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In this Message, I want to highlight how our Section is engaging in outreach, both to current members and to other segments of the legal profession. Wikipedia defines “outreach” as “an effort by individuals in an organization or group to connect its ideas or practices to the efforts of other organizations, groups, specific audiences or the general public. . . . Outreach often takes on an educational component (i.e., the dissemination of ideas), but it is increasingly common for organizations to conceive of their outreach strategy as a two-way street in which outreach is framed as engagement rather than solely dissemination or education.” All of these concepts — disseminating ideas, connecting our ideas and practices to other organizations and audiences, and engaging other groups to talk and interact with us — are vital for effective outreach.

One of our Section’s traditional strengths has been in hosting conferences and institutes that attract substantial audiences and allow for face-to-face interaction and discussion. In recent years, our fall Administrative Law Conference, spring Rulemaking Institute, and Homeland Security Law Institute have succeeded in drawing hundreds of private- and public-sector attorneys and law professors to hear first-rate speakers and panelists on major issues of administrative and regulatory law. For example, the most recent Administrative Law Conference on November 4-5, 2010, drew more than 450 paid attendees who heard an outstanding array of speakers, including White House Counsel Bob Bauer, Gulf Coast Claims Facility Administrator Kenneth Feinberg, and SEC General Counsel David Becker. One of the panels at the Conference, “The 2010 Elections and the Future of Campaign Finance Reform,” was featured as a top story on the ABA’s media website, www.abanow.org. As you read this, we will have held a November 29 program on “ACUS 2.0” and be well underway with the planning of the February 3 Lobbying Institute, March 2-3 Homeland Security Law Institute, and May Rulemaking Institute.

But we need to continue to expand our outreach efforts in several ways. First, we need to look for other opportunities to provide CLE programming, beyond the major fall and spring conferences and institutes, that will attract members and non-members alike. Our Spring Meeting and Annual Meeting programs too often have featured excellent panels that only a small handful of people attended. For our April 8-10 Spring Meeting in Charlottesville, I am working with our meeting Co-Chairs Dana Weekes and Christine Franklin to develop a number of CLE panels that can attract an audience from across Virginia as well as the Washington, D.C. area. I hope that we can also develop CLE programs for the 2011 Annual Meeting in Toronto that will attract both Canadian and American lawyers.

Second, we need to ensure that our outreach extends beyond our excellent array of publications (such as the Administrative & Regulatory Law News, the Administrative Law Review, and Section books) to include all channels of communication that current and potential members are accustomed to using, in part because they want to access substantive content whenever they choose. Our Section webpages, along with those of other ABA components, are in the process of getting a major makeover by the ABA. That makeover should substantially improve the “look and feel” and navigability of the pages. Our Section blog, Notice and Comment, is well underway, with more than 70 posts on a wide variety of administrative and regulatory legal developments. We also recently have set up a Facebook page, as many companies and non-profit entities (including other ABA Sections) have done, to provide additional opportunities for online communication and interaction.

Finally, we need to do more to demonstrate directly to various segments of the profession, including potential members, that our Section offers them real value. That value includes not only timely and relevant information that can improve their professional skills and knowledge, but also ways in which they can participate directly in improving governmental processes. For example, I have begun a series of presentations on “Careers in Administrative Law and Regulatory Practice” at law schools ranging (so far) from New York to Atlanta. These presentations are intended to provide law students with specific guidance on how to identify and pursue possible jobs that involve regulatory work — and, in the process, to show some of the benefits to be gained from involvement in the Section. I have also begun direct outreach to the four leading bars of color, to explore various segments of the profession, including potential members, that our Section offers them real value. That value includes not only timely and relevant information that can improve their professional skills and knowledge, but also ways in which they can participate directly in improving governmental processes. For example, I have begun a series of presentations on “Careers in Administrative Law and Regulatory Practice” at law schools ranging (so far) from New York to Atlanta. These presentations are intended to provide law students with specific guidance on how to identify and pursue possible jobs that involve regulatory work — and, in the process, to show some of the benefits to be gained from involvement in the Section. I have also begun direct outreach to the four leading bars of color, to explore areas of mutual interest and collaboration.

Heraclitus may have been correct when he wrote, “A hidden connection is stronger than an obvious one.” Even so, we will benefit as a Section by first being obvious in our efforts to connect and engage with others — and, with luck, persuading others to connect and engage with us.
Table of Contents

Chair’s Message .......................................................................................................................... 1
Overview of the 2010 Revised Model State Administrative Procedure Act ............................... 3
Rulemaking Under the 2010 Revised Model State Administrative Procedure Act .................... 4
Staff Advice to Decision Makers Under the 2010 MSAPA ....................................................... 6
Ex Parte Communications and the Exclusive Record Provision of the 2010 MSAPA ................. 8
Greening the Grid in California ................................................................................................. 10
2011 Spring Conference ........................................................................................................... 13
6th Annual Homeland Security Law Institute ............................................................................ 14
Supreme Court News ................................................................................................................ 16
News from the Circuits ............................................................................................................. 21
News from the States .............................................................................................................. 25
Section News and Events ......................................................................................................... 27

Administrative & Regulatory Law News

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Overview of the 2010 Revised Model State Administrative Procedure Act

By Gregory L. Ogden*

In July 2010, after more than six years’ work, the Uniform Law Commission adopted the 2010 Revised Model State Administrative Procedure Act (2010 Act or 2010 MSAPA) and recommended it to the states. It is a model act like the prior state administrative procedure acts adopted in 1946, 1961, and 1981. A model act is needed because state administrative law in the 50 states is not uniform. States can choose which provisions of the 2010 Act to adopt. The drafting committee sought to draft provisions that represent best practices in the states.

The 2010 Act is lengthier than the 1961 Act, but shorter and less detailed than the 1981 Act. The 2010 Act is designed especially for adoption by states that currently have the 1961 Act, but would like to replace that act with a more modern, up-to-date administrative procedure act. The 2010 Act is designed to ensure fairness in administrative proceedings, increase public access to the law administered by agencies, and promote efficiency in agency proceedings by providing for extensive use of electronic technology by state governments. Consistent with both the 1961 MSAPA and the 1981 MSAPA, the Act provides for a uniform minimum set of procedures to be followed by agencies subject to the Act. The 2010 Act creates only procedural rights and imposes only procedural duties.

The 2010 Act is divided into eight articles. Article One contains extensive definitions of key terms used in the Act. Many of the new Article One definitions result from the technological development of the internet and the widespread use of electronic media by governmental entities. Examples of this type of definition include “electronic,” “electronic record,” and “internet web site.”

Article Two of the 2010 Act contains provisions ensuring public access to agency law and policy. This article provides for indexing of agency documents, as well as electronic posting and distribution of documents. Article Two modernizes and codifies publishing responsibilities for agencies that have primary responsibility for rules publishing, and for agencies that adopt rules. Article Two also provides for declaratory orders and default procedural rules.

Article Three contains provisions governing rulemaking by agencies. It provides a basic set of rulemaking procedures that an agency must follow, with exceptions for emergency rulemaking and for direct final rulemaking, which are governed by different procedures that are specified. Section 311 provides for the procedures to be used with guidance documents and also provides for important safeguards in the use of guidance documents by an agency. These rulemaking provisions are discussed in the accompanying article by Professor Ronald Levin.

Article Four contains provisions for adjudication in contested cases. When an opportunity for a hearing is required by a federal or state constitutional or statutory law provision, the Article Four procedures are applicable. The 2010 Act returns to the external hearing rights approach followed in the 1961 Act. The external hearing rights approach is narrower than the approach adopted in the 1981 Act, which contained an internal definition of the scope of hearing rights. Under the 1981 Act, evidentiary hearings were required for a wide range of disputes between citizens and the government, including a state park ranger’s refusal to issue a camping permit.

Article Four provides for a variety of presiding officers (§ 402), including the agency head, and for recommended, initial, and final orders in contested cases (§ 413). This is based on variations in state law governing delegation of decisional authority in adjudication. Article Four procedures are designed to be used by both central panel agencies (governed by Article Six) and enforcement agencies that conduct their own contested case hearings.

Section 408 governs ex parte communications but also contains separation of functions provisions. The latter language is a compromise reached by the drafting committee in response to polar positions that advocated for no agency head exception, on the one hand, and the permissive approach of the 1981 Act, on the other. These positions are defended in the accompanying articles by Professor Michael Asimow and Judge Ann Young.

Article Five contains provisions governing judicial review of final agency action. The standing and scope of review sections are key provisions set forth in brief and concise language. Most states have a substantial body of judicial review case law covering these issues and others. The 2010 Act’s provisions are designed to be consistent with the existing laws of many states that take a variety of approaches to judicial review.

Article Six contains provisions governing central panel hearing agencies, typically named the office of administrative hearings. The growth of central panel agencies in the states since the adoption of the 1981 Act has been significant, with 25 states currently employing such agencies. In central panel agencies, the administrative law judges who preside over contested case hearings work for the central panel agency, not for the agency whose contested case is being adjudicated. This provides for a separation of the hearing and decision authority from the agency authority to enforce the law and adopt agency rules. This structure can provide for greater fairness in contested case hearings. Article Six is continued on page 27

* Professor of Law, Pepperdine University; Reporter, Model State Administrative Procedure Act, 2006-2010. The text of this article is adapted directly from the prefatory note to the Act.
Rulemaking Under the 2010 Revised Model State Administrative Procedure Act

By Ronald M. Levin*

Article 3 of the 2010 Revised Model State Administrative Procedure Act (2010 Act or 2010 MSAPA), the rulemaking article, was the product of extensive collaborative efforts between the drafting committee and the American Bar Association Section of Administrative Law and Regulatory Practice. In my capacity as ABA advisor to the drafting committee, I acted as a liaison between the two groups. On the whole, the committee was quite receptive to suggestions from the Section. I believe the article became clearer and more workable as a result.

From the standpoint of readers who are familiar with federal rulemaking practice, Article 3 is a combination of familiar and distinctive requirements. The most innovative provision is § 311, which deals with guidance documents (also commonly known as interpretive rules and policy statements). I will discuss this provision in detail below.

First, however, I will offer a brief tour of the 2010 MSAPA’s treatment of ordinary rulemaking. (In the language of the Act, unlike the federal APA, the word “rule” refers solely to rules that have the force of law.)

The Basic Rulemaking Process

The Act’s rulemaking process revolves around a standard notice-and-comment model. The agency begins by publishing a proposed rule in a state publication like the Federal Register (§ 304). It also creates a rulemaking record. Unlike the federal APA, the Act prescribes the contents of the rulemaking record in detail (§ 302). This record provides a basis for the agency’s decision and, later, for judicial review (§ 507).

During the ensuing comment period, members of the public may submit comments, and the agency can freely add other material to the record as well (§ 306). Oral contacts between the agency and members of the public are freely permitted. The agency has discretion to hold a live hearing, but it is not mandatory unless some other state law requires one to be held. At the end of the process, the agency publishes the final rule along with an explanatory statement containing reasons for the rule, responses to comments, etc. (§ 313). All this is familiar terrain.

Section 305 of the Act requires the agency to prepare a regulatory analysis to accompany rules that have an expected economic impact of more than a specified amount (to be determined by the legislature). Essentially, this is a requirement of cost-benefit analysis. Unlike the usual situation in federal law, questions as to whether an agency fulfilled this obligation are reviewable in court; the test is whether it made a “good faith effort to comply.” The regulatory analysis requirement carries the potential to bog down the rulemaking process with inquiries that state agencies, with their limited size and budgets, do not have the resources to pursue rigorously. Superficial analyses may be the result. Hopefully, legislatures will heed the admonition in the official Comment that they should set the trigger level for this requirement high enough “so that the number of regulatory analyses prepared by any agency are proportionate to the resources that are available.”

One other point of divergence from federal law is that the 2010 MSAPA gives the agency a time limit within which it has to complete the rulemaking proceeding, or else the rule becomes void. The 1981 MSAPA provided a six-month period from the publication of the rulemaking notice (or the conclusion of an oral hearing). Early drafts of the 2010 Act had a similar provision. Members of the drafting committee thought that an agency may drag its feet indefinitely if it does not have a deadline, thus prolonging the uncertainty for those who are threatened with regulation. However, the ABA Section of Administrative Law and Regulatory Practice objected, arguing that fixed deadlines can backfire. A host of legitimate reasons might delay the completion of a rulemaking proceeding, such as leadership changes, a crowded agenda, or a tight budget. Simple lack of consensus and a profusion of interested persons to consult might also make the deadline hard to meet. If the proceeding has to be dropped and restarted, the result could be further delay. The result of this dialogue between the two groups was a compromise. The final Act allows the agency to take two years to finish the rule; and if it makes a finding of “good cause” and opens the record for fresh comments, it can take up to two more years.

Variant Rulemaking Models

Article 3 also codifies several familiar variations on the standard notice-and-comment model. An emergency rule may be issued without notice and comment (§ 309). However, such a rule can last only 180 days, renewable once for another 180 days. Thus, this provision raises some of the same concerns about restrictive deadlines as were noted above. At the end of the combined 360-day period, the emergency might be over, but the agency might not have had time to decide what permanent rule should apply to the situation, nor to adopt that rule through the standard rulemaking process.

For rules that are expected to be noncontroversial, the Act provides a direct final rulemaking process (§ 310). The agency can announce what rule it intends to adopt, and if no one objects...

* Henry Hitchcock Professor of Law, Washington University School of Law; former Chair, ABA Section of Administrative Law and Regulatory Practice. The author served as ABA advisor to the 2010 MSAPA drafting committee from 2007-10. A longer version of this article is forthcoming at 20 Widener L.J. No. 3 (2011).
to it, it will become law without further consideration by the agency. This technique is borrowed from federal practice. In contrast to the federal APA, however, the agency does not have the option of simply adopting the noncontroversial rule without any prior notice by determining that notice and comment is “unnecessary.”

In addition, the MSAPA contains a provision for negotiated rulemaking (§§ 303(b)–(c)), similar to the federal Negotiated Rulemaking Act. Several states have already enacted such legislation, and this provision should dispel any doubts about the legality of the practice in an MSAPA jurisdiction.

**Guidance Documents**

Guidance documents differ from rules in that they are not binding, i.e., they lack the force of law. About half the states require that agencies use notice-and-comment procedures to promulgate guidance documents. The 2010 MSAPA, however, follows federal law by exempting them from rulemaking procedures (§ 311(a)). The drafters supported this exemption because they believed that members of the public benefit from knowing how the agency intends to implement its enabling legislation. Agencies cannot articulate all of their legal interpretations and policy positions in binding regulations, and advisory documents facilitate compliance and serve to channel the discretion of agency employees.

Agencies’ use of guidance documents does, however, give rise to a recurring criticism. Administrators sometimes apply such pronouncements in a binding fashion, without allowing citizens to question whether the positions expressed in them are correct. When this happens, the agency has as a practical matter given the guidance document the same force as if it were a legislative rule, while bypassing the safeguards of the rulemaking process that are supposed to accompany such rules.

The usual manner in which courts counteract this tendency for administrators to misuse guidance documents is by disallowing the rulemaking exemption. This approach is familiar in federal law. What the agency calls a guidance document may be judicially reclassified as a rule — and therefore set aside for having been issued without notice and comment — if the agency behaves as though the document contains a binding norm. This judicial technique does curb the abuse just mentioned, but it also creates practical problems for the agency. The courts’ application of the binding norm test is highly unpredictable. Naturally agencies tend to adhere to their guidance documents — that is why they issue them. But if a court thinks that the language of the document is too coercive, or the agency’s behavior in implementing it is too inflexible, the agency is at risk of having the document declared invalid. When this occurs, members of the industry are left without a reliable source of guidance as to how to satisfy their regulatory obligations.

Still, the courts’ approach is understandable, because the disallowance of an APA exemption has been the only tool they have had available for rectifying the binding use of guidance documents.

Section 311 of the 2010 MSAPA offers a completely different solution to the same problem. An agency is free to issue a guidance document without rulemaking procedure, and the Act does not contemplate that a court might reclassify the document as a disguised rule. However, § 311 itself spells out several procedural obligations that agencies must observe when using guidance documents. These duties are the “price” that the agency has to pay in return for having been allowed to adopt the document without notice and comment. The language of these obligations was for the most part drawn directly from statements developed over the years by the ABA, the Administrative Conference of the United States, and the Office of Management and Budget.

The most fundamental of these obligations is in § 311(b): When it applies a guidance document to a person, the agency must “afford the person an adequate opportunity to contest the legality or wisdom of a position taken in the document.” This principle is functionally similar to the conventional “binding norm” test noted above. However, instead of burying this issue in debates over the definition of a policy statement, § 311 brings the issue out into the open in explicit statutory terms. Agencies can therefore take the first crack at determining which procedural avenues add up to a fair opportunity to make one’s case, but the courts will then be able to exercise oversight over these determinations. Ultimately, the question of what procedures must be afforded will depend on the circumstances, but the gradual accretion of judicial precedents construing § 311(b) should serve to narrow the range of uncertainty. As the official Comment accompanying § 311 points out, the matter may also lend itself to agency rulemaking to implement § 311(b). If such a rule survives judicial challenge, other agencies will be able to emulate it; if it does not, the agency will have the opportunity to amend it in light of the court’s opinion.

**Other Guidance Requirements**

Section 311(c) provides that an agency guidance document may give binding instructions to staff members if the agency’s procedures also allow the affected person to contest the position in the document “at an appropriate stage in the administrative process.” The idea here is that, even though a guidance document cannot carry the force of law, the agency is not required to entertain challenges to it at every level of the implementation process. Low-level staff can be directed to advise challengers to speak to their supervisor or to appeal to a higher level.

Section 311(d) makes the point that a guidance document should be reliable. If an agency proposes to depart from a position expressed in the document, it must explain this decision and justify the departure in light of any reliance interests. The 2010 MSAPA thus reflects the dualistic nature of guidance documents: they should be dependable (subsection (d)) but not too dependable (subsection (b)). This is a challenging line to draw, but at least § 311 brings the challenge out into plain view.

Section 311 contains several other provisions, including publication requirements, but I will draw attention to just one more. Under § 311(h), anyone may petition an agency to revise or repeal continued on page 28
Staff Advice to Decision Makers
Under the 2010 MSAPA

By Michael Asimow*

The approval by the Uniform Law Commissioners of the 2010 Revised Model State Administrative Procedure Act (2010 MSAPA) is a landmark event. More than 20 states adopted the 1961 MSAPA, but its successor, the 1981 MSAPA, won few adoptions. Although the 1981 Act had many cutting-edge ideas, it was far ahead of its time and was too complex and detailed. The 2010 version returns to the gradualist and non-threatening approach of the 1961 Act, updated to take account of many significant developments in the 50 years since it was drafted. Let’s hope it sweeps the field. All credit to the reporters, John Gedid and Greg Ogden, for monumental efforts in bringing the ship into port after a turbulent seven-year voyage.

I was the American Bar Association’s liaison to the drafting committee for several years and I strongly support most of the provisions. But this article concerns a provision I oppose Section 408(e)(2). This section deals with the important problem of whether and when to permit ex parte agency staff advice to decision makers. The problem of staff advice arises when an agency adjudicatory decision resolves important personnel issues, dealing with the media, technical aspects if they did. Yet the case must be decided and it must be decided right.

While often controversial, the issue of ex parte staff advice has long been settled in state and federal administrative law. Agency decision makers are allowed to consult agency staff members off the record provided (i) the staff member has not been involved as an “adversary” in the case as an investigator, prosecutor, or advocate and (ii) the staff member does not add new evidence to the record. These rules are well understood, non- controversial, and easy to follow. The rules permit a non-adversary staff member to assist the decisionmaker to understand the record, to furnish legal, technical, and political advice, and to give opinions about the testimony of expert witnesses and about the ultimate resolution of the matter. Obviously, permitting this kind of advice is contrary to the adversary system as practiced in civil and criminal litigation, but many aspects of administrative adjudication depart from a strict adversarial model. Section 554(d) of the federal APA, the 1981 MSAPA, and every case that has ever been decided on the issue allows ex parte staff advice to decisionmakers (subject to the constraints that adversary staff members are screened and advisers cannot violate the “exclusive record” principle).

But the 2010 MSAPA forbids much of it. This issue was heavily debated before the drafting committee and was a bone of contention for years. A majority of the drafting committee embraced a strict adversarial model that would prohibit any ex parte staff advice. A minority of the committee (and the ABA liaisons, Ron Levin and myself) argued for the traditional rule permitting ex parte staff advice. The drafting committee compromised by allowing significant forms of staff advice, but in my view, the compromise is not acceptable. The Council of the ABA Administrative Law Section wrote to the drafting committee and to the Uniform Law Commissioners opposing Section 408(e)(2), but were unsuccessful.

Under Sections 408(d) and (e), the staff can furnish significant forms of ex parte advice. Agency heads can receive advice from legal advisers and may communicate with staff about “ministerial” matters. Staff can furnish an “explanation of the precedent, policy or scientific terms in, the evidence in the agency hearing record.” Staff can give an “explanation of the precedent, polli-

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cies, or procedures of the agency.” Indeed, staff may furnish “any other communication that does not address the quality or sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the credibility of witnesses.”

That language I have italicized is the part I object to. It would not allow staff scientists to express any opinion about how to resolve the clash of expert witness testimony or how to decide the ultimate dispute. Is witness W a reliable scientist or economist or for sale to the highest bidder? Is W propagating junk science or soundly based scientific testimony? How about the ultimate result in Batco: Should we opt for development and allow 10 ppm? Follow the precautionary principle and allow only 2? Compromise on 5? Here the 2010 MSAPA leaves the heads on their own. Staff cannot speak.

This provision makes it likely that the agency heads will not get the advice they desperately need. Indeed, the provision is so complex and so full of difficult distinctions (like the one between explaining technical evidence and expressing an opinion about its quality) that the agency may decide to forgo staff advice altogether to avoid the risk of crossing one of those lines. That would be a bad result for the public interest.

Moreover, this provision is a radical departure from all prior law and practice. It will be a lightning rod for criticism by agencies and state attorneys general. It could sink the Act entirely in many states. The 1981 Act failed because it called for too many untested departures from existing administrative law and contained too many highly nuanced and complex statutory provisions. Section 408(e)(2) is just such a provision, both breaking from prior law and loaded with difficult distinctions.

Many people say: Allow the staff advice but put it on the record. Then allow rebuttal by whichever side disagrees with it. However, I believe that on-the-record advice is likely to be worthless. If the memoranda can be used against the agency on judicial review, or will be on television or in the newspaper, the adviser will watch every word. Perhaps the advice will be given orally, but not in writing. That is why pre-decisional memoranda are exempt from disclosure under the Freedom of Information Act — we think it’s vital that our decision-makers get blunt and unvarnished advice, even though that means the public never finds out what advice was given. We have seen what meetings of agency heads are like under the Sunshine Acts — nobody says anything important in public, and there are no policy debates. That is why we extend the attorney-client privilege to a lawyer’s advice to clients. You will never get candid advice if it is not confidential.

In short, states should adopt the 2010 MSAPA. It will vastly improve state administrative law in so many respects. But they should strike out the language in section 408(e)(2) that limits the kind of advice that non-adversarial staff members can give agency heads.

From the ABA Section of Administrative Law and Regulatory Practice

Homeland Security: Legal and Policy Issues

Joe D. Whitley and Lynne K. Zusman, Editors

The concept of homeland security has evolved from a mostly academic military proposal to the biggest reorganization of the federal government since the creation of a Defense Department in 1947. Homeland Security: Legal and Policy Issues draws upon the expertise of leading practitioners in the emerging and expanding field of homeland security. This comprehensive resource looks at homeland security as a critical area of legal practice affecting both the public and private sectors. It also serves as an important compilation of policy and practice-oriented information pertaining to the Homeland Security Act.

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Ex Parte Communications and the Exclusive Record Provision of the 2010 MSAPA

By Ann Marshall Young*

For approximately 17 years I was a state central administrative law judge (ALJ) in Tennessee. Through this experience I learned that one of the most fundamental and important concepts in administrative adjudication is that decisions in contested cases are to be based solely on the hearing record, after opportunity for parties to respond to evidence affecting their interests. This concept is closely related to the ex parte prohibitions found not only in the various administrative procedure acts but also in codes of judicial conduct and disciplinary rules for lawyers. All recognize the importance of avoiding "off the record" ex parte communications except in specified appropriate circumstances, and of requiring that any that do occur be placed on the record in some manner, so that any party may respond to them, on the record. Thus the ex parte prohibitions serve the goal of ensuring that decisions are actually based exclusively on the hearing record.

The ex parte prohibitions are, more broadly, central to ensuring fundamental fairness in adjudication. For it is generally through ex parte communications that inappropriate influences may undermine the fairness of a proceeding. This may occur through communications intended to bias an adjudicator but probably more commonly occurs inadvertently, nonetheless still affecting the mindset or understanding an adjudicator has regarding the issues and facts in a proceeding. Prohibitions against such ex parte communications (i.e., communications that take place without notice and opportunity for all parties to participate), and requirements for disclosure when any such communications do occur, with opportunity for parties to respond, protect the due process rights of parties and the fairness of the adjudication process. These principles are incorporated in Section 408 of the Revised Model State Administrative Procedure Act (Act or 2010 MSAPA), which also at Section 406(c) mandates that the "hearing record constitutes the exclusive basis for agency action in a contested case."

In my view, notwithstanding some of Professor Asimow's practical arguments, proceeding as he advocates would inescapably result in decisions being based on information outside the record, in violation of Section 406(c).

Section 408(e)(2) of the Act provides that an agency head who is the presiding officer or final decision maker in a pending contested case may communicate about that case with an employee or representative of the agency but only if said employee or representative is not involved in the case in a capacity specifically prohibited by the section, and only if such communication does not "augment, diminish or modify the evidence in the agency hearing record," and is:

(A) an explanation of the technical or scientific basis of, or technical or scientific terms in, the evidence in the agency hearing record;
(B) an explanation of the precedent, policies, or procedures of the agency; or
(C) any other communication that does not address the quality or sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the credibility of witnesses.

The limitation at subsection (e)(2)(C) to an extent protects against communications that might add information that should otherwise be placed on the record. Subsection (e) overall represents a compromise between Professor Asimow's point of view that the limiting provision of subsection (C) should be eliminated so as to permit opinions from staff experts on essentially determinative issues and the competing view of quite a number of ALJs that any such explanatory communication and advice are, in essence, the sort of expert opinion normally provided in expert testimony on the meaning and significance of various "basic-fact" evidence, such that to provide it ex parte would therefore be permitting decisions to be based on substantive information outside the record, absent disclosure and opportunity to respond.

A lack of clarity certainly remains in the existing compromise language. Subsections (A) and (B) of Section 408(e) (2) could be interpreted overbroadly and inappropriately, especially if not viewed as being meaningfully limited by the requirement that any communications not "augment...the evidence in the...hearing record," and by the proviso at subsection (C). And that proviso, that communications with staff may "not address the quality or sufficiency of, or the weight that should be given to, evidence in the agency's hearing record, or the credibility of witnesses," is important — because it alerts and reminds agency members serving as adjudicators that it is their decision to make, based on their own understanding and weighing of the evidence in the record, not on an agency employee's interpretation and opinion on the quality and sufficiency of the evidence and the credibility of witnesses. That sort of interpretation of basic facts in the record and opinion on how they should be evaluated is precisely the sort of evidence that expert witnesses normally provide, on the record. Indeed,
this is what is generally most in dispute in adjudications involving complex technical issues. Viewing such situations realistically, one cannot but conclude that the sort of staff interpretation at issue would clearly also “augment” the evidence in the hearing record.

In other words, the basic facts in complex cases are often essentially undisputed. The critical questions (even when some basic facts are controverted) are what they mean and their significance with respect to the issue or issues to be resolved. Which party’s experts are more credible? According to which experts’ opinions should the basic facts be evaluated? Which expert opinions are of the best quality? Which are sufficient and which insufficient? If essentially unlimited ex parte communications and advice on the meaning and significance of basic facts were to be permitted, as Professor Asimow and the Section of Administrative Law and Regulatory Practice Council essentially urge, decisions would come to be based largely on substantive information outside the record, and parties would have no opportunity to respond to what might well be the most significant — often the deterministic — information considered by adjudicators in reaching their decisions.

In my view, if these were to be permitted, proceedings could not in good conscience be held out as respecting the rights of parties to respond to any evidence that affects their interests, or as producing decisions based exclusively on the record.

Moreover, it is not impossible or impractical to conduct proceedings in a manner that would permit agency members to base decisions exclusively on the record and their own understanding of it. I provide here but one example of this.

In Tennessee, I managed and heard cases for many state agencies, in various capacities. These included: (1) adjudicating cases sitting alone; (2) ruling on certain appellate matters; and (3) sitting with various agencies, agency heads, boards and commissions, rather in the manner of a judge sitting with a jury — except that the state agency “jury” had more authority to make ultimate decisions not only on the facts and whether they fell within defined legal standards, but also on certain aspects of the law itself, with guidance from the ALJ after hearing the arguments of parties.

When I sat with agencies, in addition to ruling on prehearing matters and ensuring that cases were managed appropriately to get them to hearing in a timely manner, I would, among other things, in the hearings themselves advise agency members on evidentiary and procedural matters. After the conclusion of the evidence, and after considering any proposed charges on the law from the parties, I would charge the agency members on the law they should apply in reaching their decisions. I would also make sure that agency members made rulings on all necessary matters and that they provided enough basis for their rulings to minimize any likelihood of a remand.

Customarily, at the beginning of a hearing with an agency, I (or whichever ALJ was assigned to the case) would inquire whether any member had received any ex parte communications and make sure that any that had been received were placed in the record. Members would also be advised not to engage in any such communications during the pendency of the case. (If necessary, I would also provide advice on the standards to follow in ruling on any motions to recuse.)

In these hearings, members of the agency staff would generally appear as expert witnesses, testifying on various technical and other matters, including the agency staff’s position on the issues in the case, and their own interpretations and opinions on the significance and meaning of basic facts in the record. These experts might also provide their opinions on how the basic facts could not reasonably be interpreted, vis-à-vis the opinions of other experts.

The agency members would question the expert witnesses, both those of their staff and those of any other parties. In my experience, they would view it as their responsibility to ask enough questions, on the record, to ensure that they had sufficient information and understanding of the issues and facts to make an informed decision.

I am sure there are other examples of adjudicatory processes that provide reasonable means of reaching decisions without relying on information and advice provided outside the hearing record, both in states where there are central panels and in those where more traditional models prevail.

In any event, based simply on a plain-language reading of the exclusive record provision of the 2010 MSAPA, the sort of communications that Professor Asimow and others advocate must be avoided, in my view. Any extent to which this may have occurred in the past in some jurisdictions is insufficient reason for this to remain the norm, particularly in a model act. The compromise set forth at Section 408(e)(2) may be less than ideal, but it is better than opening the process to wholesale violation of the fundamental principle that decisions must be based exclusively on information in the hearing record.

This is not to imply that there would be intentional violations. Rather, if the sort of communications at issue were to be permitted, it would be exceedingly difficult, if not impossible as a practical matter, to effectively separate out the sort of advice that should be avoided as being essentially the sort of expert opinion that must be presented on the record from that which might be permitted as not adding anything to the record. Moreover, any assertion that such advice would be “objective” would ensure no such thing — again, not because the advice would purposely be slanted, but because such “objectivity” is in reality very often more in the eye of the beholder than clearly established without dispute. And with no notice or opportunity to respond, any potential dispute would be cut off without recourse. The current compromise should at least serve a cautionary function through the provision in Section 408(e)(2)(C).

In conclusion, it is from time to time observed that people probably have more contact with the legal system through administrative proceedings than through judicial proceedings. Thus, public faith in the legal system may be said to rest in large part on the public’s view of the integrity of the administrative adjudication process. This, in turn, may be said to rest on such fundamentals as whether decisions are indeed based exclusively on the record — or instead on the sort of ex parte communications prohibited by Section 408(e)(2).
Greening the Grid in California

Timothy P. Duane*

The climate change policy debate has decisively shifted from “if” to “when” and “how” we should limit greenhouse gas (GHG) emissions. Nowhere does this shift have more profound ramifications than in the electric utility industry, which nationally accounts for 41% of carbon dioxide (CO2) emissions from fossil-fuel combustion. Since the 1970s, California has been a bellwether state in greening the grid. Climate change has made these efforts more urgent with passage of California Assembly Bill 32 (AB 32), the California Global Warming Solutions Act of 2006, which requires statewide GHG emissions to be reduced to the equivalent of 1990 levels by the year 2020. California’s approach to GHG reductions going forward is ambitious given the three key strategies, the key lessons from California’s earlier experience are directly relevant to all efforts today to green the grid.

The California Air Resources Board (CARB) is the lead agency for implementing AB 32, but it must consult with the California Public Utilities Commission (CPUC) and the California Energy Commission (CEC) on any energy-related aspects of AB 32 implementation. The CPUC and CEC also have authority independent of AB 32 to consider the environmental impacts of those facilities and entities over which they have regulatory jurisdiction.

The CPUC regulates retail rates in the electricity, natural gas, telecommunications, water, and transportation sectors for investor-owned utilities (IOUs). Its influence on GHG emission is primarily through economic incentives for the IOUs. Publicly owned utilities (POUs) are not regulated by the CPUC. The CPUC also has a prominent role in encouraging demand-side management (DSM) and energy efficiency measures (through decoupling rates from utility profits and funding specific programs or rate structures that promote “smart grid” operation). The CEC, unlike the CPUC, has no authority over the economic levers of electric regulatory policy.

Instead, the CEC directly regulates the siting of major, non-nuclear thermal generating facilities in the state. The CEC also develops a biennial electricity resource plan that includes projections of future electricity demand as well as available supplies to meet that demand. The CEC has more direct authority to influence electricity demand than the CPUC’s rate-oriented authority; because the CEC can promulgate energy efficiency standards for buildings and appliances. CEC efficiency standards and CPUC DSM programs have together dampened electricity demand increases over the past three decades so that California’s annual per capita electricity consumption is now less than two-thirds of the national average.

California IOUs sold nearly all of their non-nuclear thermal generating assets from 1996–2000 as the state attempted to deregulate the industry. Consequently, the CPUC now has only indirect influence on generation by approving or disapproving IOU rate recovery for the costs of electricity through Power Purchase Agreements (PPAs). The CPUC could create strong economic incentives for renewable generation by allowing higher rate recovery from zero- or low-GHG emission-generating sources and/or by disallowing rate recovery for higher-GHG emission-generating sources. The CPUC began to develop GHG emission limits in February 2006 (before AB 32), and California Senate Bill 1368 (enacted in September 2006, at the same time as AB 32) directed the CPUC and CEC to adopt GHG performance standards that effectively prohibit California utilities from building or contracting for power from coal-fired power plants.

California’s Renewable Experience Under PURPA

California is not new to the challenge of greening the grid: It led the nation in renewable generation following passage of the Public Utility Regulatory Policies Act (PURPA) of 1978 (PL 95–617). Qualifying Facilities (QFs) under PURPA (which had to be powered by either renewable energy sources or through energy-efficient cogeneration, which produces both electricity and thermal energy) jumped to over 10,000 Megawatts (MW) of generating capacity in California (19% of total capacity) from 1978 to 1998. A complex combination of economic and institutional incentives — through PPA structures, planning processes, and interconnection policies — created a robust QF industry that had in turn completely altered the state’s electricity industry by the mid-1990s. The successes and failures of the state’s earlier experience are directly relevant to all efforts today to green the grid.

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California’s major innovation in PURPA implementation was its recognition that (1) different types of generating technologies warrant different types of PPAs and (2) long-term capital investments require long-term price certainty (just as utility investments do). This approach — where renewable power purchases are treated as long-term investments and evaluated by the same criteria as utility investments in their own facilities — remains as sound today as it was in 1983. Unfortunately, the lessons learned from California’s innovation in the 1980s were lost when utilities and regulators delegated resource planning to “the market” in the Deregulation Era of the 1990s. Ideological embrace of deregulation by state lawmakers and regulators shifted policy with the intention of minimizing the direct financial costs of electricity. Renewable generating technologies could not compete in a market that favored low capital-cost technologies that neither reduced reliance on fossil fuels (which could be highly volatile in terms of ratepayers’ exposure to future electricity costs) nor addressed the environmental and security externalities associated with non-renewable generation. The result was that “the market” produced one dominant source of new power in the west: natural gas-fired generation. Moreover, California’s payment system in its deregulated market eliminated the financial benefits of diversifying the generation mix by linking the price of all power (including renewable power) to the price of producing power from the system’s marginal (i.e., least efficient) generating unit. This meant that the prices utilities and their customers paid for renewables were effectively paid for renewables were effectively just as vulnerable to natural gas price increases as natural gas-fired generation. The Deregulation Era therefore squandered much of California’s progress.

But the experience of California from the late 1970s through the early 1990s shows that it had been a false choice between the Natural Monopoly Era and the Deregulation Era. We are not limited to either stodgy, old-fashioned, centrally controlled, utility-owned generation or creative, innovative, market-responsive merchant generation. Instead, there is a third path that draws on the relative strengths of both regulators (in setting policy goals) and markets (in achieving them). That third path is the best way now to make the transition to the Climate Change Era: by establishing contested renewable generation markets, the barrier of reluctant utilities is being bridged through non-utility innovation and technology deployment. That competition, in turn, has generated utility innovation and a greatly strengthened capacity to ramp up renewable generation to the levels necessary to green the grid.

**Renewable Portfolio Standards**

A renewable portfolio standard (RPS) is a target fraction of total installed capacity or total generation that must be provided by renewable generation technologies as defined by the RPS. By 2006, 21 states had adopted RPS targets, but that number doubled to 42 states and the District of Columbia by the end of 2009. The targets, the definition of what qualifies as meeting the RPS, and the methods for determining compliance vary from state to state. Some state RPS targets are set by legislation, while others have been set through administrative processes or via executive orders. In all cases, however, an RPS effectively creates separate markets for renewable generation. And since most utilities need to increase renewable generation significantly more than projected demand increases in order to meet the RPS standard, the lion’s share of new generation will need to be renewable. This is an effective strategy for promoting renewables, but the RPS approach also has its critics because it typically costs more financially (but not environmentally) than relying only on non-renewable generation.

The federal government has offered an indirect “adder” payment since 1992 through the Production Tax Credit (PTC), which is worth $0.011 or $0.021/kilowatt hour (kwh) today (depending on the technology) for qualifying renewable generation under the Energy Policy Act of 1992, 26 U.S.C. § 45. Payment of a green premium for every kilowatt hour of power has helped nurture renewable technology development (especially wind), but it has not produced the vibrant, steadily growing renewable generating industry that is necessary to green the grid sufficiently in the Climate Change Era. Price incentives alone are not sufficient for steady development and deployment of new technologies — unless they are so high that they overcome all risks for technology and project developers. This appears to be the lesson of the Feed-in-Tariff (FIT) approach of Europe, which establishes a price (tariff) to be paid for any renewable energy fed into the grid. High FIT prices of 27-46 euro cents/kwh have generated massive investment in generating capacity for wind throughout Europe, photovoltaic in Germany, and concentrated solar power in Spain. Such high FIT prices have now led European governments to reduce FIT prices dramatically as costs have become an economic burden on electricity ratepayers. The result is likely to be another boom-and-bust technology development cycle in Europe, rather than the steady expansion of a stable and mature renewable generation industry.

This parallels the experience of California in the 1980s and 1990s.

A FIT-oriented strategy is not really an alternative to or inconsistent with an RPS-driven strategy; rather, a FIT could instead be one element in a portfolio of strategies for achieving an RPS target. California’s ambitious RPS target (established both by Executive Order and through CARB adoption of a “Renewable Electricity Standard” to implement AB 32) is to satisfy 33% of all electricity consumption from renewable generation sources by 2020. Neither large hydro-power nor nuclear generation is eligible to meet these RPS targets.

**Transmission and Renewable Generation Facilities Siting**

Meeting California’s ambitious RPS goals requires moving power from where it can be generated renewably to where the load and demand require it. Unlike fossil fuels, which can be transported to geographically more desirable sites for power generation, renewable generation must be located at the site of the

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*continued on next page*
renewable resource. The green power must then be sent to load centers via high-voltage transmission lines. New and expanded transmission capacity is therefore necessary to improve both the economic efficiency and environmental performance of the nation’s electrical system.

However, there is a tension in our federal system over who should have primary authority for siting, authorizing, permitting, and funding such capacity. Congress stepped in to expedite transmission line siting with the Energy Policy Act of 2005, Pub. L. No. 109-58, which establishes federal preemption over transmission line permitting within “National Interest Electric Transmission Corridors” designated by the Department of Energy (DOE). This centralization of authority — and reliance on a narrow set of evaluation criteria when determining whether to issue permits for new or expanded transmission lines — has created new tensions with state and local governments (which have multiple concerns in addition to the efficiency of the electric grid).

Existing federal laws such as the National Environmental Policy Act, 42 U.S.C. § 4321; the Endangered Species Act, 16 U.S.C. §§ 1531, et seq.; the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701, et seq.; and the National Forest Management Act, 16 U.S.C. § 1600 — which are triggered when federal lands or monies are used in transmission projects — present complex planning and permitting challenges. To help address such complexities, the Western Governors Association and DOE initiated the Western Renewable Energy Zone (WREZ) project in 2008, which coordinates planning at the regional scale in order to facilitate development of an integrated western renewables network. California is participating in the WREZ but has also been proceeding with its own Renewable Energy Transmission Initiative (RETI), which is about a year ahead of the WREZ effort. Under RETI, both the economic and environmental desirability of specific transmission system investments have been linked to identification of Competitive Renewable Energy Zones (CREZ) within and adjacent to California. Both the RETI and WREZ efforts are collaborative, stakeholder-led processes designed to gain widespread agreement on both where to build new transmission and where not to build new transmission in order to avoid delaying renewable development and transmission investment caused by litigation over environmental concerns. In California’s case, RETI used eight criteria to compare the environmental sensitivity of the California CREZs and then created a composite ranking score. Attention to the environmental ramifications of large-scale renewable energy development is the key to overcoming public resistance to and litigation over such development.

The economic cost of project development and transmission system investment to deliver power from the CREZs is also important. The RETI analysis therefore shows how economic and environmental tradeoffs may affect the desirability of particular CREZs. The planning and evaluation model offered by RETI is one that DOE and other states should follow. The key is that RETI is transparent and incorporates participation by a wide range of stakeholders. The RETI effort is time- and data-intensive, however, for all stakeholders. RETI has identified approximately 200 potential network transmission elements and over 100 line segments — with estimated costs, electrical performance, and environmental attributes identified for all of these potential strategic transmission system investments. Now the hard work begins of planning, designing, and permitting the specific transmission lines identified through RETI.

Perhaps more difficult is determining who should pay for the nearly $6 billion of new transmission investment identified by RETI. The first major transmission project to raise this question was the Sunrise Powerlink Project, first proposed by San Diego Gas & Electric Company (SDG&E) in December 2005 (before RETI). The $1.883 billion project has faced strong opposition over its specific routing and whether SDG&E ratepayers should pay for it. SDG&E successfully argued before the CPUC that the line would provide system benefits such that all ratepayers should both gain from and be responsible for paying for the project. Much of the delay and controversy over the project could have been avoided if the RETI process had been completed ahead of time. The original route went through Anza-Borrego State Park (the largest state park in the nation). The CPUC rejected that routing and instead approved a less economically beneficial route.

The WREZ and RETI efforts show the importance of systematically identifying high-value, low-impact sites for renewable generation and transmission facilities. Both RETI and WREZ remain programmatic screening-level efforts, however, so project-specific environmental review and permitting remain necessary under existing state and federal laws. The details of the specific permitting procedures and issues confronting individual renewable generation facilities are beyond the scope of this article, but important lessons can be drawn from the WREZ and RETI efforts (and the failure to conduct such efforts before the Sunrise Powerlink transmission line was first proposed). First, programmatic assessment is necessary to reduce the likelihood of conflict over project-specific proposals. Second, such programmatic assessment must be transparent and include participation by all of the relevant stakeholders. Third, coordination among and consistency across relevant state and federal permitting authorities is necessary if more than just a patchwork quilt of isolated renewable projects is going to be developed.

California’s Integrated Approach to Greening the Grid

California has led the nation with environmentally sensitive electricity sector policy for nearly four decades. The state’s experience with (1) energy efficiency standards coupled with ratepayer-funded demand-side management programs, (2) renewable portfolio or energy standards that recognize all of the long-run avoided cost benefits of renewable generation, and (3) strategic investments in environmentally conscious renewable power transmission is instructive for any effort to implement climate change policy by greening the grid.
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April 8-10, 2011
The Boar’s Head Inn
Charlottesville, VA
Program Co-Chairs: Dana Weekes & Christine Franklin

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- Civil and Criminal Regulation of Lobbying
- Wine Law

* Program topics are subject to change

Section of Administrative Law and Regulatory Practice
740 15th Street, NW
Washington, DC 20005
WEDNESDAY – MARCH 2, 2011

7:30 am – 8:45 am
Continental Breakfast & Registration

8:45 am – 9:00 am
Welcome and Introductions

Jonathan J. Rusch, Deputy Chief for Strategy and Policy, Fraud Section, Criminal Division, U.S. Department of Justice, Washington, DC; Chair, ABA Section of Administrative Law and Regulatory Practice

Joe D. Whitley, Program Chair; Shareholder, Greenberg Traurig LLP, Atlanta, GA and Washington, DC; Former General Counsel, U.S. Department of Homeland Security

Chad Boudreaux, Program Vice-Chair; Special Counsel, Baker Botts LLP, Washington, DC; Former Deputy Chief of Staff, U.S. Department of Homeland Security

Elizabeth L. Branch, Program Vice-Chair; Partner, Smith, Gambrell & Russell LLP, Atlanta, GA; Former Counselor to the Administrator of the Office of Information and Regulatory Affairs, U.S. Office of Management and Budget; Former Associate General Counsel for Rules and Legislation, U.S. Department of Homeland Security

George A. Koenig, Program Vice-Chair; Principal, Koenig Law Group, P.C., Atlanta, GA; Former Counsel to the General Counsel, U.S. Department of Homeland Security

9:00 am – 9:45 am
Keynote Address:
HOMELAND SECURITY: A YEAR IN REVIEW AND WHAT LIES AHEAD
The Honorable Janet Napolitano, Secretary, U.S. Department of Homeland Security (Invited)

9:50 am – 10:40 am
Plenary Session:
THE VIEW FROM DHS: CURRENT LEGAL ISSUES
Moderator: Ivan K. Fong, General Counsel, U.S. Department of Homeland Security

10:40 am – 10:50 am
Coffee Break

10:55 am – 12:00 pm
Plenary Session:
HOMELAND SECURITY: REGULATORY AND LEGISLATIVE DEVELOPMENTS 2011
Moderator: Elizabeth L. Branch, Partner, Smith, Gambrell & Russell LLP, Atlanta, GA

12:00 pm – 1:30 pm
Luncheon Discussion:
THE PROPER ROLE OF THE COURTS IN NATIONAL SECURITY

1:45 pm – 3:00 pm
Breakout Session A:
FINANCIAL TRANSACTIONS & TERRORISM
Moderator: Theodore S. Greenberg, President, TG Group, Washington, DC

1:45 pm – 3:00 pm
Breakout Session B:
GRANTS & OPPORTUNITIES: SURVEY OF THE HOMELAND SECURITY MARKETPLACE
Moderator: Matt A. Mayer, President, The Buckeye Institute for Public Policy Solutions; Visiting Fellow, The Heritage Foundation, Dublin, OH; Former Counselor to the Deputy Secretary, U.S. Department of Homeland Security; Former Acting Executive Director, Grants, Training & Exercise, U.S. Department of Homeland Security

1:45 pm – 3:00 pm
Breakout Session C:
CFATS: DEVELOPMENTS IN CHEMICAL & HAZARDOUS MATERIALS SECURITY

3:00 pm – 3:15 pm
Coffee Break

3:15 pm – 4:30 pm
Breakout Session A:
TRANSPORTATION AND SUPPLY CHAIN SECURITY
Moderator: Jeffrey A. Rosen, Kirkland & Ellis LLP, Washington, DC; Former General Counsel for Office of Management and Budget; Former General Counsel, U.S. Department of Transportation

3:15 pm – 4:30 pm
Breakout Session B:
PRIVACY & DATA PROTECTION
Moderator: Hugo Teufel III, Former Chief Privacy Officer, U.S. Department of Homeland Security

3:15 pm – 4:30 pm
Breakout Session C:
COMMUNICATIONS: PUBLIC SAFETY (FCC) SPECTRUM AND BROADBAND FOR FIRST RESPONDERS

For more information and to register, please contact Anne Kiefer at (202) 662-1690 or kiefera@staff.abanet.org
Moderator: Andrew E. Weis, Managing Director, Civitas Group LLC, Washington, DC; Former General Counsel for the Senate Homeland Security and Governmental Affairs Committee

4:45 pm – 5:15 pm
Closing Address:
DEALING WITH DISASTER: WHAT HAPPENED IN THE GULF?
Admiral Thad W. Allen, Rand Corporation, Washington, DC; Former Senior Executive Staff Member to DHS Secretary Janet Napolitano; Retired United States Coast Guard Admiral; Former 23rd Commandant of the Coast Guard

5:30 pm – 7:00 pm
Cocktail Reception

THURSDAY – MARCH 3, 2011

8:00 am – 8:40 am
Continental Breakfast

8:40 am – 8:45 am
Welcome and Introductions

8:45 am – 9:15 am
Keynote Address:
10 YEARS LATER–IS AMERICAN ANY SAFER?
The Honorable Rudolph W. Giuliani, Giuliani Partners, New York, NY; Former New York City Mayor (Invited)

9:15 am–9:25 am
Coffee Break

9:25 am – 10:30 am
Breakout Session A:
INTERNATIONAL ISSUES: TRAPS FOR THE UNWARY–A SPOTLIGHT ON FCPA & ARMS EXPORT CONTROL
Moderator: Kenneth L. Wainstein, Partner, O’Melveny & Myers LLP, Washington, DC; Former Assistant to President George W. Bush for Homeland Security and Counterterrorism

9:25 am – 10:30 am
Breakout Session B:
CYBERSECURITY ISSUES: DEVELOPMENTS IN THE FEDERAL GOVERNMENT & DATA PROTECTION CHALLENGES WITHIN THE PRIVATE SECTOR
Moderator: Gus P. Coldebella, Senior Fellow, Homeland Security Policy Institute, Washington, DC; Former Acting General Counsel, U.S. Department of Homeland Security

9:25 am – 10:30 am
Breakout Session C:
THE ROLE OF TECHNOLOGY IN HOMELAND SECURITY–LIABILITY MITIGATION TOOLS: SAFETY ACT
Moderator: Brian E. Finch, Partner, Dickstein Shapiro LLP, Washington, DC

10:45 am – 11:55 am
Breakout Session A:
INDUSTRY PROFILE: ENERGY SECURITY–A SPOTLIGHT ON UTILITIES & THE SMART GRID
Moderator: H. Russell Frisky, Partner, Stinson Morrison Hecker LLP, Washington, DC; Former Chair, ABA Section of Administrative Law and Regulatory Practice

10:45 am – 11:55 am
Breakout Session B:
THE HOMELAND LAW ENFORCEMENT AGENDA FOR 2011

10:45 am – 11:55 am
Breakout Session C:
HOMELAND DEFENSE AND CIVIL SUPPORT: THE ROLE OF DOD WITHIN OUR BORDERS

12:00 pm – 1:30 pm
Luncheon Address:
THE SUPREME COURT AND THE WAR ON TERROR
The Honorable Paul Clement, Partner, King & Spalding LLP, Washington, DC; Former (43rd) Solicitor General of the United States

1:45 pm – 3:00 pm
Breakout Session A:
STATE & LOCAL GOVERNMENT PREPAREDNESS & RESPONSIBILITY
Moderator: The Honorable Matthew R. Bettenhausen, Secretary, California Emergency Management Agency (CEMA)

1:45 pm – 3:00 pm
Breakout Session B:
IMMIGRATION HOT TOPICS: VISAS, TRADITIONAL IMMIGRATION, COMPREHENSIVE IMMIGRATION REFORM–WHAT’S NEXT?
Moderator: Chad Sweet, Co-Founder & Managing Principal, The Chertoff Group, Washington, DC; Former Chief of Staff, U.S. Department of Homeland Security

3:00 pm – 3:15 pm
Coffee Break

3:15 pm – 4:30 pm
Closing Address
TRANSPORTATION SECURITY TEN YEARS AFTER 9/11 AND TEN YEARS FROM NOW
The Honorable John S. Pistole, Transportation Security Administration Administrator; Former FBI Executive Assistant Director for Counterterrorism and Counterintelligence

4:30 pm
Concluding Remarks

or visit the website at: http://new.abanet.org/calendar/6th-annual-homeland-security-law-institute/Pages/default.aspx
By Robin Kundis Craig*

This issue’s column offers readers a preview of the U.S. Supreme Court’s 2010–2011 Term, focusing on cases scheduled for oral argument in fall 2010 that may be of interest to administrative law practitioners. The subjects of these cases range from federal preemption to the federal courts’ authority to hear cases against state officials, access to courts in administrative appeals, FOIA and the Privacy Act, and standing. Summaries of the lower court decisions — and, where available by this column’s publication deadline, oral argument — follow.

Taxpayer Standing

Taxpayer standing is the subject of the Supreme Court’s case of Arizona Christian School Tuition Organization v. Winn, 562 F.3d 1002 (9th Cir. 2009), cert. granted, 130 S. Ct. 3324 & 3350 (May 24, 2010). In this case, Arizona taxpayers challenged on Establishment Clause grounds an Arizona statute that gives tax credits for contributions to student tuition organizations, or STOs. As the U.S. Court of Appeals for the Ninth Circuit explained:

A STO is a private nonprofit organization that allocates at least 90 percent of its funds to tuition grants or scholarships for students enrolled in “a nongovernmental primary or secondary school or a preschool for handicapped students” within the state. Ariz. Rev. Stat. Ann. § 43-1089(G)(2)-(3) (2005). STOs may not provide scholarships to schools that “discriminate on the basis of race, color, handicap, familial status or national origin,” but nothing in the statute precludes STOs from funding scholarships to schools that provide religious instruction or that give admissions preferences on the basis of religious affiliation. Id. § 1089(G)(2).

In Arizona Christian School Tuition Organization v. Winn, 562 F.3d at 1005.

At issue before the Supreme Court is the plaintiffs’ standing to bring the lawsuit, which is based solely on their status as state taxpayers. The Ninth Circuit invoked the Flast v. Cohen exception to the general rule that taxpayer status does not create standing to conclude that “[b]ecause plaintiffs have alleged that the state has used its taxing and spending power to advance religion in violation of the Establishment Clause, we hold that they have standing under Article III to challenge the application of Section 1089.” 562 F.3d at 1008. The Ninth Circuit reached this conclusion despite the defendants’ argument that the plaintiffs did not fit the Flast rule because the money involved never entered the state treasury and hence could not be considered a state expenditure; the court concluded instead that Arizona’s dollar-for-dollar tax credit was the equivalent of a state grant program. Id. at 1009-10.

The Supreme Court granted certiorari to address three issues:

1. Do Respondents lack taxpayer standing because they do not allege, nor can they, that the Arizona Tuition Tax Credit involves the expenditure or appropriation of state funds?

2. Is the Respondents’ alleged injury—which is solely based on the theory that Arizona’s tax credit reduces the state’s revenue—too speculative to confer taxpayer standing, especially when considering that the credit reduces the state’s financial burden for providing public education and is likely the catalyst for new sources of state income?

3. Given that the Arizona Supreme Court has authoritatively determined, under state law, that the money donated to tuition granting organizations under Arizona’s tax credit is private, not state money, can the Respondents establish taxpayer standing to challenge the decisions of private taxpayers as to where they donate their private money?

At oral argument on November 3, 2010, the United States took Arizona’s side, arguing that, “[r]egarding injury in fact, the key point is this: Not a cent of the Respondent’s money goes to fund religion. If you placed an electronic tag to track and monitor each cent that the Respondent plaintiffs pay in tax, not a cent, not a fraction of a cent, would go into any religious school’s coffers.” Justices Sotomayor, Breyer, and Ginsburg expressed skepticism, suggesting that the United States’ argument would allow for federal taxes to be diverted to religious purposes and that an adverse ruling would destroy Flast v. Cohen and eliminate all standing to challenge government actions that violated the Establishment Clause. During the State’s argument, in turn, a wide spectrum of the Justices quizzed Arizona’s attorney about the role of state action in the tuition tax credit program and the State’s use of intermediaries to potentially promote religion and religious discrimination. During oral argument for the taxpayers, Chief Justice Roberts and Justice Scalia, then later Justice Breyer and Sotomayor, asked multiple questions about the exact nature of the alleged religious discrimination or promotion of religion by the State, while Justices Alito and Kennedy focused on the issue of whether a tax credit could qualify as state money or a state expenditure.

Appealing Federal Agency Decisions: Limitations Periods as Limitations on Jurisdiction

Under 38 U.S.C. § 7266(a), a veteran may appeal a final decision of the Board of Veterans’ Appeals to the U.S. Court

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of Appeals for Veterans Claims (the “Veterans Court”) within 120 days. When veteran Henderson tried to appeal the Board’s decision in his case, however, the Veterans Court held that the 120-day limit was jurisdictional and hence not subject to equitable tolling, as a statute of limitations normally would be. On appeal, the U.S. Court of Appeals for the Federal Circuit, sitting en banc, agreed with the Veterans Court, overruling its own precedent to the contrary — Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998), and Jaquay v. Principi, 304 F.3d 1276 (Fed. Cir. 2002) (en banc) — on the grounds that the Supreme Court had abrogated the Federal Circuit’s prior view that equitable tolling was permissible in Bowles v. Russell, 551 U.S. 205 (2007). According to the Federal Circuit, in Bowles the Supreme Court stated repeatedly that time limits for filing a notice of appeal are jurisdictional in nature. Id. at 206, 210-12, 127 S. Ct. 2360. The Court stressed the fact that it had “long held that the taking of an appeal within the prescribed time is ‘mandatory and jurisdictional.’” Id. at 209, 127 S. Ct. 2360. In addition, the Court emphasized that there is particular “jurisdictional significance” when the time limit is set forth statutorily, rather than through court-promulgated rules. Id. at 210-11, 127 S. Ct. 2360.


The Supreme Court granted certiorari to decide “whether the time limit in Section 7266(a) constitutes a statute of limitations subject to the doctrine of equitable tolling, or whether the time limit is jurisdictional and therefore bars application of that doctrine.” At the time of this writing, oral argument was scheduled for December 6, 2010.

Freedom of Information Act
The U.S. Supreme Court will address the scope of Exemption 2 (internal personnel rules and practices) in the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(2), in Milner v. Department of the Navy, 575 F.3d 959 (9th Cir. 2009), cert. granted, 130 S. Ct. 3505 (June 28, 2010). At issue is the breadth of the exemption — and hence the scope of required disclosures. Milner sent a FOIA request to the U.S. Navy, seeking Explosive Safety Quantity Distance (ESQD) data regarding the ordnance stored at Naval Magazine Indian Island in Washington State. The Navy found over 1000 pages of relevant information and disclosed all but 81 documents to Milner. Because Milner sought information that would identify the location and potential blast ranges of the ordnance, the Navy claimed that the 81 documents were exempt from disclosure under FOIA pursuant to Exemption 2 and also pursuant to Exemption 7, which exempts disclosure of information that might allow circumvention of agency enforcement. The district court granted summary judgment to the Navy on the basis of a “High 2” exemption, never reaching the issue of Exemption 7, and the Ninth Circuit affirmed.

In affirming the district court, the Ninth Circuit adopted the broad view of the “High 2” exemption, which allows agencies to exempt from disclosure any “predominantly internal” documents if disclosure might risk circumvention of agency enforcement. The court rejected a narrower “law enforcement materials” standard that some other circuits had adopted. The issue before the Supreme Court is the scope of the “High 2” exemption — specifically, “[w]hether 5 U.S.C. § 552(b)(2), which allows a government agency to keep secret only documents related solely to the internal personnel rules and practices of an agency, must be strictly construed to preclude the “High 2” expansion created by some circuits but rejected by others.” At the time of this writing, oral argument was scheduled for December 1, 2010.

Privacy Act
The federal Privacy Act, 5 U.S.C. § 552a, is implicated in NASA v. Nelson, 530 F.3d 865 (9th Cir. 2008), cert. granted, 130 S. Ct. 1755 (March 8, 2010). In this case, contract employees in “low risk” positions sued the National Aeronautics and Space Administration (NASA), challenging the agency’s new policy of requiring in–depth background checks for those employees. In response to a motion for a preliminary injunction, the U.S. Court of Appeals for the Ninth Circuit held that the plaintiffs were unlikely to succeed in their claims under the Administrative Procedure Act, 5 U.S.C. § 706, “[b]ecause the Space Act appears to grant NASA the statutory authority to require the investigations here at issue . . . .” Id. at 875. However, the Ninth Circuit also held that the plaintiffs were likely to succeed in their constitutional informational privacy claim, because NASA’s forms required potential employees to disclose information about counseling related to drug treatment and asked broad, open-ended questions about applicants’ mental stability and general citizenship. Id. at 877-80.

The U.S. Supreme Court granted certiorari to answer two questions:

1. Whether the government violates a federal contract employee’s constitutional right to informational privacy when it asks in the course of a background investigation whether the employee has received counseling or treatment for illegal drug use that has occurred within the past year, and the employee’s response is used only for employment purposes and is protected under the Privacy Act; and

2. Whether the government violates a federal contract employee’s constitutional right to informational privacy when it asks the employee’s designated refer-
Suing States in Federal Court

The Supreme Court will be deciding two cases regarding states’ amenability to suit in federal court. The first case, Sossamon v. Texas, 560 F.3d 316 (5th Cir. 2009), cert. granted in part, 130 S. Ct. 3319 (May 24, 2010), involves the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5, which creates a private right of action for “appropriate relief” against a government and then defines “government” to include state and local entities and officials of such entities. The U.S. Court of Appeals for the Fifth Circuit held that Congress could not constitutionally create a damages remedy against states and state officials, and a split on this issue now exists among the federal courts of appeal. The Supreme Court granted certiorari to decide “whether an individual may sue a state or state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act.”

The Court heard oral argument on November 2, 2010. During all three parties’ arguments, a broad spectrum of the Justices asked about the ambiguity of “appropriate relief” in this Spending Clause statute; under the Act, states agree to subject themselves to federal court jurisdiction under the Act by accepting federal funding for prisons. The clarity (or not) of the phrase “appropriate relief” is likely to define the scope of what states actually agreed to subject themselves to when accepting federal funds.

In Virginia v. Reinhard, 568 F.3d 110 (4th Cir. 2009), cert. granted sub nom. Virginia Office for Protection & Advocacy (VOPA) v. Stewart, 130 S. Ct. 3493 (June 21, 2010), VOPA, a Virginia state agency, sued various Virginia officials in their official capacities in federal court, claiming that those state officials were violating two federal statutes: the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15001-115 (the DD Act), and the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10801-10851 (the PAIMI Act). The U.S. Court of Appeals for the Fourth Circuit held that the federal courts could not entertain this lawsuit. First, the Fourth Circuit concluded “that Congress has not unequivocally expressed its intent to abrogate Virginia’s sovereign immunity in this case. Indeed, VOPA does not argue that Congress has made any effort, much less a clear one, to abrogate the states’ immunity in the DD Act or the PAIMI Act.”

Thus, the abrogation exception does not permit VOPA’s suit against state officials.” Virginia v. Reinhard, 568 F.3d at 116. Second, the court concluded that the two Acts’ provisions were not sufficiently explicit enough to waive Virginia’s sovereign immunity, even though Virginia accepted federal funds. Id. at 116-17. Finally, the Fourth Circuit concluded that, “[w]hen we consider the sovereign interests and federalism concerns at stake, we are convinced that the Ex parte Young exception should not be expanded beyond its traditional scope to permit a suit by a state agency against state officials in federal court.” Id. at 119.

The issue before the Supreme Court is “[w]hether the Eleventh Amendment categorically precludes an independent state agency from bringing an action in federal court against state officials for prospective injunctive relief to remedy a violation of federal law under the doctrine of Ex parte Young.” At the time of this writing, oral argument was scheduled for December 1, 2010.

Federal Preemption

Four cases scheduled for oral argument in October and November deal with federal preemption. In Bruesewitz v. Wyeth, 561 F.3d 233 (3d Cir. 2009), cert. granted, 130 S. Ct. 1734 (March 8, 2010), the U.S. Court of Appeals for the Third Circuit held that Section 22(b)(1) of the National Childhood Vaccine Injury Act of 1986 (NCVIA), 42 U.S.C. § 300aa-22(b) (1), expressly preempts products liability claims based on both strict liability and negligent design brought by the parents of a child who was administered the diphtheria-pertussis-tetanus (DPT) vaccine and then suffered a seizure disorder.

The Vaccine Act requires that claims against drug manufacturers for vaccine-related injuries and deaths be filed in “Vaccine Court” established under the National Vaccine Injury Compensation Program (NVICP). 42 U.S.C. §§ 300aa-10 et seq. As the Third Circuit explained:

The NVICP has two parts. Part A creates a mandatory forum for the administration of claims—it requires a petitioner seeking compensation, including the injured
party’s legal representative, to file a petition in the “Vaccine Court,” which is part of the United States Court of Federal Claims. Id. at § 300aa-11. The petitioner is entitled to receive compensation if: (1) the affected person received a vaccine covered by the Vaccine Act; (2) the affected person suffered a “Table injury”; and (3) it cannot be shown by a preponderance of the evidence that the injuries or death were not caused by the vaccine. Id. at §§ 300aa-11, 300aa-13. Alternatively, a petitioner who suffers a non-Table injury may still obtain compensation by proving affirmatively that the vaccine caused the injury. See Grant v. Sec’y of HHS, 956 F.2d 1144, 1148 (Fed. Cir. 1992). Part B of the NVICP permits a petitioner, after the Vaccine Court has issued a final judgment, to either accept or reject that judgment. 42 U.S.C. § 300aa-21 et seq. If the petitioner rejects the judgment, she may pursue certain limited claims in state or federal court. 42 U.S.C. § 300aa-21.

Brosewitz, 561 F.3d at 235–36.

The child’s seizure disorder was “on-Table.” Moreover, according to the Third Circuit:

Section 22(a) clearly states Congress’s intent to displace state law in several enumerated instances, including as provided for in subsection (b). Subsection (b) then declares that manufacturers are immune from liability for claims arising from “unavoidable” injuries and deaths related to vaccine administration, thereby prohibiting states from regulating in this area. The scope of a preemption provision stating that “no state shall pass laws with the following exceptions” may well be broader than a provision stating “state law applies with the following exceptions.” Yet the breadth of a provision does not alter the import of the underlying language, and here that language conveys a clear intent to override state law civil action claims in particular, defined circumstances.

Id. at 243.

The Supreme Court heard oral argument in this case on October 12, 2010. That argument focused on three issues, all of which involved the limits of the NCVIA’s unusual claims and compensation scheme. First, both the parties and the Justices examined the “unavoidable” limitation in the Act’s preemption of tort liability, because under the Act “[n]o vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.” 42 U.S.C. § 300aa-22(a)(1) (emphasis added). Second, the Justices questioned the attorneys about the non-exclusivity of the Vaccine Court and the implications for preemption. Finally, the Justices questioned both sides about the role of the FDA’s approval of new drugs in NCVIA preemption.

The Supreme Court heard oral argument in Williamson v. Mazda Motor of America, 84 Cal. Rptr. 3d 545 (2008), cert. granted 130 S. Ct. 3348 (May 24, 2010), on November 3, 2010. In this case, victims in a front-end automobile collision sued the minivan’s manufacturer for strict products liability, negligence, deceit, and wrongful death, claiming that the minivan’s lap belts (seatbelts) were defective and caused the injuries and deaths. The California Court of Appeals held that the Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 (2008), a regulation promulgated under the National Traffic and Motor Vehicle Safety Act (NTMVSA), 49 U.S.C. §§ 30101 et seq., preempted the plaintiffs’ tort claims, because the regulation authorizes automobile manufacturers to install a lap-only seatbelt in the lap/seating positions of a vehicle.

At oral argument, the plaintiffs argued that Congress intended to allow tort suits under the NTMVSA as part of the costs and benefits calculation of promoting highway safety. Justice Scalia, Chief Justice Roberts, and Justice Kennedy were skeptical, although Justice Ginsburg seemed more sympathetic to the argument that the regulations create only minimum required standards. The United States supported the petitioners, arguing that “[t]he savings clause makes clear that [the auto manufacturers] are not exempted from the consequences of [the choices regarding what kinds of seat belts to install] under State common law when that choice results in injury. They must show that . . . that the State law rule of decision would pose a conflict with an articulable Federal policy.” Respondent car manufacturers, in turn, argued for preemption, stating that “[i]n 1984 and again in 1989 the agency specifically determined that the statutory safety and practicability objectives would be best served by giving manufacturers the flexibility to install a lap-only or lap/shoulder seatbelt” — without liability for making that choice. Justices Sotomayor, Breyer, and Ginsburg questioned the respondents intensively, expressing skepticism regarding complete preemption.

The scope of preemption pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. § 2, is the subject of Laster v. AT&T Mobility, 584 F.3d 849 (9th Cir. 2009), cert. granted sub nom. AT&T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (May 24, 2010). The Ninth Circuit held that an arbitration agreement containing a class action waiver provision was unconscionable and unenforceable under California law and that the FAA does not preempt state unconscionability law. First, the Ninth Circuit held that the FAA does not expressly preempt the unconscionability claim because

[The FAA provides that arbitration clauses “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

continued on next page
9 U.S.C. § 2. Therefore, if a state-law ground to revoke an arbitration clause is not also applicable as a defense to revoke a contract in general, that state-law principle is preempted by the FAA. Shroyer, 498 F.3d at 987. However, “because unconscionability is a generally applicable contract defense, it may be applied to invalidate an arbitration agreement without contravening § 2 of the FAA.” Id. at 988 (internal quotations omitted).

Lower, 584 F.3d at 857. Second, it held the FAA did not implicitly preempt the unconscionability claims because California unconscionability law did not stand in the way of the FAA’s purposes of reversing judicial hostility to arbitration agreements or of promoting efficient resolution of claims. Id. at 857-58.

The U.S. Supreme Court held oral argument in this case on November 9, 2010. An unusual alliance of Justices Scalia, Ginsburg, Breyer, Sotomayor, and new Justice Kagan questioned AT&T’s attorney carefully about the Court’s ability to dictate to California what should qualify as an unconscionable contract provision, especially if the state courts applied the same standard evenhandedly to all contracts. In contrast, Chief Justice Roberts and Justices Alito and Kennedy questioned the respondents most closely about California’s ability to create special rules of unconscionability that applied to arbitration provisions in class actions.


Arizona enacted the Legal Arizona Workers Act on July 2, 2007, with an effective date of January 1, 2008. 2007 Ariz. Sess. Laws Ch. 279. The Act allows the superior courts of Arizona to suspend or revoke the business licenses of employers who knowingly or intentionally hire unauthorized aliens. Ariz. Rev. Stat. § 23-212. Any person may submit a complaint to the Arizona Attorney General or a county attorney. Id. § 23-212(B). After determining a complaint is not false or frivolous, the appropriate county attorney is charged with bringing an action against the employer in superior court. Id. § 23-212(C), (D). The Act uses IRCA’s definition of “unauthorized alien.” See id. § 23-211(11). Additionally, the Act requires that the court use the federal government’s determination of the employer’s lawful status. Id. § 23-212(H).

Id. at 862.

The Ninth Circuit first concluded that the Arizona law falls within the savings clause of IRCA’s preemption provision, which provides that “[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” 8 U.S.C. § 1324a(h)(2). The Arizona statute is a licensing statute, and hence is not expressly preempted. 558 F.3d at 864-66. It then concluded that the act’s requirement that employers use E-Verify is not implicitly preempted by federal desires to keep use of the system voluntary, “because, while Congress made participation in E-Verify voluntary at the national level, that did not in and of itself indicate that Congress intended to prevent states from making participation mandatory.” Id. at 866-67.

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By William S. Jordan III*

9th Circuit Refines “Informational Standing”

In 2003, the Forest Service issued regulations significantly limiting the scope and availability of notice, comment, and appeal procedures under the Forest Service Decisionmaking and Appeals Reform Act. The district court upheld a Wilderness Society challenge, but by the time the case reached the Ninth Circuit, the Supreme Court had decided *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009), which emphasized that a denial of an alleged right to file comments is not by itself sufficient to support a claim of “procedural standing.” Instead, the denial of the procedural right must affect “some concrete interest,” such as an environmental harm as to which the plaintiff would have standing.

The Ninth Circuit applied this principle in *The Wilderness Society, Inc. v. Rey*, 2010 WL 3665713 (9th Cir. 2010), rejecting a claim that the 2003 regulation’s restriction of notice constituted an “informational injury” sufficient to support standing. The court reached this issue because the Wilderness Society could not meet the *Summers* (or even *Luhan v. National Wildlife Federation*, 497 U.S. 871 (1990)) threshold of imminent concrete harm. The Wilderness Society had relied upon an affidavit from a member who had visited an allegedly affected area quite extensively and had written a book on the subject, but the book was thirty years old. Without concrete plans to visit the area, “a vague desire to return . . . some day” was not enough to support standing.

Despite this weakness, the district court had accepted the argument that the Forest Service’s restriction of notice would result in an “informational injury” to The Wilderness Society because the Society would be deprived of the information necessary to determine whether there would be any harm. The Ninth Circuit noted that the concept of informational injury stemmed from *Federal Elections Commission v. Atkins*, 524 U.S. 21 (1998), in which the Court had found injury because the challengers were deprived of information they needed in the political arena. Thus, there was harm to their political activities. By contrast, the harm in *The Wilderness Society* was to the ability to participate in the agency’s process, not to the Society’s environmental interest that would ultimately be affected by the agency’s decision. As discussed above, The Wilderness Society was unable to establish standing as to the ultimate environmental interest, so it could not use the intervening deprivation of information as a means of bootstrapping itself into standing that otherwise did not exist.

D.C. Circuit Finds Agency May Determine “Unit of Civil Enforcement”

A threshold question in any dispute over an agency rule is whether the agency had the authority to issue the rule in the first place. That was the issue in *National Association of Home Builders v. OSHA*, 602 F.3d 464 (D.C. Cir. 2010), in which the D.C. Circuit effectively held that an agency with the authority to define a regulatory violation through a regulatory standard also (in the absence of any indication to the contrary) has the authority to identify the “unit of civil enforcement” of the standard. The authority to define the “unit of civil enforcement” is inherent in the authority to issue the regulatory standard.

To use Judge Randolph’s examples: Are five punches to a victim’s face one battery or five? If a financial officer of a 10,000-shareholder company submits a false report to the Securities and Exchange Commission, is this one fraud or 10,000? Prosecutors want multiple charges for a single incident, while defense attorneys want only one.

This case involved workplace safety standards promulgated by the Secretary of Labor pursuant to the Occupational Safety and Health Act. The standards require employers to provide both respirators and workplace training for employees working in certain hazardous conditions. When the Secretary charged an employer with twenty-two violations for failing to provide either respirators or workplace training to his employees, the Occupational Safety and Health Review Commission, which hears such charges, held that the employer had committed only two violations. In so doing, the Commission noted that the Secretary had the authority to define what constitutes “individual units of prosecution” and that the Secretary should provide adequate notice by promulgating a clear regulation.

The Secretary accepted this invitation, promulgating a regulation under which an employer commits a separate violation for each employee affected by a violation of a workplace safety standard. Employer interests sued, arguing that the Secretary had no such authority because Congress had delegated such determinations to the Commission. The D.C. Circuit disagreed.

The governing principle is that the legislature, not the judiciary, defines the “unit of prosecution.” Having been delegated the authority to promulgate workplace safety standards, the Secretary of Labor “stands in the shoes of the legislature” with respect to determination of units of prosecution, while the Occupational Safety and Health Review Commission serves only the judicial function of “neutral arbiter,” not that of policy maker. Despite the particulars, the decision does not appear to be limited to workplace safety. According to the D.C. Circuit, “to define the violation is to define the unit of prosecution . . . . In giving the Secretary the authority to define what constitutes a violation, the Act necessarily gave the Secretary the authority to define the unit of prosecution.” Thus, any agency authorized

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to define what constitutes a violation also has the authority to
define the unit of prosecution.

D.C. and 9th Circuits Weigh in on What Constitutes
an Interpretative Rule

Two recent decisions provide an instructive contrast with
respect to the question of when an agency statement qualifies
for the interpretative rule exception to the notice-and-
comment requirements of the APA. The threshold issue in such
disputes is whether the agency statement can reasonably be
said to interpret the underlying statute or regulation. In Catholic
Health Initiatives v. Sebelius, 2010 WL 3190787 (D.C. Cir. 2010),
the D.C. Circuit rejected the agency’s exemption claim largely
because specific numerical provisions in the agency’s statement
could not be derived through interpretation from the statutory
term “reasonable cost.” By contrast, the Ninth Circuit in
Mora-Meraz v. Thomas, 601 F.3d 933 (9th Cir. 2010), upheld the
agency’s assertion that a specific “twelve months” requirement
could be derived from a statutory requirement to demonstrate a
“substance abuse problem” and a regulatory requirement to
demonstrate a “verifiable document drug abuse problem.”

Catholic Health Initiatives v. Sebelius involved the Medicare
Act’s authorization of reimbursement to hospitals for the
“reasonable costs” of furnishing medical services, which the
parties agreed required reimbursement of the costs of malprac-
tice insurance, workers’ compensation insurance, and liability
insurance. Under the applicable regulations, such costs must not
be “substantially out of line” with the costs of similar institutions.

The Secretary of Health and Human Services (HHS) issued a
Provider Reimbursement Manual — an informal agency
statement — that “does not have the effect of regulations,”
but does bind the private firms that administer the Medi-
care program. With respect to the various insurance costs, the
Manual addressed so-called “captive” insurance companies,
which are established and controlled by the healthcare provid-
ners. If the captives are domestic companies, HHS will compare
their costs to those of independent domestic insurers. If the
captives are offshore companies, however, the Manual provides
for full reimbursement only if the captives’ investments meet
certain requirements. For example, the offshore captives are
limited to low-risk investment in U.S. government debts or in
the debt or securities of U.S. corporations in the top two classi-
fications by recognized U.S. securities rating organizations.
The captives are permitted to invest in dividend-paying U.S. equities
totaling no more than 10% of the company’s admitted assets.

When hospitals sought reimbursement for such payments
to captives not meeting the Manual’s provisions, the Provider
Reimbursement Review Board gave the Manual “great
weight” as stating limitations that were a “valid extension” of
“reasonable cost” provisions of the statute and the regulations.
On review, the D.C. Circuit held that the “reasonable cost”
language was too vague to be interpreted in such specific terms.

Relying heavily on the work of Professor Robert Anthony,
the majority held that these details cannot “flow fairly from
the substance of the existing document.” Terms such as “reason-
able cost” do not in themselves “supply substance from which
the propositions can be derived.” Citing Judge Friendly, the
majority wrote, “We too have recognized that ‘numerical limits
cannot readily be derived by judicial reasoning,’ although courts
occasionally draw such limits.” Under these principles, “The
short of the matter is that there is no way an interpretation of
‘reasonable costs’ can produce the sort of detailed — and rigid

By contrast, Mora-Meraz v. Thomas upheld a notice-and-
comment exception for a Bureau of Prisons Program manual
statement that an inmate may qualify for a drug rehabilitation
program only if the inmate can show “substance dependence or
abuse within his last twelve months ‘on the street.’” Can this
specific numerical “interpretation” be squared with Catholic
Health Initiatives? The answer lies in the scientific nature of
the question at hand — what constitutes a “substance abuse
problem?” The Diagnostic and Statistical Manual of Mental Disor-
ders, to which the manual refers, defines substance abuse in
terms of symptoms occurring during a twelve month period.
As the Catholic Health Initiatives court acknowledged, quoting
Hector v. U.S.D.A., 82 F.3d 165, 171 (7th Cir. 1996), “Espe-
cially in scientific and other technical areas, where quantitative
criteria are common, a rule that translates a general norm into a
number may be justifiable as interpretation.”

The ultimate principle is that the nature of “interpretation”
depends upon the context in which a statement is made. As to
the allowable investment question at issue in Catholic Health
Initiatives, there was no well-recognized understanding that
“reasonable costs” included only charges by companies meeting
the various investment restrictions. In Mora-Meraz, as in Ameri-
can Mining Congress v. Mine Safety and Health Administration, 995
F.2d 1106 (D.C. Cir. 1993) (recognizing a specific x-ray reading
as an interpretation of “diagnosis”), the relevant interpretive
community — a scientific community in each case — had a
shared understanding that the meaning of the statutory or regu-
lationary term included particular numerical provisions.

10th Circuit Refuses to Apply Alaska Professional
Hunters to Informal Agency Statement

Despite the APA’s notice-and-comment exception for
interpretative rules and statements of policy, litigants frequently
rely upon Alaska Professional Hunters Ass’n v. FAA, 177 F.3d
1030 (D.C. Cir. 1999), to argue that an agency has violated the
notice-and-comment requirements of the APA by issuing an
informal statement that is inconsistent with a previous informal
statement. Such an attempt failed in United States v. Magnesium
Corp. of America, 2010 WL 3222058 (10th Cir. 2010), which
involved the treatment of certain mine processing wastes under
the Resource Conservation and Recovery Act (RCRA). If
such wastes are considered “hazardous,” they are subject to the stringent provisions of Subtitle C of the R.C.R.A regulations. If not, they are subject to the far less onerous provisions of Subtitle D. In 1989, after a long regulatory and legislative struggle, EPA issued a final rule setting criteria for determining whether mine wastes would be considered hazardous. Magnesium Corp’s predecessor nominated its wastes as non-hazardous during that struggle. In issuing the rule, EPA opined “that several wastes, including ‘[p]rocess wastewater from primary magnesium production by the anhydrous process’ — the category of wastes at issue in this case — were likely candidates for exemption, subject to further data collection and study.” In 1990, EPA issued a report in which it presented a study of the various wastes and “recommended the exemption of many, including ‘[p]rocess wastewater from primary magnesium production by the anhydrous process.’” In so doing, however, EPA emphasized that its findings remained “tentative.”

After arguing over the nature of the company’s wastes for a decade, EPA sued for violations of R.C.R.A. One of the issues raised was whether EPA had, in the 1990 report, interpreted the statute and regulations as exempting the company’s wastes, thereby triggering the notice-and-comment requirements of Alaska Professional Hunters.

The Tenth Circuit, citing Professors Richard Pierce and Richard Murphy of the ABA Administrative Law Section, noted the dispute over the validity of Alaska Professional Hunters under the APA. The court held that the dispute did not matter to the outcome, however, because even under Alaska Professional Hunters, “the initial interpretation is only binding if it is definitive,” and “an agency remains free to disavow and amend a tentative interpretation of one of its rules without notice and comment.” The agency’s characterization of its statement as tentative and the fact that the agency sought further public comment on the status of the wastes demonstrated that the agency had not taken a definitive position in its 1990 report. The court rejected the company’s attempt to use various aspects of the EPA-company interactions over the years to show that EPA had somehow at some point taken a definitive position.

9th and 11th Circuits Add to the Chevron Storehouse

Two recent Chevron decisions deserve mention. Northern California River Watch v. Wilcox, 620 F.3d 1075 (9th Cir. 2010), is a good example of a carefully organized and thorough examination of whether Chevron applies, in this case to a dispute over the meaning of “areas under Federal jurisdiction” in the Endangered Species Act. The court began with textual analysis and then legislative history under Step 1, finding the term ambiguous. It then turned to Mead’s own two-step analysis, finding first that the agency had been delegated the authority to issue regulations with the force of law as to the issue in question. Applying Mead’s second step, the Ninth Circuit allowed three statements in notice-and-comment rules to pass to Chevron Step 2, but it declined to apply Chevron deference to a handbook, despite the fact that the handbook had been issued after notice and comment (albeit with a statement that “nothing in this handbook is intended to supersed or alter any aspect of Federal law or regulation pertaining to the conservation of endangered species”).

Despite reaching Step 2, the Fish and Wildlife Service (FWS) stumbled because none of the three statements on which it relied adequately addressed the meaning of the language at issue. The references were tangential to the issue at hand and did “not indicate that the FWS gave any thought to this issue.”

In Bradley v. Sebelius, 2010 WL 3769132 (11th Cir. 2010), a panel of the Eleventh Circuit split on the question of whether an HHS manual was entitled to Chevron deference with respect to the question of whether an HHS position should prevail over the outcome of local wrongful death settlement. The majority criticized the agency for failing to appear in the probate proceeding despite adequate notice, while the dissent characterized the issue as involving the opposing party’s failure to appeal a decision of the Secretary. The dissent would have upheld the agency’s position under Skidmore deference, emphasizing “what is required of us in the way of deference to agency interpretations of the complex statutory and regulatory schemes they administer. Statements and guidance interpretations such as the Medicare Secondary Payer manual reflect ‘a body of experience and informed judgment to which courts and litigants may properly resort for guidance,’” and they should not be lightly disregarded.

3d Circuit Grapples With Logical Outgrowth Test

It is well established that a final rule must be the outgrowth of the proposed rule. The difficult question is, in effect, how close is close enough? In Council Tree Communications, Inc. v. FCC, 2010 WL 3307457 (3d Cir. 2010), the agency’s proposed rule seems to have been broad enough to encompass the matters included in the final rule, but the proposal failed to raise some of the specific issues within that broad compass, so the agency lost on two of three logical outgrowth challenges.

Pursuant to a statutory mandate, the Federal Communications Commission (FCC) oversees a program that helps small businesses participate in auctions of the broadcast spectrum. The FCC identifies a class of “designated entities (DE)” that qualify for credits to be added to their bids. The credits increase as the size of the business decreases. To avoid manipulation of the system, the FCC has created limitations on the relationships DEs may have with other entities. Under a longstanding principle, DEs must count the gross revenues of their affiliates, controlling interests, and affiliates of controlling interests. In the rule at issue, the Commission imposed the following limitations and other changes to its rules:

continued on next page
1. A DE must count the gross revenues of entities with which it has an “attributable material relationship,” defined to include arrangements with an individual entity for lease or sale, on a cumulative basis, of more than 25% of spectrum capacity. The higher the total gross revenues, the lower the credits.

2. A DE has an “impermissible material relationship” if it has arrangements with one or more entities, on a cumulative basis, for the lease or sale of more than 50% spectrum capacity.

3. Under existing rules, a DE that loses DE status or transfers control of a license to a non-DE must reimburse the FCC for the bidding credits it had received. The reimbursement obligation declines over time, ending after five years. The new rule extended the period of the declining reimbursement to ten years.

Various DEs argued that none of these changes was a logical outgrowth of the proposals. In the first Further Notice of Proposed Rulemaking (FNPR), the FCC had agreed with the view that “the Commission's current rules do not adequately prevent large corporations from structuring relationships in a manner that allows them to gain access to benefits reserved for small businesses.” The FNPR sought comment on how to define the elements of restrictions designed to prevent such relationships and on whether it should restrict DE credit awards where an otherwise qualified DE had a “material relationship” with a large entity in the communications industry. In particular, the Commission sought comment on “what, if any, standard should be used to determine whether a spectrum leasing arrangement is a ‘material relationship’ for the purpose of any additional restriction on the availability of designated entity benefits that we might adopt.”

After much skirmishing within the agency, the FCC issued the final rule as described above. As to the 25% attribution rule, which encompassed leasing relationships, the court noted that the Commission had specifically sought comment on leasing relationships and on how large a related entity must be to present a problem. Challengers complained that the proposal had focused on the size of the related entity, while the final rule considered the size of the combined entities. The court consid-
**Collateral Estoppel from an Investigation? Ouch!**

*By Michael Asimow*

Collateral estoppel (often called “issue preclusion”) is well accepted in administrative law. An issue that has been litigated and resolved in one case (administrative or judicial) cannot be relitigated in a subsequent case (administrative or judicial). However, collateral estoppel applies only if the losing party in the first case had a full and fair opportunity to litigate the issue and the issue was actually adjudicated.

The California Supreme Court vastly expanded the scope of collateral estoppel in *Murray v. Alaska Airlines, Inc.*, 114 Cal.Rptr.3d 241 (2010). Murray claimed that he was fired because he had blown the whistle on safety violations. Under a federal statute, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR–21”), 49 U.S.C. § 42121(b), Murray had a voluntary administrative remedy: He could request the Secretary of Labor to investigate his claims and if they were sustained he could get damages. The investigation was ex parte and all information was furnished by the airline. Unsurprisingly, the investigation concluded that there was no connection between Murray’s discharge and his safety complaint. AIR–21 provided that Murray could obtain a full administrative hearing on his claims before an ALJ (followed by judicial review if he lost), but his lawyer decided not to go that route. Instead, the lawyer filed a lawsuit in the California state courts for wrongful termination (a remedy well supported by prior California employment law cases).

In a 4–3 decision, the California Supreme Court held that Murray was blocked by collateral estoppel. The investigation concluded that there was no connection between the complaint and the discharge; he could have litigated this before an ALJ but chose not to. He had an “opportunity” for a full and fair trial on the causation issue, as well as for judicial review of the ALJ decision, remedies that he chose not to pursue. As a result, he could not litigate the issue in the state court. As the dissent pointed out, no California case (and probably no case anywhere) had ever held that collateral estoppel applies to the findings of an ex parte investigation that a party chose not to. He had an “opportunity” for a full and fair trial on the causation issue, as well as for judicial review of the ALJ decision, remedies that he chose not to pursue. As a result, he could not litigate the issue in the state court. As the dissent pointed out, no California case (and probably no case anywhere) had ever held that collateral estoppel applies to the findings of an ex parte investigation that a party chose not to pursue.

I believe that the *Murray* decision is perverse and remarkably insensitive to the economics of litigation. Starting now, no employee in his or her right mind will request the voluntary investigation provided for in AIR–21. Yet such investigations are useful and often lead to settlement of the claims; at least, they are a cheap way of developing evidence.

Murray and his lawyer (who were never warned of the consequences of their decision) undoubtedly thought they had nothing to lose by requesting an investigation — it might have a favorable outcome, it might turn up useful evidence, and it would not cost anything. However, following up a negative investigation by an ALJ hearing and federal judicial review is another matter entirely. It is a lengthy process and it is bound to be costly in terms of attorney’s fees. If you lose, you will then be precluded from your state law action (which, by the way, includes a jury trial and could produce punitive damages). So Murray and his lawyer made the entirely rational calculation that they would go straight to state court. Probably the attorney had a contingent-fee arrangement and would never have been willing to pursue the administrative remedy in preference to the state law remedy.

The purposes of collateral estoppel are to prevent vexatious relitigation of settled issues, a tactic that is costly to private parties and to the judicial and administrative adjudicatory systems. However, that did not happen in Murray because there was no earlier litigation, only an ex parte investigation. Investigatory conclusions should never be subject to collateral estoppel.

**Florida Legislature Overrides Veto of “Million Dollar Rules” Ratification Requirement**

*By Larry Sellers*

During the 2010 Regular Session, the Florida Legislature enacted several significant changes to the Florida Administrative Procedure Act (APA), including the requirement that administrative rules with a “million dollar” impact may not take effect until ratified by the Legislature. Governor Crist vetoed the bill, HB 1565, claiming that it “encroaches upon the principle of separation of powers” and that if the bill became law, “nearly every rule would have to await an act of the Legislature to become effective. This could increase costs to businesses, create more red tape, and potentially harm Florida’s economy.” On November 16, 2010, the Legislature voted to override the veto and to make the new law effective the following day.

Here is a brief summary of some of the key provisions in HB 1565:

**Revises SERC Requirements.** Since 2008, agencies have been required to prepare a statement of estimated regulatory costs (SERC) for each proposed rule that will have any impact on small business. HB 1565 limits the requirement to those cases where the proposed rule will have an “adverse” impact on small businesses.

**Partner, Holland & Knight LLP, Tallahassee, FL.**

*Visiting Professor of Law, Stanford Law School; Professor of Law Emeritus, UCLA Law School; former Chair, ABA Section of Administrative Law and Regulatory Practice; Advisory Board Chair; and Contributing Editor, Administrative & Regulatory Law News.

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businesses. It also requires a SERC where the proposed rule is likely to directly or indirectly increase regulatory costs in excess of $200,000 in the aggregate in the state within one year after the implementation of the rule.

Expands Contents of SERC to Include Economic Analysis. HB 1565 expands the required contents of a SERC to include an economic analysis if the proposed rule is likely to directly or indirectly increase regulatory costs in excess of $200,000 in the aggregate within one year after the implementation of the rule. The economic analysis is to indicate whether within five years after implementation, the proposed rule directly or indirectly is likely to: (1) have an adverse impact on economic growth, private-sector job creation or employment, or private-sector investment in excess of $1 million in the aggregate; (2) have an adverse impact on business competitiveness, including the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of $1 million in the aggregate; or (3) increase regulatory costs, including any transactional costs, in excess of $1 million in the aggregate.

Prohibits Certain Rules from Taking Effect Until Ratified by the Legislature. If the adverse impacts or regulatory costs of the rule exceed any of the above three criteria, then the rule must be submitted to the President of the Senate and Speaker of the House of Representatives no later than 30 days prior to the next regular session, and the rule may not take effect until it is ratified by the Legislature.

Provides Exception for Adoption of Emergency Rules and Federal Standards. The requirement to prepare an economic analysis — and presumably the requirement for legislative ratification — does not apply to the adoption of emergency rules, i.e., those rules necessitated by an immediate danger to the public health, safety, or welfare that warrants emergency action. These requirements also do not apply to the adoption of federal standards substantively identical to regulations adopted pursuant to federal law in the pursuance of state implementation, operation, or enforcement of federal programs.

Raises Certain Issues. When it voted to override the veto of HB 1565, the Legislature also passed a joint resolution setting the effective date as the following day, November 17, 2010. This then raised the question of whether the new law, including the requirement that certain rules may become effective only if ratified by the Legislature, applies to pending rulemakings. The Joint Administrative Procedures Committee promptly issued a memorandum suggesting that it does, advising that “[p]roposed agency rules that have not been filed for adoption, and proposed rules that have been filed for adoption but are not yet effective, as well as proposed rules noticed on or after the effective date of [HB 1565], appear to be subject to the new legislation.”

HB 1565 raises a number of other interesting questions, including whether such rules continue to be subject to legal challenges provided by the Florida APA and what process the Legislature will use to consider whether to ratify rules. Stay tuned to see how Florida answers these questions.

News from the States

From the ABA Section of Administrative Law and Regulatory Practice

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A New Chapter in the Life of the Administrative Conference of the United States

By Warren Belmar*

The Administrative Conference of the United States (ACUS) was established in 1964 by the Administrative Conference Act as a permanent body charged with identifying the causes of inefficiency, delay, and unfairness in administrative proceedings affecting public rights. With the help of a small but extremely talented staff, over the next 31 years ACUS achieved these purposes by bringing together the talents of a diverse group of uncompensated private practitioners and academics who worked with senior agency officials to craft recommendations which, solely by virtue of their merit, were voluntarily adopted by various agencies, the Congress, and the federal judiciary.

After an unfortunately long hiatus which commenced in 1995 due to a lack of funding, ACUS has been reauthorized, reconstituted, and once again funded. As of this writing, ACUS is scheduled to resume its respected advisory committee role with the convening of its first Plenary Session in 15 years at the National Archives in December 2010 under new leadership and a budget of not quite $2 million a year. This achievement is the direct result of the continuous efforts of present and former leaders of the Section of Administrative Law and Regulatory Practice, including Supreme Court Justices Scalia and Breyer, the American Bar Association, senior officials in the Clinton, Bush, and Obama Administrations, the Congressional Research Service, and numerous others who appreciated the outstanding contributions ACUS made during its first years of existence.

A listing of all of ACUS’ prior recommendations, its 10-member Council, its public- and private-sector voting members, its non-voting Senior Fellows, and respected staff can be found on its webpage (http://www.acus.gov). Under the leadership of its Chairman, Paul Verkuil, ACUS is already actively developing recommendations to improve the fairness and effectiveness of the rulemaking, adjudication, licensing, and investigative functions of federal agency programs. And, as was the case in the past, our Section can be particularly proud of its continuing history of cross-membership with ACUS. Indeed, Chairman Verkuil, 9 of the 10 Council members, 15 of the 18 Senior Fellows, and numerous agency officials and ACUS staff have been or still are active in the leadership and work of our Section. In that sense, the reconstitution of ACUS is yet another example of the Section’s longstanding reputation for bringing together legal practitioners of every stripe and political affiliation in the successful advancement of institutions and ideas dedicated to the improvement of administrative law and regulatory practice.

2010 Gellhorn-Sargentich Law Student Essay Competition

Jasmine C. Hites is the winner of the fifth annual Gellhorn-Sargentich Law Student Essay Competition. The author submitted the winning entry, NERC: Nuked by Constitutional Flaw?, while a third-year student at the University of Oregon School of Law.

* Managing Director, Capitol Counsel Group, LLC; ACUS Senior Fellow; former Section Chair and Senior Section Fellow; ABA Section of Administrative Law and Regulatory Practice; and Advisory Board Member, Administrative & Regulatory Law News.

Overview of the 2010 Revised Model State Administrative Procedure Act

continued from page 3

based on the ABA Model Central Panel Act and provides for the essential provisions of law that a state legislature would need to create a central panel agency. The chief administrative law judge of the central panel agency may also adopt procedural rules to govern contested case hearings.

Article Seven contains provisions related to legislative review of agency rules. Legislative review of agency rules has become widespread in the states. Under Section 703, the rules review committee of the legislature has the power to approve or disapprove of rules within 30 days after receiving a copy of the rule from the adopting agency. Disapproved rules will still become effective at the adjournment of the next regular session of the Legislature unless, before adjournment, the Legislature adopts a joint or concurrent resolution sustaining the action of the rules review committee.

Article Eight contains a few miscellaneous provisions, most notably a provision regarding electronic signatures. In this reporter’s humble opinion, the 2010 MSAPA represents a significant advancement over the 1961 and 1981 Acts. The success of the 2010 provisions will, of course, depend on the extent to which they are adopted by the states. But to that extent the quality of administrative law at the state level will have improved.
Rulemaking Under the 2010 Revised Model State Administrative Procedure Act

continued from page 5

a guidance document, and the agency must respond to the petition within a set time period (e.g., 60 days). This provision should be particularly helpful to persons who are the beneficiaries of a regulatory scheme, such as environmentalists or consumers. They might not otherwise have any opportunity to engage the agency on issues that concern them, because they are not likely to be the targets of an enforcement proceeding. Section 311(h) seeks to fill this gap by enabling the beneficiary to be heard through a device that closely resembles a rulemaking petition and can potentially provide a pathway to judicial review.

How well Section 311 will work remains to be seen. It might conceivably stimulate too much litigation against guidance documents, because it will codify agencies’ responsibilities into APA-enforceable duties. Or, perhaps, it might give rise to too little, because it will enable courts to rectify misuses of guidance documents without necessarily invalidating the document in question. Regardless, it should prove to be an interesting experiment, with potential applicability at the federal level if the experiment should prove successful.

From the ABA Section of Administrative Law and Regulatory Practice


J. Gerald Hebert, Paul M. Smith, Martina E. Vandenberg, and Michael B. DeSanctis

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### Administrative Process Committees

<table>
<thead>
<tr>
<th>Committee</th>
<th>Chair</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adjudication</td>
<td>Michael R. Asimow</td>
</tr>
<tr>
<td>Collaborative Governance</td>
<td>Philip J. Harter</td>
</tr>
<tr>
<td>Constitutional Law &amp; Separation of Powers</td>
<td>Bernard W. Bell</td>
</tr>
<tr>
<td>Corporate Counsel</td>
<td>Fionna A. Philip</td>
</tr>
<tr>
<td>E-Rulemaking</td>
<td>Cynthia R. Farina</td>
</tr>
<tr>
<td>Government Information and Right to Privacy</td>
<td>James T. O’Reilly</td>
</tr>
<tr>
<td>Government Relations and Legislative Process</td>
<td>Vanessa Burrows</td>
</tr>
<tr>
<td>Intergovernmental Relations</td>
<td>William S. Morrow, Jr.</td>
</tr>
<tr>
<td>Judicial Review</td>
<td>Richard W. Murphy</td>
</tr>
<tr>
<td>Legislation</td>
<td>James W. Conrad, Jr.</td>
</tr>
<tr>
<td>Regulatory Policy</td>
<td>Sidney A. Shapiro</td>
</tr>
<tr>
<td>Rulemaking</td>
<td>Cary Coglanese</td>
</tr>
<tr>
<td>State Administrative Law</td>
<td>Errol H. Powell</td>
</tr>
</tbody>
</table>

### Government Functions Committees

<table>
<thead>
<tr>
<th>Committee</th>
<th>Co-Chairs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture</td>
<td>Nancy S. Bryson</td>
</tr>
<tr>
<td>Antitrust and Trade Regulation</td>
<td>Chong S. Park</td>
</tr>
<tr>
<td>Banking and Financial Services</td>
<td>Charlotte M. Bahin</td>
</tr>
<tr>
<td>Benefits</td>
<td>Jodi B. Levine</td>
</tr>
<tr>
<td>Beverage Alcohol Practice</td>
<td>Scott D. Delacourt</td>
</tr>
<tr>
<td>Consumer Products Regulation</td>
<td>David H. Baker</td>
</tr>
<tr>
<td>Criminal Process</td>
<td>Nancy Eyl</td>
</tr>
<tr>
<td>Education</td>
<td>Caroline Newcomb</td>
</tr>
<tr>
<td>Energy</td>
<td>Kenneth G. Hurwitz</td>
</tr>
<tr>
<td>Environmental and Natural Resources Regulation</td>
<td>Jeffrey B. Clark</td>
</tr>
<tr>
<td>Ethics and Professional Responsibility</td>
<td>Myles E. Eastwood</td>
</tr>
<tr>
<td>Federal Clean Energy Finance Committee</td>
<td>Warren Belmar</td>
</tr>
<tr>
<td>Food and Drug</td>
<td>James T. O’Reilly</td>
</tr>
<tr>
<td>Government Personnel</td>
<td>Joel P. Bennett</td>
</tr>
<tr>
<td>Health and Human Services</td>
<td>Timothy Aspinwall</td>
</tr>
<tr>
<td>Homeland Security and National Defense</td>
<td>Elizabeth Branch</td>
</tr>
<tr>
<td>Housing and Urban Development</td>
<td>Otto J. Hetzel</td>
</tr>
<tr>
<td>Immigration and Naturalization</td>
<td>Jill E. Family</td>
</tr>
<tr>
<td>Insurance</td>
<td>Janet E. Belkin</td>
</tr>
<tr>
<td>Intellectual Property</td>
<td>Arti K. Rai</td>
</tr>
<tr>
<td>International Law</td>
<td>Charles H. Koch, Jr.</td>
</tr>
<tr>
<td>International Trade &amp; Customs</td>
<td>Leslie Alan Glick</td>
</tr>
<tr>
<td>Labor and Employment</td>
<td>Marc A. Antonetti</td>
</tr>
<tr>
<td>Ombuds</td>
<td>Robert J. Hickey</td>
</tr>
<tr>
<td>Postal Matters</td>
<td>Nina E. Olson</td>
</tr>
<tr>
<td>Securities, Commodities and Exchanges</td>
<td>Ian David Volner</td>
</tr>
<tr>
<td>Veterans Affairs</td>
<td>Jason Schlossberg</td>
</tr>
<tr>
<td>Annual Awards</td>
<td>Lisa S. Bressman</td>
</tr>
<tr>
<td>Subcommittee on Outstanding Government Service</td>
<td>David Charles Frederick</td>
</tr>
<tr>
<td>Nominations</td>
<td>Elaine S. Reiss</td>
</tr>
<tr>
<td>Awarded</td>
<td></td>
</tr>
<tr>
<td>Fundraising</td>
<td>Ronald L. Smith</td>
</tr>
<tr>
<td>Homeland Security Law Institute</td>
<td>Joe D. Whitley</td>
</tr>
<tr>
<td>Membership and Communications</td>
<td>Joe D. Whitley</td>
</tr>
<tr>
<td>National Institute of Administrative Law</td>
<td>Kenneth G. Hurwitz</td>
</tr>
<tr>
<td>Nominations</td>
<td>James W. Conrad, Jr.</td>
</tr>
<tr>
<td>Pro Bono</td>
<td>Jodi B. Levine</td>
</tr>
<tr>
<td>Publications</td>
<td>William S. Morrow, Jr.</td>
</tr>
<tr>
<td>Administrative Law Conference</td>
<td>Linda C. Lasley-Ford</td>
</tr>
<tr>
<td>Administrative Law News</td>
<td>Elizabeth F. Getman</td>
</tr>
<tr>
<td>Administrative Law Review</td>
<td></td>
</tr>
<tr>
<td>Faculty Advisor</td>
<td>Andrew F. Popper</td>
</tr>
<tr>
<td>Editor-in-Chief</td>
<td>Tabitha Macharia</td>
</tr>
<tr>
<td>Executive Editor</td>
<td>Amy Guthier</td>
</tr>
<tr>
<td>Managing Editor</td>
<td>Peter J. White</td>
</tr>
<tr>
<td>Developments in Administrative Law &amp; Regulatory Practice</td>
<td></td>
</tr>
<tr>
<td>Editor</td>
<td>Jeffrey S. Lubbers</td>
</tr>
<tr>
<td>Review of Recruitment of AJJs by OPM</td>
<td>Hon John M. Vittone</td>
</tr>
<tr>
<td>Veterans Benefits and Service</td>
<td>John Hardin Young</td>
</tr>
</tbody>
</table>
Jeffrey S. Lubbers, Editor

The field of administrative law and regulation is as broad and as varied as the operations of government. Some regulatory practice areas are necessarily more specialized (e.g., banking, communications, food and drug, securities, and transportation). On the other hand, many procedural issues of great interest to administrative lawyers cut across all or most agencies (e.g., adjudication, rulemaking, judicial review, and constitutional separation of powers).

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