

ADMINISTRATIVE & REGULATORY LAW NEWS

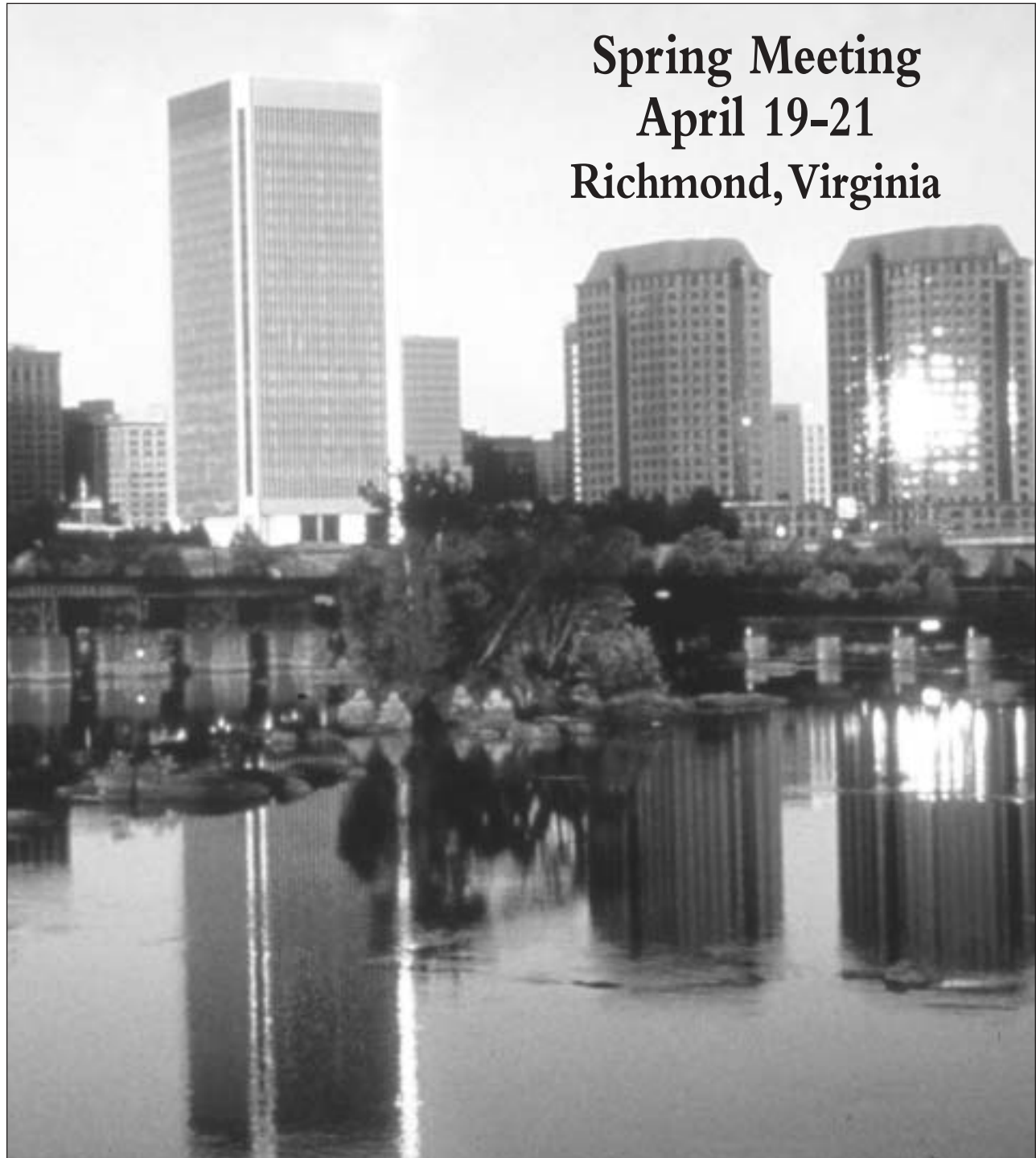


Section of Administrative Law & Regulatory Practice

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Spring 2002



Spring Meeting
April 19-21
Richmond, Virginia

Richard Nowitz

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Chair's Message



C. Boyden Gray

The courts have been relatively quiet recently on administrative law issues, but not your Publications Committee, which is now enjoying the release of Cass Sunstein's book entitled *The Cost-Benefit State: The Future of Regulatory Protection*. This is a very readable (at least to regulation junkies) and short treatise on the current state of regulatory and cost-benefit analysis in the regulatory process. It concludes that cost-benefit analysis is an important key to the future of regulation — a conclusion that is bolstered, not undermined, by the Supreme Court's decision in *American Trucking*. Hopefully, there will be more such treatises from the Ad Law Section, including more from the prolific Professor Sunstein.

One such book, now being encouraged by the Publications Committee, is a review of comparative

administrative law procedures (or lack thereof) in Europe, the Pacific Rim and elsewhere. Europe's procedures are not nearly as transparent as ours, whether viewed from the perspective of the EU itself or the individual member states. This has not caused many trade-related problems to date, but this condition is not likely to last long. It will be interesting to see what the EU constitution writers, now beginning to draft, will say (if anything) about the Fourth Branch of government not well foreseen by the Founding Fathers — and whether they will consult any of the authors of the just concluded APA project.

We will explore what the Section might be able to say or do about these comparative issues at the spring

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Member News

Lori Davis, the Section's Young Lawyers Division Liaison, was selected to participate in the inaugural Young Leaders Program which provides a forum for rising stars from the United States, Russia, and the United Kingdom to network and discuss global issues affecting young professionals, while strengthening the relationships among the three countries. The Young Leaders Program is coordinated through the Close Up Foundation in Washington, DC, and the Terry Sanford Institute of Public Policy at Duke University. Sixty participants (age 25-35) from the three countries were selected to represent diverse professional backgrounds in the non-profit, government and private sectors, from fields of practice including business and finance, the arts and sciences, government and politics, and economic and community development.

Bill Funk's book, ADMINISTRATIVE LAW: EXAMPLES & EXPLANATIONS, co-authored with Professor Richard Seamon of the University of South Carolina Law School, has been published by Aspen Law & Business. At the Annual Meeting of the Association of American Law Schools in January, Professor Funk was elected Chair of the

News that you would like shared with the Section should be sent to: Professor William Funk, Lewis & Clark Law School, Portland, OR 97219; FAX (503) 768-6671; E-mail: funk@lclark.edu. Items should be received not later than June 7, 2002.

Administrative Law Section, and he participated on a panel of the Section on Legislation, speaking on legislative riders to appropriations acts.

Also on that panel were Professors **Peter Strauss** and **Elizabeth Garrett**.

Council Member **David C. Frederick** has left the Solicitor General's Office in the Department of Justice and has become a partner in the D.C. firm of Kellogg, Huber, Hansen, Todd & Evans.

The Section is sorry to have to announce the passing of **Bernard Frank**, formerly a chair of the Ombuds Committee and a Section Fellow, inducted in August 2000. A graduate of the University of Pennsylvania Law School, Mr. Frank was in private practice in Allentown, Pa. An early advocate of ombudsmen, Mr. Frank was instrumental in their recognition by the ABA, the Federal Bar Association, and the International Bar Association. He was a board member and president of the International Ombudsman Institute at the University of Alberta, Edmonton, Canada. For his help in spreading the ombudsman concept, in 1980 he was awarded Sweden's Royal Order of the North Star. ◆

Council Capsules

A Brief Digest of Council Highlights From the 2002 Midyear Meeting

Nominations Report

Nominations Committee Chair Jack Young reported that the committee had not yet settled on a slate of recommended candidates for the upcoming term. The committee held an open meeting at the mid-year meeting to solicit names of Section members willing to serve and to seek comments on the committee's attempts to open the process to greater member input. Young said the committee, has been, and will continue to be, open to suggestion on nominees and on improvements to the process. He said that anyone who wanted to comment should contact the committee. A motion to clarify the Section's policy on house delegate term limits was at first postponed and then withdrawn. The committee will deliver its recommendations at the Spring Meeting in Richmond, April 19-21.

Multijurisdictional Practice

Larry Ramirez introduced the Interim Report of the Commission on Multijurisdictional Practice dated November 30, 2001. The report advocates amending Rule 5.5(b) of the ABA *Model Rules of Professional Conduct* (Unauthorized Practice of Law) "to provide that, as a general rule, it is not the unauthorized practice of law for a lawyer admitted in another United States jurisdiction to render legal services on a temporary basis in a jurisdiction in which the lawyer is not admitted if the lawyer's services do not create an unreasonable risk to the interests of a lawyer's client, the public or the courts."

The report also advocates adopting proposed Rule 5.5(c) of the *Model Rules* "to identify 'safe harbors' that embody

specific applications of the general principle of Rule 5.5(b)," including safe harbors relating to "services involving primarily federal law, international law, the law of a foreign jurisdiction or the law of the lawyer's home state."

Ramirez, a member of the commission, highlighted proposed Model Rule 5.5(c)(2), which would allow lawyers to perform professional services that non-lawyers may legally render. The report lists as a specific example "certain administrative agency proceedings [in which] nonlawyers are explicitly authorized to assist parties."

Council member Russell Frisby and Ratemaking Committee Chair Steven Augustino expressed concern over the wording of proposed Model Rule 5.5(c)(5), which would allow transactional representation, counseling and other non-litigation work on a temporary basis, and proposed Rule 5.5(c)(6), which would allow lawyers to provide temporary services involving primarily federal law, international law, the law of a foreign nation or the law of the lawyer's home state.

Frisby and Augustino said these proposed safe harbors do not adequately address the concerns of telecommunications practitioners whose practice transcends state lines and where jurisdiction over the underlying operations is shared by the federal government and multiple state governments. This work involves ongoing negotiations, and neither federal law nor the law of any one state predominates. The same is probably true with respect to energy practice.

Ramirez said the commission had considered many practice areas when crafting the suggested safe harbors, but admittedly not all. He encouraged the Section to voice its concerns before the commission's next public hearing, which will be held March 21 in New York City.

At the suggestion of Last Retiring Chair Ron Levin, Chair Boyden Gray stated the Section would communicate its concerns as invited.

House Resolutions

As predicted by Section vice chair and Ethics 2000 Commission delegate Tom Morgan at the Section's Annual Meeting last summer, the Ethics 2000 Commission's proposed revision to Model Rule 1.11, (the conflict of interest rule that applies to former government lawyers), passed the House of Delegates unchanged from the version supported by this Section. (See *Council Capsules, Ethics 2000, ADMINISTRATIVE & REGULATORY LAW NEWS, Fall 2001*).

The National Uniform Mediation Act, which the Section cosponsored, was approved without opposition. (See

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Arbitrary & Capricious Deregulation: *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29 (1983), Revisited

By William S. Morrow, Jr. ★

Last term in *Whitman v. American Trucking Associations, Inc.*, 121 S. Ct. 903 (2001), the Supreme Court affirmed DC Circuit doctrine holding that section 109 of the Clean Air Act precludes the Environmental Protection Agency from considering cost or feasibility when setting national ambient air quality standards. This raises an interesting issue. How can the EPA offer a rational basis for the standards it sets if it may not consider cost when setting them?

This seemed to some in the Section of Administrative Law and Regulatory Practice an opportune time for a program on the “arbitrary and capricious” doctrine. And, with the recent change in administrations, what better vehicle than revisiting the Supreme Court’s opinion in *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983), reversing the Reagan Administration’s rescission of the Carter Administration’s airbag rule.

The panel included three of the participants in *State Farm*: former White House Counsel Lloyd Cutler for petitioners, and the now Hon. Merrick Garland and James Fitzpatrick for respondents. Professor Ernie Gellhorn served as moderator.

Section Chair Boyden Gray introduced the participants and turned the podium over to Ernie Gellhorn, who quickly got things started.

Passive Restraints History

Fitzpatrick led off with a discussion of the interplay between the development of passive restraint regulations and the emerging law on deregulation.

He noted that occupant restraints in automobiles were not mandatory prior to the mid 60s. Then Ralph Nader’s book, “Unsafe at Any Speed,” came out and changed the dynamic. Congress reacted by passing the National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. Ch. 301, which for the first time, permitted federal regulators to impose stringent safety standards on motor vehicles. In 1967, the National Highway Traffic Safety Administration (NHTSA), required the installation of seat belts in cars. Usage rates did not really take off, so in 1969 NHTSA

proposed the installation of passive restraints. Ultimately, after several false starts, including a statutory repeal of the regulatory ignition interlock program, this proposal was to go into effect in August 1976. Before it could go into effect, Secretary of Transportation William Coleman suspended the requirement and substituted a demonstration project intended to foster public support for passive restraints. Then the Carter Administration took office and in 1977 rejected prior Secretary Coleman’s proposal of a voluntary demonstration program starting in 1979. The Carter regulation required passive restraints beginning in large cars in 1982.

In 1980, candidate Reagan assured a financially depressed auto industry that they would receive regulatory relief. A broad deregulatory agenda was undertaken in 1981, and the passive restraint rule, which was then months away from its first deadline, was delayed for a year, and a new rulemaking proceeding was undertaken, justified by the economic difficulties of the auto industry.

The Carter regulation was then rescinded on the ground that NHTSA could no longer predict that passive restraint systems would result in a sufficiently high level of seatbelt use to justify the significant cost of installation. According to Fitzpatrick, the reason the agency could no longer make a prediction was because the auto industry had decided to install a belt with a detachable feature instead of mostly installing airbags as originally planned. “The agency concluded that if the belt could be detached it was no different than a manual belt, and they couldn’t predict a significant increase in usage, and, therefore, they saw no safety enhancing features to this rule.”

The insurance industry appealed, and the DC Circuit set aside the decision on the grounds it was arbitrary and capricious. Fitzpatrick explained that the court found the agency’s decision had been animated by concern for the health of the industry and not safety as required by the Act. The Supreme Court agreed to review the DC Circuit’s opinion and was faced with deciding whether the arbitrary and capricious standard of the APA applied to deregulation and if so, whether the agency’s action in this instance passed that test.

The Court held that the arbitrary and capricious standard did apply and faulted the agency for not recog-

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nizing the inertia factor, the fact that in the first instance, a passive belt was attached, and inertia favored a continued high usage rate. “That part of the decision got five justices,” said Fitzpatrick. “All nine justices joined in the opinion holding that it was arbitrary and capricious for the agency not to have seriously considered the alternative of an airbag-only rule.”

“Now,” said Fitzpatrick “how does one account for this rather extraordinary detailed and searching excursion into the record? It is terrible business ever to try to second guess exactly what is going on in a court’s mind. But I do think our side did get through that the airbag rule was jettisoned not on serious safety concerns, but as part of a political arrangement with the auto industry.”

Fitzpatrick closed with the following observation. “Now it is clear that a new administration can have new and different regulatory goals. Justice Rehnquist, dissenting in part, said that a change in administration brought about by people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations. But this to me was the key phrase: ‘As long as the agency remains within the bounds established by Congress,’ it can take a second look in light of the philosophy of the new administration.”

What If?

Lloyd Cutler kept his presentation brief, focusing on what might have happened had the Carter Administration not discarded the Coleman experiment in favor of a mandatory rule.

Cutler said, looking back in hindsight, he believes “that Coleman was right and that the Carter-Adams reversal of Coleman’s plan set back general public acceptance of airbags by as much as perhaps a decade.” He pointed out that public mistrust and the inconvenience of airbags and other passive restraints instilled a reluctance to use seatbelts, with or without airbags, that persists today.

“I would submit to you that if Coleman’s 500,000 car experiment had been allowed to go forward in 1977, as all the auto companies were ready and willing to do, I believe all these bugs in the airbag and passive restraint development over the course of a couple of decades would have been discovered and worked out much earlier and general public acceptance would have come about years before it actually did.”

Cutler also pondered what would have happened if the Coleman demonstration program had been reviewed by a court, instead of being administratively revoked: “My own speculation is that by any standard of judicial review, Coleman’s order would have been sustained, even by the *State Farm* Supreme Court, and that the auto industry, the car driving public, and the entire nation would have been far better off if Coleman’s idea had prevailed.”

And of Justice Rehnquist’s dissent, Cutler agreed that

an incoming administration “should have the right to change the regulatory decisions of a previous administration of the other party. Only an incoming administration’s total failure to articulate its reasons would justify a judicial review of its actions.”

Doctrinal Context

Judge Garland talked about where *State Farm* fits in the law of judicial review of administrative action.

Garland explained that before 1970, the arbitrary and capricious test was regarded as an extremely narrow standard of review, requiring a minimum of rationality “something akin to the rational basis test used in reviewing legislative action. Courts rarely reversed, vacated or remanded agency action under that standard.”

Then in the 1970s, Judge Leventhal’s opinion in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (1970), *cert. denied*, 403 U.S. 923 (1971), introduced a more rigorous standard of review in the DC Circuit known as “hard look.” “Originally,” said Garland, “the hard look had what I would call only a quasi-procedural element. That is, a set of requirements that didn’t relate to the procedures that outsiders were given in agency proceedings, like notice and comment, but rather the kind of thought processes that the agency had to undertake in making its own decision. That is, a hard look by the agency itself.”

He said this led to a series of decisions in the DC Circuit holding that “an agency had to provide a detailed explanation of its rationale, its policy premises, and its factual support, demonstrate that it responded to significant points raised during the public comment period, show that it examined all relevant factors and demonstrate that it considered all significant alternatives to the course it chose.” He said there was also the substantive hard look that the court itself exercised requiring a reasonable basis in the record for agency findings of fact and policy choices.

Garland said the Court’s “quasi-procedural review” continued into the 80s and became more exacting, leading to a larger number of remands. “Substantive review also took on more bite, resulting not only in more remands, but a slightly more refined analytical framework. To survive arbitrary and capricious review, the [DC] Circuit said, the agency’s policy decision had to be reasonable in light of supportable findings of fact in the record and the legislative purpose.”

Turning to Supreme Court precedent on the eve of *State Farm*, Garland said the pertinent procedural review cases were *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), which held that agencies had to explain the basis for their decisions, and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519

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Supreme Court News

by William Funk*

As this issue goes to press, the Supreme Court has just decided *New York v. Federal Energy Regulatory Commn.*, 122 S. Ct. 1012 (2002). That case is one of the few significant regulatory cases before the Court this term, this one involving a challenge to FERC's Order No. 888, entitled Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, or, in other words, facilitating deregulation of electricity services. Two sets of challengers objected to the order: one was New York and other states complaining that FERC exceeded its jurisdiction by regulating (more accurately, deregulating) unbundled retail transmissions of electricity over which the states would like to retain jurisdiction for possible regulation; the other was Enron Power Marketing complaining that FERC had not deregulated enough, by not exercising jurisdiction over bundled retail transmissions of electricity.

As to the first challenge, a unanimous Supreme Court in an opinion by Justice Stevens held that the plain language of the Federal Power Act authorizes jurisdiction over "the transmission of electric energy in interstate commerce," as well as over "the sale of electric energy at wholesale in interstate commerce." Thus, while FERC's jurisdiction over the *sale* of electric energy is limited to wholesale sales, its jurisdiction over the *transmission* of electric energy is only limited by the requirement that it be in interstate commerce and is not affected by whether the electric energy is being transmitted for wholesale or retail sales. No one questioned that the electric energy involved would be in interstate commerce, because it would flow through the national grid. Accordingly, the Court upheld FERC's order with respect to the unbundled transmission of retail electricity on the basis of the plain language of the Act and without citation to any case relating to deference to agency interpretations.

The second challenge was more difficult. The Court again upheld FERC but only by a 6-3 vote, with Justice Thomas writing a dissent joined by Justices Kennedy and Scalia. There seemed to be some confusion as to whether FERC disclaimed jurisdiction to regulate bundled retail transmissions or whether it was merely refraining from the exercise of its jurisdiction in this order. Enron clearly appeared to believe FERC was taking the former approach, but the Court said that Enron was in error, that FERC was taking the latter approach.

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The dissent said that FERC's explanation of its approach was so inconsistent in its various iterations, that it was entitled to no deference.

FERC apparently interpreted the Act to prohibit it from regulating the transmission of bundled retail sales of electricity because it believed "that when transmission is sold at retail as part and parcel of the delivered product called electric energy [*i.e.*, "bundled"], the transaction is a sale of electric energy at retail," and FERC's jurisdiction over sales of electric energy is limited to wholesale sales, an interpretation seemingly seconded by the Eighth Circuit in *Northern States Power Co. v. FERC*, 176 F.3d 1090, 1096 (8th Cir. 1999). In the court below, the D.C. Circuit had upheld FERC's decision, saying that FERC's interpretation that the transmission portion of of bundled retail sales was part of the retail sale (and hence outside FERC's jurisdiction) rather than as an independent transmission in interstate commerce subject to its jurisdiction was a "statutorily permissible policy choice" to which it had to defer, citing *Chevron*. See *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 694-695 (D.C. Cir. 2000). This would appear to suggest that FERC's conclusion was that it lacked jurisdiction, as Enron claimed, but FERC did not categorically deny the ability to exercise jurisdiction over bundled retail transmission. Rather, it said that it raised "numerous jurisdictional issues" which it need not resolve in this proceeding.

The Court held that FERC's deferral of the issue of addressing bundled retail transmissions was "clearly acceptable" – first, because the FERC proceeding had been directed at increasing competition in wholesale transmissions and therefore it was not necessary to address bundled retail transmissions; and second, because the numerous additional jurisdictional questions justified deferring consideration of bundled retail transmissions. Again, the Court cited to no case and did not specify what, if any, standard of review it was utilizing in upholding FERC's order.

The dissent read the Act to provide FERC with jurisdiction over *all* transmission in interstate commerce whether bundled with retail sales or not. It found no statutory basis for distinguishing between bundled and unbundled transmissions. It characterized the majority as deferring to the agency's decision, and the dissent referred to *State Farm*, *Mead*, and *Chevron* in arguing that there was no basis for any deference in this case.

Another case in which the Court wrestled with statutory interpretation in the context of a complex regulatory system is *Wisconsin Dept. of Health and Family Services v. Blumer*, 122 S.Ct. 962 (2002). This case involved how to apportion income and assets of a married couple to determine Medicaid eligibility when one

of the spouses is institutionalized, usually in a nursing home. The Medicare Catastrophic Coverage Act of 1988 attempted to devise a system that would avoid impoverishing a couple before triggering Medicaid eligibility, but at the same time would require an appropriate level of spousal support of the institutionalized spouse. In a nutshell, a determination is made of the “minimum monthly maintenance needs allowance” (MMMNA) of the “community spouse” (that is, the non-institutionalized spouse). To meet this amount, the community spouse is entitled to keep all his or her personal income as well as half the couple’s assets, whether personally or jointly owned, which can generate income (the Community Spouse Resource Allocation or CSRA). If the combination of the community spouse’s personal income and the income generated by the CSRA would not meet the MMMNA, the couple may seek a hearing from the state administering the Medicaid program for an adjustment to bring the community spouse’s income up to the MMMNA. The dispute in this case was whether the adjustment could come from the institutionalized spouse’s income (which would otherwise go to pay costs of the institutionalized medical care) — the “income first” method — or whether the adjustment had to come from the institutionalized spouse’s half of the couple’s resources (which, by diminishing the institutionalized spouse’s resources, would tend to trigger Medicaid eligibility earlier than the income first method) — the “resources first” method.

Had Wisconsin used the resources first method, all of Mrs. Blumer’s remaining assets would have been transferred to her community spouse in order to enable his income to reach the MMMNA, and she would have immediately qualified for Medicaid. As it was, Wisconsin, like most states, used the income first method, transferring a portion of her Social Security income to him to meet the MMMNA, so that all of her remaining assets (less a \$2000 allowance) were required to be expended on her care before she qualified for Medicaid. Mrs. Blumer challenged the use of the income first method, arguing it was prohibited by the Act. The Court, in an opinion by Justice Ginsburg, upheld Wisconsin’s use of the income first method.

For administrative law purposes, the question is how the Court arrived at that decision. While the Department of Health and Human Services had issued interpretive letters upholding the use of the income first method and had an ongoing rulemaking proceeding proposing to allow states to use either the income first or the resource first method, the Court did not place reliance on the agency’s interpretation. Rather the

Court interpreted the statute for itself and found that it allowed for the use of an income first method. The Court then continued, however, to opine on, although not to “definitively resolve,” whether HHS could authorize states to use *either* the resources first or the income first method. Here the Court did find significant that HHS “has preliminarily determined that [the Act] permits both income-first and resources-first methods.” “The Secretary’s position,” the Court said, “warrants respectful consideration,” citing *United States v. Mead*, 533 U.S. 218 (2001), as well as both *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994), and *Schweiker v. Gray Panthers*, 453 U.S. 34 (1981) for the proposition that the Secretary has broad discretion under the Medicare and Medicaid Acts.

Justice Stevens dissented, joined by Justices O’Connor and Scalia. To the dissenters the statute was clear and unambiguous, allowing only the resources-first method. Citing *Mead* back to the majority, the dissent said the agency’s interpretation lacked the power to persuade.

The third case involving statutory construction of a complex regulatory system is *Barnhart v. Sigmon Coal Co.*, 122 S. Ct. 941 (2002), which required an interpretation of the Coal Industry Retiree Health Benefit Act of 1992. That Act attempted to deal with the problems of pensions in the mining industry, where many companies with unfunded pension and health benefit systems went out of business potentially leaving retired miners without pensions or health benefits. It did so by generally requiring employers with connections to retirees to assume responsibility for their benefits and requiring all remaining mining companies with union employees to pay into a fund to cover the retirees of companies that had gone out of business.

Jericol Mining Company had bought the assets of Shackleford Coal Company and had agreed to assume the responsibility for Shackleford’s contracts, including its collective bargaining agreements. Shackleford thereafter went out of business. Twenty years later the Commissioner of Social Security, acting under his interpretation of the Act, assigned responsibility for the benefits for certain retired employees of Shackleford to Jericol. Jericol objected, saying that the Act did not authorize assignment to it of Shackleford retirees.

The Act states that “signatory operators,” companies that had been signatories to certain industry-wide union-operator agreements prior to the Act, must assume responsibility for their retirees. While Shackleford had been such a company, it was no longer

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National Security & Individual Rights: Striking the Right Balance in the Rules Governing Military Tribunals

By William S. Morrow, Jr.★

Immediately following the attacks of September 11, 2001, on the Pentagon and the World Trade Center in New York, the nation found unity in shared grief and a common determination to apprehend the perpetrators and bring them to justice. Terrorism was declared public enemy number one, and nations around the world pledged their support.

Two months later on November 13, having identified Osama Bin Laden and his al Qaida terrorist organization as the likely culprits, and with a full military campaign underway to literally smoke them out of their hiding places in Afghanistan, President Bush took a significant but controversial step toward prosecuting the probable terrorists by issuing an order subjecting noncitizens detained in the war on terrorism to trial by military tribunal. 66 Fed. Reg. 57,833 (Nov. 13, 2001).

The President's Order

The President's order applies to any noncitizen the President determines there is reason to believe is or was a member of al Qaida, has associated himself or herself with acts of international terrorism, or has knowingly harbored such persons.

Detainees held under the order are to be treated humanely, and defendants shall have the right to an attorney, but "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts" will not apply. Instead, the Secretary of Defense is given wide discretion in formulating orders and regulations for ensuring "full and fair" trials.

The Secretary's rules shall at a minimum provide for admission of evidence that a reasonable person would find probative. Conviction and sentencing need only require the vote of two thirds of the members of the tribunal, a majority of members being present. Tribunal decisions will be subject to review by the

President or, if designated, the Secretary, but the accused "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal."

The breadth of the order and its rejection of rules governing criminal trials and appeals in federal courts have met with both praise and criticism. A report issued by the Task Force on Terrorism and the Law commissioned by the American Bar Association to address the major legal issues raised by the President's order contains a little of both.

ABA Task Force

The task force issued its report January 4, 2002. The report represents the views of a diverse group of eleven lawyers with experience in immigration law, national security, military justice, constitutional law, criminal law, international law, and litigation. See www.abanet.org/leadership/military.pdf.

The report recognizes the duty of our government to bring those responsible for the September 11 attacks to justice and to prevent similar attacks from occurring in the future, while admonishing that the government also has a duty to preserve and protect fundamental rights and liberties under the Constitution.

The report cites Article 21 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 821, as limiting the jurisdiction of military commissions to "offenders or offenses that by statute or by the law of war may be tried by military commission." The report finds support for the argument that the September 11 attacks on noncombatant civilians reasonably may be considered illegal acts of war but expresses concern that the President's order appears to go further and also apply to offenses that may not be war crimes and may not be connected to the September 11 attacks.

The report finds no conflict between our nation's quest for conviction of the guilty and rules that afford the accused "due process." The report recommends

★ Associate Editor for Section News; Vice Chair, Defense and National Security Committee. The author thanks the panelists for reviewing this article and suggesting improvements. Ed. Note: The Defense and National Security Committee will hold a follow-up program May 16, 2002, in Washington, DC.

that the Secretary consider the rules governing courts-martial and the procedures and standards expressed in the International Convention on Civil and Political Rights (ICCPR).

The report explains that since before World War II, military commissions have generally used procedures that mirror those used in courts-martial and that, today, the Preamble of the Manual for Courts-Martial establishes the presumption that subject to international law or any regulations prescribed by the President or other competent authority, military commissions shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial.

In addition, the report points out that the United States is a party to the ICCPR and that Article 14 of the ICCPR describes standards and procedures universally recognized as fundamental to all courts and tribunals in democratic societies. These include: (1) an independent and impartial tribunal; (2) open proceedings; (3) presumption of innocence; (4) prompt notice of charges; (5) adequate time and facilities to prepare a defense; (6) trial without undue delay; (7) the right to be present and represented by counsel of choice; (8) the right to examine witnesses for the prosecution and to obtain the attendance of defense witnesses under the same conditions; (9) free assistance of an interpreter; (10) the right against self-incrimination; and (11) opportunity for review of any conviction and sentence by a higher tribunal.

The report recommends using military commissions only to the extent compelling security interests justify their use. The report recommends against using military commissions to try persons lawfully in the United States and persons neither connected with the September 11 attacks nor accused of violating the law of war – absent specific authorization from Congress.

The report urges that “no sentence of death should be permitted on less than a unanimous vote of all the members of a military commission.”

Finally, the report advises the government to “consider the impact of its choices as precedents in (a) the prosecution of U. S. citizens in other nations and (b) the use of international rule of law norms in shaping other nations’ responses to future acts of terrorism.”

Section Program on Military Tribunals

This Section’s Defense and National Security Committee convened a panel on January 16 to discuss the task force report and a recommendation of the Bar Association of the District of Columbia (BADC) urging the ABA to adopt a resolution calling for military commissions established under the President’s order to be conducted in a fundamentally fair manner, follow court-martial principles of law and rules of evidence and procedure, and be subject to meaningful review by an inde-

pendent civilian authority appointed by the President.

The panel was moderated by Section Council member Lynne Zusman and included former Brigadier General John S. Cooke, a task force member, chair of the ABA’s Standing Committee on Armed Forces Law and retired Army judge advocate.

The panel also included Kevin Barry, vice-chair of the BADC’s Military Law Committee and a former military judge; John Flannery, a former federal prosecutor and former counsel to Rep. Zoe Lofgren; Ab Hamilton, a former State Department attorney and staff member in the Office of the United States High Commissioner for Germany, Nuremberg, Germany, 1951-53; Peter Raven-Hansen, a professor of law at George Washington University School of Law; Patrick Philbin, a deputy assistant attorney general in the Office of Legal Counsel, U.S. Department of Justice; and the Hon. Alexander White, Circuit Court Judge for Cook County, Illinois, a former staff judge advocate for the U.S. Marine Corps Reserve, and former assistant federal defender.

Cooke opened the discussion with an overview of the task force report. Much of the discussion centered on two Supreme Court cases highlighted in the report: *Ex Parte Milligan*, 71 U.S. 2 (1866), in which the Court *rejected* the trial of a U.S. civilian by military commission in the U.S. at a time when the courts were open and unobstructed, and *Ex Parte Quirin*, 317 U.S. 1 (1942), in which the Court *upheld* the trial of a deemed U.S. citizen (although ostensibly not a civilian) by military commission in the U.S. at a time when the courts were open and unobstructed.

Because the President’s order only applies to noncitizens, none of the panelists argued for a military trial of citizens suspected of involvement in the September 11 attacks. But what of noncitizens accused of war crimes? Military commissions were used extensively abroad in World War II to try German and Japanese war criminals. The Supreme Court upheld that jurisdiction in *Application of Yamashita*, 327 U.S. 1 (1946). The *Quirin* Court affirmed military commission jurisdiction over saboteurs captured and tried in the U.S. It did not matter that they could have been tried in U.S. courts.

Still, some of the panelists expressed their preference for restraint. Panelist Flannery saw *Milligan* as favoring the use of courts to the greatest extent possible. Hamilton argued that our efforts to extradite suspected offenders from other countries would suffer if those countries perceive our terrorist trials are unfair.

Professor Raven-Hansen opposes military trials for those captured in the U.S. because the predicates for invoking a military tribunal – the need for conducting a trial in a theater of combat or occupied territory and

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Recent Articles of Interest

Steve P. Calandrillo, *Responsible Regulation: A Sensible Cost-Benefit, Risk versus Risk Approach to Federal Health and Safety Regulation*, 81 B.U. L. REV. 957 (2001). Federal health and safety regulations have saved or improved the lives of thousands of Americans, but protecting our citizens from risk entails significant costs. In a world of limited resources, we must spend our regulatory dollars responsibly in order to do the most we can with the money we have. Given the infeasibility of creating a risk-free society, this article argues that a sensible cost-benefit, risk versus risk approach be taken in the design of U.S. regulatory oversight policy. This entails designing safety regulations efficiently to maximize society's welfare, choosing the point where their marginal benefits equal their marginal costs – rather than simply asking whether total benefits exceed total costs in the aggregate. Federal regulatory oversight policy should also ask that proposed regulations compare the risks they reduce to the new risks they unintentionally create (substitution risks). Additionally, our citizens should be educated regarding systematic risk misperceptions, and regulatory agencies should make their risk assessments objectively. Moreover, most-likely scenarios must be addressed by responsible regulatory solutions, rather than the current practice of focusing on worst-case estimates. Finally, agencies should publish and justify their regulatory triggers and perform ex-post evaluations of their programs in an attempt to continuously improve the quality of regulatory design. Efforts by the executive branch, from Presidents Ford, Carter, Reagan and Clinton, have attempted to inject similar common sense into the regulatory oversight process. Unfortunately, the Congressional mandates given to government agencies are often silent on the subject of cost-benefit analysis, and recent Supreme Court cases have held that regulatory agencies are not obligated to even consider the costs of their proposals. The article explores several legislative reform bills that are aimed at overriding Congressional mandates, but to date, none have been successful. Finally, this article addresses certain common criticisms to which a marginal cost benefit, risk-risk approach to responsible regulatory reform would be subject. Most notably, the measurement of costs and benefits is not an exact science, and using “willingness to pay” as a marker of individual and social utility has its limitations. Regulatory reform also faces challenges on moral grounds, as scholars openly decry the explicit tradeoff between human lives and financial resources. While these criticisms contain merit, this article concludes that to ignore a sensible

cost-benefit analysis of federal safety regulations is to divert resources from their most beneficial uses and to settle for second best.

Todd A. Ellinwood, “In the Light of Reason and Experience”: The Case For a Strong Government-Attorney Client Privilege, 2001 Wis. L. Rev. 1291. Although the attorney-client privilege is well-entrenched and its contours are fairly clear, its governmental counterpart lacks clear rules. Two values appear to be in conflict when a government entity claims privilege: the value of full and candid communication between the client and the attorney, and the value of open and honest government. In determining the rules governing the privilege in the government context, the most common methodology employed by courts and commentators involves a simple weighing of these values. During the Clinton presidency, two courts of appeals considered this question. Each ruled that the strong public interest in honest government and the exposure of wrongdoing by public officials outweighed the benefit of full and candid communication, thereby necessitating a rule that limits the government attorney-client privilege. This approach merely identifies the more important value and then assumes that this analysis justifies a certain rule. Commentators also simply weigh the values and select the rule that appears to correspond with the chosen value—favoring honest government leads to a narrow reading of the privilege, whereas a preference for candid communication results in a stronger privilege. This article advances an approach encouraged by economic analysis of law; the methodology requires a consideration of the impact that various rules will have on the behavior of people facing similar situations in the future. The analysis should focus on the results and incentives that derive from the various possible rules, and the rule that provides the incentives for desirable future conduct should be selected. Under this approach, the superior rule is a strong government attorney-client privilege, providing for confidentiality in communications related to official actions taken by government actors. The rules for the privilege should be the same as the rules created by the common law for the private attorney-client privilege, with one modification. In situations where the government official committed a clear violation of the law, the government attorney should tell the official to seek private counsel and must not provide legal assistance. Only in this very rare situation should the government official lose the assistance of government counsel, but she

should not have to fear the loss of confidentiality. A strong government attorney-client privilege promotes full and candid communication between attorney and client, and the article shows that this rule actually fosters the value of open and honest government in a manner superior to the weak or narrow rule.

Laura E. Little, *The ABA's Role in Prescreening Federal Judicial Candidates: Are We Ready to Give Up on the Lawyers?*, WILLIAM & MARY BILL OF RIGHTS J., Forthcoming Available from the SSRN Electronic Paper Collection: http://papers.ssrn.com/paper.taf?abstract_id=287322. This article concludes that President Bush's decision to eliminate the ABA's prescreening role substantially reduces the ABA's ability to contribute valuable expertise to judicial selection. ABA committee members not only are likely to know the right persons to ask questions about potential candidates, but - knowing the temptations and soft spots of legal doctrine and procedure - are also able to ask the right questions. Furthermore, the ABA offers stable procedures for evaluating judicial qualification - which can remain constant throughout the governmental changes instituted as presidential administrations come and go. The Bush administration has resolved, however, that the ABA should be treated like other "political interest groups" because it "takes public positions on divisive political, legal, and social issues that come before the courts." Commentators have suggested that perhaps the ABA is not too political for the prescreening job, just on the wrong side of the political spectrum. To the extent that ABA's voice contrasts with those who have the President's ear, its contributions are especially important to exposing competing arguments about the merits of potential candidates. Experience teaches, moreover, that high-pitched political battles over judges will continue whether or not the ABA has a vetting role. The article argues, although the Bush administration is wrong in treating the ABA as just another interest group, the ABA would be prudent to heed its critics. Several changes in ABA procedures could cure the perception that the ABA uses judicial evaluations to implement its own public policy objectives. The solution thus is not to ax independent lawyers from judicial prescreening, but to improve their contributions through refined procedures.

M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PENN. L. REV. 603 (2001). This article critiques the central commitments of contemporary separation of powers theory and doctrine.

It then suggests more promising ways to think about separation of powers disputes, suggestions that derive from the criticisms offered. The separation of powers provisions of the Constitution are understood as a way of controlling the exercise of state power by fragmenting it among three different institutions and guaranteeing that fragmentation. Conventional separation-of-powers analysis relies on two mechanisms to achieve and maintain the dispersal of state power: separating legislative, executive, and judicial power in three different branches and preserving a balance among those branches. There is vigorous disagreement about the proper characterization of any given dispute, but there is little controversy about the proper framework within which that debate should proceed. There should be. The embarrassing secret is that both commitments at the center of separation-of-powers doctrine are misconceived. The effort to identify and separate governmental powers fails because, in the contested cases, there is no principled way to distinguish between the relevant powers. The effort to maintain balance among the branches fares no better. We do not know what balance means, how to measure it, or how to predict when it might be jeopardized. The deficiencies are partly explained by the most fundamental difficulty with claims about balance among the branches. Inquiring about inter-branch balance is incoherent because it assumes that branches of government are unitary entities with cohesive interests, but that is not true. The branches are made up of individuals and sub-institutions with varying incentives that do not neatly track the institution within which they are located. The criticisms offered here reveal that we are thinking about questions of horizontal constitutional structure in the wrong way. Taking seriously the failings of current ideas offers at least two important lessons for its reconceptualization. The most significant lesson is that, if one is interested in fragmenting state power and assuring that it remains fragmented, the failure of the conventional approaches is of little moment. In the course of noticing that there is no such thing as three essential powers exercised by three undifferentiated branches, we will also notice that government authority is fragmented, widely so, albeit not according to the three-powers-in-three-branches formula. The other lesson is that current efforts go about the ambitious undertaking of matching particular powers with specific decisionmakers in the wrong way. That effort must start with an understanding of how those decisionmakers might exercise that authority, which requires a fine-grained appreciation of the forces that

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Section of Administrative Law and Regulatory Practice 2002 Spring Meeting

Chair: Kathleen Kunzer

The Jefferson Hotel
101 West Franklin Street
Richmond, Virginia

Telephone: (804) 788-8000 | Guest Fax: (804) 649-4400

Friday, April 19

Agency Website Errors:

Designing Better APA or Tort Remedies

3:00 p.m. – 5:00 p.m. ■ The Jefferson Hotel
Presented by the Government Information and Privacy Committee

Large volumes of fact and opinion information are being placed onto federal agency websites, yet some fraction of the data is erroneous and some portion of the opinions presented are misleading or unreasonable. The APA's judicial review mechanisms are not well suited to disputes over errors in disclosure, and tort immunity seems to protect agencies. In October 2002, new accuracy standards will apply to all federal agency dissemination of data. This panel will look forward at the new section 515 "data quality" norms and will explore current law on APA and tort claims recoveries.

Moderator and Program Chair: *James T. O'Reilly*, Professor, University of Cincinnati School of Law, Cincinnati, OH

Speakers:

- *Gary Bass*, Executive Director, OMB Watch, Washington, DC
- *Mark Greenwood*, Partner, Ropes and Gray, Washington, DC
- *Hon. Loren Smith*, Senior Judge, United States Court of Federal Claims, Washington, DC
- *Jim Tozzi*, Member, Board of Advisors, Center for Regulatory Effectiveness, Washington, DC

Ethics Issues for the Administrative Judiciary

4:00 p.m. – 5:30 p.m. ■ The Jefferson Hotel
Presented by the Adjudication Committee

This panel of distinguished state and federal administrative presiding officials, with the help of an ethics expert, will raise some of the ethics issues confronting the administrative judiciary. Recently, the pre-

siding officials themselves have intensified their own examination of these issues. Obviously, these issues concern all those interested in the administrative law. This panel is intended to bring practitioners and administrative law scholars into the judicial ethics conversation. Among the issues which will be raised by the panel are *ex parte* communication, presiding official authority to impose sanctions, financial conflicts of interest and independence generally.

Moderator and Program Chair: *Charles Koch*, Professor, College of William and Mary Marshall-Wythe School of Law, Williamsburg, VA

Speakers:

- *Alan Heifetz*, Hearing Officer, NASD Regulation Inc., Washington, DC
- *John Hardwicke*, Chief Administrative Law Judge, State of Maryland, Hunt Valley, MD
- *Ann Marshall Young*, Administrative Judge, Nuclear Regulatory Commission, Bethesda, MD
- *James Moliterno*, Professor of Law, William and Mary Law School, Williamsburg, VA

Section Reception

5:45 p.m. – 7:30 p.m. ■ John Marshall House Home to Chief Justice Marshall for 40 years, this location provides an historic setting for our section reception. Transportation will be provided from the Jefferson Hotel at 5:30 p.m.

Dine-Around at Area Restaurants

7:30 p.m.

For those who wish, reservations will be made in groups of ten or so to dine at one of several restaurants in Richmond. Please indicate on the registration page if you want to participate in the dine-around so we can confirm reservations.

Saturday, April 20

Section Continental Breakfast

8:00 a.m. – 9:00 a.m. ■ The Jefferson Hotel

Section of Administrative Law and Regulatory Practice Council Meeting

9:00 a.m. – 11:30 a.m. ■ The Jefferson Hotel

Golf Outing

1:30 p.m.

Tee times have been arranged for 2 and 2:20 p.m. at the Royal Kent Club, a nationally ranked Irish links style course. Transportation from the hotel will be provided at 1:30 p.m.

Tennis

Tennis courts will be available starting around 1:30 p.m. Please check with registration for further details.

Vineyard Tour

1:30 p.m. – 5:30 p.m. A mini-coach will depart from Jefferson that will take you on tour of Virginia wine country with stops at the Barboursville and Horton vineyards.

Section Reception and Dinner

7:00 p.m. ■ La Grotta Restaurant, 1218 East Cary Street, Richmond, VA. (Transportation from the hotel will be provided at 6:45 p.m.)

Sunday, April 21

Section Continental Breakfast

8:00 a.m. – 9:00 a.m. ■ The Jefferson Hotel

Section of Administrative Law and Regulatory Practice Council Meeting

9:00 a.m. – 11:30 a.m. ■ The Jefferson Hotel

Information

Hotel Information

Jefferson Hotel
101 West Franklin
Richmond, VA 23200
Telephone: (804) 788-8000
Guest Fax: (804) 649-4400

Hotel Reservations

The deadline for housing is **March 19, 2002**. Please make reservations by calling The Jefferson Hotel directly at 888-943-8800.

Advanced Registration and Ticketed Events

Please complete the registration form on-line at www.abanet.org/spring02/ and mail it along with your check made payable to the American Bar Association (ABA). Credit card registrations may also be faxed to (202) 662-1529. Advanced registrations must be received by **Thursday, April 11, 2002** to be included in the pre-registration list distributed at the program. (Please make sure to include your e-mail address on all registrations.)

Continuing Legal Education Credits

Accreditation for all educational programs has been requested from all states with mandatory continuing legal education requirements. For more specific information about MCLE credit for the Spring Meeting, please call the ABA's MCLE office at (312) 988-6217.

Airline Information

For rate information or to make reservations attendees should contact the airlines directly using the ABA reference number. To meet individual needs attendees should compare all options available, including flight schedule and rates and restrictions between airline fares and ABA rates. American Airlines 800-433-1790, ABA # 14642; Delta Air Lines 800-241-6760, ABA # 170348A, US Airways 877-874-7687, ABA #21900057 or contact the ABA travel agency at 1-800-621-1083.

Judicial Independence Resolution

Co-sponsored by Section

by Ann Marshall Young*

At the August 2001 annual meeting, the House of Delegates adopted Resolution 101B, relating to the independence of the administrative judiciary. The resolution was proposed by the National Conference of Administrative Law Judges (NCALJ) and co-sponsored by our Section.

The resolution urges federal, state, local and territorial governments to do two things:

- First, to hold members of the administrative judiciary accountable under appropriate ethical standards adapted from the *ABA Model Code of Judicial Conduct* (1990), “in light of the unique characteristics of particular positions in the administrative judiciary.” The 1990 ABA Model Code has, as the report states, served for over a decade as a benchmark for judicial conduct that is appropriately independent, impartial and responsible. The quoted language comes from a footnote to the 1990 Model Code that addresses the applicability of the code to the administrative judiciary.

- Second, to provide that any individualized removal or discipline of a member of the administrative judiciary occur only after an opportunity for a hearing under the federal or a state administrative procedure act before an independent tribunal, with full right of appeal.

The resolution defines “administrative judiciary” as including “all individuals whose exclusive role in the administrative process is to preside and make decisions in a judicial capacity in evidentiary proceedings,” but specifies that “agency heads, members of agency appellate boards, or other officials who perform the adjudicative functions of an agency head” are not included in the definition. As noted in the report accompanying the resolution, this provision is not intended to exclude those who may have limited, incidental duties in addition to judicial responsibilities, but rather to recognize the differing roles of those in major policy-making positions.

The resolution addresses the “public interest in independent, impartial and responsible decision-making in the adjudication process,” whatever the forum or title of the adjudicator (ALJ, judge, administrative judge, hearing examiner, etc.). As the report states, “in order to further public trust in the legal system, it is necessary that the

administrative judiciary be held accountable” for decision-making characterized by these qualities, especially given that public respect for government and the law has been said to depend as much or more on how fair the process is as on substantive outcomes.

The resolution has the potential to affect many members of the federal administrative judiciary, but may have even greater significance in the states. There are about 2000 members of the administrative judiciary at the federal level who are not ALJs, and the administrative judiciary in the states is certainly many times larger.

The particular vulnerabilities of the administrative judiciary has led many observers to emphasize the need to shore up the independence of its members. This need is also illustrated in recent case law involving dismissals of members of state administrative judiciaries arguably for reasons related to outcomes of case decisions. See *Perry v. McGinnis*, 209 F.3d 597 (6th Cir. 2000); *Harrison v. Coffman*, 35 F. Supp. 2d 722 (E.D. Ark. 1999), 111 F. Supp. 2d 1130 (E.D. Ark. 2000). These are actions which can create a chilling effect on the kind of fair decision-making the resolution addresses.

By urging governments to adopt provisions that provide hearing rights prior to adverse action against any member of the administrative judiciary, the resolution effectively supports extension of the kind of protection already accorded federal APA ALJs and some other members of the federal and state administrative judiciaries, to other adjudicators who are currently, in effect, at will employees. And by urging that all members of the administrative judiciary be held accountable to appropriate ethical standards, the resolution recognizes that “judicial independence” means more than just independence from adverse actions against such members that might compromise their independent decision-making. It incorporates the principle that any individual who adjudicates disputes must, in the *public* interest, be held accountable to appropriate ethical standards directed at ensuring decision-making that is independent of bias, conflicts, and other factors that can compromise responsible and impartial decision-making in less tangible ways, often from within rather than as a result of actions by others.

With passage of the resolution, members of the public, the bar, and the administrative judiciary nationwide will be able to rely on its provisions with the authority of the ABA behind them. ◆

*Administrative Judge, U.S. Nuclear Regulatory Commission. All opinions expressed in this article are her own and do not necessarily reflect the opinions of her employer or any other persons or organizations.

by Michael Asimow*

State Incorporation of Future Federal Action Is Invalid Delegation of Legislative Power¹

State agencies participating in joint federal-state regulatory or benefactor programs are frequently required to follow federal regulations. But this poses a serious practical problem since federal rules change constantly. Can a state's statute or regulation incorporate by reference future federal regulations—or does this violate the rule prohibiting the delegation of legislative power to agencies?

Proponents of the view that it is illegal to delegate state legislative power to the future actions of a federal agency point out that a state would have no ability to check or control the regulatory action of the federal agency. Opponents of this view say that there is no real alternative; the states cannot amend their statutes or regs every time a federal agency changes its regs. Moreover, the state is protected by the fact that the federal agency must provide notice and comment procedure.

A Michigan appellate court casts a vote for the view that such a statute unconstitutionally delegated legislative power to a federal agency. The statute in question was a tort reform law that excluded a drug from liability for defective design if the FDA approved the drug in the future. M.C.L. § 600.2946(5). *Taylor v. Gate Pharmaceuticals*, 2001 Westlaw 1526395 (Mich. App. 2001), states that the law “places the FDA in the position of final arbiter with respect to whether a particular drug may form the basis of a product liability action in Michigan. Regardless of the expertise the FDA possesses in the area of drug evaluation, specifically regarding safety and fitness determinations, this is unacceptable. Michigan retains no oversight of this federal agency, it cannot check the exercise of its delegated power with standards of any precision and, due to the nature of science and the FDA's processes of approval and withdrawal of the same, an ever evolving list of drugs will be excluded as bases of liability actions.”

Due Process in Private Hospitals²

Only government, not the private sector, must provide due process. Nevertheless, California case law calls for

* Professor of Law, UCLA Law School; Co-Chair, State Administrative Law Committee; Reporter for Adjudication, APA Project.

¹The information for this article was provided by Professor Jim O'Reilly, U. of Cincinnati Law School.

²The information for this article was provided by Professor Gregory L. Ogden, Pepperdine Univ. School of Law.

extensive due-process-like protections for physicians who are excluded from private medical societies, private hospital staffs, or even from some HMOs. By statute, adverse decisions by private hospitals can be taken only after a peer-review process that is far more protective to the physician than anything due process would require of a government body. Business & Professions Code §§809 et seq. specify detailed, mandatory standards of notice, document discovery, adversarial hearings, and neutral decisionmakers.

In *Unnamed Physician v. Trustees of St. Agnes Medical Center*, 113 Cal.Rptr.2d 309 (2001), the California Court of Appeal considered a case arising under these statutes. A physician whose surgical privileges would be abridged by proposed private hospital action sought mandamus to stop a pending peer-review hearing. The hospital believed the physician's patients had a much higher rate of post-operative infection than normal. The physician claimed that the hospital's bylaws failed to meet statutory standards relative to notice and discovery and he sought immediate judicial relief. He managed to avoid the normal rule of exhaustion of remedies but was denied relief on the merits (largely because the hospital amended its bylaws in response to the suit). Tens of thousands of dollars in legal fees and months later, the doctor is still practicing and the administrative process remains to be exhausted.

The fundamental issue raised by cases like *Unnamed Physician* is whether the legislature has gone too far in the direction of the protection of private physicians and against the interests of patients and private hospitals. Procedures of the exacting nature called for by the statute are rigid, slow and costly. Is this the best way to deploy precious health care dollars and protect patients from inept physicians?

Recouping Georgia Medicaid Overpayments—Now What?³

When the Georgia Division of Medical Assistance [“DMA”] claims that a healthcare provider (usually a physician or a dentist) has overcharged the program, the provider must pay back the overcharge and file an administrative appeal. Such cases are heard de novo before an ALJ of Georgia's central panel. If the ALJ rules in favor of the provider, the DMA rules do not provide DMA with any right of appeal from the ALJ's

³The information for this article was provided by Myles E. Eastwood, chair of the Membership Committee and vice chair of Defense & National Security Committee.

decision. Apparently, DMA also cannot seek judicial review of the decision.

The law provides for no interest on an overpayment nor for any payment by DMA of the provider's costs and expenses. Moreover, if DMA fails to repay the overcharge after losing the ALJ decision, it is not clear how the provider can get his money back since the law contains no explicit waiver of the state's sovereign immunity. It may be that the only remedy is a mandamus action in Superior Court.

State Law Committee Wants You to Answer a Survey⁴

The State Administrative Law Committee is gathering information about administrative law in the states from people who know what is actually happening. If you're experienced in administrative law and practice in your state, the Committee needs your participation. It would like you to 1) fill out the survey yourself, and 2) contact the chair of your State Bar's Administrative Law Section/Committee, Public Law Committee and/or Government Lawyers Committee to ensure they have filled out the survey.

The best way to fill it out the survey is to go to www.abanet.org/adminlaw/state_adminlaw_survey.html. If that does not work drop Ed Schoenbaum an e-mail asking that it be sent as an attachment.

The Committee will compare the perspectives of the

⁴The information for this article was provided by Edward J. Schoenbaum, Co-Chair, State Administrative Law Committee.

state bar chairs with those of state administrative law judges and others who fill it out. We want a good mix of private practitioners, government attorneys, academicians, ALJs, and judicial branch judges. The survey is designed to take only ten minutes to complete. It is conducted in cooperation with the ABA Judicial Division's National Conference of Administrative Law Judges (NCALJ) and the National Association of Administrative Law Judges (NAALJ).

Feel free to contact Judge Ed Schoenbaum via e-mail at edschoen@juno.com or phone at 217-524-7836 with any suggestions.

Recent Articles

Blattenberger, Andrew L. Comment. *Bored of Claims? ... Try Reading "A Practitioner's Guide to the Pennsylvania Board of Claims,"* 19 J.L. & COM. 295 (2000).

Wilson, Martin M. *Administrative Law*. 53 MERCER L. REV. 81 (2001).

Balancing Administrative Law in North Carolina: A Collection. 79 N.C. L. REV. 1569 (2001). Foreword, 79 N.C. L. REV. 1569; Daye, Charles E., *Powers of Administrative Law Judges, Agencies, and Courts: an Analytical and Empirical Assessment*, 79 N.C. L. REV. 1571; Mann, Julian, III, *Administrative Justice: No Longer Just a Recommendation*, 79 N.C. L. REV. 1639; Miller, Brad, *What Were We Thinking?: Legislative Intent and the 2000 Amendments to the North Carolina APA*, 79 N.C. L. REV. 1657.

Keane, Alice D., *Administrative Law*, 51 SYRACUSE L. REV. 191-207 (2001). ◆

Council Capsules *continued from page 3*

Council Capsules, Uniform Mediation Act, ADMINISTRATIVE & REGULATORY LAW NEWS, Winter 2002). A recommendation to amend the Animal Welfare Act to provide for citizen suits was withdrawn on the objection of this Section and the Section of Science and Technology Law. Other resolutions passing the House that were either supported or opposed by this Section are as follows.

Resolution on Military Tribunals

After an eloquent and moving address by this Section's former House delegate, U.S. Solicitor General Theodore Olson – whose wife Barbara, long active in this Section, perished during the September 11 attacks – the House narrowly passed a resolution in line with the recommendations of the ABA Task Force on Terrorism and the Law regarding President Bush's military order of November 13, 2001, providing for trial of noncitizen terrorists by military

commission. (See the article in this issue discussing: the President's order, the task force report, this Section's program on both and the resolution adopted by the House).

Olson and others sought to postpone as premature, and unnecessarily restrictive of the President's prerogative, any formal statement by the ABA before the Secretary of Defense had issued the rules that will govern detention and trial under the President's order. Proponents, on the other hand, argued that this would be the only opportunity to formally participate in the debate before the outcome was decided.

Delegates Gellhorn and Cass reported afterward that amendments they and others suggested, although ultimately defeated, "may have helped shift discussion from sweeping statements about normal legal process and human rights to a more nuanced discourse on how best to balance interests of national security and civil liberties."

Resolution on Social Security Reform

Delegates Gellhorn and Cass reported after the meeting that the resolution considered by the Council at its

Midyear Meeting urging enactment of “legislation protecting social security recipients from theft of their funds by organizational representatives” was adopted by the House after the Senior Lawyers Division accepted this Section’s amendment to prevent unjust enrichment “by limiting the federal government’s indemnity to situations where the beneficiary was ‘not otherwise reimbursed.’”

Resolution on Judicial Elections

Delegates Gellhorn and Cass reported that the resolution considered by the Council at its Midyear Meeting recommending “that states which elect judges in contested elections should consider financing such elections subject to a ‘set of [good practice] components,’” was adopted by the House “after the sponsors accepted the suggestion by [this Section] and others that the recommendation reaffirm the ABA’s commitment to merit selection of judges.”

Membership Report

Membership and Outreach Committee Chair Myles Eastwood reported Section membership had risen to approximately 9800 and that this would continue to qualify the Section for two representatives in the House of Delegates. He said the committee will focus on tracking law students, reviewing membership correspondence and recruiting from other ABA entities, such as the Government and Public Sector Lawyers Division.

Publications Report

Committee Chair Randy May reported robust sales for the Section’s books, which include the *ADR Deskbook*,

Guide to Federal Agency Rulemaking, *Federal Administrative Procedure Source Book*, *Realists’ Guide to Redistricting*, previous issues of *Developments in Administrative Law and Regulatory Practice*, and *The Lobbying Manual*.

Looking ahead, May said that Cass Sunstein’s book, *The Cost-Benefit State*, had gone to publication. He also said *Developments in Administrative Law and Regulatory Practice, 2000-2001*, would be out soon and thanked *Developments* editor Jeff Lubbers for another job well done. It will be made available on the Section’s web site for student members.

The book on Medicare coverage, decision-making, and appeals edited by Eleanor Kinney, vice-chair of Publications and Health and Human Services Committees, should be in print by summer. A revised monograph on the Sunshine Act by Klitzman, Edles and Berg, should be available by the end of the summer.

The Blackletter Statement of Administrative Law will appear in the next issue of the Administrative Law Review and will be sent to all federal judges. The Adjudication portion of the Blackletter Statement, supported by extensive commentary, prepared under the direction of Reporter Michael Asimow, will be published as a separate book. Publication is anticipated later this year.

Books in the planning stage include one covering the administrative law of multinational organizations and comparative administrative law of our nation’s major trading partners, proposed by Kathleen Kunzer, co-chair of the International Law Committee and vice chair of the Rulemaking Committee, and one on ombuds, proposed by Sharan Levine, chair of the Ombuds Committee. ◆

Chair’s Message *continued from page 2*

meeting in Richmond. There is no guarantee of any field trips to Brussels, but the thought that there might have to be on-site inspections has crossed the minds of some people. And if Leonard Leo has any clout, we will explore comparative vineyards during the Richmond visit.

The role of cost-benefit analysis in the delivery of

health care remains obscure despite, now, two panels on the subject organized by the Ad Law Section. The last panel, in Philadelphia at the winter ABA meeting, produced a couple of brilliant papers and managed to put very few of the attendees to sleep late on a Friday afternoon. But much more needs to be done to understand the economics of health care generally, and prescription drugs specifically, before we can expect a Cass Sunstein book on the subject. ◆

Arbitrary & Capricious Deregulation *continued from page 5*

(1978), which barred courts from imposing extra procedural devices beyond those expressly listed in the APA. The pertinent substantive review case was *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), which said courts had to undertake a thorough, probing, in-

depth review – a standard of review that sounded like hard look but which the *Overton* Court called narrow.

So, said Garland, in 1983, one of the questions before the *State Farm* Court was whether “the substantive element of judicial review of agency action under the APA was the same as the minimum rationality standard applied to judicial review of legislative action under the Constitution.” Another question was whether for the purposes of judicial review, deregulation should be

treated the same as regulation or whether it should be regarded as merely a return to the status quo, a type of inaction entitled to deference.

The *State Farm* Court held that deregulation should be treated the same as regulation and endorsed the DC Circuit's hard look doctrine, rather than the minimum rationality standard applied to legislation. *Vermont Yankee* was not relevant because requiring an agency to explain its consideration of alternatives did not impose additional procedural requirements.

Garland explained the Court then applied the quasi-procedural requirements to the agency's action and found that it had failed to adequately explain its conclusion that detachable belts would not substantially reduce the death toll and failed to consider non-detachable belts or airbags. "And if the problem was that there was a lack of evidence about usage rates of the new non-detachable belts, why not search for further evidence before rescinding the rule?"

"With respect to substantive review," said Garland, "the Court also applied that element to the hard look, although not at all as expressly. An agency's explanation, the Court said, must not run counter to the evidence before the agency and must demonstrate a rational connection between the facts found and the choice made. That is now the mantra of the definition of arbitrary and capricious."

Garland then explained that the Court found no direct evidence in support of the agency's finding that detachable belts cannot be predicted to yield a substantial increase in usage since detachable belts continue to provide protection unless and until detached. Moreover, if detachable belts really were useless, it seemed unreasonable to the Court, said Garland, to rescind the rule, rather than simply forbid them, leaving the automobile manufacturers only two choices: non-detachable belts or airbags.

Garland closed by noting the Supreme Court recently issued an opinion in *United States Postal Service v. Gregory*, 122 S. Ct. 431 (2001), that described the arbitrary and capricious standard as "extremely narrow."

Jot by Jot

Ernie Gellhorn structured his remarks to mostly track that portion of the Black Letter Statement on the Scope of Judicial Review, recently adopted by the Section ([see http://www.abanet.org/adminlaw/apa/home.html](http://www.abanet.org/adminlaw/apa/home.html)), covering Review of the Exercise of Agency Discretion.

The Statement begins by explaining that a court may set aside an agency action as an abuse of discretion (alternatively known in APA parlance as the "arbitrary and capricious" test), *see* APA § 706(2)(A), on any of several grounds. In practice, application of these grounds varies according to the nature and magnitude of the agency action. Thus, a court will typically apply the cri-

teria rigorously during judicial review of high-stakes rulemaking proceedings (a practice commonly termed "hard look" review), but much more leniently when reviewing a routine, uncomplicated action. The Statement then describes ten factors that weigh on a court's overall determination of whether the agency's action is arbitrary, capricious, or an abuse of discretion.

The first factor, which asks whether the agency ignored an element required to be considered or considered an element not allowed to be considered, is probably best understood as a component of a court's legal analysis.

Under the second factor, whether the action bears a reasonable relationship to statutory purposes or requirements, Gellhorn said this gets a lot of attention when courts review statutory interpretation but not when they consider whether a decision was arbitrary and capricious.

Moving to the third factor, whether the asserted factual premises for the action withstand scrutiny, Gellhorn said the first thing to ask is what are those premises. According to Gellhorn, agencies frequently do not identify them. "So my question always when I am preparing a brief on this is, if I were an agency administrator, what facts would I need to make this decision and does the record show support for it." Gellhorn said one of the unanswered questions here is whether this factor only applies to adjudicative facts or whether it applies to legislative facts, as well.

Gellhorn finds most important the fourth factor, whether the action is unsupported by any explanation or rests upon reasoning that is seriously flawed. A flawed chain of reasoning "is perhaps the most commonly stated basis for reversal of an agency action." But Gellhorn complained that too often courts merely state this as a conclusion without really saying how the agency's chain of reasoning was flawed.

The fifth factor, whether the agency failed to reasonably consider an important aspect of the problem, was one of the shortcomings on which the *State Farm* Court relied. Gellhorn said "The question here is, did the agency say and do enough. Agencies may tend to protect themselves now by giving a statement of basis and purpose that goes on for several hundred pages. On the other hand, we do rely heavily on that rationale, and that is perhaps the easiest place in which an agency's analysis can be attacked."

The sixth factor, whether the agency's action is inconsistent with prior agency policies or precedents without explanation, also was at work in *State Farm*. Said Gellhorn, "the agency had changed ground but not adequately explained why they were changing their course."

Failure to consider important alternatives, the seventh factor, figured prominently in the *State Farm* decision. Gellhorn noted the ongoing debate over the desirability or appropriateness of cost benefit analysis, but suggested that this "has always been implicit inrea-

soned decision making.”

Gellhorn said an important dimension of the eighth factor, failure to consider substantial arguments or respond to relevant and significant comments, is the need for agency disclosure of the data upon which they are relying to justify the result as reasonable and to ensure that the public comment period is meaningful. “If you don’t know what you are responding to, if you don’t know the studies that the agency relied upon, you can’t bring in effective counter-studies or identify the flaws of the studies upon which they are relying.”

Gellhorn briefly summarized the final two factors without further comment.

Gellhorn closed by arguing that after last term’s *Whitman* case parties facing a statute with no real criteria defining and limiting agency action should challenge the agency to supply those limits itself. He also offered his conclusion that the arbitrary and capricious test provides a certain discipline: “If the agency knows

that its actions may be challenged on a substantive basis, as well as a procedural basis, I believe it acts differently.”

Conclusion

Cost benefit analysis is a powerful tool for making reasoned policy choices, if done properly. But there is the rub. *State Farm* says excluding relevant considerations is not proper, but it is not always clear which consideration the court will consider so relevant as to overturn an agency’s decision because it is missing from the agency’s analysis or received inadequate weight. Moreover, data quality, modeling assumptions, and regulatory philosophy all affect the final result of any cost-benefit analysis and offer additional opportunities for second guessing the agency. And that, it turns out, is the irony of *Whitman*: that a statute which constricts the set of relevant factors by precluding consideration of cost potentially creates more discretion in the agency while perhaps narrowing the grounds for remand. ◆

Supreme Court

News *continued from page 7*

in business, and Jericol had never been a signatory. The Commissioner, however, concluded that Jericol was a successor-in-interest to Shackelford and therefore could be treated as if it were a signatory. The difficulty with this position was the language of the statute, because the Act not only defined a signatory (which by its terms would not include successors-in-interest) but also “related persons” to signatories who could also be assigned responsibility for the signatory’s retirees, and Jericol did not fall within the terms of the defined “related persons.” Finally, the Act made successors-in-interest to *related persons* liable for the signatory’s retirees. Thus, under the literal terms of the Act, a successor-in-interest to a related person of a signatory could be assigned retirees of the signatory, but a successor-in-interest to the signatory itself could not be assigned the signatory’s retirees.

The Court in an opinion by Justice Thomas concluded that the statute was unambiguous – end of case. Justice Stevens, joined by Justices O’Connor and Breyer,

dissented. He argued that this literal interpretation of the statute worked absurd results, and the legislative history supported the Commissioner’s interpretation that a successor-in-interest of a signatory could be assigned the signatory’s retirees. In response, the majority noted that the Act had been the result of a hard-fought political compromise between competing factions, and that, even if it appeared at first blush that the Act could have absurd consequences, there were plausible explanations for why Congress might have made the compromise it made. In an sentence the Court rejected use of *Chevron* deference because the statute was unambiguous. In concluding, the Court said:

We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.

What is perhaps notable about all three of these cases was the virtual absence of any *Chevron*, *Skidmore*, *Christensen*, or *Mead* discussion. To a remarkable degree the Court either relied on plain meaning or ended up agreeing with the agency without any specification of deference. ◆

Military Tribunals

continued from page 9

the attendant difficulties of obtaining evidence and preserving the chain of custody – do not arise in that situation. He also believes a state of war is sufficient for convening a military commission abroad but not at home. For that, you need a declaration of war – which

we do not have in this case.

Judge White, on the other hand, questions the use of domestic courts to try international terrorism cases and believes the military justice system is capable of yielding fair trials.

Philbin, speaking in his personal capacity, disagreed with those who find the order too broad, saying the order does not define offenses but merely offenders

who may be prosecuted for cognizable law-of-war violations and suggesting the requirement that the President personally decide who will be tried under the order exhibits an intent to limit its reach. He also is confident DOD will promulgate rules that ensure a full and fair trial as required by the order.

Before the program closed, Kevin Barry commented on the BADC's recommendation that the ABA adopt a formal position on the President's order. He said the recommendation was animated by a desire to see fundamental fairness reflected in commission composition, procedure and review.

The ABA Resolution

With help from cosponsors The Association of the Bar of the City of New York, The Bar Association of San Francisco, the Section of Individual Rights and Responsibilities and the Beverly Hills Bar Association, the BADC's four-paragraph resolution supporting the President's order but calling for fundamental fairness, the use of rules governing courts-martial, and civilian review, was modified and expanded, resulting in a more detailed recommendation that included most of the recommendations of the ABA Task Force on Terrorism and the Law.

Looking Ahead

The President's order may be applied to two groups of prisoners already in U.S. custody: those detained in U.S. jails and those detained at Camp X-Ray on the U.S. naval base in Guantanamo Bay, Cuba. Trying the former in U.S. courts poses little additional risk. Trying the latter in U.S. courts would be like planting a lightning rod in the middle of the eighteenth green.

The former likely have habeas rights, and it now appears the administration will not attempt to abridge those rights, at least not in the case of permanent resident aliens.

But nonresident enemy aliens, captured and imprisoned abroad for offenses against laws of war committed outside the United States have no right to a writ of habeas corpus in a court of the United States.

Johnson v. Eisentrager, 339 U.S. 763 (1950).

A suit recently filed in the U.S. District Court for the District of Columbia asks the court to find that Camp X-Ray is on U.S. soil. But Judge A. Howard Matz of the U.S. District Court for the Central District of California recently ruled that Camp X-Ray is outside the U.S. because the land is leased from Cuba.

All of this suggests that the President's order should be scrutinized more closely as it applies to the Camp X-Ray detainees.

The rules applying to military commission trials should acknowledge that some of those detained at Camp X-Ray may have been merely defending their homeland. Indeed, the administration has announced

that some Camp X-Ray captives will enjoy rights consistent with the prisoner-of-war provisions in the Geneva Convention because they are Taliban soldiers, not al Qaeda gangsters. The protections enumerated in the ABA's resolution should be viewed with that in mind.

The rules also should recognize that all of these captives have been brought halfway around the world and therefore lack access to any evidence or witnesses that may be found in their own country. If the chief witnesses for the prosecution turn out to be fellow prisoners, the prospects will not be good for those who do not provide "state's" evidence.

Pitting prisoners against one another is a legitimate tactic for rooting out additional conspirators, but under the present circumstances, it will be exceedingly difficult to convince the rest of the world that these prisoners were treated fairly.

One way to enhance the appearance of fairness would be to craft rules that require more votes for conviction and sentence than the minimum permitted under the order. Much of the debate has centered on the need for making a unanimous vote a prerequisite for any death sentence. Reports in the media indicate the administration will yield on this point.

But what about conviction in the first place? And what of life sentences, or any other sentence? The order permits, but does not require, conviction and sentence on less than a majority vote. The secretary's rules need not settle for the minimum allowed.

Another avenue for improving fairness lies in granting meaningful access to counsel. One of the points raised by Judge White during the January 16 program was that defendants in the military justice system have access to counsel familiar with that system. Appointment of such counsel does not depend on indigence. The defendant is allowed to hire private counsel, as well. The two lawyers work together. The need for a similar appointment process here is patently obvious, and satisfying that need would do much to quell our critics.

Conclusion

The rules for detaining noncitizen terrorists and trying them by military commission have not yet been published as this article goes to press. They may be out before this article appears in print, mooted some (or all) of the issues identified in the task force report, the January 16 program, the ABA resolution, and this article. One important thing to remember as those rules are set in motion is that history will judge how the United States reacts to the September 11 tragedy, just as it has judged our internment of Japanese Americans in World War II. The outcomes of these trials do not depend very much on what few protections we afford the accused. Our place in history does. ◆

Recent Articles of Interest *continued from page 11*

push and pull government actors in one direction or another. A doctrine built around such understandings will offer no easy answers, but it will at least ask the right questions.

Randolph J. May, *The Public Interest Standard: Is it too Indeterminate to be Constitutional?*, 53 FED. COMM. L.J. 427 (2001). This article discusses the nondelegation doctrine that inheres in our constitutional separation of powers regime and it examines whether the congressional delegation of public interest authority to the FCC violates the nondelegation doctrine. Under today's jurisprudence, the article acknowledges that even a standard as vague as the "public interest" is not likely to be found unconstitutional. But it argues that even if the courts do not hold the public interest delegation unconstitutional, Congress should revise the Communications Act to set forth more specific guidance for the FCC. In today's environment of increasing "convergence," with competition emerging across communications sectors, Congress should fulfill its responsibility to establish fundamental policy for an industry that is such an integral part of the overall economy. Congress should not wait to possibly be compelled by the courts to replace the public interest standard with more specific legislative guidance. Instead, it should provide the FCC with a clear roadmap toward a deregulatory endgame consistent with a competitive marketplace.

Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NORTHWESTERN U. L. REV., Forthcoming, Available from the SSRN Electronic Paper Collection: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=283026. In statutory interpretation, judicial authority has long rested on the assumption that judges carry out Congress's policy choices rather than their own. The rise of the administrative state cast doubt on that assumption, however, by calling new attention to the leeway inherent in interpretation. Indeed, by the late-twentieth century the Supreme Court itself acknowledged that interpretation requires policy choices best left to political officials and used this observation to justify judicial deference to administrative interpretations of statutes. Having suggested that the policymaking discretion inherent in interpretation is best left to the political branches, however, the Court has never explained why judges should retain the important interpretive role they do. Judges and scholars

alike have overlooked a serious tension between the Court's rationale for deference and its retention of significant interpretive authority nonetheless. This tension has been rendered quite important by recent decisions that reinforce the Court's power over agencies and raise new questions as to why the Court should retain its historical control over statutory interpretation even after acknowledging that interpretation entails more than fidelity to legislative instructions. This article seeks to resolve this tension in the Court's jurisprudence by constructing a defense of judicial power that does not depend on judges being faithful agents of Congress. The article defends judicial power based on the judiciary's role in the constitutional structure and its internal institutional attributes and uses this structural and institutional account of the judicial function to critique the Court's recent decisions on deference.

Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: a Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001). Cost-benefit analysis is analyzed using a model of agency delegation. In this model an agency observes the state of the world and issues a regulation, which the President may approve or reject. Cost-benefit analysis enables the President to observe the state of the world (in one version of the model), or is a signal that an agency may issue (in another version). The roles of the courts, Congress, and interest groups are also considered. It is argued that the introduction of cost-benefit analysis increases the amount of regulation, including the amount of regulation that fails cost-benefit analysis; that the President has no incentive to compel agencies to issue cost-benefit analysis, because agencies will do so when it is in the President's interest, and otherwise will not do so; that Presidents benefit from cost-benefit analysis even when they do not seek efficient policies; that agencies and their supporters ought to endorse cost-benefit analysis, not resist it; and that cost-benefit analysis reduces the influence of interest groups. Evidence for these claims is discussed. Finally, it is argued that courts should force agencies to conduct cost-benefit analyses in ordinary conditions, but that they should not force agencies to comply with them.

Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001). This article challenges the influential claim that primary responsibility for environmental regulation should be assigned to the federal government because public choice pathologies cause systematic underrepresentation of environmental interests at the state level. The article first disputes the theoretical argument by advocates of federal regulation who claim that environmental groups are less disadvantaged at the federal level because of economies of scale in organization. The

relevant question, instead, concerns the relative effectiveness of environmental and industry groups at the federal and state levels. The article casts doubt on the plausibility of the conditions under which federal regulation systematically benefits environmental groups. More generally, the public choice account on which supporters of federal intervention rely views environmental regulation as the product of a clash between environmental interests seeking more stringent standards and industrial interests seeking less stringent standards. This account, however, has little explanatory power. More compelling public choice theories do not point in the direction of federal intervention. Professor Revesz then musters empirical data to challenge the view that states are ineffective environmental regulators. He shows that before the era of extensive federal involvement, which began in 1970, states had in fact made great strides with respect to those air pollution problems that were reasonably well understood. Moreover, at present, states are undertaking significant environmental protection measures that go well beyond what the federal government requires. The article attempts to explain why some states have taken the lead with respect to protective environmental measures, while the efforts of other states have lagged. By comparing the regulatory actions of the states with the voting records of their members in the U.S. House of Representatives, it suggests that the differences stem from different levels of preference for environmental protection rather than from public choice pathologies.

Peter L. Strauss, *Courts or Tribunals? Federal Courts and the Common Law*, ALA. L. REV., Forthcoming, Available from the SSRN Electronic Paper Collection: http://papers.ssrn.com/paper.taf?abstract_id=296031.

Every Justice, save perhaps Justice Breyer, has recently subscribed to an opinion raising questions in one or another context about whether federal courts can appropriately exercise common law law-making functions that had, until these questions began to appear, been characteristic of all American courts. To invoke a special class of “federal tribunal” whose actions are not to be confused with those of common law courts suggests broader implications than the long-familiar debates about *Erie RR. Co. v. Tompkins*, or more recent contentions over when, if ever, it is appropriate to infer privately enforceable judicial remedies in aid of federal statutes; this seems to be about the nature of the institutions, not elements of their jurisdiction or prudential rules for the exercise of their powers. This paper, given as the Daniel Meador Lecture at Alabama Law School in the fall of 2001, finds no historical or constitutional basis for these doubts, insofar as they concern interstitial law-making on subjects within Congress’s legislative competence. Indeed, it argues, drawing on extensive analysis of several settings and cases,

such functions have particular importance where state court common law judgments can impair the implementation of federal law. The doubts, it suggests, are more properly understood as reflecting a certain discomfort with the changing character of the judicial function in modern times. High court judges today choose the questions they will decide, in a framework that encourages them to favor the legal system’s need for definition over party claims for justice as the basis for choice; and from an enormous volume of potential targets for decision that puts the discipline of common law processes in question. The discomfort is widespread, and it is perhaps more instinctual than intellectual, a realization that the ground has shifted without yet quite knowing what to do about it. In repeated arguments about precedent, and perhaps unexpected adherence to it, one can find expression of the tensions between the prior model of litigant-required judging, and the new powers of policy-directed choice. The certiorari function brings forward the law-making side of judging, and at the same time reflects a weakening of the possibilities for hierarchical control within the judiciary. Our common-law premises cannot explain either development. In groping for an understanding and accommodation, the Justices appear often enough to be behaving in the familiar, unconscious mode. In the unspoken battle between agenda-setting and judging, we should all hope judging wins.

Collections

Getting Beyond Cynicism: New Theories of the Regulatory State, 87 CORNELL L. REV. No. 2

(2002). Cynthia R. Farina & Jeffrey J. Rachlinski, *Foreword: Post-Public Choice?*; Jonathan R. Macey, *Cynicism and Trust in Politics and Constitutional Theory*; Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, But Throw Out That Baby*; Terry M. Moe, *Comment: Cynicism and Political Theory*; Saul Levmore, *Comment: From Cynicism to Positive Theory in Public Choice*; Yvette M. Barksdale, *Comment: Cynicism, Phenomenology, and the Problem of Paradox: Dilemmas of Public Law Discourse*; David B. Spence, *A Public Choice Progressivism, Continued*; Gregory S. Alexander, *Comment: Playing with Fire*; Lisa Schultz Bressman, *Disciplining Delegation After Whitman v. American Trucking Ass’n*; Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*; Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*; William N. Eskridge, Jr. & John Ferejohn, *Comment: Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*; Lisa Henzerling & Frank Ackerman, *Comment: The Humbugs of the Anti-Regulatory Movement*; Samuel Issacharoff, *Comment: Behavioral Decision Theory in the Court of Public Law*; Jerry L. Mashaw, *Essay: Deconstructing Debate, Reconstructing Law*; Peter L. Strauss, *Essay: Educating Citizens*. ◆

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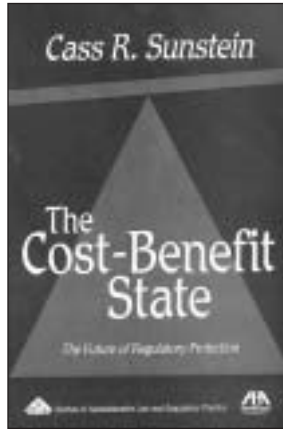


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By Cass R. Sunstein

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