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It is said that good things come in threes. One can concoct theories for why people might think this is true—it could reflect Christian trinitarianism, or the existence of three dominant monotheistic religions, or the mystical appeal of the pyramid. But it’s hard to know why it actually would be true. To be sure, some good things come in threes—my three children come to mind (at least, to my mind). Or, to use a less parochial and more Section-relevant example, the three branches of government, which one sees on the Section’s logo. But some not so good things come in threes as well. Blind mice, for example.

Here then, to mark the start of my term, are a good set of threes and a troublesome set—three things that delight me as Section chair and three things that worry me.

What delights me are the fundamental strengths of this Section. There are many, and different members will value different aspects of what the Section offers. But here are three I particularly value:

• **The opportunity to learn.** I have never come to a Section program, meeting, or even social gathering without learning something. There are so many knowledgeable people in our midst. Importantly, our section boasts a balanced mix of private practitioners, government lawyers, and academics that is rare if not unique among ABA sections. One learns most by crossing paths with people who care about the same things, but have different expertise, background, and perspective.

• **The nonpartisanship.** Ours is a fractious and divided age, and a fractious and divided profession, in which political disagreements feel ever more corrosive and disheartening. Relatively speaking, however, our section has avoided partisan struggles. I’d like to think this reflects the fact that our members are people of good will, civility, and maturity. That is undoubtedly true, but we also benefit from the nature of the field. The fact that administrative law is not partisan. And we are. But there have been a few cracks. A partisan divide characterizes and to some extent paralyzes debate outside the section over, say, the REINS Act or proposals to make rulemaking more formal. This reflects an awareness on both sides of the substantive consequences of what are on their face policy-neutral, procedural proposals. Such disagreement can be avoided by fleeing to the highest level of meaningless abstraction. (ABA resolutions often reflect this tactic.) I would rather that we avoid it through serious, open-minded discussion. Whether one thinks agencies should do a lot or a little, we can all agree that whatever they do they should do well. And we can substantially agree on what that means.

• **The level of engagement.** The Section has historically made, and continues to make, an important contribution to the profession and to the improvement of governance in this country. An awful lot of people devote an awful lot of time to Section projects. Other than our three stellar full-time staff members, they all do it without pay. Why? Of course there are important indirect professional benefits. But the main reason is that they realize that this is a meaningful form of service.

So, with those strengths, what could there be to worry about? Well, at least these three challenges, which are interrelated and to a large extent correspond to the strengths:

• **Providing value for members in the world of the Internet.** Much of the value that this and other sections have historically provided their members has been in the form of professionally useful information, conveyed in publications (like this one) but also through casual in-person conversations. In the era of agency websites, open government, blogs, listservs, on-line access to law reviews, and so on, much of what was available to members—only by virtue of their membership, through publications and even conversations, is now available to everyone on the Internet. To stay relevant and useful, our section and the ABA as a whole must focus on exactly how we can effectively serve our members.

• **Declining membership.** In recent years, our section has undergone a disconcerting contraction. It has done so, I hasten to add, right along with the ABA itself. This is not a section-specific challenge. But increasing membership is vital to the section’s vibrancy, relevance, and success. I am delighted that immediate past chair Jon Rusch will bring his considerable skills and dedication to the position of chair of our Membership Committee this year.

• **Elusive consensus.** I know, I know, I just said we are nonpartisan. And we are. But there have been a few cracks. A partisan divide characterizes and to some extent paralyzes debate outside the section over, say, the REINS Act or proposals to make rulemaking more formal. This reflects an awareness on both sides of the substantive consequences of what are on their face policy-neutral, procedural proposals. Such disagreement can be avoided by fleeing to the highest level of meaningless abstraction. (ABA resolutions often reflect this tactic.) I would rather that we avoid it through serious, open-minded discussion. Whether one thinks agencies should do a lot or a little, we can all agree that whatever they do they should do well. And we can substantially agree on what that means.

That list of strengths and concerns is, of course, incomplete. But however long you make either list, the strengths hugely outweigh the concerns. I begin my year as chair of the Section with tremendous optimism for what we can achieve. I look forward to working with the section leadership and all interested members to advance our field and our profession, to bring value to our members, and to improve the functioning of our government. That sounds grandiose, but it is exactly what the Section has always done, and it is what the Section will continue to do on my watch.
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Administrative & Regulatory Law News

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The Administrative & Regulatory Law News (ISSN 1544–1547) is published quarterly by the Section of Administrative Law & Regulatory Practice of the American Bar Association to provide information on developments pertaining to administrative and regulatory law and policy, Section news, and other information of professional interest to Section members and other readers.

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

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Nonmembers of the Section may subscribe to this publication for $28.00 per year or may obtain back issues for $7.00 per copy. To order, contact the ABA Service Center, 321 North Clark Street, Chicago, IL 60610, Tel. 800/285–2221.

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Administrative and Regulatory Law News
Among the most important issues for American national security is the national response to the growing threat from cyber activities. This threat is both ubiquitous and potentially catastrophic. It forces the United States, and the entire world, to reevaluate the way in which nations think of both national security and the concept of armed conflict. To combat this threat, President Obama must refocus America’s attention, by both reallocating the primary governmental responsibility for cyber security from the Department of Homeland Security (DHS) to the Department of Defense (DoD) and overhauling the public-private partnership that he has made a key component of his cyber strategy.

President Obama’s Cyber Emphasis

Beginning with President Clinton in 1996 and continuing through President George W. Bush to President Obama, the Executive Branch has taken the lead on securing the nation from cyber threats but has focused its efforts mainly on government computers and systems. Shortly after entering office, President Obama embarked on a potentially new and expanded view when he called for a complete review of government cyber policies and practices. The report was published several months later.¹ In response to the findings and recommendations of the report, President Obama stated that:

From now on, our digital infrastructure—the networks and computers we depend on every day—will be treated as they should be: as a strategic national asset. Protecting this infrastructure will be a national security priority. We will ensure that these networks are secure, trustworthy, and resilient. We will deter, prevent, detect, and defend against attacks and recover quickly from any disruptions or damage.²

President Obama’s expanded vision of what the focus of governmental concern should be is undoubtedly correct in that it reflects the reality of today’s national security threats. But even this vision is mired in a parochial and anachronistic view of the changing world and its impact on national security.

Changing Threats, Enemies, and Targets

The nature of the changing cyber threat is clearly demonstrated by recent budget decisions in the United Kingdom. During a time of significantly reduced budgets, the UK opted to forgo the production of aircraft for their aircraft carriers and allocate those resources to expanding and maintaining its cyber defenses. The UK is not alone in such decisions. For nations and their leaders, including President Obama, this worldwide attention to the cyber operations reflects a recognition that the types of threats to a nation are changing. The pervasive nature of the Internet and the increased capability it provides is accompanied by increased risks to nations and users. The Stuxnet malware demonstrates the possibility of a debilitating cyber attack coming from any one of a broad range of actors including other nations, criminal business networks, transnational terrorist organizations, citizen activist groups, flash mobs of like-minded individuals across transnational borders, recreational hackers, and individuals. A new era of threats is emerging and will force the world to look at national security from a different and expanded perspective. President Obama must expand his view to a more holistic approach and be prepared to respond with national power to threats that come from any source.

In addition to expanding views of who may be a national security threat, new considerations as to who or what may be targeted in a cyber attack are also challenging traditional notions of national security. Under current international law, actions that have severe economic effects but do not involve kinetic force do not qualify as a “use of force” that is prohibited by the United Nations Charter. Yet in today’s world, surely a cyber operation that destroys confidence in the stock markets of a nation should be seen as a national security threat. The entire international community, and certainly the United States, must adjust how it views an illegal “use of force,” recognize that cyber attacks on economic and other similar targets are a potentially debilitating use of force, and commit itself to protection of these assets.

Public-Private Partnership

One of the key findings and recommendations of the Cyberspace Policy Review concerns cooperation between the private and public sector. The report argues that the protection of critical infrastructures, including banking and financial systems, from armed attack is a core responsibility of the federal government. However, in connection with the public-private partnership issue, President Obama stated,

Let me also be clear about what we will not do. Our pursuit of cybersecurity will not—I repeat, will not include—monitoring private sector networks or Internet traffic. We will

continued on next page

preserve and protect the personal privacy and civil liberties that we cherish as Americans. Indeed, I remain firmly committed to net neutrality so we can keep the Internet as it should be—open and free.3

This statement by President Obama seems to assume that “open and free” also means to some extent unsecure. That need not be the case; indeed, it should not be the case. On the contrary, keeping the Internet “open” is going to be more and more reliant on increased security measures to maintain the functioning of the World Wide Web.

The government’s current approach to public-private partnership is very “hands-off.” Even among key defense industries, “there are no regulatory requirements for conducting formal risk assessments,”4 and U.S. critical infrastructure executives reported the “lowest levels” of government regulation across 14 countries surveyed.5 It appears that the current public-private partnership means that the private sector does what it wants and the government encourages and suggests security measures but provides no regulation or oversight.

President Obama needs to give serious consideration to the current public-private partnership and begin to assert more regulation over security requirements in the private sector, particularly those that support government operability and critical national infrastructure. To accomplish this, the President should ask Congress to legislate standards of cyber security common to all of these private sectors, with government oversight to ensure the standards are met.

Once the standards are in place, the government should create “red teams” to exercise the security measures of the private sector as they do now with respect to the public sector in order to ensure sufficient security. The results of these exercises should be made public in a “name and shame” effort to help the market drive increased security if government regulation proves less than fully adequate. Such steps are necessary to transform the current public-private partnership from a failed attempt at cooperation into an aggressive pillar of national cyber security.

Allocation of Responsibility

One of the other hallmarks of the U.S. Government’s current approach to national cyber security is the designation of DHS as the lead agency to combat cyber threats, with DoD playing a supporting role. Ignoring obvious problems with DHS’s ability to fulfill its responsibilities during the previous administration, President Obama has continued to utilize this approach.

As has been previously discussed, the cyber threat is truly a national security issue and though it threatens the homeland, it can originate from anywhere in the world and defies national borders. Assigning the overall responsibility for cyber security to DHS is parochial and ineffective. Instead, DoD ought to be given the lead and allowed to use its current assets such as the National Security Agency, Cyber Command and other agencies which are already heavily engaged in cyber operations overseas to ensure that the cyber security umbrella adequately protects all U.S. assets throughout the world.

A recent report from the Quadrennial Defense Review Independent Panel agrees. The report states:

In addition, more than 80 percent of the Department’s logistics are transported by private companies; mission-critical systems are designed, built, and often maintained by our defense industrial base. The majority of our military’s requirements are not neatly bounded by the .mil (dot mil) domain; they rely on private sector networks and capabilities. That is why the Panel believes it is vital that the Department of Defense ensure the networks of our private sector partners are secured.


Additionally, President Obama must ensure that the cyber activities of DoD and other government agencies are adequately funded, that research is appropriately encouraged, and that the government has aggressive recruiting and pay structures to attract the very best minds in the area of national cyber security. Some of these measures are in their embryonic stages, but more must be done and done more quickly, as U.S. Deputy Secretary of Defense William Lynn recently wrote in Foreign Affairs:

The United States will lose its advantage in cyberspace if that advantage is predicated on simply amassing trained cyber professionals. The U.S. government, therefore, must confront the cyber defense challenge as it confronts other military challenges: with focus not on numbers but on superior technology and productivity.


Assigning DoD as the single agency responsible for this work and then adequately funding both personnel and research is a vital step in the right direction.

Conclusion

The threat from cyber attacks is certainly among the most important issues for American national security. The changing nature of the threat, the enemy, and the targets make this an issue of urgent and enduring importance. President Obama must focus the full attention and powers of the government on this issue to ensure the safety of the nation. Two important steps that will do much to accomplish this task are the overhaul of the current public-private partnership that he has made a key building block of his cyber strategy and the reallocation of the primary governmental responsibility for cyber security from the Department of Homeland Security to the Department of Defense. The U.S. can either act now with commitment and foresight or wait to do so in the aftermath of a potentially catastrophic cyber attack.
The Homeland Security Deputization Dilemma

By Jon D. Michaels*

In the wake of the 9/11 attacks, the federal government has mobilized its counterterrorism and national security resources. It has done so by hiring legions of new employees, ramping up expenditures, and establishing new monitoring, surveillance, and security programs. States and localities have done their part as well, creating or bolstering their own anti-terror capabilities and partnering with their federal counterparts in a variety of efforts and interventions.

Yet, in many important respects, the frontlines of homeland security are safeguarded as much by the assistance and vigilance of hot dog vendors, FedEx drivers, tech support guys at Circuit City, telecom executives, and even beauty-supply wholesalers as they are by the combined efforts of government law enforcement and intelligence personnel. Indeed, private actors have emerged as unflinching partners in counterterrorism and homeland security operations.

Perhaps unsurprisingly, the government quickly appreciated the potential utility of these private actors and reached out to them in creative ways. Among those effectively deputized are:

The Telecom Industry

Two programs in particular best capture the close working relationship between the government and the telecommunications industry: The first, sometimes referred to as the Terrorist Surveillance Program, enabled the National Security Agency (NSA) to listen in on millions of international telephone conversations and read millions of international e-mail correspondences. (where one of the parties was on U.S. soil) without showing required for a court order. Access of this sort typically requires court authorization as specified in the Foreign Intelligence Surveillance Act. The telecoms’ willingness to facilitate surveillance sans court orders prompted James Risen of the New York Times to describe this new private-public partnership as “open[ing] up America’s domestic telecommunications network to the NSA in unprecedented and deeply troubling new ways, and represent[ing] a radical shift in the accepted policies and practices of the modern U.S. intelligence community.”

The second, the so-called “NSA call-data program,” involved the major telecoms agreeing to provide NSA with stores of electronic and telephonic metadata—e.g., telephone numbers, IP addresses, e-mail accounts, the time of the correspondence, and the physical location of those corresponding. NSA then compiles and analyzes that metadata to discern suspicious patterns of activity.

Parcel Couriers

Prior to 9/11, FedEx steadfastly refused law-enforcement requests for assistance. Corporate policy changed dramatically after the attacks. Since then FedEx has reportedly become an unflinching partner in counterterrorism and homeland security operations. One of the more interesting features of the partnership is the courier company’s apparent willingness to open and inspect packages at the government’s request—and without a court order—thus allowing the government to bypass an important check on its authority and discretion. By contrast, both United Parcel Service and the U.S. Postal Service refuse such government entreaties absent legal compulsion.

Retail Merchants

Terrorists might reveal themselves not only through their electronic, telephonic, and physical correspondence; they might also do so through the goods and services they purchase, or even inquire about. For example, in the process of servicing a customer’s laptop computer, a Circuit City technician uncovered incriminating jihadist material. By alerting the authorities, the technician proved instrumental in helping the FBI foil a planned attack on military personnel at Fort Dix, NJ.

Another plotter, this one in Colorado, bought unusually large amounts of hydrogen peroxide and acetone from a retail beauty supplier. The plotter intended to use those supplies as ingredients to build several bombs and detonate them in New York City. The plotter happened to reveal his intentions through other channels, which tipped off the authorities and led to his arrest. Only after the fact did the beauty-supply proprietor admit that he thought the high-volume purchases of potentially incendiary ingredients seemed very suspicious and that, in retrospect, he should have contacted the police.

Recognizing the benefits of fostering explicit ties to merchants and the need for continued vigilance, law enforcement officials have pointed to the Colorado beauty-supply encounter as a lost opportunity that could have proven disastrous. Government officials at the federal, state, and local levels have thus all redoubled their efforts to partner with members of their communities and remind them of the continued threats to our safety and security. For example, the City of Los Angeles recently initiated “iWatch,” a citizen and business vigilance program, going so far as creating downloadable apps, both to generate buzz and to facilitate the process of filing reports to the authorities. New York City, in turn, has created Operation Nexus. To date, the NYPD

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* Acting Professor, UCLA School of Law. For a fuller elaboration of the ideas presented here, see Jon D. Michaels, Deputizing Homeland Security, 88 Tex. L. Rev. 1435 (2010); Jon D. Michaels, Privatization’s Pretensions, 77 U. Chi. L. Rev. 717 (2010); and Jon D. Michaels, All the President’s Spies: Private-Public Intelligence Gathering in the War on Terror, 96 Cal. L. Rev. 901 (2008).

has reached out to more than 30,000 businesses—as exotic as scuba shops and plastic surgery centers and as mundane as hardware stores and self-storage facilities. The goal is straightforward: to familiarize the businesses with the types of purchases terrorists might make and to acculturate the merchants so their response to suspicious customers is much more like the Circuit City technician’s than the Denver beauty supplier’s.

Doormen and Maintenance Workers

Over the past few years, law enforcement officials have been working with tens of thousands of doormen, maintenance workers, and other employees of residential and commercial buildings, providing counterterrorism training and instruction. Called “natural allies” of the police, and encouraged to participate by both their employers (the building-owners industry) and their own unions, the building workers are taught to detect and file reports on anything or anyone deemed suspicious. Specifically, the workers are advised to alert the police if they encounter suspicious vehicles or packages, tenants possessing little furniture, and would-be renters offering to pay in cash.

By sheer numbers alone, all of these private deputies serve as force multipliers—additional eyes and ears on alert for suspicious activities. But of greater significance is the fact that many of these private actors enjoy superior access to electronic and physical spaces often closed to law enforcement personnel.

Opening Closed Doors

Superior access could be said to be a function of legal and cultural arbitrage. Many laws reflect a pre-deputized landscape. They protect personal property and liberty primarily against government encroachments. Private actors, never before envisioned to be doing the government’s bidding (such as, for instance, furthering criminal investigations), are thus often free to encroach with greater legal impunity. Today, as evidenced by the government’s partnerships with the telecom industry and with FedEx, these private actors are sharing their findings with the law enforcement and intelligence personnel in ways that were not anticipated at the time those laws were enacted.

The cultural component is keyed to the public not fully appreciating deputation’s pervasiveness. As a general matter, people tend to act more cautiously and guardedly when interacting with the law enforcement personnel than they do with those they encounter in social and commercial contexts. Interactions with repairmen, deliverymen, and customer-service representatives are presumed to be business related—not an opportunity, let alone pretext, to conduct a criminal investigation. Accordingly, people are more candid and inviting than they likely would be were they under the impression that their plumber or bank representative is deeply integrated into America’s homeland security apparatus.

The ways in which the government has endeavored to deputize these private actors—harnessing their “manpower” and leveraging their superior access—are critical to our understanding of the post-9/11 administrative state, of the strengths and weaknesses of our current approach to homeland security, and of how deputization diffuses and complicates the legal and cultural boundaries between private and public.

Below, I highlight two sets of such challenges that have garnered relatively little attention but merit further consideration.

Distorting Markets

Typically, the government has to invoke its statutory or regulatory authority to require or encourage private assistance, or it has to enter into formal contractual relationships to engender partnerships. Deputization of the sort characterized above marks a departure from those conventional approaches.

Here, informal deals—government enticements, entreaties, and threats—supplant laws and contracts as the bonds that marry the private and public sectors. For example, reports suggest that FedEx has received quite a number of valuable perks from the government in exchange for its law enforcement and intelligence assistance. It is not at all apparent that UPS, which has resisted deputization, has received any of those perks. Similarly, Qwest, the only major telecom to refuse to participate in the NSA partnerships, reported that the NSA cancelled highly valuable government contracts worth hundreds of millions of dollars. Qwest, which feared the partnerships ran afoul of federal law, alleges the cancellations were retaliatory.

The combination of government carrots and sticks might help it secure private-sector participation. But it appears also to distort markets and market decisions—raising questions whether these relationships are truly voluntary and, moreover, whether they create races-to-the-bottom, with deputies potentially crossing more and more lines to curry favor with a government willing to reward such cooperation.

Notwithstanding the UPS and Qwest examples, firms—particularly less efficient ones—might be especially willing to partner up with the government in order to secure some of the valuable perks—and obtain competitive marketplace advantages over their more reluctant rivals. But if those perks—such as additional government contracts and access to intelligence briefings—are sufficiently valuable, how long can the reluctant rivals hold out? If the reluctant businesses cannot feasibly hold out (because of declining profits or market share), the deputization relationships could become compulsory in practice, without the requisite legal process that we usually consider a prerequisite to the government compelling private parties.

Enabling Intelligence Misappropriation

In order to facilitate the deputies’ work, the government often has to disclose sensitive material to its private allies. The government might provide names, addresses, telephone numbers, and IP addresses with the understanding that such information is pertinent to an investigation. A problem arises, though, when the deputies start conflating their dual roles—that is, they are both engaged in their day-to-day commercial enterprises and they are homeland security deputies charged with culling information for the authorities. Such conflation might lead the deputies to use the intelligence information to alter the way they conduct business. Doing so poses two sets of chal-

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The Ivory Tower at Ground Zero: What Legal Education Still Needs to Learn About Law and Terrorism

By Peter Margulies*

In the ten years after September 11, legal education’s report card has been decidedly mixed. Soon after the attacks, scholars began a vigorous campaign against detention without judicial review. The Supreme Court vindicated this view in Boumediene v. Bush, 553 U.S. 723 (2008), affirming detainees’ access to habeas corpus. That vindication has led to a rough but stable consensus that terrorism’s challenges call for coupling flexibility and constraint. However, the academy’s focus on indefinite detention and military commissions has come at a cost. Too often, law school pedagogy and scholarship squint through the lens of doctrine, undistracted by the way that law works in practice. Administrative law practitioners know that law is often less about doctrine than about framing an issue that resonates in a regulatory structure or the court of public opinion. In this pragmatic project, the academy has fallen short.

Current debates about detention policy reveal this gap. On the one hand, most scholars (and voters) have accepted the need for detention of suspected terrorists at Guantanamo subject to judicial review. As the University of Texas’s Robert Chesney and Harvard’s Jack Goldsmith predicted in a 2008 Stanford Law Review piece, habeas corpus in the D.C. Circuit now encompasses basic procedural rights such as access to evidence and suppression of coerced statements. Leading progressives like Georgetown’s David Cole have largely accepted this framework, reasoning that a choice limited to criminal charges or release would give terrorists more rights than soldiers for the Axis powers received during World War II. However, legal doctrine does not explain two key detention developments: first, the trend toward government victories in habeas cases, and second, the debate about a new detention statute. Politics and facts on the ground have driven both of these stories.

The government has won a growing share of habeas cases because of the facts in those cases and the current composition of reviewing courts. As the Brookings Institution’s Ben Wittes demonstrated in his book, Detention and Denial (Brookings Institution Press 2010), Guantanamo detainees are a mixed bag. While detainee advocates had found it useful to portray virtually all detainees as students or aid workers with the bad luck of being in Afghanistan immediately after September 11, this description fit only one cohort of detainees. Others openly boasted of substantial ties to Al Qaeda or the Taliban. The D.C. Circuit has wisely held that the government can detain these and other individuals who lack a credible explanation for their conduct in Afghanistan. The government’s habeas victories have shown that procedural rights do not automatically alter litigation outcomes; rights merely allow the facts to speak for themselves.

In addition, however, the D.C. Circuit’s conservative majority—cemented by twenty years of Republican presidents in the last thirty years—has played a substantial role. Doctrine does not like to dwell on this dynamic, but a serious scholar should not pretend it is not there. Moreover, as American University’s Steve Vladeck has blogged, the Supreme Court is also far less likely to review the D.C. Circuit’s decisions, since new Justice Elena Kagan has recused herself from Guantanamo cases because of her service as Solicitor General. Without Kagan, the Court’s liberal wing would have to persuade both Justice Kennedy and a conservative like Chief Justice Roberts to prevail—an unlikely prospect. That makes the D.C. Circuit the court of last resort on most detainee matters.

Politics is also front and center in proposed detainee legislation. Doctrine from Justice Jackson’s famous concurrence in the Steel Seizure case, distilled by New York University’s Richard Pildes, would support congressional buy-in that firmed up detention standards. However, progressives who ordinarily favor Congress over the executive are seeking to slam the brakes on possible legislation, worried that in the current climate it would contain even more onerous restrictions on closing Guantanamo and trying terrorists in civilian courts. Legislation is on balance desirable, particularly given the effect that a smaller U.S. role in Afghanistan might have on the applicability of the Authorization for the Use of Military Force that Congress passed just after September 11. However, the unpredictability of Congress makes this a close question.

Legal constraints on detention have also had another impact that doctrine did not predict: An uptick in the use of lethal force, such as drone strikes in Pakistan, against terrorists. When detention is more cumbersome, drone strikes became a useful option. Drone strikes have highlighted a convergence on international law between conservatives and some critics of the last administration. For example, Yale’s Harold Koh, a stern critic of policies unilaterally implemented shortly after 9/11, now serves as legal adviser at the State Department. Koh has argued persuasively that self-defense, which justifies the use of force under international law, must include measures that respond to terrorist groups’ ability to plan attacks in secret. Drone strikes, Koh has asserted, meet the need, as long as those strikes comport with basic international law guarantees such as avoiding disproportionate harm to civilians. Koh has been more willing to push the envelope.

* Professor of Law, Roger Williams University.

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loped on grounds for the use of force than on coercive interrogation tactics, where the Obama Administration has underlined its departure from methods like waterboarding that were used in the eighteen months after September 11. Koh’s views overlap significantly with Harvard's Goldsmith, who while at the Justice Department’s Office of Legal Counsel (OLC) in 2003 and 2004 pushed back against overly broad legal justifications for coercive interrogation. Goldsmith, a self-described conservative, has expressed skepticism about the authority of customary international law but has not questioned the need to avoid disproportionate collateral damage in drone strikes. Here, too, the emerging consensus touches on doctrine, but ultimately owes just as much to pragmatic considerations.

Doctrine also offers only modest help on a question administrative law practitioners have puzzled about for years: the scope of the *Chevron* doctrine. The ubiquity of *Chevron* may have led observers to believe that the Court would invoke it to support deference to the executive’s positions on indefinite detention and military commissions. However, those observers were disappointed. In ruling repeatedly for chal-

lenge, Chevron’s absence resides not with doctrinal teachers need to develop simu-

lation modules in their courses.

As lawyers navigate through multiple forums, they must cultivate knowledge about the structure, culture, and operations of each. Consider two important factors that law schools rarely teach: path-dependence and opportunity costs, illustrated in the following hypothetical. Suppose an official can consult with stakeholders at Time 1, or delay until Time 2. Consultation at Time 1 would shore up stakeholders’ support. Conversely, a failure to consult would breed mistrust, ensuring that the level of consultation that could have brought agreement at Time 1 will not satisfy stakeholders at Time 2. Securing agreement becomes more expensive, requiring even greater official concessions.

In national security matters, the Bush Administration learned this lesson the hard way. Its early unilateralism alienated the courts, convincing them that more accountability was necessary. More timely concessions by the Bush Administration might have triggered greater judicial deference. Unfortunately, advocates for Guantanamo detainees who celebrated the election of President Obama did not appreciate that consultation is important not only for ramping up unilateral policies, but also for winding down those measures. Advocates pushed for President Obama’s early announcement that he would close Guantanamo by January 2010. Troubled by the Obama Administration’s failure to consult, Congress enacted legislation that impeded closure efforts. Within a few months President Obama articulated a more comprehensive national security strategy that could have earned congressional support for closing Guantanamo, if the early closure announcement had not triggered legislative mistrust.

As of August 2011, Guantanamo is still here with no signs of its demise any time soon. Of course, politics may have played a role in Congress’s response; an opposition campaign ad warning that a legislator “tried to ship suspected terrorists to the United States” will not assist that legislator’s re-election. However, the political dimension merely reinforces the need for a comprehensive package that will not leave legislators vulnerable. That “Grand Bargain” may have been available in 2009, but lingering congressional mistrust and changed political circumstances have made it a more distant prospect today.

Path-dependence and opportunity costs also played a role in the 2011 debate about America’s support for Libyan rebels against dictator Muammar el-Qaddafi. This debate played out against the backdrop of the War Powers Resolution, which Congress passed during the Vietnam era to check the President’s power to unilaterally involve the United States in foreign wars. When support for the Libyan intervention was high in March 2011, the Administration did not seek formal authorization from Congress, apparently believing that the intervention would be short. Instead, the Administration argued rightly that the United Nations Security Council’s approval of NATO’s intervention satisfied the requirements of the War Powers Resolution. But the intervention took more time than expected, and path-dependence came into play. In late May, the War Powers Resolution’s 60-day clock for seeking congressional authorization expired. By this time, Members of Congress who would have provided support earlier were lukewarm about the intervention.

With the State Department’s Koh taking the lead, the Administration argued that even the United States’
The use of lethal drone attacks in Libya did not amount to “hostilities” under the statute, thus tolling the 60-day clock. This argument had some equities on its side: the Libyan effort involved no American ground troops, as a practical matter Qaddafi forces lacked the capacity to down U.S. aircraft, and both some in Congress and some legal scholars believed that the 60-day clock was unconstitutional. However, the extended Libyan intervention had begun to resemble the plans gone awry that drove enactment of the War Powers Resolution. Moreover, the Administration never fully explained how mounting drone attacks did not amount to “hostilities.” Its strained interpretation will make the War Powers Resolution less useful when some future President commits American forces in a more substantial way without congressional support. That foreboding is an opportunity cost that the present Administration owns. To equip students to deal with analogous problems, law teachers should devote more time in the classroom to the crucial role of timing in legal change.

Opportunity costs, as well as bureaucratic structure, also influenced other post-9/11 agency developments from natural disasters to immigration. The creation of the Department of Homeland Security in 2002 reserved a healthy helping of the budgetary pie for agencies that were part of DHS’s core counterterrorism mission, but siphoned off resources from other vital tasks, such as emergency response to natural disasters. That budgetary triage foreordained the government’s inadequate response to Hurricane Katrina. DHS also received a bigger budget for immigration enforcement, which Congress had transferred from the Justice Department. However, immigration judges remained at Justice, where they became budgetary stepchildren. The result was a burgeoning immigration backlog. The backlog’s pressure made each political asylum case into a hit-or-miss affair that Georgetown’s Philip Schrag aptly called “refugee roulette.” Legal doctrine did not predict this result, but real people suffer with its consequences.

In sum, legal education deserves partial credit for its performance after September 11. On the plus side, law teachers and their students challenged the government’s initial unilateralism and have helped craft a consensus on detention that balances security with the rule of law. But law schools should do more to put legal doctrine in perspective. They should provide greater support for clinics and impetus for experiential learning in the traditional classroom—perhaps through simulations that model national security controversies like the Libya debate. They can also teach in greater depth about factors like path-dependence, opportunity costs, and agency structure that shape legal doctrine. Taking these steps will help lawyers of the future deal more effectively with terrorism and its legal consequences.

NEW! From the ABA Section of Administrative Law and Regulatory Practice

The Law of Counterterrorism

Lynne K. Zusman, Editor

Counterterrorism is defined as “offensive measures taken to prevent, deter, pre-empt, and respond to terrorism”. In contrast, anti-terrorism is defined as “defensive measures used to reduce the vulnerability to terrorist acts”. This important, ground-breaking work addresses the multiple facets of legal authority that affect our ability to fight transnational terrorism.

Over the last decade, the American public has benefited from the work of many federal agencies. This book examines in detail the roles they play, the highly esoteric nature of counterterrorism law, and the importance of adhering to the rule of law when engaged in counterterrorism.

Among areas examined in detail are Afghanistan; the Taliban and Al-Qaeda; the DOJ torture memo; the philosophy of terrorism; war crimes jurisdiction; the 9/11 Commission; current and future national security principles; the National Security Act and IC reform; the National Counterterrorism Center; the organization and structure of the intelligence community; the National Security Council system; communications surveillance; the PATRIOT Act, and more. Order your copy today.

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Thwarting Nuclear Terrorism Through Container Inspections

By Nitin Bakshi, Stephen Flynn, and Noah Gans*

Each year, ocean-going vessels transport millions of shipping containers to the United States. These containers provide terrorists with a potentially attractive way to hide a nuclear device destined for U.S. shores. The successful smuggling and detonation of such a device would be disastrous. In addition to lives lost, the detonation of a nuclear device in a port could lead to losses in the range of $55-$220 billion. Even if it were not detonated, the successful smuggling of a nuclear device into a U.S. port has the potential to disrupt global supply chains: anxiety that other containers may contain nuclear devices would result in stepped-up inspections that would cause congestion throughout the global intermodal transportation system.

U.S. Security Initiatives in Place at International Ports

To counter this threat of nuclear terrorism, the United States has initiated various security measures at both domestic and foreign ports. Two important security measures implemented at international ports, the Container Security Initiative (CSI) and the Secure Freight Initiative (SFI), seek to detect the presence of nuclear devices in shipping containers at overseas ports, before such containers are loaded onto a vessel bound for the U.S.

CSI, a program administered by U.S. Customs and Border Protection (CBP), uses an automated targeting system that employs rules-based software to identify containers that are at risk of being tampered with by terrorists. A key input to this system is the container’s shipping manifest, which contains information about the container’s sender, recipient, and contents. CBP mandates that an ocean carrier transporting a container to the U.S. provide manifest information to CSI officials at least 24 hours prior to the container’s lading onto a vessel that will call on a U.S. port. Manifests and other data are analyzed at CBP’s National Targeting Center in Arlington, Virginia, and containers that are identified as suspect are flagged to be inspected by the local customs authority at the port of origin before they are shipped to U.S. ports. These customs officials typically use gamma or high-energy x-ray radiography and either hand-held mobile or stationary radiation detection technology to screen the high-risk containers and ensure that they do not contain a nuclear weapon or radiation dispersal device.

SFI is a joint initiative of CBP, the U.S. Department of Energy, and the U.S. Department of State. Its purpose is to leverage learning from other port security initiatives, such as Operation Safe Commerce, and to serve as a pilot for a system that might be capable of scanning 100 percent of U.S.-bound containers. Under SFI, all U.S.-bound containers arriving at participating overseas seaports are scanned with both non-intrusive radiographic imaging and passive radiation detection equipment placed at terminal entrance gates. Optical character recognition is used to identify containers and classify them by destination. Sensor and image data gathered through this primary inspection is then transmitted in near real time to the National Targeting Center in Virginia. There, CBP officials incorporate these data into their overall scoring of the risk posed by containers and target high-risk containers for further scrutiny overseas. Any container that triggers an alarm during primary inspection is automatically deemed to be high-risk and undergoes a more sensitive inspection.

One-Hundred Percent Scanning Requirement

A 2007 U.S. law, “Implementing Recommendations of the 9/11 Commission Act of 2007,” popularly called the 9/11 Commission Act, requires that before any cargo bound for the United States is loaded onto a ship at an international port, it must be scanned to detect radiological contraband. The deadline for compliance with this law is July 1, 2012, unless the Secretary of Homeland Security grants an extension, which can be offered in two-year increments. This law is a significant deviation from CBP’s CSI approach of scanning only cargo it identifies as being high-risk, and the operational feasibility of 100 percent scanning has been questioned by a wide range of participants in the maritime supply chain: CBP and European customs officials, trade associations such as the U.S. Chamber of Commerce and the National Association of Manufacturers, and corporate leaders. The most commonly expressed concern is that this security requirement will generate congestion that will increase the cost of doing business and hurt commerce. In the face of this resistance to the legislative protocol, DHS Secretary Janet Napolitano has already indicated that she intends to grant a two-year extension.

Benefits and Costs of 100 Percent Scanning

An obvious goal of 100 percent container scanning is to detect and neutralize any nuclear weapons and to curb the illegal movement of radiological material. A stringent security regime also serves to deter terrorists from attempting to infiltrate the maritime supply chain in the first place. A less obvious benefit is
associated with disaster recovery. In the event that an unfortunate event were to occur, it would be imperative to identify the stage in the global supply chain at which the security breach occurred in order to contain losses and resume port operations quickly. The images and scan information gathered through 100 percent scanning would provide vital information to facilitate this task.

At the same time, there are three broad ways in which the 100 percent scanning requirement may be detrimental to trade. First, if there is limited scanning and radiation detection capacity, then delays resulting from waiting in inspection queues could require containers to sit idle at ports. Second, even with adequate equipment, the scheme could generate more alarms than there is human inspection capacity to resolve, and the result would again be delays as containers wait in inspection queues. Finally, the diversion of containers from their usual movements within terminals to a centrally managed government inspection facility has the potential to engender significant terminal congestion. No matter what the source of the problem, these extra delays would lead to increases in transportation lead times, higher inventory levels in supply chains, and ultimately higher costs for consumers.

Evaluating the Impact of 100 Percent Scanning on Terminal Operations

Given the economic importance of maritime trade, a rigorous quantitative analysis of the impact of 100 percent scanning on container terminal operations is critical for policy makers, as well as for companies with an economic interest in the efficient movement of containers within the international supply chain. Our 2011 Management Science article, “Estimating the Operational Impact of Container Inspections at International Ports,” reports the results of just such an analysis.

Our study is based on detailed data on the movement of individual containers, collected from two of the world’s largest international container terminals. Among other features, these datasets mark the entry and exit times of every container passing through each of the terminals over the course of one month, along with an indication of whether or not the container is bound for the U.S. The database includes records for more than 900,000 containers.

We use these historical records as the basis for a simulation analysis that estimates the effect of a number of inspection protocols on terminal operations. The simulations provide us with insights into the impact each protocol may have on three key attributes of the inspection schemes: the transit delays that would be incurred by inspected containers, the additional real estate the terminals would need to stage in-process containers, and the average handling cost per container.

Results and Implications

Our simulation results suggest that a variant of the SFI inspection scheme, that we refer to as an “Industry-Centric” inspection scheme, is capable of being scaled up to satisfy the scanning and radiation detection requirement mandated by the 2007 U.S. law. Its use of rapid screening by relatively low-cost drive-through portals allows it to handle 100 percent of all container traffic—bound for the U.S., as well as other destinations—on a cost-effective basis. In turn, the relatively small percentage of containers that fail this rapid primary inspection can be scanned in a cost-effective manner by more sensitive drive-through equipment. In contrast, the current CSI protocol would face significant hurdles were it to be scaled up to scan more than a small fraction of U.S.-bound container traffic.

The economy and robustness with which the Industry-Centric scheme operates follows, in large measure, from the type of equipment used. The current CSI protocol relies on highly sensitive high-energy x-ray radiography to scan containers that are thought to pose a potential threat. This is a time-consuming procedure. In contrast, the Industry-Centric inspection scheme performs a rapid initial scan of 100 percent of inbound traffic with lower-cost drive-through radiation and medium-energy x-ray radiographic portals. While this equipment is less sensitive than that used under CSI, it is precise enough to verify the safety of the vast majority of containers, thereby reducing the demand on more sensitive inspection equipment. Our simulation results clearly imply that the equipment and inspection protocol used in the Industry-Centric scheme are relevant in guiding the choice of the appropriate inspection regime for international ports.

Furthermore, a qualitative analysis of the two schemes’ logistical requirements also suggests that disruptions to terminal operations would be much more severe under CSI than the Industry-Centric approach. Under the CSI scheme, containers targeted for inspection must be pulled from a terminal’s storage stacks only hours before the time at which they normally would be retrieved for their vessel loadings. This disrupts the highly optimized sequence in which terminals order yard crane movements within the stacks. Under the Industry-Centric scheme, in contrast, targeted containers undergo inspection upon arrival at the terminal before they are placed in the stacks. Thus, the Industry-Centric inspection regime avoids the disruptions and delays that would follow from the early removal of even a small fraction of containers from the terminal’s stacks.
Tentative Agenda of CLE Programs

Thursday November 17, 2011

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<th>CLE Session #1</th>
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<td><strong>Admin Law 101 Track: Regulatory Review of Independent Agencies, Including Presidential/OMB Review and UMRA</strong></td>
<td>This panel will analyze the legal and policy rationales for subjecting or exempting independent agencies from regulatory review under Executive Orders and the Unfunded Mandates Reform Act, and the obligations to apply cost-benefit analysis and choose least burdensome regulatory alternative.</td>
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**Solving the Immigration Adjudication Crisis**

| This panel will discuss potential reforms to the immigration adjudication system. While there is widespread agreement that the immigration courts need reform, thus far no consensus has emerged and no action has been taken to comprehensively reform the system. This panel will bring audience members up to date on the challenges facing a system charged with determining whether a foreign national may be deported from the United States. It will also discuss proposed reforms, including an ongoing study being conducted by the Administrative Conference of the United States. Two of the invited speakers (Lenni Benson and Russell Wheeler) are leading the ACUS study. | Moderator: Jill E. Family, Associate Professor, Widener University School of Law, Harrisburg, PA |

**Congressional Ethics: Rules, Process, and Enforcement**

| This panel will provide a comprehensive overview of U.S. congressional ethics rules, of the advisory and enforcement processes followed by the House Ethics Committee and the Senate Ethics Committee, and of the role of the House Office of Congressional Ethics. Some of the subjects covered will include: application of congressional gift rules to lobbyists, corporations, and trade associations through provisions of the Lobbying Disclosure Act; recent developments in congressional ethics enforcement; and the relationship between congressional ethics offices and the Department of Justice in ethics enforcement (including a brief discussion of recent developments under the Speech or Debate Clause of the Constitution). | Moderator: Robert L. Walker, Of Counsel, Wiley Rein, LLP; Elections and Government Ethics Practice Group, Washington, DC |

**GWU Law Review**

| Moderator TBD |
| **Admin Law 101 Track: The Government in the Sunshine Act: A Current Assessment** | The Government in the Sunshine Act, enacted in 1976, requires that the multi-member bodies that head government agencies hold their meetings in public. Many have suggested that the Sunshine Act decreases collegiality at such multi-member agencies and encourages the use of techniques to avoid meaningful discussions at meetings. This panel will discuss various assessments of the Act’s impact on multi-member agencies. | Moderator: James T. O’Reilly, Professor, University of Cincinnati Law School, Cincinnati, OH |

**Recent Developments in Employment Based Immigration Adjudication**

| This panel will discuss developments in employment-based immigration adjudication and recent challenges to agency policy and adjudication in federal court. The panel will focus on controversial issues in the alien investor program, alien labor certification, and the portability of foreign workers between employers. The panel will also discuss recent litigation and strategies in challenging agency action. | Moderator: Geoffrey Forney, Trial Attorney, United States Department of Justice, Washington, DC |

**Administrative Law Issues in the Patient Protection and Affordable Care Act: Prospects for Facilitating Genuine Health Reform**

| This program is intended to educate on the major administrative law issues in the Patient Protection and Affordable Care Act (PPACA). This statute, enacted in March 2010, requires an aggressive agenda of regulatory implementation which will affect all aspects of the US health care sector. The panel will: 1. Explain the basic provisions of PPACA and associated administrative law issues. 2. Debate the constitutional validity of PPACA and the litigation on this issue now before the federal courts. | Moderator: Eleanor D. Kinney, JD, MPH, Hall Render School of Law, Indianapolis, IN |

**Energy Track: Interstate Fracking Regulation**

| Rising energy prices and the pressure to develop affordable domestic fuel supplies has resulted in natural gas and oil companies using hydraulic fracturing technology to extract natural gas and oil from shale substrate in various locations throughout the United States. This “new” water injection process has raised concerns from... | Moderator: Charles Gordon, Prior Senior Regulatory Attorney for Occupational Safety and Health Administration, Department of Labor, Professor, Lewis and Clark, Gaithersburg, MD |

Thank you to those who have already registered. Please note the above is subject to change. Contact Toni Martinez at...
environmentalists and state regulators. The panel will discuss new “fracking” regulations promulgated under an interstate compact by the Delaware River Basin Commission (DRBC). Attendees will learn about the fracking process, how the States regulate that process, and how fracking regulation is affected by the Delaware River Basin Compact and NEPA. | Moderator: William S. Morrow, Chair, Intergovernmental Relations Committee, ABA Section of Administrative Law and Regulatory Practice

The Impact of New Federal State & Local Pay-to-Play Regulations on Your Clients | The purpose of this panel is to familiarize attendees with the impact of the new pay-to-play regulations at the federal, state, and local level on a broad range of entities and individuals associated with those entities. Any entity with a current contract or bid for a contract with a federal state or local government may be affected. This panel will discuss compliance strategies, explore differences between state and federal pay-to-play regulations, and provide a brief overview of the scandals that led to the enactment of these regulations and predict future trends in this area. (Panel tentative) | Moderator: Kenneth G. Hurwitz, Haynes and Boone, LLP, Washington, DC

Friday November 18, 2011 | CLE Session #4 | 9:00 am – 10:30 am
Developments in Administrative Law, Part I | Panelists TBD

Friday November 18, 2011 | CLE Session #2 | 10:45 am – 12:15 pm
Developments in Administrative Law, Part II | Organizer: Jeffrey S. Lubbers | Panelists TBD

Friday November 18, 2011 | CLE Session #3 | 1:45 pm – 3:15 pm
Judicial Review in the Roberts Era | As Justices Kagan and Sotomayor settle into their seats on the bench and the Roberts Court enters its seventh term, now seems an appropriate time to step back and think about how the Roberts Court has handled various doctrines relating to judicial review of federal agency action, including Chevron, Skidmore and Auer deference, as well as arbitrary and capricious review. This panel will identify and discuss some of the Roberts Court’s most significant decisions in the area of judicial review, including the Court's recent opinions in Talk America, Mayo Foundation, FCC v. Fox, and Massachusetts v. EPA, to determine whether any consistent themes or patterns can be discerned. The panel will also assess whether any predictions for the fate of judicial review of federal agency action during the Roberts era can be made. | Moderator: Kathryn Watts, Associate Dean for Research and Faculty, University of Washington School of Law, Washington, DC

Incorporation by Reference | Moderator: Daniel Cohen, Department of Energy, Washington, DC

Should Congress expand the jurisdiction of the Court of Appeals for Veterans Claims and the Court of Appeals for the Federal Circuit? | The issue to be discussed by this panel is whether the jurisdiction of the Court of Appeals for Veterans Claims (CAVC) and the Court of Appeals for the Federal Circuit (CAFC) should be expanded. In particular, the program will address whether Congress should grant the CAVC de novo jurisdiction to review all aspects of a decision by the Board of Veterans’ Appeals and also grant the CAFC jurisdiction to review factual determinations for “clear error.” The panelists will address the pros and cons of the approach, including issues that should be addressed by Congress (in particular, a concern that the Court should not re-visit favorable factual determinations made by the Board), Panelists would be proposed to include private practitioners, VA practitioners, and academics. It is hoped that the program will serve as the springboard for a resolution by the ABA House of Delegates, recommending that Congress create legislation. | Moderator: John Hardin Young, Partner, Sandler, Reif Young & Lamb, Washington, DC.

Ethics Training Program in cooperation with the Government & Public Sector Lawyers Division (GPSLD) | Moderator & Panelists to be selected in conjunction with GPSLD

Friday November 18, 2011 | CLE Session #4 | 3:30 pm – 5:00 pm
DC Circuit Judges Panel, Organizer: Hon. Brett Kavanaugh | Moderator TBA

Information as a Regulatory Tool | Organizer: Steve Wood | Moderator TBA

The New Consumer Finance Protection Bureau and Regulation | Moderator: Christine C. Franklin, Principal/Attorney, Franklin Law, LLC, Chicago, IL

OIG 101: Over Thirty Years of Increasing Oversight Authority | Moderator: Nancy Eyl, Assistant Counsel to the IG, DHS OIG, Washington, DC

antonia.martinez@americanbar.org or 202-662-1582 with any questions. Thanks and we hope to see you in November at Georgetown!
By Robin Kundis Craig*

It was a busy end of the term for the U.S. Supreme Court, with many decisions relevant to administrative law practitioners. The Court twice discussed deference to an agency’s interpretation of its own regulations (one in the context of preemption), prompting Justice Scalia to opine that the Court should consider abolishing Auer deference because of its differences from Chevron deference in terms of separation of powers.

Auer Deference and Federal Administrative Agencies

The Court uttered one of its broadest statements of deference to administrative agencies in *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254 (June 9, 2011). The case involved the issue of whether, under the Telecommunications Act of 1996, 47 U.S.C. § 251, “an incumbent provider of local telephone service must make certain transmission facilities available to competitors at cost-based rates.” 131 S. Ct. at 2257. In an amicus curiae brief to the Court, the Federal Communications Commission (FCC) contended that its regulations “require the incumbent provider to do so if the facilities are to be used for interconnection: to link the incumbent provider’s telephone network with the competitor’s network for the mutual exchange of traffic.” *Id.* In an opinion for a unanimous Court (Justice Scalia concurred; Justice Kagan did not participate), Justice Thomas first concluded that the statute was unclear on the issue. *Id.* at 2260. As a result, deference to the FCC’s interpretation was warranted:

In the absence of any unambiguous statute or regulation, we turn to the FCC’s interpretation of its regulations in its *amicus* brief. As we reaffirmed earlier this Term, we defer to an agency’s interpretation of its regulations, even in a legal brief, unless the interpretation is “‘plainly erroneous or inconsistent with the regulation[s]’” or there is any other “‘reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question.’” *Id.* at 2260–61 (citing and quoting *Chase Bank USA, N.A. v. McCoy*, 562 U.S. ——, 131 S. Ct. 871, 880–81 (2011) (quoting *Auer v. Robbins*, 519 U.S. 452, 461, 462 (1997))). Because the FCC’s interpretation met this test, *id.* at 2261–63, and because there was no “other reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter in question” such as “a post-hoc rationalization by Commission counsel of agency action that is under judicial review,” *id.* at 2263 (quoting *Auer*, 519 U.S. at 462), the Court deferred to the FCC’s interpretation.

Justice Scalia agreed with the result, “because I believe the FCC’s interpretation is the fairest reading of the orders in question.” *Id.* at 2265–66 (Scalia, J., concurring). However, he concurred specially to question the continued validity of the Auer rule of strong deference to an agency’s interpretation of its own regulations. In particular, Justice Scalia contrasted Auer deference and Chevron deference on separation of powers grounds:

It is comforting to know that I would reach the Court’s result even without Auer. For while I have in the past uncritically accepted that rule, I have become increasingly doubtful of its validity. On the surface, it seems to be a natural corollary—indeed, an [*a fortiori*] application—of the rule that we will defer to an agency’s interpretation of the statute it is charged with implementing, see *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). But it is not. When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation). The legislative and executive functions are not combined. But when an agency promulgates an imprecise rule, it leaves to itself the implementation of that rule, and thus the initial determination of the rule’s meaning. And though the adoption of a rule is an exercise of the executive rather than the legislative power, a properly adopted rule has fully the effect of law. It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well. “When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.” Montesquieu, *Spirit of the Laws* bk. XI, ch. 6, pp. 151–152 (O. Piest ed., T. Nugent transl. 1949).

*Id.* at 2266. This opinion therefore signals, perhaps, the beginnings of yet another evolution in federal agency deference doctrines.

Auer Deference and Federal Preemption

The role of Auer deference to federal administrative agencies also arose in the preemption context in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (June 23, 2011). *PLIVA* raised the issue of “whether federal drug regulations applicable to generic drug manufacturers directly conflict with, and thus pre-empt, . . . state-law [failure-to-warn] claims” based on the

* 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.
labels for generic metoclopramide, a digestive system drug, 131 S. Ct. at 2572. In a fractured but basically 5–4 majority opinion authored by Justice Thomas, the Court concluded that the regulations did preempt state law tort claims.

Under the federal Drug Price Competition and Patent Restoration Act, “generic drugs” can gain FDA approval simply by showing equivalence to a reference listed drug that has already been approved by the FDA. This allows manufacturers to develop generic drugs inexpensively, without duplicating the clinical trials already performed on the equivalent brand-name drug. A generic drug application must also ‘show that the [safety and efficacy] labeling proposed . . . is the same as the labeling approved for the [brand-name] drug.’” Id. at 2574 (quoting 21 U.S.C. § 355(j)(2)(A)). The dispute in PLIVA centered on the ability of manufacturers of generic drugs to change the FDA-approved label. The FDA’s position was that its regulations “require that the warning labels of a brand-name drug and its generic copy must always be the same—thus, generic drug manufacturers have an ongoing federal duty of ‘sameness.’” Id. at 2574–75. According to the Court, Auer deference applied to this basic interpretation, and the FDA’s views are “controlling unless plainly erroneous or inconsistent with the regulation[s]” or there is any “other reason to doubt that they reflect the FDA’s fair and considered judgment.” Id. at 2575 (citing Auer, 519 U.S. at 461, 462).

Nevertheless, the Court also observed that “[a]lthough we defer to the agency’s interpretation of its regulations, we do not defer to an agency’s ultimate conclusion about whether state law should be pre-empted.” Id. at 2576 n.3 (citing Wyeth v. Levine, 555 U.S. 555, 576 (2009)). As a result, the Court majority conducted its own preemption analysis. It deferred to the FDA’s view that its regulation “allow[s] changes to generic drug labels only when a generic drug manufacturer changes its label to match an updated brand-name label or to follow the FDA’s instructions” and that “changes unilaterally made to strengthen a generic drug’s warning label would violate the statutes and regulations requiring a generic drug’s label to match its brand-name counterpart.” Id. at 2575 (referencing 21 C.F.R. § 314.94(a)(8)(iv)). It also deferred to the FDA’s view that “Dear Doctor” letters—letters from manufacturers to alert doctors of potential problems with drugs—qualify as drug labeling, with the result “that federal law did not permit the Manufacturers to issue additional warnings through Dear Doctor letters.” Id. at 2576. The Court declined to rule on the FDA’s interpretation that manufacturers had a duty to request stronger label warning through the FDA, finding federal preemption even if that duty existed. Id. at 2576–77. As the majority summarized the resulting legal situation:

State tort law places a duty directly on all drug manufacturers to adequately and safely label their products. Taking [the plaintiffs’] allegations as true, this duty required the Manufacturers to use a different, stronger label than the label they actually used. Federal drug regulations, as interpreted by the FDA, prevented the Manufacturers from independently changing their generic drugs’ safety labels. But, we assume, federal law also required the Manufacturers to ask for FDA assistance in convincing the brand-name manufacturer to adopt a stronger label, so that all corresponding generic drug manufacturers could do so as well.

Id. at 2577.

Given this situation, five Justices found federal preemption as a result of basic conflict preemption. Specifically, “[i]t was not lawful under federal law for the Manufacturers to do what state law required of them. And even if they had fulfilled their federal duty to ask for FDA assistance, they would not have satisfied the requirements of state law.” Id. at 2577–78. However, the majority also recognized that the possibility of FDA approval of a requested label change “raises the novel question whether conflict pre-emption should take into account these possible actions by the FDA and the brand-name manufacturer.” Id. at 2578. Specifically, the plaintiffs had argued that the manufacturers could not carry their burden of proving the impossibility of complying with both state and federal law when the manufacturers had not even tried to get the drug’s label changed through the FDA. Id. at 2578–79.

The five-Justice majority disagreed, concluding that conflict preemption cannot turn on what a federal agency or Congress might do to eliminate a conflict between state and federal law:

The question for “impossibility” is whether the private party could independently do under federal law what state law requires of it. Accepting [the plaintiffs’] argument would render conflict pre-emption largely meaningless because it would make most conflicts between state and federal law illusory. We can often imagine that a third party or the Federal Government might do something that makes it lawful for a private party to accomplish under federal law what state law requires of it. In these cases, it is certainly possible that, had the Manufacturers asked the FDA for help, they might have eventually been able to strengthen their warning label. Of course, it is also possible that the Manufacturers could have convinced the FDA to reinterpret its regulations in a manner that would have opened the CBE process to them. Following [the plaintiffs’] argument to its logical conclusion, it is also possible that, by asking, the Manufacturers could have persuaded the FDA to rewrite its generic drug regulations entirely or talked

continued on next page
Congress into amending the Hatch–Waxman Amendments.

If these conjectures suffice to prevent federal and state law from conflicting for Supremacy Clause purposes, it is unclear when, outside of express pre-emption, the Supremacy Clause would have any force. We do not read the Supremacy Clause to permit an approach to pre-emption that renders conflict pre-emption all but meaningless.

Id. at 2579 (citing Wyeth, 555 U.S. at 573). However, only four Justices (Justice Kennedy refused to join this section of the majority opinion) agreed that the Supremacy Clause powerfully displaces state law: “The non obstante provision in the Supremacy Clause ... suggests that federal law should be understood to implicitly repeal conflicting state law. Further, the provision suggests that courts should not strain to find ways to reconcile federal law with seemingly conflicting state law.” Id. at 2580.

Justice Sotomayor dissented, joined by Justices Breyer, Ginsburg, and Kagan. The dissenters objected to what they perceived as the majority’s alteration of the traditional conflict preemption analysis, which places a heavy burden on the party claiming preemption to show the “impossibility” of complying with both state and federal law. Id. at 2582 (Sotomayor, J., dissenting). They emphasized that a possible pathway out of the apparent conflict could have been followed through the FDA:

The Food and Drug Administration (FDA) permits— and, the Court assumes, requires—generic-drug manufacturers to propose a label change to the FDA when they believe that their labels are inadequate. If it agrees that the labels are inadequate, the FDA can initiate a change to the brand-name label, triggering a corresponding change to the generic labels. Once that occurs, a generic manufacturer is in full compliance with both federal law and a state-law duty to warn. Although generic manufacturers may be able to show impossibility in some cases, petitioners, generic manufacturers of metoclopramide (Manufacturers), have shown only that they might have been unable to comply with both federal law and their state-law duties to warn [the plaintiffs]. This, I would hold, is insufficient to sustain their burden.

Id. In addition, the dissenters maintained that the Court’s resolution of PLIVA contradicted the Court’s 2009 decision in Wyeth. Id. at 2583.

Preemption


In addition, this five-Justice majority concluded that federal law did not implicitly preempt Arizona’s mandated use of E-Verify, a federal electronic system for checking employment eligibility. Id. at 1985. While federal law prohibits the Secretary of Homeland Security from mandating use of E-Verify, there were no similar prohibitions, express or implied, regarding state requirements. Id. Moreover, Arizona’s mandate does not conflict with the federal scheme. The Arizona law requires that “every employer, after hiring an employee, shall verify the employment eligibility of the employee” through E-Verify. That requirement is entirely consistent with the federal law. And the consequences of not using E-Verify under the Arizona law are the same as the consequences of not using the system under federal law. In both instances, the only result is that the employer forfeits the otherwise available rebuttable presumption that it complied with the law.


Four of these five Justices also concluded that the IRCA did not implicitly preempt the Arizona licensing statute through conflict preemption. As Justice Roberts’ opinion continued, the Arizona statute closely tracked the federal statute, id. at 1981-83, and it did not contradict congressional purposes:

Of course Arizona hopes that its law will result in more effective enforcement of the prohibition on employing unauthorized aliens. But in preserving to the States the authority to impose sanctions through licensing laws, Congress did not intend to preserve only those state laws that would have no effect. The balancing process that culminated in IRCA resulted in a ban on hiring unauthorized aliens, and the state law here simply seeks to enforce that ban.

Id. at 1984-85.

Justice Thomas concurred in most of the opinion and concurred in the judgment. Justice Breyer dissented, joined
by Justice Ginsburg. According to these Justices, the Arizona statute defined “license” too broadly to fit within the IRCA’s savings clause, because that definition covered “virtually every state-law authorization for any firm, corporation, or partnership to do business in the State.” Id. at 1987. Justice Sotomayor dissented separately. She summarized her disagreement with the majority as follows:

The Court reads IRCA’s saving clause—which preserves from pre-emption state “licensing and similar laws,” 8 U.S.C. § 1324a(h)(2)—to permit States to determine for themselves whether someone has employed an unauthorized alien so long as they do so in conjunction with licensing sanctions. This reading of the saving clause cannot be reconciled with the rest of IRCA’s comprehensive scheme. Having constructed a federal mechanism for determining whether someone has knowingly employed an unauthorized alien, and having withheld from the States the information necessary to make that determination, Congress could not plausibly have intended for the saving clause to operate in the way the majority reads it to do.

Id. at 1998.

Standing

In an unusual example of standing analysis in a criminal context, the Supreme Court upheld the standing of a federal prisoner, Carol Bond, to challenge the federal statute under which she was indicted on Tenth Amendment grounds. Bond v. United States, 131 S. Ct. 2235 (June 16, 2011). Bond conditionally pled guilty to violations of the Chemical Weapons Convention Implementation Act of 1998, 18 U.S.C. § 229, for possession of a chemical weapon but argued throughout her proceedings that the federal statute, enacted pursuant to a treaty, violated the Tenth Amendment. The U.S. District Court for the Eastern District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit denied her claim. The Third Circuit explicitly agreed with the United States that Bond did not have standing to pursue the constitutional claim because she was not a state, and the Tenth Amendment protects the powers reserved to states.

In a unanimous opinion authored by Justice Kennedy, the Supreme Court reversed. Relying on Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992), the Bond Court easily concluded that Bond met Article III standing requirements: her potentially unconstitutional incarceration was an injury-in-fact, the incarceration was caused by the allegedly unconstitutional statute, and the Court could redress her injury by declaring the statute unconstitutional. Id. at 2361-62. The more difficult issue was whether Bond had prudential standing to pursue her claim. The Court disagreed with amicus arguments that Bond was not asserting her own claims—that “to argue that the National Government has interfered with state sovereignty in violation of the Tenth Amendment is to assert the legal rights and interests of States and States alone.” Id. at 2363. Instead, the Court concluded, “Bond seeks to vindicate her own constitutional interests. The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a State.” Id. at 2363-64.

In particular, Bond’s interests lay in the United States’ system of federalism, which “protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions.” Id. at 2364. As a result:

The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.

Id. (citing New York v. United States, 505 U.S. 144, 181 (1992)).

Justice Ginsburg, in her concurring opinion joined by Justice Breyer, suggested that the standing analysis should be even simpler in these circumstances. “Bond, like any other defendant, has a personal right not to be convicted under a constitutionally invalid law.” Id. at 2367. As a result, “a court has no ‘prudential’ license to decline to consider whether the statute under which the defendant has been charged lacks constitutional application to her conduct. And that is so even where the constitutional provision that would render the conviction void is directed at protecting a party not before the Court.” Id.

The Supreme Court also touched on standing in American Electric Power Co., Inc. v. Connecticut, 131 S. Ct. 2527 (June 20, 2011). This was the second of the Supreme Court’s climate change cases, and the standing issues were similar to those raised in Massachusetts v. EPA, 549 U.S. 497 (2007), where the Court split 5-4 to conclude that Massachusetts, as a State, had standing to challenge the federal Environmental Protection Agency’s refusal to regulate greenhouse gas emissions under the Clean Air Act, 42 U.S.C. §§ 7402-7671q. In AEP, several states, the City of New York, and three private land trusts brought federal and state common-law nuisance claims against four electric power companies and the Tennes-
see Valley Authority; the opinion addressed only the federal nuisance claims.

In an 8-0 opinion on the merits (Justice Sotomayor did not participate), Justice Ginsburg concluded for the Court that the federal Clean Air Act displaces the federal common law of nuisance with respect to claims involving greenhouse gas emissions. 131 S. Ct. 2537-38. Regarding standing, however, the Justices split 4-4, affirming the Court of Appeals for the Second Circuit’s conclusion, based heavily on Massachusetts v. EPA, that at least some of the plaintiffs had standing to bring the lawsuit. Justice Ginsburg’s opinion on standing, in its entirety, was as follows:

The petitioners contend that the federal courts lack authority to adjudicate this case. Four members of the Court would hold that at least some plaintiffs have Article III standing under Massachusetts, which permitted a State to challenge EPA’s refusal to regulate greenhouse gas emissions, 549 U.S., at 520–526, 127 S. Ct. 1438; and, further, that no other threshold obstacle bars review. Four members of the Court, adhering to a dissenting opinion in Massachusetts, 549 U.S., at 535, 127 S. Ct. 1438, or regarding that decision as distinguishable, would hold that none of the plaintiffs have Article III standing. We therefore affirm, by an equally divided Court, the Second Circuit’s exercise of jurisdiction and proceed to the merits.

Id. at 2535.

Justice Alito concurred, joined by Justice Thomas, to emphasize that they concurred in the judgment based on the merits conclusion in Massachusetts v. EPA that the EPA could regulate greenhouse gas emissions pursuant to the Clean Air Act; however, they suggested that they disagreed with that earlier conclusion. Id. at 2540–41. No Justice discussed standing at any length. As a result, AEP v. Connecticut suggests that Justice Sotomayor may be a key vote in the future with respect to the implications of Massachusetts v. EPA’s “special solicitude” for states litigating in federal courts and the emerging jurisprudence in lower courts concerning “increased risk” standing.

**Separation of Powers**

Separation of powers and a bankruptcy court’s authority to adjudicate certain types pf claims were the focal points of the Supreme Court’s decision in Stern v. Marshall, 131 S. Ct. 2594 (June 23, 2011), a “long-running dispute between Vickie Lynn Marshall and E. Pierce Marshall over the fortune of J. Howard Marshall II, a man believed to have been one of the richest people in Texas”—so long-running that it inspired Chief Justice Roberts, writing for the 5-4 majority, to quote Charles Dickens’ Bleak House. Id. at 2600. Vickie, better known as Anna Nicole Smith, filed a petition in bankruptcy in the District Court for the Central District of California after J. Howard died. Pierce filed a defamation complaint against her in bankruptcy court based on Vickie’s claims that Pierce was trying to defraud the estate. Vickie counterclaimed, asserting that Pierce had tortiously interfered with her inheritance from J. Howard.

As the Supreme Court summarized, “[o]n November 5, 1999, the bankruptcy court issued an order granting Vickie summary judgment on Pierce’s claim for defamation. On September 27, 2000, after a bench trial, the bankruptcy court issued a judgment on Vickie’s counterclaim in her favor. The court later awarded Vickie over $400 million in compensatory damages and $25 million in punitive damages.” Id. at 2601. Pierce challenged the bankruptcy court’s judgment on the grounds that Vickie’s counterclaim was not a “core” bankruptcy claim under the Bankruptcy Code and hence that the bankruptcy court could not enter final judgment upon it. The district court and the court of appeals agreed, with the result that a prior judgment on the same claims by the Texas probate court should have been accorded Full Faith and Credit.

The Supreme Court affirmed the court of appeals, but on constitutional rather than statutory grounds. Indeed, the majority determined that, under statutory definitions, Vickie’s counterclaim was indeed a “core” bankruptcy proceeding. Id. at 2605. However, that statutory classification violated the separation of powers principles inherent in Article III because Congress was attempting to withdraw jurisdiction over a traditional common-law claim from the Article III courts. Id. at 2608-09. Vickie’s counterclaim was a pure state common-law claim and not subject to the “public rights” exception for bankruptcy. Id. at 2610–15. In addition, the majority relied heavily on the plurality opinion in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), to support its formalistic and categorical argument that:

This is not a situation in which Congress devised an “expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task.” The “experts” in the federal system at resolving common law counterclaims such as Vickie’s are the Article III courts, and it is with those courts that her claim must stay.

Stern v. Marshall, 131 S. Ct. at 2615 (citations omitted). In essence, therefore, the majority concluded that “Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article” and that Congress lacks the power to assign resolution of common-law contract and tort claims to anyone but an Article III judge. Id. at 2620.

Justice Scalia concurred to suggest that the Court had not gone nearly far enough in its separation-of-powers analysis—although, interestingly, he would leave delegations of
adjudicatory authority to administrative agencies intact. According to Justice Scalia, “[l]eaving aside certain adjudications by federal administrative agencies, which are governed (for better or worse) by our landmark decision in *Crowell v. Benson*, 285 U.S. 22, 52 S. Ct. 285, 76 L.Ed. 598 (1932), in my view an Article III judge is required in all federal adjudications, unless there is a firmly established historical practice to the contrary.” *Id.* at 2621.

Justice Breyer dissented, joined by Justices Ginsburg, Sotomayor, and Kagan. The dissenters agreed with the majority’s statutory conclusion that Vickie’s counterclaim was a “core” bankruptcy proceeding that the bankruptcy court could adjudicate to final judgment. *Id.* at 2622. However, they disagreed with the majority’s constitutional analysis, preferring to follow the Court’s separation-of-powers precedents that take “a more pragmatic approach to the constitutional question [seeking] to determine whether, in the particular instance, the challenged delegation of adjudicatory authority posed a genuine and serious threat that one branch of Government sought to aggrandize its own constitutionally delegated authority by encroaching upon a field of authority that the Constitution assigns exclusively to another branch.” *Id.* at 2624. Under that approach, the Court should balance various factors to determine whether the assignment of claims away from Article III courts is unconstitutional, including:

1. the nature of the claim to be adjudicated;
2. the nature of the non-Article III tribunal;
3. the extent to which Article III courts exercise control over the proceeding;
4. the presence or absence of the parties’ consent; and
5. the nature and importance of the legislative purpose served by the grant of adjudicatory authority to a tribunal with judges who lack Article III’s tenure and compensation protections. The presence of “private rights” does not automatically determine the outcome of the question but requires a more “searching” examination of the relevant factors.

*Id.* at 2626.

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NEW! From the ABA Section of Administrative Law and Regulatory Practice


*William V. Luneburg, Thomas M. Susman, and Rebecca H. Gordon, Editors*  
*Foreword by Thomas Hale Boggs, Jr. and Nicholas W. Allard*

This 2011 supplement provides updates and new material, including guidance to the Lobbying Disclosure Act issued by the Secretary of the Senate and the Clerk of the House of Representatives from June 2009 to June 2011; the various Obama Administration initiatives pertaining to registered lobbyists; the opinion of the U.S. Court of Appeals for the District of Columbia Circuit in *National Association of Manufacturers v. Taylor*; and a variety of other clarifications and important recent developments.

Chapter 21 on federal campaign finance has been substantially rewritten and updated to reflect changes in the law, including the impact of the landmark 2010 Supreme Court decision in *Citizens United v. Federal Election Commission*. That chapter now also incorporates the material of Chapter 22 dealing with lobbyist bundling of campaign contributions, bringing together in one place all of the material pertaining to the federal law of bundling.

The book features several entirely new chapters: one on the Obama Ethics Pledge, another on “honest services” fraud, and two dealing with the practice of lobbying, including perspectives on the lobbying profession and the Noerr-Pennington doctrine. There is also an entirely new Part V with two chapters offering comparative perspectives on, respectively, the lobbying laws of Canada and those of the European Community and its members. These should be of significant interest to practitioners whose clients do business abroad. Order your copy today.

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News from the Circuits

By William S. Jordan III

D.C. Circuit Muddies Interpretive Statement Exception to Notice and Comment

The Administrative Procedure Act requires federal agencies to use the notice-and-comment procedures of legislative rulemaking to issue binding statements unless the agency statements qualify as “interpretative rules.” In Natural Resources Defense Council v. EPA, 2011 WL 2601560 (D.C. Cir. July 1, 2011), EPA relied upon the interpretive rule exception to justify issuance of an informal guidance document under the Clean Air Act (CAA). Unfortunately, the D.C. Circuit both emphasized the interpretive nature of EPA’s statement and concluded that the statement was “legislative” in nature, requiring notice and comment. This appears to fly in the face of the interpretive rule exception, but perhaps the guidance document was really a “general statement of policy,” which EPA may not make binding without notice and comment.

To oversimplify the underlying substantive law, EPA once had in place a 1-hour ozone standard. It then promulgated an 8-hour ozone standard that it said would improve protection of public health overall, including in 1-hour periods, but that it acknowledged could lead to “high 1-hour exposures of concern.” After much litigation, it was determined that “nonattainment areas,” which had not achieved compliance with those standards, were subject to both standards. This triggered § 185 of the CAA, which requires states to impose fees on all major stationary sources (e.g., factories) in areas that miss their deadlines.

With eight areas of severe nonattainment facing significant costs, a Clean Air Act Advisory Committee asked EPA whether it would be “legally permissible” for states to forgo imposing § 185 fees by pursuing either a “program alternative” (e.g., a plan to reduce vehicle emissions, rather than focusing on stationary sources) or an “attainment alternative” (essentially considering areas in compliance with the 8-hour standard to be in compliance with the 1-hour standards).

EPA responded with a guidance document stating, as characterized by the court, that “EPA believes 1-hour nonattainment areas have flexibility to choose between the statutorily mandated program and an equivalent—i.e., the program alternative.” EPA also said that states could avoid the fees by relying on the “attainment alternative.”

The NRDC challenged the guidance document on the ground that EPA had failed to comply with the notice-and-comment requirements of § 553 of the APA. The court first found standing due to state abandonment of some compli-

D.C. Circuit Raises Constitutionality of Independent Agencies

True to his campaign pledge, President Obama is trying to shut down Yucca Mountain as a possible site for the nation’s repository for high-level nuclear waste. Six months before President Obama took office, the Department of Energy (DOE), a traditional executive branch agency, had applied to the Nuclear Regulatory Commission, an independent agency, for authorization to construct a repository at Yucca Mountain. The NRC promptly docketed the application for consideration by the Atomic Safety and Licensing Board (ASLB).

Following the President’s lead, DOE in March 2010 filed a motion to withdraw the Yucca Mountain application. In
June 2010, the ASLB denied DOE’s motion as contrary to the Nuclear Waste Policy Act (NWPA). Shortly thereafter, the NRC Secretary invited the parties to file briefs addressing whether the Commissioners themselves should review the ASLB’s decision and whether they should reverse it or uphold it. Both the Commission’s consideration of those issues and the ASLB’s licensing proceeding were still unresolved when the D.C. Circuit decided In re Aiken County, 2011 WL 2600685 (D.C. Cir. July 1, 2011).

In In re Aiken County, state and local governments and residents near temporary waste disposal sites tried to challenge the actions of the Obama Administration as violating the NWPA, in which Congress had essentially directed the use of Yucca Mountain as the ultimate repository for high-level nuclear waste. With proceedings pending before the NRC, it is not surprising that the court held that DOE’s actions were not ripe for review. For one thing, the NRC, not DOE, controlled whether the license application could be withdrawn. Since the NRC might moot the challengers’ concerns by refusing to allow withdrawal, and since the ASLB’s review of the application was still underway, the matter was not ripe for review.

The challengers tried to attack a “determination made on or about January 29, 2010, by Respondents President Obama, Secretary Chu, and DOE, to unilaterally and irrevocably terminate” the Yucca Mountain project. But that “determination” was nothing more than a public announcement by DOE of its intentions and did not amount to final agency action. DOE had already applied for the license (under the Bush Administration), so it had complied with statutory requirements, and the NRC now controlled termination of the project; so there was nothing to review.

But the specter of an independent agency, the NRC, controlling the outcome of a presidential campaign pledge prompted an extensive concurring opinion by Judge Kavanaugh on the (in his view) constitutionally suspect status of independent agencies. Characterizing President Obama as a “simple petitioner of the administrative state” (and quoting now-Justice Kagan in the process), Judge Kavanaugh surveyed the history of independent agencies from Humphrey’s Executor through the Supreme Court’s recent decision in Free Enterprise Fund v. Public Company Accounting Oversight Board, quoting at length many criticisms of Humphrey’s Executor and assertions of the tension between presidential authority and the concept of independent agencies. Asserting that his point was “not to suggest that [Humphrey’s Executor] should be overturned,” he argued that the decision “does not require ignoring the issues of accountability, liberty, and government effectiveness raised by independent agencies.” He mentioned the possibility of more intense judicial review of independent agencies, as suggested by Justice Breyer, or congressional attention to ensuring greater accountability of such agencies. Taken as a whole, however, his opinion is a strong invitation to the Supreme Court to dispense with Humphrey’s Executor and strengthen the unitary executive concept of the presidency.

D.C. Circuit Says APA § 553 Rulemaking Provisions Apply to TSA’s Full-Body Scanner Decision

Few federal actions affect more Americans more directly—or, one might say, intimately—than the Transportation Security Administration’s use of full-body scanners at the nation’s airports. The scanners produce a “crude image of an unclothed person,” giving rise to concerns about privacy and the safety of the technology. Required by statute to screen each passenger to ensure that no one is “carrying unlawfully a dangerous weapon, explosive, or other destructive substance,” TSA has recently shifted from reliance on magnetometers to the use of full-body scans, which can detect non-metallic objects such as liquids or powders.

In response to this shift, the Electronic Privacy Information Center (EPIC) filed a petition for rulemaking under § 553(e) of the Administrative Procedure Act, asserting that the scans violated various statutes and the Fourth Amendment. TSA responded to EPIC’s substantive concerns and denied that it had to undertake the rulemaking process when changing methods of passenger screening.

When challenged in the D.C. Circuit, TSA argued that EPIC had not petitioned for rulemaking because the relief that EPIC actually sought was immediate suspension of the scanning program. The court in Electronic Privacy Information Center v. U.S. Department of Homeland Security, 2011 WL 2739752 (D.C. Cir. July 15, 2011), made short shrift of this argument, noting that it would be surprised to find many petitions for rulemaking that did not seek a particular substantive outcome. Although the court did not articulate a standard for determining whether a particular filing constitutes a § 553(e) petition for rulemaking, its reaction indicates impatience with cavalier agency treatment of a filing that could reasonably be considered to be a petition for rulemaking.

On the merits, the court dismissed in a footnote the proposition that the use of scanners might somehow not constitute a “rule” under the APA, noting that “the question at issue is again whether the agency’s pronouncement is or purports to be binding.” (Apparently, an agency’s binding requirement is by definition a rule.) Instead, the court rejected TSA’s arguments that its use of scanners qualified for an exception to rulemaking requirements as a procedural rule, an interpretive rule, or a general statement of policy.

The court seemed to struggle a bit with the procedural rule exception, as one of the hallmarks of a procedural rule is that “it may alter the manner in which the parties present themselves or their viewpoints to the agency.” Since a body scan...
Third Circuit Strictly Applies 553 Notice Requirement to FCC Media Ownership Pronouncement

Prometheus Radio Project v. FCC, 2011 WL 2653785 (3d Cir. 2011), is the latest in a long line of litigation over the Federal Communications Commission’s efforts to regulate ownership of different types of media—newspapers, radio, and TV stations. The Commission’s efforts began in 1975, with rulemaking efforts in 2003 (remanded on various issues) and 2008 (the subject of this decision). Generally, the issues had to do with limits on cross-ownership of various types of media outlets and with the agency’s efforts to implement its longstanding policy of increasing minority and female ownership of the media.

In a stringent application of the notice requirement in § 553 of the APA, the majority held that the FCC had not provided adequate notice of its latest version of the rule governing newspaper/broadcast media cross-ownership. In its earlier remand, the court had advised that “any new ‘metric’ for measuring diversity and competition in a market [must] be made subject to public notice and comment before it is incorporated into a final rule.” As a result, the FCC had issued a Further Notice of Proposed Rulemaking in which it invited “comment on all the issues remanded . . . regarding cross-ownership.” It also specifically asked, “Should limits vary depending upon the characteristics of local markets? If so, what characteristics should be considered, and how should they be factored into any limits?” (emphasis by the court). After a 90-day comment period and an additional 60 days for responsive comments, the Commission announced that it had commissioned 10 economic studies, but dissenters criticized the transparency of the process undertaken to develop the studies and the amount of time to complete the studies. Publication of the studies prompted a flurry of criticism of the process. The FCC then held six public hearings on media ownership across the country. The Chairman of the Commission then published an op-ed piece in the New York Times describing his own “proposal” and set a 28-day deadline for responses, again prompting criticism from dissenting colleagues. After much pressure and late-night scrambling, the Commission issued the challenged rule by a 3-2 vote.

In reviewing the charge of inadequate process, the majority strongly emphasized the purposes of the APA to ensure testing of the proposal in the crucible of public comment and ensure fairness to the parties. The majority quoted the D.C. Circuit’s HBO decision for the proposition that an agency “has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible” and emphasized that the agency had an obligation to remain “open-minded.” Relying in part on the limited time available after the Chairman’s op-ed piece, and essentially characterizing the notice as limited to the two sentences quoted above in italics, the court found that “[t]his is not the agency engagement the APA contemplates.”

The dissent took a very different approach, arguing that the notice had to be judged in light of the long history of the agency’s proceedings and the litigation. As the dissent saw it, the FCC had clearly sought comment on the full range of cross-ownership issues, such that the rule was “not just the product of one isolated rulemaking, but is instead the outcome of an iterative and interactive process of statutorily prescribed agency review of broadcast media regulation and our judicial review of that agency action.”

The two sides represent competing visions of the administrative state. The majority treats the proceedings as if they were adjudicatory in nature, emphasizing process to ensure fairness to the participants, while the dissent views the long chain of events as an iterative decision-making process in which procedural arguments must be judged in the larger context.
**First Circuit Allows Post-Settlement Third-Party Intervention**

Intervention is typical of the administrative process, as regulatory beneficiaries participate in proceedings between agencies and regulated entities. That is what happened when David and Marilyn Slade participated successfully in a zoning proceeding and later intervened in the lawsuit challenging the zoning denial. Industrial Communications sought a variance to allow construction of a cell tower that would clutter the Slades’ view of Lake Winnipesaukee. The Town of Alton Board of Zoning Adjustment denied the variance for failure to meet the criteria of New Hampshire law, and Industrial Communications sued to override the decision under provisions of federal law. The Slades intervened in the lawsuit, but the Town handled the defense.

To the Slades’ distress, the Town agreed to settle. Refusing to hear from the Slades, the District Court entered the consent decree as a final judgment.

Normally a governmental party may settle on the best terms it can obtain, but the question on appeal was whether the Slades could continue as defendants in the lawsuit. They must establish standing, of course, which the Slades could easily do, but weighed against their interest was the Town’s interest in being able to settle its own litigation. An intervenor normally may not hold up a settlement “merely by withholding its consent.”

Here, however, the First Circuit recognized in *Industrial Communications & Electronics, Inc. v. Town of Alton*, 2011 WL 1887334 (1st Cir. May 19, 2011), that the Slades had “something more” than the mere withholding of consent. The Slades’ rights under state law (given the denial of the variance) would be overridden by the settlement. As a result, they had “independent interests to protect that are threatened by the decree.”

**D.C. Circuit Hardship Analysis Considers Business Uncertainty in Ripeness Determination**

In *Alcoa Power Generating, Inc. v. FERC*, 2011 WL 1642442 (D.C. Cir. 2011), Alcoa applied to FERC to relicense a hydro power facility. Section 401(a)(1) of the Clean Water Act provides that a federal agency may not license such a project until the state has issued a certification that the project will comply with the Act. The statute provides, however, that the state certification is waived if the state “fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request.”

Here, the state issued the certification within a year, but it included a requirement for a bond of $240 million to ensure compliance with requirements to achieve water quality, stating that the certification was not “effective” until the bond was in place (which had not occurred within a year). A state administrative law judge stayed the certification pending appeal. Alcoa asked FERC to declare that the state had waived the certification by imposing a requirement that had not been resolved by the one-year deadline. On FERC’s refusal, Alcoa sought review of FERC’s interpretation of the statutory language providing for waiver of the certification if the state has not acted within a year.

FERC argued that its action was not ripe for review because the ongoing proceeding before the North Carolina ALJ could either change the analysis or moot the dispute altogether. Although such ongoing process would typically prevent review, the D.C. Circuit held that Alcoa’s challenge was ripe. As to the test of “fitness for review,” the court found that the question was purely legal and that the odds were high that the court would confront the waiver at a later date, if not then. As a practical matter, the court found it unlikely that the state proceedings would remove the bond requirement or otherwise moot the dispute.

As to the “hardship” test, Alcoa was able to continue operating under annual licenses, which suggested no hardship. The company argued there was no need to reach the hardship issue if no institutional interests favored postponement, but the court noted that it typically weighs “the institutional interests in postponing review against the hardship delay would cause.”

The court then departed from the norm by considering investment uncertainties to constitute a hardship. It did so by relying on a specific statutory provision arguably reflecting congressional concerns about such impacts.

Alcoa argued that “delay in obtaining a fifty-year renewal denies it the certainty and security required to make long-term capital investments” in the hydro power project. Although normally such business uncertainty may not qualify as hardship, the court had recognized an exception in previous litigation involving the Alaska pipeline, in which “delay would have been ‘a cognizable hardship to the Nation as a whole.’” Alcoa’s case did not rise to the level of national concern, but the court noted that the statute provides for licenses of “no less than 30 . . . years.” According to the court, this indicated “congressional recognition that significant capital investments cannot be made in hydro power projects without the certainty and security of a multi–decade license.” Thus the court could accord “some weight” to Alcoa’s asserted hardship, and “the legally cognizable hardship that Alcoa Power will suffer from delay, although not overwhelming, suffices to outweigh the slight judicial interest in the unlikely possibility that we may never need to decide the waiver issue.”

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*Administrative and Regulatory Law News*
Paper or Plastic? California spurns the federal standing rules

By Michael Asimow*

The small but beautiful town of Manhattan Beach enacted an ordinance banning plastic bags. The town decided that it was unnecessary to file an environmental impact report (EIR) under the California Environmental Quality Act (CEQA), California’s rigorous version of National Environmental Policy Act. The Save the Plastic Bag Coalition (an association of plastic bag manufacturers) immediately filed suit, claiming that the ordinance would lead to the substitution of paper for plastic and that paper bags are even more environmentally damaging than plastic bags. The Coalition members were motivated by the prospect of an immediate loss of business in the town, but the real concern was the possibility that the ordinance might encourage much bigger cities to enact similar bans.

California stoutly rejects the federal rules of standing. It has never adopted the “injury in fact” test with its many difficult-to-apply refinements. Instead, if the plaintiff suffers some harm that is “over and above” the harm suffered by the public at large, that is sufficient. California also spurns the zone of interest test, and it freely permits public interest and taxpayer standing.

In Save the Plastic Bag Coalition v. City of Manhattan Beach, 52 Cal. 4th 155, 127 Cal. Rptr. 3d 710 (2011), the California Supreme Court emphatically reaffirmed these rules (which had been cast into doubt by recent lower court decisions). That the Coalition’s members were threatened with the loss of a minor number of plastic bag sales was enough for private-interest standing. It is irrelevant that the purpose of CEQA is to protect the environment, because California does not follow the zone of interest test, and it freely permits public interest and taxpayer standing.

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The Coalition won the standing battle, but it lost the war. Manhattan Beach’s decision not to file an EIR was not an abuse of discretion. Under a “common sense” approach, there was no reason to think that the ordinance would have a “significant” environmental impact in Manhattan Beach or anywhere else, considering that the town had only 40,000 inhabitants and about 200 mostly tiny retail stores. People might switch to reusable shopping bags instead of paper; if they got paper bags, they might recycle them. And the town was simply too small to cause any macro impact on the environment. However, the Court noted, this analysis might be different if a much larger city enacted such a ban.

Court Strikes Governor’s “Supreme Executive Power” Rules Freeze

By Larry Sellers**

On January 4, 2011, Florida Governor Rick Scott issued Executive Order No. 11-01 to freeze all rulemaking by agencies under the direction of the Governor and to establish the Office of Fiscal Accountability and Regulatory Reform (OFARR) for the purpose of reviewing all rules prior to agency promulgation. The order prohibited agencies from promulgating rules unless they obtain prior approval from OFARR. The order also prohibited the Secretary of State from publishing notices of rulemaking except at the direction of OFARR.

On March 28, 2011, Rosalie Whiley filed a petition for writ of quo warranto in the Florida Supreme Court, requesting that the Court direct the Governor to demonstrate his authority for issuing Executive Order No. 11-01 and requesting that the Court revoke the order should the Court find the Governor’s authority lacking.

The petition argued that Florida’s Administrative Procedure Act (APA) assigns certain rulemaking authority directly to the “agency heads,” and that just because the legislature allows the Governor to appoint agency heads does not mean that the Governor has the power to control their rulemaking by fiat. The petition further argued that the Governor does not have the state constitutional authority to replace legislative mandates with procedures that are inconsistent with the APA and that the executive order violates the separation of powers.

On April 8, 2011, asserting “supreme executive power” vested in the Governor by the Florida Constitution, Gover-

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Governor Scott issued Executive Order No. 11-72, expressly superseding Executive Order No. 11-01 and chronicling the rulemaking reviews conducted by OFARR in the intervening three months. It noted that OFARR had reviewed over 11,000 existing rules and helped agencies identify 1,035 unnecessary rules for repeal. The new order contained many of the same requirements as the initial order, but it no longer prohibited the Secretary of State from publishing notices; however, it did provide that no agency may submit a notice of rulemaking for publication without OFARR approval.

In his response to the petition, Governor Scott argued that the OFARR approval process does not violate the Florida Constitution because the Governor has the power to inform agency heads who serve at his pleasure of the considerations that will govern their retention and removal and that as the chief administrative officer and the “supreme” executive, the Governor may direct those agency heads who serve at his pleasure. He also argued that the orders do not violate the APA because they do not require agency heads to improperly delegate or transfer rulemaking responsibilities and OFARR does not require agencies to contravene APA time limits. In addition, the Governor contended that the Court lacks jurisdiction to issue a writ of quo warranto, in part because the petition constitutes a standard APA challenge that should have been brought at the Division of Administrative Hearings (DOAH).

In her reply, Whiley argued that neither the “supreme executive power” nor the Governor’s role as the chief administrative officer allowed the Governor to ignore or displace statutes that govern rulemaking. She also argued that both executive orders violated the rulemaking authority that the legislature gives exclusively to agency heads and rulemaking time limits mandated by the APA.

Meanwhile, the Florida Legislature enacted HB 993 during the recently concluded 2011 Regular Session. HB 993 specifically refers to Executive Order No. 11-01 (but not to No. 11-72) and establishes an enhanced biennial review and compliance economic review process for rules in effect on November 16, 2010. However, the measure provides that an agency is exempt from these reviews “if it has cooperated or cooperates with OFARR in a review of the agency’s rules in a manner consistent with Executive Order No. 11-01, or any alternative review directed by OFARR.” It is unclear whether this legislation was intended to provide any authorization for the executive orders inasmuch as it applies to rules already in effect; nonetheless, shortly after the bill became effective, the Governor filed it with the Court as supplemental authority.

On August 15, 2011, the Court ruled that “the Legislature retains the sole right to delegate rulemaking authority to agencies and that all provisions in Executive Orders 11-01 or 11-72 that operate to suspend rulemaking authority contrary to the APA constitute an encroachment upon a legislative function.” The Court therefore granted the petition, but it withheld issuance of the writ, trusting that any provision in Executive Order 11-72 suspending agency compliance with the APA’s rulemaking requirements “will not be enforced against an agency at this time, and until such time as the Florida Legislature may amend the APA or otherwise delegate such rulemaking authority to the Executive Office of the Governor.” Two justices dissented.

Mary C. Lawton Award

The Section of Administrative Law and Regulatory Practice has selected Gabriel Taussig, Chief of the Administrative Law Division of the New York City Law Department, to receive the 2011 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. Mr. Taussig's contributions clearly meet that test.

Mr. Taussig graduated from Queens College in 1971 and received his law degree from Brooklyn Law School in 1974, where he was an editor of the Law Review. He joined the NYC Law Department in 1974 via the Department's Honors Program and started as a staff attorney in the Administrative Law Division. He became a supervisor in 1979 and was named Chief of the Division in 1984.

During the past 27 years, Mr. Taussig has overseen all of the litigation handled by the division and has taken an active role in all of the more significant cases. In addition, he has provided invaluable legal advice to various city agencies regarding their regulatory initiatives.

Some of his more notable achievements include promulgation of various building and fire safety regulations; enforcement of the City's Landmarks Law; promulgation of ground breaking health code regulations banning smoking in public places and requiring calorie labeling in chain restaurants; development of protocols for successfully treating and, as necessary, detaining persons with tuberculosis; implementation of Kendra's law, which authorizes court-ordered outpatient treatment for certain persons who are mentally ill and refuse to undergo voluntary treatment; and establishment of licensing schemes that provide for detailed background checks to unearth organized crime affiliation.

Mr. Taussig also served as the Acting General Counsel for the New York City Department of Buildings from August of 2001 to May of 2002. He is a member of the Board of Trustees of the Queens Public Library and has lectured before the Association of the Bar of the City of New York, the New York County Lawyers' Association, and the Practicing Law Institute.

Mr. Taussig is the recipient of the highly prestigious Sloan Public Service Award, bestowed by the Fund for the City of New York in recognition of his work and commitment to public service. He also has received the Leadership Award by the Zoning Advisory Council and the Corporation Counsel's Award for Distinguished Legal Service.

Scholarship Award

The The Section of Administrative Law and Regulatory Practice has selected Professor Nina A. Mendelson from the University of Michigan Law School to receive the Scholarship Award for the best administrative law article published in 2010, Disclosing “Political Oversight” of Agency Decision Making, 108 Mich. L. Rev. 1127-1178 (2010).

The article presents evidence from multiple presidential administrations that suggests regulatory review conducted by the White House’s Office of Management and Budget is associated with high levels of changes in agency rules. The article documents how OMB and affected agencies generally report whether a particular agency decision is consistent with presidential preferences and how this threatens to undermine the promise of presidential influence as a source of legitimacy for the administrative state. The article argues that agencies should be required to summarize executive influence on significant rulemaking decisions.

Professor Mendelson is a member of this Section’s governing council and a public member of the Administrative Conference of the United States. She also serves as one of three U.S. special legal advisers to the NAFTA Commission on Environmental Cooperation and is a member scholar at the Center for Progressive Reform. She received her AB in economics, summa cum laude and Phi Beta Kappa, from Harvard University and her JD from Yale Law School, where she was an articles editor of the Yale Law Journal.

2011 Gellhorn-Sargentich Law Student Essay Competition

Aaron M. Moore, Class of 2012, American University Washington College of Law, is the winner of the sixth annual Gellhorn-Sargentich Law Student Essay Competition for his paper titled, Preserving the Ark of Our Safety: How a Stronger Administrative Approach Could Save Section 5 of the Voting Rights Act.

An Administrative Procedure Act for Europe

By Charles H. Koch, Jr.*

European friends of the Administrative Law & Regulatory Practice Section recently established an organization that will advance European administrative law. The organization, known as “Research Network on European Administrative Law” (ReNEUAL), is working toward simplifying and rationalizing

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European Union administrative law and in the end developing an EU Administrative Procedure Act (APA).

ReNEUAL was launched largely on the efforts of Herwig Hofmann, Luxembourg University, and Jens Peter Schneider, Freiburg University. Top European administrative law scholars now participate in the Network. Section members George Bermann (steering committee member) and Charles Koch advise on U.S. administrative law.

ReNEUAL will proceed in three stages. Currently it is developing a report on potential sources for developing a restatement and best practices. This report will then be made available for comment. The final report with the comment will be used to write a restatement and guidelines for best practices. ReNEUAL is employing four working groups: rulemaking, single-case decisionmaking, information management, and administrative contracts. The three first are quite familiar, but Americans might be surprised by the equally prominent treatment of administrative contracts. In fact, a good deal of EU policy is made through inter-institutional agreements and agreements with “third countries,” such as the US. Thus the work of this group might have the greatest practical impact on US interests. Nonetheless, all four studies hold both direct and comparative interest for US practitioners and scholars.

This project could not be more timely. There is growing interest throughout Europe in reforming administrative law. Of course the growing importance of EU administrative acts, especially after the coming into force of the Lisbon Treaty December 2009, has focused attention on EU administrative bodies. At present the core administrative body, the European Commission, employs a bewildering array of procedures. The growing number of “independent agencies” adds diversity and complexity. (“Independent agencies” in the EU are those outside the Commission’s bureaucracy.) Contributing further to the confusion is that most of the implementation of EU law takes place at the national level, unlike the U.S. where “commandeering” of state legislative and executive bodies is unconstitutional. In this environment, the various ministries within these 27 Member State systems inevitably assume important case decision and policy functions. Thus 27 brands of administrative process might be involved in carrying out the law created by EU legislation and administrative acts. In short the European network of administrative processes is daunting and often inescrutable.

The European Parliament (EP) has recently focused attention on simplifying and rationalizing EU administrative processes. On behalf of the Directorate General for Internal Policies of the European Parliament, Professor Jacques Ziller, Pavia University, outlined the EP project. (Jacques Ziller, Towards Restatements and Best Practice Guidelines on EU Administrative Procedural Law (Sept. 19, 2010)). He observed:

[The EU’s network characteristics] are marked by an overburdening complexity of often overlapping rules and principles, further increased by a great variety of national administrative law systems which work hand-in-hand with European provisions for implementation of EU policies. There is in many respects a growing gap between, on one hand, the proliferation of new forms of administrative action in the EU and their regulatory framework and, on the other hand, their integration in various control and legitimacy mechanisms.

The EP seems to be looking to the ReNEUAL project as a foundation for its efforts to come to grips with these processes. The EU Commission has also begun to examine the need for reforming the administrative processes. In furtherance of that goal, it issued a “communication” about EU administrative law issues. European Agencies—The Way forward, COM(2008) 135 final (Mar. 11, 2008). It focused attention on the agencies outside its bureaucracy. The Commission initially sought to develop an inter-institutional agreement between it and the other two key EU institutions, the EP and the EU Council which shares legislative authority with the EP. The EU Commission ultimately concluded that this effort was at best premature and promised to begin a dialogue. To this purpose, Commission President José Barroso met with representatives of the current 28 agencies. This initiative, however, seems quite unsatisfactory. While the number of agencies is growing, most of the direct implementing work still takes place at the Commission.

Nor can the administrative machineries of the 27 Member States be ignored in the end. At this point, ReNEUAL concedes: “What this project does not intend to address is proposing a general harmonisation of Member State administrative law. The focus of the project is exclusively EU administrative procedure law . . . .” While this is a rational limitation on the scope of the current project, the Parliamentary document recognized: “Implementation of the EU’s policies takes place in networks consisting of large national bureaucracies and a comparatively small EU-level bureaucracy.” Therefore, the job cannot be considered done until some uniformity is developed among the implementing Member State bureaucracies. Perhaps it is sufficient at this point to hope that the project’s findings filter down to the administrative processes within the Member States. ReNEUAL urges: “Inevitably this [project] will impact in some fashion on the Member States legal orders.” In the end this evolutionary force will not be sufficient. Thus, from the general principles, ReNEUAL can be expected to work towards a pan-European administrative law.

Section members might want to keep up with these developments. ReNEUAL is a moving force in this reform process. For access to this window on European administrative law, see www.reneual.eu.
Concerns that the deputies are engaging in unjust business practices arise when the deputies use the information given to them by the authorities for their own commercial—and de facto punitive—purposes. In some instances, businesses are obligated by law to refuse services to individuals identified on government watch lists. The Transportation Security Administration’s No-Fly list is one such example. But in the informal deputization contexts, the government gives the private businesses information principally to facilitate additional surveillance. The government wants firms to track packages mailed to a given residential address or to intercept e-mails to a specific account. It is far from apparent that the government intends for the deputies to deny commercial services based on that information.

Yet allegations abound suggesting that some deputies have done precisely that—cancelling lines of credit, discontinuing Internet service, or impeding transportation or employment opportunities. In refusing service, the deputies are exacting what amounts to sanctions based on what is often scant information. Moreover, and especially if they are common carriers, they might well be engaging in unlawful discriminatory business practices. The information given to deputies might not even pertain to a known suspect. It might be associated instead with a co-worker, co-religionist, or a relative—none of whom the government has reason to believe is involved in a terrorist plot; the information is important primarily to the extent it enables additional monitoring of the actual suspect.

Concerns that the deputies are undermining national security arise insofar as the deputies’ punitive actions tip off terrorist suspects. Someone who is planning a terrorist attack and who has always paid her bills on time and never had any problems with, say, her bank, might have reason to suspect that a sudden cancellation of her account is connected to an ongoing government investigation. That person might then change her other accounts, too, alert co-conspirators of the possibility that they are being observed, and go further underground to avoid continued surveillance—much to the chagrin of law enforcement personnel who can no longer readily monitor her and her confederates.

Conclusion

There are many benefits and challenges that deputization poses. Greater legal formality and greater transparency would no doubt be helpful, certainly to lessen opportunities for evading the law and perhaps too to curtail the use of carrots and sticks that are so powerful they effectively render the deputization arrangements close to compulsory. But greater formality and transparency come at the cost of flexibility and secrecy. As always, striking the right balance is essential. It is especially complicated in this arena given how little information trickles into the public domain and given how the law (and public expectations) might well have to adjust to the ways in which deputization increasingly blurs the lines between private and public.
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