract_id=262023.

The American rulemaking spectrum ranges from one Constitution, through hundreds of congressional statutes, thousands of administrative regulations, and tens of thousands of important guidance documents to innumerable more casual agency documents such as press releases or letters of advice. Our legal system treats constitutions, statutes, and regulations, if valid, as binding text, subject only to the requirements that they be authorized by the superior authority and appropriately adopted following designated procedures; if valid, each of them has legislative effect on government and citizen alike, until displaced by another text validly adopted at the same or a higher level. The innumerable casual items at the base of this pyramid, while often in fact influential on private conduct, are denied any formal jural effect. It is at the level of important guidance documents that one finds confusion; confusion whether they are legitimate instruments of agency policy or a ruse to evade the higher procedural obligations associated with adopting regulations; confusion whether an agency may give them any jural effect and, if so, to what degree; and confusion whether and to what extent they must be respected by the courts. Since the frequency with which these documents are prepared suggests their importance, this confusion is regrettable. Generally ignored provisions of the Administrative Procedure Act, 5 U.S.C. 552(a)(1) & (2), appear to recognize that these documents may be treated as if they were precedents (not legislative documents) if they have been appropriately published. Hence, they may be described as "publication rules," to distinguish them from the more formal regulations that are adopted following notice-and-comment procedures and that enjoy, if valid, legislative effect. The paper builds on these provisions to critique recent judicial decisions and to suggest a general approach to publication rules following the model of precedent. ◆

Kingpin Act *continued from page 6*

of the Administrative Procedure Act in making Tier II designations, adopting regulations or imposing civil penalties. Judicial review is available for civil penalties imposed by the Secretary of the Treasury for violations of licenses, orders, rules, and regulations issued under the Act. 21 U.S.C. § 1906(b), (c). The Act specifically denies review of “designations” and other executive branch “determinations, identifications [and] findings” under the Act. 21 U.S.C. § 1904(f).

The Commission’s Report

The Commission prepared its report after reviewing pertinent precedent, gathering documents, meeting informally with representatives of government agencies, businesses and financial institutions, and holding public hearings. The report contains several important conclusions.

First, the Commission concluded that any effort by the government to preclude judicial review of the Secretary’s designations of foreign Kingpin accomplices on constitutional grounds “almost certainly would be rejected by the Courts.” At the same time, the Commission felt there was “no basis under applicable precedent to conclude that the Kingpin Act’s preclusion of judicial review of statutory claims pursuant to the [APA] is unconstitutional.” Nevertheless, the report takes the position that in the latter instance, preclusion “is both unnecessary and inconsistent with the accountability of government actions inherent in sanctions programs established pursuant to IEEPA and in numerous other regulatory schemes.”

The Commission also determined that although the blocking of assets of foreign persons implicates the Due Process Clause, a foreign person without substantial connections to the United States does not have standing to challenge the action, the government is not required to provide notice and hearing in advance, and blocking is not an unlawful “taking.”

The Commission was unable to assess the impact of the Kingpin Act on U.S. businesses because the Secretary did not make any Tier II designations in 2000 and the Commission was not provided any evidence that U.S. persons were affected by the President’s designations last June. The report expresses the Commission’s concerns, however, “about the ability of U.S. individuals and companies to comply with the Act, and the potential for inadvertent violations – concerns based in part on the experience of U.S. businesses in seeking to comply with comparable sanctions regimes administered by OFAC.”

The report praises OFAC’s professionalism and good faith but expresses the belief “that the sound administration of the Kingpin Act and other economic sanctions laws would benefit from greater openness and responsiveness by OFAC and from formal administrative

review of final OFAC actions.”

The Commission’s report to Congress lists twelve specific recommendations for further action:

1. Congress should eliminate the Kingpin Act’s preclusion of judicial review.
2. Congress should establish a system of administrative review with respect to actions taken by the Secretary or his designee under the Kingpin Act and IEEPA.
3. Congress should clarify the standards for Tier II designations.
4. Congress should consider eliminating OFAC’s authority to block assets during the pendency of an investigation.
5. Congress should require OFAC to make its licensing procedures more responsive to the legitimate needs of U.S. persons affected by blockings.
6. Congress should conform the Kingpin Act’s civil penalties more closely to those in IEEPA.
7. OFAC should promulgate regulations that reflect OFAC’s current civil penalty policy and establish safe harbors.
8. Congress should amend the criminal penalty provisions of the Kingpin Act.
9. OFAC should publish proposed sanctions regulations for public notice and comment unless exigent circumstances are present.
10. OFAC should make its operations and decision-making standards more transparent.
11. Congress should establish an advisory committee to provide a forum for dialogue between OFAC and the affected U.S. business community.
12. Congress should appropriate additional funds to OFAC as necessary to implement the Commission’s recommendations, if adopted, and to facilitate administration of the Kingpin Act.

The Panelists’ Remarks

The program was held in the Section’s headquarters in Washington, DC, in mid-February of this year. Thomas E. Crocker, a partner at Alston & Bird LLP, who represents a variety of domestic and foreign clients, including many financial institutions, served as moderator. The speakers included: David H. Laufman, who was staff director and deputy chief counsel for the Commission and is currently working in the Office of Public Integrity at the U.S. Department of Justice; John L. Ellicott, a senior counsel at Covington & Burling with a practice in export controls, economic sanctions, and foreign blocking measures; Jeff Taylor who was majority counsel for the Senate Judiciary Committee at the time of the panel; R. Richard Newcomb, the director of OFAC; and Bruce Zagaris, a partner in Berliner, Corcoran & Rowe, L.L.P., who works extensively in counseling and defending white

collar criminal cases with significant international elements. The government attorneys advised that the views they were expressing were their own and should not be attributed to their employers, past or present.

None of the panelists argued against the Commission's recommendation that Congress should eliminate the Kingpin Act's preclusion of judicial review, and Zagaris argued that review should be *de novo*. Likewise, there did not seem to be much disagreement with the proposition that few, if any, Tier I designees would be affected by the Act. As Newcomb noted, "the real action is in prohibiting transactions." The panelists' remarks accordingly focused on OFAC's interaction with Tier II designees.

Zagaris expressed skepticism at the idea of requiring OFAC to expand its sphere of operations from sanctioning countries to sanctioning individuals without a concomitant increase in budgeted resources and without due process safeguards: "Identifying the right person is more difficult than identifying the right country." Zagaris also disagreed with the Commission's conclusion that blocking is not a taking under the Fifth Amendment given the absence of any time limits in the statute.

Ellicott advocated the use of notice and comment rulemaking in connection with OFAC's licensing process, by which OFAC issues permits for engaging in otherwise prohibited transactions, and OFAC's civil penalty function. He thinks licensing regulations should specify the information needed in an application, establish a timetable for processing applications, require designation of a contact within the agency for status checks, and require the agency to issue notice whenever it intends to deny an application. As for civil penalties, Ellicott believes OFAC should issue regulations that spell out "when a penalty will be imposed and how to negotiate a settlement."

Newcomb responded that OFAC is sensitive to the needs of the business and legal communities and has twice published interim final rules with opportunity for comment. He noted that OFAC maintains a website where new rules may be viewed. (See <http://www.ustreas.gov/ofac/>). He also mentioned that the civil penalty rules were evolving and that his office was working on publishing them soon. His office is also working on internal timetable guidelines for processing license applications.

Both Zagaris and Ellicott spoke in favor of reducing the maximum civil penalty of \$1 million for violations of the statute or any license, regulation or order thereunder. As Ellicott pointed out, the maximum civil penalty for a single violation under IEEPA is \$11,000. Ellicott also urged that Congress should mandate hearings before an ALJ as part of the assessment process if OFAC, or Treasury proper, does not take that step voluntarily. Zagaris, however, did not think that appointing an ALJ to decide these matters would be an improvement if the standard of judicial

review were "arbitrary and capricious." As noted above, he thinks judicial review of OFAC actions should be *de novo*. The middle ground, of course, would be convincing Congress to amend the statute to require a hearing on the record, which under the APA is subject to a "substantial evidence" standard of review.

Jeff Taylor said he could not be specific on when the Senate Judiciary Committee might take up the Commission's recommendations. He said the goals of the Kingpin Act enjoy significant support on the Committee but acknowledged that the Committee recognizes U.S. businesses have legitimate concerns. He opined that one Commission recommendation the Committee might find controversial is the recommendation that Congress should consider eliminating OFAC's authority to block assets during the pendency of an investigation. He thought the Committee was likely to give the administration some time to digest the report before scheduling any hearings.

Conclusion

The Commission's recommendations face an uncertain fate in Congress. On the one hand, the intended beneficiaries of the Commission's labors, U.S. persons that may be unduly affected by actions taken by the Secretary of the Treasury under the Kingpin Act, have reason and merit in their corner. The Act's creation of the Commission admits of the possibility that U.S. persons might be unnecessarily burdened by the statute's general omission of administrative and judicial remedies. The Commission's investigation has revealed that Congress was right to be concerned. Moreover, precluding judicial review of agency action under the statute ultimately neutralizes the standards in the Act that are meant to constrain its implementation by the executive branch.

On the other hand, Congress's act-first-investigate-later approach has shifted the onus of overcoming institutional inertia to the regulated community. And although the Bush Administration may unilaterally adopt the Commission's administrative review recommendations, Congress must appropriate funds for that purpose, and the executive branch is powerless to invest the judicial branch with the jurisdiction to review agency action. Unfortunately, Senator James M. Jeffords' recent declaration of independence from the GOP, tipping the balance of power in the Senate to the Democrats, has surely diminished the prospect of any hearings in that house of Congress in the near future as the members sort out committee compositions and revisit their agendas.

One thing is certain. Unless and until Congress brings the monetary sanctions under the Kingpin Act more in line with the monetary sanctions under IEEPA, the cost to U.S. firms of guarding against inadvertent violations and the cost of paying for such violations will be greater than necessary to achieve the purposes of the Act. ◆

Medicare *continued from page 7*

timely and costly administrative and judicial review. Yet manufacturers are eager to get administrative and judicial review and have found mandatory fair hearings before Medicare contractors – which beneficiaries often find useful – unduly burdensome.

The Medicare Coverage Policymaking Reforms

BIPA establishes required procedures that HCFA must follow in making Medicare coverage determinations, particularly at the national level. *See* 42 U.S.C. § 1395y(a). The policymaking procedure must accord notice to the public and opportunity to comment prior to implementation of any national coverage determination. Similarly, HCFA must provide notice and an opportunity to comment in the meetings of advisory committees involved in the coverage policymaking processes. Further, in making a national coverage determination, HCFA must consider applicable information, including clinical experience and medical, technical, and scientific evidence. It must also provide a clear statement of the basis for the coverage determination (including responses to comments received from the public) and the assumptions underlying that basis. HCFA must also make available to the public the data (other than proprietary data) considered in making the determination.

In addition, BIPA requires improvements in the processes of the Medicare Advisory Committee that now advises HCFA in making Medicare coverage policy. Specifically, any advisory committee appointed to advise HCFA on coverage policy must assure full participation of a nonvoting member in the deliberations of the advisory committee and shall provide such nonvoting member access to all information and data made available to voting members of the advisory committee. Further, if HCFA and its advisory committees organize panels of experts for particular types of items or services, such expert panels may report their recommendations directly to HCFA without prior approval of the supervising advisory committee or its executive committee. This reform is designed to address concerns about the tight supervision of panel decisions in the current Medicare Advisory Committee.

BIPA has also established an appeals process that can be invoked to review both national and local coverage policies independent of explicit coverage denials in the context of claims. This is an extraordinary process that allows for independent review of Medicare coverage policy outside the existing appeals process and Medicare appeals independent of HCFA. Specifically, an aggrieved party – basically a Medicare beneficiary in

need of an item or service – can invoke this appeals process. Of note, providers, suppliers and manufacturers can only invoke this appeals process through a nominal beneficiary.

An aggrieved party can initiate an appeal of an implemented national coverage determination to the Departmental Appeals Board (DAB) of the U.S. Department of Health and Human Services. The DAB's review is *de novo*, and it can consult with scientific and clinical experts, permit discovery, and take evidence to evaluate the reasonableness of the determination. A DAB decision constitutes the final HHS action for which judicial review is available.

An aggrieved party can similarly appeal a local coverage determination made by Medicare contractors to an ALJ that adjudicates other Medicare appeals. The reviewing ALJ has the same latitude of review for local coverage determinations as the DAB has for national coverage decisions. The ALJ decision is then reviewable by the DAB. A DAB decision on the local coverage determination constitutes the final HHS action for which judicial review is available. As under current law, an ALJ would continue to have authority to adjudicate a national coverage determination.

Reforms of the Medicare Beneficiary Appeals Process

BIPA has made major changes in the appeals procedures for Medicare coverage policy for Medicare beneficiaries faced with coverage denials for individual claims. With respect to the procedures for appealing the individual claim denials, BIPA has made many changes. First, BIPA consolidates the different appeal process for Parts A and B of the Medicare program into a single system. Second, the statute clarifies the concept and content of the initial determinations which are the decisions made by Medicare contractors from which appeals can proceed. Third, the new law clarifies the procedures for expediting appeals of negative coverage determinations by Medicare contractors. Fourth, BIPA establishes firm deadlines for decisionmaking at different levels of the appeals process, with options for appellants to proceed to the next level if deadlines are not met.

Suppliers and providers can represent beneficiaries in appeals and also appeal beneficiary claims for which they have accepted assignment. As under current law, manufacturers cannot represent beneficiaries in appeals involving their products. Any provider or supplier representing the beneficiary must waive any right to payment from the beneficiary with respect to the services or items being appealed. Further, BIPA now imposes a positive responsibility on HCFA to perform outreach activities to inform beneficiaries, providers, and suppliers of their appeal rights.

Perhaps the most important reform is the creation of independent medical review for the reconsideration of determinations on coverage in individual cases made by Medicare contractors. HCFA must now contract with at least 12 qualified independent contractors (QIC) nationwide to conduct reconsiderations of Medicare coverage determinations at the request of beneficiaries or HCFA. QICs must be comprised of panels of physicians or other health care professionals with ability to consider clinical experience and medical, technical and scientific evidence associated with the reconsidered coverage determination. QICs adjudicate questions of whether services in individual cases are reasonable and necessary and thus covered benefits under the Medicare program. Their actual review authority of coverage determinations is constrained. They are bound by national coverage determinations but not local coverage determinations.

There are important requirements on the content and distribution of QIC decisions intended to bring consistency to Medicare coverage adjudications. First, the QIC reconsideration must include a detailed explanation of the decision, a discussion of pertinent facts and regulations and, where the issue is reasonable and necessary services, an explanation of the medical and scientific rationale. Further, the QIC must make its decisions available to Medicare contractors with appeal adjudication responsibilities and also to Medicare+ Choice plans that handle appeals for Medicare beneficiaries who have opted to receive care through Medicare+ Choice plans in managed care plans rather than through fee-for-service Medicare under Parts A and B.

A beneficiary can appeal the QIC decision to an ALJ with further review by DAB. As under current law, both administrative and judicial review for claims over a specified jurisdictional amount are available. The exist-

ing restrictions under current law for administrative and judicial review of national coverage policy remain. An ALJ may not review a national coverage determination, except to decide whether the determination has been applied correctly to the claim at issue. A court shall not set aside or invalidate a national coverage determination because public rulemaking provisions contained in the Administrative Procedure Act or the Social Security Act have not been followed. Further, any case in which a court determines that the record is incomplete or otherwise lacks adequate information to support the validity of a national coverage determination is remanded back to the Secretary for additional proceedings to supplement the record. The court may not determine that an item or service is covered in the particular case except upon review of the supplemented record.

Conclusion

These reforms of the Medicare coverage policymaking and beneficiary appeals processes, effective October 1, 2001, are among the most far-reaching in the history of the Medicare program. They go a long way to mandate opportunities for notice and participation for all constituencies of the Medicare program, including the manufacturers of new technologies and devices, which have a real stake in Medicare coverage policy. They also clarify and strengthen the appeals process for beneficiaries who are directly affected by Medicare coverage policy. The frank challenge of these reforms will be to ensure that they permit full and fair consideration of the new medical technologies without tying down the resources of the Medicare program. The reforms will only be effective if they ensure that truly necessary and effective medical technologies are made available to Medicare beneficiaries in an expeditious manner at an affordable cost to the Medicare program and taxpayers. ◆

Election Reform *continued from page 8*

statewide canvassing board at a time when the Florida Secretary of State's office is slated for abolition.

Terwilliger said the legislature needs to enumerate what qualifies as a vote on a system-by-system basis and that this needs to be done ahead of time. He also warned that the more subjective a standard is the more likely it will violate the Court's Equal Protection standard. Florida's "will of the voter" test probably does not meet that standard, according to Terwilliger. He thinks States will feel the pressure to establish statewide training and supervision of poll workers.

Sandler said the problem is not that objective standards do not exist. He pointed to the Texas statute and said if those standards had been applied in Florida there

would not have been an Equal Protection problem.

Florida must have been listening, because on May 10, 2001, Governor Jeb Bush signed into law the Florida Election Reform Act of 2001, effective January 1, 2002. 2001 Fla. Laws Ch. 2001-40. The Act, among other things: prohibits the use of punchcard voting systems; provides funding for upgrading county voting systems; requires a uniform ballot design for each voting system; provides standards for equipment testing; substantially modifies the standards and procedures for manual recounts; provides for poll worker recruitment and training; and funds a statewide voter registration database.

If other States follow Florida's example, the chances of repeating a near-Presidential election crisis will diminish. If not, then as Yogi Berra would say, "It's déjà vu all over again." ◆

Chair's Message *continued from page 2*

Faced with this obvious reality, enthusiasts of the nondelegation doctrine fall back on the idea that it should serve merely to prevent “too much” delegation. Here we have a classic example of hope belied by experience. If sixty-five years of experience with the nondelegation doctrine in the courts should have taught us anything, it is that no one has figured out a workable test by which judges can decide how much is too much.

The history of the doctrine since 1935 is a story of failed efforts to make the doctrine justiciable. Among the most famous was then-Justice Rehnquist's opinion in *Industrial Union Dep't, AFL- CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980), known as the *Benzene* case. He would have made the application of the doctrine turn on whether Congress had avoided “a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge.” Hundreds of other delegations could be described by this subjective standard. And the consequences of invalidation — elimination of statutory authority for a program until Congress forges a consensus on issues that, by hypothesis, it was unable to resolve earlier — are too drastic for society to tolerate haphazard invocations of such a test. The most significant statutory mandates would become the most vulnerable.

The opinions of various Justices in *American Trucking* did highlight, as prior case law had not, a further difficulty with the nondelegation doctrine — the absence of persuasive support for the doctrine in the text of the Constitution. Justice Scalia, writing for the majority, sought to ground his analysis in the opening language of Article I: “All legislative Powers herein granted shall be vested in a Congress . . .” In other words, he was suggesting (as did Justice Thomas in a concurring opinion) that the legislative power cannot be delegated. Yet, if the phrase “legislative power” means what it probably would suggest to most minds — the power to enunciate general edicts that have the force of law — the assertion is patently false, as Justice Stevens noted in a concurring opinion. Scores of agencies routinely exercise that kind of power when they promulgate rules, and a construction of Article I that would nullify their ability to do so is unthinkable. The Scalia-Thomas reasoning works only if one ascribes a purely artificial meaning to the term “legislative power,” so that the case law test we use to implement the nondelegation doctrine (namely, the “intelligible principle” test) is read back into the definition of “legislative.”

The thoughtful reader will, however, ask: even if the nondelegation doctrine cannot workably be expanded beyond the shadowy marginal position it now occupies, why get rid of it? What harm does it do? The answer is that it does promote untoward results — by inducing lower court judges to take it seriously. Ultimately one can't blame good judges like Stephen Williams and Douglas Ginsburg, the D.C. Circuit judges who brought us *American Trucking*, for supposing that the nondelegation doctrine should sometimes be given effect. After all, the Supreme Court keeps saying so. The result of the Court's continued lip service is that it elicits attempts to reinvigorate the doctrine, which the Court then has to grant certiorari in order to intercept. After six decades' experience, we should doubt that these sporadic and destabilizing challenges to various regulatory programs will actually lead to a fruitful result.

Some modern theorists, although not defending the constitutional nondelegation doctrine as such, do approve of it insofar as it enables courts to reject certain kinds of statutory interpretations on the ground that they would raise nondelegation concerns. For example, avoidance of possibly unconstitutional delegation has been cited as a reason to eschew interpretations that would allow regulation of minuscule risks, as in *Benzene*, or that would intrude on civil liberties. I do not share this view. Canons of construction that would disfavor interpretations like these may be attractive on their own terms, but they should stand or fall on their individual merits — rather than as corollaries of the plainly dubious premise that Congress must wield “all legislative power.” Such canons are common outside the administrative law field; the courts can embrace them or not, as they see fit, without looking to the nondelegation doctrine. Besides, the driving force of these judicial decisions is not that administrators were given a wide range of choices, but that certain choices they made (or might have made) were intrinsically oppressive. For example, the main problem with the statutory construction rejected in *Benzene* was its perceived stringency, not the breadth of the options that it made available to OSHA.

Well, the nondelegation doctrine's life span may not be nearing its close, but my Chair year certainly is. As my term reaches its “far from young, fast approaching gray” phase, I would like to thank the many Section members whose cooperation and spirited participation has made this year a rewarding experience. I especially thank our capable Section Director, Leanne Pfautz, whose efficient and knowledgeable management of the Section's functions makes its elected leaders look good. It has been a privilege to work with all of you, and I look forward to greeting many of you at the Annual Meeting. ◆

Supreme Court

News *continued from page 13*

disparate impact discrimination. Moreover, the Court found that the prohibition against disparate impact discrimination could not be based upon Section 601, which was the only section the Court had found to authorize a private cause of action.

The Court left a major loophole, however, by acknowledging that a plaintiff could sue under Section 1983, alleging that a state was violating rights protected under federal law — the agency regulations banning disparate impact discrimination. As a result, environmental justice cases that had been filed as actions under Title VI are now being filed under Section 1983. This will in all likelihood lead to a case in which the Court will have to face the question whether the agency regulations themselves are lawful under Title VI. In light of the analysis in *Alexander* and the Court's recent cases interpreting Congress's power to adopt legislation enforcing the Fourteenth Amendment, those seeking "environmental justice" will not be looking forward to that case.

IRS Longstanding Reasonable Interpretation of Its Regulations is Entitled to Deference

In a dispute with players involving free agency rights, the Cleveland Indians baseball team agreed to pay certain players back pay for the years 1986 and 1987. The payment was made in 1994. The question in *United States v. Cleveland Indians Baseball Co.*, 121 S.Ct. 1433 (2001), was whether the employer's FICA and FUTA contributions with respect to this backpayment should be calculated on the basis of the years in which the payment was earned (1986 and 1987) or of the year in which it was paid. Because the salary caps and tax rates had both increased between 1987 and 1994, and because in 1986 and 1987 the salary then paid to the players had already resulted in the Indians making the maximum contributions under the then existing caps, whereas in 1994 the players involved had not otherwise received any salary from the Indians (meaning that all the backpay would be fully subject to the tax rates and caps), the Indians argued that the contributions should relate back to the years in which the salaries were earned. The government argued, consistent with its longstanding interpretation of its regulations, that the contributions should be calculated based upon the year in which the payment actually was made.

The statute favored the government. Since 1939 it has referred in various provisions to calculating the FICA and FUTA taxes on the basis of the "wages paid" in a particular year. Moreover, this statutory language replaced earlier language that referred to calculating the taxes on the basis of wages paid "with respect to employment during the calendar year," indicating a clear

intent by Congress to change the year of calculation from when the wages were earned to when the wages were paid. The only problem with this clear statutory interpretation was a Supreme Court decision in 1946, *Social Security Bd. v. Nierotko*, 327 U.S. 358. There the Court held that for purposes of determining an employee's eligibility for Social Security benefits (which requires a certain number of calendar quarters in which an employee has earned wages) backpay should be calculated as having been received in the calendar quarter in which the wages would have been earned, not as having been received when the backpay was actually paid. The Court in *Cleveland Indians* concluded that *Nierotko* parried the thrust of the plain statutory language, but it did not itself compel the interpretation sought by the Indians. The Court said that in *Nierotko*, "In all likelihood [the holding] reflected concern that the benefits scheme created in 1939 would be disserved by allowing an employer's wrongdoing to reduce the quarters of coverage an employee would otherwise be entitled to claim toward eligibility. No similar concern underlies the tax provisions [involved in the *Cleveland Indians* case, even though both use the same statutory language]." Given the conflict between the plain language and the thrust of *Nierotko*, the Court said that its role should be to defer to the Commissioner's regulations as long as they are reasonable. Those regulations, however, are themselves not explicit about how to treat backpay. Nevertheless, the IRS "has consistently interpreted them to require taxation of back wages according to the year the wages are actually paid, regardless of when those wages were earned or should have been paid."

At this point, a reader schooled in administrative law would already have been surprised not to have seen *Chevron v. NRDC* cited. Moreover, following last term's decision in *Christensen v. Harris County*, 529 U.S. 576 (2000), and its restatement that agencies' interpretations of their own regulations are entitled to strong deference, the reader would expect simple reliance on this doctrine here. But the Court does not make it simple, saying "We need not decide whether the Revenue Rulings themselves are entitled to deference. In this case, the Rulings simply reflect the agency's longstanding interpretation of its own regulations. Because that interpretation is reasonable, it attracts substantial judicial deference. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)." The bottom line, of course, is the same; the agency wins, receiving deference to its interpretation of its own regulations without regard to the form in which that interpretation is made. Indeed, one wonders why it took the Court so long to reach that conclusion. Justice Scalia concurred in the judgment. To him the statutory language was simply unclear how it was to deal with backpay, and "hence it is an issue left to the reasonable resolution of the administering agency."

Court Overturns NLRB's Interpretation of Term "Independent Judgment" Using *Chevron*

The Court and the National Labor Relations Board have had difficulties regarding the supervisory status or not of certain types of nurses, see *NLRB v. Health Care & Retirement Corps. of America*, 511 U.S. 571 (1994) (holding that nurses' judgment was exercised "in the interest of the employer" even when they exercised it for professional or technical matters, rather than for disciplinary or other matters), and in *NLRB v. Kentucky River Community Care, Inc.*, 121 S.Ct. 1861 (2001), the difference continued.

In *Kentucky River* the NLRB had determined that certain nurses working in the facility were not supervisors because they did not exercise "independent judgment," as required by the statute to qualify someone as a supervisor. According to the NLRB, the nurses' judgment was not "independent" because it related to "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards." The Court disagreed. An initial question was who had the burden of proof in the NLRB proceeding as to whether certain employees are supervisors. Here the Court unanimously agreed with the NLRB that the burden is borne by the party claiming the employee is a supervisor, notwithstanding that the General Counsel has the burden of proof for all elements of the unfair labor practice. Here, the employer wished to claim that the employees were supervisors and accordingly it was not an unfair labor practice to refuse to bargain with them.

As to the "independent judgment" issue, the Court stated that the term was ambiguous with respect to the degree of discretion required for supervisory status, and therefore it is within the NLRB's discretion, within rea-

son, to decide what scope of discretion qualifies. In addition, the Court found the NLRB's conclusion reasonable that independent judgment can be vitiated by detailed orders and regulations issued by an employer. However, the NLRB's determination that "professional or technical judgment" can never be independent judgment, no matter how much discretion is allowed by the employer, is inconsistent with the statute, the Court said. This part of the opinion was 5-4, with Justice Stevens writing a dissent that was joined by Justices Breyer, Ginsburg, and Souter.

Underlying this dispute over nurses is the NLRB's attempt to distinguish professional employees, such as lawyers, doctors, and nurses, who necessarily must supervise in some senses other employees, but who should not be foreclosed from unionization under the National Labor Relations Act as supervisors. The Court seemed somewhat sympathetic to this concern, suggesting a possible NLRB interpretation of the term "responsibly . . . direct [employees]" in the Act, which is a prerequisite activity for supervisors who do not have authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees. That is, if the "supervision" made by doctors, lawyers, and nurses is not considered "responsibl[e] direct[ion]," then they would not qualify as supervisors under the Act. Here, however, the NLRB had not interpreted this term, but instead had interpreted the term "independent judgment," the Court could not uphold the agency's interpretation.

Kentucky River thus joins the small but growing number of Supreme Court cases that appear to overturn agency interpretations at *Chevron's* step two, rather than step one, although even that conclusion cannot be certain, because the Court did not organize its analysis in a step one/step two format. ◆

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adverse WTO decision does not invalidate the domestic standard, as a practical matter it may have that effect. This method of affecting domestic law should be of concern to United States lawyers because the process is essentially secret and entirely in the hands of government representatives. So far, however, this method of extending international standards is more theoretical than real inasmuch as yet there has been no determination that a domestic standard is inconsistent with GATT because it is inconsistent with an international standard.

A second method by which international standards can affect domestic standards is through the process of "harmonization," through which nations negotiate among themselves to adopt uniform regulations, a goal mandated by the SPS and TBT. Under current practice, the United States negotiates with other nations and

when agreement is reached, the applicable federal agency then proposes the new "harmonized" regulation under the APA. As a practical matter, however, the notice-and-comment procedure is a pure formality, because the ability of the agency to adopt any changes depends on its willingness to go back and renegotiate the terms of the "harmonized" regulation. The recognition of the lack of this willingness is behind the Section's attempt to provide for public input to the harmonization process before its conclusion.

The third method by which international standards affect domestic standards is through equivalency determinations or mutual recognition agreements. Under this method, a domestic agency determines that a foreign (or international) standard is the equivalent of a federal standard and therefore the agency will not take enforcement

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action against the foreign product imported into the United States. Often this equivalency determination is manifested in a mutual recognition agreement whereby another nation accords our products a like equivalency determination. Because this method does not require any change to our regulations, there is no APA process involved. Moreover, judicial review of these determinations may be avoided because they may be characterized as the exercise of prosecutorial discretion rather than any change to the regulations. Thus, this method also raises problems for administrative lawyers.

Whatever the method involved, Professor Shapiro suggested that there was a bias to reduce the stringency of domestic health, safety, and environmental standards, because most nations do not protect their citizens and environment to the degree the United States does. As a result, developing international norms, while they raise the standards in most countries, may tend to lower the standards in the United States.

Professor Charles Koch of William and Mary Law School was the final panelist. He asked the audience to consider three visions of the future. One vision involves the emigration of international dispute resolution bodies from strictly trade disputes to disputes involving other issues, including human rights. Professor Koch noted that the European Community, which began as simply a

free trade organization – the Common Market, has now extended to an international government. One could even look to the history of the United States, in which the desire for free trade among the states led to the Constitutional Convention of 1787 and the creation of a national government. A second vision is one of global federalism, in which the national sovereignty of nation states will diminish in favor of international bodies, such as the WTO. Obviously, such a vision is not one many of us would embrace, but Professor Koch's suggestion was that this may be an inevitable development as a result of world trade, communications, and increasingly shared values. Such a vision suggests that American lawyers should be very concerned about the administrative procedures used by the developing international bodies. Professor Koch's third vision was that growing internationalism requires us to understand and appreciate other nations' domestic laws and culture. He gave an example of how the European Court of Justice has decided cases on the basis of "general principles of law," but those principles are derived from the domestic laws of several nations. Some of these general principles, he explained, may be familiar to American lawyers, but not in the terms used by the court. For instance, review of a regulation for "proportionality," familiar to European lawyers, probably would be recognizable to American lawyers as included in the concept of "arbitrary and capricious" review. ◆

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