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This year’s Administrative Law conference was a huge success. You can read all about it in Section News and Events in this issue. We had a great turnout, lots of energy, and most importantly, superb panels. First and foremost, I want to thank the conference co-chairs, Neil Eisner and Richard Murphy; the hardworking Section staff—Anne Kiefer, Toni Martinez, and Ryan Spagnolo—and all of the organizers and panelists. You created something very special.

One of the attributes that made this year’s conference so successful was, not surprisingly, the mix of perspectives that comes from bringing academics, government lawyers, and private practitioners together. I know I am beginning to sound a bit like a broken record on this, but it is one of the great benefits the Section has to offer. For us academics, a particular value of this mixing is learning something about how things work in the real world. An occupational hazard for law professors is to focus too much on how things are supposed to work, or how they work in principle, or how they would work if law professors ruled the world (which—fortunately, I suspect—they don’t) and not enough on how they work in reality.

On two separate occasions during the conference, I was talking with someone who suggested that law professors should not spend their sabbaticals cloistered in some other educational institution’s library but, rather, should go work for an agency. The idea would not be that the professor would serve as a scholar in residence, observing or pontificating. Instead, he or she would actually perform the duties that constitute real, day-to-day agency business. My reaction is simple and immediate: Where do I sign up?1

That said, ignorance about how systems actually function is not a problem limited to law professors. Everyone has a tendency to over-extrapolate from the bit of reality they know well or to assume their own experience is typical. And in fact even law professors, if they have the time and expertise for empirical scholarship, can help us learn something about the real world. So we should welcome the unmistakable and accelerating empirical turn in legal scholarship. One can get a sense of these developments by browsing through the Journal of Empirical Legal Studies (JELS), which is still less than a decade old, or the Empirical Legal Studies blog, a group effort subtitled “bringing methods to our madness.”2 In describing the aims and scope of the journal, the JELS editors observe:

There is currently a gap in the legal and social science literature that has often left scholars, lawyers, and policymakers without basic knowledge of legal systems or with false or distorted impressions. Even simple descriptive data about the functioning of courts and the legal systems are often lacking. Reform and intellectual debate have previously proceeded in an empirical vacuum.3

This vacuum has existed, and continues to exist, in many legal fields. I would not hazard a guess as to where it has hampered understanding more and where less. But it is safe to say that administrative law has been in need of solid empirical work.

Happily, that is now changing. And a number of scholars with connections to the Section are leading the way, producing empirical work that casts doubt on many accepted truths about the administrative process. Indeed, at times these studies make one wonder whether we know anything at all.

Consider standards of review, which are so central to administrative law doctrine. Several years ago, former Section Chair Paul Verkuil conducted a study of actual outcomes and found that the stricter the official level of scrutiny (or in ad law terms, the harder the look), the more likely it was that the court would uphold the agency! For example, applying the substantial evidence standard, district courts reverse social security disability determinations more than 50% of the time; reviewing de novo, they set aside agency Freedom of Information Act denials only 10% of the time.4

Other empirical studies have also cast doubt on the importance of the articulated standard of review. For example, a huge amount of such work has been done with regard to Chevron, tending to find that for all the fuss it has generated over the years, that decision has not led to a meaningful increase in judicial acceptance of agency decisions, particularly in the Supreme Court. The list of articles is long; one prominent example, which won the Section’s scholarship award in 2009, is Eskridge & Baer’s The Continuum of Deference.5 Eskridge and Baer tabulated some 1014 Supreme Court decisions over the two decades after Chevron. Their essential conclusion: there has been no “Chevron revolution.”

One of the most recent examination of outcomes and standards of review is by Section member and International Law Committee co-chair David Zaring. Zaring reviewed over 200 cases decided by the D.C. Circuit under the APA’s substantial...continued on next page

1 I hasten to add that many academics have had experience as agency employees. Just limiting ourselves to former Section chairs, Bill Funk, Peter Strauss, Antonin Scalia, Bill Luneberg, and Phil Harter are examples—and each stands as an example of the value of such experience.

2 http://www.elsblog.org/cgi-bin/elsblog.cgi?content=/the_empirical_legal_stud/.


evidence standard between 2000 and 2004. He discovered that the agency was affirmed in 71.2% of those cases. Standing alone, that number does not tell us very much. But Zaring offers this statistic to fill in a hole in a larger picture: the overall agency success rate under varying standards of review. The studies Zaring reviews find remarkably consistent affirmance rates, and his own study adds one more example. For all the complexity of scope-of-review doctrine, and for all the nuance and struggle to articulate the distinctions between substantial evidence and arbitrary-and-capricious, or *Chevron* and *Skidmore*, or step two of *Chevron* and arbitrary-and-capricious, etc. etc., it turns out that courts consistently uphold agency action about two thirds of the time. For those seeking a very useful summary of these empirical studies, Richard Pierce just published one in the Section's scholarly journal, the *Administrative Law Review*.7

Or consider another of the givens of contemporary administrative law: that the rulemaking process has become “ossified” as a result of analytic and explanatory requirements imposed by the accumulation of executive orders, statutory requirements, and “hard look” review. The ossification story is powerful, intuitively sensible, and generally accepted. But it is largely anecdotal and impressionistic. In the mid-90s, Section member and chair of the Publications Committee Bill Jordan wrote an important article that actually looked at what happened to every legislative rule remanded by the D.C. Circuit over a 10-year period.8 Because about four out of five were reissued with little or no change, Bill concluded that the courts were not meaningfully interfering with agency policymaking.

Bill's study said little about the time and burdens of agency rulemaking. Several recent empirical studies suggest that they are less overwhelming than the standard account would have it. For example, Ann O'Connell, co-chair of the Section's Separation of Powers Committee, compiled a database of 20 years of Unified Regulatory Agendas, from 1983 to 2003. Among other things, she found that federal agencies are writing a lot of regulations, issuing between 500 and 1000 notices of proposed rulemaking a year. Of course, perhaps an “unossified” bureaucracy would be producing ten times that much; the bare number tells us only so much. But it tells us something. In addition, rulemaking does not actually take as long as is often assumed. It is hardly an overnight process, but after looking at rulemakings by ten specific agencies, O'Connell concluded: “the procedural costs to rulemaking (from the agency's perspective) are not so high as to prohibit considerable

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Afghanistan: The Need to Maintain an Independent Electoral Agency

By John Hardin Young*

The Islamic Republic of Afghanistan is a failing, if not failed, state. It will not, however, become a dissolved state, even with the withdrawal of NATO security forces. One factor that may allow Afghanistan to remain viable and to evolve into a democratic society is the permanence of its independent electoral commission.

Afghanistan has remained a unitary state for more than two and a half centuries, despite the various tribal interests that divide it.1 This state of affairs may be due, in part, to loyalties that are predominantly local with little political cohesiveness within ethnic groups. The larger schism may be between city and rural groups.2 It is a challenged country: 71.9 percent of the population over 15 years of age is illiterate, 35 percent of the population is unemployed, 36 percent of the population lives under the poverty line, and 90 percent of the revenue to run the government is from foreign aid.3

Afghanistan also has the second-highest infant mortality rate and second-shortest life expectancy in the world.4 It, however, also has a recent history of elections starting in 2004, which, to a degree, have produced acceptable election results, although fraud continues to plague the process.5 If Afghanistan can maintain viable electoral machinery, even as it spirals toward possible failure, enough of a legacy may remain that as Afghanistan evolves, genuine elections may be possible.

Basic Constitutional Structure

In 2001, following the collapse of the Taliban, the international community met in Bonn, Germany. The Taliban were excluded from that conference. Hamid Karzai was chosen as the interim leader. Following the Bonn conference, Afghanistan convened a national council of elders (loya jirga) in 2002 and a constitutional convention in 2003. The Constitution that was adopted, with the encouragement of the international community, is based on a strong executive model, not unlike the 1964 constitution written by Muhammad Zahir Shah’s monarchy.

The Afghan Constitution creates three branches of government: a president, a judiciary, and a legislature. The Constitution also provides for an Independent Elections Commission (IEC) separate from the other three branches. Article 156 of the Constitution provides the basic outline of an electoral system managed by the IEC with the mandate “to administer and supervise every kind of election as well as refer to general public opinion of the people in accordance with the provisions of the law.”6 Other provisions of the Constitution important to the electoral process include Article 7 (which incorporates, among other international agreements, the Universal Declaration of Human Rights) and Article 33, which provides that “[t]he citizens of Afghanistan shall have the right to elect and be elected.”7

The Constitution also provides for the creation of an Independent Human Rights Commission of Afghanistan (AHHR), which is authorized to “refer human rights violations of individuals to legal authorities and assist them in defense of their rights.”8 This authority appears to include active involvement in asserting voter claims before the IEC.

Unfortunately, the Constitution created an election calendar in which elections would be held three out of every four years by scheduling elections for the president and the lower house of the national assembly (wolesi jirga) every five years, provincial councils every four years, and district councils every three years. The IEC, however, lacks the ability to set up the logistics for and manage elections on a periodic basis, let alone annually, given the challenges of security, fraud, and lack of political discipline and parties. Holding people and factions accountable during Afghanistan’s elections appears difficult, if not impossible.

As UN Special Representative Brahimi stated to the Karzai Cabinet on June 10, 2003: “The Constitution would outline the basic electoral system, the details of that system would probably have to be further articulated in the electoral law.”9 There is no “probably” about the need for a detailed electoral law. It is a necessity. In 2005, such a law was proposed but not enacted by the National Assembly. The 2005 electoral law was instead promulgated under the emergency powers of the president provided in Article 79 of the Constitution.10 The electoral law was subsequently modified in 2010 by Presidential Decree No. 43. The 2005 and 2010 Electoral Laws provide for the creation of an Electoral Complaints Commission (ECC) to adjudicate electoral disputes, impose civil sanctions and penalties, and

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1 Afghanistan is made up of the following groups: Pashtun 42%, Tajik 27%, Hazara 9%, Uzbek 9%, Aimak 4%, Turkmen 3%, Baloch 2%, other 4%; Sunni Muslims make up 80% with Shia Muslims 19% and other 1%. CIA World Fact Book at https://www.cia.gov/library/publications/the-world-factbook/geos/af.html#top (2011 data).


3 CIA World Fact Book.

4 Id.

5 Prior to 1973, Afghanistan experienced a short period of democracy.

6 Afghan Const., art. 156.

7 The creation of the Constitution, following the Bonn Agreement of 2001, and the elections that followed through 2009 are described in SCOTT SEWARD SMITH, AFGHANISTAN’S TROUBLED TRANSITION (First Forum Press 2011) (hereinafter referred to as “Smith”).

8 Afghan Const., art. 58.

9 Smith at 58.

10 A practice that has been criticized as contrary to the constitutional process.
Elections Test the Ability to Capture the Will of the People

The Afghan electoral system initially had three major obstacles to overcome. First, original proposals for a proportional representative system of elections in which candidates would run on open or closed party lists were rejected by the cabinet. This proposal would have required the establishment of political parties. The alternative that was accepted was that candidates would run in single member districts and be elected through the use of a single non-transferable vote (SNTV), by which a single candidate for that office would be elected. While SNTV was intended to be used only for the 2004 election for the lower house of the national assembly (woolesi jirga), it remains the method of voting in Afghanistan. In all fair elections, multiple candidates run for a single office. The problem with SNTV was that some candidates would be elected by a very large number of voters and some by a much smaller number, creating an inequality in representation that arguably violates the spirit of the constitutional provision that divides seats so that they are proportional to population. The difference between the last winner and the first loser, moreover, would likely be very small, which highlights the temptation for fraud, or the temptation to misread administrative errors as deliberate fraud.

Second, while the Afghan Constitution, not unlike the U.S. Constitution, does not mention political parties, Karzai refused to permit political parties to form or to be recognized on the ballot. Whether this refusal was an attempt to consolidate the president’s central role or whether it was legitimate fear that political parties would revert to the “tanzims” that conducted the Afghanistan civil war is unclear. The result, however, is clear: a large number of candidates running for a finite number of positions with winners rarely commanding a majority lead.

Third, the lack of security led to fraud on a large scale. In the 2009 presidential election and in the 2010 national assembly elections, more than a quarter of all ballots were disqualified based on allegations of fraud. The 2009 election involved the president and provincial councils. The IEC was appointed by Karzai. The ECC had five members, three of whom were appointed upon the recommendation of the UN Special Representative and two by the President. The major contenders in the presidential election were Karzai and Abdullah Abdullah. Neither was able to capture a majority of the votes cast in the first round.

The ECC investigated and prosecuted discrete incidents of election violations. The fraud was so rampant and obvious in many districts that the solution was to set aside for further investigation all the ballots in a ballot station based on the adoption of “triggers.” These triggers were used where ballot boxes or whole balloting stations were “captured” (i.e., commandeered by political or terrorist factions), where ballot boxes contained more than 600 votes, or where one candidate received over 95 percent of the vote. The significance of finding 600 votes demonstrated clear proof of fraud because that was the maximum number of ballots provided to a polling station. The calculation of time-required-to-vote and time-available-to-vote yielded 550 voters. The extra 50 ballots were in case a station was remarkably efficient or hours were extended. For 600 people to vote would, therefore, have required exceptional circumstances. That was why it was such a powerful indicator of fraud.

In these two latter instances, the IEC, after a dispute over the use of triggers, determined that where the ballots exceeded 600 in a ballot box or the ballots were 95 percent or more in favor of one candidate, the entire ballot box would be excluded. These triggers were used as criteria for the conducting an IEC audit of a statistical sample of ballot boxes under the supervision of the international-majority ECC. The statistical “audit” led to the disqualification of over 1.2 million ballots and prevented President Hamid Karzai from being reelected in the first round of voting.

In 2010, the national assembly elections were to be run by the Afghans, with only limited international oversight. For example, of the five ECC commissioners, three were Afghan and two were from the international community. The record of the international community commissioners following that election appeared mixed: the international commissioners (with the concurrence of one of the Afghan commissioners) demanded an audit of the election results but also appeared to have been of little influence and to have deferred to their Afghan counterparts in individual decisions, even when the evidence did not support a particular decision, which became a cause of the post-electoral controversy over the seating of various members of the national assembly.

Like the 2009 elections, the 2010 election was marred by fraud with nearly a quarter of all ballots disqualified. Continued on next page

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11 Afghan Electoral Law, arts. 61-64.
12 Afghan Electoral Law, art. 12(7).
13 Afghan Electoral Law, art. 62(5).
14 Afghan Electoral Law, art. 6.
15 Afghan Electoral Law, art. 7.
16 See Smith at 64.
17 In 2010 2,506 candidates ran for 249 seats.
18 The triggers seem to have been developed on the basis of electoral sampling models, which have not been successfully used in actual elections.

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The 2010 election also involved a direct challenge to the authority of the IEC and ECC. Under the Electoral Law, “final results of elections after completion of the counting procedures and determination of all complaints regarding voting and counting by the Electoral Complaints Commission . . . shall be final and binding after certification by the Commission.”

This provision was tested in the 2010 elections when the ECC determined that 62 members otherwise elected to the National Assembly would not be seated due to fraud or other irregularities in the results. The Attorney General, without any apparent authority, investigated the ECC and IEC. A special judicial committee was appointed by Karzai, who attempted to overturn the decision. Ultimately, the Supreme Court found that the results could not be reviewed.

To resolve what was becoming an electoral crisis, Karzai agreed to “refer” nine of the questionable candidates back to the IEC. The issue then became whether the IEC could take any action given that it had certified the election of other candidates as the winners over the nine. One set of opinions held that the language in Article 58 that certified results were “final and binding” meant that once the results had been certified there was no remedy, even in the face of an obvious mistake. A second set of opinions, which was to prevail, held that under Article 156 of the Constitution and the Electoral Law, the “final and binding effect” language meant only that decisions of the IEC (and the ECC) could not be appealed, but the IEC had the authority to correct decisions after certification. The argument was that the IEC existed within a constitutional framework as a separate and distinct independent entity with rulemaking and adjudicatory powers and, thus, had plenary powers to protect constitutionally guaranteed electoral rights while preventing and identifying electoral irregularities. The IEC was required to provide the appropriate means and mechanisms for resolving, and when based on the law and facts, for correcting irregularities at any time. This power was viewed as consistent with international human rights laws that require effective remedies as established, for example, in Article 8 of the Universal Declaration of Human Rights and in articles 2(3) and 3 of the International Covenant on Civil and Political Rights.

The evidence also supported the IEC’s decision to reinstate the nine candidates. In those nine cases, the record did not support the initial decision made. In its press release reinstating the nine candidates, the IEC stated that “the IEC has reviewed the evidence and it has found that the results were not justified.”

The controversy ended when the IEC concluded that it had the authority to correct decisions after certification, particularly if the right-to-elect and-to-be-elected provisions of the Constitution, Declaration of Human Rights, and Electoral Law had been violated. This assertion of authority reinforced the independent and impartial nature of the IEC. The rationale was that the essence of the power to correct after certification includes cases of: 1) administration or clerical error; 2) fraud; and 3) legal error in the decision. The IEC also recognized that the correction of errors is an extraordinary remedy that can be used only in cases of clear and unmistakable error and that, as with other civil law systems, the decisions to correct an error related to the particular cases and did not set a precedent for future cases.

**IEC and ECC Structure**

The IEC is constitutionally created as an independent governmental agency. The Electoral Law provides the legislative authority for its operation. The ECC, on the other hand, is not established by the Constitution; rather, it is provided for in Chapter Thirteen of the Electoral Law, which includes Articles 61–64. While

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20 Electoral Law, art. 58.

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21 Electorat Law, art. 62(7).


23 The 2005 Electoral Law made somewhat similar provision for an ECC in Chapter IX, Articles 52–54.

24 Election Law, chaps. Two through Twelve, respectively.


26 Electoral Law, arts. 61 & 62.

27 Id., art. 62(7).

28 Review by even a special panel of the Supreme Court appears not to produce an independent review given the politicization of the court and, thus, UNHCR General Comment 32 does not appear applicable.
the IEC. 29 Third, although the Electoral Law outlines the appointment process for ECC commissioners, 30 it is silent on the appointment process for IEC Commissioners. Fourth, the ECC, following the issuance of the 2010 Electoral Law, reversed its previously stated position that it had the authority to review decisions of the IEC by declaring that the 2010 law denied it such authority.

To meet these challenges, the IEC must further develop as a permanent agency that can withstand downturns in the political future of Afghanistan. For any electoral management system to be effective, pre-determined standards must exist. The IEC, pursuant to its regulation-making authority under Article 66, through a permanent secretariat, 31 must undertake a comprehensive review of gaps in the Electoral Law (including, for example, candidate listing, audit procedures, and rules for the suspension of elections due to security or climatic conditions) consistent with the Constitution and Electoral Law. Once these gaps are identified, the IEC should promulgate written and published regulations, sufficiently prior to the beginning of an election cycle, which address the electoral rules necessary for each part of the process. Drafts of these rules should be provided to civic societies and potential and declared candidates for their comments. Optimally, consideration of the rules would be conducted in public meetings with public input. The final rules should be consistent with the Constitution and international obligations embodied in the Constitution.

For a political system to work effectively, political parties should be encouraged and barriers to their formation removed. Party registration should be easy and transparent. Reporting and disclosure rules must be administered in an even-handed manner. Candidates should be permitted to run on party tickets. Similarly, the SNTV system should be scrapped, in favor of ranking or other methods that are acceptable to the Afghan people and which produces majority candidates. Surveys and voting acceptance testing should be undertaken to determine whether open or closed proportional systems would work. The revised system should be implemented at all levels of voting, including district elections, which despite provisions for them in the Constitution have yet to be conducted. 32

For the fair and impartial adjudication of disputes, clear definition of proscribed acts and procedures for their resolution are required. The IEC, until the ECC is constituted prior to an election, 33 must promulgate regulations that define the elements of each of the violations set forth in Article 63 and establish within the ECC an intermediate level of review that would: (i) hold on-the-record hearings, (ii) conducted by trained election complaints adjudicators, (iii) with procedures applied consistently to all complaints made either directly to the ECC or to the Provincial Election Complaints Commissions, (iv) with final review by the full ECC. After final certification under Article 58, IEC procedures should provide for the correction of errors and the possibility of reopening a finding of a violation if new evidence shows clearly and convincingly that the violation did not occur. The IEC should also provide an appeal mechanism for IEC decisions through its regulatory authority by providing for review of its decisions by the ECC. 34

For the conduct of the elections, it is vital that security be provided. During an election, the resources of the army and police should be put at the disposal of the IEC to ensure adequate security at every polling place. Where security is not available, polling places must be consolidated. Formal binding mechanisms, including regulations, must be implemented for inter-agency cooperation to carry out the governmental duty to assist the IEC in holding credible elections, as well as predetermined standards for postponement or closing of polling centers.

The rate of fraud in Afghan elections is unacceptable and destroys the will of the people to vote and have their ballots count. It cannot continue. Nor can the IEC and ECC disqualify ballots on gross assumptions of what happened where it appears only statistically that the vote is not what it should be. Factual

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29 See supra note 19 at 9–10 (suggesting that complaints be considered first by the relevant election commission subject to review by the ECC). This suggestion has the benefit of providing a level of review but appears not consistent with at least the current position of the IEC legal department that the IEC and ECC are separate and independent bodies with separate functions. The Report does recommend a permanent ECC.

30 Electoral Law, art. 61 (providing that ECC Commissioners are appointed by the President in “consultation” with the Speaker of the two Houses of the National Assembly and the Chief Justice of the Supreme Court).

31 These secretariats should be organized into two separate entities: one for the development of regulatory policy consistent with Recommendation A, and second, one for the development of adjudicatory processes to implement Recommendation B, infra. The loci of these entities within the commissions are an operational issue for the Chief Electoral Officer.

32 Article 141 provides for district elections, but the districts have never been established, and elections have never been held.

33 Many have recommended a permanent ECC, see notes 1 & 28 supra. If the ECC becomes a permanent agency then these functions should be performed by the ECC.

34 The IEC, as a constitutionally created entity, and through Article 66 of the Electoral Law, appears to have the authority to create a review mechanism for its decisions, which is different from the position of the ECC that it did not have the statutory authority to review IEC decisions.
Ohio Adopts New Constraint on Agency Rules

By James T. O'Reilly*

S teplechase jumping events for horses are exciting, as the well-groomed sleek equine athletes jump progressively higher fences to win Olympic gold or national awards. Of course, at some point the fences are too high, and no competitor can succeed. What if everyone who wanted to have a health or safety regulation adopted saw the fence raised higher and higher; would rulemaking simply stop in that state?

The experiment of raising barriers is underway with FoxNews presenter and now Ohio governor John Kasich. Kasich was elected in 2010 on a “job creation” platform and his post-election rush to curb state government has been dubbed the “shock and awe” campaign. Rather than having further legislative debate on regulation, Kasich immediately implemented by Executive Order a ban on any new state regulations, if the sponsoring agency “failed to demonstrate the intent justifies the rule’s adverse impact on businesses.” Exec. Order No. 2011-01K.

Business backers of the controversial Kasich hailed this Order as crucial to attracting new businesses and creating and retaining jobs. The crushed stone companies whose air emission permits were stalled by dust concerns soon got their permits as the executive order let them “push the permits across the finish line.” The restaurant association’s web message to members was: “Tell us what government regulations you’d like to see eliminated.” Presenters from the state agencies told the state bar administrative law committee in prepared remarks that they were adjusting to their new constraints, but their faces showed the wariness of survivors facing the barriers ahead. Informally, some regulators at the bar conference were counting the months until retirement was possible.

Leaving aside the individual value judgments about the prudence and wisdom of the edict, let’s examine how any administrative agency manager would jump over a fence set at this level. The burden is totally on the agency manager. The intent of the statutory provision being implemented is to be discerned first from the actual words used in the statute. (Ohio has no tradition of discerning statutory intent from the informal legislative committee reports or floor debate history.)

Ohio’s seven supreme court justices are all conservative members of Kasich’s party, so one cannot expect a dramatic new adoption of an intent standard beyond the judge’s interpretation of the literal intent of statutory terms.

After the agency manager determines statutory intent, he or she then states how the rule being proposed will meet that intent. This is an implicit prerequisite for all rule drafters in every state or federal agency, a basis for connecting the rule with the authority delegated. In some cases the federal statute delegating a role to the state is clear, but more likely, the state agency finds intent from its own evaluation of the desires of the senator or representative who spoke most loudly for the statutory term. Later appellate briefs take issue with the expressed intent, and the justices hold their own views as each jurist has survived Ohio’s hotly contested climate of expensive judicial elections.

Next, the agency has to speculate about “the rule’s adverse impact on businesses.” Presumably the agencies will heed the demands of business lobbyists who told the state bar administrative law meeting that agencies must hold sessions with the affected businesses to listen to impacts that the proposal would have on their work. A quantitation of adverse impacts would include equipment purchases, additional hiring for the activity demanded by the rule, additional records and reports, reduced effluent or emissions, and whatever else the businesses told the agency were “adverse” impacts.

Silence inevitably has impacts in the rulemaking decisional process. Silence about impacts on families, children, air breathers, water drinkers, forest trail walkers, etc., is intentional in the Kasich order. There is no mandate that the state agency consider human health or environmental quality impacts, unless the statute’s “intent” to do so is clear.

So the hurdle bar rises; no rule is allowed to pass over if the intent does not “justify” the adverse impact on the business affected. Readers from outside Ohio may be scratching their heads and asking, “Could my state’s rule about topic X pass the Kasich commands?” It is too early to quantitatively evaluate the drop in new rules, but in 2014 when Kasich leaves office or is reelected, data on the administrative consequences will be part of the analysis. Opponents speaking at the state bar administrative session decried the one-sided approach of the executive order, failing to consider impacts on patients’ health, for example, if the rule is rejected or withdrawn because it has some adverse effect on nursing home managers. The bar is set quite intentionally high: look at the statutory “intent” in the words used by the legislature, match it to claims of adverse business effects, and ask if the agency manager “failed to demonstrate the intent justifies the rule’s adverse impact on businesses.” Impacts on children? Lake purity? Air quality? Trainloads of New York waste filling eastern Ohio? Floods of wastewater from “fracking” gas wells killing fish and condemning water wells? Sorry, not part of the Ohio equation.

The old political claim that “As Ohio goes, so goes the nation” comes to mind. Could your federal agency or state agency adopt its next five rules if you as administrator failed to show that the statutory intent “justifies” adverse impacts on businesses? Stay tuned to the veteran Fox commentator, now governor, as his show must go on. This paradigmatic hurdle for new rules may well be coming to your state soon!

*Vice Mayor, City of Wyoming, OH; Professor, University of Cincinnati College of Law; Former Chair, Section of Administrative Law & Regulatory Practice; current Co-Chair, Food & Drug Committee; and Member, Administrative & Regulatory Law News Advisory Board. Views expressed are those of the author.
“Deferece” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight”

By Peter L. Strauss*

A late spring issue of the Columbia Law Review will carry an article that I immodestly hope will help to clarify/simplify/rationalize what has seemed the reigning administrative law mystery of the last third of a century, *Chevron* “deference.” Trying to work out why it has never seemed especially mysterious, controversial, or difficult to me, I came very recently to the realization that “deference” is at the heart of the confusion. Justice Stevens, the author of *Chevron*, captured the problem in a sentence denying the utility of the Court’s analogous and equally confusing approach to equal protection issues. Multi-level deference analysis, like “tiers of scrutiny” equal protection analysis, “does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.”

Perhaps the title says it all, but here is the abstract of the piece currently posted on SSRN.com, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1932446:

Administrative law scholars have leveled a forest of trees exploring the mysteries of the *Chevron* approach contemporary judges take to reviewing law-related aspects of administrative action. Without wishing to deny for a moment that judicial practice has been inconstant—influenced by the importance of the matter, by the accessibility of the issues to non-expert judges, by politics, and by the earned reputations of differing agencies—this short comment suggests an underappreciated, appropriate, and conceptually coherent structure to the *Chevron* relationship of courts to agencies, a structure whose basic impulse may be captured by the concept of “allocation.” Steering clear of commonly used review concepts that may muddle rather than clarify the structure’s operation, it avoids the term “deference”, and argues that instead of “*Chevron* deference” and “*Skidmore* deference,” one could more profitably think in terms of “*Chevron* space” and “*Skidmore* weight.”

“*Chevron* space” denotes the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints, its allocated authority. “*Skidmore* weight” addresses the possibility that an agency’s view on a given statutory question may in itself warrant respect by judges who are themselves unmistakably responsible to decide the question.

The paper thus argues that a simple and rational synthesis of the leading cases can without difficulty be made, if one abandons the confusions of “deference” for the distinct qualities of “weight” and “space.” Agency views of statutory meaning may often be entitled to considerable weight when judges come to decide for themselves issues of statutory meaning. American courts have recognized this proposition for almost two centuries. More recently we have come to understand and accept that executive agencies may be vested by Congress with authority to act with the force of law, so long as the boundaries of that action can be judicially determined. In that space, the agency is the prime actor, and the very conclusion that Congress has delegated authority to it commands reviewing courts to act not as deciders but as overseers.

* Betts Professor of Law, Columbia Law School, and Former Chair, Section of Administrative Law & Regulatory Practice. The full article will appear in 112 COLUM. L. REV. (forthcoming 2012).
Who Makes Agency Decisions?

By Ralph S. Tyler*

The U.S. Food and Drug Administration (FDA) recently decided to make the Plan B (“morning after”) contraceptive pill available over the counter without age restrictions, thereby making the pill available to pre-teen girls without a prescription. The Obama Administration’s response to FDA’s Plan B decision is illustrative of the diminished policy role of agencies in an age of increased centralization of federal executive power. The Plan B decision is, therefore, instructive for those seeking to influence the direction of agency actions and for those contemplating legal challenges to agency actions.

Health and Human Services (HHS) Secretary Kathleen Sebelius overruled the decision of FDA Commissioner Dr. Margaret Hamburg to permit young women/girls below the age of 17 to obtain the Plan B pill without a prescription. The Food, Drug, and Cosmetic Act authorizes the Secretary, “through the Commissioner,” to execute the provisions of the Act, 21 U.S.C. § 393(d)(2). Thus, in overruling the FDA Commissioner, the Secretary exercised her power to trump the agency’s medical and scientific expertise.

Following the Secretary’s decision, FDA’s spokesperson stated that no Secretary had ever previously exercised this authority to overrule the Commissioner in the context of a drug approval decision. It would be a mistake to conclude from that statement that FDA’s decisions on other matters have been or are immune from the influence of the HHS Secretary or of persons above her in the government.

FDA makes many types of decisions in addition to approving or disapproving medical products. For example, FDA issues regulations, guidance documents, and Federal Register notices. The vast majority of these documents reflect policy judgments and choices. Except for truly mundane matters (e.g., scheduling notices in the Federal Register), these documents and the policy judgments reflected in them are subjected to a multi-step internal government “clearance process” before the documents are released.

The documents are reviewed, commented upon, and approved (or not) by HHS and then beyond HHS at the White House, specifically by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB). The power of offices outside of FDA to review and to approve (or not) a document carries with it the power to approve (or not) the policy choices reflected in the document. Other agencies involved in domestic policy matters are subject to a similar policy review structure.

A well-publicized non-FDA example illustrates how vesting review authority outside an agency equals authority to approve (or not) an agency’s policy decisions. On September 2, 2011, President Obama announced that he had decided to ask the Administrator of the Environmental Protection Agency (EPA) to withdraw a draft, final ozone air-quality rule. On the same day, OIRA Administrator Cass Sunstein sent a memorandum to the EPA Administrator setting forth the White House’s reasons for this action. That memorandum makes clear OIRA’s view that its review of EPA rules (as well as OIRA’s review of the rules of other agencies) includes the review of substantive policy matters and is not limited to questions such as the agency’s legal authority to promulgate the rule.

The Sunstein memorandum and the statement issued by Secretary Sebelius when she rejected FDA’s decision on Plan B have much in common. Neither document gives much weight to the expert judgment of the agency involved, and both documents articulate a robust view of the appropriateness of non-experts outside the agency deciding policy matters even when those matters necessarily involve technical information.

The memorandum of Secretary Sebelius rejecting FDA’s Plan B decision, for example, states explicitly that she reached a different decision than FDA because she substituted her judgment for that of the agency (“Based on my review, I have concluded that the data submitted for this product do not establish that prescription dispensing requirements should be eliminated for all ages.”).

The point here is not whether HHS or OMB/OIRA should be making key policy calls. The point is the straightforward factual one that the nominally responsible agencies are not making the key policy calls—persons outside those agencies are. While this practice played out in a public fashion with FDA and EPA, there is no reason to believe that other domestic agencies are not undergoing comparable executive branch review and second-guessing of their respective policy judgments.

At least two implications flow from the fact that the power of domestic agencies has been diminished in favor of concentrating power higher up the bureaucratic chain.

First, given that persons outside an agency with review authority will ultimately decide whether or in what form an agency proposal will (or will not) see the light of day, those seeking to have input on agency rules and policies must pay as much attention to those persons as to those inside the agency.

Second, the increasingly apparent role of non-experts outside of agencies in making key policy decisions casts a quite different light on the notion of judicial deference to agency decisions. The doctrine of judicial deference in administrative law is based on two closely related premises. The first premise is that agencies have expertise. The second premise is that the agencies with expertise are actually making the decisions. The factual basis for that second premise is ripe for scrutiny.

In cases challenging an agency action or rule, one can anticipate that the government will raise objections to efforts to develop the record of how and by whom key decisions were made. The counter arguments to overcome those objections are strengthened by the government’s willingness to reveal, as it did in the cases of Plan B and the EPA rule, that non-experts outside of an agency are, in fact, the ones making the final decisions.

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Preserving the Ark of Our Safety: How a Stronger Administrative Approach Could Save Section 5 of the Voting Rights Act

In our system, the first right and most vital of all our rights is the right to vote. Jefferson described the elective franchise as ‘the ark of our safety’. It is from the exercise of this right that the guarantee of all our other rights flows.

—Lyndon B. Johnson

Overview


Section 5 was the central provision of Congress’s solution to the ineffective and costly adjudication of the continuously evolving methods of voting discrimination. By automatically requiring examination of any proposed change to the voting practices in a covered jurisdiction, Section 5 shifts the burden to a covered jurisdiction to prove that the change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race.” 42 U.S.C. § 1973c, as determined by the U.S. Attorney General or the U.S. District Court for the District of Columbia.

Experience has shown that Section 5 may be frustrated by party politics. For example, in 2001, while a Mississippi redistricting plan was pending at the Department of Justice, the Mississippi Republican Party convinced a federal judge to adopt a separate Republican-favored redistricting plan if the Department of Justice (DOJ) failed to grant preclearance within sixty days. After review, career staff unanimously found that the proposal did not negatively affect minority voters and recommended that DOJ grant preclearance. Political staff rejected the recommendations and extended the review past the sixty-day window, thus allowing the federal court to install the Republican-favored redistricting plan. The reasoning for the delay was suspicious and condemned as being the product of political influence. But party politics is not the only problem.

The Constitutionality Problem

When Congress passed the VRA in 1965, it stated the VRA was “appropriate legislation” under the Fifteenth Amendment. Almost immediately the constitutionality of some key sections were challenged in South Carolina v. Katzenbach, 383 U.S. 301 (1966). In its analysis, the Supreme Court recognized that Section 5 may be an “uncommon exercise of congressional power,” but stated that the question of whether the legislation is appropriate is dependent on the conditions and circumstances facing Congress. Upholding Section 5, the Court held that Congress knew of the persistent voting discrimination and that Congress had reason to believe that the covered states “might try similar maneuvers in the future in order to evade the remedies” of the VRA. These “exceptional conditions” and “unique circumstances” indicated Section 5 was appropriate legislation under § 2 of the Fifteenth Amendment. South Carolina challenged the coverage formula, arguing that voting discrimination did not exist in all of the covered jurisdictions. The Court was not swayed, indicating that the formula was “relevant to the problem of voting discrimination,” and thus Congress could “infer a significant danger of the evil in [those] few remaining” covered jurisdictions.

As the coverage formula ages and the United States achieves greater racial equality, Section 5 becomes increasingly controversial. The coverage continues to be based on the state of the country in 1964, 1968, and 1972, but because it is explicitly set forth in the VRA, DOJ lacks authority to modify it. Furthermore, Congress chose not to amend the formula in the 2006 Reauthorization Act.

Congress created Section 5’s coverage formula to single out jurisdictions with the worst history of entrenched voting discrimination. To answer the question of current constitutionality, it must be determined whether voting discrimination or the risk of voting discrimination still exists in covered jurisdictions at sufficient levels to justify singling them out for coverage.

Proposed voting changes and corresponding preclearance objections provide evidence of the continued entrenchment of racial discrimination in covered jurisdictions. In a congressional study of DOJ preclearance objections, discriminatory intent or purpose was found in 74% of objections handed down in the 1990s. Voting Rights Act: Section 5—Preliminary Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 180 (1st Sess. 2005). This indicates that intentional voting discrimination is still present in the covered jurisdictions. Notably, since Section 5 coverage was initiated in 1965, not one Louisiana redistricting plan, in expanded version of the Administrative Law Review.
its initially submitted form, has received preclearance. To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 16, 18 (1st Sess. 2005). Considering the fact that redistricting plans are often in effect for at least a decade, they can be an extremely effective means of minimizing the voting power of minorities. It is also important to note that there is an additional deterrent effect of preclearance, which has likely prevented numerous discriminatory changes from ever being proposed. While Section 5 has helped prevent the enforcement of discriminatory practices, it has yet to cure the behavior that is the root of the problem, and because case-by-case adjudication of voting discrimination remains as ineffective as it was in 1965, and discrimination is still disproportionately present in the covered jurisdictions, present circumstances sustain Section 5's continued constitutionality.

Need for Reform

The United States has made great strides toward equality since the passage of the Voting Rights Act in 1965. But while blatant acts of racism have decreased, there are still concerted and consistent efforts to discriminate against minority voters. The codensation of minorities toward a common political party somewhat transformed discussions of institutionalized discrimination, as voting discrimination can now be more easily attributed to political motivations and biases. Reforms directed at the statutory structure and at the opt-out rules (which provide an escape mechanism for states that have had no voting rights complaints for 10 years) nevertheless should be undertaken to reinforce the constitutionality of Section 5, increase its effectiveness, and help guard against political abuse in Section 5 enforcement.

New Statutory Structure

Because Section 5 is relatively static, DOJ is unable to adapt its enforcement to changes and developments in demographics, motivations, and constitutional interpretation. The slow-moving and politically shackled arms of Congress are not always a successful means of responding to new contingencies or shifting circumstances.

The responsibility of updating the coverage formula is tailor-made for an agency. For all the congressional hearings and debates on the coverage formula during the 2006 reauthorization, a change never really stood a chance against the political pressures. There is a strong rationale behind the current coverage and it should not be easily dismissed, and thus Congress should set the current coverage as the starting point. DOJ should have the flexibility to enact, through notice-and-comment rulemaking, new procedures and rules. This would allow the Section 5 mechanism to be adapted to new and changing situations, and enable DOJ to more easily respond as new ideas and solutions arise.

To confront the potential for political bias in preclearance decisionmaking, Congress should create specific reporting requirements for DOJ and allow limited appeals of grants of preclearance. This would add more transparency and accountability and would be a significant safeguard for ensuring a nonpolitical basis for preclearance decisions.

One such reporting requirement should be the creation of a record for every preclearance decision. This record should include all arguments and supporting evidence introduced by the requesting jurisdiction, plus any documents, memoranda, or studies created or relied upon by DOJ. If preclearance is either denied or explicitly granted, the record should also include an order laying out the evidence relied upon, the conclusions drawn from that evidence, and the reasoning behind the ultimate decision. Occasionally DOJ simply does not respond to a request for preclearance within sixty days, thus effectively granting preclearance. To confront this, any party should be allowed to submit a request to DOJ demanding a reasoned explanation for a decision at any time up to fourteen days after the expiration of the initial sixty days. Once a request is submitted, the jurisdiction may not enforce the change for which it is seeking preclearance until DOJ releases an official decision, complete with all the requirements mentioned above. Requiring an inclusive record would open the process up to public and political scrutiny, creating additional pressure to make reasoned decisions based on the law as opposed to political bias. This may result in a heavier workload for DOJ, but it is a reasonable price to pay given the importance and lasting effect of preclearance decisions.

A record would also serve a vital role during an appeal. Currently, a DOJ denial of preclearance is not appealable, though the jurisdiction may subsequently request preclearance from the D.C. District Court—essentially resulting in a new preclearance proceeding. This would not change. Congress should also allow appeals of grants of preclearance to be brought in the D.C. District Court, with a two-tier system of review. For decisions that concern redistricting or explicit preconditions to voting or registering to vote—such as ID requirements or good-behavior prerequisites—the standard of review should be de novo. For appeals of other voting changes, the court should analyze DOJ's decision under the Chevron doctrine and would overturn only if “arbitrary, capricious, or manifestly contrary to the statute.” 467 U.S. 837, 844 (1984). This deference would help prevent the court from being overloaded with cases by allowing it to dismiss decisions reasonably supported by the record and the law. At the same time, it would help prevent politically biased preclearance decisions by allowing the court a means of overturning those cases.

New Opt-out Rules

With its new rulemaking power, DOJ should make two immediate changes. First, it should create a more effective opt-out mechanism. It is not immediately clear why so few jurisdictions have utilized the current opt-out provision, but this raises serious concerns about its effectiveness. DOJ should enact a tiered opt-out system with each tier representing different classes of voting changes, thus providing for different evidentiary requirements for different tiers. The requirements should be more relaxed for simple voting changes such as the extension of polling station hours during an election. But the current
RESOLUTION IN MEMORY OF ROBERT A. ANTHONY

WHEREAS our colleague and friend Robert A. Anthony, GMU Foundation Professor Emeritus at the George Mason University School of Law, passed away on November 17, 2011;

WHEREAS Professor Anthony was a long-time and active member of the Section of Administrative Law and Regulatory Practice—serving with distinction as Secretary, a Member of the Council, and as Chair and Vice Chair of several Section Committees—and an endurally faithful supporter of Section activities;

WHEREAS Professor Anthony was among the nation’s most distinguished and prolific Administrative Law scholars of his generation, especially as one of the foremost authorities on agency rulemaking and the use and misuse by agencies of policy statements and guidance documents;

WHEREAS Professor Anthony was a dedicated teacher, beloved by his students at the George Mason University and Cornell University Law Schools;

WHEREAS Professor Anthony served with distinction as Chairman of the Administrative Conference of the United States from 1974 to 1979, during ACUS’s formative years, then as Senior Fellow from 1982 to 1995, and again as Senior Fellow from 2010 until the time of his passing; and

WHEREAS Professor Anthony, in all his dealings with the Section and its members, was a generous and kind colleague, a willing contributor to all manner of activities, a ready mentor, and a devoted and loyal friend:

NOW, BE IT THEREFORE RESOLVED that the Section expresses its sorrow at Bob Anthony’s passing and honors his memory for his many contributions to the Section, the legal profession, legal education, legal scholarship, and, above all, for the friendship he shared with us all.

Unanimously adopted by the Council of the Section of Administrative Law and Regulatory Practice of the American Bar Association this 28th day of November, 2011.
Thursday – March 22, 2012

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

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

Joe D. Whitley, Program Chair; Vice-Chair, ABA Section of Administrative Law & Regulatory Practice; Greenberg Traurig LLP, Atlanta, GA and Washington, DC; Former and first General Counsel, U.S. Department of Homeland Security; former U.S. Attorney for the Northern (Macon) and Middle (Atlanta) Districts of Georgia, U.S. Department of Justice

Chad N. Boudreaux, Program Vice-Chair; Huntington Ingalls Industries, Inc., Newport News, VA; Former Deputy Chief of Staff, U.S. Department of Homeland Security; former Senior Counsel to the Deputy Attorney General, U.S. Department of Justice

Elizabeth L. Branch, Program Vice-Chair; 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

9:00 am – 9:45 am
Keynote Address
TO BE ANNOUNCED

9:50 am – 10:40 am
Plenary Session
EXECUTIVE AGENCY GENERAL COUNSEL PANEL: A LOOK AT HOMELAND SECURITY LEGAL AND POLICY 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 2012
Moderator: Elizabeth L. Branch, 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

12:00 pm – 12:30 pm
Lunch

12:30 pm – 1:30 pm
Panel Discussion
HOMEGROWN THREATS AND RADICALIZATION
Moderator: Adam J. White, Boyden Gray & Associates, Washington, DC

1:45 pm – 3:00 pm
Breakout Session A
HOMELAND DEFENSE AND CIVIL SUPPORT: THE ROLE OF THE MILITARY WITHIN OUR OWN BORDERS
Moderator: Paul F. McHale, McKenna Long & Aldridge, LLP, Washington, DC; Former Congressman and Assistant Secretary of Defense for Homeland Defense

1:45 pm – 3:00 pm
Breakout Session B
CARGO & SUPPLY CHAIN SECURITY
Moderator: Joel A. Webber, Couri & Couri, Chicago, IL

1:45 pm – 3:00 pm
Breakout Session C
EMERGING COMPLIANCE ISSUES FOR GOVERNMENT CONTRACTORS: AN IN-HOUSE PERSPECTIVE
Moderator: Chad N. Boudreaux, Corporate Vice President and Associate General Counsel, Huntington Ingalls Industries, Inc., Newport News, VA; Former Deputy Chief of Staff, U.S. Department of Homeland Security; former Senior Counsel to the Deputy Attorney General, U.S. Department of Justice

3:00 pm – 3:15 pm
Coffee Break

3:15 pm – 4:30 pm
Breakout Session A
THE LAW ENFORCEMENT AGENDA 2012
Moderator: Jayson P. Ahern, The Chertoff Group, Washington, DC; Former Acting Commissioner, U.S. Customs & Border Protection (CBP)

3:15 pm – 4:30 pm
Breakout Session B
HOMELAND SECURITY & INFORMATION SHARING: PERSPECTIVES FROM FEDERAL, STATE, & LOCAL GOVERNMENTS AND THE PRIVATE SECTOR
Moderator: Hugo Teufel III, Former Chief Privacy Officer, U.S. Department of Homeland Security

3:15 pm – 4:30 pm
Breakout Session C
PRIVATE CIVIL LITIGATION AGAINST ALLEGED TERRORIST SPONSORS
Moderator: Vincent J. Vitkowsky, Edwards Angell Palmer & Dodge LLP, New York, NY

4:45 pm – 5:15 pm
Closing Address
James (JIM) J. Carafano, Ph.D., Deputy Director, The Kathryn and Shelby Cullom Davis Institute for International Studies and Director, Douglas and Sarah Allison Center for Foreign Policy Studies; The Heritage Foundation, Washington, DC

5:30 pm-7:00 pm
Cocktail Reception

FRIDAY – MARCH 23, 2012

8:00 am – 8:40 am
Continental Breakfast

8:40 am – 8:45 am
Welcome and Introductions
8:45 am – 9:15 am
Plenary Session
VOLATILITY OVERSEAS AND ITS EFFECT ON AMERICA’S HOMELAND SECURITY
Moderator: Chad C. Sweet, The Chertoff Group, Washington, DC; Former Chief of Staff, U.S. Department of Homeland Security

9:15 am – 9:25 am
Coffee Break

9:25 am – 10:30 am
Breakout Session A
PRESSING CHALLENGES IN IMMIGRATION LAW AND POLICY
Moderator: Rachel Brand, Chief Counsel for Regulatory Litigation, U.S. Chamber of Commerce National Chamber Litigation Center, Washington, DC; Former Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice

9:25 am – 10:30 am
Breakout Session B
NATIONAL PREPAREDNESS: HAVE 10 YEARS AND BILLIONS OF DOLLARS MADE OUR COMMUNITIES BETTER PREPARED?

9:25 am – 10:30 am
Breakout Session C
CYBERSECURITY DEVELOPMENTS IN THE FEDERAL GOVERNMENT AND PRIVATE SECTOR
Moderator: Stewart A. Baker, Steptoe & Johnson, LLP, Washington, DC; Former Assistant Secretary for Policy, U.S. Department of Homeland Security and former General Counsel, National Security Agency

10:30 am – 10:45 am
Break

10:45 am – 11:55 am
Breakout Session B
CAREERS IN HOMELAND SECURITY & NATIONAL SECURITY — THE ACADEMIC PATH, ETC.
Moderator: Harvey Rishikof, Professor, National Defense University, National War College, Washington, DC; Chair, ABA Standing Committee on National Security Law

10:45 am – 11:55 am
Breakout Session C
CHEMICAL FACILITY ANTI-TERRORISM STANDARDS (CFATS)

12:00 pm – 12:30 pm
Lunch

12:30 pm – 1:30 pm
Afternoon Address
The Honorable Michael B. Mukasey; Debevoise & Plimpton LLP; Former United States Attorney General

1:45 pm – 3:00 pm
Breakout Session A
INTERNATIONAL ISSUES: SPOTLIGHT ON FCPA & OFAC
Moderator: Kenneth L. Wainstein, O’Melveny & Myers LLP, Washington, DC; Former Assistant to the President (43rd) for Homeland Security and Counterterrorism

1:45 pm – 3:00 pm
Breakout Session B
CFIUS & FOREIGN INVESTMENTS
Moderator: Mark E. Plotkin, Covington & Burling LLP, Washington, DC

3:00 pm – 3:15 pm
Coffee Break

3:15 pm – 4:30 pm
Closing Address
TO BE ANNOUNCED

4:30 pm
Giveaways & Concluding Remarks

Coming Events

April 20-22
Spring Conference
Princeton, NJ

May 9-10
8th Annual Administrative Law and Regulatory Practice Institute
Washington, DC

August 3-5
Annual Meeting
Chicago, IL

Fall
Administrative Law Conference
Washington, DC

Winter 2012 15 Administrative and Regulatory Law News
By Robin Kundis Craig*

In its 2011–2012 Term, the U.S. Supreme Court will be deciding several cases of potential interest to administrative law practitioners. As is the custom for this quarter’s column, I am providing the readership with a preview of the relevant cases scheduled for oral argument through January 2012.

Cases Deciding Federal Court Access and Jurisdiction, Including Standing to Sue

On October 3, 2011, the Supreme Court heard oral argument in Reynolds v. United States (decision below: United States v. Reynolds, 380 Fed. Appx. 125 (3d Cir. 2010)), which will decide the issue of whether a convicted sex offender who pled guilty to violating the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250, has standing to challenge the Act on Tenth Amendment grounds or to challenge the Interim Rule implementing that Act. The Court of Appeals for the Third Circuit denied Reynolds standing to assert the Tenth Amendment claim with little analysis, relying on substantial case law that holds that individuals lack standing to assert Tenth Amendment claims against the federal government for infringement of states’ prerogatives under the Constitution. 380 Fed. Appx. at 125 (citing United States v. Shenandoah, 595 F.3d 151, 161–62 (3d Cir. 2010)). More expansively, the Third Circuit concluded that Reynolds lacked standing to challenge the Interim Rule because the Interim Rule affected only those sex offenders who did not have a registration requirement prior to the passage of SORNA but nonetheless were subject to sex offender registration requirements after SORNA became law. Because Reynolds was subject to a registration requirement before Congress enacted SORNA, the Interim Rule did not apply to him and he lacked standing to challenge it. Id.

Standing under the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. § 2607, is the issue in First Am. Fin. Corp. v. Edwards (decision below: Edwards v. First Am. Fin. Corp., 610 F.3d 514 (9th Cir. 2010)), scheduled for oral argument on November 28, 2011. Plaintiff, a private home buyer, is claiming that “First American improperly paid millions of dollars to individual title companies and in exchange those title companies entered into exclusive referral agreements with First American.” First Am. Fin., 610 F.3d at 515. First American, in turn argues that Edwards lacks both constitutional standing and statutory standing under RESPA. With regard to constitutional standing, First American argued that Edwards suffered no injury-in-fact because its dealings did not increase the price of her title insurance. Edwards argued, and the Ninth Circuit agreed to address on certiorari the question of whether Edwards had a statutory cause of action and statutory injury regardless of the lack of economic impact. Specifically, the Ninth Circuit concluded that:

RESPA prohibits the payment of “any fee, kickback, or thing of value” in exchange for business referrals and also forbids that a “portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service” be paid for services that are not actually rendered to the customer. 12 U.S.C. § 2607(a), (b). Whenever a violation of these prohibitions occurs, the statute provides that the defendants are liable to the “person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.” Id. § 2607(d)(2) (emphasis added).

These RESPA provisions are clear. A person who is charged for a settlement service involved in a violation is entitled to three times the amount of any charge paid. The use of the term “any” demonstrates that charges are neither restricted to a particular type of charge, such as an overcharge, nor limited to a specific part of the settlement service. Further, the term “overcharge” does not exist anywhere within the text of the statute.

Id. at 517. This case is likely to be a good test of Justice Kennedy’s concurring observation in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), that Congress remains free to define new injuries that can support constitutional standing in the federal courts.

The Supreme Court will be addressing the increasingly-relied-upon political question doctrine this Term, having heard oral argument in Zivotofsky v. Clinton (decision below: Zivotofsky v. Sec. of State, 571 F.3d 1227 (D.C. Cir. 2009)) on November 7, 2011. In this case, a three-year-old child born to United States citizens in Jerusalem asked the courts, through his parents, to order the Secretary of State to list “Israel” as his place of birth on his U.S. passport. Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002) (codified at 22 U.S.C. § 2651 note (2006)), states that “[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.” Nevertheless, the Secretary of State refused to do so, citing the longstanding foreign relations policy of the United States to take no position on the issue of whether Jerusalem is part of Israel. The U.S. Court of Appeals for the District of Columbia Circuit held that the Secretary of State’s refusal to comply with the Foreign Relations Authorization Act constituted a nonjusticiable political question. Zivotofsky, 571 F.3d at 1231–33. The two questions that the Supreme Court agreed to address on certiorari are: (1) Does the political question

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doctrine deprive the federal courts of jurisdiction to enforce a federal statute that explicitly directs the Secretary of State how to record the birthplace of an American citizen? And (2) Does section 214 impermissibly infringe on the President’s power to recognize foreign sovereigns?

A more direct question regarding the federal courts’ jurisdiction will arise in *Mims v. Arrow Financial Services, LLC* (decision below: *Mims v. Arrow Fin. Servs.*, LLC, 421 Fed. Appx. 920 (11th Cir. 2010)), scheduled for oral argument on November 28, 2011. In this case, the Supreme Court will address the question of whether Congress divested the federal district courts of jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction) to hear private actions brought pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227, instead lodging exclusive jurisdiction with the state courts. The statute creates a private right of action, stating that “[a] person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State” an action alleging a violation of the Act, 47 U.S.C. § 227(b)(3). The Court of Appeals for the Eleventh Circuit, with little analysis but relying on prior decisions, concluded that Congress had invested exclusive jurisdiction over such lawsuits in the state courts and dismissed the case for lack of subject matter jurisdiction. *Mims*, 421 Fed. Appx. at 921.

**Cases Involving Federalism Concerns, Including Preemption**

On October 3, 2011, the Supreme Court heard oral argument in *Douglas v. Independent Living Center of Southern California* (decision below: *Indep. Living Ctr. of So. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644 (9th Cir. 2009)) and two consolidated cases to decide whether Medicaid recipients and providers have a cause of action under the Constitution’s Supremacy Clause to enforce the provision of the Medicaid Act that requires states to ensure that payments are sufficient to ensure that Medicaid recipients have care and services available “at least to the extent that such care and services are available to the general population.” 42 U.S.C. § 1396(a)(30)(A). The Court of Appeals for the Ninth Circuit held that the State of California violated this provision when it enacted a 10 percent reduction in Medicaid payments. 572 F.3d at 652. It also held that the plaintiffs had a cause of action under the Supremacy Clause on the basis of conflict preemption. *Id.* at 653.

On the same day, the Court also heard federalism-based challenges to SORNA on review of the Third Circuit’s decision in *Reynolds*, 380 Fed. Appx. 125 (discussed above with respect to standing). Specifically, Reynolds argues that SORNA exceeds Congress’s authority under the Commerce Clause. The Third Circuit dismissed this argument quickly, relying on its decision in *United States v Shenandoah*, 595 F.3d 151 (3d Cir. 2010), where it had joined the Courts of Appeals for the Eighth, Tenth, and Eleventh Circuits in upholding SORNA’s constitutionality. *Shenandoah*, 595 F.3d at 160–61. Specifically, the Third Circuit emphasized in *Shenandoah* that “SORNA requires the government to prove that Shenandoah traveled in interstate or foreign commerce, and thereafter failed to register as required by SORNA.” *Id.* at 161.

The Supreme Court will be deciding several preemption cases this Term that affect federal regulatory programs. On November 9, 2011, for example, the Court heard oral argument in *National Meat Association v. Harris* (decision below: *Nat. Meat Ass’n v. Brown*, 599 F.3d 1093 (9th Cir. 2010)). The case involves the issue of whether the Federal Meat Inspection Act (FMIA), 21 U.S.C. §§ 603, 678, preempts the enforcement against federally regulated swine slaughterhouses of a California penal statute that bans aspects of trade in, the slaughter for human consumption of, and the inhumane handling of nonambulatory (“downer”) food animals such as cows and pigs, which are much more likely to be diseased than ambulatory animals. Under the FMIA, in contrast, all animals are sent to federal inspection before they enter a slaughterhouse where they are to be slaughtered for meat capable of human consumption that will be sold in commerce. 21 U.S.C. § 603(a). Regulations pursuant to the FMIA require nonambulatory animals to be classified as “U.S. Suspect” and held for further examination. 9 C.F.R. § 309.2(b). If the downer animal shows signs of certain diseases upon inspection, it must be classified as “U.S. Condemned” and disposed of according to specific procedures. See *id.* §§ 309.4–309.18. But if the animal passes inspection, it may be slaughtered and sold for human consumption.

*Nat’l Meat Ass’n*, 599 F.3d at 1097–98. The federal district court granted an injunction prohibiting the enforcement of the California law, but the Ninth Circuit reversed despite the FMIA’s express preemption provision, which states that “[r]equirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State .. .” 21 U.S.C. § 678. It construed this provision narrowly and concluded that the California law neither duplicated federal procedures nor added additional or different inspections but instead merely withdrew certain kinds of animals from eligibility for slaughter. The Ninth Circuit also found no implied preemption because it is not impossible to comply with both the FMIA and its regulations and the California law; nor does the California law act as an obstacle to the FMIA’s purposes. In granting certiorari, the Supreme Court agreed to review both the scope of the FMIA’s (and the implementing regulations’) preemption of state law and the more general issue of how courts should incorporate and apply the oft-stated presumption against federal preemption of state law.

*continued on next page*
On the same day, the Court heard arguments in *Kurns v. Railroad Friction Products Corp.* (decision below: *Kurns v. A.W. Chesterton, Inc.*, 620 F.3d 392 (3d Cir. 2010)), in which it will address the issue of whether Congress intended the Federal Railroad Safety Acts—specifically, the Locomotive Inspection Act (LIA), 49 U.S.C. §§ 20701, et seq.—to preempt state-law tort lawsuits. The lawsuit involved railroad employees’ exposure to asbestos and their subsequent deaths from mesothelioma. Both the district court and the Third Circuit held that the LIA preempted the products liability claims based on design defect and failure to warn. As the Third Circuit explained, the LIA:

> provides that “[a] railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances”—(1) are in proper condition and safe to operate without unnecessary danger of personal injury...” 49 U.S.C. § 20701.

While the statute itself is silent as to any preemptive effect, one can easily understand how a state law or action which regulates whether a locomotive or any of its parts and appurtenances “are in proper condition and safe to operate” could conflict with federal safety regulations.

*A.W. Chesterton*, 620 F.3d at 396. Moreover, in 1926 the Supreme Court expressly held that the LIA’s predecessor statute occupies the field of regulation in this area. *Id.* at 396-97.

The Supreme Court will turn to Congress’s authority to abrogate state sovereign immunity in *Coleman v. Court of Appeals of Md.* (decision below: *Coleman v. Maryland Court of Appeals*, 626 F.3d 187 (4th Cir. 2010)), scheduled for oral argument on January 11, 2012. This case asks whether Congress could—and did—abrogate states’ Eleventh Amendment sovereign immunity through the self-care provision in the Family and Medical Leave Act (FMLA). 29 U.S.C. §§ 2601-2654.

Plaintiff Daniel Coleman was an employee of the Maryland Court of Appeals, which he sued in federal district court for race discrimination in violation of Title VII of the Civil Rights Act of 1964 and violations of the FMLA. The district court dismissed both claims on a Rule 12(b)(6) motion to dismiss for failure to state a claim. On the FMLA claim, the district court concluded that Congress had unconstitutionally abrogated state sovereign immunity in the self-care provision of the FMLA, and the Court of Appeals for the Fourth Circuit affirmed.

The Fourth Circuit noted that in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), on which Coleman relied, the Supreme Court addressed whether the FMLA’s third provision, relating to caring for a family member with a serious health condition, constituted a valid abrogation of the states’ sovereign immunity. In concluding that it was, the Court determined that Congress had enacted the FMLA in response to “the States’ record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits.” The Fourth Circuit found no such anti-discrimination motivation with respect to the personal medical leave provision of the FMLA, 626 F.3d at 192-93.

The Fourth Circuit also found no basis for applying Congress’s authority to abrogate sovereign immunity to the statute as a whole, rather than on a provision-by-provision basis.

**Challenges to Agency Administration of Federal Statutes**

The Supreme Court scheduled oral argument in *Caraco Pharmaceutical Laboratories, Inc. v. Novo Nordisk A/S* (decision below: *Novo Nordisk A/S v. Caraco Pharmaceutical Labs., Inc.*, 601 F.3d 1359 (Fed. Cir. 2010)) for December 5, 2011, to determine how the federal Food & Drug Administration (FDA) can handle patent information in its regulation of drugs. Under the Food, Drug, and Cosmetic Act and numerous related statutes, new drugs require FDA approval, and as part of that process, the manufacturer must identify all patents that claim the drug or a method of using the drug. 21 U.S.C. § 355(b), (c). Under the FDA’s regulations implementing these requirements, drug manufacturers fill out the FDA’s forms to provide the “use code narrative,” and then the FDA assigns a unique number or “use code” to each description. The FDA then publishes a list of drugs, their relevant patents, and the use codes in a publication known as the “Orange Book.” Manufacturers of generic versions of drugs in the Orange Book can use an abbreviated approval process, but they must address all of the patent issues relating to the generic drug’s use. As part of this process, generic drug manufacturers can make a “Paragraph IV certification,” stating that the patent is invalid or will not be infringed by the manufacture, use, or sale of the generic drug. Under the Hatch-Waxman Act, this Paragraph IV certification becomes an act of patent infringement, requiring the generic drug manufacturer to give notice to the original drug manufacturer and allowing the original drug manufacturer/patentee 45 days to bring an action for patent infringement. If the patentee does not sue, the FDA can approve the generic drug. 21 U.S.C. § 355(j). If the patentee sues, however, a 2003 amendment to the Hatch-Waxman Act allows the generic drug manufacturer to counterclaim to challenge the accuracy of the patent information submitted to the FDA. *Id.*

In this case, Novo manufactures Prandin, a drug for people with Type 2 diabetes, and Caraco sought approval for a generic version. Novo sued for patent infringement based on Caraco’s Paragraph IV certification, and Caraco counterclaimed. The district court found that Novo had filed an overly broad use code narrative with the FDA and ordered Novo to correct the information. Novo appealed to the Court of Appeals for the Federal Circuit, which reversed on pure statutory interpretation grounds. The Federal Circuit first emphasized that “[t]he Hatch-Waxman Act provides a limited counterclaim to a generic manufacturer in a Paragraph IV infringement action. The Act authorizes the generic manufacturer to assert a counterclaim “on
the ground that the patent does not claim either (aa) the drug for which the application was approved; or (bb) an approved method of using the drug.” 21 U.S.C. § 355(j)(5)(C)(ii)(I) (emphasis added). Novo Nordisk, 601 F.3d at 1364. Based on the clear meaning of this language, the court concluded that “the Hatch–Waxman Act authorizes a counterclaim only if the listed patent does not claim any approved methods of using the listed drug.” Id. at 1365.

According to Caraco, the Federal Circuit’s decision in effect invalidated the FDA’s regulations regarding what counts as “patent information” and a longstanding agency practice of allowing the correction of “patent information” as part of the generic drug approval process, although the decision considered neither those regulations nor the FDA’s views of the generic drug approval process in this context. Indeed, the two judges in the majority argued that the FDA had caused the problem by requiring Novo to change its drug label to include a single broad indication. Complicating the issue further is the fact that “[t]he FDA has consistently held the position that its role in listing patents in the Orange Book is ‘ministerial,’ and that establishing an administrative process for reviewing patents, assessing patent challenges, and de-listing patents would involve patent law issues that are beyond its expertise and authority.” Id. at 1370 n.3 (Clevenger, J., concurring). Thus, this case presents for the Supreme Court a rather unusual context in which to consider statutory interpretation, agency interpretations and implementation of statutes through regulations, and the scope of agency authority in a regulatory regime that mixes two very different kinds of legal expertise—drug regulation for public safety and patent protections for those drugs.

The Supreme Court set January 9, 2012, as the date for hearing oral argument in Sackett v. Environmental Protection Agency (decision below: Sackett v. EPA, 622 F.3d 1139 (9th Cir. 2010)), which addresses the U.S. Environmental Protection Agency’s (EPA’s) use of Administrative Compliance Orders (ACOs) in its enforcement of the federal Clean Water Act, 33 U.S.C. §§ 1251-1387. An ACO carries no immediate enforcement penalty but rather orders an alleged violator to come into compliance. In this case, the EPA in November 2007 used an ACO to order the Sackets to remove fill material from about a half-acre of their 0.63-acre property in Idaho, on the grounds that the filled area had been a wetland. The ACO itself stated that failure to comply with the ACO could subject the Sackets to penalties of up to $32,500 per day; apparently in addition to the penalties available under the Clean Water Act for discharging fill material into a wetland without a permit. Before paying to remove the fill, the Sackets tried to challenge the ACO by requesting a hearing with the EPA, which the EPA denied. They then filed a lawsuit in federal district court, challenging the ACO as “arbitrary and capricious” under the Administrative Procedure Act (APA) and a violation of the Sackets’ due process rights.

The district court dismissed the case for lack of subject matter jurisdiction, concluding that the Clean Water Act precludes judicial review of ACOs before the EPA undertakes an enforcement action. The Ninth Circuit affirmed, noting in its analysis that “[e]very circuit that has confronted this issue has held that the CWA impliedly precludes judicial review of compliance orders until the EPA brings an enforcement action in federal district court.” Sackett, 622 F.3d at 1143 (citations omitted). Applying the test for preclusion, the Ninth Circuit first decided that Congress had given the EPA a choice of procedures to use, and that subjectsing ACOs to judicial review would remove that choice by forcing the EPA to go to court every time it wanted to enforce the statute. Id. Next, it concluded that Congress wanted the EPA to be able to engage in minor enforcement without becoming embroiled in litigation. Id. at 1144. Finally, during the creation of similar administrative enforcement provisions in the closely related Clean Air Act, Congress had specifically removed provisions that would allow for pre-enforcement review. Id. Thus, the Ninth Circuit found congressional intent to preclude pre-enforcement judicial review.

Moreover, the Ninth Circuit read the Clean Water Act in a way that would avoid the Sackets’ due process argument despite the fact that an ACO can be based on “any information available,” invoking the doctrine of constitutional avoidance. Thus, the Ninth Circuit concluded:

Read carefully, [the Clean Water Act’s administrative enforcement] provision does not authorize the EPA to bring enforcement actions for mere violations of compliance orders. Rather, to enforce a compliance order, the EPA must bring an action alleging a violation of the CWA itself. Given that the CWA does not empower the EPA to bring an enforcement action on the basis of a violation of a compliance order alone, it follows that a court cannot assess penalties for violations of a compliance order under § 1319(d) unless the EPA also proves, by a preponderance of the evidence, that the defendants actually violated the CWA in the manner alleged. Under this interpretation, if the EPA does not prove that the CWA was actually violated, the compliance order is unenforceable, even if it was validly issued on the basis of “any information available.” We therefore hold that the term “any order” in § 1319(d) refers only to orders predicated on actual violations of the CWA as identified by a district court in an enforcement proceeding according to traditional rules of evidence and standards of proof.

Id. at 1145–46. The Supreme Court will review this decision to decide: (1) whether pre-enforcement review is available under the Clean Water Act; (2) whether pre-enforcement review is available under the APA; and (3) if pre-enforcement review is not available, whether the EPA’s use of ACOs violates constitutional Due Process protections.
By William S. Jordan III*

4th Circuit Shows Deference to Agency Interpretation of Statutorily Adopted Private Standards


The Act authorized the Department of Energy (DOE) to adopt conservation standards for “small electric motors,” which the Act provided “means a NEMA general purpose alternating current single-speed induction motor, built in a two-digit frame number series in accordance with NEMA Standards Publication MG1–1987.” DOE interpreted this statutory language and related provisions of the NEMA Standards Publication as authorizing it to reach electric motors up to three horsepower. The National Electrical Manufacturers Association (NEMA), which had issued the publication in question, argued that the statute limited DOE to motors of one horsepower or less.

The majority read the statutory terms “NEMA general purpose . . . motor” and “built in a two-digit frame number series” together, and in light of various complexities of the referenced publication, to conclude that the statute was ambiguous and that DOE's position was reasonable. In the process, the majority rejected NEMA’s reliance on a House Committee Report stating that the Act “requires DOE to prescribe energy conservation standards for . . . electric motors of less than one horsepower.” To the majority, NEMA’s position required reliance on a negative inference in the face of other “more reliable indicia of meaning.”

The dissent read the statute in a more holistic manner. Rather than parsing the relationship between “general purpose motor” and motors “built in a two-digit digital frame,” the dissent essentially viewed the statute as incorporating “the publication in its entirety, including the ratings and standards,” which reached only motors of one horsepower or less. Not surprisingly, the dissent emphasized the significance of committee reports and relied upon this Committee Report as a “positive statement of what Congress intended,” rather than a mere negative inference.

Whatever the validity of these positions, the lesson is that Congress can seriously muddy the waters when referencing an external standard. Such standards are typically written in contexts different from whatever Congress is considering when it legislates, and their terms and definitions may well not be well suited to what Congress intends.

3d Circuit OutFoxes FCC on Penalty for Jackson-Timberlake Super Bowl Escapade

Justin Timberlake’s baring of Janet Jackson’s breast during the 2004 Super Bowl consumed 9/16 of a second in real time but untold hours of taxpayer resources and high-priced talent on both sides of the issue. After the FCC fined CBS $550,000 for this incident, the Second Circuit in *CBS Corp. v. F.C.C.*, 535 F.3d 167 (3d Cir. 2008), vacated, *F.C.C. v. CBS Corp.*, — U.S. —, 129 S.Ct. 2176, 173 L.Ed.2d 1153 (2009), found that the FCC had departed without adequate explanation from its previous policy of not penalizing “fleeting material” that was indecent.

In *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), which involved fleeting indecent language, the Supreme Court upheld the agency’s explanation for its departure from its policy of not finding violations in such situations. As a result, the Court remanded the then-pending CBS decision for further consideration. Importantly, the FCC in *Fox* did not impose a penalty because it acknowledged that its finding of a violation represented a departure from the FCC’s prior policy.

On remand, the Second Circuit, in *CBS Corp. v. FCC*, 2011 WL 5176139 (3d Cir. 2011), vacated the FCC’s penalty on the ground that the FCC had “arbitrarily and capriciously departed from its prior policy excepting fleeting broadcast material from the scope of actionable indecency.” The FCC argued that its prior policy had related only “to fleeting words and not to fleeting images.” The Second Circuit majority disagreed, reading the relevant history as establishing that the FCC “had not distinguished between categories of broadcast material such as images and words,” such that the agency’s position with respect to the 9/16 second exposure of Janet Jackson constituted a departure from its previous policy. The majority also rejected the FCC’s argument that its decision in *Young Broadcasting of San Francisco, Inc.*, 19 F.C.C.R. 1751 (2004), issued days before the Super Bowl, had put CBS on notice of its position as to fleeting images. Since the FCC had not acknowledged a change of position, it was “unable to comply with the requirement under *State Farm* that an agency supply a reasoned explanation for its departure from prior policy.”

The dissent, on the other hand, read the Supreme Court’s *Fox* decision as compelling “the conclusion that the fleeting exemption was limited to a particular type of words.” The majority found no such meaning in *Fox*.

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The majority seems to have reached the right outcome while missing a far more important point. After Fox, the agency will certainly be able to justify its new treatment of fleeting images. So the case could go back up to the Second Circuit with a new explanation. The real problem is that the FCC penalized CBS for behavior that occurred before the agency announced its change of position. As the FCC acknowledged in the Fox litigation, “assessing penalties based on violations of previously unannounced policies would amount to ‘arbitrarily punishing parties without notice of the potential consequences of their actions.’” Recognition of this flaw in the agency’s attempt to penalize CBS would definitively end the litigation.

Moreover, if the majority had emphasized the timing of the agency’s policy announcement relative to its imposition of a penalty, the majority could have provided guidance that would have been useful beyond this case. For example, the majority distinguished the FCC’s Young decision as reflecting “only ‘tentative conclusions.’” It would be helpful to know, however, whether even a definitive policy articulation issued only a few days before the incident in question could have constituted notice sufficient to support a penalty. Surely the court could have articulated some standard for determining whether such a short time constituted notice adequate to support a penalty, or at least to support a penalty over a half million dollars. Similarly, the court might have articulated a standard by which to determine whether an agency’s historic treatment of an issue constituted notice adequate to support a penalty. The disagreement between the majority and dissent on this issue by itself suggests that notice would have been inadequate to support a penalty even if the agency had otherwise adequately explained itself.

Circuits Begin Addressing Reviewability, Standing, and Constitutionality Challenges Arising Out of Landmark Health Care Legislation

The Patient Protection and Affordable Care Act (Affordable Care Act) created the so-called “individual mandate” under which (with some exceptions) individuals must either obtain adequate health insurance or pay a “penalty” through the income tax collection system. The Act creates a similar requirement that businesses of a certain size provide adequate health insurance or pay a similar penalty. Litigation over the Act has recently spawned various opinions on standing, reviewability under the Anti-Injunction Act, and the constitutionality of the individual mandate.

Three recent standing decisions may suggest more about the hazards of jumping on a political litigation bandwagon than about the intricacies of standing doctrine. In Virginia ex rel. Ciocinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011), the Commonwealth of Virginia apparently tried to be the first off the mark by filing its challenge on March 23, 2010, the day President Obama signed the legislation. The next day, the Governor of Virginia signed the Virginia Health Care Freedom Act, which provided that “[n]o resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage.” Virginia did not claim that the federal legislation imposed any financial obligation or similar harm on the Commonwealth. It claimed only that the conflict between the federal and state legislation created standing for Virginia to challenge the federal legislation. The Fourth Circuit rejected Virginia’s argument that the federal legislation somehow caused it a sovereign injury. Since the Virginia statute “regulate[d] nothing and provide[d] for the administration of no state program,” the federal statute did not affect Virginia’s exercise of “sovereign power.” Instead, the Virginia statute “simply purport[ed] to immunize Virginia citizens from federal law.” The court also held that Virginia was seeking to sue on behalf of its citizens, which is contrary to the settled principle that a state has no legitimate interest in protecting its citizens from the government of the United States. To accept Virginia’s position, the court said, would be to allow any state to challenge any federal program simply by enacting a statute “purporting to prohibit the application of the federal law.”

In Baldwin v. Sebelius, 654 F.3d 877 (9th Cir. 2011), Steve Baldwin and the Pacific Justice Foundation failed to establish standing for embarrassingly basic reasons. Baldwin did not allege that he did not have qualifying health insurance or that he would not have it by the time the mandate takes effect in 2014. He asserted only the need to take investigatory steps to determine whether he would be in compliance with the Act, but that put him in the same shoes as everyone potentially affected by the Act (or by any statute, for that matter), a classic “generalized grievance.” The organization was not subject to the individual mandate, and it did not allege that it had or would have enough employees to be subjected to the “shared employer responsibility” provision of the statute.

New Jersey Physicians, Inc. v. President of the United States, 653 F.3d 234 (3d Cir. 2011), reflects similarly sloppy preparation and pleading in a highly political litigation effort. The plaintiffs were a physician, one of his patients, and a non-profit allegedly subjected to the “shared employer responsibility” provision of the statute. Patient Roe, seemingly the strongest candidate for standing, alleged only that he paid for medical care without involvement of a third party and that he chooses his doctor and method of payment. The allegations provided “no specifics as to whom Roe chooses or how Roe pays,” so there was no indication that the Act adversely affected Roe (as opposed to plaintiffs in some other actions who had alleged financial pressures or pressures to change spending habits). The complaint offered no facts to support the doctor’s standing.

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and the organization depended upon the doctor. Interestingly, the court emphasized that the dismissal was without prejudice and essentially invited the plaintiffs to “attempt to remedy the jurisdictional defects.”

The plaintiffs in *Liberty University, Inc. v. Geithner*, 2011 WL 3962915 (4th Cir. 2011), ran into a different problem—the Anti-Injunction Act (AIA). The AIA strips the courts of pre-enforcement jurisdiction over challenges to the assessment or collection of any tax. Since the Affordable Care Act imposes the individual mandate “penalty” on “taxpayers” and does so through the operation of the income tax collection system, the Fourth Circuit held that the AIA prevented pre-enforcement review of the Affordable Care Act. To the majority, the mere use of the term “penalty” did not prevent the required payment from being a tax for purposes of the AIA. Judge Davis disagreed, joining most courts that have addressed the issue, and reached the merits, finding the individual mandate to be a valid exercise of the commerce power. Judge Wynn provided a majority on the AIA issue, but he reached the merits in response to Judge Davis. Judge Wynn would uphold the Affordable Care Act under the taxing power.

The D.C. Circuit finally weighed into the debate on November 8, 2011, in *Seven-Sky v. Holder*, 2011 WL 5378319 (D.C. Cir. 2011). As to the AIA, the majority distinguished the “penalty” imposed to enforce the individual mandate from the tax assessments or collections protected by the AIA. Reaching the merits, the majority upheld the individual mandate under the Commerce Clause. After exploring the extensive role of health care in the national economy, the majority noted: “The right to be free from federal regulation is not absolute, and yields to the imperative that Congress be free to forge national solutions to national problems, no matter how local—or seemingly passive—their individual origins.” Judge Kavanaugh dissented as to the AIA and did not reach the merits. He noted, however, that the majority had been candid “—and accurate—in admitting that there is no real limiting principle to its Commerce Clause holding. The majority opinion’s holding means, for example, that a law replacing Social Security with a system of mandatory private retirement accounts would be constitutional.” The difficulty of identifying such a limiting principle may be the crux of the Supreme Court’s ultimate decision on these issues.


**9th Circuit Finds Veterans Health Care Claims Reviewable, Holds Delays Violate Due Process**

Over a vigorous dissent, a panel of the Ninth Circuit found that it had jurisdiction to review the constitutionality of the health care system administered by the Department of Veterans Affairs (DVA), particularly with regard to mental health. Tragically, many veterans commit or attempt suicide before they are able to obtain mental health services from the DVA or to have their mental health claims resolved by the agency. In *Veterans for Common Sense v. Shinseki*, 2011 WL 1770944 (9th Cir. 2011), rehe’d en banc granted, 2011 WL 5574937 (9th Cir. Nov. 16, 2011), the court held that these delays violate due process.

Before reaching the constitutional claim, the court addressed whether the veterans’ claims were justiciable. As to claims brought under the Administrative Procedure Act, the court held that the agency’s delays did not constitute reviewable final agency action because the claimants had failed to identify any “discrete agency action that [the agency] was required to take,” as required by *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004). The majority then addressed the application of the Veterans Judicial Review Act (VJRA), which the DVA argued precluded review. The VJRA provides that:

The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans . . . . [T]he decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by action in the nature of mandamus or otherwise.

Despite the breadth of that language, the majority essentially held that it precluded review only of individual claims, not claims of constitutional violations by virtue of delays.

Little noticed in this and similar cases is the court’s acceptance—with DVA concurrence—of the proposition that veterans have a property right in veterans’ benefits even if the agency has not yet found them qualified to receive the benefits. This is quite distinct from *Goldberg v. Kelly*, for example, in which welfare recipients had property rights in benefits they were already receiving. Although not discussed, the principle in this case must be that someone who would be entitled to government benefits upon making a certain factual showing (with no opportunity for the exercise of discretion by the agency) has a protectable property interest and due process right to make the necessary factual showing. The Supreme Court has not yet recognized this principle, but this is the latest of several lower court veterans benefit decisions to have done so. [Editor’s Note: See Jeffrey S. Lubbers, *Giving Applicants for Veterans’ and Other Government Benefits Their Due (Process),* ADMIN. & REG. L. NEWS, Spring 2010 at 16.]

The Ninth Circuit then applied *Mathews v. Eldridge* balancing to find that the DVA system violated due process. As to the alleged failure to provide prompt medical appointments,
the court found that additional procedures—essentially a right to have some medical review of an administrative denial of an appointment—would help reduce the risk of error. The court then undertook a similar balancing with respect to the extensive delays in resolving benefit claims, concluding that the private interests and the benefits of improved procedures outweighed the government interests.

The problem at that point, as noted ferociously in Judge Kozinski’s dissent, was what to do about this systemic failure. As the dissent characterized it, the majority had “install[ed] a district judge as reluctant commander-in-chief.” He viewed the decision as extreme judicial overreaching.

**D.C. Circuit Roundly Rejects SEC Proxy Mailing Rule**

*Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), raises the question of how to value democracy. In theory, publicly held companies are owned by the shareholders, who exercise their ownership interest by voting on election of the company’s directors. Prior to the rule at issue here, such elections were contested through separate distributions of election materials. Management distributed its nominees through the standard proxy materials, and dissident shareholders were left to their own devices to communicate about their candidates.

Believing that this process “impede[d] the expression shareholders’ right under state corporation laws to nominate and elect directors,” the SEC issued a rule requiring management to include shareholder nominees and related supporting statements in the proxy materials distributed to shareholders. The Commission found the “potential benefits of improved board and company performance and shareholder value” sufficient to “justify [its] potential costs.”

Management interests challenged the rule on the ground that the SEC had failed “to consider the rule’s effect upon efficiency, competition, and capital formation, as required by” the applicable statute. Among other things, they argued that the SEC had failed to consider the intensity of management opposition to shareholder nominees and the costs management would incur in that opposition. In the process of agreeing with this assertion, the court rejected the SEC’s judgment about the validity and value of various studies. The court criticized the agency’s rejection of studies favoring the management position in favor of “two relatively unpersuasive studies” purportedly showing the value of the inclusion of dissident directors on corporate boards.

The court’s dismissive treatment of the SEC’s response to these studies contrasts sharply with the longstanding principle of judicial deference to agency assessment of complex technical and scientific studies. *Baltimore Gas & Elec. Co. v. Natural Resources Def. Council*, 462 U.S. 87, 103 (1983). Note that the court considered itself qualified to determine that the studies relied upon by the SEC were “relatively unpersuasive.” This is not the language of arbitrary and capricious review or even of hard look review. This is the language of substantive judgment, even political judgment.

The contrast is particularly striking because this case essentially involved judgments about the value of democracy. In assessing electoral democracy, surely we assume that elections improve outcomes because they hold politicians accountable for their actions. It seems reasonable for the SEC to incorporate this fundamental principle of democratic institutions into the arena of shareholder democracy. At least a court should review such agency judgments—made by the politically accountable electoral branch of government rather than the unaccountable judiciary—with considerable deference. The D.C. Circuit’s review in this case was precisely the opposite. On one particular issue, the court characterized the agency’s explanation as “utterly mindless.”

It is difficult to determine the long-term significance of this decision. It suggests, among other things, that the D.C. Circuit (at least these three judges) consider themselves well qualified to second-guess agency decisions about issues of corporate structure and costs even if they should defer to agency decisions about scientific and technical issues.

[Editor’s Note: See John F. Cooney, *Chevron Deference and the Dodd-Frank Act*, this issue.]

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New Mexico Supreme Court Rejects New Governor’s Attempt to Turn Back the Clock on Midnight Rules

By Bill Brancard**

Under the New Mexico State Rules Act, a rule is not valid or enforceable until it is filed with the State Records and Archives Center (Records Center) and then published in the New Mexico Register. Unlike the Federal Register, the New Mexico Register is published only twice a month and there is a several week lag between filing a rule with the Records Center and publication in the Register. The New Mexico Supreme Court faced the question of whether the Governor can block the publication of a rule that has been filed with the Records Center.

In December 2010, during the waning days of the Governor Bill Richardson Administration, a number of new rules and rule changes were filed with the Records Center. These included greenhouse gas emissions rules promulgated by the Environmental Improvement Board (EIB) and dairy discharge permit rules promulgated by the Water Quality Control Commission (WQCC). Based on the schedule for the New Mexico Register, these rules were slated for publication on January 14, 2011. On January 1, 2011, Governor Susana Martinez took office and immediately issued Executive Order 2011-001, which suspended all pending rulemakings for 90 days. The Governor’s General Counsel and the Acting Secretary of the Environment wrote to the State Records Administrator and asked that publication of pending rules be suspended. The Records Administrator did so.

Several citizen groups, who were proponents of the rules adopted by the EIB and WQCC, petitioned the State Supreme Court for a writ of mandamus to compel the Records Administrator to publish the rules. In New Energy Economy v. Martinez, 2011-NMSC-066, 149 N.M. 207, 247 P.3d 286 (2011), a unanimous Supreme Court found the Governor lacked the authority to block the publication of the rules and issued the writ. The Court found that the EIB and the WQCC were independent of the Governor and therefore the Governor or her appointed cabinet secretary lacked the authority to block their rules. The Governor lacked this authority even though all members of the EIB (and most of the WQCC) are appointed by the Governor. Also, the Court found that the Records Administrator was independent of the Governor and that the Administrator was bound by his own rules that require publication of a filed rule in the next issue of the Register.

The Court found that the EIB and the WQCC were independent of the Governor and therefore the Governor or her appointed cabinet secretary lacked the authority to block their rules. The Governor lacked this authority even though all members of the EIB (and most of the WQCC) are appointed by the Governor. Also, the Court found that the Records Administrator was independent of the Governor and that the Administrator was bound by his own rules that require publication of a filed rule in the next issue of the Register. The Court explicitly refused to address whether the agency that filed the rules could ask the Administrator to delay publication.

Postscript: Each of the Richardson-era rules mentioned here was appealed, and the EIB, with all new members appointed by Governor Martinez, is now considering a hotly contested petition filed by industry to repeal the greenhouse gas rules. The WQCC just approved a revised version of the greenhouse gas rules. Negotiated between the dairy industry and environmental groups and supported by the new Administration.

Abuse of Discretion and the Aids Epidemic—A County Health Department Confronts the Porn Industry

By Michael Asimow*

Courts are often called upon to decide whether a suspicious-looking discretionary agency decision should receive close scrutiny (“hard look”) or whether the court should give the agency the benefit of the doubt and assume that it knew what it was doing (“soft look”). In many cases, the court does neither but instead remains for a better explanation, thus forcing the agency to confront and to justify the choices it made.

In AIDS Healthcare Foundation v. Los Angeles County Department of Public Health, 128 Cal. Rptr. 3d 292 (2011), the reviewing court confronted this dilemma—and pretended it did not exist. Most pornographic movies are produced in the San Fernando Valley, which is a suburb of Los Angeles County. There have been numerous cases of HIV/AIDS in the pornography industry. Despite acknowledging that mandatory use of condoms would be effectual in confronting the epidemic, the County’s Health Department refused to do so. The court concluded that the Department’s decision was not an abuse of discretion.

The court’s analysis consists of little more than a statement that there are many ways the epidemic might be contained and it would be inappropriate for the court to interfere with the Department’s discretion by mandating it to require condoms. The court failed to scrutinize the decision to determine whether the agency had considered its choices with care, as many other California cases have done.

A better approach might have been to remand the case to the Department so that it could furnish an explanation of its decision. It might well be that the decision was rational. A condom requirement might have caused the industry to immediately move its production facilities out of California to a more accommodating state or foreign country, thus resulting in economic losses to the County without any offsetting public health benefit. But the Department should have been required to explain its decision so that the court could determine whether it was rational or merely the result of lobbying by the pornography industry.

—*

* 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.

**General Counsel, New Mexico Energy, Minerals and Natural Resources Department.
Nominating Committee Formed

The Section’s Nominating Committee, responsible for recommending candidates for open Section officer posts and council seats, has been established for the coming elections in August. The committee consists of Bill Funk (chair) (funk@lclark.edu), Jonathan Cedarbaum (jonathan.cedarbaum@wilmerhale.com), and Linda Lasley Ford (Linda.Ford@dot.gov).

A Full Fall Conference

By Otto Hetzel*

With 25 panels and presentations, over 600 in attendance, an awards luncheon, and a timely tribute to current and former chairs of the Administrative Conference of the United States (ACUS), the 2011 Administrative Law Conference, held this past November 17-18 on the campus of Georgetown University in Washington, D.C., continued the Administrative Law Section’s longstanding success in attracting to its premier annual program the nation’s leading scholars, practitioners, and government lawyers in the fields of administrative law and regulatory practice.

The participants, a who’s who of speakers, panelists, and guests, included current American Bar Association President William T. (Bill) Robinson III; current ABA House of Delegates Chair Linda A. Klein; past ABA Governor and former Administrative Law Section Chair Jack Young; former United States Ambassador to the European Union, White House Counsel to President George H.W. Bush, and former Administrative Law Section Chair C. Boyden Gray; current Administrative Law Section Chair Michael Herz; current House Delegate and former Administrative Law Section Chair Randy May; former Administrative Law Section Chairs:

Michael Asimow, Bill Funk, Eleanor Kinney, Ron Levin, and Jim O’Reilly; and former ABA House Delegate Judy Kaleta.

Also present were the Honorable Brett Kavanaugh (D.C. Circuit); the Honorable Paul Michel (former Chief Judge of the Federal Circuit); the Honorable John D. Bates (District Court for D.C.); Professor Richard Pierce (author of Administrative Law Treatise); Professor Susan Dudley (former head of the Office of Information and Regulatory Affairs); Jeffrey Rosen

continued on next page
The conference was co-chaired by Professor Richard Murphy, Texas Tech University School of Law, and former Administrative Law Section Chair Neil Eisner, DOT Assistant General Counsel for Regulation and Enforcement.

The guests of honor were current ACUS Chair and former Administrative Law Section Chair Paul Verkuil and past ACUS Chairs: Marshall Breger; former Administrative Law Section Chair Sally Katzen (acting ACUS Chair); Thomasina Rogers; Robert S. Ross, Jr. (acting ACUS Chair); and the Honorable Loren Smith.

The Conference started with four engaging programs, all with distinguished, knowledgeable panelists. One panel examined and evaluated the potentially significant future impact of the “Debt Ceiling Default” and the likely futility of the Select Joint Committee that was to deliver significant budget cuts that if not adopted by Thanksgiving would result in across-the-board cuts in domestic and military expenditures. The panel, John Bowman, former Treasury Department Assistant General Counsel and Acting Director of the Office of Thrift Supervision; John Cooney, Partner, Venable LLP; Professor Neil H. Buchanan, George Washington University Law School; Chris Krueger, Sr. VP, Washington Research Group; and Charlotte M. Bahin, moderator, addressed the political dynamics of the original compromise resulting from a contrived controversy over extending the debt ceiling in circumstances where a failure to raise the ceiling would have had drastic economic consequences if a default on government debt obligations had occurred. In fact, the controversy did generate lowering of U.S. creditworthiness by some rating agencies.

Another panel, “Regulatory Review of Independent Agencies, Including Presidential/OMB Review and the Unfunded Mandates Reform Act,” discussed the oft-debated issues relating to efforts by the White House to regulate independent agencies through Executive Orders and cost-benefit analyses under UMRA. Moderated by Alan Raul, Sidley Austin LLP; this panel’s commenters included C. Boyden Gray; Boris Bereshteyn, Immigration and Customs Enforcement, DHS; Russell Wheeler, Brookings; and Professor Lenni B. Benson, New York Law School. The panel, moderated by Professor Jill Family, Widener University School of Law, focused on deportation cases and the potential for reforms as a result of ongoing ACUS and ABA studies.

“The George Washington Law Review’s Annual Scholars’ Review of Administrative Law” drew on recent research of panelists and discussed the role that courts have recently had on administrative law and the extent that doctrinal flexibility is needed or appropriate. Moderated by Professor Robert Glicksman, George Washington University Law School, much of this panel’s focus was on research by Professor Jason Yackee,
Wisconsin Law School, Professor Richard Pierce, George Washington Law School, and Professor Gillian Metzger, Columbia Law School, questioned the interim conclusions reached by Professor Yackee regarding consistency of judicial decisions in administrative law.

Professor Jim O’Reilly, Cincinnati Law School, moderated a panel on “Government in the Sunshine Act.” Panelists discussed the impact that opening discussions to the public have had on the effectiveness of multi-member bodies (such as commissions), the techniques used to side-step such requirements, and how these measures generate meaningful, transparent decision-making. The panelists were Professor Bernard Bell, Rutgers Law School; Randy May, President, Free State Foundation; and Stephen Klitzman, Office of Intergovernmental Affairs, FCC.

Two other panels completed the Thursday morning program. Hall Render Professor of Law Eleanor Kinney, Indiana University Robert H. McKinney School of Law, moderated an academic panel which considered “Administrative Law Issues in the Patient Protection and Affordable Care Act: Prospects for Facilitating Genuine Health Reform.” This panel examined major public health law issues arising from the 2010 PPACA. The panel also addressed the Supreme Court’s upcoming consideration of the Act’s constitutionality later this Term.

“The Impact of New Federal State and Local Pay-to-Play Regulations on Your Clients” examined recent SEC transparency rules affecting those seeking contracts from state and federal agencies. Having the potential to create future restrictions after making political contributions to local, state, and federal (including presidential) elections, made these rules of immediate concern in advising clients regarding contributions in the upcoming 2012 elections. Both election law and financial services issues were considered. Moderated by Liz Howard, Sandler, Reiff, Young & Lamb PC, the expert panelists were Joseph Sandler, Sandler, Reiff, Young & Lamb; Brandi Zehr and D. Mark Renaud, Wiley Rein, LLP; and, Ki Hong, Skadden Arps Slate Meagher & Flom.

An examination of ethical issues was undertaken by a panel titled, “So Someone Objects to Your New Client.” The panel was moderated by John Hardin Young, Sandler, Reiff, Young & Lamb, and included Lawrence Fox, Visiting Lecturer in Law, Yale (Drinker, Biddle) and Professor Tom Morgan, George Washington University Law School, who provided their perspectives on the professional responsibility considerations that may arise when considering whether to represent a client or take a position that is unpopular with the firm’s other clients or the public generally, on what internal approaches firms have taken when deciding upon such matters were examined, and on the extent to which decisions on these issues implicate whether lawyers function as a profession or a business. Application of these issues to lawyers in government was also examined.

A panel on the “Paperwork Reduction Act: A Primer” provided an understanding of the Act and the extent that it provides a realistic check on agency authority for information collection. The role of OMB, which reviews surveys and other statistical information collections, was discussed by the panel of David Rostker, Assistant Chief Counsel, SBA; Brian Harris-Kojetin, OMB; and Joe Bartels, Attorney, Department of Commerce.

“Information as a Regulatory Tool,” was the focus of a panel moderated by Steve Wood, National Highway Traffic Safety Administration, DOT, who was joined by Jennifer Nou, OMB; William Morrow, Chair of the Section’s Intergovernmental Relations Committee; moderated a panel consisting of Ken Warren, General Counsel, Delaware River Basin Commission; Professor Ken Kristl, Widener Law School’s Environmental & Natural Resources Law Clinic; and Richard Lewis, Steptoe and Johnson, who examined “ Interstate Fracking Regulation.” They considered the environmental effects that hydraulic fracturing technology, a water injection process used to extract natural gas and oil from shale substrates, was having in various locations and debated the likely effectiveness new interstate “fracking” regulations proposed by the Delaware River Basin Commission under its multi-state compact.

A panel on “The Impact of New Federal State and Local Pay-to-Play Regulations on Your Clients” examined recent SEC transparency rules affecting those seeking contracts from state and federal agencies. Having the potential to create future restrictions after making political contributions to local, state, and federal (including presidential) elections, made these rules of immediate concern in advising clients regarding contributions in the upcoming 2012 elections. Both election law and financial services issues were considered. Moderated by Liz Howard, Sandler, Reiff, Young & Lamb PC, the expert panelists were Joseph Sandler, Sandler, Reiff, Young & Lamb; Brandi Zehr and D. Mark Renaud, Wiley Rein, LLP; and, Ki Hong, Skadden Arps Slate Meagher & Flom.

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Kristin Davis, FDA; Karl Simon, EPA; and Dr. Robert Post, Deputy Director, Center for Nutrition Policy and Promotion, Department of Agriculture. The focus was on agency use of “regulation by disclosure” to reduce rule-making and maintain flexibility. Issues considered were: what type of information should be disclosed and in what form, such as statements and graphics; the limits of the process; and estimating the potential costs and benefits.

An examination of the developing regulatory approach of the recently created Consumer Financial Protection Bureau under the 2010 Consumer Financial Protection Act was undertaken by a panel moderated by Christine Franklin, Franklin Advocacy, P.C. The panel consisted of Kelly Cochran, the Bureau’s Deputy Assistant Director of Regulations; Michael Calhoun, President, Center for Responsible Lending; and Ruth Amberg, Federal Deposit Insurance Corporation. Consideration of the need for protections in specific markets such as mortgage, credit card, college loan, checking, and payday lending were examined along with the potential effect of regulations on the current financial crisis.

Friday morning witnessed the annual review of Developments in Administrative Law moderated as usual by Professor Jeffrey Lubbers, American University, Washington College of Law, who was joined by an outstanding expert panel including Professor Michael Asimow, Stanford Law School; Professor Bill Funk, Lewis and Clark Law School; Associate Dean and Professor William Jordan III, Akron School of Law; Professor Richard Murphy, Texas Tech School of Law; and Associate Dean Kathryn Watts, University of Washington School of Law. These scholars presented an extensive overview of the most important administrative law developments in the last year.

Following lunch, four panels provided insights into various other administrative law issues. “Judicial Review in the Roberts Era” moderated by Kathryn Watts, examined review of agency action over the seven-year history of the Roberts Court, including such doctrines as *Chevron, Skidmore,* and *Auer* deference to administrative action and the current scope of arbitrary and capricious reviews. The *Talk America, Mayo Foundation, FCC v Fox,* and *Massachusetts v EPA* decisions were examined in some detail from the various perspectives of the panelists: Professor Kristin Hickman, Minnesota Law School; Henry Hitchcock Professor of Law Ron Levin, Washington University School of Law; Lyle T. Alverson Professor of Law Richard Pierce, George Washington University Law School; and Professor Matthew Stephenson, Harvard Law School.

Daniel Cohen, Assistant General Counsel, DOE, moderated a panel on “Incorporation by Reference” that previewed the issues that ACUS would be taking up at its next Plenary Session in December. Amy Bunk, Office of the Federal Register; Clark Silcox, General Counsel, National Electrical Manufacturers Association; and Emily Bremer, Staff Counsel, ACUS, explored issues related to agency use of incorporation by reference of copyrighted material (that may need to be purchased) in the development and promulgation of regulations; potential agency misunderstanding of incorporated materials; the procedure for handling subsequent industry updating of consensus standards; and, generally, the procedures for approving and managing regulations that utilize other materials, access to which may be limited by cost even in an age of announced government transparency.

Another panel considered the topic, “Should Congress Expand the Jurisdiction of the Court of Appeals for Veterans Claims and the Court of Appeals for the Federal Circuit.” In anticipation that the ABA House of Delegates may be considering the issue, the panel, moderated by John Hardin Young, Sandler, Reiff, Young & Lamb, with panelists Ronald Smith, Veterans Pro Bono Program, Finnegan, Henderson, Farabow, Garrett & Dunner; former Federal Circuit Chief Judge Paul Michel; R. Randall Campbell, Assistant General Counsel, VA; Bart Stichman, Executive Director, National Veterans Legal Services Program; and Professor Jim O’Reilly, Cincinnati College of Law, discussed whether *de novo* jurisdiction to review all aspects of a decision.
including examination for factual “clear errors” should be enacted by Congress.

Judith Kaleta, Assistant General Counsel, Office of the General Counsel, Alternate Agency Ethics Official, and Dispute Resolution Specialist for DOT, led an animated discussion of “Ethical Considerations in Public Sector Law” in a program designed for government lawyers that illustrated ethical issues confronted by public lawyers by using an interactive, role-playing format. Her colleagues were R. Bryan McDaniel, Administrative Judge, Interior; Sharon Pandak, Greehan, Taves, Pandak, and Stoner PLLC; Cynthia Rapp, Deputy Clerk, U.S. Supreme Court; and Richard Litsey, Counsel, Senate Committee on Finance. Issues were presented through hypothetical scenarios which then generated active discussions of them, with evolving complexities, including: duties to former clients, special conflicts of interest affecting government employees, what constitutes professional misconduct, the requirements for reporting it, determination of the scope of legal representation, identifying the client, and determination of the responsibilities of supervisory lawyers.

The conference closed with two panels. One, “OIG 101, Over 30 Years of Increasing Oversight Authority,” moderated by Nancy Eyl, DHS Inspector General’s Office, had a panel of four representatives of various agency Office of Inspectors General: Elizabeth Dean, Farm Credit Administration; Kathy A. Buller, U.S. Peace Corps; Maryann Grodin, Nuclear Regulatory Commission; and Henry Shelly, Counsel to OIG, DOD. The panel traced the development of the Offices of Inspector General under the 1978 Inspector General Act and discussed more recent legislation that increased their authority relating to law enforcement powers, subpoena authority, having counsel independent from agency general counsels, semi-annual congressional reporting requirements, the role of the Council of the Inspectors General on Integrity and Efficiency that oversees all Inspector General Offices.

Equally well attended was the panel on administrative law issues relating to national security, titled, “Administrative Law Goes to War.” This panel reviewed the judicial role and relevant decisions from federal courts. Panelists were Judge Brett Kavanaugh, D.C. Circuit Court of Appeals; Judge John D. Bates, D.C. District Court; and Benjamin Wittes, Senior Fellow, Governance Studies at the Brookings Institute. They covered such issues as judicial deference, statutory interpretation approaches used, and application of “standing” and the “political question” doctrines in war powers cases. Standards of review used in recent decisions relating to review of executive branch actions and military trials involving Al Qaeda and detainees were also discussed.

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opt-out requirements should remain for redistricting changes and imposition of explicit prerequisites to register or vote. A tiered system would allow nondiscriminating jurisdictions, which may be discouraged by the cost and difficulty of meeting the evidentiary burden of the current opt-out provision, to choose a less onerous opt-out level and gain back some independence over their voting system.

In addition, instead of an opt-out proceeding beginning in the D.C. District Court, as under the current VRA, the first step should be formal adjudication within DOJ. Afterward, the jurisdiction would still be able to appeal DOJ’s decision to D.C. District Court. This would allow DOJ some power to adjust the adjudicatory proceeding to minimize any unnecessary costs or burdens on the petitioners, while at the same time APA formal adjudication would still ensure a fair and independent proceeding. The reformed opt-out provision should make clear that any proven acts of voting discrimination would result in reversion to complete coverage. This reform strengthens the constitutionality of Section 5 by directly confronting the concern of the Supreme Court that the current provision makes it too difficult for jurisdictions with no history of discrimination to opt-out. As more jurisdictions successfully utilize this opt-out provision, DOJ’s preclearance workload would be reduced, freeing up scarce resources. This would increase the agency’s effectiveness at enforcing the VRA and preventing voting discrimination.

As a second rulemaking change, DOJ should create a set of criteria and procedures by which jurisdictions may be added to Section 5 coverage. Adding a jurisdiction to Section 5 coverage should require clear and convincing evidence showing a consistent pattern of voting discrimination—either intentional, effectual, or both—and a strong likelihood of continuance into the future absent the requirement of preclearance. Formal adjudicatory proceedings to add a jurisdiction to coverage should be initiated by DOJ, but any individual voter or groups could petition DOJ to act. This would greatly increase the effectiveness of Section 5 by ensuring the coverage formula represents, as closely as possible, the areas with the greatest propensity toward discrimination. Further, requiring formal adjudication would ensure that decisions are made by impartial Administrative Law Judges and that parties have an ample opportunity to be heard and to cross-examine adverse witnesses. This reform would also strengthen Section 5’s constitutionality by allowing coverage to be extended to where discrimination exists and, when combined with a reformed opt-out provision, ensure that coverage more accurately represents the current state of the country.

Conclusion

Section 5 has been an extremely successful tool in the fight against voting discrimination. It has helped produce remarkable increases in minority voter registration and minority representation at all levels of government. The right to vote, the ark of our safety, is more secure today because of this important provision. Despite this, voting discrimination still persists and the need for protection remains. Section 5 must be reformed both to increase its effectiveness in a new, ever-changing society and to ensure that it remains a constitutional assertion of congressional power. The apolitical goal of voting equality must guide this debate as well as inspire those in power to tackle this issue now.

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

The Law of Counterterrorism

Lyne K. Zusman, Editor

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

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

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

TOPIC: Any topic relating to administrative law.

ELIGIBILITY: The competition is open to currently enrolled students of ABA accredited law schools who are also members of the ABA Section of Administrative Law and Regulatory Practice. The essay must be the student's original work and may include a paper submitted for a graded law school course, a law review note or comment, or an article written specifically for the Award. The paper may be prepared to satisfy a course requirement or for other academic credit. However, the essay must be the work of the submitting student without substantial editorial input from others. Co-authored papers are ineligible. Only one essay may be submitted per entrant.

FORMAT: Essays may not exceed 40 pages (exclusive of footnotes and end-notes). The text of the essay must be double-spaced, with twelve-point font and one-inch margins. Depending upon the type of article submitted, at the discretion of the Section, the winning student may be invited to shorten the entry for publication in the Administrative and Regulatory Law News. Entrants are encouraged to review past copies of the News prior to drafting their submissions. Cites must conform to the current edition of the Uniform System of Citation (Bluebook).

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

Submit a digital copy in Word format to Section Director Anne Kiefer, at anne.kiefer@americanbar.org. Entries must be received by 7 p.m. Eastern time on April 1, 2012.

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

AGREEMENT: By submitting an entry in this contest, the entrant grants the ABA and the ABA Section of Administrative Law and Regulatory Practice permission to edit and publish the entry in the Administrative and Regulatory Law News or the Administrative Law Review. Publication in either source will be at the sole discretion of the Editors and Editorial Boards of these publications upon determination by the Section that the article merits publication. Please direct any questions about the contest to the Section Director at anne.kiefer@americanbar.org.

JUDGING: Entries will be judged anonymously by the Fellows of the ABA Section of Administrative Law and Regulatory Practice based upon the following criteria:

• Creativity and clarity
• Organization
• Quality of analysis and research
• Grammar, syntax, and form

PRIZE: The winner will receive a $5,000 cash prize and round-trip airfare and accommodations to attend the Section’s Fall Conference in Washington, DC.
investigations must be conducted and be full-summed. Decisions of the ECC must be fair, apply the law, and be based on credible evidence. From the record, it appears that the ECC in 2010 did not apply the law evenly or require proof of a violation before disqualifying ballots on the basis of unsworn allegations and hearsay. It is similarly critical that the IEC and ECC undertake significant training programs to increase institutional skills, voter confidence, and sustainability. Some of these tasks are underway through the IEC’s strategic planning process, which attempts to focus on building trust among voters, reducing administrative costs, creating the election administrative process as a “center of excellence,” and conducting elections in accordance with the law.

Conclusion

Afghanistan is a country struggling with a history of foreign invasion, Taliban repression, civil war, rampant fraud, and a disorganized and ineffective central government. The 2014 presidential election will be a transitional period for Afghanistan. The IEC has an opportunity to build the mechanisms for genuine elections. The IEC will struggle to meet this goal, but it must make a clean break from past elections where fraud was the rule rather than the exception. It must guarantee a secure place to vote and ensure that those votes count. Even after 2014, the IEC can be the one institution that can ensure fair and credible elections, even if it takes a while to get it right.
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