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I have greatly enjoyed my year as Section Chair. Since August I have had the opportunity to work with the Section’s enthusiastic members and staff on a number of programs and policies, and also in a variety of other efforts. Together, we have moved forward in the face of an unprecedented financial meltdown which not only negatively affected the general economy but also the ABA and its membership. However, despite this downturn, policy, outreach and education have remained our focal points. Moreover, as outlined below, I am pleased to note that the Section has made positive inroads in all of these areas. While membership has been impacted, our attendance at educational events remains strong, and our policy-making initiatives continue to provide a clear voice and benefit for administrative law professionals. I hope that you will continue to devote your energy and enthusiasm to further the important work of the section.

**Policy Issues**

We continued strong efforts in the policy area:

“**Improving the Administrative Process – A Report to the President-Elect of the United States**” was submitted to the Obama Administration in November, along with “**Achieving the Potential—the Future of Federal E-rulemaking, A Report to Congress and the President.**” Much of what we recommended has found its way into policy and procedural statements under the new administration.

In January, a letter was sent to the Obama–Biden Transition Team on the Selection of Administrative Law Judges by OPM. Nancy Skancke has met with agency officials on behalf of the Section, and is continuing to work on the issues identified in the letter.

The Section’s position on Presidential supervision of agency rulemaking was submitted in March, and in May White House Counsel was provided with the Section’s views on Executive Memoranda and notice-and-comment procedures.

The Section has formed several new committees and task forces. The Legislative Committee has been very active in support of the revived ACUS and is developing a recommendation on projects for the agency to undertake as soon as its staff is in place. A Federal Lobbying Reform Task Force is working on constitutional and practical issues. The Homeland Security Coordinating Committee was developed to leverage the efforts of all ABA entities in the homeland security arena. A Federal Clean Energy Finance Committee is just getting underway. Section members are also actively engaged in the work of ABA task forces, including the Financial Markets Regulatory Reform, and the FTC Red Flag Rule groups. I encourage all Section members with an interest in any of these policy issues to volunteer.

To ensure that the wealth of Section knowledge on important administrative law issues remains available for use by its members, a searchable database of Section policies and blanket authority documents is currently under development and will be available on the Section web site in the near future. We continue to advance the rule of law through our efforts to promote improvement in administrative procedures and rulemaking.

**Outreach & Education**

Likewise, outreach and education have remained strong:

A tremendous lineup of CLE programs is planned for the Section’s Annual Meeting July 30 – August 2 in Chicago. Please visit the Section’s web site at http://www.abanet.org/adminlaw/ for a brochure and to register for the Section Dinner at Symphony Center on Friday July 31, 2009. Chairs Christine Franklin and Janet Belkin have secured a speaker from the Chicago Mercantile Exchange, to discuss regulatory reform proposals for derivatives in the wake of the worldwide financial crisis and the Chicago Mercantile Exchange’s plans to act as a clearing house for certain financial products.

Vice-Chair Jonathan Rusch chaired the “**5th Annual National Institute of Administrative Law, New Directions in Agency Rulemaking**” on June 10. More than 250 administration and agency staffs, in addition to general counsels, attended the program, highlighting important administrative law issues and new policies under the new administration. Read Otto Hetzel’s review of this program in this issue of the Administrative and Regulatory Law News.

Congratulations to the Labor and Employment Committee, and the Government Personnel Committee, for their successful brown-bag lunches/teleconferences this spring, which attracted more than 80 people. The programs were “**Latest Federal Sector Developments at the Equal Opportunity Employment Commission Office of Federal Operations**” and “**Surmounting the ‘Maternal Wall’ Emerging Developments in Family Responsibilities Discrimination, Including Newly Released EEOC Guidance.**”

Charlotte Bahin and Marc Scheineson chaired the Full Administrative Law Conference. “**Wall Street to Main Street: Bail Out and Financial Restructuring**” and “**Corporate Co-Operation with a Government Investigation: What does it Mean? What is the Risk? Has Anything Changed?**” were profiled by major news outlets. The always-essential “**Annual Review of Major Developments in Administrative Law**” continued to be one of the highlights of the conference.

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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.

Manuscripts should be e-mailed to kiefera@staff.abanet.org. Articles should generally be between 1500 and 2500 words and relate to current issues of importance in the field of administrative or regulatory law and/or policy. Correspondence and change of address should be sent to: ABA Section of Administrative Law & Regulatory Practice, 740 15th Street, NW, Washington, DC 20005–1002.

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

**William V. Luneberg.** 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.

Section Chair-Elect (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.

Vice-Chair

**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 academia, 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 of 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.

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

**H. Russell Frisby.** Russell is a partner at the law firm of Fleishman & Walsh LLP. Before joining his current firm, Previously Russell was a partner at Kirkpatrick Lockhart, served as President of CompTel/Ascent, a telecommunications trade association, and served as Chairman of the Maryland Public Service Commission. Russell is a former Section Budget Officer and he has served as the Section’s representative to the ABA Commission on Racial and Ethnic Diversity in the Profession.

Section Delegate

**The Honorable John Vittone.** John has been the Chief Administrative Law Judge at the U.S. Department of Labor since April 1996 and was formerly Deputy Chief Judge from 1987. John has served in the House of Delegates for almost ten years as the NCALJ delegate, a member of the Board of Governors, and a member at large. John has been active in Section affairs since the early 1980s. In addition, he served on the council as the administrative law judge representative in the 1990s. The section has honored him as a Section Fellow and bestowed the Mary C. Lawton Award on him in 2007.

Secretary

**Anna Williams Shavers.** 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.** 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. Before joining the DAV in February 1989, Prior to joining the DAV in...
February 1989, Mr. Smith worked 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 is 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**

**Cynthia Farina** is Professor of Law at Cornell University and a principal researcher in the Cornell e-Rulemaking Initiative (CeRI). She is a co-author with Peter Strauss (Columbia) and Todd Rakoff (Harvard) of a leading casebook in administrative law and a Fellow of the Administrative Law Section. She is currently the Reporter for the Committee on the Status and Future of the Federal e-Rulemaking Project, Professor Farina has also served as a co-reporter of the ABA European Union Project, co-reporter on the Judicial Review (standing) section of the APA Project; and reporter for the ABA Special Committee on Government Standards, which produced the report, “Keeping Faith: Government Ethics and Government Ethics Regulation.” She was a member of the editorial review board for the 2d edition of The Lobbying Manual: A Compliance Guide for Lawyers and Lobbyists, and has served as Co-Chair of the Section’s e-Rulemaking Committee, Vice-chair of the Judicial Review Committee; and Chair of the Government Organization and Separation of Powers. She served as one of the inaugural group of judges for the Richard D. Cudahy Writing Competition on Regulatory and Administrative Law, and continues to judge for the Competition. Following her graduation summa cum laude from Boston University School of Law, Professor Farina clerked for the Hon. Raymond J. Pettine, Chief Judge of the U.S. District Court of Rhode Island, and for the Hon. Spottswood Robinson, III, Chief Judge of the U.S. Court of Appeals, D.C. Circuit. She spent three years as a litigator in private practice before joining Cornell.

**Jeffrey B. Litwak** is Counsel to the Columbia River Gorge Commission, an interstate compact agency overseeing the Columbia River Gorge National Scenic Area. His practice includes interstate compacts, administrative law, land use, state and local government law, and civil appeals. He is admitted to practice in Oregon, Washington, the U.S. District Court for Oregon, the Ninth Circuit, and the U.S. Supreme Court. Jeff is an adjunct professor of law at Lewis and Clark College, where he teaches seminars on interstate compact law and land use law. He also serves as a municipal land use hearings officer. Jeff is currently a co-chair of the Section’s Interstate Compact Committee, an advisory board member for National Center for Interstate Compacts, and a member of the Oregon State Bar Real Estate and Land Use Section Executive Committee. Previously, Jeff was an Assistant County Counsel for Multnomah County, OR, and prior to his legal career a land use planner. Jeff received his J.D. with a certificate in environmental law from Northwestern School of Law, Lewis and Clark College (1997); a Master of City Planning with a specialty in environmental policy, planning, and mediation from MIT (1992); and a certificate in dispute resolution from the Harvard Law School-MIT-Tufts Program on Negotiation (1992). Jeff has been an active Section member since 2003 and a member of the Fellows of the American Bar Association since 2006.

**Fiona Philip** is a partner at Howrey LLP specializing in government enforcement matters, white collar criminal investigations, and securities litigation. Ms. Philip represents corporations and their officers, directors, and employees in government proceedings before the SEC, DOJ, FINRA and other law enforcement agencies and regulatory bodies. Ms. Philip’s practice includes representation in connection with investigations of potential violations of the Foreign Corrupt Practices Act (FCPA), insider trading, stock options backdating, and accounting and internal controls irregularities. She also assists management and boards of directors with internal investigations and advises public companies, exchanges, and financial services firms with Sarbanes-Oxley counseling and remedial measures related to securities laws issues. Ms. Philip has served as co-chair of the Corporate Counsel Committee. She is also an advisory committee member of the SEC Historical Society. Ms. Philip is a Double Hoya, having obtained her Bachelors and JD from Georgetown University. She is regularly quoted by the media as an expert in securities regulation and corporate governance matters.

**Jeffrey Rosen** recently returned to private practice as a partner at Kirkland & Ellis LLP in Washington, D.C., after serving in senior government positions from 2003 to 2009. Most recently he served as General Counsel and Senior Policy Advisor at the White House Office of Management and Budget (2006–2009), where among other things he was the Administration’s lead lawyer for regulatory and administrative law issues. Before that, he was General Counsel of the U.S. Department of Transportation (2003–2006), where his range of responsibilities included the department’s rulemaking and enforcement programs. Before entering public service, Jeff was a litigator with Kirkland & Ellis LLP for more than 21 years, where he also served on the firm’s management committee. From 1996–2003, he was also an Adjunct Professor at Georgetown University Law Center. In 2008, Jeff served as the Executive Branch liaison to the Section’s Governing Council, and he has been a speaker at several Section programs during his years in government. He holds a B.A. with highest distinction from Northwestern University and a J.D. magna cum laude from Harvard Law School.
The past eighteen months have been an exceptionally promising time for the Freedom of Information Act and for those who look to it to shine a bright light on the world. First Congress amended the Act with a package of amendments designed entirely to aid FOIA requesters, improve agency FOIA performance, and foster greater disclosure. Then a president who has declared that he wants to run “the most open administration in history” was elected to replace a president whose administration seemingly “never met a secret it didn’t like.” See, e.g., The Nature of Government Secrecy, 26 Gov’t Info. Quarterly 305, 307 (2009).

But as often is said of expected improvements in such areas of administrative law, “the devil’s in the details.” And when it comes to the FOIA, those devilish details are most often found in the quality of the implementation of new provisions and policies, on a governmentwide basis, and the timeliness, comprehensiveness, and effectiveness with which that is achieved. That is where the brightness of promised sunshine can readily fade if a new presidential administration is not pragmatic and careful. In this case, the badly incomplete implementation of the FOIA amendments made by Congress in 2007 foreshadowed no less.

The 2007 FOIA Amendments

From the time it was enacted in 1966, the FOIA has been a continual work in progress, with policy shifts from one presidential administration to the next and major amendments by Congress every decade. See, e.g., The Cycle Continues: Congress Amends the FOIA in 2007, Admin. & Reg. L. News, Spring 2008, at 11–15, available at http://www.abanet.org/adminlaw/news/Spring08.pdf. The OPEN Government Act of 2007, Pub. L. No. 110–175, which largely took effect immediately upon its enactment on December 31, 2007, continued this pattern with a set of procedural FOIA amendments aimed at enhancing all agencies’ administration of the Act.

Notably, these included:
- A new definition of “representative of the news media”;
- A provision extending the FOIA’s reach to many additional records, held by government contractors; and
- A new requirement that agencies specify FOIA exemptions invoked on redacted document pages themselves.

The first of these statutory provisions holds significance to the determination of fees that are chargeable under the Act, as well as to the granting of public interest “waivers” of those fees. See 5 U.S.C. § 552(a)(4)(A)(ii)–(iii), as amended by Pub. L. No. 110–175. It also applies to requests for special “expedited processing” and, by extension, to the new imposition of penalties for the breach of any FOIA deadline by an agency. See 5 U.S.C. § 552(a)(6)(E); 5 U.S.C. § 552(a)(4)(A)(viii) (establishing special “penalty” provision that holds even greater benefits for “news media” requesters). Yet although this provision became effective as a matter of law on December 31, 2007, it still has not been implemented as required by law through individual agency regulations. All agencies have FOIA regulations that serve as the framework for their own FOIA processes and which are required to incorporate, among other things, the proper definition of “representative of the news media” for its multiple purposes in the Act’s administration. (For current purposes, this also now includes the question of whether “bloggers” and other “Web-based” FOIA requesters qualify as “news media” representatives.)

So many times over the years, agencies have promptly turned to updating their regulations in implementation of such newly defined statutory terms. This time, however, they have utterly failed, on a governmentwide basis, to do so.

Similarly, there has been a wide-scale failure to implement the OPEN Government Act’s remarkable new “government contractor” provision. This FOIA amendment supplemented the Act’s definition of “agency record” to more expansively include all information “that is maintained for an agency by an entity under Government contract, for the purposes of records management.” 5 U.S.C. § 552(f)(2)(B), as amended by Pub. L. No. 110–175 (effective as of Dec. 31, 2007). In so doing, Congress granted FOIA requesters the legal right to place records “on the hook” (in FOIA parlance) even though they are possessed by an agency contractor, not an agency. But FOIA requesters will not know how best to do so (e.g., whether to make such requests indirectly to an agency or to the contractor itself, which may vary from case to case), nor will agency FOIA personnel know how to handle such a novel thing, unless each affected agency amends the request-making and request-handling parts of its FOIA regulations in explicit recognition of this new legal right. In short, when it comes to such a radically different new provision, the procedures of existing regulations will not do.

Inexplicably, a full year and a half after this unprecedented provision became law, it has fared no better than the “news media” one. By now it is evident that during the Bush Administration the Department of Justice decided to try to “low key” this high-concept FOIA enhancement, and by all accounts it succeeded in greatly minimizing both...
the frequency and effectiveness of its use, but the time is now long past for it to be given its due through necessary regulatory implementation and compliance with the notice-and-comment requirements of the Administrative Procedure Act (APA). Simply put, FOIA requesters are entitled to receive both actual and constructive notice of how to exercise their rights under it.

And on that score, it should be noted that such new statutory provisions also are required to be incorporated into all agencies’ “FOIA Reference Guides,” pursuant to subsection (g) of the Act, 5 U.S.C. § 552(g). But that has not been done either. Tellingly, even the Justice Department’s own “FOIA Reference Guide,” which stands as an example, has not been updated since May 2006.

Perhaps most symptomatic of the Bush Administration Justice Department’s shoddy approach to FOIA amendment implementation was its cavalier attitude toward the OPEN Government Act’s new requirement that all agencies specify “the exemption under which [a] deletion is made” on the face of records as processed for disclosure. 5 U.S.C. § 552(b) (concluding sentences), as amended by Pub. L. No. 110–175 (effective as of Dec. 31, 2007). At the same time at which it was ignoring the palpable need for new agency FOIA regulations, it expressly settled for the fact that this was “already existing practice [at] . . . some agencies” — as if that were sufficient to excuse it from making any ordinary effort to ensure the new requirement’s full and proper implementation governmentwide. See Congress Passes Amendments to the FOIA (posted 1/9/08), available at http://www.usdoj.gov/oip/foiapost/2008foiapost9.htm. Meanwhile, FOIA requesters at many “other agencies” did not get the benefit of this new entitlement due to its non-implementation.

In sum, one might think that these implementation failures would be focused on and rectified by responsible officials in the Obama Administration — if nothing else as part of its strong commitment to government transparency and accountability. But as with the elements of the Obama Administration’s own FOIA policies, discussed below, this still remains to be seen.

**Obama Administration FOIA Policy**

Now, of course, there is much more to implement under the FOIA and the stakes are even higher. First there were President Obama’s stunning “Day One” issuances on both transparency in general and the FOIA in particular, which held great promise of an immediate end to Bush Administration secrecy in favor of unprecedented openness. See Presidential Memorandum for Heads of Executive Departments and Agencies Regarding Transparency and Open Government (Jan. 21, 2009), available at http://www.wcl.american.edu/lawandgov/cgs/documents/20090121_government openness_memo.pdf?rd=1; Presidential Memorandum for Heads of Executive Departments and Agencies Regarding Freedom of Information Act (Jan. 21, 2009), available at http://www.wcl.american.edu/lawandgov/cgs/documents/20090121_obama_foia_memo.pdf?rd=1. In the latter, President Obama promised the prompt issuance of a new Attorney General FOIA memorandum — the traditional vehicle by which an administration’s overall disclosure policy for the Act is set — in order to ensure that “openness prevails” under it.

Indeed, the Obama Administration’s Justice Department implemented this requirement quite quickly, in less than 60 days, and for this alone Attorney General Eric Holder deserves high praise. See Attorney General Memorandum for Heads of Executive Departments and Agencies Regarding Freedom of Information Act (Mar. 19, 2009) (“Holder FOIA Memorandum”), available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf. But sometimes when you place such a high priority on doing something quickly what you wind up with is not what you might well have had if you had taken more time. Unfortunately, it appears, the Holder FOIA Memorandum is a prime example of this.

To be sure, it rescinds the infamous Ashcroft FOIA Memorandum and in its place re-institutes (courtesy of his predecessor Janet Reno) the “foreseeable harm” standard and its twin concept of “discretionary disclosure” to govern the defense of FOIA litigation and thus FOIA decisionmaking governmentwide. It conveys the hortatory reminder to all government employees that the FOIA “is everyone’s responsibility.” And it inveighs against the imposition of “unnecessary bureaucratic hurdles” in the Act’s administration, just as President Clinton (in conjunction with Attorney General Reno) did in 1993. However, the Holder FOIA Memorandum is as significant, and significantly disappointing, for what it does not do.

First, and quite surprisingly in light of the above, the Holder FOIA Memorandum says nothing about the importance of all agencies updating their FOIA regulations. It makes no mention of the fact that this has been sorely overdue, due to the 2007 FOIA Amendments, since early last year. In fact, in an inexplicable instance of a perfect opportunity lost, it makes no mention of agency FOIA regulations whatsoever. By contrast, Attorney General Janet Reno specifically urged all agencies to “undertake a complete review and revision” of their FOIA regulations when she sought to end the era of Reagan/Bush secrecy in 1993. Attorney General Memorandum for Heads of Executive Departments and Agencies Regarding Freedom of Information Act (Oct. 4, 1993) (“Reno FOIA Memorandum”) at 1, available at http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm.

This is a glaring deficiency. Even without recent FOIA amendments that call for individual agency implementation through the processes of the APA (of which the FOIA is a part), it is absolutely essential that agencies update their FOIA regulations both to remove all traces of a previous administration’s FOIA policies and to maximize the applicability of what the current administration now holds. And especially in this case, in the wake of the Bush Administration, FOIA requesters need and deserve no less.

Second, the Holder FOIA Memorandum likewise missed the opportunity to address the most serious of FOIA problems, that of long backlogs of pending FOIA requests at most departments and many other federal agencies. Apart from
What this means, amazingly, is that the very first opportunity for the Obama Administration to implement its disclosure standards under the FOIA is marred by its own half-heartedness, or worse. Either intentionally or negligently (the result being pretty much the same), the Holder FOIA Memorandum by its terms applies itself to pending litigation (and by extension to agency administrative decisionmaking) *only* if a half-dozen lawyerly hedges are first satisfied. See, e.g., *Holder Has a New FOIA Policy*, Colum. J. Rev. (Mar. 26, 2009), available at http://www.cjr.org/campaign_desk/holder_has_a_new_foia_policy.php?page=all&print=true. Every lawyer knows what the hedge “if practicable” means; non-attorney agency FOIA personnel do, too. And as for the explicit inclusion of “agency defendants” within the “judgment” to be exercised — well, that’s practically a prescription for client agency resistance to, and ultimate blockage of, any enlightened (albeit potentially burdensome) change.


There are yet other deficiencies that sadly will impair the implementation of Obama Administration FOIA policy across the executive branch. For one, the Holder FOIA Memorandum also inexplicably places primary emphasis on the long-established, quite unremarkable rule that an agency “must consider whether it can make partial disclosure” of a requested record “whenever [it] determines that it cannot make full disclosure of [it],” Holder FOIA Memorandum at 1, as if that holds some special current significance. It does not. Rather, it can only confuse and distract from agency focus on what actually is new.


continued on page 9
The Liebman-Era NLRB: A New Shift Toward the Protection of Collective Rights

By Nicole A. Bernabo*

On January 20, 2009, President Barack Obama designated Wilma B. Liebman, a Member of the National Labor Relations Board (NLRB), as Chairman. The NLRB is the agency that enforces federal labor laws and the primary adjudicative body that interprets and applies the federal labor law affecting private-sector employers—the National Labor Relations Act (NLRA). The Board is made up of five members consisting of a split of two Democrat and Republican appointees, and a chairman selected from the president’s party. It is anticipated that Liebman’s appointment will shift the NLRB decidedly to the left and that there will be a strong push for labor law and workers’ rights to be at the forefront of the national agenda. This new pro-labor philosophy and viewpoint favoring collective rights will contrast sharply with the former Bush-era Board’s orientation toward protecting individual employee free choice.

Liebman’s labor perspective has been shaped by her lengthy career spanning over 30 years in labor law and labor policy. She began at the NLRB and served as a staff attorney from 1974 to 1980, after graduating from the George Washington University Law Center. Between 1980 and 1993, she served on the legal staff of two labor unions: the International Brotherhood of Teamsters for nine years and then the International Union of Bricklayers and Allied Craftsmen for three years. Subsequently, Liebman served for several years as Special Assistant and then Deputy Director, at the Federal Mediation and Conciliation Service. President Clinton appointed Liebman to the Board in 1997 and she is now in her third term, the longest-serving Member of the current Board. At the end of this term in August 2011, she will be the third longest-serving Member in the history of the Board.

Liebman has described the core purpose of the NLRA as protecting the rights of employees to organize and promoting collective bargaining. In Liebman’s view, the Board under the leadership of former Chair Battista fell far short of upholding these principles. During the eight years of the Bush-era Board, Liebman repeatedly dissented and had been highly critical of majority decisions that, according to Liebman, stripped away workers’ rights and in her view, deviated from what she characterized as longstanding precedent. She has publicly stated that “[d]uring the Bush administration, nearly every policy choice made by a sharply divided board impeded collective bargaining, created obstacles to union representation or favored employer interests.”¹ In a statement to Congress, she claimed that the Board’s actions in reversing precedent resulted in “a loss of confidence in the Board and the legitimacy of the process” and that “[f]ewer workers have fewer rights, and weaker remedies, under the National Labor Relations Act.”² Indeed, Liebman cites what she characterizes as a severe decline, approximately 46 percent, in the Board’s union representation caseload since Liebman became a member in 1997.³ This decline may also be attributable to other factors such as globalization and a move away from manufacturing in the United States, as well as top-down organizing union corporate campaigns and voluntary card check agreements.

As Chairman, Liebman is now in a prime position to make fundamental changes in labor law. The NLRB will act far differently than we have seen during recent years and once the Democratic majority is firmly established, some recent key NLRB decisions may be reversed, such as those involving employees’ use of company e-mail, nonunion employee representation rights, supervisory status, voluntary recognition and the right of employees to challenge such recognition, unlawful hiring, backpay in “salting” cases and NLRB guidelines regarding employee political activity may change. See Register Guard, 351 NLRB No. 70 (2007) (company e-mail); See IBM Corp., 341 NLRB No. 148 (2004) (nonunion employee representation rights); Oakwood Healthcare, Inc., 248 NLRB No. 37 (2006) (supervisory status); Dana Corp., 351 NLRB No. 28 (2007) (voluntary recognition and the right to challenge recognition); Toeing Electric Co., 351 NLRB No. 18 (2007) (unlawful hiring); St. George Warehouse, 351 NLRB No. 42 (2007) (backpay in “salting” cases); Grosvenor Resort, 350 NLRB No. 86 (2007) (same). Liebman dissented in each of these prominent decisions and found, inter alia, that the former Board majority had improperly subordinated employee rights to countervailing business interests and denied meaningful remedies to workers.

³ Id., p. 6 (note 5).

*The author is a labor and employment associate at Robinson & Cole, LLC. in Hartford, CT, representing employers throughout the Northeast, and co-chair of the Section’s Labor and Employment Committee.
Recognizing that the Board, alone, is unable to make the significant and immediate labor law changes that she believes are necessary, Liebman has challenged Congress to engage in a “fundamental re-examination” of labor law that “would have to address a whole range of issues that are not yet on the [Board’s] agenda.” (Statement at a conference sponsored by the Washington, D.C., Chapter of the Labor and Employment Relations Association, November 20, 2008). She maintains that the NLRA, which has not had a major revision since 1947, in its current form “does not effectively protect workers’ right to organize” and “does not effectively promote the institution of collective bargaining, let alone encourage constructive labor management relations.” Id. She asserts that the NLRA is outdated and “was written for an industrial era when workers toiled on the assembly line and often stayed with the same firm for years — not like now. I would hope any changes made take into account changes in the workplace and in the economy.” As Chairman, Liebman is not permitted to advocate for or against pending labor legislation. The recently introduced Employee Free Choice Act (EFCA) exemplifies the modern amendments that Liebman publicly speaks about in broad strokes. Congress has not garnered sufficient support to pass this legislation despite Liebman’s veiled appeal to Congress to do so. She has publicly stated:

At a time when union membership is at a historic low point, and the earnings gap [is] growing, recent Board decisions are reinforcing trends that imperil collective bargaining as a national policy goal and that threaten to undo Congressional assumptions about collective action as a means to redress economic inequality. Restoring federal labor law to its intended purposes is obviously no panacea. But it would be a step in the right direction.

In addition to struggling with what Liebman touts as an antiquated law, the Board’s authority is also under a legal cloud because of a recent ruling by the District of Columbia Circuit Court of Appeals in 

Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, No. 08-1162 (D.C. Cir. May 1, 2009), which called into question the validity of over 400 decisions and orders issued by its two-member Board constituency that the Court found were rendered without a proper quorum of three members in violation of Section 3(b) of the NLRA. (The First and Seventh Circuits have reached the opposite conclusion, and a petition for cert to the Supreme Court has been filed to resolve this split).

Aside from Liebman, the other current Member is Peter Schaumber, a Republican. While the President has recently identified two individuals who he plans to nominate to the Board, these nominations have not been formally approved (as of this publication), but are expected to pass through the Senate without difficulty and will then crystallize the Democratic majority. (Nominees Craig Becker and Mark Pearce are Democrats, and both are attorneys who currently represent labor unions). The two-member Board under Liebman’s leadership nevertheless continues to act in spite of the D.C. Circuit Court ruling. See Statement of Chairman Wilma B. Liebman and Member Peter C. Schaumber
Concerning the District of Columbia Circuit’s 


Liebman’s pro-labor philosophy will undoubtedly color the decisions of the newly constituted Board. In furtherance of this bend, expect this new Board to exercise its full remedial discretion to impose liability for unfair labor practices without yielding to countervailing business interests. Employers should thus be fully prepared to respond to a significant modification of NLRB rulings that in the past have come down in their favor.

Sunshine Not So Bright: FOIA Implementation Lags Behind


However, such deficiencies are only secondary to the Holder FOIA Memorandum’s sheer short-sightedness in failing to serve as an exemplar, and thus most potent, instrument of change. Perhaps its limitations are much akin to those seen so early on in the Obama Administration’s troubling struggle to reform the state secrets doctrine while immediately being buffeted between its intelligence agencies (as litigation clients) and the courts. Too little done, and done too weakly, hope-fully because it was just too soon to be able to do much more. See Presidential Press Conference of Apr. 29, 2009 (“And so we [didn’t] have the time to effectively think through, what exactly should an

overarching reform of that doctrine take? We [had] to respond to the immediate case in front of us.”). But before too long, as the public searches for concrete examples of the promised “new FOIA era,” the Obama Administration will have to improve the FOIA by greatly improving its policy implementation.

Conclusion

When Congress or a new president acts to improve government openness, it is something done to much acclaim. But when the shouting’s over, what matters most is how well those broad strokes are put into practice, as a matter of improved day-to-day administrative practice, at the ground level within federal agencies. This is as true with respect to FOIA administra-

continued from page 7
2009 Gellhorn-Sargentich Law Student Essay Competition

Connor Raso is the winner of the fourth annual Gellhorn-Sargentich Law Student Essay Competition. The author submitted the winning entry while a second-year student at Yale Law School. An expanded version of the article will appear in Volume 119 of the Yale Law Journal.

Do Agencies Use Guidance Documents to Avoid Presidential Control?

A recent debate has emerged over whether federal agencies issue “guidance documents” to avoid presidential influence over the rulemaking process. Guidance documents have long been exempt from review by the Office of Information and Regulatory Affairs (OIRA), which reviews most rules on behalf of the White House. The scope of this exemption is potentially vast, as guidance documents greatly outnumber rules.

Policymakers, courts, and academics have all expressed concern that agencies have abused this loophole. For example, a report from the House Committee on Government Reform notes that guidance documents may allow agencies to circumvent procedures that: “protect citizens from arbitrary decisions and enable citizens to participate effectively in the process.” Similarly, D.C. Circuit opinions have sharply criticized agency use of guidance. Finally, academics have expressed strong concern that agencies abuse guidance documents.

In response to such concerns, President Bush issued an executive order in 2007 requiring agencies to receive OMB approval for a subset of “significant” guidance documents. President Obama quickly repealed this executive order, however. This decision signals that the Obama Administration does not share the Bush Administration’s concern that agencies use guidance documents to undermine presidential control. This paper uses newly available data to analyze the central question underlying this policy difference: do agencies actually use guidance documents in place of rules to avoid presidential control?

Presidential Control of Guidance

The Bush Administration’s executive order required non-independent agencies to classify all existing guidance documents as “significant” or “non-significant.” Agencies were also required to submit all newly created significant documents to OIRA for approval. The Order defined “significant” guidance as the subset of all documents satisfying the following conditions:

(i) Lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(iii) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(iv) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in Executive Order 12866, as further amended.

This definition of significant guidance closely mirrored the definition of significant rules, suggesting that the Bush Administration sought to impose a similar level of control on guidance documents and rules. The Obama Administration’s repeal of the executive order leaves guidance documents fully exempt from OMB review.

Is Guidance Actually Used to Avoid Presidential Control?

Will agencies exploit the Obama Administration’s repeal of the Bush executive order and use guidance documents to skirt presidential control of rulemaking? This paper analyzes data generated by the Bush executive order, which provides the first uniform measure of guidance document significance.

Use of Guidance for Significant Policymaking

Do agencies use guidance documents to formulate important policy decisions? To analyze this question, the author compiled a count of significant guidance documents by agency.

1 The term “guidance document” lacks a clear legal definition. Guidance is commonly associated with a varied set of regulatory materials such as agency interpretations of existing rules, statements outlining how an agency will regulate an evolving area, and internal training manuals. See Exec. Order No. 13,422, 72 Fed. Reg. 2763, 2763-65 (Jan. 23, 2007).

2 No systematic analysis of the total volume of guidance documents has been compiled, but case studies strongly suggest that agencies issue significantly more guidance documents. See, e.g., Peter L. Strauss, The Rulemaking Continuum, 1992 Duke L.J. 1463, 1469.


4 See, e.g., Appalachian Power Co. v. EPA, 281 F.3d 1015, 1019 (D.C. Cir. 2000).


11 Data were unavailable for the Department of Commerce, the Food and Drug Administration, and the Federal Motor Carrier Safety Administration. In addition, independent agencies are exempted from submitting data to OMB, see Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted in 5 U.S.C. § 601.
Restricting the analysis to significant guidance documents has several important advantages relative to studying the entire population of guidance. First, the fact that all significant documents satisfy the significance criteria removes much of the heterogeneity that complicates empirical analysis. As a result, the analysis is not contaminated by the fact that some guidance documents are substantially more important than others. In addition, significant guidance documents are directly comparable to significant rules because the definition of both categories is almost identical.\(^\text{12}\)

The data show that agencies rarely issue significant guidance documents (see Table 1). A total of 723 significant guidance documents were in effect in September 2008 from the 15 agencies for which data were available. This sum may appear substantial at first glance, but it is small in comparison to the number of significant rules issued by these agencies each year. From 1993 to 2008, OMB reviewed 9,338 significant rules from the 15 agencies.\(^\text{13}\) Again, the definitions of significant guidance and significant rules are nearly identical, making these categories directly comparable. In short, the proportion of outstanding significant guidance documents is small relative to the body of rules. This suggests that agencies do not frequently use guidance documents to avoid issuing rules that are subject to OMB review.

This finding may be the result of both legal requirements and political forces. In a number of cases, Congress requires agencies to promulgate a rule.\(^\text{14}\) This is partially offset by the fact that Congress also requires agencies to issue guidance documents, however.\(^\text{15}\) In other cases, administrative law doctrine clearly requires the agency to use a guidance document.\(^\text{16}\) Finally, in many cases the agency leader may simply prefer to issue a rule.

Several agencies issued guidance documents at a significantly higher rate than their peers. A qualitative analysis of these outliers provides some insight as to whether this behavior was intended to avoid presidential control. In most cases, the behavior appears to be motivated by the agency’s need to fulfill a policy mandate within a time constraint. The Department of Homeland Security is perhaps the clearest example. The Department was created in relative haste after September 11, 2001, and was required to quickly implement a number of policy changes. This pressure was especially significant in the wake of September 11. The Department used guidance because it often lacked the time and resources to make policy via rules. For instance, the newly created Transportation Safety Administration quickly issued a number of guidance documents related to airline safety.\(^\text{17}\) Similarly, the Department of Education used approximately one-third of its total guidance to meet the tremendous policymaking mandate imposed by the No Child Left Behind Act.\(^\text{18}\) Again, the pressure to quickly implement the law was substantial and the policymaking burden was significant.

Other agencies appear to use much of their guidance to clarify highly technical details. The Department of Transportation is not known as an ideological agency. Political science ideology measures of federal agencies show that the Department is one of the most moderate government agencies.\(^\text{19}\) Anecdotally, both Presidents Obama and Bush appointed Transportation secretaries of the opposite party. Transportation’s use of guidance reflected this reputation; over two-thirds of the Department’s total guidance documents were technical modifications to airline and trucking safety standards. These safety standards sometimes changed rapidly in response to new studies and field experience, making rulemaking impractical.\(^\text{20}\)

Moreover, the technical nature of these regulations required frequent and rapid clarification, which was not amenable to the much slower rulemaking process.

**Use of Guidance for Ideological Policy**

If guidance is used to implement ideologically charged policy decisions, it should be revised when a new president appoints agency leaders with different policy preferences. An agency leader who disagrees with a guidance document issued by his predecessor has a strong incentive to modify it because amendments to guidance do not require the notice and comment process or the other procedural requirements associated with rulemaking. Revisions are therefore less likely to incite political controversy or consume time of agency staff. If guidance documents are used to implement ideological policy decisions, a substantial number should be amended after a change in partisan control of the presidency.

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\(^\text{12}\) Office Of Mgmt. & Budget 2007, supra note 8.
\(^\text{13}\) Data gathered from the General Services Administration, See General Services Administration, RegInfo, http://www.reginfo.gov/public.
\(^\text{14}\) No existing study has systematically analyzed the proportion of agency rules mandated by Congress. A recent study analyzing agency deadlines imposed by Congress shows that some agencies devote a high proportion of their rulemaking docket to non-discretionary rules, however. See Jacob E. Gersen and Anne Joseph O’Connell, Deadlines in Administrative Law, 156 Univ. Penn. L. Rev. 923 (2008).
\(^\text{17}\) See, e.g., Transportation Safety Administration, Security Guidelines for General Aviation Airports (2004).

\(^\text{19}\) Joshua D. Clinton and David E. Lewis, Expert Opinion, Agency Characteristics, and Agency Preferences, 16 POL. ANAL. 3, 6 (2008).
This change did not occur on a large-scale basis in 2001, however (see Table 2). President Bush’s appointees revised only 11.8 percent of guidance documents issued by previous administrations. This comparison to all previous administrations is appropriate because Clinton agencies would have been expected to modify any ideological guidance issued by the Reagan and Bush Administrations, forcing the second Bush Administration to re-modify the guidance.

Several interesting patterns emerge from these data. Agencies such as the EPA and the Department of Labor that used significant guidance documents more often than average revised their guidance infrequently. For instance, the Bush EPA declined to revise several of its guidance documents detailing proper procedures for conducting risk assessments.21 Such guidelines have significant implications for the projected net benefits of particular regulations, and therefore may influence the stringency of environmental regulation. Although the leaders of a Bush EPA may be expected to hold different views on this subject from their predecessors in the Clinton Administration, they declined to revise a number of their guidance documents.

Finally, a number of the revisions to significant guidance were highly technical and did not fundamentally alter policy. For instance, virtually all Federal Aviation Administration (housed within the Department of Transportation) revisions focused on airplane safety standards. Most of these changes were motivated by findings from FAA inspectors or the airlines.22 Including such technical revisions therefore overstates the extent to which agency leaders modified guidance documents to move policy toward their ideological preferences.

**OMB’s Guidance Reform Nominations**

In 2002, OMB asked the public to nominate guidance for modification. Interested parties submitted 49 such

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21 See, e.g., ENVIRONMENTAL PROTECTION AGENCY, GUIDELINES FOR ECOLOGICAL RISK ASSESSMENT (1998).

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<th>Table 2: Proportion of Guidance Documents Modified by the Bush Administration</th>
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This fact alone is striking. Given the low cost of submitting nominations, regulated parties would be expected to submit many more nominations if the benefits of reform were significant. Moreover, if guidance were important then OMB would be expected to approve reform suggestions from its constituent interest groups quickly. However, OMB did not act upon most of the nominations even though many came from allies of the Bush Administration. Of the 49 nominations, 37 were from an entity traditionally considered as an ally of the Bush Administration. Many of the 11 remaining nominations were from nonpartisan groups not traditionally considered as hostile to the Bush Administration. The Bush Administration nonetheless reformed only 17 of these 49 nominations. The Bush Administration declined to reform 21 of the documents, and reform was pending four years later on the remaining 11 documents. This record suggests that guidance reform was not a high priority.

To take one illustrative example, the U.S. Chamber of Commerce proposed reforming an EPA guidance document issued in the Clinton Administration encouraging state environmental agencies to deny or revoke operating permits in jurisdictions with a high proportion of minority or low-income residents. The document allowed concerned parties to file administrative complaints against anyone applying for an operating permit in such an area. The Chamber of Commerce argued that this guidance document exceeded the EPA’s statutory authority and restricted development of business in impoverished areas. The Bush EPA declined to act on this suggestion despite its apparent ideological appeal. The EPA did not comment on the reason for this inaction, but this outcome indicates that guidance reform was a low priority.

Conclusions
The Obama Administration has not relinquished control over the rulemaking process by suspending OMB review of guidance documents. Agencies do not commonly use guidance documents to circumvent the rulemaking process and OMB review. Significant guidance is issued infrequently relative to rulemaking. Agency leaders with very different ideological views rarely repeal guidance documents issued by their predecessors despite the modest cost of doing so. Finally, the OMB completes reform on only 35 percent of guidance documents recommended for revision.

Concern over agency misuse of guidance may be partially caused by overgeneralization from a few egregious examples of abuse. Such concern may also be partially fueled by interest groups seeking to reduce regulation by consuming limited agency resources with additional procedural requirements. This is not to suggest that agencies never use guidance to skirt OMB review. Generalizing about an entity as large as the executive branch is obviously hazardous, and critics of guidance correctly point to some egregious examples of abuse.

Some agencies such as the FDA and the IRS clearly use guidance much more frequently than others. On balance, however, this paper’s results strongly indicate that the Obama Administration’s suspension of OMB review of guidance will not undermine presidential control of the rulemaking process.

24 Such entities include corporations, industry trade associations, conservative think tanks, and other Bush administration agencies. The classification is available upon request from the author.
25 See Office of Mgmt. and Budget 2006, supra note 23.
26 Office of Mgmt. and Budget, Executive Office of the President, Stimulating Smarter Regulation: Summaries of Public Suggestions for Reform of Regulations and Guidance Documents 320 (2002).
27 Id.
28 See Office of Mgmt. and Budget 2006, supra note 23, at 111.
29 For such examples, see Anthony, supra note 5.
31 The IRS frequently issues interpretative rules. For an analysis of this practice, see Kristin E. Hickman, Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements, 82 Notre Dame L. Rev. 1727.
Thursday July 30, 2009
10:30 – Noon | ABA Presidential Showcase Program: Hot Topics and Recent Developments in Public Corruption Investigations & Government Ethics (CLE) | Sponsored by the Section of Administrative Law & Regulatory Practice and the Criminal Justice Section | This panel discussion—moderated by the Chair of the Illinois Reform Commission and featuring a highly regarded federal judge, DOJ Public Integrity prosecutor, noted defense counsel and ethics experts—will address issues that arise in high profile public corruption cases, including important ethical issues. Topics to be addressed include the corruption trial of former U.S. Senator Ted Stevens and issues arising in high-profile Illinois corruption cases involving George Ryan, Rod Blagojevich and Antoin “Tony” Rezko.
| Moderator: Patrick M. Collins, Partner, Perkins Coie LLP and chair of the governor-appointed Illinois Reform Commission | Panelists: Hon. Abner J. Mikva, Chief Judge, U.S. Circuit Court of Appeals D.C. (Retired); Judge Amy St. Eve, U.S. District Court, Northern District of Illinois, who presided over the federal corruption trial of Antoin “Tony” Rezko; Edward Gerson, former attorney for impeached Illinois Governor Rod Blagojevich; Attorney for Sen. Ted Stevens, Justin Shur, DOJ Criminal Division, Public Integrity Section, Washington, DC
2:00 – 3:30 pm | Energy Alternatives and Incentives for Clean Energy (CLE) | Co-sponsored by the ABA Standing Committee on Environmental Law, and the Section of Environment, Energy, and Resources | This session will focus on a group of practitioners who are dedicated to the development of the nation’s alternative energy resources to meet America’s domestic energy demands in an environmentally responsible manner while reducing the nation’s dependence on imported energy sources and stimulating state and national economic development—all in a challenging and ever-shifting regulatory environment. The Panel will share their thoughts on trends/developments in specific environmental regulatory programs that intersect with alternative energy projects, specifically recent trends in regulation for nuclear, wind, and solar permitting and site assessment. Further, there will be a discussion regarding tax incentive programs specifically geared towards alternative energy projects. Finally, the panel will round out with “real life” experience of the Illinois Power Agency (“IPA”) and some of the issues that the IPA faces in meeting the mandatory “cost effective” renewable energy component of centralized energy purchases.
| Moderator: Todd Maiden, Partner, Reed Smith, San Francisco | Panelists: Tamar J. Cerafici, Of Counsel, Ballard Spahr, Philadelphia; Tom Donovan, P.E. Regional Vice President, Shaw Environmental & Infrastructure, Inc., Chicago; Arnold E. Grant, Partner, Reed Smith, Chicago
3:45 – 5:15 pm | Antarctica – What Does the Future Hold? | Antarctica—a cold, forbidding place with no indigenous or permanent residents—is a continent without formal nation-state governance as we typically think of it. Yet seven countries assert claims, some overlapping, to parts of the continent. The Antarctic Treaty System (“ATS”), a series of treaties and other binding rules, is the only “regulatory” system in place attempting to deal with the governance of the continent and to prevent the misuse of Antarctica for strategic or resource purposes. With the increasing global demand for a diminishing pool of resources, the question of the optimal governance system for Antarctica presents an interesting launch point for this engaging discussion of law, science, and diplomacy. Specifically, panelists will explore the viability of the ATS and discuss alternatives to provide better environmental protection for the continent.
| Moderator: Janet Belkin, J.D. Ph.D. | Panelists: Evan T. Bloom, Deputy Director, Office of Ocean and Polar Affairs, Bureau of Oceans and International Environmental & Scientific Affairs, U.S. Department of State; Michele Perrault, International Vice President, Sierra Club
9:30 – 10:30 pm | Hospitality Suite, Chairman’s Suite, Westin Michigan Avenue
Friday July 31, 2009
8:30 – 10 am | Agencies of Change: Exploring Institutional Reform at the FCC and the FERC (CLE) | A look ahead to explore possible changes at the Federal Communications Commission and the Federal Energy Regulatory Commission under the new Administration. A panel of experts will discuss institutional reform at both agencies, including potential modifications to their organization, structure, and processes, and the impact of such changes on communications and energy regulation.
| Moderator: H. Russell Frisby, Jr., Chair, ABA Section of Administrative Law & Regulatory Practice, Partner, Fleischman and Harding LLP | Panelists: Kathleen Q. Abernathy, Former Commissioner, Federal Communications Commission, Partner, Wilkinson Barker Knauer, LLP; Randolph J. May, President, The Free State Foundation; David Honig, Executive Director, Minority Media and Telecommunications Council; James J. Hooecker, Former Commissioner, Federal Energy Regulatory Commission, Senior Counsel, Husch Blackwell Sanders, Principal, Hooecker Energy Law & Policy, PLLC; David K. Owens, Executive Vice President, Business Operations, Edison Electric Institute; Ken Hurwitz, Partner, Haynes and Boone, LLP
2:00 – 3:30 pm | Homeland Security Coordinating Committee Meeting | Contact Anne Kiefer kiefera@staff.abanet.org for information on this program.
3:45 – 5:15 pm | Lawyers in Your Living Room! Law on Television (CLE) | From Perry Mason and The Defenders in the 1960’s to L. A. Law in the 80’s, The Practice and Ally McBeal in the 90’s, to Boston Legal, Shark, and Law & Order today, the television industry has generated an endless stream of dramatic series involving law and lawyers. As a result, most members of the public receive most of their information (and misinformation) about what lawyers do and how legal institutions function from absorbing pop culture representations about lawyers on television or in the movies. Daytime judge reality shows like Judge Judy are equally influential in spreading highly misleading information about what judges do. Lawyers need to know what messages all this television programming transmits to the public because public expectations about law and lawyers have a profound influence on law practice.
This program will celebrate the publication of the ABA Press of Lawyers in Your Living Room! Law on Television (2009). This definitive book features more than 30 chapters about legal television, both domestic and foreign. The Annual Meeting program will feature some of the authors of that book who will discuss the cultural impact of law on television. The discussion will focus on lawyer shows of today as well as those of yesteryear. The program will discuss the Judge Judy phenomenon as well as shows that are not primarily about lawyers but feature important lawyer characters (such as Sethical, The Simpsons, or The West Wing). It also will discuss the production of dramatic shows, including writing and technical advising. Of course, there will be plenty of clips featuring familiar lawyer characters and a good time will be had by all! Copies of the book will be available for sale.
| Moderator: Michael Asmow, Professor Emeritus, UCLA School of Law, editor of “Lawyers in Your Living Room! Law on Television” | Panelists: David Ginsburg, Director, Entertainment and Media Law Program, UCLA School of Law; Jill Goldsmith, Television writer and producer; Nancy Marder, Professor of Law, Chicago-Kent College of Law; Philip N. Meyer, Professor of Law, Vermont Law School; Nancy B. Rapoport, Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas
5:30 – 7:00 pm | Section Reception | Co-Sponsored by The University of Pittsburgh Law School
7:00 – 9:00 pm | Dinner & Presentation by a Representative of the Chicago Mercantile Exchange | A representative of the CME Group will speak after dinner about the regulatory reform proposals for derivatives in the wake of the worldwide financial crisis and the Chicago Mercantile Exchange’s plans to act as a clearing house for certain financial products.
| We are fortunate to have access to The Club on the eighth and ninth floors of Symphony Center with its terrace view of Millennium Park, Renzo Piano’s new Modern Wing of the Art Institute, and the surrounding cityscape. Take in the wonderful view from the terrace during the reception. Then enjoy a delicious sit-down dinner prepared by Blue Plate Catering, one of Chicago’s finest.
| The Reception is complimentary. The Dinner is $100 per person. Registration is required for both.
9:30 – 11 pm | Hospitality Suite, Chairman’s Suite, Westin Michigan Avenue
Saturday Aug 1, 2009
8 – 9 am | Section Breakfast
9 – Noon | Section Council Meeting
Noon – 1:30 pm | Publications Committee Meeting
2:00 – 3:30 pm | Enforcement Redux: FDA’s New Vigor Under New Leadership (CLE) | This panel will explore the prospects for expanded litigation and penalty enforcement actions under the Obama FDA, in light of prior trends and future congressional oversight.
| Moderator: James T. O’Reilly, Professor, University of Cincinnati College of Law | Panelists: Deborah Autor, Director of Compliance, Center for Drug Evaluation & Research, Food & Drug Administration; Frederick Branding, Partner, Reed Smith; Steven Kowal, Partner, Kil Gates; Edgar Aseyeb, Sandler Travis
3:45 – 5:15 pm  | Government Litigators in the New Administration: How Far Must They Go to Seek Justice  | Co-Sponsors: Section of Administrative Law & Regulatory Practice, Section of Antitrust Law, Business Law Section, Center for Professional Responsibility, Government & Public Sector Lawyers Division, and Litigation Section  | Both criminal prosecutors and civil government litigators are said to have a duty to "seek justice." But the concept of "seeking justice" is ill-defined, and it is unclear whether, and to what extent, the amorphous duty includes obligations of candor and restraint that are not explicitly codified in rules of professional responsibility and other law. Through an interactive discussion of hypothetical cases, the panel and the audience will explore how, ethically and professionally, the duty to "seek justice" sets government litigators apart from lawyers litigating on behalf of private clients and potentially establishes different professional expectations for government litigators.  | Moderator: Joel Daly  | Panelists: Michael Clark, Hamel Bowers & Clark LLP, Houston, TX; Roxann E. Henry, Hovrey LLP, Washington, DC; Kathryn Kelly (invited), Assistant United States Attorney, Chicago, IL; Professor Ben Kempen, University of Wisconsin Law School, Madison, WI; Honorable John R. Tunheim, U.S. District Judge, Minneapolis, MN

Sunday Aug 2, 2009
8 – 9 am  | Section Breakfast
9 – Noon  | Section Council Meeting

Program Concludes

Registration Information
Participants must register with the ABA in order to attend the CLE programs. Visit the ABA web site at this link to register:

http://new.abanet.org/annual/default.aspx

To attend the July 31 Administrative Law Section Reception or Dinner at Symphony Center, or the Section Council or committee meetings, complete the registration form at the end of this brochure, or register online at the Section's web site:


CLE Information
Accreditation will be requested for the indicated programs from every state with mandatory continuing legal education (MCLE) requirements for its lawyers. Please be aware that each state has its own rules and regulations, including its definition of "CLE." Check with your state agency for confirmation of this program's approval. Attorneys seeking to obtain MCLE credit in Pennsylvania are required to pay state accreditation fees directly to that state. Certificates of attendance will be available at the conclusion of the program. In order to receive CLE credit, all attorneys will be required to sign in on the sign in sheets and obtain a Uniform Certificate of Attendance. Registration fees must be paid in full before registrants can receive credit.

Weekend Activities
Chicago's lakefront bustles with activity in Summer. You cannot go wrong with any of the well-known choices, such as the newly-opened Modern Wing of the Art Institute by Renzo Piano, nearby Millennium Park with its Anish Kapoor "Bean" and Frank Gehry band shell, the Field Museum or Shedd Aquarium to the South, or even a baseball game at Wrigley Field or Cellular Park. Here are some less well-known options for the weekend which are fun and relaxing.

Green City Market
Chicago has wonderful farmers' markets. The Green City Market in Lincoln Park has become a renowned sustainable, organic market, and is a favorite of chefs and locals alike. The Market is open from 7 a.m. until 1 p.m. It is located in the southeast corner of Lincoln Park, just north of the parking lot at Clark Street. You can wander through the stalls of the Market and enjoy eating pastries, fruits, and other foods while listening to the festive music which fills the air. Fruit crepes are special breakfast favorites of many. There also is a weekly chef's demonstration.

The Green City Market is a walk of 1.3 miles from the Westin or a short cab or bus ride. If you choose to walk, you may enjoy stopping by the Division Street Market on route and checking out the fragrant lilies and delicious Summer fruits. The Division Street Market is located on Division between Clark and State Streets. It is open on Saturdays from 7 a.m. until 2 p.m.

Lincoln Park Zoo
You can continue north from the Green City Market to nearby Lincoln Park Zoo, one of only a few free zoos in the country. Stop by to see the white-cheeked gibbons at the Brach Monkey House. They are special favorites of visitors and draw large crowds.

Chicago History Museum
You may prefer to return from the Green City Market to visit the Chicago History Museum at 1601 North Clark (Clark and North Avenues). The Museum has special exhibits celebrating the Lincoln Bicentennial throughout the year, as well as other exhibits. It is open from 9:30 a.m. until 4:30 p.m. on Saturdays. Its website is www.chicagohistory.org.

Chicago Architecture Foundation River Cruise
This recommendation actually is not limited to Saturday. If you are going to do one thing in Chicago, we recommend the Chicago Architecture Foundation River Cruise. It is the best way to see Chicago and its renowned architecture. Be forewarned that it is very popular. Advance reservations are recommended and can be made by going to the Chicago Architecture Foundation’s website at www.architecture.org. You also should be aware that there are other boat tours of Chicago’s architecture which are alternatives if the Architecture Foundation is not available, but our first choice would be the "Arch Tour."

For other ideas, visit http://www.choosechicago.com/Pages/default.aspx

Enjoy a beautiful summer day in Chicago!!!!

ABA Section of Administrative Law and Regulatory Practice Annual Meeting Events & Council Meeting  ★ July 30, 2009 – August 2, 2009

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<td>Sat. Aug. 1, 8:00 am – 12:00 pm – Section Council Meeting w/ Continental Breakfast</td>
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Refunds will be processed less a $25 cancellation fee on or before July 15, 2009. No refunds will be issued after this date. Substitutions will be accepted—please notify us of any substitutions.

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Standing

The Forest Service Decisionmaking and Appeals Reform Act of 1992 required the U.S. Forest Service to establish a notice, comment, and appeal process for “proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974.” Pub. L. 102-381, § 322, 106 Stat. 1419. In its regulations implementing this requirement, the U.S. Forest Service established that certain public participation procedures—notice, comment, and appeal—would not apply to projects that it had categorically excluded from the Environmental Impact Statement requirement pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332. 36 C.F.R. §§ 215.4(a), 215.12(f). As a result, Forest Service projects excluded from public notification, comment, and challenge included fire rehabilitation activities on less than 4200 acres and salvage timber sales of 250 acres or less.

Environmental organizations originally sought to challenge these regulations in the specific context of the September 2003 Burnt Ridge Project, which was a salvage sale of timber on 238 acres in the Sequoia National Forest that had been damaged by a forest fire during the summer of 2002. All parties admitted that the plaintiffs had established standing to challenge that specific project through the affidavit of a member who used the relevant area for recreation. However, after the district court granted a preliminary injunction against the Burnt Ridge Project, the parties settled that part of the litigation. The plaintiffs then determined to pursue a general challenge to the regulations on the grounds that they would inevitably be applied to future Forest Service projects. At this point in the litigation, the Forest Service argued that the plaintiffs lacked standing to continue.

In a 5-4 decision authored by Justice Scalia (Justices Breyer, Stevens, Souter, and Ginsburg dissented), the U.S. Supreme Court agreed with the Forest Service and concluded that the plaintiffs had failed to allege adequate injury-in-fact to challenge the regulations outside the context of the Burnt Ridge Project. Summers v. Earth Island Institute, — U.S. —, 129 S.Ct. 1142, 1152-53 (March 3, 2009). The majority began by reciting the standing test: “To seek injunctive relief, a plaintiff must show that he is under threat of suffering ‘injury in fact’ that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.” Id. at 1149 (citing Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180-81 (2000)). It then emphasized that “[t]he regulations under challenge here neither require nor forbid any action on the part of [Earth Island]. The standards and procedures that they prescribe for Forest Service appeals govern only the conduct of Forest Service officials engaged in project planning.” Id. As a result, as non-directly regulated parties, the plaintiffs had the burden of demonstrating injury-in-fact, the only standing element at issue.

The majority concluded that the environmental challengers had not established injury-in-fact to challenge the regulations in general. While affidavits from members of the plaintiff organizations established individual injury from the Burnt Ridge Project, that aspect of the case had settled, and “[w]e know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests.” Id. at 1149-50. The only other affidavit that the majority considered, the Bensman affidavit, alleged past injury from Forest Service developments but failed to challenge any particular future timber sale or to connect Bensman’s injury to specific tracts of National Forest. Id. at 1150. As a result, “we are asked to assume not only that Bensman will stumble across a project tract unlawfully subject to the regulations, but also that the tract is about to be developed by the Forest Service in a way that harms his recreational interests, and that he would have commented on the project but for the regulations.” Id. at 1150. This chain, the majority concluded, was too tenuous to support standing.

The majority also rejected plaintiffs’ procedural injury argument, even though, at heart, the plaintiffs argued that the Forest Service was illegally denying them congressional mandated participation in agency decision making processes. According to the Court, “deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right in vacuo—is insufficient to create Article III standing.” Id. at 1151. Notably, Justice Kennedy concurred specially on this point, stating that “[i]t is this case that presents different considerations if Congress had sought to provide redress for a concrete injury giving rise to a case or controversy where none existed before.” Id. at 1153.
inappropriate here.

be constitutional; thus, a constitutional bar on standing was participated in public processes with the Forest Service in the past and were likely to do so in the future, that provision would be constitutional; thus, a constitutional bar on standing was inappropriate here. *Id.* at 1154–55 (J. Breyer, dissenting).

Beyond this relatively standard injury-in-fact debate, however, three aspects of the case are worth attention. First, after settling the Burnt Ridge Project aspects of the case and the entry of the district court’s judgment on those issues, the plaintiffs submitted additional affidavits that, according to the dissenters, would have established standing for the remaining issues in the case and that the Supreme Court should have incorporated, given the posture of the standing challenge and the Federal Rules of Civil Procedure. *Id.* at 1157–58. The majority, however, refused to consider these affidavits, concluding that “if respondents had not met the challenge to their standing at the time of judgment, they could not remedy the defect retroactively.” *Id.* at 1150 n.*.

Thus, in procedurally convoluted administrative challenges, proper application of the Federal Rules of Civil Procedure may be critical to plaintiffs’ standing.

Second, and reflecting an issue that has been prominent in lower federal courts since *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (J. Kennedy, concurring)), the majority and the dissent debated the meaning of “actual and imminent” injury-in-fact and the role of probability in assessing standing. According to the dissent, past injury is relevant to current standing: “Where the Court has directly focused upon the matter, i.e., where, as here, a plaintiff has already been subject to the injury it wishes to challenge, the Court has asked whether there is a realistic likelihood that the challenged future conduct will, in fact, recur and harm the plaintiff.” *Id.* at 1155–56 (J. Breyer, dissenting). Moreover, “a threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates.”

The dissenters emphasized that “[t]he Forest Service admits that it intends to conduct thousands of further salvage-timber sales and other projects exempted under the challenged regulations ‘in the reasonably near future,’” and that “the Government has conceded[] that the Forest Service took wrongful actions (such as selling salvage timber) ‘thousands’ of times in the two years prior to suit.” *Id.* at 1156 (J. Breyer, dissenting). As a result, the majority could not credibly claim that illegal salvage timber sales were unlikely to injure the plaintiff groups and their members in the foreseeable future. *Id.* at 1155 (J. Breyer, dissenting).

According to the majority, however, “[t]he dissent proposes a hitherto unheard-of test for organization standing: whether, accepting the organization’s self-description of the activities of its members, there is a statistical probability that some of those members are threatened with concrete injury.” *Id.* at 1151. It rejected the dissent’s attempt to “replace the requirement of

‘imminent’ harm . . . with the requirement of a realistic threat’ that reoccurrence of the challenged activity would cause [the plaintiff] harm ‘in the reasonably near future’. . . .” *Id.* at 1152–53.

Finally, it is worth noting that the U.S. Court of Appeals for the Ninth Circuit dismissed claims related to different Forest Service regulations on a different administrative law issue: ripeness. However, its discussion of ripeness overlapped considerably with the underlying considerations in standing, and it concluded that the challenges to the regulations not at issue in the Burnt Ridge Project “were not ripe for adjudication because there was not a sufficient ‘case or controversy’” before the court to sustain a facial challenge. *Id.* at 1148 (quoting *Earth Island Institute v. Rutherbeck*, 490 F.3d 687, 696 (9th Cir. 2007)). However, given its conclusion on standing, the Supreme Court did not reach the issues of ripeness or the propriety of a nationwide injunction. *Id.* at 1153.

**“Arbitrary and Capricious” Review**


Until 2006, the FCC had a policy of not taking enforcement actions against broadcasters who broadcast a single “fleeting expletive”—generally, an unscripted ejaculation during live broadcasts. In March 2006, however, the FCC issued an enforcement order against Fox Television Stations and its affiliates in response to its broadcasts of two “fleeting expletives”—one by the singer Cher during the 2002 Billboard Music Awards, the other by celebrity Nicole Ritchie during the 2003 Billboard Music Awards. After challenges and a remand to more fully hear the parties’ objections, the FCC upheld its indecency findings. On appeal, the U.S. Court of Appeals for the Second Circuit reversed the order, finding the FCC’s reasoning arbitrary and capricious under the Administrative Procedure Act (APA), in part because the Second Circuit concluded that the FCC had not adequately explained its change in enforcement policies and in part because it feared that the FCC’s enforcement policy would violate that First Amendment, although the Second Circuit did not reach the constitutional issue.

In a 5-4 decision authored by Justice Scalia (Justices Stevens, Ginsburg, Breyer, and Souter dissenting), the Supreme Court reversed, concluding that the FCC had not been arbitrary and capricious in its enforcement order. *Federal Communications Commission v. Fox Television Station, Inc.*, — U.S. —, 129 S. Ct. 1800 (April 28, 2009). The majority began by noting that

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the arbitrary and capricious standard is a “‘narrow’ standard of review” that requires an agency to “examine the relevant data and articulate a satisfactory explanation for its action.” Id. at 1810 (quoting Motor Vehicles Manufacturers Association of the United States, Inc. v. State Farm Mutual Insurance Co., 463 U.S. 29, 43 (1983)). Moreover, “a court is not to substitute its judgment for that of the agency,” . . . and should “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”” Id. (quoting State Farm, 463 U.S. at 43; Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974)).

Most significantly, the majority announced that there is no heightened APA review for decisions involving a change in agency position:

We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change by subjected to more searching review. The Act mentions no heightened standard, and our opinion in State Farm neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance. . . . Treating failures to act and rescissions of prior action differently for purposes of the standard of review makes good sense, and has basis in the text of the [APA], which likewise treats the two separately. . . . The statute makes no distinction, however, between initial agency action and subsequent agency action undoing or revising that action.

Id. at 1810–11. The Court did provide some caveats, however. First, “the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position.” Id. at 1811. Second, agencies cannot ignore valid regulations still in effect. Id. Finally, the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the consciousness of change of course adequately indicates.

Id.

The Court also determined that constitutional avoidance did not demand heightened review in cases where constitutional rights were implicated. “The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts. . . . We know of no precedent for applying it to limit the scope of authorized executive action.” Id. at 1811–12. Instead, if the agency’s authorized action is unconstitutional, the court can set it aside under the APA as “unlawful.” Id. at 1812.

Under these rules, the FCC’s enforcement actions were not arbitrary and capricious. First, the FCC openly acknowledged that its decision that the “fleeting expletives” at issue warranted enforcement was breaking new ground—a fact, it declined to assess penalties in recognition of that fact. Id. at 1812. Second, “the agency’s reasons for expanding the scope of its enforcement activity were entirely rational,” given that it carefully explained how both literal and non-literal uses of sexual and scatological expletives could be offensive and indecent, it had declined to create safe harbors in the past, and new technologies have made it much easier for broadcasters to “bleep out” offending words. Id. at 1812–13. Empirical evidence regarding the impact of such fleeting expletives was not required, id. at 1813, and the FCC’s retention of discretion to regard fleeting expletives as indecent in some contexts (music award shows likely to draw many children viewers) and not in others (Saving Private Ryan) did not render the enforcement policy arbitrary and capricious. Id. at 1814. Finally, the majority found entirely logical the FCC’s conclusion that a per se exemption for fleeting expletives would likely increase the number of fleeting expletives broadcast during prime time television. Id.

Justice Kennedy concurred to suggest that agencies might in fact have to provide more detailed explanations of changes in policies in some circumstances. “The question whether a change in policy requires an agency to provide a more-reasoned explanation that when the original policy was first announced is not susceptible, in my view, to an answer that applies in all cases.” Id. at 1822–23 (J. Kennedy, concurring). Justice Stevens in dissent “emphasize[d] two flaws in the Court’s reasoning”: (1) “assuming that the [FCC’s] rulemaking authority is a species of executive power, the Court espouses the novel proposition that the Commission need not explain its decision to discard a longstanding rule in favor of a dramatically different approach to regulation”; and (2) the Supreme Court’s precedent regarding the meaning of “indecent” was not as broad as the FCC assumed. Id. at 1824–25 (J. Stevens, dissenting). Justice Ginsburg dissented to emphasize that the First Amendment question was real and substantial. Id. at 1828 (J. Ginsburg, dissenting).

Justice Breyer, in a dissent joined by Justices Stevens, Souter, and Ginsburg, argued that the FCC had failed to adequately explain why it had changed its enforcement policy with respect to fleeting expletives. Id. at 1830 (J. Breyer, dissenting). Specifically, he argued that the FCC failed to discuss two important factors. “First the FCC said next to nothing about the relation between the change it made in its prior ‘fleeting expletive’ policy and the First-Amendment-related need to avoid ‘censorship,’ a matter as closely related to broadcasting regulation as is health to that of the environment.” Id. at 1833 (J. Breyer, dissenting). “Second, the FCC failed to consider the potential impact of its new policy upon local broadcasting coverage.” Id. at 1835 (J. Breyer, dissenting). As a result, the dissenters would have concluded that the FCC was arbitrary and capricious in its enforcement order.
Statutory Interpretation, Chevron Deference

Several of the Supreme Court’s decisions this quarter centered on issues of statutory interpretation and the proper relationships among Congress, the courts, and federal agencies. For example, Carceri v. Salazar involved the applications of the Indian Reorganization Act (IRA), 25 U.S.C. §§ 465, 479, to the Narragansett Indian Tribe in Rhode Island. The federal government had not formally recognized the Narragansett as a Tribe in 1934, when Congress passed the Act, but did recognize the Tribe in 1983. This historical progression required the Court to determine what the word “now,” as used in the IRA, means.

Under § 465 of the IRA, the Secretary of the Interior may acquire land and hold it in trust “for the purpose of providing land for Indians.” 25 U.S.C. § 465. However, the Act defines “Indian” to “include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction.” 25 U.S.C. § 479 (emphasis added). Relying on its IRA authority, in 1998 the Secretary of the Interior took a 31-acre parcel of land in the town of Charlestown, Rhode Island into trust for the Tribe, over the protests of the state, the governor, and the town. These parties sued the Secretary pursuant to the federal APA, claiming that the Secretary’s action was illegal because the Tribe was not “now” under federal jurisdiction in 1934, when Congress enacted the IRA. The Secretary, in turn, argued that “now” applied to the moment of land acquisition, and hence that the land transfer was legal because the Narragansett were a recognized tribe in 1998 when the Secretary acted.

In a 6–3 decision, in an opinion authored by Justice Thomas (Justices Souter and Ginsburg concurred in part and dissented in part; Justice Stevens dissented), the Supreme Court concluded that Rhode Island and the Town of Charlestown were correct: the Secretary of the Interior could not take land into trust for tribes not formally recognized in 1934. Carceri v. Salazar, — U.S. —, 129 S. Ct. 1058, 1068 (Feb. 24, 2009). According to the majority, the statute was unambiguous in its meaning on this point. In 1934, according to the Court, “the primary definition of ‘now’ was ‘at the present time; at this moment; at the time of speaking.’” Id. at 1064 (quoting Webster’s New International Dictionary 1671 (2d ed. 1934), and citing Black’s Law Dictionary 1262 (3d ed. 1933).

The Court was content with this contemporaneous dictionary definition for several reasons. First, it “is consistent with interpretations given to the word ‘now’ by this Court, both before and after passage of the IRA, with respect to its use in other statutes.” Id. at 1064. Second, this meaning “also aligns with the natural reading of the word within the context of the IRA.” In particular, the majority emphasized that in other sections of the IRA, Congress had explicitly referred to both contemporaneous and future events through the phrase “now or hereafter.” In contrast, the definition of “Indian” referred only to “now.” Id. at 1064–65. Third, “the Secretary’s current interpretation is at odds with the Executive Branch’s construction of §§ 465 and 479 at the time of enactment,” which interpreted “now” to mean “recognized in 1934.” Id. at 1065. While the Court made it clear that it was not deferring to this earlier interpretation, it did agree with it. Id.

Fourth, and perhaps most importantly, the majority rejected the Secretary’s arguments that “now” was ambiguous. Although acknowledging that, in general, “now” was susceptible of more than one meaning, the Court nevertheless underscored the importance of statutory context in statutory construction, concluding that “the susceptibility of the word ‘now’ to alternative meanings ‘does not render the word . . . whenever it is used ambiguous, particularly where ‘all but one of the meanings is ordinarily eliminated by context.’” Id. at 1066 (quoting Deal v. United States, 508 U.S. 129, 131–32 (1993); see also Abuelhawa v. United States, — U.S. —, 129 S. Ct. —, 2009 WL 1443133, at *3 (May 26, 2009) (emphasizing that “statutes are not read as a collection of isolated phrases” and that “[a] word in a statute may or may not extend to the outer limits of its definitional possibilities” (quoting Dolan v. Postal Service, 546 U.S. 481, 486 (2006)).

Nor did the Court agree that the “shall include” language in § 479’s definition of “Indian” left a gap for the Secretary of the Interior to fill under Chevron; instead, that provision “explicitly and comprehensively defined the term by including only three discrete definitions . . . . ” Carceri, 129 S. Ct. at 1066. Policy considerations were thus irrelevant, “because Congress’ use of the word ‘now’ in § 479 speaks for itself and ‘courts must presumed that a legislature says in a statute what it means and means in a statute what it says there.’” Id. at 1066–67 (quoting Connecticut National Bank v. Germain, 503 U.S. 249, 253–54 (1992)).

Fifth, the Court rejected the Secretary’s argument that the definition of “tribe” was controlling rather than the definition of “Indian,” because the Secretary’s authority to take lands in trust was for “Indian tribes,” and the definition of “tribe” also incorporated the definition of “Indian.” Thus, “[t]here is simply no way to circumvent the definition of ‘Indian’ in delineating the Secretary’s authority under §§ 465 and 479.” Id. at 1067. Nor did the later-enacted Indian Land Consolidation Act (ILCA), 25 U.S.C. § 2202, remove the problem, because it neither expanded the Secretary’s authority to take lands into trust nor altered the definition of “Indian.” Id. at 1067–68. As a result, the Secretary had no authority to take the 31-acre parcel into trust for the Narragansett Tribe.

Justices Souter and Ginsburg concurred in part and dissented in part to point out that § 479 refers to “any recognized Indian tribe now under Federal jurisdiction,” which allows for the possibility that tribal recognition and being “under Federal jurisdiction” might be separate statuses, triggered by different events. If so, then the Narragansett need only have been “under Federal jurisdiction” in 1934—not necessarily formally recognized. These two Justices would have remanded the case.

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to the Secretary for clarification of these two points. Id. at 1071 (J. Souter, concurring and dissenting). Justice Stevens dissented, arguing primarily that, in the IRA’s overall structure, the distinction between individual Indians and tribes was critical, with the result that “now, the temporal limitation in the definition of ‘Indian,’ only affects an individual’s ability to qualify for benefits under the IRA,” not a tribe’s eligibility for land. Id. at 1073–78 (J. Stevens, dissenting).

Statutory Silence

In this quarter the Supreme Court also confronted the problem of silent statutes — specifically, when does silence carry congressional meaning, and when is silence an actual gap for the agency to fill? For example, the Court remanded a case to the Board of Immigration Appeals (BIA) after concluding that the BIA had mistakenly relied on the Supreme Court’s own precedent in interpreting the Immigration and Nationality Act’s (INA’s) “persecutor bar.” The “persecutor bar” denies refugee status and asylum to “any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42). The petitioner, Daniel Girmai Negusie, had been conscripted against his will by the Eritrean government to act as a prison guard for Ethiopian prisoners, raising the issue of whether the INA’s “persecutor bar” requires voluntary action. The BIA concluded that the Supreme Court’s interpretation of the Displaced Persons Acts “persecutor bar” in Fedorenko v. United States, 449 U.S. 490 (1981), was controlling and concluded that Negusie was barred from refugee status.

In a 6–3 decision, with an opinion authored by Justice Kennedy (Justices Stevens and Breyer concurred in part and dissented in part; Justice Thomas dissented), the Supreme Court concluded that Fedorenko was not controlling, because the INA served different purposes than the Displaced Persons Act, and remanded to the BIA for reconsideration. Negusie v. Holder, — U.S. —, 129 S. Ct. 1159, 1162 (March 3, 2009). The Court first established that the BIA was entitled to Chevron deference in interpreting ambiguous provisions of the INA and that “[j]udicial deference in the immigration context is of special importance, for executive officials ‘exercise especially sensitive political functions that implicate questions of foreign relations.’” Id. at 1163–64 (quoting INS v. Abudu, 485 U.S. 94, 100 (1988)).

In distinguishing the Fedorenko decision, the Court again emphasized the importance of statutory context to the construction of specific provisions, with an additional emphasis on statutory purpose. Thus, in the Displaced Persons Act, enacted to address persons displaced from World War II and to punish Nazi conduct, Congress had required “voluntary” conduct in some provisions but not in the “persecutor bar,” supporting the Court’s conclusion in Fedorenko that voluntary conduct was not required for the “persecutor bar” to apply. In contrast, Congress enacted the INA as part of the Refugee Act to create a general rule for refugees and displaced persons, and the INA does not contain provisions that emphasize “voluntary” conduct. As a result, Fedorenko did not control the interpretation of the INA’s “persecutor bar.” Id. at 1165–66. Instead, unlike in the Displaced Persons Act, the statutory silence in the INA’s “persecutor bar” represented a gap for the BIA to fill rather than a congressional indication that voluntariness was not required.

The most interesting debate in Negusie was how to proceed from there. According to the majority, because the BIA mistakenly thought Fedorenko controlled, it “has not yet exercised its interpretive authority” regarding the issue. Id. at 1167. As a result, because the agency had not yet exercised its Chevron discretion, the proper remedy was to remand without interpreting the statute, because Congress had delegated gap-filling authority to the BIA and the BIA should therefore first exercise that authority in light of difficult policy choices. Id. (quoting National Cable & Telecommunications Association v. Brand X Internet Services, 545 U.S. 967, 980 (2005)).

In contrast, Justices Stevens and Breyer concurred in part and dissented in part specifically to argue that the Court should have gone ahead and determined whether the INA’s “persecutor bar” included or rejected a voluntariness requirement. Arguing that the case involved a “narrow question of statutory construction,” they concluded that Chevron did not require remand to the agency. Id. at 1170, 1171 (J. Stevens, concurring and dissenting). Noting “that statutory interpretation is a multifaceted enterprise, ranging from a precise construction of statutory language to a determination of what policy best effectuates statutory objectives,” id. at 1171 (J. Stevens, concurring and dissenting), Justice Stevens emphasized that courts are the final authorities on a statute’s meaning: “The Chevron framework thus accounts for the different institutional competencies of agencies and courts: Courts are expert at statutory construction, while agencies are expert at statutory implementation. That the distinction is subtle does not lessen its importance.” Id. Moreover, “[t]he fact that Congress has left a gap for the agency to fill means that courts should defer to the agency’s reasonable gap-filling decisions, not that courts should cease to mark the bounds of delegated agency choice.” Id. Drawing parallels to the adjudication context, Justice Stevens distinguished between questions of pure statutory construction and applications of statutes to particular sets of facts, arguing that the former remains well within the courts’ expertise. Id. at 1172 (J. Stevens, concurring and dissenting). Thus while “[t]he BIA’s formulation of a test to apply the statutory standard in individual cases and its application of that test in respondent’s case were precisely the sort of agency action that merited judicial deference,” the question before the Court was a pure and narrow legal question about whether voluntary action was required for the INA “persecutor bar” to apply. Id. at 1173 (J.
Stevens, concurring and dissenting). The two Justices would have answered that legal question “no” and then remedied the case to the BIA to apply that definitive interpretation to Negusie’s application.

More emphatically, Justice Thomas dissented “[b]ecause the INA unambiguously precludes any inquiry into whether the persecutor acted voluntarily . . . ” Id. at 1176 (J. Thomas, dissenting). As a result, there was no role for the BIA to play in interpreting the statute, and its denial of asylum should have been affirmed.

The Clean Water Act’s technology-based effluent limitations created yet another statutory silence issue for the Supreme Court—one with, arguably, too much statutory context rather than too little. Specifically, § 1326(b) of the Act applies to facilities that pump in cooling water from waters of the United States and requires that “[a]ny standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact [BTA].” 33 U.S.C. § 1326(b) (emphasis added). Section 1311 governs technology-based effluent limitations for existing point sources and generally requires that they incorporate “the best available technology economically achievable” (BAT or BATEA). 33 U.S.C. § 1311(b)(2)(A). Section 1316 governs new point sources and requires them to comply with effluent limitations based on “the best demonstrated control technology” (BADT).

When the EPA promulgated regulations to implement § 1326(b) for large existing sources whose primary activity is the generation and transmission of electricity (the “Phase II regulations”), it allegedly engaged in an active cost-benefit analysis, comparing the costs of various kinds of technological retrofitting to the environmental benefits produced—in generally, the prevention of entrainment and impingement of aquatic organisms in and against the intake pipes and screens. As a result, the EPA refused to require existing facilities subject to the rule—about 500 facilities representing about 53% of the nation’s power generation—to use closed-cycle cooling systems, which had been the BTA requirement for new facilities. Instead, the EPA required most existing facilities to reduce “impingement mortality for all life stages of fish and shellfish by 80 to 95 percent from [a] calculated baseline,” using a mix of technologies that the EPA considered to be “commercially available and economically practicable.” 40 C.F.R. § 125.94(b)(1); 69 Fed. Reg. 41,602.

Environmental groups challenged these Phase II regulations on the grounds that the EPA could not engage in cost-benefit analyses when setting BTA standards. The U.S. Court of Appeals for the Second Circuit agreed, concluding that the EPA could consider only what costs could be reasonably be borne by the industry and which technologies were most cost-effective. Riverkeeper, Inc. v. EPA, 475 F.3d 83, 99-100 (2d Cir. 2007).

The Supreme Court, however, concluded that the EPA had reasonably concluded that it could use cost-benefit analysis to establish BTA for existing sources. In a 5–1–3 decision authored by Justice Scalia (Justice Breyer concurred in part and dissented in part; Justices Stevens, Souter, and Ginsburg dissented), the majority concluded that § 1326(b) is not clear regarding the applicability of cost-benefit analysis and hence that it would defer to the EPA’s interpretation pursuant to Chevron. Entergy Corp. v. Riverkeeper, Inc., — U.S. —, 129 S. Ct. 1498 (April 1, 2009). The majority emphasized that Congress had used an almost bewildering panoply of technology-based standards in the Act, some of which clearly required the “elimination” of certain kinds of discharges of pollutants, see 33 U.S.C. § 1311(b)(2)(A), some of which clearly contemplated cost-benefit analysis, see 33 U.S.C. § 1314(b)(1)(B), and some of which are intermediate. See 33 U.S.C. §§ 1314(b)(4)(B), 1314(b)(2)(B), 1316(b)(1)(B).

As a result, § 1326(b)’s silence regarding costs was un instructive, especially in light of the fact that while “two of the other tests authorize cost–benefit analysis, . . . all four of the other tests expressly authorize some consideration of costs.” Entergy Corp., 129 S. Ct. at 1508. Moreover:

The inference that respondents and the dissent would draw from the silence is . . . implausible, as § 1326(b) is silent not only with respect to cost–benefit analysis but respect to all potentially relevant factors. If silence here implies prohibition, then the EPA could not consider any factors in implementing § 1326(b)—an obvious logical impossibility.

Id. As a result, “it was well within the bounds of reasonable interpretation for the EPA to conclude that cost–benefit analysis is not categorically forbidden.” Id.

The majority also considered the EPA’s application of its cost–benefit analysis reasonable, because “the EPA sought only to avoid extreme disparities between costs and benefits.” Id. at 1509. Moreover, according to the majority, the EPA’s regulation actually imposed costs of $389 million while producing “annualized benefits of $83 million . . . and non-use benefits of indeterminate value,” “‘demonstrat[ing] quite clearly that the agency did not select the Phase II regulatory requirements because their benefits equaled their costs.” Id.

Justice Breyer viewed § 1326(b) as being one of those statutory provisions where legislative history is crucial to constructing statutory meaning. Specifically, he agreed with the majority that “the relevant statutory language authorizes the Environmental Protection Agency (EPA) to compare costs and benefits,” but he dissented from their final conclusion because “the drafting history and legislative history of related provisions . . . makes clear that those who sponsored the legislation intended the law’s text to be read as restricting, though not continued on next page
forbidding, the use of cost-benefit comparisons.” Id. at 1512 (J. Breyer, concurring and dissenting).

The dissenters, in contrast, would have agreed with the Second Circuit that Congress’ silence in § 1326(b) was a prohibition against using cost-benefit analysis to set BTA. In their interpretation, “[u]nless costs are so high that the best technology is not ‘available,’ Congress has decided that they are outweighed by the benefits of minimizing adverse environmental impact.” Id. at 1516 (J. Stevens, dissenting). The need for congressional control and concern was made obvious by the EPA’s actual assessment of environmental benefits in the Phase II regulations, which ended up giving short shrift to the environment:

[Although the EPA estimated that water intake structures kill 3.4 billion fish and shellfish each year, . . . the Agency struggled to calculate the value of the aquatic life that would be protected under its § [1326(b)] regulations . . . . To compensate, the EPA took a shortcut: Instead of monetizing all aquatic life, the Agency counted only those species that are commercially or recreationally harvested, a tiny slice (1.8 percent to be precise) of all impacted fish and shellfish. This narrow focus in turn skewed the Agency’s calculation of benefits. When the EPA attempted to value all aquatic life, the benefits measured $735 million.

But when the EPA decided to give zero value to the 98.2 percent of fish not commercially or recreationally harvested, the benefits calculation dropped dramatically—to $83 million.

Id. at 1516–17 (J. Stevens, dissenting).

Cost-benefit analysis therefore was an issue of congressional concern, according to Justice Stevens. Specifically, “[b]ecause benefits can be more accurately monetized in some industries than others, Congress typically decides whether it is appropriate for an agency to use cost-benefit analysis in crafting regulations.” Id. at 1517. Like Justice Breyer, Justice Stevens argued that “[t]he appropriate analysis requires full consideration of the CWA’s structure and legislative history to determine whether Congress contemplated cost-benefit analysis and, if so, under what circumstances it directed the EPA to utilize it.” Id. at 1518 (J. Stevens, dissenting). Going further than Justice Breyer, however, the dissenters concluded that this approach to interpretation was determinative and that § 1326(b)’s silence on the issue was in fact instructive. According to Justice Stevens, “Congress granted the EPA authority to use cost-benefit analysis in some contexts but not others,” indicating “that Congress intended to control, not delegate, when cost-benefit analysis should be used.” Id. As a result, there was no gap for the EPA to fill and it was entitled to no Chevron deference. Id.

Chair's Message continued from page 1

Renée Landers and Paul Afonso chaired five CLE programs in Boston in February. A financial bailout program, sponsored by Suffolk University Law School and the Rappaport Center for Law and Public Service, drew more than 100 people.


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News from the Circuits

By William S. Jordan III*

D.C. Circuit – NLRB Can’t Avoid Quorum Requirement by Delegation

What’s a multi-member agency to do if (usually due to squabbling between Congress and the President) the number of sitting agency members drops below the quorum required for the agency to act? The NLRB thought it had the answer: while the agency still has a quorum (3 in that case), delegate decisional authority to a subcommittee that will still be able to meet its own quorum.

Entirely too clever, according to the D.C. Circuit in Laurel Baye Healthcare of Lake Lanier, Inc. v NLRB, 2009 WL 1162574 (D.C. Cir. 2009). Recognizing that its membership would fall below a quorum as terms expired, a four-member Board delegated operating authority to a three-member committee, which required a quorum of only two members. The Board relied upon statutory authority “to delegate to any group of three or more members any or all of the powers which it may itself exercise.” The statute also provide that, “A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and that although “three members of the Board shall, at all times, constitute a quorum of the Board, . . . two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.”

Despite the ambiguity inherent in this language, and despite acknowledging that the case “presents a close question,” the court ignored the possibility of Chevron deference, relying instead on canons of construction (construing so that the words “at all times” would not be rendered superfluous) and the Restatement (Third) of Agency to conclude that the agency could not avoid its own quorum requirement by delegating to a subset of itself. In so doing, the court distinguished its own Falcon Trading decision, in which it had upheld a two-member decision by the SEC. In that case, however, the court found explicit authority for the SEC to establish its own quorum requirement. It seems that in the absence of such explicit statutory authority, the delegated authority ends when the delegating body no longer has the authority to act.

Why did the court ignore Chevron? Probably because it could not imagine Congress intending that the courts should defer to an agency’s interpretation that would avoid the usual quorum requirement.

10th Circuit – Sexual Orientation not in the Eye of the Beholder

“I know it when I see it” may be enough for obscenity in some circles, but it’s not enough to sustain an immigration judge’s refusal to grant asylum to a Moroccan homosexual. After overstaying his visa, Razkane sought asylum on the ground that he would be subjected to persecution in Morocco due to his homosexuality. Despite evidence that Morocco criminalizes homosexual behavior and that homosexuals are often beaten in Morocco with minimal police interference, the immigration judge rejected Razkane’s claims because “the IJ found there was nothing in Razkane’s appearance that would designate him as being gay because he did not ‘dress in an effeminate manner or affect any effeminate mannerisms.’”

In Razkane v. Holder, 562 F.3d 1283 (10th Cir. 2009), the Tenth Circuit held that the IJ had improperly “elevated stereotypical assumptions to evidence upon which factual inferences were drawn and legal conclusions made.” The IJ could not rely upon his own assumptions about whether Moroccans would identify Razkane as homosexual and subject him to persecution.

In a rebuke to the original IJ, the court ordered that the matter be assigned to a different IJ if further proceedings were warranted.

4th Circuit – Lack of Notice not Prejudicial Error

In Columbia Venture LLC v. South Carolina Wildlife Federation, 562 F.3d 290 (4th Cir. 2009), the Fourth Circuit applied the APA’s admonition that “due account shall be taken of the rule of prejudicial error,” 5 U.S.C. §706, to uphold a FEMA determination despite the agency’s failure to publish the required notice in the Federal Register. In so doing, the court provided useful guidance as to the meaning of “prejudicial error.”

In 1999, FEMA conducted the various studies needed to establish the “base flood elevation” for Richland County, South Carolina. The agency sent the proposal to Richland County and published it in local newspapers, but it did not publish in the Federal Register as required by statute. Columbia Venture, a local developer whose land was not affected by the proposal, submitted supporting information and at one point wrote to FEMA that, “your agency has provided more than adequate information.” Unfortunately for Columbia Venture, FEMA later issued revised maps and a new proposal that included some of Columbia Venture’s land in the area that would be subject to floodplain restrictions. This time FEMA both notified everyone and published in the Federal Register.

When FEMA ultimately adopted the new proposal, Columbia Venture challenged the agency’s initial failure to provide the statutory notice. Despite Columbia Venture’s involvement from the very beginning and its praise of the agency, the District Court found that the company had been prejudiced because it had been “deprived of the opportunity to elicit support from the public at-large.” Wrong prejudice, according to the Fourth Circuit. The question is whether a party is prejudiced “with

continued on next page

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respect to its own arguments and claims” on the merits, not as to some effort to generate political support.

Federal Circuit – Two Regulatory Taking Claims Denied but Diminution Door Left Open

In two recent decisions, the Federal Circuit denied claims for compensation based upon monetary loss caused by federal regulation, but in one decision it recognized the possibility of such a claim under a Penn Central analysis. Palmyra Pacific Seafoods, LLC v. United States, 561 F.3d 1361 (Fed. Cir. 2009), hinged on the conclusion that the claimant did not have a compensable property interest even though the government’s action had frustrated the purpose of a contract entered into by the claimant. Having contracted with the owners of a Pacific island for the exclusive right to operate a commercial fishing establishment on the island, Palmyra claimed a taking when the United States established a wildlife refuge and banned commercial fishing within twelve miles of the island. The court denied the claim because the mere fact that government action reduces the value of a contract does not constitute a taking. This situation contrasts sharply with those in which a contract creates a property right with which the government then interferes. For example, once a company has a contract to build a ship, the government’s appropriation of the contract constitutes a taking. In Palmyra, however, the island’s owners contracted only to grant permission to operate a fishing facility from their property. They did not own and could not convey a right to fish in the surrounding waters. Any fishing opportunities were subject to the government’s sovereign powers as to those waters. The severe diminution in the value of the contract was unfortunate for Palmyra, but it was not a taking of property.

In a more complex decision, the court in Rose Acre Farms, Inc. v. United States, 559 F.3d 1260 (Fed. Cir. 2009), denied a takings claim where USDA regulations caused a significant financial loss by restricting the sale of Rose Acre’s eggs and causing some of its hens to be seized for salmonella testing. In the early 1990s, USDA adopted regulations under which certain eggs (as to which there was an indication of possible salmonella contamination) could be sold only for uses involving pasteurization, rather than for the higher-value purpose of “table eggs,” such as those we would buy from the local grocer. The regulations also required that some hens from suspect houses be slaughtered so their internal organs could be tested for salmonella poisoning.

Rose Acre asserted a taking, showing that for 25 months it had been forced to sell its eggs at the reduced price, and that its production had otherwise been interfered with. The trial court initially found a $6 million regulatory taking and a categorical taking of the hens seized for testing. On remand to apply Penn Central principles, the trial court found a 219% diminution in value. Despite finding that the character of the government action favored the government, the trial court ultimately found a taking of $5.4 million.

The Federal Circuit reversed, largely on the ground that the trial court had incorrectly determined the extent of diminution in value. In an extensive and somewhat tortured discussion the Federal Circuit rejected reliance upon loss of profits in favor of consideration of loss of value, and it held that the eggs themselves, rather than the farms, were “the parcel” under consideration. This resulted in a determination that the effect on Rose Acre was nowhere near enough to constitute a compensable taking.

The court briefly addressed the question of what Rose Acre’s reasonable investment-backed expectation had been in 1990, indicating that this consideration favored Rose Acre because the science at that time indicated that eggs with intact shells did not pose a threat of food borne disease. By implication, the opinion suggests that the expectations could later change along with scientific understanding and regulatory chance. This appears to conflict with the Supreme Court’s decision in Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

Finally, the Federal Circuit, in a lengthy discussion of the effect of Lingle v. Chevron, USA, Inc., 544 U.S. 528 (2005), held that while the regulation’s attention to health and safety did not categorically preclude a taking, that characteristic weighed very strongly in favor of the government: “That is the type of regulation in which the private interest has traditionally been most confined and governments are given the greatest leeway to act without the need to compensate those affected by their actions.” The USDA prevailed in a Penn Central balancing, but that may be cold comfort to regulatory agencies that now must contend with takings claims even when they are trying to save lives and protect property.

Federal Circuit – Administrative Law Principles Again Intrude on PTO

The Patent Bar appears to be in an uproar over Tafas v. Doll, 559 F.3d 1345 (Fed. Cir. 2009), which seems to the non-patent administrative lawyer to be pretty standard stuff. In 2007, the Patent and Trademark Office issued rules limiting various types of applications that could be filed with the PTO and requiring extensive information to be provided when applications include several claims. The court split three ways, with primary attention to the question of whether the rules are substantive or procedural in nature.

The PTO sought Chevron deference with respect to whether the rules were within the statutory authority to “govern the conduct of proceedings in the Office . . . [and] facilitate and expedite the processing of patent applications.” Judge Prost insisted that he must first determine whether the rules are substantive or procedural. If substantive, they are invalid because continued on page 32
Keynote Speech: “The Transparency President.”

The program started with a thought-provoking presentation by Keynote Speaker, Cary Coglianese, Edward B. Shils, Professor of Law, University of Pennsylvania Law School, whose topic focused on “The Transparency President? The Obama Administration and Open Government.” He addressed the President’s promise to “create a transparent and connected democracy” and “an unprecedented level of openness in Government,” starting with contrasting examples of the closed nature of the Bush Administration with President Obama’s actions on his first full day in office in issuing two presidential memos dealing with open government issues. The first enunciated three of the President’s abiding values—transparency, participation, and collaboration—and directed the Office of Management and Budget (OMB) to issue an “Open Government Directive” within 120 days that would specify steps all executive departments and agencies would need to take to implement these values, including “independent agencies.” The second memo directed the Attorney General to develop a new Freedom of Information Act (FOIA) policy establishing a presumption in favor of release of government information. A week later, Obama instructed OMB to undertake a review of Executive Order 12866, which both the Clinton and Bush Administrations had used to govern White House review of new regulations proposed by executive branch agencies, and Obama asked it to recommend “disclosure and transparency” revisions to the Executive Order. In an unprecedented move, the President also had OMB solicit public comments on these issues before issuance of a new Executive Order. Over 150 public comments were received during the comment period and posted on the OMB website.

By mid-March the Attorney General had reviewed FOIA policy and announced new guidelines: that the Department of Justice (DOJ) would only defend future denials of FOIA requests when disclosure was prohibited by law or a “disclosure would harm an interest protected by one of the statutory exemptions.” With the passage of the Stimulus legislation, the President announced creation of a new website, “recovery.gov” so that “every American can find out how and where their money is being spent.” In conjunction with these actions, Professor Coglianese noted the Obama Administration had initiated efforts to use the Internet more interactively, including streaming of health care reform forums, blog postings of government officials, and a comment function allowing the public to share stories and ideas about health care. Before an interactive town hall Internet meeting involving submitted questions and voting by the public, apparently more than 100,000 questions were submitted and over 3.5 million votes were cast on them. A new Open Government Initiative website was also established, including using a wiki to allow the public to collaborate in drafting further transparency-related recommendations.

Professor Coglianese then proceeded to evaluate the “virtues and vices” of Obama’s open government. As to virtues, he pointed out that transparency can advance good public policy and legitimate governmental decision-making by informing the public about problems government is attempting to solve and the options being considered. With access to more information, he suggested, the public (citizens, professional groups, and interest organizations) can participate more thoughtfully and help government make better decisions. It can also help prevent government mistakes and abuses by allowing others (including those with oversight responsibilities) to know what government is doing. This, in turn, may generate more compliance with good governance norms and make for more careful decisions, less susceptible to expediency or improper influence.

On the other hand, he warned of its vices: that “too much transparency” might actually detract from good decision-making by discouraging officials from making self-critical analyses of proposed actions since others could monitor what they say and do. Internal dissent could be suppressed, and government might be less likely to gain useful information from private actors resistant to providing useful information for fear that trade secrets and sensitive business information might be exposed.

Professor Coglianese framed the issue as “how much transparency to foster” and “what types of actions and information to disclose.” On the type of information to be disclosed, he contrasted “fish bowl transparency” that documents how officials behave (such as who attended meetings between government officials and interest groups) and “reasoned transparency” that provides sound, reasoned explanations for actions continued on next page
taken, including why alternatives were rejected, allowing an evaluation of the soundness of the reasoning used. He opined that while other values may limit fishbowl transparency, discipline of decision-makers can be achieved when they must provide sound reasons for their decisions during an active oversight process.

He concluded with a political assessment of transparency and its potential as a “double-edged sword.” While stressing transparency has distanced Obama from his unpopular predecessor and has also been a popular concept, he said it also can create disappointment with every compromise of complete transparency. He noted the hypocrisy charges that arose with Obama's failure to release photos of detainee treatment and reliance on the “state secrets” defense. Professor Coglianese noted some also were troubled by the failure to keep high profile commitments, such as the failure to provide timely and complete spending details on recovery.gov or to post legislation for 5-days for public comment before the President signed it (contrary to his “Sunlight Before Signing” Pledge). Professor Coglianese concluded that while a zeal for transparency to enhance good governance is politically popular, it is important to give the public an understanding that doing so still requires making difficult policy tradeoffs and extolling transparency as a goal may have created some false impressions of how easily it will be accomplished.

Panel I: OIRA Oversight in the Obama Administration

Next on the program was an informative panel moderated by Paul Noe, currently V.P. for Public Policy at the American Forest & Paper Association and formerly Counselor to the Administrator, OIRA.

Michael Fitzpatrick, currently Associate Administrator, OIRA, continued the examination of the Obama Administration's informational policies and evaluated its centralized management and leadership processes through OIRA's role in OMB under Executive Order 12866.

Fitzpatrick contrasted Rahm Emanuel's January 20th Memo withdrawing all proposed regulations then pending (not yet published in the Federal Register) and instructing agencies not to submit any new ones except for emergencies until they were reviewed and approved once Obama policy officials were in place, with similar orders given at the start of the Clinton and Bush administrations. Obama differed, however, by asking agencies to consider extending effective dates of regulations already published but not yet in effect and he encouraged agencies to ask for additional public comments.

Fitzpatrick pointed out that the President on January 30th directed OMB to develop recommendations for a new regulatory review executive order. Its scope was ambitious and was to cover such critical issues as: the relationship between OIRA and the agencies; disclosure and transparency; public participation; the role of cost benefit analysis; distributional considerations (fairness and concerns for future generations); timeliness; the role of behavioral sciences in formulating regulatory policy; and, identifying the best tools for achieving public goals through regulatory process. He said 183 public comments were received on the process, primarily from industry, public interest groups, and academia, along with agency comments and feedback at public meetings.

He analyzed the review process of withdrawn and delayed regulations, reporting that through June 5, 2009, the new Administration reviewed 136 proposed regulatory actions: 99 “new” rules were found ready for publication while 37 “old” ones were withdrawn. (In the Bush Administration's similar review, 130 proposed regulations were withdrawn. Bush review times were greater, 52 and 64 days respectively.) Of these, 38 were “economically significant;” the remaining 98 were “significant.” Review was expeditious, averaging 32 days for the economically significant ones and 28 days for the rest, a substantial improvement over the Bush review record. Agencies submitted 185 regulatory actions for review, of which 32 were economically significant. He concluded that centralized review under OIRA continues to be robust, is being conducted expeditiously without compromising thoroughness, and that the review of E.O. 12866 that the President requested has not changed the performance of OIRA's customary activities.

Gary Bass, Executive Director of OMB Watch, commented on a number of key issues in the centralized management of the regulatory process through OIRA. While acknowledging that public comments were being received by agencies, he still felt improvements could be made in the process, such as making agency responses to comments public. He expressed concern about delays, suggesting they were not simply at OMB and OIRA, but also at Congress in its review of major rules, and that the length of the process reported did not include the long-lead time taken at the agencies, themselves.

Bass also opined that many regulations lacked quality and failed to consider people impacts in addition to economic ones. Much of the regulatory review seemed to be busy work with too much debate and agency responses about what are really silly issues. Touching on funding at OIRA, the need for better enforcement, and achieving greater certainty in results, he also discussed how the process might be improved, including re-establishing principles of delegation to agencies (not OIRA) and having OIRA take more of a coordinating, not directive, role. He felt the e-rulemaking process needed overhauling and that better metrics should be established to help agencies handle their regulatory tasks, arguing that agencies should be given more leeway and flexibility in their decisions and that OIRA needed better communications with the agencies.

Professor Sid Shapiro, University Distinguished Chair in Law at Wake Forest University School of Law, provided analysis of several key concepts in OIRA's role.
Suggesting that OIRA should provide oversight, not act as a decider, he argued that it should be less intrusive in the agency rulemaking process. He highlighted the potential role of the numerous appointed Obama White House policy czars and questioned whether establishing such czars undermines the concept of Congressional delegation of authority to agencies — not the White House. He also commented extensively about the conceptual difficulties involved in justifying OIRA’s oversight of “cost-benefit” analyses. Suggesting that it was an amorphous and imprecise standard, he argued for methodological reform, with more attention to what should be involved in a cost-benefit analysis. In particular, he pointed out that non-monetary considerations are regularly ignored and that analysis of other significant benefits involved were frequently being missed as a result. He proposed that the concept of cost-benefit analysis should be replaced, perhaps with an alternative that focused more on qualitative analyses, feasibility considerations, and problem-oriented analysis.

Susan Dudley, OIRA Administrator in the Bush Administration, shared her perspectives and the lessons she had learned from her experience at OIRA. While she felt that OIRA provided a broad perspective, too often she acknowledged that it did not achieve the necessary consistency in carrying out its role. She believed that agency “tunnel vision” tended to exclude relevant facts that were not in a particular agency’s scope of interest and this needed to be corrected. Agency silos needed to be broken down and other considerations brought in, but OIRA was usually not able to do so.

She emphasized that OIRA did provide an important function and gave the President a second opinion on various policy issues raised through regulatory review. She acknowledged that in performing one of its most important roles, cost-benefit analysis, OIRA was clearly not perfect, commenting that sometimes costs were emphasized and at other times, the benefits achieved were stressed. She felt OIRA played a pragmatic role in which trade-offs were inherent in the process and that among OIRA’s challenges were: improving its relationships with agencies, earlier sharing of information, overcoming delays involved in the process, avoiding truncated reviews, improving its web presence, avoiding a fishbowl approach (just providing a factual dump not a reasoned analysis), minimizing time consuming dumb idea discussions, and failing to anticipate unintended consequences.

Panel II: Structuring an Effective Comment Process for Rulemaking

Sally Katzen, Executive Managing Director of the Podesta Group and former Clinton OIRA Administrator, moderated the second panel which examined the opportunities for improving the rulemaking comment process.

Beth S. Noveck, Deputy Chief Technology Officer, Office of Science & Technology Policy in the Executive Office of the President, provided exciting examples of how the Obama Administration was spearheading new and innovative technologies to improve open government. In keeping with one of Obama’s main themes, to increase public participation, she indicated that the White House was trying to generate institutions capable of innovation. She noted, for instance, that at the Department of Energy, Secretary Chu was reorganizing processes and methodologies to encourage more public participation in government as contrasted to simply informing the public of decisions already taken.

The President’s desire, she said, is for transparent, participatory government that emphasizes collaboration between government agencies and the public along with the use of new tools to achieve this. New forms of participating and opportunities for public commenting are being developed. There will be an innovations gallery, asking and showing how to do it, providing possible models, and celebrating those doing it, with the objective of developing government wide-policy that will not start with a finished draft, but rather generate suggestions for a draft. There will be a brainstorming platform to solicit ideas. She referred for example to: http://www.whitehouse.gov/open/blog/ as a source of activity already underway. In fact, within several hours after appearing at the Institute, she posted Enhancing Citizen Participation in Decision Making on that site, echoing her points presented at the Institute.

Neil Eisner, Assistant General Counsel, Office of Regulation and Enforcement at the Department of Transportation, provided his agency’s perspective on increasing public participation so that it obtains more comments, hears from new people, utilizes electronic techniques, sees more economic analysis in its e-docket, develops more consensus, uses official blogs to the public explaining policies, obtains comments on them, and seeks more than regulated industry perspectives. To do this, the Department is trying to establish an accessible electronic docket to provide an alternative to hard copy comments and allow reply comments. It has established DOT.regs.gov. This allows for comments to be typed in and also allows for search of the docket. They are currently looking at software that will allow for search on an issue. Other software will provide a list serve on the docket. The Department also wants to be able to obtain ratings on comments; unfortunately this is a labor intensive effort so it needs to look at new techniques that will allow for responses to commenters, with the capacity to request replies to queries such as “what is the basis for your comment.”

Professor Cynthia Farina, who heads the Cornell e-Rulemaking Initiative at Cornell Law School, continued on next page
rulemaking. Several criteria have guided her efforts. First, more comments are not necessarily better; what they are seeking is comments from more than the usual suspects. “Better” also means obtaining more manageable, informed, and responsive comments. The project is also seeking to achieve mediated communications that provide some controls on improper behavior in commenting while still facilitating collaboration, informal retrieval opportunities, and a deeper analysis of comments. She wants to alert, engage, educate, inform, keep current, and encourage knowledgeable individuals to participate.

The “public” doesn’t exist, as such, she pointed out. There is considerable variation as to who might show up and actually comment. For instance, there is the problem of uninformed, “drive by” participation, where uninvolvement persons just happen to run across what is happening and throw in their often poorly considered comments. Professor Farina believes that although such comments should not be systematically excluded, for serious consideration, the minimal requirements should be an informed person with at least a concern about the issue and preferably a stake in the outcome. Among those she hopes to engage are: informed citizens without a specific stake but with a concern about the issue; currently unengaged stakeholders, individuals and groups, who never have commented before but have a concern; knowledgeable experienced stakeholders, and unofficial experts, all of whom can provide some thoughtful contributions.

The next issue she is tackling is how to rate, rank, and evaluate comments that are provided. She would like to develop techniques to create incentives for consensus building. She also wants to provide a process so that commenters can engage each other in a dialogue. Something like a chatroom or responses to experiences with products that are now available. Doing so would allow commenters to get beyond parallel play, to interact among themselves, and to discover interests behind the positions presented. Currently, staff reacts to comments only at the very end. She wants to get them engaged earlier, perhaps by responding to comments as they are submitted. Another task will be providing the agency guidance in managing the comments, sorting them out, grouping, and evaluating them. Other issues are whether an agency can respond to interim comments, sorting them out, grouping, and evaluating them. Other issues are whether an agency can respond to interim questions, and how this would affect time needed to reach a decision.

Congressional Oversight of Agency Rulemaking.

The luncheon speaker, Congressman Steve Cohen, Chair, Subcommittee on Commercial and Administrative Law, House Judiciary Committee, provided remarks concerning his pleasure in being able to help re-establish the Administrative Conference of the United States (ACUS), which has now been authorized and received appropriations to re-activate its role in providing guidance to the federal government on regulatory affairs. In introducing him, the Section expressed its appreciation for his steadfast support for ACUS.

Panel III: Rulemaking on the Fly: Rollbacks, Crises, and Other Exigencies

The potential problems that might be encountered by agency counsel in handling rule-making in emergency circumstances were discussed by a panel of agency counsel who drew from their experiences in these situations. Panelists were: Carol Ann Siciliano, Associate General Counsel, Cross-Cutting Issues Law Office, Office of General Counsel, U.S. Environmental Protection Agency; John Knepper, former Deputy General Counsel, U.S. Department of Treasury; Scott Alvarez, General Counsel, Legal Division, Board of Governors, Federal Reserve System; and, Elizabeth L. Branch, Smith, Gambrell & Russell, LLP, former Associate General Counsel for Rules and Legislation, U.S. Department of Homeland Security, and former Counselor to the Administrator, OIRA.

A major topic of discussion was what might constitute “good cause” for rulemaking without public comments. While some circumstances might justify expediting rulemaking, the general consensus was it should be avoided because of the potential for subsequent invalidation. One solution suggested was to delay effective dates. Taking this tack, however, was suggested only if there were no initial adverse comments and an option existed for submitting an alternative rule if the proposed rule was withdrawn. An example of alternative techniques to avoid expedited rulemaking arose in the aftermath of Hurricane Katrina. Normally a clean water permit is needed to allow polluted flood waters to be released. In an emergency, it was determined this might be satisfied based upon an existing regulation. Ultimately, a ruling was issued that the existing regulation applied in the circumstances.

At Treasury, as the current financial crisis arose and many emergencies were experienced, they did not use the interim final process out of fear of interagency rule restrictions and a desire to avoid possible judicial review of their process. Agency counsel’s evaluation was that trying to justify “good cause” would likely lose on review. Rather they obtained legislation to deal with true emergencies, which in general in the extant circumstances Congress was agreeable to providing expeditiously. Another alternative, was to use individual contract provisions to impose compensation restrictions.

At EPA, which has no emergency rule authorization, interpretative rules, guidance issuances, and exercise of discretion are used to deal with emergency problems. Another approach was to provide an extremely short 14 day public comment period, justified by the circumstances. Enforcement discretion letters have also been used.
Panel IV: Effective Appellate Advocacy in Agency Rule-making and Adjudication Cases: The Judicial Perspective

An incredibly candid and useful set of suggestions for appellate advocates were provided by the Honorable Brett M. Kavanaugh, Judge, United States Court of Appeals for the District of Columbia Circuit, who acted primarily as Moderator, and the Honorable David B. Sentelle, Chief Judge, United States Court of Appeals for the District of Columbia Circuit, who responded to questions by Judge Kavanaugh relating to how advocates should handle rule making and adjudication cases before the D.C. Circuit. The judges’ dialogue provided rare insights on how to successfully handle such cases ranging from appellate advocacy techniques and tips to writing effective briefs.

Illustrative of the advice provided were the following topics: handling tough questioning, avoiding concessions asked by the court; getting quickly to the key arguments; responding directly to questions posed by the panel, weaving responses to a judge’s questions into counsel’s answer; knowing your case facts well, including the record; acting civilly as to opposing counsel and parties; utilizing rebuttal time; making clear the result you want; understanding the role and focus of amicus briefs; dealing with Chevron deference, remembering it requires establishing ambiguity; using language of the statute effectively; understanding the limits on using legislative history—“it all is a compromise”—so avoid saying “Congress intended;” letting the court know how agency rules operate in the real world; being prepared to deal with hypotheticals; answering the court’s question and then distinguishing if necessary; not distorting facts or overreaching on arguments; recognizing brevity is critical; not using full word count on briefs; taking out as much length as possible; and including a guide to terminology and acronyms; avoiding jargon; not belittling the court below, the agency, or opposing counsel; referring to “learned colleague” is an effective demonstration of civility; and finally, avoiding “ly” words such as “clearly,” “plainly,” and “obviously.”

Special Breakout Session for Agency General Counsel

Thomas Sussman, Director, ABA Governmental Affairs Office, hosted a session moderated by Richard E. Wiley, Wiley Rein, LLP, former Chair of the Federal Communications Commission which provided a rich source of experience to attending agency general counsel and staff which was incorporated in presentations by: Jonathan Z. Cannon, Blaine Philips Distinguished Professor of Environmental Law, University of Virginia School of Law, former General Counsel, U.S. Environmental Protection Agency; Jeffrey A. Rosen, Kirkland & Ellis, former General Counsel, Office of Management and Budget and former General Counsel U.S. Department of Transportation; Peter Strauss, Betts Professor of Law, Columbia Law School, former General Counsel, U.S. Nuclear Regulatory Commission; and Beth A. Wilkinson, Paul, Weiss, Rifkind, Wharton & Garrison, LLP, former General Counsel, Fannie Mae.

HAPPY WITH YOUR CAREER?

Our Section leadership team is moving ahead with “AdLaw 101: Careers in Administrative Law & Government,” a paperback guide for law students and young lawyers about moving into, and moving up in, careers in our field. How did you enter our field, what would you like to say to young people considering this area of law practice, what are the lifestyle and rewards issues as you see them, and what works or doesn’t work for career advancement? Please email your suggestions to the editing team in care of Prof. Jim O’Reilly at james.oreilly@uc.edu. He and Prof. Anna Shavers are the editors, working with an expanding team to produce these insights for winter publication, so your comments are earnestly welcomed.

AdLaw Section Young Lawyers rep Nancy Eyl welcomes insights from her fellow young lawyers on the “serendipity of finding a role as an administrative lawyer;” please contact Nancy at polyglota@gmail.com.
California Independent Judgment Review — Should It Protect the Rights of Oil Companies?

By Michael Asimow*

Unique among the states, California law calls for reviewing courts to exercise independent judgment over the fact findings of state and local administrative agencies when an agency adjudication substantially affects a “fundamental vested right.” This standard requires the court to reweigh the evidence in the record and gives a reviewing court far greater power than it has under the customary “substantial evidence” test (or even the “clearly erroneous” test used in some states).

But what’s a “fundamental, vested right”? Independent judgment applies most clearly to revocations of professional licenses but it also covers discharge of civil service employees by local government and a wide variety of other interests important to individuals (such as welfare rights). It is unclear when independent judgment applies to purely economic interests, such as those affected by business or environmental regulatory agencies or local land use decisions. The cases on this issue are in hopeless conflict.

In *Termo Co. v. Luther*, 86 Cal.Rptr.3d 687 (2008), the Court of Appeal extended independent judgment to an order requiring the corporate operators of oil wells to plug the wells because they had been abandoned for seven years and were likely to be unproductive if reopened. Moreover, the agency determined that the wells posed a threat to public safety. The court held that the right involved was “vested” (because the wells had been operated for about six years until they were abandoned). Moreover, the right to operate the wells was “fundamental.” Normally, “fundamentalness” is measured by “the effect of [the decision] in human terms and the importance of it to the individual in the life situation.” Somehow, it seems a stretch to equate the right of a corporation to operate an oil well with the revocation of a physician’s license or the discharge of a local policeman for misconduct. There’s an enormous difference in “human terms” and “life situation” between shutting down an unproductive oil well and revoking a nurse’s license for misconduct.

In the author’s opinion, *Termo* involves a serious misapplication of independent judgment. Independent judgment is often defended as a vital civil liberty of individuals, but it has never functioned as a protector of corporate economic interests. Courts should not be reweighing the evidence and second guessing expert agencies about whether oil wells should be abandoned or whether they are hazardous. Instead, California courts should uphold administrative decisions regulating business interests so long as the decision is supported by substantial evidence.

Florida Amends APA — Again

By Larry Sellers**

During the 2009 regular session, the Florida Legislature enacted a few changes to the Administrative Procedure Act (FLAPA) on the recommendations of the Joint Administrative Procedures Committee. SB 2188, signed by the Governor June 16, 2009, amends the FLAPA in several respects.

**Clarifies and simplifies definition of “agency.”** Section 1 of the Act provides that the definition of agency does not include any municipality or legal entity created solely by a municipality. Section 2 of the Act states that this change is not intended to effect a substantive change in meaning, and is intended to be consistent with existing judicial interpretations.

**Expands required public notice of meetings to agency websites.** The Act recognizes that many agencies regularly use their websites to inform the public and that the public has come to rely on this. Section 3 of the Act amends § 120.525, governing meetings, hearings, and workshops. The Act requires public notice, including the agenda and any meeting materials available in electronic format (excluding confidential and exempt information), to be published on an agency’s website at least 7 days before the event.

**Requires statement of agency organization and operations to be published on agency website.** Similarly, Section 4 of the Act amends § 120.54(5)(b)7. to provide that the uniform rules must require that the statement concerning the agency’s organization and operations be published on the agency’s website.

**Revises rulemaking requirements.** Section 4 of the Act makes several other changes to the rulemaking requirements in § 120.54. These include:

**Emphasizes that staff must be available at public hearing.** The Act revises § 120.54(3)(c) to provide that when a public hearing is held on a proposed rule, the agency must ensure that staff are available to explain the agency’s proposal and to respond to questions or comments regarding the proposed rule. Since 1996, similar language has been in § 120.54, in paragraph (2)(c), dealing with rule development and public workshops.

**Clarifies what materials must be considered and may provide a basis for change.** The Act revises § 120.54(3)(c) and (d) to clarify that material submitted to the agency within 21 days after publication of notice of proposed rulemaking and between the date of publication of the notice and the end of the final public hearing must be considered by the agency and may serve as a basis for modification of the proposed rule.

**Revises notice of effective date.** The Act revises § 120.54(3)(e) to require that the effective date of a rule be specified in the notice of proposed rule.

The Act takes effect July 1, 2009.

* Professor of Law Emeritus, UCLA Law School; Last Retiring Section Chair; Advisory Board Chair; and Contributing Editor.

**Partner, Holland & Knight LLP, Tallahassee, FL.*
By Yvette M. Barksdale*

Adam Levitin, Hydraulic Regulation: Regulating Credit Markets Upstream, 26 YALE J. ON REG. _____ (forthcoming 2009). Available in Draft at: http://ssrn.com/abstract=1259406. The author argues that the current federal financial regulatory structure is dysfunctional and does not adequately protect consumer interests because of 1) a federal regulatory focus on safety and soundness (favoring profitability), 2) regulatory capture, through i) the financial industry’s strong financial incentives for capture, ii) “revolving door” industry employment opportunities for regulators, and 3) “competition in [regulatory] laxity” — i.e. multiple “race to the bottom” competing federal and state regulatory structures. These practices encourage i) forum shopping by regulated parties, and ii) regulatory inattention to consumer protection. Because of the states’ emphasis on consumer protection, the author prefers an increased role for state, rather than centralized federal, regulators.

Catherine M. Sharkey, Federalism Accountability: “Agency-Forcing” Measures, 58 DUKE L. J. _____ (forthcoming 2009). Available at http://ssrn.com/abstract=1410798. The author argues that federal administrative agencies, despite their admittedly dismal track record, have proven to be better than Congress at protecting the interests of States. Using Executive Order No. 13,132 as a framework, the author advocates retaining federal agency preemption, but with “agency-forcing measures” to induce agencies to be more attentive to federalism concerns. These measures include: 1) codifying E.O. 13,132 to require federalism impact statements and consultation with state officials, 2) executive review by OIRA of agency compliance with E.O. 13,132 and 3) hard look review of agency justifications for preemption.

Jedediah Purdy, Presidential Popular Constitutionalism, 77 FORDHAM L. REV. 1837 (2009). This article argues for a strong Presidential rhetorical role in leading the society to develop what the author calls “a normative societal vision of national community and of membership in that community.” Such “Presidential constitutionalism” performs a strong legitimating role and creates a persuasive view of human dignity with space to develop a robust normative social vision for society.

Jerry L. Mashaw, Governmental Practice And Presidential Direction: Lessons From The Antebellum Republic?, 45 WILLAMETTE L. REV. _____ (forthcoming 2009). Available at http://ssrn.com/abstract=1327056. The author examines the difficulties of relying upon historical “practice” to determine constitutional constraints on administration. As a case study, the author discusses the early 19th century relationship between President Thomas Jefferson and the nascent administrative bureaucracy, particularly the Secretary of the Treasury. This case study illustrates the thinness and fluidity of historical practice regarding the President’s relationship to the bureaucracy.

Adrian Vermeule, Our Schmittian Administrative Law, 122 HArv. L. REV. 1095 (2009). Addressing whether the bureaucracy is capable of properly responding to emergencies, the author argues that administrative law has built in black and grey holes which exempt the government from the ordinary rule of law in relevant circumstances. Some such holes are built into the Administrative Procedure Act, (through, for example, the definition of an “agency”) and ordinary administrative law concepts (such as “arbitrary”, “unreasonable” or “substantial.”) Accordingly, administrative agencies do not need special institutional processes or other exceptional authority to legitimate administrative action in such emergency circumstances.


Bradford C. Mank, Standing And Future Generations: Does Massachusetts v. EPA Open Standing For Generations To Come?, 34 COLUM. J. ENVTL. L. 1 (2009). The article advocates proxy standing for future generations harmed by current practices, such as environmental hazards which provide present benefits, but harmful consequences for future generations. The article also addresses the viability of such standing under current doctrine.

David Robinson, Harlan Yu, William Zeller, and Edward W. Feltem, Government Data and the Invisible Hand, 11 YALE J. L. & TECH. 160 (2008-2009). The authors argue that governments should get out of the website management business, which they are not good at. Instead, government should focus on information supply, allowing others to develop websites and other information delivery platforms. As an example of current government dysfunction, the authors cite Regulation.gov, which they argue needs more features and functionality.

SYMPOSIA OF INTEREST


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**Recent Articles of Interest**

**News from the Circuits** continued from page 24

the PTO does not have substantive rulemaking authority. If procedural, he would grant *Chevron* deference because they are clearly within the ambit of the PTO. Note, however, that he said, “an agency’s determination of the scope of its own authority is not entitled to *Chevron* deference” a proposition that, as stated, seems contrary to the mainstream view.

On the question of whether these rules are substantive or procedural, Judge Prost relied on standard APA doctrine identifying procedural rules exempt from notice and comment under §553 of the APA. Relying upon *American Hospital Ass’n v. Bowen* and *JEM Broadcasting v. FCC*, he found that these rules are procedural because they “alter the manner in which the parties present their viewpoints,” but do not “foreclose effective opportunity” to present their applications. Also, these rules do not encode a substantive value judgment, so they are procedural.

Judge Bryson rejected that approach, finding APA precedent on the substantive/procedural distinction unhelpful, and addressing the question of the scope of rulemaking power intended by Congress. He might well have applied *Chevron* deference to that issue, but he found it unnecessary since he found the rules well within the scope of the statute.

Judge Rader, on the other hand, followed *Chrysler v. Brown* in asking whether the rules “affect[] individual rights and obligations.” Finding a significant effect on private interests, he held the rules were substantive and thus ultra vires.

**Federal Circuit – Back to Basics**

In *Axiom Resource Management, Inc. v. United States*, 2009 WL 1175510 (Fed. Cir. 2009), an unsuccessful bidder challenged a DOD contract as violating provisions relating to conflicts of interest. The commanding officer initially examined the contract and upheld the award. Upon a second protest, the CO reassessed the situation based upon an extensive analysis by a branch of the agency and again upheld the contract. After a third unsuccessful protest, Axiom went to the Court of Claims, which allowed Axiom to supplement the record with material never considered by the agency and ultimately found that the CO had abused his discretion.

In admitting the extra-record evidence, the Court of Claims rejected the agency’s argument that Axiom had failed to justify adding to the record. Reflecting an attitude probably admirable in an agency, but not in a reviewing court, the Judge said, “let me cut to the chase here. My practice is to allow everybody to put ... whatever they want to put into the record in trial and even in an administrative record to supplement.” In response to the agency’s request to add its own supplementary evidence, she said, “I let everybody put in what they want to ... put in. The world will not come to an end. Western civilization will not crumble based upon this value judgment.”

Western civilization has thus far survived, but her decision did not. As established by *Camp v. Pitts* and its progeny, review is limited to the record compiled by the agency, particularly because the court’s function is to consider whether the agency’s decision was arbitrary and capricious, rather than to render its own de novo determination. Supplementation is limited to cases in which “the omission of extra-record evidence precludes effective judicial review.” The Court of Claims had abused its discretion by failing to apply this standard in admitting the additional evidence. Along similar lines, the Federal Circuit also found that the Court of Claims had incorrectly conducted de novo review, rather than the more limited arbitrary and capricious standard of review.
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NEW! From the ABA Section of Administrative Law and Regulatory Practice

Lawyers in Your Living Room! Law on Television

Michael Asimow, Editor

From Perry Mason and The Defenders in the 1960s to L.A. Law in the 80s, The Practice and Ally McBeal in the 90s, to Boston Legal, Shark and Law & Order today, the television industry has generated an endless stream of dramatic series involving law and lawyers. The way lawyers are perceived has depended on how they are portrayed on television series and in the media. A new guide, Lawyers in Your Living Room! Law on Television examines television series from the past and present, domestic and foreign, that are devoted to the law.

Written in an entertaining and relatable style, you'll enjoy the forewords by Sam Waterston (Law & Order) and James Woods (Shark), who share their experiences playing "real-life" lawyers and how their roles have shaped the way lawyers are perceived to the general public. Lawyers in Your Living Room! begins with an introduction and history of law on television. It then discusses the process of writing for television—from courtroom to writer's room and how lawyers have played an important role in furnishing technical advice for TV. The book also discusses the media effects from television shows and legal ethics on TV.

Included are chapters on daytime television judge shows, including Judge Judy, and non-legal shows with important lawyer characters like The Simpsons, Seinfeld, or West Wing. The most popular television series, past and present, are also discussed, as well as popular shows abroad. All fans of legal television—a group that includes almost everybody—will enjoy this discussion of how TV shapes the views of lawyers and the law.

“Playing a hard-driven, unscrupulous defense attorney-turned-prosecutor in Shark was a real eye-opener for me as an actor and, more importantly, as a citizen.”

– James Woods

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