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“Now is the winter of our discontent
Made glorious summer by this sun of York;
And all the clouds that lour’d upon our house
In the deep bosom of the ocean buried.”

Richard III, Act I, Scene I

For those of you who live on the East Coast, the beginning line of the Duke of Gloucester’s famous musings may reflect your own feelings about the winter of 2009-2010, which we trust is well on its way to becoming a glorious summer. At the same time, for the Administrative Law and Regulatory Practice Section, the past few months have indeed been significantly brightened by the efforts of many of its members and others who have assisted the Section in its mission. For the Council’s January meeting, Cass Sunstein, Administrator of the Office of Information and Regulatory Affairs, was kind enough to attend our luncheon and discuss some of the Obama Administration’s important transparency initiatives and other programs of interest to the Section. Also during January, Ron Smith and Joel Bennett staged CLE programs dealing, respectively, with the due process rights of veterans and representation of federal employees in EEOC proceedings. February brought to members (and others) programs examining the outlook for transportation legislation and various issues of significance for federal lobbyists, courtesy of Jason Schlosberg and Tom Susman. As I am writing this message, Joe Whitley, George Koenig, and Lisa Branch are about to stage the 5th Annual Homeland Security Institute with a stellar cast of speakers and we are eagerly awaiting the publication of Jim O’Reilly’s new book for the Section, Careers in Administrative Law and Regulatory Practice, which we hope will assist us in future membership campaigns targeted to law students and young lawyers. And, of course, without the 12-hour days of Anne Kiefer, our Section Director, the sun would have set on all of our activities.

The Strategic Planning Committee is now putting the finishing touches to its work, with the hope that it will present various recommendations to the Council at the Spring Meeting at Nemacolin Woodlands (May 14-16). That effort has focused in large part on how we can offer more services to members and others as well as ensure the future financial success of the Section. Specifically, it is currently being proposed that we 1) expand the scope of our currently successful publication program to include additional books that will highlight the Section’s expertise and provide valuable information for the practicing bar and others; 2) offer more freestanding CLE programs over the course of the year in various formats (webinars, teleconferences, as well as more traditional events) and targeted skills training in the area of administrative law for government agencies and private entities; 3) institutionalize fundraising for sponsorships of Section events and functions; and 4) create an aggressive communications program to attract and retain members of the Section.

We are also currently finalizing the program for the Spring Meeting and I hope that many of you can attend. We will offer panel discussions on May 14 relating to public participation and transparency with regard to health-policy decision-making in developing countries; the possible role for the Section in the area of global administrative law; the potential involvement of Section members in international missions related to administrative law; the current status of the nuclear plant licensing process; and the pending challenge, awaiting decision in the Supreme Court, to Sarbanes-Oxley based on the Appointments Clause of the Constitution. During the afternoon of May 15, having fun and learning about things other than administrative law will be the chief preoccupation—with tours of Frank Lloyd Wright’s Fallingwater, rafting on the Ohio River, golf, spa treatments, and shopping among the many activities available. The Council’s meetings on the mornings of the 15th and 16th promise to be filled with important agenda items, including the final approval of the Section’s Strategic Plan.

As always, I welcome your ideas and suggestions for an energetic Section that better serves its members and the public as well as your willingness to offer your time and effort in that cause.

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Administrative & Regulatory Law News

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

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Section Chair (automatic succession by operation of the bylaws):

Jonathan Rusch. Jon is Deputy Chief for Strategy and Policy in the Fraud Section of the Criminal Division at the U.S. Department of Justice. He has served as Section Secretary and a Council member, as well as chair or co-chair of the Antitrust and Trade Regulation, Criminal Process, and Regulatory Process Committees and as program chair for the Spring 2008 Section Meeting.

Section Chair-Elect (automatic succession by operation of the bylaws):

Michael Herz. Michael is Professor of Law and Director of the Floersheimer Center for Constitutional Democracy at the Benjamin N. Cardozo School of Law, Yeshiva University. He has taught at Cardozo since 1988, and has also been a visiting professor at the NYU Law School and Princeton’s Woodrow Wilson School and an adjunct professor at Columbia. He teaches and writes primarily in the areas of administrative law, environmental law, and constitutional law; and recently became co-editor of the Breyer Stewart administrative law casebook. Before entering academe, Michael was an attorney at the Environmental Defense Fund and a law clerk for Justice Byron White of the U.S. Supreme Court and Chief Judge Levin Campbell of the U.S. Court of Appeals for the First Circuit. He is a graduate of Swarthmore College and the University of Chicago Law School.

Michael has been an active Section member for many years, serving on the Council from 2005-2008, co-chairing the Fall Conference in 2006 and 2007, acting as Assistant Chief Reporter for the APA Project, and serving as a contributing co-editor of the Section’s A Guide to Judicial and Political Review of Federal Agencies (2005). He is a past chair of the Rulemaking Committee, vice chair of the Judicial Review Committee, and a member of the Scholarship Award Committee for 2005 and 2006.

Vice-Chair

Jamie Conrad. Jamie is the principal of Conrad Law & Policy Counsel, a solo law practice that he established in 2007, where he provides regulatory and legislative representation of associations, companies, and coalitions in the areas of environment, homeland security, and science/information policy. He was in-house counsel at the American Chemistry Council for 14 years, and previously practiced with the DC offices of Cleary, Gottlieb, Steen & Hamilton and Davis, Graham & Stubbs. Jamie is a frequent speaker and author. He conceived and edits the Environmental Science Deskbook (Thomson West). Jamie is currently a member of the Council (2008-present) and served as Secretary (2005-08). He has chaired the Legislation Committee and Environmental & Natural Resources Regulation Committee and co-chaired the Regulatory Policy Committee. Jamie has organized, moderated, and spoken at numerous Section programs. He has authored and coauthored Section reports and recommendations and blanket authority letters. Jamie also has held various leadership positions in the Section of Environment, Energy & Resources. He is a fellow of the American Bar Foundation. Jamie received a BA from Haverford College and a JD from George Washington Law School.

Last Retiring Chair (automatic succession by operation of the bylaws):

William V. Luneburg. Bill is a Professor of Law at the University of Pittsburgh School of Law. His areas of specialization are: Administrative Law; Environmental Law; and Civil Litigation. Bill's scholarship has been published widely in leading law journals. Bill's longstanding involvement with the Section includes service on the Section's Council, chairing the Legislative Process and Lobbying and the Rulemaking Committees, serving on the Nominating and Scholarship Committees, and most recently co-editing the third edition of Section's Lobbying Manual book. In addition, Bill has played a leading role in developing several Section resolutions, and he has chaired and participated in many Section CLE programs.

Secretary

Anna Williams Shavers (incumbent). Anna is a professor of law at the University of Nebraska College of Law. She established the University of Minnesota Law School’s first immigration clinic. She is a former Council Member and Immigration Committee chair and currently serves as chair of the Publications Committee and liaison to the ABA Commission on Immigration. She is a Board Member of the Midwestern People of Color Legal Scholarship Conference, Inc. She has previously served as Chair of the AALS Section on Immigration Law, a member of the ABA Commission on Law and Aging, and a member of the ABA Coordinating Committee on Immigration Law.

Budget Officer

Ronald Smith (incumbent). Ron is Pro Bono Counsel with Finnegan, Henderson, Farabow, Garrett & Dunner, LLP. Mr. Smith manages Finnegan’s veteran’s pro bono program of more than 100 pending appeals in federal courts. Prior to joining Finnegan in the summer of 2008, he was Deputy General Counsel for Veterans Claims for the Disabled American Veterans, where he supervised all appeals to the federal courts for the DAV. Prior to joining the DAV in February 1989, Mr. Smith worked

continued on next page
in the Department of Veterans Affairs Office of Inspector General. Ron has authored a number of articles on veteran’s law topics and has prosecuted more than 400 appeals in the federal courts, resulting in more than sixty published opinions. Ron has served on the Court of Appeals for Veterans Claims Rules Advisory Committee for many years and is a past chair of that committee. He has also been appointed to and presently serves on the Federal Circuit Advisory Council. Ron is a past President of the Federal Circuit Bar Association and a past Chair of the Federal Bar Association Veterans’ Law Section. He presently serves in the ABA House of Delegates on behalf of the Federal Circuit Bar Association, and was the Section’s Assistant Budget Officer for 2008-2009. He is a founding member of the Court of Appeals for Veterans Claims Bar Association.

Council Members:

James Gerkis (to fill remaining Conrad term). James is a partner in the Corporate Department of Proskauer Rose LLP, resident in the New York office. He has extensive experience in sophisticated domestic and international corporate, financing, securities, and real estate transactions. His practice experience includes mergers and acquisitions and leveraged buy-outs, private equity and venture capital transactions, real estate transactions (including REIT public offerings, joint ventures and hotel and resort developments), various financing transactions, and capital markets experience (representing both issuers and underwriters). James has made presentations relating to securities law and homeland security at several ABA conferences and is the author of many articles on various aspects of securities law, homeland security, and related subjects. He received his law degree from Columbia University School of Law in 1983 where he was a Harlan Fiske Stone Scholar and a Teaching Fellow.

Linda Jellum. Linda is a professor at Mercer Law School. She currently teaches Administrative Law, Comparative Administrative Law in the E.U. and U.S., Statutory Interpretation, and Property Law. Linda has written extensively in the areas of Administrative Law and Statutory Interpretation, including “Which is to Be Master,” The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers, 56 U.C.L.A. L. Rev. 837 (2009). She has also authored two books on statutory interpretation. Linda is co-chair of the Section's Judicial Review Committee. Before joining the faculty, Linda spent five years working for Washington State's Attorney General's office, serving as lead attorney for the Department of Social and Health Services. She received her JD and undergraduate degree from Cornell University. She has sat for and passed five states' bar exams.

Suedeen G. Kelly. Suedeen served as a Commissioner on the Federal Energy Regulatory Commission from 2003 through 2009. Prior to joining FERC, she was Professor of Law at the University of New Mexico School of Law, where she taught administrative, energy and public utility law. Before joining the faculty in 1986, she was Chair of the New Mexico Public Service Commission. She worked as Regulatory Counsel to the California Independent System Operator (2000) and as an aide to U.S. Senator Jeff Bingaman (1999). She practiced law in New Mexico with the Modrall Law Firm (2001-2003) and with Luebben, Hughes & Kelly (1978-1982). She also practiced in Washington, DC, with Ruckelshaus, Beveridge, Fairbanks & Diamond and the Natural Resources Defense Council. She co-chaired the Constitutional Law and Separation of Powers Committee with Professor Cynthia Farina in the 1990s. Suedeen has also been a member of the ABA’s Environment, Energy, and Resources Section and served as a Council Member from 2000-2003. Suedeen has her BA with distinction in Chemistry from the University of Rochester and her J.D. cum laude from Cornell Law School.

Nina A. Mendelson. Nina is Professor of Law at the University of Michigan. She teaches and conducts research in the areas of administrative law, environmental law, statutory interpretation, and the legislative process. Her scholarship is published in prominent law reviews, including the Columbia Law Review, the N.Y.U. Law Review, and the Michigan Law Review. She currently serves as one of three U.S. special legal advisers to the NAFTA Commission on Environmental Co-operation and is a member scholar at the Center for Progressive Reform. Prior to joining the Michigan faculty in 1999, Nina served with the U.S. Department of Justice's Environment and Natural Resources Division, the Senate Environment and Public Works Committee, and the law firm of Heller, Ehrman, White & McAuliffe. She earned her A.B. in economics, summa cum laude and Phi Beta Kappa, from Harvard University. Her JD is from Yale Law School, where she was an articles editor of the Yale Law Journal. Following law school, she clerked for Judge Pierre Leval, then of the Southern District of New York, and for Judge John Walker Jr., on the Second Circuit. Most recently, she spoke at the Section's Administrative Law Conference in October 2009, on the effect of executive supervision in agency rulemaking.

Jason Schlosberg. Jason is an attorney with the Federal Railroad Administration (FRA) of the U.S. Department of Transportation, where he drafts and enforces regulations, conducts offensive and defensive civil litigation, and counsels the agency in administrative law matters. Before joining FRA, he was an attorney advisor with the department's office of hearings, where he worked with four administrative law judges drafting decisions and orders and advising them on proceedings regarding complex factual and legal issues. Previously, with the law firm of Gardner, Carton & Douglas, Jason represented clients before federal agencies, drafting and filing comments in regulatory proceedings affecting the development and use of emerging technologies, counseled clients regarding regulatory compliance, administrative law, and corporate restructurings, and negotiated and drafted asset, intellectual property, continued on page 31
Import Safety: Consumer Protection in a Global Marketplace

By Cary Coglianese, Adam M. Finkel, and David Zaring*

Even with the global recession, the problem of unsafe food, pharmaceuticals, and other consumer products has grown ever more salient as a result of expanding international trade. Over just the past several years, consumers around the world have faced health risks from a variety of imported products, including cough medicine and toothpaste that contained a chemical compound used in antifreeze, toys that contained amounts of lead paint, milk and milk products that contained melamine ordinarily used as a fire retardant, and lethal contaminated blood thinner used for kidney dialysis patients. Often these unsafe imports have originated in China, but other countries have also been implicated. In 2008, for example, the FDA barred for safety reasons the importation of more than thirty generic drugs produced by Ranbaxy Laboratories Ltd., an Indian pharmaceutical manufacturer.

Although the need to protect consumers from unsafe food, drugs, and other products is not limited to imported products, the challenge of protecting consumers from unsafe imports deserves special analysis. Not only will safety crises from imported products not disappear, but they are likely to increase as international trade expands. Already the U.S. economy depends on more than $2 trillion worth of imported goods per year. The sheer volume of this trade creates a vast and complex network of potential sources of safety problems. More than 825,000 different exporting companies bring products into the United States through more than 300 airports, seaports, and border crossings, straining the capacity of national regulatory authorities to inspect products at the borders and monitor facilities at the site of manufacture. The U.S. currently relies on imports for more than 80 percent of the active pharmaceutical ingredients used by its drug manufacturers.

In addition to the vulnerability citizens face from goods manufactured in parts of the world not subject to their common “social contract,” the combination of global trade with modern technology’s constant innovation in manufacturing techniques, product designs, and formulas makes the challenge all the greater for the regulator of imported products. Furthermore, the recession does not help, as hard economic times only accentuate the competitive pressures that can lead firms to cut corners on safety.

In much of the world, separate regulatory laws and institutions have been created to deal with safety problems in different industries. But most of these laws have been designed to address domestically created consumer safety problems. The challenge of import safety calls out for new policy ideas and analysis. Global trade poses both quantitatively and qualitatively distinct problems for consuming publics around the globe and for those governments charged with protecting them. The import safety problem raises a variety of jurisdictional, legal, cultural, political, and practical issues that are not present with domestic product regulation.

**The Import Safety Problem**

The schematic shown in Figure 1 provides a highly simplified model of the various links in the causal chain that leads to consumer harm from imported products. At each step along the way there is the possibility for tampering, defects, or contamination. As even this simple schematic suggests, protecting import safety requires oversight over a complex welter of inputs on both sides of the border.

At some point from the initial ingredient production to the sale and use by consumers, an imported product moves from one jurisdiction to another. That movement over a jurisdictional border—from the exporting state to the importing one—qualitatively distinguishes the problem of import safety from the “ordinary” problems all governments face in policing the safety of food, drug, and consumer products within their borders. These challenges can be legal, cultural, and even practical. Just identifying who manufactured an ingredient can sometimes be difficult when records are kept in another country and in another language. Even when harm can be practically traced back to sources in other countries, regulatory and legal liability may not extend overseas, effectively giving importers a “free ride” on the harms that their products impose on consumers.

In addition to the challenges of monitoring and enforcing safety abroad, international trade complicates consumer protection still further when nations exhibit different cultural postures toward risk and place different domestic priorities on the use of government regulatory resources. Even if some cross-cultural risk threshold exists above which no consumer should be expected to suffer, it is still undoubtedly the case that the consuming publics in wealthy importing nations will often have different expectations for safety than consumers in developing countries. These differences factor not only into differences in government-imposed safety standards but also into political and institutional choices about what types of domestic regulatory organizations to create and how to fund them, choices that are affected by competing priorities for scarce government resources.

* Cary Coglianese is Deputy Dean for Academic Affairs, Edward B. Shils Professor of Law, and Professor of Political Science at the University of Pennsylvania, where he is also a Director of the Penn Program on Regulation. Adam M. Finkel is Executive Director of the Penn Program on Regulation and professor at the UMDNJ School of Public Health. David Zaring is Assistant Professor of Law at the Wharton School of Business and a faculty affiliate of the Penn Program on Regulation. This article draws in part on Chapter 1 of Import Safety: Regulatory Governance in the Global Economy (Cary Coglianese, Adam Finkel & David Zaring eds., University of Pennsylvania Press, 2009).

continued on next page
Policy Challenges

Achieving an acceptable level of import safety simply cannot be accomplished absent some form of international cooperation or interaction. If nothing else, it is that interaction, in the form of international trade, that gives rise to imports, and hence to the problem of ensuring their safety. Because the traditional tools of domestic regulation cannot, alone, address the totality of the problem, any proposal for innovative new protections must not only overcome domestic regulatory hurdles but also survive in the international environment as well.

It is possible, of course, to impose ordinary tort liability on the producers of the tainted or defective products when consumers are harmed by products. However, liability by itself will likely be insufficient because of the costs and practical difficulties in assigning responsibility when consumers are harmed. It can be difficult to identify which component of a product caused the problem. Even if the specific component can be identified, when supply chains are long and complex it will often be difficult to trace back the source of the harm to hold the appropriate party liable. If that party is located in another country, ensuring the collection of a judgment can be difficult.

International cooperation over import safety is needed, but it too poses important, even at times novel, challenges. These challenges are greatest when the exporting and importing countries do not share the same substantive safety standards. If such differences in standards grow out of real differences in risk tolerances, and are not just a cover for protectionism, they will be permissible under global rules. Nevertheless, they might still affect the willingness of an exporting country to engage in forms of regulatory cooperation with an importing country.

In addition to bilateral regulatory cooperation between exporting and importing countries, other institutional arrangements could involve the creation of transnational institutions that would possess standard-setting authority or enforcement powers (or both). Or perhaps such arrangements could involve attempts to leverage private-sector institutions to address product safety through greater reliance on private standard-setting and auditing bodies, trade associations, or even large manufacturers or retailers who can use their purchasing power to impose safety-related demands on their suppliers.

In considering the appropriate form of intervention, a further question arises concerning the consequences that should be imposed on those who violate safety standards. Some of these consequences may be imposed by the marketplace itself—if they are informed of risks, consumers can simply avoid products they find unsafe. The government can also respond, either with blunt instruments, such as trade sanctions or product bans against the exporting country, or with more specific consequences such as targeted penalties or liability judgments against the specific actors who created and sold unsafe products.

New Directions in Domestic Regulatory Strategy

In the wake of the recent safety scares and scandals, both importing and exporting countries stand at a crossroads. Given the vastness in the supply of imported products, solving the import safety problem will require new ideas. It will also require careful analysis by a broad range of scholars from a variety of disciplines. Import safety is both a regulatory problem as well as a trade problem, a domestic problem as well as an international problem.

The solutions available to policy makers are varied. A country might try to improve its enforcement program by deploying limited resources more effectively. Or it might try to improve outcomes by encouraging consumers themselves to take more care—and ensuring that they can do so by requiring more and better labeling on products, highlighting their risks, their origins, and their ingredients. Countries might improve safety by turning away, to some degree, from border interdiction and facilitated consumer self-help and turning instead toward improving the government’s responsiveness when outbreaks of unsafe products are identified. Probably no small part of the solution to import safety problems will continue to be responsive and reactive in form—though more effectively than at present—rather than purely preventative.

Effective policies will require smart, well-functioning regulatory institutions to carry them out. This may require the centralization of authority, the establishing of robust, shared databases, and integrated communications systems in which multiple agencies must be involved, or the separating of organizational units that promote and subsidize industries from those that manage risks.

However difficult to achieve, institutional reform may not be enough. Companies also need to develop internal regulatory systems to identify all “critical control points” in their operations at which risks can be monitored and
addressed, and then they must create internal plans and procedures for ensuring that risks can be minimized. Such a management-based approach holds much promise for conditions like those that apply to imports, where product performance is costly for the government to assess on an individual basis and where one-size-fits-all solutions do not apply.

The sheer volume, heterogeneity, and changing nature of products that pass through the global trade network make it virtually impossible for the government to regulate through more conventional means. Thus, imposing mandates or otherwise encouraging importers to develop their own private forms of self-regulation holds great appeal. Of course, the same vastness and complexity that make it difficult for governments to impose and enforce traditional regulatory standards will also undoubtedly hamper to some extent efforts to ensure that firms’ management systems are operating well and that other forms of public-private partnerships are delivering substantive results rather than just symbolism.

**Toward a Global Consumer Protection System?**

In addition to engaging the private sector, efforts to manage the most local of all problems—risk from individual consumption—within an expanding global network will likely require involvement by international institutions and actors. By itself, the marketplace does not seem equipped to handle the problem, and as noted above, national governments cannot hope all on their own to patrol all the goods entering their borders.

In developing regulatory responses to import safety problems, critical issues will arise over how to manage the relationship between the goal of global free trade and the safety demanded by domestic publics. The World Trade Organization (WTO) was designed to encourage freer trade among its members, but the imposition of domestic safety requirements on imported products would seem antithetical to the WTO’s raison d’être of equal treatment for foreign and domestic producers of goods and services—even when such requirements are consistent with General Agreement on Tariffs and Trade (GATT) exceptions to the general ban on barriers to free trade.

International networks exemplify an increasingly salient approach in which domestic regulators play the central role. Regulatory networks of varied types are now being put to the task of regulating import risks, including the Codex Alimentarius Commission (an international organization that has become the authorized entity for global food safety standards) and the International Consumer Product Safety Caucus (a transnational organization comprising representatives from domestic regulatory agencies). These networks, and other forms of soft law and so-called new governance strategies, all raise advantages and disadvantages that merit full consideration in addressing import safety.

The various international strategies for addressing consumer protection in a globalized economy raise at least three major sets of questions that will be familiar to administrative lawyers. The first set focuses on efficacy. How effective are the varied strategies and under what conditions? When should international hard or binding law, and even the creation of supranational institutions, be deployed? When should soft, nonbinding law, or more collaborative forms of governance, be pursued? When are domestic responses more effective than international responses, and vice versa?

The second set of questions focuses on equity. There are, after all, winners and losers to all domestic and international solutions. Who benefits? And who suffers? How should the demands of the developed world be reconciled with the realities of the developing world? Is it morally just to have the costs of new regulation imposed disproportionately on those who are already struggling, in order to reap benefits for consumers in the wealthiest parts of the world? As the global exchange of goods continues to gather momentum, these sorts of questions will only continue to arise.

The final set of questions focuses on accountability. Who exactly are the publics to be served by any international import safety regime? Is it the public in exporting countries, the public in importing countries, or both? How are all of their voices to be heard or represented in the process of setting and enforcing international standards?

Solving the market failures inherent in import safety will only give rise to worries about creating failures in democratic governance.

**Conclusion**

Any solutions to the problem of import safety must tackle two different issues: institutional structure and policy design. Institutional structure focuses on the regime level, considering the totality of a regulatory system, such as the entirety of a single country’s import safety apparatus or of multinational regulatory and trade systems. Policy designs are those more concrete strategies that can be adopted by any variety of national or international institutions, be they nations like China or the United States or international entities such as the European Union (EU) or the WTO. Policy designs range from the novel, such as requiring importers to secure insurance that would cover defective products, to a repurposing of the familiar, such as by using risk analysis and forecasting to help regulators act in smarter, more targeted ways.

An analysis of both policy designs and institutional structures suggests a growing need to combine public-sector oversight with private participation by importers and producers of goods, and even consumers themselves. And no wonder. Private action is surely a crucial part of any solution to the import safety problem, simply because this problem is bigger than the capacity of even the most effective public regulators acting by themselves.

Given the complexity of global systems of production, shipment, and sale of consumer goods, domestic governments and private firms will continue to be called on to prevent, interdict, and respond to hazardous imports, whether they are contaminated foodstuffs, unsafe pharmaceuticals, or consumer products with hidden dangers. Ensuring safe imports in an era of globalization will undoubtedly strain traditional domestic regulatory entities. As such, the challenges of the global society require the development of new ideas about regulation, information dissemination, and policy reform.
What is the Sound of a Corporation Speaking? “Just Another Voice,”
According to the Supreme Court

By Linda L. Berger*

W hen the Supreme Court overrules itself, and reaches a result different from the conclusions of Congress, the Executive Branch, and more than 20 state legislatures, the Court has the burden of persuasion. Did the five justices in the majority in *Citizens United v. Federal Election Commission*, 558 U.S. ____ (2010), meet that burden? I think the answer is no, setting aside the question of whether the majority reached the “right” conclusion about the constitutionality of limiting corporate spending in election campaigns. In this essay, I will explain my answer and address a related question: did the *Citizens United* majority observe the rules of the legal conversation within which the Court is but one of the speakers?

To be persuaded by the majority that the First Amendment protects corporate expenditures for “electioneering communications” and candidate advertisements during election campaigns, you must first agree with the majority that corporations are engaged in “speech” when they spend money for these purposes. Otherwise, the “unqualified text” of the First Amendment—“Congress shall make no law ... abridging the freedom of speech, or of the press”—does not cover what could easily be described as just another product manufactured by the corporation. The majority claims a simple syllogism renders the conclusion certain: the First Amendment protects speech; corporations produce speech; thus, corporations are protected by the First Amendment. But the syllogism’s premises require the decision maker to accept without question much that is implicit in the two metaphors on which its logic depends. The logic depends on the assumption that for the purposes of the First Amendment, corporations should be seen as “persons” and their spending of money to achieve some results should be viewed as “speech.” Articulating these metaphors uncovers some of what is hidden by the majority’s opinions, revealing our ordinary understanding that “free speech” is the expression in speaking or writing of the views of an individual human being. Because our ordinary understanding of free speech is so different, we recognize that it is a stretch to fit the source of the metaphor, a person speaking, onto the metaphor’s target, a corporation spending.

That the majority shares our ordinary understanding of free speech is reflected in Justice Kennedy’s comparison of the campaign financing statute to other restrictions on free speech. The exemplary speakers described in Justice Kennedy’s opinion for the Court match this ordinary understanding: they are individuals (distributing pamphlets and speaking about politics); media corporations (publishing books and newspapers); and nonprofit advocacy groups (the Sierra Club, the National Rifle Association, and the American Civil Liberties Union) expressing their views on public issues. After describing these speakers, Justice Kennedy argues that no one would claim the statute was constitutional if it was being applied to individuals. But he fails to acknowledge the reason why no one would make this claim: when individuals exercise their First Amendment rights, they are “persons speaking,” exactly what we expect when we think of free speech, with little metaphoric transfer required to make them fit.

Avoiding the metaphoric reasoning on which its syllogism depends, the majority conceals the question of whether the metaphors are helpful in these circumstances and fails to examine whether corporate spending should be viewed as speech. Instead, the majority assumes that what the statute regulates not only constitutes speech but in fact constitutes political speech, the most favored kind. Early in the opinion, Justice Kennedy lets his readers know that they should take for granted that “political speech” is involved. Writing about one of the cases the majority is about to overrule, he identifies its holding as prohibiting core value speech: “*Austin* had held that political speech may be banned based on the speaker’s corporate identity.” So too, in his concurrence, Chief Justice Roberts characterizes the government’s argument as urging “us in this case to uphold a direct prohibition on political speech.”

Compounding the generalization that corporate spending automatically qualifies as speech, the majority makes a good deal of the principle that the First Amendment protects “speech,” not speakers. Dismissing the dissent’s argument that protected speech might be confined to the expression of individual human beings, Justice Scalia scoffs, “This is sophistry,” and explains that the corporation’s authorized spokesperson is a human being. But the opposing argument is not that there is no “person” working at the corporation who signs the contract or operates the machinery or convenes the board meeting. Instead, the opposing argument is that it might make a difference for First Amendment purposes that a challenged communication was the product of a corporate process, rather than the expression of an individual person. When a corporation “speaks” in this way, no one knows which corporate employees participated in the process through which the communication was produced or whose

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views the communication represents; no one is responsible or accountable for the content of the statements or the manner in which they were communicated.1

Only when you accept the inferences and reasoning processes transferred by metaphoric reasoning are you able to conclude that corporations are engaged in speech when they spend money in an election campaign. Going further, the majority’s conclusion that the First Amendment should protect corporate speech relies on another set of unexamined assumptions: that the marketplace of ideas metaphor is the most appropriate way to think about how the First Amendment works. The majority assumes its audience agrees with this framework, which automatically suggests that the corporation needs protection from government regulation. Thus, Justice Kennedy writes that speech is so important to the election process that further regulation of the market could only be detrimental: “As additional rules are created for regulating political speech, any speech arguably within their reach is chilled.” Transferring its assumptions about the economic marketplace to the First Amendment arena, the majority naturally concludes that more speech is better than less speech, that (because money is “speech” in this instance) more spending is better than less spending, and that the better product will prevail.

Nowhere does the majority acknowledge that the dissent’s question deserves serious consideration: given the language, purpose, and history of the First Amendment, should it be interpreted to protect artificial entities such as for-profit corporations against government regulation? In his dissent, Justice Stevens presents the text-based argument that the Constitution itself makes a distinction between types of speakers. Thus, it might be concluded that individual speakers are protected by the free speech clause, but that the only protected entities are those that fall within the free press clause. Rather than counter the argument that the text itself distinguishes between speakers, the majority responds that it would be hard to apply the distinction.

As for the purposes of the First Amendment, most commentators acknowledge that protecting personal expression, supporting individual self-fulfillment and self-determination, is among them. This purpose might be furthered by extending protection beyond the personal to a group of people who have joined together for the specific purpose of expressing their views. But it is difficult to justify extending protection on these grounds to a corporate entity whose purposes grow out of and are limited by its responsibility to its stockholders.

Rather than meeting their burden of persuasion, the majority justices repeatedly shift the burden to the dissent. First, the majority asks the reader to assume that if a corporation is treated for some purposes as a person, it follows (as night follows the day) that a corporation should be treated as a person for all purposes. “The lack of a textual exception for speech by corporations” indicates to Justice Scalia that the natural reading of the First Amendment’s free speech clause would include them. Given corporate attributes that make the entity very different from an individual speaker, the majority instead should explain the lack of any text indicating that corporations were intended to be included. Writing that “the individual person’s right to speak includes the right to speak in association with other individual persons,” Justice Scalia concludes that “[t]he association of individuals in a business corporation is no different.” But surely it is the majority’s burden to explain why there is no difference.

As for engaging effectively in the national civic and legal conversation, the majority appears oblivious to current discussions of corporate roles and responsibilities, the functioning of a poorly regulated economic marketplace, and the excesses of campaign financing. Chief Justice Roberts assumes his audience agrees that it would be a bad thing if “First Amendment rights could be confined to individuals, subverting the vibrant public discourse that is at the foundation of our democracy.” Justice Scalia concludes that “to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.” Given the current public debate, these statements seem jarring; as the dissenting Justice Stevens notes, “While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.”

The majority’s tone-deafness extends to its expressions of reluctance to reach a sweeping conclusion, claiming to have been forced by circumstances to decide a difficult question. Instead, the majority appears to have reached out to find and determine an issue not pursued by the parties. Though Chief Justice Roberts claims that “[t]his is the first case in which we have been asked to overrule Austin,” Justice Stevens responds that it would be more accurate “to state that ‘we have asked ourselves’ to reconsider [Austin and McConnell].”

Reopening the argument, then reversing recent precedent partly on the basis that it was unstable, violates the conventions of the legal conversation in several ways. As anyone who has been engaged in a long-running dispute can attest, it is just not fair to claim that a decided principle is undecided simply because the people who disagreed in the first place continue to complain. Yet Justice Kennedy relies on this evidence to show that Austin is ripe for overruling: “[I]t has been noted by two of us that ‘Austin was a significant departure from ancient First Amendment principles.’” Concurring, Justice Roberts points out that “the validity of Austin’s rationale—itself adopted over two ‘spirited dissents,’—has proved to be the consistent subject of dispute among Members of this Court ever since.” Dissenters may continue to disagree; what the rules frown on is the claim that continuing to disagree is destabilizing rather than merely obstinate. The continued on page 15
Citizens United v. Federal Election Commission: Corporate Personhood

v.

the Regulatory State

By Dale F. Rubin*

Citizens United v. Federal Election Commission, 558 U.S. ___ (2010), held unconstitutional, on First Amendment grounds, a statute which prohibited corporations from using their general treasury funds to make independent expenditures for speech that expressly advocated the election or defeat of a candidate. The decision in Citizens United severely restricts the power of the state to regulate the “speech” of corporations in the political arena. Although Citizens United does not specifically concern itself with this issue, this essay will focus on the concept of “corporate personhood,” a judicial creation which undergirds the concept of corporate “speech.”

In the context of Citizens United, it is important to note that with reference to corporate “speech,” I am not referring to management speaking on behalf of a corporation. I am referring to the corporation actually “speaking” itself! How did the courts arrive at the conclusion that corporations could “speak” and therefore are entitled to First Amendment protections? The answer is that for over a hundred years, corporations have been recognized as natural persons and accorded protections under certain amendments to the Constitution. As a result of this “corporation/natural person” judicial creation, the ability of the state to regulate the activities of corporations has been seriously hampered.

Corporations are not real people. Thus, it is not hyperbole to state that the judicial journey from the corporation as artificial entity to the corporation as natural person is pockmarked

with manifestly erroneous Supreme Court jurisprudence. Consider this: the Supreme Court has decided that corporations derive their personhood rights from the due process provision of the Fourteenth Amendment!

“At the time of the adoption of the Bill of Rights, the founding fathers were thinking of protecting natural persons from governmental abuse of power. They did not have corporations in mind.”

Corporations began their relentless effort to convince the courts that the word “person” in the Fourteenth Amendment also applies to corporations from the time of adoption in 1868. Between 1868 and 1900, of the approximately 300 cases filed asserting Fourteenth Amendment protections, 288 were filed by corporations and only 12 were filed by African-Americans.

Obviously, since the Fourteenth Amendment qualifies the word “person” with the words “born” or “naturalized,” its application to corporations is disingenuous at best. Furthermore, in the famous Slaughterhouse Cases, in 1873, the Supreme Court made it very clear that the Fourteenth Amendment applied only to recently freed African-American slaves and not to slaughterhouse owners who had asserted that their rights under the amendment had been abridged by the City of New Orleans.

Unfortunately, corporations struck “personhood” pay dirt in the case of County of Santa Clara v. Southern Pacific Railroad, 118 U.S. 394 (1886). County of Santa Clara was concerned with which was the proper taxing authority, the state or the county, in connection with the taxation of railroad property. Although lengthy arguments had been made in the lower courts asserting corporate protections under the Fourteenth Amendment, the Supreme Court decided to settle the issue on other grounds. In fact, the Court stated as follows: “The court does not wish to hear argument on the question whether the provision of the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction, the equal protection of the laws, applies to these corporations. We are of the opinion that it does.” This statement was placed in a headnote of the case and appears nowhere in the main body of the opinion.

With respect to the relevant issue of the case, i.e., the proper taxing authority, the Court concluded that this question could be resolved on other grounds and thus “it is not necessary to consider any other questions raised by the pleadings and the facts found by the court.” Thus, based on a statement that played no part in the decision of the case, corporations were henceforth considered to be “persons” and accorded protections under the Fourteenth Amendment and subsequently certain protections under the Bill of Rights.

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Notwithstanding, specific questions still need to be addressed: (1) What is the status of a conclusory statement made by a Chief Justice in a case in which the majority expressly states that such a conclusion played no part in the holding of the case? How can courts cite as precedent a conclusion for which the court cites no rationale or explanation? How can future courts criticize, distinguish, or endorse a conclusion in the absence of any rationale giving rise to its existence? How can County of Santa Clara stand as such a powerful precedent when every court that has previously addressed the issue ruled that corporations were not considered persons within the meaning of the Fourteenth Amendment? Granting corporations rights under the Fourteenth Amendment and the Bill of Rights flies in the face of the overwhelming weight of the evidence indicating that these amendments were enacted for the protection of human beings, not corporations.

An analysis of how the courts created the corporate person still does not answer the question of how can corporations “speak” and thereby be entitled to protections under the First Amendment. This question was resolved in the case of Buckley v. Valeo, 424 U.S. 1 (1976), another example of dubious jurisprudence. The Buckley Court invalidated political expenditure limits imposed by the FEC. Now one may pose the query: What do political expenditures have to do with speech? The commonsense answer is nothing. The Buckley Court thought otherwise. In ruling that the spending of money on political campaigns was the equivalent of speech, the Court stated: “A restriction on the amount of money a person or group can spend on political communication necessarily reduces the quantity of expression by restricting the number of issues discussed... This is because every means of communicating ideas in today’s mass society requires the expenditure of money.”

First of all, why is it undesirable to limit the number of issues discussed in a political campaign? Anyone who has followed recent political campaigns would more than welcome stringent limits on the garbage disguised as political advertisements. Secondly, and more to the point, it is painfully obvious that not every means of communicating ideas costs money. Street corners have long been used as platforms for speech by impecunious candidates.

The fact is that since corporations cannot really “speak” like human beings, the Buckley Court simply decreed that corporate political expenditures are the same as speech. As an aside and as a testament to the absurdity of the notion of corporate “speech,” it should be noted that corporations cannot “speak” for the purpose of asserting protections under the Fifth Amendment privilege against self-incrimination. Since corporate officers cannot take the Fifth on behalf of the corporation, this amendment cannot be utilized by the corporation, because the corporation cannot really “speak.”

From a regulatory standpoint, cases like County of Santa Clara, Buckley, and others pose a nightmare for government agencies seeking to police the affairs of corporations. In the context of the First Amendment, how can the FEC control corporate spending on political campaigns? The answer is that it cannot. If corporate political expenditures equal speech, on what basis can such expenditures be limited? If one feels currently inundated by infomercials on television, wait until the election cycle rolls around! Far from expanding the “number of issues discussed,” corporate spending will drown out the voices of real people and harshly limit the number of ideas to which the populace is exposed. Remember Death Panels?

Equally as daunting is the fact that corporations have also been accorded protections pursuant to the Fourth Amendment. In the case of Hale v. Henke, 201 U.S. 43 (1906), the Supreme Court held that an overbroad subpoena for corporate documents constituted an unreasonable search and seizure pursuant to the Fourth Amendment based on the corporation’s status as a “person.” The Court stated: “A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body, it waives no constitutional immunities appropriate to such body.” Again, this is law by judicial decree ignoring the most salient aspect of corporate existence: it cannot “be” in the absence of a privilege granted by the state. As a result of Hale, governmental agencies are required to get a subpoena or a warrant in most cases in order to inspect documents or the premises of corporations. See v. City of Seattle, 387 U.S. 541 (1967). This puts regulatory agencies at a distinct disadvantage.

Nevertheless, it is important to note that at least in the context of the Fourth Amendment, the Supreme Court has experienced rare moments of clarity. In the case of United States v. Morton Salt Co., 338 U.S. 632 (1950), the Court upheld a request by the FCC for a large amount of “additional and highly particularized reports showing continuing compliance with the [previously entered into consent] decree.” Debunking the “corporations as natural persons” shaky jurisprudence, the Court stated: “While they may and should have protection from unlawful demands made in the name of public investigation, (citations omitted), corporations can claim no equality with individuals in the enjoyment of the right to privacy. They are endowed with public attributes... The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation.” Of course, this statement would apply equally to the corporate exercise of speech under the First Amendment. But the Morton Salt Court went further. It also stated: “Even if one were to regard the request for information in this case as nothing more than official curiosity... agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.”

It is incontrovertible that at the time of the adoption of the Bill of Rights, the founding fathers were thinking of protecting natural persons from governmental abuse of power. They did not have corporations in mind. In fact, colonial attitudes toward corporations were decidedly negative. For example, in 1800, Thomas Jefferson stated: “I hope we shall crush in its birth the aristocracy of our monied corporations which dare already
to challenge our government to a trial of strength and bid defiance to the laws of our country.” James Madison in 1817 stated: “there is an evil which ought to be guarded against in the indefinite accumulation of property from the capacity of holding it in perpetuity by corporations…The growing wealth acquired by them never fails to be a source of abuses.”

The shop merchant community, which comprised the overwhelming majority of businesses in colonial America, stated, through its National Trades Union: “We entirely disapprove of the incorporation of Companies inasmuch as we believe their tendency is to eventuate and produce monopolies, thereby crippling the energies of individual enterprise and invading the rights of smaller capitalists.”

President Martin Van Buren issued a statement in 1837 that foreshadowed our current political climate: “I am more than ever convinced of the dangers to which the free and unbiased exercise of political opinion, the only sure and safeguard of republican government, would be exposed by any further increase of the already overgrown influence of corporate authorities.”

This virulent anti-corporate sentiment was reflected in the stringent regulatory environment to which corporations were subject. For example, in colonial America, corporations could not own stock in other corporations. They were forbidden to own property not directly needed for their authorized business. Most States placed limitations on the amount of capital they could raise. Corporations could not operate outside the state of their incorporation, and some states allowed corporations to exist only for a specified period of time, after which time they would be required to apply for renewal of their charter or dissolve.

In retrospect, maybe the colonists had the answer to the undue corporate influence in our political environment that Citizens United will undoubtedly further spawn. We sometimes seem to forget that notwithstanding a hundred years of ill-founded Supreme Court jurisprudence regarding corporate personhood, States still have the power to regulate corporations by placing certain restrictions in their corporate charters. In light of Citizens United, this may be the only weapon left in our government regulatory arsenal.

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**NATIONAL ADMINISTRATIVE LAW JUDICIARY FOUNDATION**

The National Administrative Law Judiciary Foundation (NALJF) is the public interest arm of the National Association of Administrative Law Judiciary (NAALJ). One of the Foundation’s major purposes is to promote the study and research of administrative law and distribute this knowledge to the administrative judiciary and the public. To further this purpose, a Fellowship was endowed to encourage research and scholarship for improving administrative justice.

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**2010 FELLOWSHIP COMPETITION**

NALJF is currently requesting applications for the 2010 Fellowship. The topic for the 2010 Fellowship is “Transparency in Government in the Context of Administrative Adjudication.” The proposed article may be a general overview of this topic or a more focused approach. The author can address the meaning of transparency and the implications of the issue, with a point of view for or against “transparency” as defined by the author. The proposed article can include discussion of practical implications and/or the philosophical principles or social policies at stake. Examples of sub-topics could include but are not limited to any of the following sub-categories: ex parte communications, including between adjudicator and agency personnel; confidentiality and privacy issues; national security issues; and criminal investigations.

As an alternative to the above topic, an applicant may submit a topic of the applicant’s choosing. To be considered, such a submission should propose, for approval by the Fellowship Committee, a scholarly review of the law on an issue relevant to executive-branch adjudication at any level of government.

All applications for the 2010 Fellowship must be in electronic format (WORD format preferred) and must include the following documents: (1) an abstract or an introduction to the proposed article, (2) a detailed outline for the proposed article, (3) a writing sample, (4) curriculum vitae, and (5) a list of publications. All submissions must be sent by e-mail to naalj@naalj.org, with a CC to jfarrell.nysalja@yahoo.com. The deadline for all submissions is April 30, 2010.

The Fellowship Committee will review the submissions and select the Fellowship Winner by May 30, 2010.

The Fellow will prepare an original article for publication in the Journal of the National Association of Administrative Law Judiciary, and will deliver a fifty-minute oral presentation at the 2010 NAALJ Annual Conference in California in October, 2010. The final draft of the paper will be due January 1, 2011.

The Fellow will receive a $1500.00 cash stipend, as well as transportation, accommodations, and meals, at the 2010 NAALJ Annual Meeting and Educational Conference in California in October 2010.

Applications and inquiries regarding the Fellowship should be submitted by e-mail to naalj@naalj.org, with CC to jfarrell.nysalja@yahoo.com

Sincerely,
Hon. John G. Farrell, Fellowship Committee Chair
On January 21, 2010, the Supreme Court threw the election stage into potential chaos with its decision in Citizens United v. Federal Election Commission, 558 U.S. __, 130 S.Ct. 876 (Jan. 21, 2010) (“CU”). The verdict? Corporations are now free to make unlimited independent express advocacy expenditures in federal elections. The possible implications? The obvious one that is monopolizing the public debate is that corporate funds (and probably union treasury funds as well) may now play a larger role in how individuals are elected to public office at federal, state, and local levels. There may be a grain of truth in that. But it appears that the CU decision may not be quite the calamity that some scholars and practitioners have suggested.

Prior to the CU decision, both for-profit and nonprofit groups were able to spend freely on so-called “issue ads,” ads which do not expressly advocate for or against a particular federal candidate but with clever writing pack quite a punch in the context of an election. Thus, what might be more important to discuss about CU is not how it opens the door for corporations to expressly advocate (which they could get quite close to before), but how the decision affects the spending of a number of other players on the electoral stage, such as section 527 groups, federal political committees, section 501(c) nonprofits, and even state political parties. CU has thrown several decades of (almost) settled law into turmoil, and the layers of its consequences are only just beginning to peel away.

The Decision

CU considered whether a nonprofit group, the eponymous Citizens United, could use treasury funds to produce and promote a 90-minute documentary critical of Hillary Clinton (“Hillary”) during the 30-day period leading up to the presidential primaries in the 2008 election cycle. CU, slip op. at 2-4. At the time of the decision, federal law permitted certain political advertisements, so-called “electioneering communications,” to air during this period. These are broadcast, cable, or satellite political advertisements that (1) mention a clearly identified federal candidate, (2) are publicly distributed in the 60 days prior to a general election or 30 days prior to a primary election, and (3) are targeted to the relevant electorate. 11 C.F.R. § 100.29(a). The ads, however, could not expressly advocate for or against a particular candidate. The Bipartisan Campaign Act of 2002 (“BCRA”) imposed disclaimer and disclosure requirements on such electioneering communications, id. §§ 110.11(c); 104.20, as well as restrictions on the use of corporate or union funds for “electioneering communications” if they did not constitute “pure” issue advocacy. See Wis. Right to Life, Inc. v. Fed. Election Comm’n, 551 U.S. 449 (2007) (“WRTL”).

Citizens United argued that the Hillary documentary itself was not an electioneering communication because it was not “publicly distributed” over broadcast, cable, or satellite media—the movie was offered on DVD and in theaters, but the organization also wanted to offer the movie over video-on-demand to digital cable subscribers to increase viewership. CU, slip op. at 2. Such a communication is considered “publicly distributed” with respect to presidential candidates if it reaches 50,000 or more persons in a state where a primary election is to be held. Id. § 100.29(3)(ii)(A). The Court declined to find that Hillary was not an electioneering communication because it was capable of being “publicly distributed” to more than 50,000 persons, given that the digital cable system reached over 34.5 million subscribers. CU, slip op. at 6. In addition, the Court ruled that the ad was not “pure issue advocacy” as defined by the WRTL decision. Id. at 7-8.

Thus, the Court declined to rule for Citizens United on the narrower grounds that the Hillary documentary was not an electioneering communication, but the Court did find merit in its arguments that Citizens United “has a constitutional right to speak on this subject.” CU, slip op. at 12. Finding no plausible narrow grounds for a decision that would not chill political speech, id., the Court took the unusual, though not unprecedented, move to reconsider the merits of Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990), a decision that sanctioned state restrictions on the role of corporate funds in state and local elections, and the merits of a portion of McConnell v. Federal Election Commission, 540 U.S. 93, 206 (2003), which had more recently upheld a facial challenge to the BCRA’s “electioneering communications” law.

In a 5-4 decision, the Court overturned Austin and the electioneering portion of McConnell, striking down restrictions on the right of corporations to expressly advocate for the election or defeat of a particular federal candidate and to pay for electioneering ads that did not constitute “pure” issue advocacy. Placing heavy weight on the existence of a cornucopia of statutes, regulations, advisory opinions, and other guidance that an individual or entity must navigate before engaging in political speech, CU, slip op. at 18, the Court determined that such restrictions functioned as a type of “prior restraint” which is an “unprecedented governmental intervention into the realm of speech.” Id. at 19. The Court concluded that “the

continued on next page
Government lacks the power to ban corporations from speaking” and that “the First Amendment does not allow political speech restrictions based on a speaker’s corporate identity.” CU, slip op. at 31.

What’s Next?

So what does CU mean for political advertising in the 2010 election cycle? Corporations and unions are still prohibited from making direct contributions to federal candidates and to state and local candidates where prohibited by state law. Prohibitions against coordinating express advocacy expenditures with federal candidates are still in place, so any corporate and union spending will have to be conducted independently. Will we see “Vote for John Smith for U.S. Senate” ads with disclaimers reading “Paid for by Pfizer, Inc.”? That’s unlikely, as for-profit companies still have to answer to their shareholders about such expenditures. It’s more likely that such companies will continue to funnel their contributions to existing groups who will put their disclaimer on such communications. The question remains, to whom, and what can they do with that money?

Section 527 organizations and political committees

There is no clear guidance on what a section 527 political organization may take from the CU decision. A 527 organization may collect unlimited contributions from many types of donors, including individuals, corporations, unions, partnerships, other 527 organizations, and political committees. Many of these 527 groups segregate their funds into separate corporate and non-corporate bank accounts—such accounting gymnastics provides the flexibility to make contributions at the state level and to pay for federal electioneering communications without running into prohibitions against the use of corporate funds for such communications unless they meet the pure issue ad test in 11 C.F.R. § 114.15.

The test provides a “safe harbor” for issue ads that (1) do not mention an election, candidacy, a political party, or voting; (2) do not take a position on a candidate’s character, qualifications, or fitness for office; and (3) focus on a legislative issue, urging a candidate to adopt a position or urging the public to take a position on a particular issue. Id. This concept derives from the Court’s decision in WRTL, which found that a communication was the “functional equivalent of express advocacy,” and thus could not be paid for using corporate or union funds, if it was “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” WRTL, 551 U.S. at 469-70. After CU, this test, which articulates something “less than” express advocacy, would appear to be functionally no longer relevant. Does this mean that a 527 now may use its corporate account to make an express advocacy communication for a federal candidate? After all, if a corporation acting on its own may make an independent express advocacy expenditure, surely two corporations pooling their funds into a 527 organization must be permitted to do the same.

Or consider this. FEC restrictions concerning registration of political committees were not affected by the CU decision and are still in place—if a group of one or more persons spends over $1,000 in a calendar year to influence the election or defeat of a federal candidate, it must register as a federal political committee, subject to incoming contributions limits and source restrictions, as well as disclosure requirements. 11 C.F.R. §§ 1100.5, 102.1(d). If a 527 organization uses a segregated bank account containing corporate funds, is it limited to spending $1,000 per calendar year on independent express advocacy communications before triggering registration as a federal political committee? Would the FEC find that the use of those corporate funds in excess of $1,000 is illegal because federal political committees cannot accept corporate contributions? Is that $1,000 registration threshold now an unconstitutional “expenditure limit” on independent express advocacy communications funded by corporate money?

Finally, may a 527 organization rely on the “major purpose” test referred to in Buckley v. Valeo, 424 U.S. 1, 79 (1976), in which the Court determined that federal election laws reach only organizations that have a “major purpose” of influencing the nomination or election of a candidate? All of these issues are now unclear in the wake of the CU decision.

Nonprofit organizations

It’s clear that nonprofit organizations may accept corporate contributions, regardless of the CU decision. What those contributions may be used for, however, has principally been a mechanism of tax law. Under current IRS regulations, a section 501(c)(4) organization, for example, may conduct limited electoral activities, generally restricted to issue advocacy communications, limited to spending $1,000 in contributions to federal political committees, and generally prohibited from making direct contributions to federal or state candidates where prohibited by law. In the 2010 election cycle, BCRA provided that section 501(c)(4) organizations may run electioneering communications using corporate or other “partisan” activities).

With the opinion in FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) (“MCFL”), the Court carved out an exception for section 501(c)(4) organizations to do express advocacy communications to influence the election or defeat of a federal candidate if the organization met several criteria, including: (1) it does not engage in business activities, (2) it has no shareholders, (3) the organization does not accept funds from union or business organizations, and (4) the organization was not established by a union or business organization. 11 C.F.R. § 114.10(c). If a nonprofit accepted and/or used corporate funds, it could not issue either electioneering or express advocacy communications.

CU has changed all of this. The concept of an MCFL organization as described above is now all but moot, given that a section 501(c)(4) organization can now run express advocacy communications in federal elections, regardless of the type of money it
accepts, subject only to IRS restrictions on nonprofit spending and Buckley’s major purpose test mentioned above. The concept of an electioneering communication is also somewhat obsolete, for what organization would bother with an electioneering communication when it could expressly advocate?

State political parties

Although the decision has no direct effect on them, the potential losers in the wake of CU are political parties. Many state parties have low-dollar contribution limits and limited ability to coordinate with their candidates under state and local laws. These organizations, however, are permitted to expressly advocate on behalf of their candidate within the limits of federal and state laws. The potential problem is that parties may find themselves further marginalized as nonprofits, corporations, and unions flood the political landscape with new spending in response to the CU decision. Whether this concern comes to fruition remains to be seen. Parties should remain a big player in the short term.

Conclusion

The CU decision has created somewhat of an uproar among those concerned about increased corporate influence in the democratic process. Leaving the discussion about the sanctity of democracy aside, the 2010 election cycle will be extremely interesting to watch as those corporate (and union) funds find the path of least resistance, new players emerge on the electoral stage, and these new rights are exercised.

What is the Sound of a Corporation Speaking?
“Just Another Voice,” According to the Supreme Court

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true ground of this objection to Austin is expressed by Justice Roberts; the court must balance “the importance of having constitutional questions decided against the importance of having them decided right.”

Finally, the majority harms the legal conversation by not taking its burden of persuasion seriously. Rather than rebutting the dissent’s argument that the free speech and free press clauses might be interpreted to protect different types of speakers, Justice Scalia flatly declares that “No one thought that is what it meant.” Near the end of his concurrence, Justice Scalia makes the same irrefutable contention: “we are therefore simply left with the question whether the speech at issue in this case is ‘speech’ covered by the First Amendment. No one says otherwise.”

The majority addresses another question, whether narrower grounds might have been found adequate to decide the issue, in more depth. But its argumentation strategy is similar—declare that the conclusion is undisputed. Thus, the majority explains why the narrower arguments were rejected before it declares the statute unconstitutional on its face, presumably because there are cases not before the court in which the statute would be found unconstitutional. What are those cases? We don’t know because the majority does not tell us. Instead, Justice Kennedy concludes that the statute “beyond doubt discloses serious First Amendment flaws,” that it chills speech that is “beyond all doubt protected,” and that “[a]ny other course of decision would prolong [its] substantial, nation-wide chilling effect.”

In sum, the Citizens United majority substituted certainty for persuasion. On questions like these, the justices would better serve the ongoing legal conversation if they heeded Learned Hand’s caution that when judges themselves so sharply disagree, they should not be too sure of their conclusions.

RESOLUTION IN MEMORY OF DAVID E. CARDWELL

WHEREAS our friend and colleague David E. Cardwell, passed away on November 18, 2009;

WHEREAS David served in such crucial roles as a member of the Section Council, liaison to the Section of State and Local Government, and liaison to the Standing Committee on Election Law;

WHEREAS David served as a long-time leader in the American Bar Association, a delegate to the House of Delegates, and member of the Board of Governors;

WHEREAS through his energy, good humor, and insight, he effectively represented the Section’s interests to other entities within the American Bar Association;

WHEREAS, in his distinguished career, David was a partner at Holland & Knight; General Counsel to the Florida Redevelopment Association; and founder, Executive Director, and General Counsel of the Florida Grapefruit League Association;

WHEREAS David was a nationally recognized expert in election law and the political process;

WHEREAS David, with political acumen and persuasive insights, contributed so much to this Section as a mentor to many other leaders of this Section;

NOW, BE IT RESOLVED, that the Section expresses our deep sadness at David’s passing, our condolences to his wife, Dagmar, his daughter Reece, and his son Patrick, and honors his memory for his numerous contributions to the American Bar Association, this Section, and the legal profession. We are honored to call him our friend and colleague.

January 23, 2010
Giving Applicants for Veterans’ and Other Government Benefits Their Due (Process)

Jeffrey S. Lubbers*

As reported in a recent “News from the Circuits” column,¹ the U.S. Court of Appeals for the Federal Circuit, in two recent decisions, Cushman v. Shinseki, 576 F.3d 1290 (Fed. Cir. 2009) and Gambill v. Shinseki, 576 F.3d 1307 (Fed. Cir. 2009), held that the protections of the Fifth Amendment’s Due Process Clause apply to applicants for veterans disability benefits. Shortly after those two decisions, a third decision, Edwards v. Shinseki, 582 F.3d 1351 (Fed. Cir. 2009), followed the Cushman precedent, but in this case the author of the opinion for the court, Judge Randall Rader, also penned a separate opinion in which he offered “additional views” expressing his agreement “with the result” but also asserting his strong disagreement with Cushman on the grounds that the Supreme Court has never squarely addressed the issue of whether applicants for government benefits have a property (or liberty) interest sufficient to allow them to invoke due process protections and that, to the extent this issue has come up, a plurality of the Court has seemingly indicated that applicants lack such interests.

I wish to highlight some of the larger implications of these cases for administrative and constitutional law. In the end, I conclude that the Cushman decision is not a departure from the way that most appeals courts have dealt with due process in the application context, though whether the Supreme Court would be willing to go along with the mainstream view, if the issue were squarely presented, is an open question.

Let’s start with the fundamentals. The Due Process Clauses of the Fifth and Fourteenth Amendments provide that the government may not “deprive any person of life, liberty, or property, without due process of law.” The key words for the purpose of this discussion are “deprive” and “property.”

In plain English, to be deprived of something, one must presumably possess it first. It would follow, then, that to trigger procedural due process, one must presumably claim that the state is depriving him or her of a possessory interest in property or liberty.

Until 1970, the concept of property in the Supreme Court’s jurisprudence was relatively limited to real property, money, and tangible things—items a person might possess in the ordinary sense of the word. If such property were taken away by the state, the person suffering the deprivation generally had a right to a trial-type hearing. The hearing might need to be held before the deprivation, but it could also be afterwards if there were no irreparable harm in doing so—i.e., if there were a make-whole remedy of some sort that could be provided after the fact.

But starting with the landmark cases of Goldberg v. Kelly in 1970 and Board of Regents v. Roth in 1972, the Supreme Court began to recognize the concept of “entitlements” to continued government benefits such as welfare benefits or a tenured government job as a type of property for the purposes of the Due Process Clause that could not be taken away without a fair hearing. This was true even though such entitlements were not really possessed in the same way as traditional property—they could not, for example, be given away, sold, subdivided, or devolved through inheritance. While it was true that some entitlements, such as the welfare benefits in Goldberg, were provided for as a matter of state statutory law, others, such as the government job at issue in Roth, were not. Nevertheless, in the latter case, the Court recognized that an employee could have an implied entitlement if he or she had regulatory or contractual protection from removal except for good cause.

The concept of entitlements grew to include the right to a continuation of public education, public housing, and other government benefits such as social security, food stamps, Medicaid, and veterans’ benefits. In each of these contexts federal courts held that if someone has been granted the right to receive such benefits, they couldn’t be revoked (at least on individual, non-programmatic grounds) without due process. After all, at that point there would certainly be a deprivation.

This broad expansion of the concept of property (and a parallel expansion of the concept of liberty by the Supreme Court) led to an examination of what process was due in these various situations. In Goldberg, the Court ruled that the beneficiary had to be given a pre-termination, trial-type hearing before welfare benefits were taken away. That was understandable due to what the Court called the “brutal need” of beneficiaries for these subsistence benefits. But, unfortunately, the cost of such hearings led New York City—the defendant in that case—to make policy changes that made it harder for beneficiaries to get on the welfare rolls in the first place because it had become so much harder to remove them later on.

The somewhat unsatisfactory unintended consequences of Goldberg and the realization that not every type of deprivation of an entitlement would warrant a trial-type hearing led the Supreme Court, a scant six years later, to pull back from Goldberg in the case of Mathews v. Eldridge, 424 U.S. 319 (1976), in which the Court developed its famous three-prong balancing test for determining what process was due, once a property or liberty deprivation was found.

After Mathews, courts have had to balance (1) the importance of the

* Professor of Practice in Administrative Law, Washington College of Law, American University. This article is adapted from remarks made at a Section program, “Due Process Issues in Veterans’ Cases after Cushman v. Shinseki,” co-sponsored by the law firm Finnegan, Henderson, Farabow, Garrett & Dunner LLP (Jan. 12, 2010).

private interest involved in the case, (2) the risk of error without the sought-after additional procedures, and (3) the government’s interest, including an interest in avoiding the cost of the additional procedures. In applying its new formula in the Mathews case itself, the Court held that social security beneficiaries did not have a right to the pre-termination trial-type hearing that was granted to the welfare beneficiaries in Goldberg. Instead a post-termination hearing sufficed.

Thus, after Mathews, the procedural due process decision-making sequence was set—first a property or liberty deprivation would have to be shown and, if it were, the Mathews balancing test would be used to decide what process was due. This was all fairly clear for persons claiming that the government was taking away entitlements they had already been receiving, but what about applicants for these benefits?

Professors Michael Asimow and Ron Levin have explained the so-called “endowment effect”: “There is a common sense difference between the rejection of an application and termination of an existing status. We are more outraged when we lose a job for unjust reasons than when we are not hired for unjust reasons. Similarly, our life is probably more disrupted when we lose a license than when our license is probably more disrupted when we lose a job for unjust reasons.”

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Perhaps a better way to frame the issue is to ask two discrete questions (and again I owe this formulation to Professor Levin). The first question is the broader one raised by Judge Rader: Assuming that a statute confers an entitlement to a benefit, must the government afford a due process right to a fair hearing before it can make a final decision rejecting an applicant’s claim for those benefits? A second, narrower question is whether the government can deny benefits to an applicant temporarily, while a controversy over his right to payments is pending? This is really a question of the timing of the benefits vis-à-vis the hearing.

It is certainly true that the broader, general question of whether first-time applicants can have a property interest has not been decided by the Supreme Court. It was expressly reserved in Watters v. Radiation Survivors, 473 U.S. 305 (1985), a case that challenged the statutory $10 fee limitation in veterans cases. And a few years later, Justice O’Connor dissented from the denial of certiorari in a case that raised the question directly. See Gregory v. Town of Pittsfield, 470 U.S. 1018, 1018 (1985) (O’Connor, J., dissenting).

In 1999, however, the Court decided a case which did not reach the broad question but seemed to provide an affirmative answer to the second question. The case is the one cited by Judge Rader—American Manufacturers Mutual Insurance Co. v. Sullivan, 526 U.S. 40 (1999).

This case concerned the Pennsylvania workers’ compensation law, which provided that employees would receive payment of reasonable and necessary medical expenses for on-the-job injuries. If, however, the employer or insurance company thought that the medical procedure that formed the basis for the claim was not reasonable or necessary, it could refuse to pay until the issue was decided after a “utilization review” hearing. A further de novo appeal of a denial could be taken by the employee to a workers’ compensation judge. This, of course, takes time, so employees argued they were entitled to pre-review payments as a matter of due process. The Supreme Court decided that due process was not applicable because the case involved a private insurance company—i.e., no state action—but because it disagreed with the lower court’s reasoning, it also discussed the due process issues that might have arisen had it been state action.

The Court could have disposed of that question by simply finding that the Mathews v. Eldridge balancing test would have required payment only after a hearing, but instead a plurality of the Court went out of its way to say that due process would not apply because the applicants were in a very different position from the beneficiaries in Goldberg and Mathews, who were trying to protect a continuation of their benefits.

Thus, what the Court really did in American Manufacturers Mutual Insurance was allow a temporary denial of benefits while eligibility was being determined, but it did not really squarely answer the question of whether the government could make a final decision rejecting an applicant’s claim for those benefits without due process. Indeed, in that case, a hearing was available before the final determination.

Justice Ginsburg concurred in the temporary denial, but she did so while also specifically confronting the question of whether a final denial of benefits could be made without due process—and she said no to that.

I have to say that her view certainly seems right, because the contrary view—that due process does not apply at all to applicants for statutory benefits—would, if taken to its logical extension, mean that it would be constitutional for the government to treat some applications unfairly, shred half of them, throw some in the trash unread, or subject them to a process tainted with corrupt practices.

Another way of viewing this issue, as Professor Michael Herz has pointed out, is that the whole point of the “new property” concept was that the property interest derives “not from possession or expectation but from legal entitlement,” and as to that, the current holder of the entitlement and the applicant are “identically situated.”

Of course for a benefit to qualify as an entitlement, an applicant would have to be able to show that the government is compelled to provide the benefit if the applicant meets the qualifications or eligibility requirements set forth in the statute or regulations—in other words, that the government’s decision was not a discretionary one. And of course, some government benefits are discretionary—for example in grant applications or applications for a state scholarship or for a government job subject to a workers’ compensation judge’s decision. These are all fairly clear for persons claiming that the government was taking away entitlements they had already been receiving, but what about applicants for these benefits?


3 E-mail from Ronald Levin, April 2, 2009, to adminlaw@chicagokent.kentlaw.edu (administrative law listserv) as part of a discussion of whether applicants have a right to due process.

4 E-mail from Michael Herz to same forum as described in note 3, supra (emphasis added).
Using Wikis to Teach Administrative Law

By David Thomson*

Administrative law is one of the courses students love to hate. This is particularly true in schools where administrative law is a required course, since many students in the class gripe about it being mandatory and would not take it otherwise.

The vast reach of administrative law makes it challenging for both the teacher and the student. When I was first asked to teach administrative law, I accepted the challenge and decided to use a wiki to involve the students in the course more than they would be if I just spent all our class time lecturing.

Wiki software is designed to support collaborative writing, which makes it an attractive device for teaching. The best known wiki, of course, is Wikipedia, a collaboratively written encyclopedia. While Wikipedia has engendered some controversy, it remains a regularly updated encyclopedia of over 8.2 million articles that has been written in less than six years.

Opportunities for collaborative writing abound in most law school courses. I am a supporter of collaborative learning in law school, at least generally so—like everything else, the devil is in the details. But as I approached teaching administrative law, I thought of ways that I might use a wiki environment to increase engagement in my class. I came up with two. First, I set up a wiki for the students to write the outline for the course collaboratively. Second, I set up small group wikis for research projects on particular agencies.

The wiki course outline was the toughest sell, but I have always been concerned that law school student performance is greatly influenced by the variability in quality of course outlines. Some students produce or obtain good outlines. Others do not. So I had the students in this course prepare the outline together, and of course, they all had access to the same product (the collaborative outline) for the final exam.

I found that several students welcomed this approach, several resisted it vehemently, and the rest were willing to go along with the experiment. A few students dropped the course when I announced that this is how I would conduct the class. Most of the students in the course were 3Ls, and some were graduating at the end of the semester.

I think the students resisting it were mostly students who felt they had their own process of getting A’s figured out, and they didn’t want anyone else to either share it or interfere with it. I think the students who welcomed it (I received several encouraging e-mails) were students who typically struggled to prepare or obtain outlines for courses and often turned to commercial outlines (which can be particularly problematic for administrative law, since it is such a vast topic, and teachers teach it in substantially different ways).

Participation in the preparation of the outline amounted to 10% of each student’s grade in the class, and nearly all students participated. A week before the final exam, at the final review class, I gave them printed copies of their work product. They were allowed to take this outline and the textbook (only) into the final exam.

The final product was an excellent outline for the course, and exceeded 165 pages. It even included several tables and charts—some of which I had given the class as handouts, and others that were prepared from scratch by students.

The other use of wikis in the course was for group projects. One of the problems of teaching administrative law is that it often seems disconnected from the agencies that are involved in the cases. You can teach the principle from the case, but simultaneously teaching students how the relevant agency operates can be difficult. In addition, one of the critical skills of attorneys who practice administrative law is the ability to navigate and evaluate the operative aspects of the bureaucracy. So research skills also become important.

I assigned groups of four students to one of 11 federal agencies. These were agencies that were involved in some of the seminal administrative law cases, and agencies that I thought would interest the students, such as EPA, the FCC, and OSHA. Students in each group used a group wiki to prepare a site of information about their agency, and each made a presentation to the class. All the wikis were available for other students to access, but the small group members were the only ones who could build the site for their assigned agency. The group wikis—and the matching presentations—constituted 20% of their grade for the course.

Students really seemed to enjoy this process. Most of the groups went above and beyond and created fantastic sites about their agencies, with pictures, cartoons, logos, and the like adorning them. Of course, they often included numerous links to sources outside the wiki—from the agencies themselves and from sources that criticized or commented on the operation of the agency. At the end of the course, I gave the students “a gift you made yourselves” in the form of a CD-ROM of all the agency presentations. The CD included 88 MB of information.

Setting up the wikis was simple, since the facility to do so was built into the University of Denver’s courseware system of choice: Blackboard. By default, our Blackboard sites include a wiki capability, and also allow for group wikis to be configured. That process is simply 1) creating a new group wiki, 2) giving it a name, and 3) assigning the group members access to write to it.

Although not technically difficult, experimenting with a new technology and using it in two different ways was challenging. Most particularly, it was challenging for the students, because I was asking them to try something new to support their learning. By the third

year, students often have, as I like to say, one foot out the door and the other on a banana peel. When you combine that reality with trying something new—in a course that is required and generally has a bad reputation—you are bound to get resistance. But having pushed through that, I am glad I did. At the end of the year, my student evaluations seemed to also indicate that the students were glad they hung in there with the course. Further, I was heartened by the fact that attendance in this class was very high (particularly for administrative law, with mostly 3L students). There were no students who missed more than four classes, and most students attended nearly all of the classes. I would recommend the use of wikis in other courses, particularly where the professor wants to encourage students to be more involved in their learning and believes that a collaborative writing approach might help to achieve that goal.

To discuss how you might use wikis in your teaching, please feel free to contact the author at his e-mail address: dthomson@law.du.edu. For information about using this and other technologies in teaching, you may also wish to visit David’s website: http://www.law.du.edu/thomson.

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Giving Applicants for Veterans’ and Other Government Benefits Their Due (Process)

continued from page 17

decisions. Others, such as social security or veterans’ benefits are not.

Note that this distinction between discretionary and non-discretionary decisions on applications also points up the fact that there will be situations where there is no property interest in obtaining something initially, but once you have it you also acquire a property interest because the initial decision to grant may be discretionary but the decision to terminate is not—for example, hiring for/firing from a government job or admission to/expulsion from a state university.\(^5\)

In that regard I think that Judge Rader’s reliance on a distinction between social security and veterans benefits seems dubious. While it is true, as Judge Rader points out, that workers do contribute a portion of their salary to the social security trust fund, veterans have also contributed their blood, sweat, and tears to defending this country. Moreover, each is entitled to benefits if they meet the objective eligibility standards.

The Cushman decision cites many decisions by other circuit courts that have decided that applicants for statutorily mandated benefits have a property interest in receiving those benefits that is similar to the interest of those already receiving benefits. Most of these opinions stress the mandatory, non-discretionary nature of the statutorily mandated benefits. I especially commend Judge Calabresi’s opinion for the Second Circuit in \(Kapps v. Wing\), 404 F.3d 105, 113 (2005), involving a claimed right to a hearing before a homeowner may be denied home energy assistance payments distributed by the State of New York. Judge Calabresi wrote: “To the extent that state law imposes ‘substantive predicates’ that limit the decision-making of [program] officials, it . . . may confer a constitutionally protected property right.” The \(Cushman\) court itself found that “seven of our sister circuits have addressed similar questions concerning statutorily mandated benefits,” each finding that “applicants for benefits, no less than benefits recipients, may possess a property interest in the receipt of public welfare entitlements.” 576 F.3d at 1276 (quoting \(Kapps\)).

Thus, \(Cushman\) seems to be in the mainstream, and were it not for the dicta in the \(American Manufacturers Mutual Insurance\) case and Judge Rader’s “cert. bait” in his \(Edwards\) opinion, I would conclude that veterans and other beneficiaries of statutory, non-discretionary benefit programs can safely rely on their right to due process in the application process (as measured in particular instances by the \(Mathews v. Eldridge\) balancing test). But whether the majority of the current Supreme Court would be willing to see this the same way probably depends, like so many cases, on the view of Justice Kennedy.

In any event, neither \(Cushman\) nor \(Edwards\) will be making it to the Supreme Court. The government did not seek certiorari in \(Cushman\) and neither did Edwards’ counsel (who could have because the denial of Edwards’ claim was ultimately upheld). That these decisions remain in good standing may be good news for veterans and others similarly applying for statutory, non-discretionary benefits. But what about all the applicants for discretionary government benefits—for example petitions for political asylum, applications for government jobs, grants, or loans on the federal level, or for zoning variances on the state and local level? Could rejected applicants for these non-entitlements challenge a denial by pointing to evidence that their applications were handled in a very haphazard, unfair, or even corrupt way? Or is the government completely immune from charges of gross procedural violations or unfairness in handling such applications? At least as a constitutional matter, even under the prevailing due process jurisprudence as exemplified by \(Cushman\), the government would be. And if that were the case, what then would prevent governments from retooling all sorts of application programs to make them more discretionary?

This has been called a “crack in the new property.” See William Van Alstyne, \(Cracks in the New Property\): \(Adjudicative\) \(Due Process in the Administrative State\), 62 \(Cornell L. Rev.\) 445 (1977). It’s a topic too big for this article, but the solution to such claims, as a constitutional matter, if they cannot be rooted in a property interest, might be to couch them in terms of a violation of equal protection of the law, or perhaps as raising some sort of a liberty interest to be free from extreme governmental arbitrariness as a matter of substantive due process. See generally Virginia T. Vance, \(Note, Applications for Benefits: Due Process, Equal Protection, and the Right to Be Free From Arbitrary Procedures\), 61 \(Wash. & Lee L. Rev.\) 883 (2004).

In any event, it certainly would be helpful to us Administrative Law professors if the Supreme Court clarified some of these issues, but if and when they do, I hope that the reasoning of \(Cushman\) is upheld.
2010 Mary C. Lawton Outstanding Government Service Award

The nomination should be based on outstanding contributions to the development, implementation, or improvement of administrative law and regulatory practice that reflect sustained excellence in performance.

All government lawyers active in the fields of administrative law and regulatory practice are eligible. While career officials generally will be favored, exceptional political appointees also will be considered. Nominations are solicited from federal government agency general counsels, state attorneys general, and other officials, as well as from members of the Section of Administrative Law & Regulatory Practice.

All nomination packages should provide the name and period of government service of the nominee, the departments or agencies in which he or she has served and is currently serving, and the specific contributions of the nominee that you think warrant his or her selection. Include a MINIMUM of three (3) letters of support for your nominee.

Please submit your nomination package to the ABA Section of Administrative Law and Regulatory Practice, 740 15th Street, N.W., Washington, D.C. 20005, email: kiefera@staff.abanet.org, or fax to 202-662-1529. Direct inquiries to Anne Kiefer, Section Director, 202-662-1690. All nominations must be submitted by June 18, 2010. The award will be presented at the Section’s Annual Awards Luncheon in October 2010.

2010 Gellhorn-Sargentich Law Student Essay Competition

TOPIC: Discuss a problem or issue relating to presidential control of agency rulemaking.

PRIZE: The winner will receive a $500 cash prize and round-trip airfare and accommodation to attend the Section’s Fall Conference in Washington, DC. At the discretion of the editorial board, the winning entry will be selected for publication in Administrative and Regulatory Law News.

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

The essay must be the student’s original, unpublished work. The paper may be prepared to satisfy a course requirement or for other academic credit. However, the essay must be the work of the submitting student without substantial editorial input from others. Co-authored papers are ineligible. Only one essay may be submitted per entrant.

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

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

JUDGING: Entries will be judged based on the following criteria:
- Creativity and clarity of the proposal or thesis
- Organization
- Quality of the analysis and research
- Grammar, syntax, and form

The entries will be judged anonymously by the Fellows of the ABA Section of Administrative Law and Regulatory Practice.

ENTRY PROCEDURE: Each submission must include a SEPARATE COVER PAGE with the entrant’s name, law school, year of study, mailing and email address, and phone number. The contestant’s name and other identifying markings, such as school name, MAY NOT appear on any copy of the submitted essay.

Submissions must be postmarked no later than APRIL 30, 2010 and mailed to: American Bar Association, Admin Law Essay Competition, 740 15th Street NW, Suite 900, Washington, D.C. 20005; or sent via email to kiefera@staff.abanet.org.

Section of Administrative Law and Regulatory Practice staff will assign a random number to each entry and record this number on all copies of each essay submitted. Neither the contestant’s identity nor his/her academic institution will be known to the selection committee.

By submitting an entry in this contest, the entrant grants the ABA and the ABA Section of Administrative Law and Regulatory Practice permission to edit and publish the entry in the Administrative & Regulatory Law News. Please direct any questions about the contest to the Section Staff Director at kiefera@staff.abanet.org.
May 14–16, 2010 ★ Nemacolin Woodlands Resort ★ Farmington, PA

Program Chairs ★ Charles Demonaco & Margaret Krasik  Section Chair ★ William Luneburg

2010 Spring Conference Schedule At-a-Glance

Friday May 14, 2010

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<tr>
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<th>Location</th>
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<tr>
<td>8:00 am – 9:00 am</td>
<td>Registration &amp; Continental Breakfast</td>
<td>Salon A</td>
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<tr>
<td>9:00 am – 10:10 am</td>
<td>Ensuring Public Participation in Health-Related Decision-making Through Administrative Law; Mirage, Charade or Genuine Community Empowerment? (CLE Program)</td>
<td>Salon A</td>
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<tr>
<td>10:20 am – 11:30 am</td>
<td>Global Administrative Law Initiative: A Roundtable Discussion</td>
<td>Salon A</td>
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<tr>
<td>12:00 pm – 1:30 pm</td>
<td>Lunch – Overseas Missions and the Advancement of the Principles of Administrative Law</td>
<td>Salon B</td>
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<td>2:00 pm – 3:10 pm</td>
<td>Nuclear Power 2010: The Nuclear Revival and Licensing New Nuclear Power Plants (CLE Program)</td>
<td>Salon A</td>
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<tr>
<td>3:20 pm – 4:30 pm</td>
<td>Free Enterprise Fund v. Public Company Accounting Oversight Board: The Appointments Clause and the Constitutional Power of the President to Supervise Federal Agencies (CLE Program)</td>
<td>Salon A</td>
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<tr>
<td>4:30 pm – 6:30 pm</td>
<td>Section Cocktail Reception &amp; Chair’s Hospitality. Join your colleagues for a Cocktail, H’ors Doeuvres, and camaraderie. Dinner will be on your own in Resort Restaurants (be sure to make an advance reservation).</td>
<td>Joseph’s</td>
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Saturday May 15, 2010

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<tr>
<th>Time</th>
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<tr>
<td>7:30 am – 9:30 am</td>
<td>Breakfast &amp; Publications Committee Meeting</td>
<td>Salon A</td>
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<tr>
<td>9:30 am – 12:00 pm</td>
<td>Council Meeting</td>
<td>Salon A</td>
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<tr>
<td>12:00 pm – 6:00 pm</td>
<td>Activities – Golf, Rafting, SpaVisits</td>
<td>On your own</td>
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<tr>
<td>6:30 pm – 9:30 pm</td>
<td>Reception &amp; Dinner, Guest Speaker: Franklin Toker, Professor of Art and Architecture, University of Pittsburgh</td>
<td>Malachite at Falling Rock</td>
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Sunday May 16, 2010

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<tr>
<th>Time</th>
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<tr>
<td>7:00 am – 8:00 am</td>
<td>Breakfast</td>
<td>Salon A</td>
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<tr>
<td>8:00 am – 12:00 pm</td>
<td>Council Meeting</td>
<td>Salon A</td>
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Meeting Registration

Register online or complete the form. Advance Registration is available until May 11, 2010, and is required for teleconference participation. Credit cards or a check are required for on-site in-person registration. Receipt copies are emailed when the registration is processed. Questions? 202-662-1582 or keivelm@staff.abanet.org.

REGISTER BY MAY 11, 2010
Since early December 2009, the U.S. Supreme Court has decided two cases that limit the authority of federal administrative agencies to define the scope of their own authority and the scope of judicial review. In addition, the Court has weighed in again on the issue of mootness.

Article III of the U.S. Constitution limits the federal courts to hearing “Cases” or “Controversies.” U.S. Const., art. III., § 2. Several doctrines operate to confine the courts to this role, including mootness. Under the Supreme Court’s jurisprudence, an “actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.” Preiser v. Newark, 422 U.S. 395, 401 (1975) (quoting Steffel v. Thompson, 415 U.S. 459, n.10 (1974)). The lapse of a live controversy moots the lawsuit, unless one of several exceptions exists.

In December 2009, the Supreme Court declared the controversy in Alvarez v. Smith, — U.S. —, 130 S. Ct. 576 (Dec. 8, 2009), moot, obviating the need for it to discuss the underlying Due Process Clause issue. In this case, Chemnare Smith and five other individuals filed a lawsuit pursuant to 42 U.S.C. § 1983 against the City of Chicago, the Superintendent of the Chicago Police Department, and the Cook County State’s Attorney, alleging that Illinois’ personal property forfeiture laws violated their due process protections. Under Illinois law, personal property used “to facilitate” a drug crime may be seized without a warrant in certain circumstances. 720 Ill. Comp. Stat., ch. 725, §§ 150/5, 150/6. The State has up to 142 days to begin judicial forfeiture proceedings, during which time the State retains the property. Id. ch. 725, §§ 150/5, 150/6. Police had seized cars of all six plaintiffs in the lawsuit without a warrant, and the plaintiffs claimed that Illinois’ failure to hold a speedy post-seizure hearing to determine the legitimacy of the seizure violated the Due Process Clause of the Fourteenth Amendment. U.S. Const., amend. XIV, § 1.

Both the district court and the U.S. Court of Appeals for the Seventh Circuit decided the case on due process grounds. The district court granted the defendants’ motion to dismiss on the basis of Seventh Circuit precedent holding that “the Constitution does not require any procedure prior to the actual forfeiture proceeding.” Jones v. Takaki, 38 F.3d 321, 324 (7th Cir. 1994). The Seventh Circuit, however, reversed, expressly disavowing its prior precedent. Smith v. Chicago, 524 F.3d 834, 836-39 (7th Cir. 2008). The appeals court held that the Illinois statutes’ procedures “show insufficient concern for the due process rights of the plaintiffs” and that, “given the length of time which can result between the seizure of property and the opportunity for an owner to contest the seizure,…some sort of mechanism to test the validity of the retention of the property is required.” Id. at 838.

Although the Supreme Court granted certiorari, the state proceedings had continued during the course of the litigation. As a result, by the time of oral argument, both sides conceded “that there was no longer any dispute about ownership or possession of the relevant property.” Alvarez v. Smith, 130 S. Ct. at 580. The Court accordingly concluded, in a unanimous opinion by Justice Breyer, that the case was moot, despite several arguments to the contrary. Id. Justice Stevens dissented from the Court’s granting of vacatur. Id. at 584 (Stevens J., dissenting).

The State’s Attorney argued that the issue of damages kept the case alive. The Court, however, noted that “the plaintiffs filed their motion [for damages] after the Seventh Circuit issued its opinion,” and the remand prevented the district court from ruling on it. Id. As a result “we have before us a complaint that seeks only declaratory and injunctive relief, not damages.” Id. The plaintiffs, in turn, raised the issue of class certification. However, the district court had denied the plaintiffs’ motion for class certification and the plaintiffs did not appeal the decision. As a result, the class action certification was no longer in dispute. Id.

Two common exceptions to the mootness doctrine were held not to apply. Federal courts can continue to hear mooted controversies if the problem is “capable of repetition” while “evading review.” Federal Election Comm’n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 462 (2007). In Alvarez v. Smith, however, “nothing suggests that the individual plaintiffs will likely again prove subject to the State’s seizure procedures.” Id. at 581. Nor could mootness be avoided because it was caused by a party’s voluntary conduct or through settlement. Instead, “[t]he six individual cases proceeded through a different court system without any procedural link to the federal case before us.” Id. at 582. As a result, the case could not continue:

The parties, of course, continue to dispute the lawfulness of the State’s hearing procedures. But that dispute is no longer embedded in any actual controversy about the plaintiffs’ particular legal rights. Rather, it is an abstract dispute about the law, unlikely to affect these plaintiffs any more that it affects other Illinois citizens. And a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words “Cases” and “Controversies.”

Id. at 580-81 (citations omitted).

With respect to federal agencies, the Supreme Court this quarter continued a discernible trend—usually made manifest in the context of Chevron deference—to restrict the breadth of authority that agencies enjoy to define their own authority. For example, Union Pacific R.R. Co. v. Brotherhood of Locomotive Engineers & Trainmen General Committee of Adjustment, Central
Region, — U.S. —, 130 S. Ct. 584 (Dec. 8, 2009), involved the authority of the National Railroad Adjustment Board (NRAB) to declare certain of its own procedural rules “jurisdictional” and hence to dismiss grievance claims solely on the grounds of procedural noncompliance.

The federal Railway Labor Act (RLA) vests the NRAB with authority to adjudicate grievances of railroad employees and to adopt “such rules as it deems necessary to control proceedings.” 45 U.S.C. § 153 First (h), (i), (v). Arbitration before the Board is mandatory if the parties fail to resolve “minor disputes” through the grievance procedures in collective bargaining agreement or through conferencing and one party refers the matter to the NRAB through a notice of intent. Id. §§ 153 First (i), 152 Second (6). Arbitration before the Board largely forecloses litigation of the underlying disputes. The lawsuit arose because a panel of the NRAB dismissed five employee claims “for lack of jurisdiction” because the claimant failed to comply with procedural rules—namely, because neither party mentioned “conferencing” despite the fact that the Board’s rules require the parties to “set forth all relevant, argumentative facts.” 29 C.F.R. § 301.5(d), (e). Nor would the panel allow the record to be supplemented to provide proof that conferencing had occurred. When the Union appealed the dismissal to the federal courts, the district court upheld the NRAB, but the Seventh Circuit reversed, concluding that nothing in the statute, the Board’s regulations, or the relevant collective bargaining agreement required proof of conferencing and that the Board’s proceedings violated due process.

The Supreme Court held, in a 9-0 opinion by Justice Ginsburg, that the NRAB had improperly declined jurisdiction. Noting that the federal courts are generally bound to exercise jurisdiction when it exists, the Court emphasized that “[t]he general rule applicable to courts also holds for administrative agencies directed by Congress to adjudicate particular controversies.” Union Pac. R.R. 130 S. Ct. at 590. Indeed, “Congress alone controls the Board’s jurisdiction.” Id. As a result, the Seventh Circuit erred in deciding the case on constitutional grounds when statutory grounds would suffice. Id. at 595-96.

The Court acknowledged that the RLA requires conferencing but concluded that satisfaction of that requirement “does not condition the adjudicatory authority of the Board.” Id. at 597. The Board’s jurisdiction extends to “all disputes between carriers and their employees ‘growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.’” Id. (quoting Sleam v. Delaware, L. & W.R. Co., 339 U.S. 239, 240 (1950) (quoting 45 U.S.C. § 153 First (i))). The conferencing requirement, however, is unrelated to collective bargaining agreements and is framed as a “general duty” of the parties. As a result, neither the conferencing requirement itself nor an initial failure to submit proof of conferencing are “jurisdictional” matters that limit the Board’s authority. Id. When the railroad argued that NRAB decisions had characterized the conferencing requirement as jurisdictional, moreover, the Court reasoned that “[i]f the NRAB lacks authority to define the jurisdiction of its panels, … surely the panels themselves lack that authority.” Id. at 598.

Interestingly, the issue of deference to the agency regarding a statutory matter never emerged in the Court’s opinion. Instead, “[b]y refusing to adjudicate cases on the false premise that it lacked power to hear them, the NRAB panel failed ‘to conform, or confine itself, to the jurisdiction Congress gave it.’” Id. at 599. The Court therefore affirmed the Seventh Circuit. Id.

A slightly different issue regarding the extent of agency authority arose in Kucana v. Holder, — U.S. —, — S. Ct. —, 2010 WL 173368 (Jan. 20, 2010), which involved the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The Act states that no court shall have jurisdiction to review Attorney General actions “the authority for which is specified under this subchapter to be in the discretion of the Attorney General.” 8 U.S.C. § 1252(a)(2)(B). When petitioner Agron Kucana moved to reopen his removal proceedings under the Act, citing new evidence to support his plea for asylum, an Immigration Judge denied the motion, and the Board of Immigration Appeals sustained that ruling. On appeal, the Seventh Circuit concluded that it lacked jurisdiction to review the decision because the Attorney General, by regulation, deemed such decisions to be discretionary.

The issue before the Supreme Court was “whether the proscription of judicial review stated in § 1252(a)(2)(B) applies not only to Attorney General determinations made discretionary by statute, but also to determinations declared discretionary by the Attorney General himself through regulation.” Kucana, 2010 WL 173368, at *4. In an 9-0/8-1 decision authored by Justice Ginsburg (Justice Alito concurred in the judgment), the Court concluded that the statute did not allow the Attorney General to invoke the ban on judicial review through regulations. While the Court’s analysis focused almost entirely on statutory interpretation, it did note as well that “[s]eparation-of-power concerns … caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary’s domain.” Id.

The Court focused its attention on the fact that the bar on judicial review applied to determinations made discretionary “under this subchapter.” While § 1252 also listed specific statutory actions that were not reviewable, a determination of a motion to reopen was not among them. Id. at *6. Instead, the categorization of such determinations as “discretionary” came from an Attorney General regulation. 8 C.F.R. § 1003.2(a). The Court noted that “[t]he motion to reopen is an ‘important safeguard intended ‘to ensure a proper and lawful disposition’ of immigration proceedings.” Kucana, 2010 WL 173368, at *6 (quoting Dada v. Mukasey, 554 U.S. 1, ___ (2008)). Moreover, “[f]ederal-court review continued on next page
of administrative decisions denying motions to reopen removal proceedings dates back to at least 1916.” Id.

Acknowledging that “[t]he word ‘under’ is a chameleon; it has many dictionary definitions and must draw its meaning from its context,” the Court focused less on dictionary definitions than on statutory structure and context. Id. at *7 (quoting Ardestani v. INS, 502 U.S. 129, 135 (1991)). Section 1252 cross-references only statutory provisions, not provisions in the Attorney General’s regulations. Id. at *8. The catch-all provision that the Seventh Circuit relied on comes immediately thereafter, “suggest[ing] that Congress had in mind decisions of the same genre, i.e., those made discretionary by legislation.” Id. Moreover, the decisions made unreviewable were substantive decisions regarding whether aliens can remain in the United States based on special considerations, whereas a decision on a motion to reopen a hearing is a procedural decision. Id. at *9. Finally, “[i]f Congress wanted the jurisdictional bar to encompass decisions specified as discretionary by regulation along with those made discretionary by statute, … Congress could easily have said so,” as it had in other provisions of the Act enacted at the same time. Id.

The statutory history of the Act corroborated the Court’s interpretation. Most importantly, when Congress enacted the Act in 1996, it both transformed the nature of the motion to reopen into a form of statutory relief and amended the Immigration and Naturalization Act to expedite removal of illegal aliens. Id. at *9-10. “Congress thus simultaneously codified the process for filing motions to reopen and acted to bar judicial review of a number of executive decisions regarding removal. But Congress did not codify the regulation delegating to the BIA discretion to grant or deny motions to reopen.” Id. at *10. As a result, the Court concluded, Congress intended to leave decisions on motions to reopen—that important procedural safeguard—subject to federal court review. Id.

The Court also emphasized “a familiar principle of statutory construction: the presumption favoring judicial review of administrative action.” Id. at *11. Under this well-established principle, it “takes ‘clear and convincing evidence’ to dislodge the presumption,” which § 1252 does not contain. Id.

Finally, the Court stressed the paramount authority of Congress and the incongruity of allowing the Executive Branch to define the limits of judicial review.

By defining the various jurisdiction bars by reference to other provisions in the INA itself, Congress ensured that it, and only it, would limit the federal courts’ jurisdiction. … If the Seventh Circuit’s construction of § 1252(a)(2)(B)(ii) were to prevail, the Executive would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions “discretionary.” Such an extraordinary delegation of authority cannot be extracted from the statute Congress enacted.

Id.

As was true for Union Pacific Railroad, no discussion of deference to the agency appears in Kucana, even though the case clearly turned on an issue of statutory interpretation and even though the Attorney General was clearly acting on a particular interpretation of the Act—an interpretation that the Seventh Circuit, at least, found persuasive. Union Pacific Railroad and Kucana thus underscore a trend in the Roberts Court to limit (or eliminate) deference to administrative agencies in certain “core” contexts, such as when the extent of the agency’s own authority is at issue—consider, for example, Gonzales v. Oregon, 546 U.S. 243, 255–69 (2006) (the Oregon assisted suicide case)—or when an agency interpretation raises constitutional concerns, as in Rapanos v. United States, 546 U.S. 715, 721-22 (2006) (considering the extent of federal authority to regulate the filling of wetlands). ☑

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9th Circuit Splits on Meaning of “Hearing”

The courts have long struggled with the meaning of the term “hearing” in various contexts. It can refer to a trial-like proceeding before an Administrative Law Judge, or it can refer to an informal proceeding in the nature of a legislative hearing. Seemingly less likely, it could also refer to any proceeding in which an agency provides notice to those concerned, takes written comment, and reaches a decision after reviewing those submissions. So thought a Ninth Circuit panel in United Farm workers of America, AFL-CIO v. Administrator, EPA, 592 F.3d 1080 (9th Cir. 2010), which considered, whether a notice-and-comment process constituted a “hearing” for the purpose of determining jurisdiction.

In 2006, EPA approved the use of the pesticide AZM for certain purposes after having received extensive written comments from pesticide manufacturers, growers, environmental groups, and the United Farm Workers. The UFW challenged the decision in federal district court pursuant to § 16(a) of FIFRA, which provides that “the refusal of the Administrator to cancel or suspend a registration . . . is judicially reviewed by the district courts of the United States.” The Ninth Circuit upheld the district court’s denial of jurisdiction on the ground that EPA’s written notice-and-comment process had constituted a “hearing” for the purpose of this provision.

Citing no support whatsoever, the majority found that the term “hearing” “identifies elements essential in any fair proceeding—notice be given of a decision to be made and presentation to the decisionmaker of the positions of those to be affected by the decision. By itself, the term does not connotate more.” Thus, jurisdiction did not lie in the district court. The court also relied on a related provision, § 16(b) of FIFRA, which provides for jurisdiction in the courts of appeals for any order issued “following a public hearing.” The court is surely presuming that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeal. A reading of the legislative history indicates that the courts of appeal were intended to address Judge Pregerson’s arguments or to grapple with the longstanding ambiguity of the term “hearing,” the nature of the decision at issue, or the reasons Congress might have chosen to restrict review to the courts of appeals.

D.C. Circuit’s Judge Randolph Ponders Chevron and Private Actors

Private actors have long played important roles in federal programs. For example, the Secretary of Health and Human Services has delegated certain coverage decisions to private contractors. This delegation threatened to raise the question of whether interpretations by such contractors are entitled to Chevron deference, but the D.C. Circuit in Hays v. Sebelius, 589 F.3d 1279 (D.C. Cir. 2009), avoided the issue by holding that Congress had spoken clearly to the interpretive issue at hand.

Under the Medicare Part B statute, “no payment may be made... for any expenses incurred for items or services which ... are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member.” The Secretary had delegated coverage decisions to private insurance contractors involved in the program. The Secretary had also instructed the contractors to apply a “least costly alternative” policy, under which Medicare reimburses for treatment only up to the cost of the least costly alternative that is “reasonably feasible and medically appropriate.” The policy is mandatory as to durable medical equipment, but discretionary as to prescription drugs.

Purporting to apply the policy, four contractors ruled that reimbursement for the drug DuoNeb would be based upon the cost of the cheaper alternative of administering doses of two separate drugs, rather than a single dose of DuoNeb, which combined the drugs. The patient challenged the limitation on the ground that the language “reasonable and necessary” modifies “items or services,” so that the contractors could determine only...
whether DuoNeb was reasonable and necessary, not whether the cost was reasonable and necessary. Rejecting an invitation to apply Chevron deference, the court agreed with the patient based on the plain language of the statute and related provisions. The mining industry challenged the PIL as “a de facto mandatory standard” issued without notice and comment in violation of the APA. The answer depends upon whether the PIL is designed for situations in which the question is whether the statute had been ambiguous, it was not clear that Chevron would have applied. The application of the “least costly alternative” policy to the drug DuoNeb had explicitly been left to the contractors’ discretion, so the Secretary had actually asked the court to defer to private contractors. Judge Randolph questioned whether the statute had authorized the delegation of lawmakers powers to private contractors and whether, if it had, the authorization would be constitutional.

11th Circuit Finds Statement on Mine Shaft Ventilation Standards not Subject to Notice and Comment Requirement

The Administrative Procedure Act requires that virtually any agency statement of future effect be subjected to notice and comment unless the statement falls within one of several exceptions. In National Mining Association v. Dept. of Labor, 589 F.3d 1368 (11th Cir. 2009), the question was whether the Mine Safety and Health Administration (MSHA) had violated the APA when it issued a Procedure Instruction and Program Policy Letter (PIL) without submitting the letter to public comment. According to MSHA, PILs “state agency policy, meaning an interpretation or clarification of a regulation ... [and] are intended for the mining community as well as MSHA enforcement personnel.”

MSHA promulgates regulations setting standards for ventilation in mine shafts. District managers have discretion to vary from general standards when approving plans for certain mining activities close to the working face of the mine (the area where the mining equipment is cutting into and removing the seam of coal). The PIL at issue stated that “District managers are strongly encouraged to consider whether approval of an extended cut plan is appropriate if MSHA collected respirable dust samples indicate a dust concentration of greater than the applicable standard or quartz concentration that exceeds 100 ug/m3.”

As to the PIL’s status as a statement of policy, the court noted that the question is whether the statement establishes a “binding norm.” The court must determine whether “the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case.” If the agency may consider the individual facts and reach decisions guided but not controlled by the agency statement, the statement is not binding. That was the case here, where the PIL addressed “the general procedures district managers are to consider when evaluating” plans for ventilation near the working face of the mine. The fact that these are inherently discretionary decisions supported the court’s judgment, as would the language of the PIL, which “strongly encouraged [district managers] to consider” certain matters, but did not impose any particular requirement.

1st Circuit Upholds District Court’s Review of State Regulatory Program Against Abstention Challenge

Reflecting our federal scheme of dual sovereignty, the Supreme Court held in Burford v. Sun Oil Co., 319 U.S. 315 (1943), that the federal courts must at times abstain from review of a state regulatory scheme. In New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989), the Court wrote that a federal court should abstain where a case involved “difficult questions of state law bearing on policy problems of substantial public import,” or where review might be “disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.”

In Vaqueria Tres Monjitas, Inc. v. Irizarry, 587 F.3d 464 (1st Cir. 2009), the First Circuit explained that Burford requires federal courts to abstain from review of a state regulatory scheme as necessary “to maintain the balance between state control over its own regulatory policies and federal oversight.” 587 F.3d at 473. The First Circuit noted that in Burford, the Court upheld a lower court’s abstention where the plaintiff challenging the state agency grant of an oil drilling permit argued that the order was not reasonable under the applicable state statute. Although there was federal subject matter jurisdiction because the plaintiff claimed a violation of due process, resolution of the claim required interpreting state law, not constitutional law. Abstention was appropriate, in the First Circuit’s view, because the federal court was simply being called upon to review the state agency’s determination in light of the policy outlined by state law.” 587 F.3d at 473.

In Vaqueria, the First Circuit rejected an invitation to abstain from review of the milk marketing regulatory scheme implemented by the Milk Industry Regulatory Administration (ORIL in Spanish initials) in Puerto Rico. Milk processors, which purchase raw milk, convert it into fresh drinkable milk, and sell it into the consumer market, challenged ORIL actions that set a minimum price the processors had to pay for raw milk and a maximum price that could be charged to consumers. Under the regulatory scheme, the processors also sold any...
surplus milk to Indulac, a statutorily created entity, and the only entity in Puerto Rico authorized to process ultra-high temperature milk, which does not need refrigeration prior to opening. The net result of ORIL’s actions had been to place processors at a severe disadvantage in the market, while effectively forcing them to subsidize Indulac, which exerted substantial influence on regulatory decisions. The milk processors challenged the ORIL process as violating due process and equal protection.

Noting the Supreme Court’s admonition that *Burford* abstention should be “the exception not the rule,” the First Circuit emphasized that the concern in *Burford* was “to prevent federal courts from bypassing a state administrative scheme and resolving issues of state law and policy that are committed in the first instance to expert administrative resolution.” Here, the challenge was to the decisionmaking process as a whole, not to the reasonableness of particular decisions. The question was not “the wisdom of . . . outcomes, but . . . whether or not they were arbitrary and discriminatory.” The federal courts may undertake more than a facial challenge to a statute. They may challenge “a regulatory scheme, which plaintiffs contend has no set standards and affords the Administrator unbridled discretion over rate-making.”

The First Circuit also deflected an 11th Amendment challenge to the district court’s order, which had directed that a surcharge be placed on milk to provide a remedy to the processors. Since this remedy did not require that funds be taken from state coffers, it did not run afoul of the 11th Amendment. The court ultimately upheld the preliminary injunction on the ground that ORIL’s regulatory actions, including altering standards without explanation, ignoring essential parameters, and failing to pursue inquiries or conduct research, “taken as a whole likely violated due process.”

7th Circuit Offers Guidance on Trier-of-Fact

**Deference, “Clear Error,” and Nonmutual Collateral Estoppel**

Burt Kanter was a very prominent tax lawyer and writer who died in 2001. Although not in his will, one of his bequests is a Seventh Circuit decision providing guidance on three issues of general interest in administrative law, *Kanter v. Commissioner of Internal Revenue*, 590 F.3d 410 (7th Cir. 2009). In 1986, Kanter sought review of an IRS determination that he had not paid all of his taxes. In “a yo-yo path through our judicial system,” Kanter’s case went first to a Special Trial Judge (roughly comparable to an Administrative Law Judge), who found in his favor on the facts. The Tax Court then held otherwise on the facts, which raised the following question on review: to whom should the reviewing court defer, the STJ or the Tax Court?

Noting that the law sometimes requires the reviewing court to look to the original factfinder (e.g., reviewing whether the ALJ’s decision under the Black Lung Benefit Act is supported by substantial evidence), while at “other times, the proper point of reference for the court of appeals is the reviewing body’s decision” (the typical situation under § 557(b) of the APA), the court said that, “it is the legal relationship between the entities that determines which set of findings is entitled to deference.” In Kanter’s case, Tax Court Rule 83 provided that “the findings of fact recommended by the Special Trial Judge shall be presumed to be correct.” Thus, the role of the court of appeals was to ensure that the Tax Court had deferred to the STJ’s findings of fact and to do so itself. More generally, the lesson is that “each area of the law must be evaluated on its own.” Although deference to the ultimate agency decision is the norm, the particular statutory regime may dictate that the agency and the reviewing court defer to the initial decisionmaker, whether STJ or ALJ.

Under the applicable statute, the court is to review the STJ’s findings for “clear error.” As described by the Seventh Circuit, the standard is essentially the same as the substantial evidence test as described long ago in *Universal Camera*. The court must uphold the STJ’s findings if they are “plausible in light of the record viewed in its entirety. . . . Where there are two permissive views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.”

Finally, the court rejected Kanter’s attempt to short-circuit the litigation by arguing that the IRS’s arguments were collaterally stopped by his colleagues’ victories in two other circuits in disputes arising under the same facts. Although the Supreme Court had held in *United States v. Mendoza*, 464 U.S. 154, 162 (1984), that nonmutual offensive collateral estoppel is prohibited, Kanter argued that defensive use of nonmutual collateral estoppel should be allowed. The Seventh Circuit disagreed, discussing related policy concerns and concluding that “[w]e think it more likely, however, that the Court intended to create a uniform rule precluding the use of the doctrine against the government, and later cases in this circuit support that approach.” 590 F.3d at 420.

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Check the list of Administrative Law publications at [www.ababooks.com](http://www.ababooks.com) to be sure.
1. Adam B. Cox and Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458 (2009). The authors advocate greater scholarly attention to the allocation between the political branches of authority over immigration, arguing that executive discretion over the enforcement of immigration law provides presidents, as a practical matter, far more authority over immigration policy than the plenary power doctrine might suggest.

2. Cynthia R. Farina, *False Comfort And Impossible Promises: Uncertainty, Information Overload, and The Unitary Executive*, 12 J. of Const. Law __ (forthcoming 2010). Available at: http://ssrn.com/abstract=1555112. In this article, the author argues that the unitary executive theory, which gives the President all-encompassing oversight responsibility over the federal bureaucracy, is inconsistent with the reality of the modern federal government, a bureaucracy which is far too vast, complicated, and unwieldy for any one individual to comprehend, much less effectively manage. Instead, there should be greater attention to and appreciation for the important roles of the other parts of the government.

3. Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 Harv. L. Rev. 482 (2009). This article is an in-depth discussion of the challenges and pathologies faced by cities and other local governments that attempt to retain and redistribute what the author calls “mobile capital,” i.e., local investment that can pick up and move elsewhere. These local government regulatory efforts include minimum wage laws, local labor laws, anti-chain and big box laws. The author argues that much of this local economic regulation has been misunderstood. The article discusses 1) the economic and political problem of mobile capital and local efforts to control it; 2) recent local efforts to retain mobile capital; 3) the leverage available to locals as they challenge business’s traditional primacy; and 4) the recent trend towards development of localist political economies in the context of debates about the relative merits of decentralization.

4. Katharine A. Van Tassel and Rose H. Goldman, *Manufacturing the Wings of Icarus: FDA Regulation of Nanotechnology Used in Products for Human Consumption, Including Food, Dietary Supplements, Cosmetics and Sunscreens*, __ U. Ill. J. Law Tech. & Policy __ (2010). Available at: http://ssrn.com/abstract=1556683. This article argues for greater regulatory attention to nanotechnology, the engineering of extremely small particles 1 to 100 nanometers in size. (The authors note that a human hair is 80,000 nanometers wide.) These particles are increasingly used off label in hundreds of consumer products, including sporting goods, cell phones, digital cameras, coatings for eyeglasses, paints, stain-resistant clothing, and light-emitting diodes used in computers. The FDA has refused to regulate them, concluding that the nanoparticles present no greater risk than their normal sized counterparts. The authors assert that a growing scientific literature is identifying health risks and adverse physical effects from the particles.


6. Philip J. Weiser, *The Future of Internet Regulation*, 43 U.C. Davis L. Rev. 529 (2009). The author advocates some form of Federal Communications Commission regulation of Internet connectivity disputes, arguing that the Internet has become too crucial to remain unregulated. As an example, the author points to a fall 2008 dispute between Sprint and Cogent, two Internet infrastructure companies that caused millions of Internet users to lose some form of Internet connectivity.


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American society must build resiliency in the face of disruption. In his concluding remarks, Mr. Fong emphasized that the vulnerability if not well coordinated. Mr. Fong also stated that agencies combines the nation's full assets, but is also a potential ability to trade. He noted that attacks and disasters will occur and resume our way of life after these instances. Mr. Fong said security is not simply preventing attacks, but protecting the American way of life, including civil liberties and ability to trade. He noted that attacks and disasters will occur over time, and that we need to prepare in order to maintain and resume our way of life after these instances. Mr. Fong said that distributing responsibilities among federal, state, and local agencies combines the nation's full assets, but is also a potential vulnerability if not well coordinated. Mr. Fong also stated that we must lead an international initiative to deploy new technology. In his concluding remarks, Mr. Fong emphasized that the American society must build resiliency in the face of disruption and ensure that constant readiness does not impair our national efficiency and mental health.

Immediately following Mr. Fong's address, conference co-chair Elizabeth Branch moderated a panel presentation on upcoming homeland security regulations in 2010. Members of this panel included: Neil Eisner, DOT Assistant General Counsel for Regulation and Enforcement; Michael Fitzpatrick, Associate Administrator at OIRA; George Korch, Senior Science Advisor to the HHS Assistant Secretary for Preparedness and Response; and Mary Kate Whalen, DHS Associate General Counsel for Regulatory Affairs.

Twenty tables, organized by homeland security topics, facilitated networking and offered lively discussions during lunch, aspects of which were reported to the group.

The first set of plenary sessions in the mid-afternoon included a panel discussion on international issues, which was moderated by Paul Rosenzweig, Principal at Red Branch Consulting and former Deputy Assistant Secretary for Policy, DHS. Panel members included: Richard Barrett, Coordinator of the UN Al-Qaida Taliban Monitoring Team; Ambassador C. Donald Johnson, Director at the Dean Rusk Center, University of Georgia School of Law; and Luc Veron, Minister-Counselor with the European Commission Delegation.

A second panel was moderated by Joel Webber, Counsel at Couri & Couri, on re-regulation of freight shipping and its impact on the supply chain. Participants included Joan Bondareff, Of Counsel, Blank Rome; Rear Admiral Charles Michel, retired Military Advisor to the DHS Secretary; and Michael Penders, CEO of Environment Security International. The panel reviewed issues between DHS and the freight industry.

Julie Myers Wood, President of ICS Consulting LLC, former Assistant Secretary (ICE), DHS, moderated a third panel discussion on immigration that included panelists Elizabeth Dickson, Manager of Global Immigration Services, Ingersoll Rand Company; Beth Gibson, Senior Counsel to the Assistant Secretary, ICE, DHS; Jessica Herrera-Flanigan, partner, Monument Policy Group, former Staff Director and General Counsel, House Homeland Security Committee; and Dawn Lurie, Shareholder, Greenberg Traurig. This panel discussed handling paperwork required of employers and ways in which DHS seeks to build a culture of compliance and prioritizes investigations on companies that engage in abusive practices, low wages, and poor working conditions. There was also a discussion regarding perspectives on upcoming legislation, which will be dealing with enforcement, future flows, and pathways to citizenship.

Heading into the afternoon plenary sessions, Chad Boudreau, Special Counsel, Baker Botts LLP; former DHS Deputy Chief of Staff, moderated a panel on chemical infrastructure. Panelists included Sue Armstrong, DHS Acting Assistant Secretary for Infrastructure Protection; Jamie Conrad, Jr. of Conrad Law & Policy Counsel; Meghan Ludike, DHS Associate General Counsel. 

continued next page
Counsel for National Protection & Programs; and Brandon Milhorn, Chief Republican Counsel, Senate Homeland Security Committee. The group lauded the cooperative regime that has developed, in which industry helped train inspectors and strengthened security practices for all companies.

Another panel on foreign investments was moderated by Stewart Baker, a Partner at Steptoe & Johnson and former Assistant Secretary for Policy, DHS, which included panel members Mark Jaskowiak, Deputy Assistant Treasury Secretary for Investment Security; Sanchitha Jayaram, Director for Foreign Investment and Trade, DHS; and Ted Kassinger, a Partner at O’Melveny & Myers. The panel discussed the creation of CFIUS and its role, as well as its focus on national security and how it operates within our broad open investment policy, so it always seeks expeditious mitigation to allow transactions to go forward.

Paul McHale, a Partner at McKenna Long & Aldridge, former Assistant Secretary of Defense, and previously a Member of Congress, moderated a third panel discussion on DOD and Homeland Defense. Jeff Greene, Counsel on the Senate Homeland Security and Governmental Affairs Committee; Christian Roifano, Chief Counsel, National Guard Bureau; David Trissell, Chief Counsel of FEMA; and Carl M. Wagner, Associate General Counsel for Homeland Defense, DOD were among the panel members for this informative session. Panelists discussed the military’s capability to intervene in natural disasters to save lives, mitigate property damage, and process paperwork. Issues on new legislation that allows the National Guard to perform public safety missions under state control while being federally funded and how interstate compacts allow states to share emergency assistance were also discussed. In addition, this panel touched on post-combat issues affecting the National Guard, related interactions between FEMA and DOD, congressional oversight, and future legislation.

FEMA Administrator Craig Fugate gave an inspiring address to finish out the first day of the program. He stressed the need for engaging the private sector and individual citizens in planning and responding to emergencies. Administrator Fugate explained how FEMA operates, that it does not respond itself; but FEMA facilitates, coordinates, and provides grants to those who do respond. He noted that while a declaration of emergency empowers government when it is most needed, we must also build relationships with private capabilities. In large-scale disasters, Administrator Fugate believes we will fail as a nation unless we engage the entire community.

An inspiring keynote address to open the second day of the Institute was given by New York City Police Commissioner Raymond Kelly, who described NYC’s extensive organization to handle security and terrorist threats.

The Institute began its morning plenary breakout sessions with a panel discussion on cybersecurity, moderated by Chad Boudreaux. Panel members for this informative discussion on legal developments within the cybersecurity community included: Gus Coldebelha, Former Acting DHS General Counsel; Sigal Mandelker, Senior Counsel at Proskauer Rose LLP and former DOJ Deputy Assistant Attorney, Criminal Division; Asha Mathew, Senate Senior Counsel for Minority, Committee on Homeland Security and Governmental Affairs; and Andy Purdy, Chief Cybersecurity Strategist with CSC in Virginia.

The second panel discussion on privacy and civil liberties began with a panel discussion on cybersecurity, moderated by Chad Boudreaux. Panel members for this informative discussion on legal developments within the cybersecurity community included: Gus Coldebelha, Former Acting DHS General Counsel; Sigal Mandelker, Senior Counsel at Proskauer Rose LLP and former DOJ Deputy Assistant Attorney, Criminal Division; Asha Mathew, Senate Senior Counsel for Minority, Committee on Homeland Security and Governmental Affairs; and Andy Purdy, Chief Cybersecurity Strategist with CSC in Virginia.
Chief Privacy Officer. This session included panelists Stewart Baker; Eric Lichtblau, a reporter with the Washington Bureau, New York Times; and Gregory Nojeim, Director of Project on Freedom, Security & Technology, Center for Democracy and Technology (CDT).

Joshua Filler, President of Filler Security Strategies, Inc. and former DHS Director of the Office of State and Local Government Coordination, moderated the third morning panel discussion on understanding Homeland Security grants and opportunities. Panel members included: David Hags, Principal with Booz Allen and Hamilton and former DOJ Director of the National Institute of Justice; Tracy Henke, Partner at Thomas Advisors, Inc. and former DHS Assistant Secretary; and Dennis Schrader, President of DRS International, LLC and former Deputy Administrator with the National Preparedness Directorate (NPD), FEMA.

During the second day's luncheon, a panel presentation provided a unique White House perspective spanning two Administrations. Moderated by Ken Wainstein, a Partner at O’Melveny & Myers and former Homeland Security Advisor to President George W. Bush, Mr. Wainstein was joined in this discussion by panel members John Brennan, the President's Advisor on Homeland Security and Counterterrorism, former Head of NCTC; Admiral Jim Loy, Senior Counsel at the Cohen Group and former DHS Acting Secretary and Deputy Secretary and Commandant of the U.S. Coast Guard; and Juan Zarate, Senior Advisor at CSIS and former NSC Deputy.

The final address of the day was delivered by Michael Chertoff, President of the Chertoff Group, Senior Counsel, Covington & Burling, former Circuit Judge and DHS Secretary. Secretary Chertoff stated that threats may be simultaneously military, criminal, or within categories that did not previously exist and that we need a better set of legal tools to pull off the shelf in an emergency. Secretary Chertoff also stated that the legal structure must address cybersecurity threats, including transnational attacks that may be crimes or acts of war. He mentioned the fact that we have no policy in place on preemption and retaliation. The current administration, according to Secretary Chertoff, wisely declassified the summary of the National Cybersecurity Initiative. He said that the real danger of unsettled authority is not an indecisive president, but the failure of his subordinates to accept directives. Secretary Chertoff stated that the absence of clear rules could threaten command and control in a given crisis. Secretary Chertoff said that some issues require vigorous debate that respects Administration personalities and their good faith. He said that Miranda does not bar extensive questioning, provided any prosecution foregoes using its fruits and that we have no domestic system for confinement where prosecution is not possible. Secretary Chertoff concluded this inspiring address by calling upon the American Bar Association to take the lead in the solution of the fascinating cutting-edge legal problems that our country must address before the next crisis.

Next year's 6th Annual ABA Homeland Security Law Institute will be held on March 2 & 3, 2011. Please mark your calendars to attend.

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**2010 Nominations continued from page 4**

and telecom agreements and licenses. Jason is also president and general counsel of NegativeSpace Media, a small media company that licenses content for use in broadcast and cable television, internet, home video, and print media. Jason chairs the Section’s Transportation Committee and has served as vice chair of that committee, the Homeland Security Committee, and the Defense and National Security Committee. In these roles, he has organized various functions, including luncheon panels, the Third Annual Administrative Law Institute, and sessions during Section events. He also is the founder and editor of *TQ: ABA Transportation Committee Quarterly*. Elsewhere in the ABA, Jason has been a member of the Government and Public Sector Lawyers Division and Air and Space Law Forum and has judged two National Appellate Advocacy Competitions. He earned his B.A. from Emory University and his J.D. from American University.
By Michael Asimow*

This litigation was in the public interest—or was it?

Under federal law, a private attorney general who successfully litigates to vindicate the public interest is not entitled to attorneys’ fees (absent a statute that provides for fee shifting). Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240 (1975). The California Supreme Court emphatically rejected Alyeska in Serrano v. Priest, 141 Cal. Rptr. 315 (Cal. 1977), ruling that a successful private attorney general could recover attorneys’ fees from the defendant if the litigation “resulted in the enforcement of an important right affecting the public interest.” Serrano was later codified in CA Code of Civ. Proc. § 1021.5, a provision that has been the subject of countless reported and unreported judicial decisions.

A major problem in applying § 1021.5 is to distinguish public interest from private interest litigation, given that plaintiffs are usually vindicating their own interests along with those of the public. A plaintiff might seek to stop development in a beautiful forest enjoyed by many people but also adjacent to her home. Is this private or public interest litigation?

Under § 1021.5, the plaintiff must demonstrate that the financial burden of private enforcement [is] ... such as to make the award appropriate. This standard requires plaintiffs to demonstrate that the value of their private interest in the case is less than the attorneys’ fees necessary to engage in the litigation. If the fees outweigh the value of the private interest, presumably the plaintiff is vindicating a public interest along with its private one.

This standard makes some sense when it is possible to monetize the plaintiff’s private interest, but how do you put a dollar value on the plaintiff’s non-pecuniary private interests, such as his “nimby” interest in protecting the forest? This problem—of how to monetize values like human life or safety or environmental protection—plagues many areas of administrative law, such as the application of cost benefit analysis to proposed rules.

In RiverWatch v. County of San Diego Dep’t of Envtl. Health, 96 Cal. Rptr. 3d 362 (2009), a number of plaintiffs sought to block construction of a solid waste facility by attacking the sufficiency of the environmental impact statement filed by the county. One of the successful plaintiffs was a Native American tribe. Although it claimed to be representing the public interest in environmental decisionmaking, it was also protecting nearby religious sites that would be ruined by the development. The appellate court upheld a trial court decision (approving a $239,000 attorneys’ fee) that the tribe’s non-economic interest in the religious sites was worth much less than the amount of the fees. It found that the tribe was concerned more with protecting generalized environmental interests than protecting the religious sites. In fact, there seems to be no principled way to make this comparison and the discretion of the trial court is unconstrained. If you’re as cynical as this author, you could be easily convinced that § 1021.5 is being used to subsidize private rather than public interest litigation.

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