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On July 26, shortly before I became Chair of this Section, I had the privilege of participating in a program at the National Archives in Washington, D.C., to celebrate the 75th Anniversary of the Enactment of the Federal Register Act in 1935. One purpose of the program was to commemorate the past contributions of the Federal Register to the transparency of regulatory processes. Even the first edition of the Federal Register, published on March 14, 1936, showed the vast range of federal regulatory issues that would be open to public review and comment—executive order enlarging a migratory bird refuge; an Agriculture Department notice regarding a milk-handling order hearing; and new Federal Trade Commission, Securities and Exchange Commission, and Treasury Department rules.

But another purpose of the program was to highlight the importance of looking forward, not just backward, to keep pace with societal and technological changes in ensuring effective public notice and comment processes. To that end, several federal officials announced the launching of Federal Register 2.0, a prototype of the “Web 2.0” online version of the Federal Register. Before the Advisory Committee of the Federal Register grants Federal Register 2.0 official status, the National Archives and Records Administration will need—appropriately—public comment on the “look and feel” and usability of the site.

This event reminded me that, while this Section can look back with pride on a successful and productive year thanks to the able leadership of now-former Chair Bill Luneburg, we need to look ahead and build on those accomplishments. In light of the membership challenges that our Section, like other ABA components, continue to face, the Section strategic plan, which the Council adopted at the San Francisco Annual Meeting, sets out specific goals that we should pursue aggressively.

The first of those goals is to enhance the Section’s role as the leading source of expertise in administrative law and regulatory practice. To that end, we need to expand our renewed collaboration with the Administrative Conference of the United States (ACUS), and its Chair (and former Section Chair) Paul Verkuil, and to look for new opportunities to demonstrate the Section’s expertise at national and international levels. For example, I have developed a working relationship for the Section with the U.S. Department of Commerce’s Commercial Law Development Program (CLDP). CLDP provides commercial law technical assistance to governments and private sectors of developing and transitional countries in support of their economic development goals. CLDP is now requesting the Section’s help in identifying sources of expertise in its ongoing relationships with various developing nations. The Section’s Global Administrative Law Task Force, which Bill Luneburg started last year, should also be a fertile source of new projects with international dimensions.

The second of those goals is to increase Section membership by a minimum of 800 new lawyers and 160 new law student members each year for the next three years. Both of these subgoals are admittedly ambitious, and it will take a sustained effort by the Section to meet them. I am confident that the new Membership and Communication Committee—one of the four committees now designated as Standing Committees in the Section’s recently revised Bylaws—will undertake a vigorous program, under Ken Hurwitz’s leadership, directed at both of those subgoals.

One approach that I intend to pursue is to have Section leaders give presentations about careers in administrative law and regulatory practice at law schools around the country. When former Section Chair Jim O’Reilly gave such a presentation during the Annual Meeting in San Francisco, he drew more than 55 law students. Other law schools are already expressing interest in similar presentations, and I hope that we can follow through in a number of cities throughout the year.

The third of those goals is to increase Section non-dues revenue by 25 percent over the next three years through increased publications. The other three newly designated Standing Committees will play critical roles in reaching this goal. Last year, the Publications Committee, with Bill Jordan and Anna Shavers as Co-Chairs, performed remarkably well in developing new titles and seeing them to fruition. But the Committee needs members to help identify and develop new publications on a variety of topics that can generate new revenue for the Section and further demonstrate the breadth of the Section’s expertise.

The final goal is to actively develop new leaders to serve the Section in the future. I have identified a number of younger Section members, with demonstrated records of service to the Section, to take up new leadership positions as Committee Chairs and Vice-Chairs. This Section has always thrived on the continuing involvement of lawyers from all sectors of administrative and regulatory law: private practitioners; corporate practitioners; government representatives; and law teachers and deans. Each of those sectors represents a corner of the foundation on which the Section rests. Even as the Section’s leadership needs to focus in the short term on implementing existing meetings and projects, we need to ensure that we are also taking longer-term actions to strengthen that foundation with both financial and human capital.

I look forward, with the assistance of the Section’s leadership, Section Director Anne Kiefer, Program Assistant Meghan Keivel, and Program Associate Rachel Rosen, to helping the Section sustain and add to its long record of accomplishments.
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Administrative & Regulatory Law News

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Interview of DOE General Counsel
Scott Blake Harris

By Daniel Cohen*

Under the Obama Administration, the U.S. Department of Energy (DOE) has assumed a more prominent position in the President’s Cabinet than it has in the past. Led by Secretary of Energy, Dr. Steven Chu, a Nobel Prize-winning physicist, DOE has been charged with leading a fundamental long-term transformation in the production, transmission, and consumption of energy in the United States. Among its most important missions is leading a nation-wide effort to transform our aging electric transmission infrastructure into an interactive, digital “smart grid.”

The following interview of DOE General Counsel Scott Blake Harris this past summer offers some insight into the thinking behind this shift in departmental goals and objectives and into his views regarding the office of general counsel.

Harris became DOE’s General Counsel after 33 years of practicing law in Washington, D.C. At his Senate confirmation hearing, he characterized his experiences in federal service and private practice as being “at the intersection of law, technology and policy.”

Before joining DOE, he founded the law firm of Harris, Wiltshire & Grannis, LLP and served as its Managing Partner for twelve years. Before that, Harris served in the federal government from 1993 to 1996, first as Chief Counsel for Export Administration in the U.S. Department of Commerce, and then as the first Chief of the International Bureau at the Federal Communications Commission. He was also a partner at the law firms of Williams & Connolly and Gibson, Dunn & Crutcher. Harris graduated magna cum laude from both Harvard Law School and Brown University.

How can we make our country more energy secure while preserving and protecting our environment, especially in the aftermath of the oil-well blowout in the Gulf of Mexico?

As underscored by the tragedy in the Gulf, our current approach to the generation and use of energy is simply unsustainable. We can do a far better job of improving our nation’s security and economic well-being by tapping into the deep reservoir of American ingenuity so that we become the world leader in developing clean sources of energy and in using that energy efficiently.

We can both decrease our dependence on fossil fuels and create a robust, new, job-producing clean energy industry.

One way to think about this is to say that U.S. energy policy must confront the problem of energy “scalability.” This computer-networking term means that solutions that may work well for a few people may not work at all for many people. In effect, what we need over the long term are more “scalable” sources of clean energy. Fortunately, the solution to this problem is American ingenuity.

We need to unleash the transformative power of America’s entrepreneurs to develop clean, safe, secure, and sustainable sources of energy. Secretary Chu argues that this will be one of the defining challenges of the 21st Century—one that will drive a “Second Industrial Revolution” in energy production and consumption.

Our choices are to lead and export our products and technologies to the rest of the world, or we can lag behind, and buy from others what we could have created ourselves.

Our competitors around the world certainly understand this. Earlier this year, it was reported that China had announced plans to invest more than $700 billion into renewable energy projects over the next decade. We need to act now to re-assert American technological leadership in this critical area.

That is why President Obama and Secretary Chu made sustainable energy a cornerstone of the Recovery Act’s economic stimulus. As a result, the Act is not just creating jobs; it is allowing us to invest in a high-tech energy industry that will promote long-term economic growth, technological leadership, and private-sector job creation. Before the Recovery Act, America made a mere 2% of the batteries that will drive the next generation of hybrid and electric vehicles. By 2012, we will make 20%, and that figure will rise to 40% by 2015.

In short, I think that the oil spill in the Gulf is a reminder that President Obama and Secretary Chu were right: clean energy will be a defining challenge of the 21st Century. If America embraces and masters that challenge, we will lead the world in clean energy for years and decades to come.

What role do you think that DOE should play in encouraging the deployment of Smart Grid and other energy-demand-management technologies?

DOE has multiple roles to play in encouraging the deployment of a more modern and smarter electrical transmission system. We should support an

continued on next page
array of innovative efforts to manage and reduce energy consumption, and then we should further support those innovators by studying and reporting on which efforts seem to be most successful and why. These efforts are also an important part of any long-term strategy for sustainable energy because grid modernization is critical to supporting increased renewable energy sources like solar and wind. DOE has already begun this important work.

For example, through the Recovery Act, DOE is distributing $4.5 billion for Electric Grid Modernization—this includes $3.4 billion for the Smart Grid Investment Grant Program. These Recovery Act funds are being leveraged by significant additional funds from private corporations, utilities, and state and local governments to support a wide array of projects aimed at developing or deploying smart grid technologies and other modernization efforts.

In addition to this financial support, DOE is also working to assess the overall progress and the broader impact of a more interactive electrical grid. As a result, this spring, we began two public comment proceedings by issuing two Requests for Information. One focused on the utilization and protection of consumer data, and the other focused on the evolving communications needs of electric utilities. This summer, we held public roundtables in both proceedings to supplement the data that we were gathering through the comment process. Both proceedings will lead to reports that will provide more information and experimentation in government; and it makes government more responsive by putting more energy sources and to use that energy more efficiently.

As the Supreme Court has noted, federalism was intended, in part, to permit more experimentation and competition in governance: “This federalist structure of joint sovereigns allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizen.”


History should remind us that these are more than mere words. Fifteenth Century China was a unified empire that had the wealth and the naval prowess to have discovered and colonized the Americas. But when mid-century Emperors decided to forbid further exploration fleets, that decision affected all would-be naval leaders. By contrast, 15th Century Europe was a mélange of many competing states. European Christopher Columbus was rebuked by the first ruler whom he asked for funding—just as he would have been in China. But in 15th Century Europe, Columbus could keep asking until he found wiser rulers. Federalism, like economic competition in the private sector, can be an engine of innovation.

Developing a sustainable approach to the generation and use of energy is perhaps as complex a challenge as that faced by the 15th Century explorers. We need to figure out how to simultaneously promote incremental change with the tools now available and promote research into the high-risk, long-term technologies that could fundamentally change how we produce and consume energy. Moreover, it is unlikely that there is one “best” solution to these challenges: different circumstances call for diverse solutions. Solar power may prove to be better for Phoenix than Seattle.

That is why I think that our federal system, implemented across a country with diverse geography and natural resources, may offer the best solution to a challenge as complex as that of making the generation and use of energy sustainable. We need to conduct many experiments, make some mistakes, assess our progress, and then figure out what works best for both Arizona and Maine. But the advantage of our diversity should be clear: if the genius who turns out to be the Christopher Columbus of clean energy happens to have her world-changing proposal rejected by the public utility commission in one state, our federal system will ensure that she can ask the PUC of another state to choose more wisely. DOE is promoting diverse approaches to these diverse challenges for precisely that reason.

Your first job after law school was as a law clerk for Gerhard A. Gesell, the famous U.S. district judge for the District of Columbia. How did that experience affect your career and approach to the law?

Working for a federal judge right after law school graduation is almost always a transformative experience, and it certainly was for me. In terms of my career, Judge Gesell convinced me that it would be worthwhile and rewarding to spend time both in the private sector and in public service. It is no accident I followed that path. In terms of my approach to law and decision-making, the Judge taught me the importance of the facts and that principles alone could not lead to sound decisions. He also taught me that the

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Evolving Regulation in the New Energy Boom States

By Hannah Wiseman*

America cannot function without adequate energy supplies, and the complications posed by this fact have been unusually apparent this year. From the Gulf oil spill to a deadly coal mining accident, the fuels that drive America’s economy and quality of life offer no simple answers. Each step of the energy cycle requires complex regulatory attention, which aims to strike a balance between public goals such as affordable energy, healthy individuals, and a clean environment and the need for economical production of fuels and electricity. Recently, this challenge has been highlighted in the Appalachian states, where geologists have discovered that trillions of cubic feet of natural gas reside in the Marcellus Shale underlying New York, Pennsylvania, Ohio, West Virginia, and small portions of other neighboring states. Companies from around the United States, and even from abroad, have rushed into Pennsylvania and New York in search of profits from this shale gas, which is extracted using a technique called hydraulic fracturing or fracing (pronounced “fracking”). West Virginia and Ohio also have started to see more requests for drilling permits in the Marcellus.

Shale gas is not unique to the Appalachian region, but its production has rapidly expanded there following activity in other parts of the United States. In Texas in the 1990s, gas operators perfected a technique called slick water hydraulic fracturing to extract natural gas from shale. To fracture a well using the slick water technique, an operator excavates a well pad and access road and drills a vertical and then often a horizontal wellbore through the shale. The operator cases the well to separate gas flowing through the well from water and other underground substances and then perforates the casing. After cleaning the area around the perforated casing with an acid treatment, the operator pumps millions of gallons of water and small quantities of chemicals down the wellbore at high pressure. The water—forced out into the surrounding shale—helps to induce or expand fractures in the shale, and the chemicals reduce the friction as the water moves through the wellbore and improve other aspects of the operation. The operator also injects a material called a “proppant,” which is typically sand, to help to prop the fractures open and allow natural gas to flow back through them. Following the “frac job,” a portion of the water injected into the well flows back up to the surface; this “flowback water” is typically stored in a pit on site and then disposed of or reused in another fracturing operation.

The Barnett Shale in Texas continues to produce astounding quantities of natural gas as a result of slick water fracturing, and operators from that region—as well as others who have mastered the slick water technique—have begun moving to other shale formations in hopes of similar bonanzas. Areas that have not previously seen this type or pace of drilling activity can thus be caught off guard. In places like Pennsylvania, where the Marcellus Shale underlies much of the state, the gas rush has created a “boomstate,” not just boomtowns. The first fraced Marcellus gas well in Pennsylvania began producing in 2005. In 2008, 195 Marcellus gas wells had been drilled, and this number nearly quadrupled to 768 wells in 2009. By 2010, about 5,200 permit applications were filed. Requests for slick water fracturing also began pouring into New York around this time, and Pennsylvania’s and New York’s contrasting approaches to these booms provide interesting case studies in adaptive regulatory response.

In the Marcellus region, disputes have emerged over every aspect of the fracturing process. Lease profits are high, and many residents and officials welcome the substantial infusion of wealth promised by the gas boom. Some residents and administrators, however, are concerned about proposed fracing on public lands. Others point to potential environmental effects from substantial water withdrawals, transportation of chemicals to the site, storage of wastewater on the surface, disposal of the flowback water through wastewater treatment plants or other methods, and air emissions from on-site equipment. Some communities worry about potential conflicts with surface uses such as agriculture and tourism, as well as local economic impacts. Municipalities expand road maintenance as heavy truck and tanker use increases.

Many existing regulations at the federal, state, and municipal level were not designed with high levels of slick water fracing in mind, and several responses have emerged to address the new issues posed by the fracing boom. Existing federal regulations apply to the disposal of the wastewater (companies cannot discharge pollutants into waters of the United States without a Clean Water Act permit, for example) and to other steps of the process, but the practice of fracing itself is exempt from the Safe Drinking Water Act (SDWA). Waste from the fracing process is also exempt from hazardous waste disposal regulations within the Resource Conservation and Recovery Act—as is waste from other oil and gas operations. Bills were introduced in the House and Senate to repeal the SDWA exemption and to require operators to disclose to states or state administrators the chemical...

*Assistant Professor of Law, The University of Tulsa College of Law. The author explores this topic in greater depth in Regulatory Adaptation in Fractured Appalachia, 21 Vill. Envtl. L.J. 229 (2010).
constituents used in fracking, but each bill remains in committee. In the meantime, the Environmental Protection Agency has embarked upon a national “comprehensive research study” of fracking.

While there has been moderate activity at the federal level, agencies and legislators in “boomstates” like Pennsylvania and New York have been very busy. Under New York's State Environmental Quality Review Act, agencies must conduct environmental impact studies before permitting certain activities. New York's Department of Environmental Conservation (DEC) issued a generic environmental impact statement (GEIS) addressing oil and gas production in New York in the 1990s. But when it began receiving applications for slick water fracting in the last few years, the agency discovered that its existing analysis does not adequately address some aspects of this practice. The agency therefore has embarked upon a detailed supplemental study and has delayed the slick water permitting in the meantime. The resulting draft report—which has received thousands of public comments now being reviewed by the DEC—analyzes the potential environmental effects of every step of the fracting process, from the construction of well pads and access roads to air emissions, potential surface water pollution, potential seismic effects from the fracturing of the shale, and local economic and social impacts. Early indications are that the final supplemental GEIS will recommend that the agency place conditions on slick water fracting, including increasing some of the required setbacks of the well pad from surface waters and other resources, requiring the disclosure of chemicals used in fracting, enhancing the safety of surface pits for flowback water, adding protective measures for fracting location and impoundment procedures within the watershed of New York City's drinking water supply, and increasing protection against chemical spills on site, among other provisions. Meanwhile, the New York Senate passed a moratorium on drilling through May 2011, which must also be approved by the Assembly and governor.

Pennsylvania has taken a very different approach to the natural gas boom. When the state received a flurry of applications to drill and frac wells, it did not put them on hold. Instead, it issued hundreds of permits and commenced new regulatory and legislative activity to address the potential effects. The governor hired additional staff members for the Department of Environmental Protection, and the Department has since issued fines for incidents such as chemicals spilled on site and methane gas in residents' wells. The DEP has also proposed strengthened requirements for water replacement if residents' wells near a frac site are contaminated and has enhanced the regulations for the casing of wells in order to protect groundwater. Further, it has developed new total dissolved solids standards for “salty” wastewater, meaning that the water produced by fracting will now face more stringent treatment standards. The Department of Conservation and Natural Resources, in the meantime, has been busy reviewing lease proposals for Marcellus gas development on public land. There has also been activity in the political halls of the state, with one representative introducing a bill that proposes a one-year moratorium on new fracting permits.

As state agencies and the legislature have addressed the rush of fracting activities in Pennsylvania, municipalities have also attempted to place their own limits on the practice. State law supersedes “local ordinances and enactments purporting to regulate all oil and gas well operations” that are regulated by Pennsylvania's Oil and Gas Act. But towns have still managed to influence permits issued by the DEP. In Huntley & Huntley, Inc. v. Borough Council of Oakmont, 600 Pa. 207 (2009), the DEP had issued a permit to drill to a natural gas producer, but the town council had refused to grant a conditional use permit for the drilling, which was proposed in a residential zone. The Pennsylvania Supreme Court held that the conditional use portion of the town's zoning ordinance was not preempted by the Oil and Gas Act, although it determined that the Council too narrowly interpreted the use in question. In Range Resources v. Salem Township, 600 Pa. 231 (2009), on the other hand, the court held that “a general ordinance directed at regulating surface and land development associated with oil and gas drilling operations” was preempted.

With all of the regulatory activity in Pennsylvania, an on-the-ground laboratory of regulatory responses to an energy boom has emerged. One of the most interesting aspects of Pennsylvania's administrative evolution in response to the boom has been its effort to inform operators—particularly those coming from outside of the state—of its regulations. States have the bulk of regulatory authority over oil and gas development, and regulations differ substantially among the states. Texas, for example, does not require minimum distances between oil and gas wells and nearby natural resources such as surface waters, nor does it require pit liners for flowback water impoundments; New York and Pennsylvania do. The operators moving from the Barnett Shale up to the Marcellus had to familiarize themselves with many new regulations, and the Department of Environmental Protection held industry training seminars to introduce operators to state environmental and oil and gas regulations. The Department did not hesitate to issue fines when violations occurred.

Another regulatory regime that was likely unfamiliar to out-of-state operators was Pennsylvania's system for water governance. The Susquehanna River Basin Commission and Delaware River Basin Commission, which are regional agencies formed by a Compact among the Basin states and Congress, regulate water withdrawals within the basin. When fracting companies withdrew water without first obtaining a permit or exceeded the withdrawal allowances within their permit, the Susquehanna River Basin Commission issued hefty fines—partly, it appears, to send a message to other operators who might have made similar mistakes. The Delaware River Basin Commission also took steps to inform operators of its regulatory presence. Its executive director issued a determination in 2009, that notified all natural gas operators in certain areas of the Basin that extraction
could not occur without prior commission approval.

As slick water fracing becomes more commonplace and continues to expand in shale plays around the country, other state agencies could learn from New York’s and Pennsylvania’s experiences. Informing operators of regulations is essential, as is hiring additional staff to address the sudden increase in drilling activities. Agencies will likely continue to contend with legislative proposals for moratoria, as well as complaints from citizens regarding potentially contaminated wells or surface water, and they must have adequate staffing to handle these changes. Most of all, agencies should look to other states’ regulations to see whether their own could be improved; where geography is similar, widely divergent regulations on the necessary impoundments for flowback water, for example, may not be sensible. Where one state has engaged in careful science-based analysis of the ideal regulations, others could benefit from this work and borrow its results. Regulating the potential effects of the gas boom will not be easy, but states are providing useful precedent for the agencies that are just beginning to experience heightened levels of fracing activity within their states. With attention to the path already taken, administration in the energy boom states can effectively evolve.

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**Interview of DOE General Counsel Scott Blake Harris** continued from page 4

My prioritization strategy is simple: Focus first on what matters most. I oppose regulation for the sake of regulating, and believe that well-designed laws can encourage private enterprise and innovation by directing energies in productive directions. That is why one of my priorities has been enforcing DOE's energy efficiency standards.

DOE’s energy efficiency standards and Energy Star certifications serve two important purposes. First, they are intended to provide American businesses and consumers with the information that can help them save money by buying the most efficient products on the market. Second, they are intended to encourage manufacturers to invest in building even-more-efficient products.

When I arrived at DOE, I was stunned to discover that the Department had never systematically enforced DOE’s 35-year-old energy efficiency standards. This had created the worst of circumstances: law-abiding businesses could presume that they would not be rewarded for investing in energy efficiency, and corner-cutting businesses could presume that they would not be punished if their products were less efficient than the law required or their labels indicated.

We thus moved quickly and decisively to end that situation. We clarified the legal implications of certifying compliance with DOE standards. We brought enforcement actions against manufacturers of improperly certified and non-compliant products. We created a dedicated enforcement team that now works full-time on enforcing energy efficiency standards. And when a large foreign company tried to argue that DOE could not legally withdraw Energy Star certification from its refrigerator-freezers just because they violated Energy Star efficiency standards, DOE fought them in court—and we won, hands down. Since we began our effort, manufacturers have newly certified more than 600,000 products as meeting our energy efficiency standards. We have initiated forty-two enforcement actions. Before I arrived, the number of enforcement actions that had been brought was zero. We have removed from the market sixty-four products that failed to meet our minimum energy efficiency standards. When I arrived, the number of products that had been removed from the market was zero. And we have already collected over $350,000 in penalties or settlements for violations of our regulations. Before I arrived the amount that had been collected was zero.

Today, our enforcement message is simple: Congress designed the law to set minimum energy efficiency standards and to create incentives to reward those businesses that incur the risks and the costs needed to create more efficient products. Our enforcement strategies are now designed to ensure that those who violate the law pay the appropriate penalty, so that those who make investments in energy efficiency are able to reap the benefits of those investments.
Coal Mine Safety:
A Call for Comparative Law and Interdisciplinary Studies

By Anne Marie Lofaso*

On January 2, 2006, the Sago Mine disaster gripped the nation and the world. The fate of thirteen miners lost deep in a West Virginia coal mine hung in the balance as rescue efforts dragged on for two days and nights. The hopes and prayers of the miners’ families and countless millions in a vast television audience seemed finally to be answered as the words “they’re alive!” resounded through the mine site and around the world. But the joy of a miracle was cruelly doused by the terrible news that, in fact, there was only one survivor clinging to life and that twelve miners had perished.

Four years later, on April 5, 2010, a massive explosion ripped through the Upper Big Branch (UBB) Mine in a small town in southern West Virginia. That explosion, which instantly took the lives of twenty-nine coal miners and seriously injured two others, was the worse United States coal mining disaster in forty years.

West Virginia coal miners and their peers throughout American and global coalfields work in anonymity to provide the power that fuels the American and global economy and the electricity that allows all of us to live in unparalleled comfort. In light of those human sacrifices, governmental policy should explore and stimulate new ways of examining and solving a very old problem—providing the safest possible workplace for America’s coal miners.

Tackling the complex issues associated with coal mining safety requires the creative thinking involved in both comparative law and interdisciplinary analyses.

Overview of Safety Issues

Coal mining is a dangerous occupation. Putting aside the long-term health problems associated with mining, such as black lung disease—which according to the United Mine Workers claims the lives of as many as 1500 coal miners a year—coal operators, regulators, and miners face many hazards, most notably fires, floods, explosions, roof falls, electrocution, and powered haulage and machinery accidents.

The coal mining industry’s annual fatality rate—2.3 per 10,000 workers—is five times more hazardous than the average private workplace. By analogy, this means that six or seven of the 29,000 West Virginia University students would die each year in university-related accidents, compared with a bit more than one death at other similarly sized universities.

Miners put themselves in harm’s way every time they walk into a mine, so that others can benefit from the comforts of modern society. About ninety-two percent of the coal produced in the United States is used to generate electricity, and fifty percent of the electricity generated in the United States is fueled by coal. Other coal is used either for international export or for making products such as synthetic materials, paper, steel, cement, and medicine.

Case Studies: Sago and UBB

At the time of the Sago explosion, which ripped through the mine projecting outward from a sealed area into the active workings of the mine, twenty-nine miners were underground. Sixteen miners, who were located a fair distance from the ignition point and not seriously injured by the blast, escaped. The thirteen miners near the blast were not so fortunate. One miner was killed by the force of the explosion itself; the other twelve attempted to escape. Consistent with their training, the twelve miners tried to activate their breathing apparatus, a self-contained self-rescuer, but four of those SCSR s reportedly failed or the miners otherwise were unable to operate them. According to a preliminary report by Davitt McAteer, former Assistant Secretary for Mine Safety and Health, to West Virginia Governor Joe Manchin, the miners “had to abort that escape attempt when they encountered thick dust and swirling smoke.” Still following approved safety training, the miners “turned back and retreated behind a curtain . . . at the working face of the section in an attempt to barricade themselves against the smoke and carbon monoxide created by the explosion.” There those twelve miners waited, unaware that rescue efforts were moving much more slowly than they might have expected.

Lack of communication between the rescuers and the twelve survivors of the initial blast proved critical. For example, had technology been available that allowed communication between rescuers and miners, rescuers may have pinpointed the miners’ location, allowing them to drill a borehole that could have provided a fresh air source and/or an escape route. Proper communication would have allowed rescuers to determine that there was in fact no fire in the mine, enabling rescue teams to enter the mine earlier. Rescuers could have told the miners that there was breathable air in a nearby, still-accessible area. Instead, twelve miners surrounded by toxic methane laden air waited to be rescued; eleven of them eventually died of asphyxiation awaiting rescue.

The UBB disaster raises different questions. The official report is incomplete, but journalists have reported that there

* Associate Professor, West Virginia University College of Law. This article updates a longer version originally published at 111 W.V.L. REV. 1 (2008).
were no survivors immediately following the massive explosion and that the UBB mine had been previously cited for several safety violations. This raises different questions about prevention. Who is in the best position to prevent such tragedies when no rescue is possible? Workers? Operators? Government? Are workers’ representatives, operators and government officials cooperating to create safe workplaces? Are any operators circumventing safety rules, resulting in preventable tragedies? Are injury rates a better indication of safety than fatality rates and, if so, are operators, especially in nonunion mines, accurately reporting those injuries?

The Sago and UBB disasters remind us that the continual, unnoticed price we pay for our comfort can include serious injury and even death of those whose labors unlock the energy of coal. As Ken Ward Jr. reported in the Charleston Gazette, “Inlin disasters like Sago get headlines. But far more coal miners die . . . alone, crushed by heavy equipment, ground up by runaway machinery, buried beneath collapsed mine roofs.”

Questions Raised in the Aftermath

In light of the Sago and UBB disasters, it seems relevant to ask: What, if any, obligations do we owe workers who endanger themselves for our benefit? What role, if any, should the law play to protect coal miner safety? Is coal mining in the United States as safe as it can be? According to the government’s official mine safety statistics, the year 2006, with forty-seven coal miner deaths (24 from West Virginia), was the deadliest year for American coal miners since 1995. But 2010 is not far behind. At the time of this writing, 42 miners have already perished—33 of those miners came from West Virginia, making 2010 already the deadliest year for that state in at least three decades.

Spikes in coal miner deaths have occurred three times in the past 16 years. In addition to the 42 miners who died in the first seven months of this year, 47 miners died in 1995 and 2006. Otherwise, deaths have ranged between 18 and 38 miners per year. Considering the 2006 and 2010 death spikes, and the disproportionate toll that West Virginian coal miners have borne, it is natural to wonder whether other major coal-producing states, such as Kentucky and Pennsylvania, and other coal-producing countries, such as China, India, Australia, South Africa, Russia, or Britain are experiencing a rise in the level of workplace fatalities. Are these recent death-spikes statistical anomalies or can they be attributed to some cause, such as lax enforcement of safety regulations, inadequate safety equipment and/or preventive measures, or some other regulatory deficiency? Do the death-spikes simply reflect a rise in coal mining production, such that the number of absolute deaths does not actually reflect a relatively more dangerous workplace? Is there some other explanation such as random variation?

This analysis is complicated by a fundamental distinction between work environments. Mining in the Appalachian Coal Region—West Virginia, Kentucky, and Pennsylvania—is conducted to a significant extent in large underground mines, while coal mining in the Great Plains and Intermountain West comes mainly from mid- to large-sized surface mines. These differences may affect fatality rates because causes of accidents differ. Explosions usually cause underground mining accidents that trap miners, increasing the death toll and encouraging sensationalization. By contrast, surface mining accidents often involve machinery or truck accidents, blasting injuries, and falls. An accurate statistical analysis of fatality rates must account for these differences to (1) document with precision the types of hazards associated with each and (2) develop strategies for addressing those hazards. A comparative law analysis of underground mining hazards alone may reveal significant differences. For example, most underground mining fatalities in India are caused not by explosion but by inundation, a problem that underground mines in the United States do not experience. Even if the recent death-spikes are statistical anomalies, the Sago and UBB disasters emphasize inherent dangers.

From a cost-benefit perspective, it is important to inquire whether the industry and government regulators support economically reasonable steps to keep miners safe. From a worker rights perspective, on the other hand, one must bear in mind that twenty-two deaths per year are twenty-two too many deaths—and it is essential to ask whether those institutions are doing all they should to keep miners safe. That inquiry leads to a host of other questions divided into three categories: regulation, enforcement, and technology.

With respect to regulation and enforcement, we must identify the extent of any relationship between mine safety regulations and trends in mine safety. One might ask whether and how downward trends in mining injury and fatality rates correlate with increased regulation and, more importantly, increased enforcement of safety regulations. Do upward trends correlate with lax enforcement of existing regulations, deregulation, or even failure of the government to provide sufficient funding for inspection and regulatory enforcement? No matter what answers ultimately are identified, it is important that the questions be asked and possible answers be objectively analyzed.

The death-spikes also raise questions regarding the sufficiency of the technology available to coal miners. For example, are the technologies that are currently available, including post-Sago innovations, sufficient to make underground mining safer? Is the best available technology being used in mines or are regulators and operators settling for cheaper alternatives? Are there technologies on the horizon that would make underground mining safer? If the technology is available, is there a distribution problem? To what extent can post-disaster legislative initiatives and voluntary coal industry efforts contribute to safer coal mines?

Given the complexity of these questions, both a comparative law and an interdisciplinary approach are appropriate.

continued on next page
The Comparative Law Approach

According to the Oxford University Comparative Law Forum, comparative law is the academic examination of various legal systems to determine how those systems differ and compare with one another for the purpose of better understanding our own legal system. Initially, comparative law study allows us to question our own biases by revealing them. What better way to see our implicit assumptions about how the law should look than by studying different solutions to the same legal issue set in different jurisdictions? Such analysis allows us to obtain a deeper and more sophisticated understanding of our own legal system.

By opening our eyes to other ways of regulating behavior, comparative law allows us to find solutions to our own legal problems that may elude us because of our own biases. All academics become entrenched in a certain way of thinking typically inherited from their academic training. And so, when a Newton, or a Darwin, or an Einstein comes along, we are amazed that someone trained in a certain way of thinking is able to throw off those academic shackles and think about a problem in a new way. In pursuing law as an academic subject, comparative law study makes this process easier by providing the perspective we need to observe anomalies and then, ideally, to appreciate the solution that otherwise eludes us because of our mindset.

Comparative law study can also be done at a domestic level. Indeed, one of the strengths of our own legal system is its federal constitutional nature. By allowing states to experiment with different solutions to the same legal problems facing several states, we all benefit from the collective and different experiences of the parts.

The Sago disaster, in some sense, has already revealed anomalies in coal mining safety laws and regulations. Notwithstanding some examples to the contrary, most notably, the modern day sweatshop, which remains extant in parts of the United States, members of the legal community and citizens of this country in general hold fast to the view that our country has moved beyond its industrial-revolution-era history of workplace abuse. At least with respect to coal mining, there is much truth in that perspective. Our current track record easily surpasses the horrors of the pre-1930 period, when on average 2,295 miners were killed each year. Yet, as journalist Ken Ward Jr. reported, “while 13 West Virginia coal miners were trapped inside the Sago Mine . . . three Tasmanian miners were saved from a fire by an 8-by-5-foot steel box”, and less than a month after twelve of the thirteen Sago coal miners perished, “72 miners in Saskatchewan were rescued after being trapped underground for 30 hours, thanks to a similar box called a mine rescue chamber.” On the other hand, less than six months after the Sago disaster, and eight days after the West Virginia Office of Miners’ Health, Safety, and Training imposed a statewide moratorium on the installation of supposedly “explosion-proof” Omega block seals used at Sago—five more men in Darby, Kentucky perished in a coal-mine explosion in which Omega block seals failed. Despite the eighty-year trend of declining fatalities in United States’ coal mines, the Sago and Darby disasters—two underground mine explosions, six months apart, in which “explosion-proof” seals failed—and the more recent UBB disaster, raise serious questions as to the current safety of the mining industry.

The comparative law approach allows us to examine American coal mine safety on several levels. First, we look in our own backyard: how do various state coal mining safety records in large underground mined coal-producing states (e.g., West Virginia, Kentucky, and Pennsylvania) stand up to mine safety records in other coal-producing states? We might then assess the safety records of other countries engaged in underground coal mining. In both cases, we must ask whether the underlying causes for fatalities differ. For example, preliminary research suggests that death by inundation is increasing in India, while underground flood fatalities have never been a significant problem in the United States. Does that mean that the United States has something to teach India about preventing underground mine floods, or does it mean only that certain geological circumstances make Indian mines more susceptible to flooding than American mines?

These questions must be answered by government, industry, and labor. This diversity of perspective will ensure a fair discussion of the substantive questions raised in the aftermath of Sago and UBB.

The Interdisciplinary Approach

Coal mining is a regulated industry in the United States. Comprehensive federal legislation of coal mine health and safety first appeared in the aftermath of the Farmington disaster, another West Virginia mine explosion, leading to enactment of the Federal Coal Mine Health and Safety Act in 1969. After another mine disaster, Congress passed the more stringent Federal Mine Safety and Health Act of 1977 (Mine Act of 1977). Since the passage of the Mine Act of 1977, there had been a steady decrease in coal mining fatality rates, at least until 2006. However, the extent to which comprehensive coal mine safety regulations has affected this downward trend should be evaluated. It would also be useful to compare safety records in union and nonunion mines—after all, the last four underground coal mine disasters all occurred in nonunion mines, taking the lives of 52 miners. Perhaps differing presidential philosophies about health and safety regulation has affected coal mine safety enforcement and lax enforcement has resulted in more fatalities. The regulatory context of coal mine safety and a comparison of regulatory philosophies naturally lead us to two fundamental questions: What role, if any, should the law play in regulating coal mining safety? If the law has a role to play, what remedies or sanctions, if any, should the law mandate?

Whether the law should play a regulatory role in mine safety is not solely a legal question. To evaluate that question properly it is necessary to bring to bear the expert knowledge of lawyers, economists, and policy makers to evaluate the extent to which safety regulations in fact make the workplace safer. Such experts must also determine the extent to which the free market provides sufficient incentives to encourage mine safety. Few adhere to the extreme view that mine safety regulation should be entirely repealed. But those who do advocate that position believe that the free market will drive unsafe mines out of business.
By contrast, those who favor regulation point to market failures driven in part by imperfect information or inequality of bargaining power between the coal miners and their employers. More fundamentally, those who favor mine safety regulation believe that it is the moral obligation of our legislature to enact laws to protect workers.

Assuming a regulatory scheme is appropriate, one might ask whether current enforcement measures are sufficient. Are fines adequate or should criminal sanctions including imprisonment be imposed for willful violation of federal or state safety standards? In fact, the Mine Act of 1977 provides for criminal sanctions but regulators do not systematically impose such penalties. Perhaps less obviously, we must ask whether Congress is properly funding administrative agencies charged with inspecting mines. Some have asked whether those government officials charged with miner safety are neutral proponents of safety or whether they merely represent the interests of former clients. Others argue that decreasing union density in coal mines contributes to lax safety enforcement.

Assuming there is a role for law—to combat market failure, to fulfill a perceived human-rights goal of creating some floor of employee safety rights, or to achieve a combination of those economic and social goals—one must reevaluate what we need to regulate and whether some current regulatory approaches should be discarded for new initiatives.

To answer these questions, it is necessary for Congress to hear from the various constituents, labor officials and industry representatives, who, because of their experience in working in and operating mines, can identify some of the things that we need to regulate. For example, according to the Sago Report, several technological failures likely led to the Sago disaster. The Omega block seals failed. Communications systems failed.

Conclusion
Coal mining is an important industry for our nation and the global economy. Although coal mining is safer here than it is in most other countries, Appalachian miners seem to be at higher risk than miners in other areas of the country. Given this disproportionate burden borne by some of our poorest citizens, it seems reasonable to engage in some creative thinking to improve safety.
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### Schedule at a Glance

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<td>Registration and Continental Breakfast</td>
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<td>Fallout from 2010 Census: Redrawing District Lines</td>
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<td><strong>12:00 pm–2:00 pm</strong></td>
<td>Section of Administrative Law Awards Luncheon Keynote Address: Securities and Exchange Commission, Awards Presentation</td>
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<td>Campaign Finance Reform</td>
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<td>Impact of Immigration Law: What Every Lawyer Should Know Part II</td>
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<td>Section of Administrative Law and Regulatory Practice Reception and Dinner Keynote Address: Bob Bauer, Counsel, The White House Awards Presentation of Section Fellow and Senior Fellows</td>
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<td><strong>10:30 am–12:00 pm</strong></td>
<td>Annual Developments in Administrative Law and Regulatory Practice</td>
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<td><strong>12:15 pm–1:45 pm</strong></td>
<td>Luncheon Address Featured Speaker: Ken Feinberg, Administrator, Gulf Coast Oil Spill Compensation Fund</td>
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<td><strong>2:00 pm–3:15 pm</strong></td>
<td>Legislative and Regulatory Responses to Environmental Disasters</td>
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<td>FOIA &amp; The New Transparency</td>
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ABA Section of Administrative Law and Regulatory Practice

2010 Administrative Law Conference
November 4-5, 2010
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MEGHAN KEIVEL- 202-662-1582, keivelm@staff.abanet.org, fax: 202-662-1529

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**TOTAL MEAL TICKETS **

**TOTAL PROGRAM AND MEAL FEES $**

Payment by check or credit card is required at time of registration. Make checks payable to the American Bar Association. Return this form by email: keivelm@staff.abanet.org or fax: 202-662-1529 or mail: Meghan Keivel, ABA Section of Administrative Law, 740 15th St, NW, Washington, DC 20005. Cancellations are permitted until October 15, 2010, less a $50 fee. Substitutions are permitted. All cancellations or substitutions must be by email to keivelm@staff.abanet.org or fax to 202-662-1529.

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Standing: At Trial and on Appeal

By Robin Kundis Craig*

Environmental cases have long been a substantial source of the Supreme Court’s standing jurisprudence, and the past term was no different. In Monsanto Co. v. Geerston Seed Farms, — U.S. —, 130 S. Ct. 2743 (June 21, 2010), the Court found, 7 or 8 to 0 (Justice Stevens dissented on the merits, not on standing, but did not comment on standing; Justice Breyer did not participate), both that the environmental plaintiffs had standing to bring the case and that Monsanto had standing to bring its appeal.

In Monsanto, conventional alfalfa growers and environmental groups challenged the decision of the Animal and Plant Health Inspection Services (APHIS, a division of the U.S. Department of Agriculture) to de-regulate Monsanto’s Roundup Ready Alfalfa (RRA), a genetically engineered plant, claiming that APHIS made the decision to de-regulate before preparing an Environmental Impact Statement (EIS) as required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332. Monsanto lost below, but the district court vacated APHIS’s regulatory decision and enjoined all future planting of RRA. Monsanto challenged the injunction but not the vacatur. Both sides’ standing were at issue in the Supreme Court.

The petitioners (Monsanto and the federal government) argued that the respondents (conventional alfalfa farmers and environmental groups) lacked standing to seek injunctive relief, characterizing their alleged injuries-in-fact as mere risks—specifically, the risk that the RRA would escape into the environment and into the conventional alfalfa crops, contaminating them. The Court, however, disagreed, focusing on the conventional and organic alfalfa farmers. The district court, it noted, concluded that the farmers had established a “reasonable probability” that their crops would be contaminated by the RRA and its Roundup-ready genes. That probability, moreover, meant that the farmers would have to immediately implement testing and prevention measures to ensure that they could keep marketing even non-contaminated alfalfa to their customers. Id. at 2754-55. These injuries were sufficient to create standing:

Such harms, which respondents will suffer even if their crops are not actually infected with the Roundup ready gene, are sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis. Those harms are readily attributable to APHIS’s deregulation decision,

which, as the District Court found, gives rise to a significant risk of gene flow to non-genetically-engineered varieties of alfalfa. Finally, a judicial order prohibiting the growth and sale of all or some genetically engineered alfalfa would remedy respondents’ injuries by eliminating or minimizing the risk of gene flow to conventional and organic alfalfa crops. We therefore conclude that respondents have constitutional standing to seek injunctive relief from the complete deregulation order at issue here.

Id. at 2755.

Respondents, however, also argued that Monsanto lacked standing to bring its appeal because Monsanto had not challenged the district court’s vacatur of APHIS’s decision to de-regulate RRA. The Court first noted that Monsanto’s standing under ordinary circumstances would be relatively obvious:

Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling. Petitioners here satisfy all three criteria. Petitioners are injured by their inability to sell or license RRA to prospective customers until such time as APHIS completes the required EIS. Because that injury is caused by the very remedial order that petitioners challenge on appeal, it would be redressed by a favorable ruling from this Court.

Id. at 2752 (citation omitted). It then indicated that the failure to challenge the vacatur did not substantially change the standing analysis. “First, although petitioners did not challenge the vacatur directly, they adequately preserved their objection that the vacated deregulation decision should have been replaced by APHIS’s proposed injunction.” Id. at 2753.

Second, the district court had enjoined APHIS from granting even partial de-regulation until it completed the EIS, not just the further planting of RRA. As a result, Monsanto had standing at least to appeal that part of the injunction. Id. at 2753-54.

Separation of Powers, the Appointments Clause, and Statutory Review

The Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7201-7266, created the Public Company Accounting Oversight Board to enforce the Act’s provisions. Id. § 7211. The Board consists of five members who are appointed by the Securities & Exchange Commission (SEC). Moreover, the SEC retains significant oversight authority over the Board. For example, the SEC has the authority to remove Board members, but can do so only “for good cause shown” after a formal adjudication. Id. § 7211(c)(6). In addition, the Act empowers the SEC to review any Board rule or sanction; it is the Commis-

* Attorneys’ Title Professor of Law and Associate Dean for Environmental Programs, Florida State University College of Law; and Contributing Editor Administrative & Regulatory Law News. The author may be reached at rcraig@law.fsu.edu.
concluded that it had jurisdiction to review the constitutionality of the Act, despite the statutory scheme of review in the U.S. Constitution. The United States countered, among other things, that the courts could not hear the challenged to the SEC.

A divided Supreme Court determined, 5-4, that the Act violates separation of powers principles and the Appointments Clause. Free Enter. Fund v. Public Co. Accounting Oversight Bd., ___ U.S. ___, 130 S. Ct. 3138, 3147, 3151 (June 28, 2010). Writing for the majority, Chief Justice Roberts first addressed the jurisdictional issue. Like both courts below, the Court concluded that it had jurisdiction to review the constitutionality of the Act, despite the statutory scheme of review in the SEC. Id. at 3850. According to the Court:

Provisions for agency review do not restrict judicial review unless the “statutory scheme” displays a “fairly discernible” intent to limit jurisdiction, and the claims at issue “are of the type Congress intended to be reviewed within th[e] statutory structure.” Generally, when Congress creates procedures “designed to permit agency expertise to be brought to bear on particular problems,” those procedures “are to be exclusive.” But we presume that Congress does not intend to limit jurisdiction if “a finding of preclusion could foreclose all meaningful judicial review”; if the suit is “wholly collateral to a statute’s review provisions”; and if the claims are “outside the agency’s expertise.” These considerations point against any limitation on review here.

We do not see how petitioners could meaningfully pursue their constitutional claims under the Government’s theory.

Id. (quoting Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207, 212-13 (1994), and Whitnet Nat’l Bank in Jefferson Parish v, Bank of New Orleans & Trust Co., 379 U.S. 411, 420 (1965)). Thus, even in situations of administrative agency review, the Court preserved a presumption that constitutional challenges can get to federal court.

On the merits, the Court framed the issue to be: “May the President be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States?” Id. at 3147. It affirmed that, in general, “the executive power included a power to oversee executive officers through removal” and hence that the President retains the authority to remove principal officers of the United States. Id. at 3152. The Court then distinguished the Act’s removal procedures from other removal procedures even as it acknowledged that it had previously upheld limited restrictions on the President’s removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President—or a subordinate he could remove at will—who decided whether the officer’s conduct merited removal under the good-cause standard.

The Act before us does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President’s direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.

Id. at 3153. As a result, the Court concluded, the removal arrangement violated separation-of-powers principles by infringing on the President’s Article II duties and authorities:

This novel structure does not merely add to the Board’s independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.

Id. at 3154.

Otherwise, however, the challengers’ Appointments Clause arguments failed. First, the majority concluded that Board members are not “principal officers” who must be appointed by the President with the advice and consent of the Senate: because, with the removal of the “good cause” requirement, the SEC can now remove Board members at will, and because the Board is subject to SEC oversight, the Board members are “inferior officers.” Id. at 3162. Second, the SEC was a proper body under the Appointments Clause to appoint those officers: “Because the Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a ‘Department’ for the purposes of the Appointments Clause.” Id. at 3163. Finally, the entire Commission, not just its Chairperson, constituted the “head” of the department for Appointments Clause purposes. Id. at 3163-64.

continued on next page
Justice Breyer dissented, joined by Justices Stevens, Ginsburg, and Sotomayor. The dissenters agreed with the majority that Board members are inferior officers. However, in their view, the Act did not so interfere with presidential duties as to violate separation-of-powers principles, while “the Court’s contrary holding threatens to disrupt severely the fair and efficient administration of the laws.” Id. at 3164-65 (Breyer, J. dissenting).

Quorum for Agency Decisionmaking

In 1947, the Taft-Hartley Act amended the National Labor Relations Act to increase membership on the National Labor Relations Board from three to five members. At the same time, the Act established that three members constitute a quorum and that the Board could delegate its authority to groups of at least three members. In New Process Steel, L.P. v. National Labor Relations Board, — U.S. ——, 130 S. Ct. 2635 (June 17, 2010), the question for the Supreme Court was “whether, following a delegation of the Board’s powers to a three-member group, two members may continue to exercise delegated authority once the group’s (and the Board’s) membership falls to two.” Id. at 2638. In a 5-4 decision authored by Justice Stevens, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito, the Court concluded that the remaining two members could not exercise any such authority. Id.

According to the majority, “[f]irst, and most fundamentally, reading the delegation clause to require that the Board’s delegated power be vested continuously in a group of three members is the only way to harmonize and give meaningful effect to all of the provisions” in the Board’s quorum statute. Id. at 2640. “Second, and relatedly, if Congress had intended to authorize two members alone to act for the Board on an ongoing basis, it could have said so in straightforward language.” Id. at 2641. “In sum, a straightforward understanding of the text, which requires that no fewer than three members be vested with the Board’s full authority, coupled with the Board’s longstanding practice, points us toward an interpretation of the delegation clause that requires a delegate group to maintain a membership of three.”

Justice Kennedy, joined by Justices Ginsburg, Breyer, and Sotomayor, dissented, offering both pragmatic and “plain meaning” justifications. Specifically:

As of the day this case was argued before the Court, the National Labor Relations Board (Board), constituted as a five-member board, had operated with but two members for more than 26 months. That state of affairs, to say the least, was not ideal. This may be an underlying reason for the Court’s conclusion. Despite the fact that the statute’s plain terms permit a two-member quorum of a properly designated three-member group to issue orders, the Court holds that the two-member quorum lost all authority to act once the third member left the Board. Under the Court’s holding, the Board was unauthorized to resolve the more than 500 cases it addressed during those 26 months in the course of carrying out its responsibility “to remove obstructions to the free flow of commerce” through “the promotion of industrial peace.” This result is removed even farther from the ideal and from congressional intent, as revealed in the statutory design. So it is hard to make the case that the Court’s interpretation of the statute either furthers its most evident purposes or leads to the more sensible outcome.

Id. at 2645 (Kennedy, J., dissenting).

Equal Access to Justice Act Attorney Fee Awards

The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), allows the “prevailing party” in a suit against the federal government to recover attorney fees. In Astrue v. Ratliff, — U.S. ——, 130 S. Ct. 2521 (June 14, 2010), the Supreme Court had to decide whether this language allowed the federal courts to offset an EAJA award in one case by a preexisting debt that the client owed the federal government. Resolving a circuit split, the Court unanimously held that such offsets were permissible. According to the Court, “prevailing party” is a term of art and refers to the prevailing litigant. Id. at 2525. As such, when a Social Security claimant prevailed in her claim against the Social Security Administration but owed money to the federal government, the attorney fee award could be offset by that debt.

Unusually, Justice Sotomayor, joined by Justices Stevens and Ginsburg, concurred to acknowledge that the plain meaning textual analysis was accurate but nevertheless almost certainly violated congressional intent. Allowing such offsets, they noted, undermined the purposes of EAJA attorney fee awards. Id. at 2530 (Sotomayor, J., concurring).

Statutory Interpretation: Canons and Presumptions

The Supreme Court provided several guidelines this term for the construction of federal statutes. First, the Court emphasized that Congress’s language controls; “[i]t is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.” Lewis v. City of Chicago, Ill., — U.S. ——, 130 S. Ct. 2191, 2200 (May 24, 2010); see also Hui v. Castaneda, — U.S. ——, 130 S. Ct. 1845, 1855 (May 3, 2010) (“We are required, however, to read the statute according to its text.”) As a result, even in patent law, statutory language is given is ordinary, common, and contemporary meaning, unless Congress defines a term differently. Bilski v. Kappos, — U.S. ——, 130 S.
D.C. Cir. – CERCLA UAO Procedures and EPA Practice Satisfy Due Process

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authorizes the Environmental Protection Agency (EPA) to issue “unilateral administrative orders” (UAOs) directing companies to clean up hazardous substances for which they are responsible. These orders are one of four options EPA may choose in pursuing such a clean-up. The others involve negotiating a settlement with the responsible companies, EPA's cleaning up the mess and seeking reimbursement, and suing the companies to compel clean-up. To issue a UAO, EPA must determine that the mess may pose “an imminent and substantial endangerment to the public health or welfare or the environment.” EPA must compile an administrative record, allow others to participate in development of the record, hold a public meeting, and respond to comments.

The target of a UAO has two options: (1) comply and seek reimbursement as appropriate, or (2) refuse to comply, forcing EPA to institute enforcement action. When EPA sue to enforce a UAO, the target company is subject to possible fines of $37,000 per day of noncompliance if the court finds the company “willfully” failed to comply with a UAO “without sufficient cause.” Or EPA may clean up the mess itself and sue the company, in which case the company is liable for three times the costs incurred by EPA. These are the only ways a company may obtain judicial review of a UAO.

GE challenged EPA’s issuance of a UAO as a violation of due process, arguing under Ex Parte Young, 209 U.S. 123 (1908), that the fines for noncompliance were so severe that the company had no choice but to comply prior to having its arguments heard by a neutral decision maker. In General Electric Co. v. Jackson, 2010 WL 2572955 (D.C. Cir. 2010), the D.C. Circuit rejected GE’s facial invalidity argument on two grounds. First, the Supreme Court has held that a statutory scheme of this nature may satisfy due process if the fines are subject to a “good faith” or “reasonable grounds” defense. Moreover, there is no due process violation if the fines are subject to judicial discretion. Both are true of CERCLA, under which such penalties apply to willful violations, and the court determines in its discretion whether the fines are appropriate.

The court reached the due process claim because, as a threshold matter, GE had established that the scheme threatened to take its property through the imposition of fines. GE also argued that it had a property interest in its “stock price, brand value, and cost of financing,” all of which it said were adversely affected by EPA’s issuance of the UAO. The court rejected this assertion on the ground that no independent source in state law supported GE’s right to particular stock prices, brand value, or cost of financing. To GE’s assertion that these constituted “consequential impacts” recognized by the Supreme Court, the D.C. Circuit replied that the Court had considered such impacts in liberty interest analyses under Mathews v. Eldridge, not in determining the existence of a protected property interest.

Moreover, the claim that the issuance of a UAO affects such interests is comparable to the claim, rejected in Paul v. Davis, that the mere effect on reputation violates a protected liberty interest. Rather, the issuance of a UAO is comparable to the filing of a lis pendens, which can similarly affect a party’s financial condition.

In addition to its facial claim to the UAO scheme, GE asserted that EPA’s pattern and practice of implementing the scheme violated due process. This claim, however, essentially depended upon the alleged adverse effects on GE’s stock price, brand value, and credit rating, but those did not constitute protected property interests for the reason addressed above.

6th Circuit Splits on Zoning Change Due Process

At some point in a developer’s struggle with zoning requirements and applications for permits, the developer’s right to a certain designation (and package of building rights) becomes “vested” such that it is a protected property interest for purposes of the due process clause. In Wedgewood v. Township of Liberty, 2010 WL 2583410 (6th Cir. 2010), the Sixth Circuit, over a dissent (and seemingly contrary to established principle), decided that the locality’s failure to follow state procedural requirements had resulted in a denial of due process even though the developer had not yet filed the applications that normally result in vesting.

In 1991, Liberty Township had approved a Planned Unit Development (PUD), and in 1992 the Township had authorized 220,857 sq. ft. of commercial development in area 3 of the PUD and a total of 499,930 sq. ft. of commercial development in areas 3, 8, and 9. While those areas apparently remained untouched, by 2003 owners of other areas of the PUD had obtained approvals and permits and had actually constructed 390,611 sq. ft. of commercial space.

Then the Wal-Mart rumors started. Turned out they were true. First the developer was denied a variance to authorize more square footage than had previously been approved for area 3. Then the Township Trustees issued new “Instructions” to the Zoning Department, to the effect that its 1992 decision had effectively created a “floating zone” with a maximum of 500,000 sq. ft. of commercial space in the Westwood Commerce Center. By 2004, however, approvals for areas 4, 5, 6, and 10 had used up most of the allowable area.

Six months later, the developer filed an application for a permit to build a smaller Wal-Mart that would not have exceeded the square footage that had been approved in 1992 for area 3. The zoning commission denied this application under the “Instructions.”

continued on next page

C. Blake McDowell Professor of Law; The University of Akron School of Law; Chair Publications Committee; and Contributing Editor Administrative & Regulatory Law News.
rights when it issued the Instructions. T ownship could not have violated the developer's due process for the proposition that the Township had violated Ohio law in using the Instructions to amend the original plan.

The Township denied that it had amended the original plan, but the courts found that the Instructions constituted an amendment to what the Township had originally intended. So the issue became whether the developer had a protected property interest such that the due process had required the Township to provide notice and some sort of hearing when it issued the Instructions.

The majority characterized the question as whether the “Zoning Commission had the authority under Ohio law to take the action that it did,” citing Stile v. Copley Township, 115 F. Supp. 2d 854 (N.D. Ohio 2000), in which a change of a PUD classification had been held to violate due process where the Zoning Commission had failed to follow Ohio procedural requirements. Thus, the failure to follow Ohio’s statutory notice requirement in amending the original zoning plan resulted in a violation of the developer's due process rights.

Chief Judge James Carr of the Northern District of Ohio, sitting by designation, dissented. He relied upon two propositions. First, Ohio law is clear in holding that the right to an existing zoning classification vests upon the filing of the permit application. Second, while substantive state law limiting government discretion may give rise to a protected property interest, “state procedural requirements cannot be the types of ‘limits on discretion’ that are sufficient to find a property interest.” This case involved the violation of a procedural right, so the developer could not have had a vested interest until it filed its permit application in 2004, after issuance of the Instructions. Thus, the Township could not have violated the developer's due process rights when it issued the Instructions.

D.C. Circuit – Adult Stem Cell Researchers Have “Competitor Standing” to Challenge Embryonic Stem Cell Grant Guidelines

An applicant for federal grants has competitor standing to the same extent as a business competitor. Despite HHS efforts to complicate the analysis, the essential question is whether government has taken “a step that benefits his rival and therefore injures him economically.” While “the complainant [must] show an actual or imminent increase in competition,” it need not demonstrate that the agency action will “almost certainly cause [him] to lose business.” So held the D.C. Circuit in Sherley v. Sebelius, 2010 WL 2540358 (D.C. Cir. 2010), in recognizing the standing of adult stem cell researchers to challenge NIH guidelines governing grants to researchers examining embryonic stem cells.

NIH had supported adult stem cell research (ASC) for many years when, in 2009, President Obama lifted President Bush’s restrictions on embryonic stem cell (ESC) research and ordered NIH to issue guidelines to govern applications for grants to support such research. Adult stem cell researchers sued, arguing that the action violated the Dickey-Wicker amendment, which prohibits federal funds from supporting research in which a human embryo will be harmed or destroyed.

The district court denied standing, however, asserting that: (1) competitor standing may arise “only when the ‘particular statutory provision ... invoked’ reflects a purpose ‘to protect a competitive interest’”; (2) “competitor standing applies [only] to participants in ‘strictly regulated economic markets’”; and (3) applications for NIH grants were already so competitive that “the additional competition made possible by the Guidelines would not ‘almost surely cause [them] to lose’ funding.”

The D.C. Circuit disagreed on all counts. (1) There is no need to show a particular statutory provision intended to protect a competitive interest. Such a requirement would go to the merits. (2) The competitor standing doctrine is not limited to “strictly regulated markets.” The question is whether the action causes injury in fact. (3) On the facts, it was uncontested that there would be no more money available for a broader range of eligible stem cell research projects, which would increase the already fierce competition.

HHS tried to complicate the analysis by breaking down the stages of the application process to show that the plaintiffs’ applications might not compete with ESC grant requests and that there was no guarantee that an ESC applicant would receive funds that would otherwise have gone to the plaintiffs. No such specificity was required, however. It was enough that the Guidelines would “elicit an increase in the number of grant applications involving ESCs”: “Because the Guidelines have intensified the competition for a share in a fixed amount of money, the plaintiffs will have to invest more time and resources to craft a successful grant application.” Thus, the plaintiffs had demonstrated injury in fact.

As to prudential standing, the plaintiffs argued that they fell within the zone of interests of the Dickey-Wicker amendment to fund only permissible stem cell research, while HHS argued that the amendment reflected “Society’s interest in not funding research in which a human embryo ... is destroyed,” not the financial interests of ASC researchers. In a somewhat odd formulation reflecting its own precedent, the court found prudential standing because the plaintiffs’ interest in preventing NIH from funding such research “is not inconsistent with purposes of the Amendment.”

D.C. Circuit – Executive Order Cannot Revive Judicial Review Provision of Lapsed Statute

The Export Administration Act of 1979 (EAA) was a temporary statute designed to regulate the export of dual-use
items, those with civilian and military uses. Congress periodically extended the statute, but it expired in 2001 and has not yet been reenacted or extended. In 2001, relying on the International Emergency Economic Powers Act (IEEPA), the President issued an Executive Order directing the Department of Commerce to continue enforcing the EAA regulations as if the EAA itself were still in effect.

In 2008, Commerce charged a Macedonian sporting goods and military supply company with violations of the regulations. This resulted in a default judgment, fine, and 5-year loss of export privileges. On the advice of the Department, the company appealed to the D.C. Circuit under an EAA provision that the court “shall have jurisdiction” over challenges to civil penalties. With little help from the parties, the court recognized that it had no statutory basis for jurisdiction. Micei Int’l v. Dep’t of Commerce, 2010 WL 2794295 (D.C. Cir. 2010). The EAA provision had lapsed, the IEEPA had no relevant provision, and the default jurisdiction for review of agency action is in the district court. Jurisdiction also could not arise under the general savings clause, 1 U.S.C. § 109, which treats a lapsed statute as still in effect to sustain proper enforcement actions under the statute. Any such the action must have been initiated while the statute was still in effect. This action had been initiated in 2003, two years after statutory lapse.

Commerce had once thought that the President’s order had extended the judicial review provision as well as the substantive provisions of the regulations, but the President has no authority to create jurisdiction. Since Congress had not authorized jurisdiction in the D.C. Circuit and had not delegated to the President the authority to create such jurisdiction, the D.C. Circuit could not consider the matter. It could, however, and did transfer the petition to the district court because the company had acted in good faith reliance upon the advice of the Department of Commerce.

2d Cir. – Interstate Compact Agency Not Federal Agency Under APA1

On June 29, 2010, the Second Circuit decided an interlocutory appeal in New York v. Atlantic States Marine Fisheries Commission, 609 F.3d 524 (2d Cir. 2010), concluding that the Atlantic States Marine Fisheries Commission (ASMFC), which was created by an interstate compact with the consent of Congress, is not a federal agency within the meaning of the federal APA.

The State of New York filed suit against the U.S. Department of Commerce contending that the final management rule for the 2008 recreational summer flounder fishery violated federal law and the federal APA. Three trade associations moved to intervene, including United Boatmen of New York, Inc. United Boatmen also moved to join ASMFC as a defendant, alleging jurisdiction under § 702 of the APA to review ASMFC’s adoption of the underlying fishery management plan at issue in the original action against the Department of Commerce.

The District Court granted intervention and joiner, and ASMFC moved to dismiss. The District Court denied the motion to dismiss, concluding that ASMFC is a “quasi-federal agency”, that is, the character of this compact agency is federal enough to make this compact agency amenable to suit under the federal APA. ASMFC appealed to the Second Circuit, which concluded that the ASMFC is not an agency as defined by the federal APA, and that the “quasi-federal” agency doctrine embraced by some district courts should not be used to expand the statutory definition of agency under the federal APA.

The court considered several factors in determining whether ASMFC was an agency subject to the federal APA. It started by noting precedent holding that the statutory definition of the term “agency” excludes unstated meanings of that term. Because interstate compact agencies are not listed, they are excluded. Next, the court concluded that the definition should not be expanded because it states what the term “means,” which is different than if the definition were to state that term “includes” various governmental authorities. Finally, the court concluded that even though interstate compacts are subject to congressional approval under the Constitution, “the entity is itself an aggregation of states,” and that “[w]hile an interstate compact or agreement becomes federal law if it is a congressionally sanctioned interstate compact within the meaning of the Compact Clause of the Constitution, it does not follow that the Commission is a federal agency.” (citation omitted).

The court then turned to the question of whether ASMFC is a “quasi-federal” agency. The court first observed that although other circuit courts had considered the issue, none had fully embraced the doctrine in a published decision. It went further, however, to express skepticism about the validity of the “quasi-federal” agency doctrine, explaining that there will always be federal involvement in a congressional sanctioned compact, that finding ASMFC to be a “quasi-federal” agency would be in tension with the text of the compact as a contractual agreement between the member states, and that Congress chose to endorse the ASMFC rather than preempt the area by creating an actual federal agency. Ultimately, the court concluded, “in the absence of other factors not present in this case, the acts of Congress in approving the interstate compact, in adopting the Atlantic Coastal Fisheries Cooperative Management Act, and in providing funding to the Commission, did not transmogrify the ASMFC into a ‘quasi-federal’ agency.”

While this reasoning related to compacts may be sound, the decision seems to significantly limit opportunities for judicial review of ASMFC fishery management plans prior to state implementation.

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1 Submitted by Jeffrey B. Litwak, Visiting Professor, Lewis and Clark Law School; Counsel, Columbia River Gorge Commission; and Section Council Member.
The Section of Administrative Law and Regulatory Practice has selected Karen V. Clopton, Chief Administrative Law Judge of the California Public Utilities Commission (CPUC), to receive the 2010 Mary C. Lawton Outstanding Government Service Award.

The award is presented annually to a government lawyer whose outstanding contributions to the development, implementation, or improvement of administrative law and regulatory practice reflect sustained excellence in performance. Judge Clopton’s career clearly meets that test.

She began her legal career at the National Labor Relations Board in 1983 and served in various capacities at that agency until 1990, when she began a 10-year stint in private practice litigating labor law and employment law cases.

She was appointed to the San Francisco Civil Service Commission in 1993 and re-appointed in 1999. During her tenure as Commissioner she streamlined the classification system and personal services contracting process and improved the civil service merit examination system. At the same time, Judge Clopton also served on San Francisco Mayor Frank Jordan’s Advisory Employee Relations Panel from 1992-94.

Judge Clopton left private practice in 2000 to become the first Chief of Operations for the Port of San Francisco. In 2002, she left the Port to become the first Chief of Operations and Corporate Counsel for the San Francisco State University Foundation, Inc., the University’s financial support arm. She continued in that capacity until 2006.

Judge Clopton was appointed General Counsel for the California Department of Corporations (DOC) in 2007 by Governor Arnold Schwarzenegger. While at DOC, she oversaw all litigation; reviewed all Office of Administrative Hearings decisions; reviewed and implemented all DOC employment policies and procedures; and served as liaison with the Governor’s legal staff and other governmental agencies.

In 2009, Judge Clopton became the first African American appointed Chief Administrative Law Judge for the CPUC. As Chief Judge, she manages the Administrative Law Judge Division, consisting of over 100 employees, including 40 judges, and is credited with helping to make the CPUC more accessible to the public, more transparent, and more efficient. She also currently serves on the National Association of Regulatory Utility Commissioners’ Staff Subcommittee on Administrative Law Judges.

The award will be presented to Judge Clopton on November 4, 2010, at the Section’s upcoming Administrative Law Conference.

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Second, canons of construction like noscitur a sociis cannot modify the meaning of a statutorily defined term. Id.; see also Schwab v. Reilly, —— U.S. ——, 130 S. Ct. 2433, 2453 (June 21, 2010) (“Although we may look to dictionaries and the Bankruptcy Rules to determine the meaning of words the Code does not define, the Code’s definition of the ‘property claimed as exempt’ in this case is clear.”) (citation omitted).

Third, “the canon against interpreting any statutory provision in a manner that would render another provision superfluous” remains in full force and “applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times.” Bilski, 130 S. Ct. at 3228–29 (citations omitted). Moreover, “[i]f [this] established rule of statutory interpretation cannot be overcome by judicial speculation as to the subjective intent of various legislators in enacting the subsequent provision,” Id. at 3229.

Fourth, relatedly, “[w]here the text permits, congressional enactments should be construed to be consistent with one another.” Kawasaki Kisen Kaisha Ltd v. Regal Beloit Corp., —— U.S. ——, 130 S. Ct. 2433, 2447 (June 21, 2010).

Fifth, the presumption against the extraterritorial application of U.S. laws is a canon of construction that applies in all cases, regardless of whether there is a risk of conflict between the American statute and a foreign law.” Morrison v. National Australia Bank, Ltd., —— U.S. ——, 130 S. Ct. 2869, 2877–78 (June 24, 2010). Thus, “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.” Id. at 2878.
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The field of administrative law and regulation is as broad and as varied as the operations of government. Some regulatory practice areas are necessarily more specialized (e.g., banking, communications, food and drug, securities, and transportation). On the other hand, many procedural issues of great interest to administrative lawyers cut across all or most agencies (e.g., adjudication, rulemaking, judicial review, and constitutional separation of powers).

*Developments in Administrative Law and Regulatory Practice, 2008–2009* is the eleventh book in the annual series. It describes and analyzes current developments in administrative law and regulatory practice, both by process (e.g., judicial review and rulemaking), and by substantive areas (i.e., particular areas of practice). It provides a ready reference source for practitioners, judges, and academics on significant events within administrative law. As an annual publication, it also provides a historical chronicle of changes in administrative law and regulatory practice.