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Chair’s Message

William V. Luneberg

Looking to the future, Congress and the Obama Administration have adopted or are in the process of adopting reform measures that should be a major focus of the Section’s attention for years to come, including the Patient Protection and Affordable Care Act, the Health Care and Education Reconciliation Act of 2010, the Senate-passed Restoring American Financial Stability Act of 2010, and the Obama Administration’s Open Government initiatives. Likely immigration reform and various legislative and regulatory changes to address the challenges of global warming and to provide adequate (and, hopefully, environmentally friendly) energy supplies will no doubt raise additional issues for us in coming years. I am fully confident that the Section will rise to the challenge, as it always has, to provide valuable insights to government leaders with regard to the administration of all these new programs, as well as guidance (via CLE programs and books) to both Section members and persons outside the ABA with respect to the changing legal landscape.

Coincidentally, in reaction to ABA budget shortfalls (due in part to loss of membership), the leadership of the Association has in recent months been focusing on various aspects of the ABA’s operations that may ultimately assist us in our mission. Areas of Association attention have included what attracts (and keeps) members and increasing non-dues revenue. This has resulted in proposals to redesign the Association’s webpage, to make ABA Publishing a profit center (meaning that it will not publish books that will not make money), and to restructure the operations of the ABA’s CLE Center to avoid losses and to better service entities within the ABA in offering their distinctive programming. This is not the place to examine those initiatives in detail. At this writing, the Board of Governors of the Association is still considering the direction of some of the crucial changes. Suffice it to say that some proposals, particularly those relating to the Center’s control of the Sections’ CLE offerings, have been very controversial, requiring modifications to ensure the continued autonomy of Section programming while at the same time improving the services offered by the Center if Sections choose to utilize them. While I suspect many members of this Section don’t spend a lot of their time following internal ABA reorganizations, the website, publishing, and CLE initiatives deserve your attention given their potential impact on the benefits this Section can offer to its members and how effectively we can recruit new members.

Parallel to the broader Association focus on membership and revenue, the Section’s Strategic Planning Committee has formulated a draft three-year plan that was discussed at the Spring Meeting at Nemacolin Woodlands on May 16. The four pillars of the draft plan are: 1) to enhance the Section’s role as the leading source of expertise in administrative law and regulatory practice; 2) to increase Section membership by a minimum of 800 new lawyers and 160 new law student members each year for the next three years; 3) to increase Section non-dues revenue by 25% over the next 3 years though increased publications, additional CLE programming, and fundraising; and finally 4) to actively develop new leaders to serve the Section in the future. Final action on that plan will be taken in San Francisco at the ABA’s Annual Meeting.

Over the past several months, the Section has been fortunate to enjoy very successful programming, not only an enormously successful Homeland Security Institute, but also stand-alone offerings that have dealt with regulatory compliance, the EEOC’s Office of Federal Operations, and agency Inspector Generals—programs made possible by the hard work of, respectively, Joe Whitley, Jennifer Alisa Smith, Joel Bennett, and Nancy Eyl. Hopefully, the trend of increased CLE offerings will continue into the summer, fall, and beyond. Meanwhile, the Publications Committee is actively seeking proposals for new books that will serve the needs of administrative practitioners, particularly books focused on specific areas of administrative law and regulatory practice. You are encouraged to contact the co-chairs of that committee, Bill Jordan, jordan@uakron.edu, and Anna Shavers, ashavers@unl.edu, with ideas you have for possible Section publications.

Finally, I should note that Paul Verkuil, former Section Chair, was confirmed as Chairman of the newly reauthorized and funded Administrative Conference of the United States. Given Paul’s long and very productive association with the Section, we are hopeful that both ACUS and the Section can in the future assist each other in a variety of ways in carrying out their respective goals of serving the public interest.

In closing, I hope you are all enjoying a summer that allows at least some time for relaxation and that I will see you at the Section’s meeting in San Francisco in August to thank you personally for your continued interest in and service to the Section. And, as always, I want to thank Anne Kiefer and her staff, Meghan Kievel and Rachel Rosen, for their countless hours of work to ensure the Section’s success.
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Section News and Events

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DeShaney and “State-Created Danger”: Does the Exception Make the “No-Duty” Rule?

By Laura Oren*

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he child beaten into a coma in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), was a toddler when the state of Wisconsin first learned that his father was abusing him. As it was required to do by state law, the police department referred the complaint it received to the County Department of Social Services (DSS), which had the sole authority to investigate all child neglect or abuse reports. By law, DSS had to initiate the investigation within 24 hours of receiving the complaint and to reach a conclusion about whether abuse was indicated within 60 days. It was the only state agency that could take action, including referral to court, if it found cause to believe abuse had occurred. Although DSS was obligated to investigate the complaint, it did not do so. Instead, when Joshua’s father denied the charges, DSS simply closed the file. Subsequently, however, the little boy arrived with further injuries at a hospital emergency room where he was identified as a victim of child abuse. The hospital made another referral to DSS. The agency placed him in the temporary custody of the hospital while they investigated. Despite indicia of abuse and its own conclusions recorded in internal reports, the state returned Joshua to his father’s custody. In exchange for this, Joshua’s father promised the agency to do certain things to ensure his son’s protection, such as keeping him in a Head Start program where others could monitor his welfare in a public space. However, Joshua’s father did not follow through on those assurances. DSS specifically promised to oversee the boy’s welfare, but it did a terrible job. Over the next fourteen months, Joshua repeatedly arrived at hospital emergency rooms with suspicious injuries. DSS received additional complaints, observed cigarette burns on the child, and became convinced that Joshua was in grave danger. However, DSS did not remove him from the home or take even minimal other steps to protect him. Finally, the boy again arrived at a hospital ER, where emergency surgery saved his life but could not reverse the effects of longstanding trauma to the brain. He lost nearly half the tissue in his brain. During the entire period during which DSS was aware of the danger to Joshua and had undertaken to oversee his welfare, the caseworker also did not alert his non-custodial mother (who lived out of state at an address known to DSS). When the mother finally was called, the caseworker told her “I just knew the phone would ring some day and Joshua would be dead.”

A narrow majority of the United States Supreme Court chose the DeShaney case to announce a doctrinaire rule of substantive due process that precluded any constitutional remedy for Joshua and for so many others. Although the Court acknowledged lines of cases recognizing affirmative duties to protect individuals from harm inflicted by private actors under certain circumstances, the general rule was that “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. … In the substantive due process analysis, it is the State’s affirmative act of restraining the individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the ‘deprivation of liberty’ triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.” The Constitution therefore does not impose any affirmative duties of “governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. … If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.” DeShaney, 489 U.S. at 195–97 & 205.

I have argued elsewhere that this lumping of child protection with all other types of “governmental aid” rendered to adults in what the Court called the “free world” is particularly inapposite. Every state has deliberately decriminalized family violence directed against children, substituting instead social service agencies like Wisconsin’s DSS. In diverting most child abuse cases away from the criminal justice system and into child protection agencies, the state affirmatively uses its power to put children in a very different position from any other victim of assault. The justification for this less-than-equal treatment is that the alternative will protect children better. In light of this exchange, DeShaney was wrongly decided. Under the circumstances of that case, the state’s decision to impose a special legal status on vulnerable children should have given rise to a corresponding affirmative duty of protection under the Due Process Clause of the Constitution.

DeShaney, however, placed even child protection in the general category of what it labeled “government aid.” As a result, the case has come to stand for an equally general “no affirmative duty” rule.

continued on next page

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and is cited over and over in many different contexts. At the same time, however, in all circuits but the Fifth, appellate courts have found that dicta in the Court’s opinion implies two exceptions to the general no-duty rule—the so-called “special relationship,” and “state-created danger” caveats. By “special relationship” the DeShaney Court implied something other than the tort definition accepted by the Restatement but dismissed by its opinion as irrelevant to constitutional analysis. DeShaney, 489 U.S. at 197, 201-02. Cf. Restatement 3d Torts, §40. Rather, the Court focused on the question of custody, opining that “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” DeShaney, 489 U.S. at 199-200. This reasoning explained the prior results in cases such as Estelle v. Gamble, 429 U.S. 97 (1976) (ruling that the Eighth Amendment’s prohibition on cruel and unusual punishment requires the provision of adequate medical care to prisoners), or Youngberg v. Romeo, 457 U.S. 307 (1982) (holding that substantive due process requires that involuntarily committed mental patients be protected from danger by others or by themselves). DeShaney, however, did not explain in detail the full contours of the kind of “custody” that produces a constitutionally based “special relationship” imposing affirmative duties on the state to protect someone from private violence. See, e.g., DeShaney, 489 U.S. at 201 (reserving question of foster care).

The second exception, the so-called “state-created danger” doctrine, is the subject of this update. It nearly universal (but mostly theoretical) acceptance in the circuits derives from the following language in DeShaney:

While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father’s custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual’s safety by having once offered him shelter. Under these circumstances, the State had not constitutional duty to protect Joshua. DeShaney, 489 U.S. at 201.

With the exception of the Fifth, which refuses to take a clear position, each circuit has elaborated or adapted a test and found at least some circumstances under which a “state-created danger” might trump the general rule that the state has no affirmative duty to protect anyone from harm inflicted by private actors. These are situations that could be described as Judge Posner did in a pre-DeShaney case, where “the state puts a man in a position of danger from private persons and then fails to protect him.” Bowers v. DeVito, 868 E2d 616, 618 (7th Cir. 1982), cited in Kallstrom v. City of Columbus, 136 E3d 1055 (6th Cir. 1998).

As interpreted in virtually all of the circuits since the DeShaney decision, the state-created danger doctrine inquires whether the state actively put the victim in a worse position, making him or her more vulnerable to the private action that inflicted the injury. In addition to this concern with finding some “affirmative act” committed by a state actor, the tests also focus on the foreseeability of the danger to that particular victim, and on a heightened state of mind or degree of culpability of the state official. The Third Circuit, for example, embraced the following standard from Kneipp v. Tedder, 95 F3d 1199, 1208 (3d Cir. 1996) (police separated highly inebriated woman from her husband and left her alone to fall down embankment in the dark, suffering exposure, hypothermia, and brain damage):

1. the harm ultimately caused was foreseeable and fairly direct;
2. the state actor acted in willful disregard for the safety of the plaintiff;
3. there existed some relationship between the state and the plaintiff;
4. the state actors used their authority to create an opportunity that otherwise would not have existed for the third party’s crime to occur.

Later Third Circuit formulations substituted for “willful disregard” that “a state actor acted with a degree of culpability that shocks the conscience.” Bright v. Westmoreland County, 443 E3d 276, 281 (3d Cir. 2006).

The escalation from “willful disregard” to “shocks the conscience” in the Third Circuit echoes the Supreme Court’s repeated reliance both before and especially after DeShaney on the use of state-of-mind requirements to draw constitutional or Section 1983 lines, especially where failures to act are involved. These decisions reflect the Court’s desire to prevent the constitution from becoming, in its view, a “font of tort law.” Pre-DeShaney, the Court had already held that negligence could never violate the Due Process Clause of the Fourteenth Amendment. Daniels v. Williams, 474 U.S. 327, 328 (1986) (inmate’s slip and fall on pillow claim). The Daniels ruling provided a way out of the dilemma that the Court itself had created in its earlier decision in Parratt v. Taylor, 451 U.S. 527, 534 (1981), which had held that the Section 1983 statutory remedy contains no particular state-of-mind requirement. The Parratt majority had assumed that the “font of tort law” specter could be controlled by its requirement that “random and unauthorized,” i.e. unforeseeable, deprivations of property interests (such as the lost hobby kit that was the subject of the inmate’s claim in Parratt) were not actionable under §1983 unless the state first refused a post-deprivation tort remedy. Justice Powell’s concurrence, however, warned that governmental tort immunities in many states would leave far too many claims unaffected by this limitation. In Daniels, Justice Rehnquist

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2 I have written about the state-created danger doctrine in Safari Into the Snake Pit: The State-Created Danger Doctrine, 13 W&M. & Marry Bt. Rs. 1.139-91 (2005), and in Some Thoughts on the State-Created Danger Doctrine: DeShaney is Still Wrong and Castle Rock is More of the Same, 16 Temp. Pol. & Civ. Rs. L. Rev. 47 (2007). This article relies in part on the material originally published in those articles.
revisited that warning and found it justified, leading him to draw a constitutional line based on state of mind. In a companion case also involving a non-intentional failure to act, but arguably much more related to the kind of abuse of government power that should trigger constitutional protection, the Court merely reiterated its position; even the inattentive failure to protect an inmate from assault by another inmate did not cross the constitutional line unless something considerably more than simple negligence was involved. **Davidson v. Cannon**, 474 U.S. 344 (1986).

At virtually the same time it issued the decision in **DeShaney**, the Supreme Court also hung its hat on state-of-mind distinctions in a statutory interpretation of Section 1983 in a case raising the issue of when a municipal government could be held liable for its “failure to train” lower-level employees to perform admittedly constitutionally based affirmative duties. In **City of Canton v. Harris**, 489 U.S. 378 (1989), the Court conceded without cavil that jail personnel had affirmative duties to provide medical care for detainees in their facilities. Nonetheless, establishing the municipality’s liability under Section 1983 for its failure to train officers to recognize serious medical needs required proof of a heightened degree of culpability, that is, “deliberate indifference” to the necessity of such training.

After **DeShaney**, other cases continued the emphasis on heightened state-of-mind requirements as a way of distinguishing ordinary from constitutional torts and of staving off the feared flood of trivial lawsuits. State employees injured on the job by other state actors seemingly lost any claim to constitutional protection except under the most extreme circumstances. The Court ruled in **Collins v. Harker Heights**, 503 U.S. 115 (1992), that a failure to warn or to supervise properly did not implicate due process when a supervisor instructed a state employee to enter a sewer filled with dangerous gases, where he died. In the absence of any deliberate imposition of harm, or even knowledge of the seriousness of the risk, the Court saw this as a mere demand that the state provide a workplace safe from all harms, an affirmative obligation not guaranteed by the Constitution. Perhaps more surprisingly, the Court also insulated the deadly results of active police chases from virtually all due process scrutiny in **County of Sacramento v. Lewis**, 523 U.S. 833 (1998). It ruled that absent the deliberate intention to inflict harm, state actors had no obligation to protect a passenger on a fleeing motorcycle from injury or death in a wild police chase.

The Court was so determined to close the **DeShaney** trap and guarantee that government officials owed no one a duty of protection from private violence that it even rejected the significance of detailed state statutes governing protective orders. It managed to do so in the face of the purpose of the development of such statutes designed to extend mandatory arrest guarantees of protection against domestic violence in an area where law enforcement had been found particularly deficient. In **Town of Castle Rock v. Gonzales**, 545 U.S. 748 (2005), the Court ruled that the state laws creating protective orders failed to create a “property interest” sufficient to trigger procedural due process rights requiring enforcement of the restraining order. The Court concluded that “in light of today’s decision and that in **DeShaney**, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its ‘substantive’ manifestations. This result reflects our continuing reluctance to treat the Fourteenth Amendment as a ‘font of tort law.”’ **Castle Rock**, 545 U.S. at 768. This due process ruling, of course, does not preclude the kind of equal protection claim about unequal police response to domestic violence that was first raised in **Thuman v. City of Torrington**, 595 F. Supp. 1521 (D. Conn. 1984).

Despite these cases, the Supreme Court has never explicitly repudiated (nor endorsed either, except in the dicta of **DeShaney**) the idea that officials can become constitutionally liable for the harms inflicted by private actors under very specialized circumstances in which the state actor can be said to have put the victim in a worse position than before. Moreover, all the circuits (except the Fifth) continue to acknowledge the existence of the “state-created danger” doctrine. Looking at the actual results of such claims, however, it is fair to wonder whether it is merely a hypothetical exception that proves no rule at all, except perhaps to shore up the general “no-affirmative duty” assertion. I have surveyed sets of state-created danger cases twice before. Reviewing a more recent period, January 2008 through April 2010, and considering the body of mostly district court cases, many unreported, it is evident that very few of the “state-created danger” claims go forward beyond the motion to dismiss or summary judgment stages. This is true without calculating whether or not the Twombly/Iqbal “plausibility” pleading standard will promote more early dismissals or the effect of the many unpublished “non-precedential” appellate decisions. Moreover, it is unclear whether any of the early stage survivors will ever reach a successful conclusion.

What types of cases are being brought under the “state-created danger” theory these days? Still most numerous in the Third Circuit, the cases range over a number of familiar (and some more unusual) situations: They include police interactions with victims who are impaired in some fashion, either because they are intoxicated or because they have significant psychological problems. Despite **DeShaney** and **Castle Rock**, there are a number of cases involving the state’s failure to protect a child from abuse (sometimes involving foster children) or to properly handle and avert domestic violence. Victims complain about various defaults or mistreatment during emergency response, either when 911 is called or when the police interfere with people seeking help in an emergency. Informants, sting participants, and witnesses bring “state-created danger” claims when they feel that police

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One cause of action and another similar

The survival of

Children & Youth

their child.

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violent history of an older child in order

concealed the sexually abusive and

that officials at the social service agency

a motion to dismiss after it was alleged

a district court in Pennsylvania denied

number of affirmative steps (to cover up

children ultimately harmed, and taking a

test: foreseeability, culpability (shocks the

Third Circuit's "state-created danger"

district court was satisfied that the plain-

the defendants' motion to dismiss, the

Within the year, the protected officer

to provide neutral references for him.

They also were aware that he had applied
to be a foster parent and they knew that

he had engaged in domestic violence.

They conspired to cover-up his crimes,

going so far as to destroy the evidence

on the computer, to conceal the reasons

for his termination of employment, and
to provide neutral references for him.

Within the year, the protected officer
gained access to the sisters of two boys

he was able to foster due to the cover-up.

He sexually assaulted the girls, and their

foster parents brought the Section 1983

claims on their behalves. In rejecting

the defendants' motion to dismiss, the

district court was satisfied that the plainti-

fs adequately pled all the elements of

the Third Circuit's "state-created danger"
test: foreseeability, culpability (shocks the

conscience), a sufficient relationship to the

children ultimately harmed, and taking a

number of affirmative steps (to cover up

the crimes that they knew about).

Some cases involving outrageous facts

have survived the early stages of litigation.

In a case of sexual assault by a foster child,
a district court in Pennsylvania denied

a motion to dismiss after it was alleged

that officials at the social service agency

concealed the sexually abusive and

violent history of an older child in order

to induce foster parents to take him into

their home, where he sexually assaulted

their child. *Bryan v. Erie County Office of

Children & Youth*, 2009 U.S. Dist. LEXIS

40591 (W.D. Pa. 2009). The survival of

this cause of action and another similar

one in the Tenth Circuit sharply contrasts

with most of the child protection cases,
even those involving foster children or

alleged systemic failures on the part

of the agencies charged with keeping

them safe. While it is also unusual for

state-created danger claims based on bad

things that happen at school to survive,

there are some exceptions. Allowing a

person known to pose a risk of sexual

assault to roam freely on your campus

(or inviting him back), can be a state-

created danger according to lower courts

within the Third and Ninth Circuits.

Special-needs children, especially those

so vulnerable that they are entitled to the

assistance of a one-on-one aide, also had

some success with assault claims based

on "state-created danger" in lower courts

of the Sixth and Eighth circuits, although

c their cases do not always survive the early

stages of litigation either.

Unless they are impaired, adults do not

fare very well under the "state-created
danger" doctrine. Even with a protective

order in place, claims of failure to protect

from domestic violence do not do very

well, including under the so-called

"emboldenment" theory. Drug inform-

ants, sting participants, and witnesses

are mostly left to their own devices,
even when officials allegedly reveal

their identities. But there might still be

some vitality in what may be called the

"stranded drunk" type of injury, where

the police take an inebriated person

into custody and leave him or her in a

dangerous situation in the middle of the

night. See, e.g., *Friedman v. Borgata Hotel*,

2009 U.S. Dist. LEXIS 29084 (D.N.J.

2009). Similarly, shocking police interac-

tions with the mentally ill can give rise

to a claim that goes forward. Summary

judgment was denied in a lower court

in the Seventh Circuit where a bipolar

young woman was raped and thrown

out of a seventh floor apartment build-
ing. Because of her erratic behavior, she

had been ejected from the airport and

ultimately was arrested and transported
to two Chicago police stations after a

long and bizarre sequence of events. She

was released thousands of miles from

her known home state, at night in an

area with a reputation for violent crime.

She was sent off without being referred

for evaluation in a mental health facil-

ity, without her medications, with no

physical means to leave the area, and

arguably with an impaired mental ability
to think through potential options. *Paine

v. Johnson*, 2010 U.S. Dist. LEXIS 15238

(E.D. Ill. 2010). In another instance,
police behavior arguably led to the

suicide of a man they were arresting for

soliciting a minor on-line. The authori-
ties had invited a national television crew
to accompany them and film the arrest

for a show called "To Catch a Predator." The

Assistant D.A. who was the subject

of this operation allegedly committed

suicide rather than face the circus of

publicity and numerous police officers
descending on him outside his door.

*Comadl v. NBC*, 536 F. Supp. 2d 380

(S.D.N.Y. 2008).

There is little information available for

the current period about the survival rate

of the "state-created danger" doctrine

in the courts of appeals, especially in

published cases bearing precedential

value. In a survey of a slightly earlier

period, however, I found that only

two out of twenty-one appellate cases

survived. The rate of going forward

in the district courts is probably worse

today than it was earlier, but perhaps not

by many percentage points. This merely

reinforces the limited potential of this

exception to the DeShaney no-duty rule.
The line between action and inaction

often can be in the eyes of the beholder.
The seeming inability to assess facts

from a common ground means that the core

of the doctrine is uncertain in a way that

raises serious questions about its ultimate

usefulness. A number of these cases are

touched with the "abuse of power" that

should be the hallmark of constitutional
tort litigation. At the same time, no one

would maintain that government is a

universal guarantor of people's safety.
The trick is how to distinguish one from

the other. As the inconsistencies and

irrationalities in the special danger cases

become more and more troublesome,

they create dialectical contradictions that

reveal the artificiality of the action/inac-

tion line. That blurring of falsely bright

lines may someday call into question the

"no affirmative duty" rule in all its glory.

A rule without a principled rationale

may yield to a reexamination of the

original purposes.
“Social orphan” is a term that refers to a child who may have living parents, but who is not currently living under the care of those parents. The reasons for widespread social orphanhood are social, cultural, economic, and often a combination of these factors. It is estimated that there are millions of social orphans around the world, more in poorer countries than in wealthy ones, but present in every country. When children find themselves outside of family care, they will immediately confront a set of available alternatives; the options available to them reflect national child welfare policies.

Generally, the possible outcomes for such children include: family reunification, extended family care or guardianship within the extended family or community, institutional care (orphanages and group homes of varying sizes), domestic foster care, domestic adoption, international adoption, or a more ad hoc and chaotic option, such as living on the streets. Social orphanhood is often dangerous and traumatic for the child, and thus engenders passionate debate about “best practices” and what solution best preserves the rights of the child, especially as this relates to the role of international adoption.

Considering the worldwide population of social orphans, I have argued that there is an urgent need for a Social Orphan Protocol to the United Nations Convention on the Rights of the Child (UNCRC). The debate over best practices in dealing with this vulnerable population of children, including the contentious debate over international adoption, has been severely hampered by a lack of information about the numbers and life conditions of social orphans. It is a sad fact that no international instrument places any obligation on States to account for these children, in terms of their numbers and life conditions. The Hague Convention on Intercountry Adoption, essentially procedural in nature, is not capable of shedding light on the ideological issues surrounding the issue of permanency for children living out of family care; and the international adoption debate, as a consequence, is likely to continue on ad infinitum, without any meaningful resolution. National governments should no longer enjoy impunity to hide their populations of social orphans; instead, the international community must have access to information on them, and an independent body of experts must have the legal power to examine the manner in which the children are living, as well as to advocate for legally and psychologically sound options for them.

The text of my Draft Protocol to the UNCRC on Social Orphans, is included at the end of this article. This Draft Protocol is aimed at ensuring true permanency for social orphans by clarifying, after years of debate on the subject, which solutions should be pursued for these children, and where international adoption should be understood as fitting within this hierarchy. The approach reflected in the Draft Protocol demands a far greater level of effort from national governments than has been seen to date, especially in terms of assessing and accounting for social orphans.

The manner in which the UNCRC dealt with alternative care for children not able to live in their original families was highly inadequate, in part because it listed a set of options for alternative care, but without clearly rating them in terms of their benefits to children. As research has increasingly shown that institutional care is extremely damaging to children, almost all persons with an interest in the subject have reached the conclusion that institutions are not desirable and that more humane alternatives are necessary. The international child welfare establishment, including UNICEF and other groups, are aware of the dangers of institutions and now advocate for “community based” forms of care, including foster care. Some child welfare bodies openly oppose international adoption; UNICEF seems to reluctantly accept it in very limited circumstances. Adoption advocates argue that foster care is not the equal of adoption and that where family reunification and domestic adoption are not available, international adoption can be expanded to provide an excellent alternative for many more children than at present. The Draft Protocol attempts to clarify when and how, in human rights terms, international adoption is an option that must be pursued.

Social Orphans and the Intercountry Adoption Debate: Going Nowhere Fast

Whether international adoption is an appropriate solution for a child living outside of family care has been hotly debated at the international level. The debate has political and cultural overtones and goes far beyond the issue of what would make particular children happy. Child welfare specialists and advocates on opposing sides of the question have fought over what “human rights for children” really mean.

* Professor of Law, Suffolk University Law School. This article is excerpted from a longer article of the same name that appeared in 1 Hum. RTS. & Glob. L. Rev. 39 (Fall 2007/Spring 2008).
is a long history of national shame and a strong desire to hide social orphans from view. For many countries, social orphans are regarded as an unfortunate fact of life and their fates are considered to be more or less static, given the constraints of social and cultural reality. This does not have to be the case, and the psychological demands of small children indicate that this flawed conception must be altered in light of a new understanding of what the social orphan is and might be.

The debate over the “best interests” of these children continues to be largely on a theoretical plane. International child welfare bodies, such as UNICEF and the Committee on the Rights of the Child, speak enthusiastically about issues like family reunification, yet give no indication of whether they are capable of bringing about such large-scale social changes. It is one thing to say “community based” solutions are desirable, yet quite another to document how they are working in practice. Direct policy makers, administrators, and caregivers from the front lines are rarely heard from, thus leaving the field to those who believe that international adoption is simply either a “good” or a “bad” thing in the larger scheme of child welfare policy. There has been little apparent movement towards large-scale change in the lives of those hundreds of thousands of children living without the care of their families of origin, despite the proliferation of policy statements and declarations of best practices in child welfare. They are discussed, if at all, at arms length and in the abstract.

appendix: Draft Protocol to the UNCRC on Social Orphans

The States Parties to the present Protocol,

Considering that the international community has recognized that the best interests of the child, as stated in Article 3 of the United Nations Convention on the Rights of the Child, should guide decisionmaking in the area of child welfare; and in light of Articles 19, 20, and 37 of that Convention, it would be appropriate to clarify the obligations of States Parties with respect to the highly vulnerable population of children living outside of family care within their territory;
Bearing in mind that many countries, both developed and developing, have large populations of children living outside of family care, also known as social orphans, and that these children are especially vulnerable to neglect and exploitation;

Disturbed that these children often fail to live up to their human potential and alarmed at the fact that these children frequently find themselves at the margins of society as young adults;

Concerned that social orphans are often hidden from view, and that States have not provided accurate and independently verifiable assessments of the numbers or living conditions of these children;

Concerned that the Articles 20 and 21 of the UNCRC are not sufficiently clear about the relationship between the developing child and the urgent and time-bound need for permanency in a family setting;

Gravely concerned that many States Parties to the UNCRC have large populations of social orphans, yet lack systems of domestic or international adoption, and that their children are harmed by a lack of access to the benefits of family life;

Determined that social orphans could be greatly assisted by the adoption by the international community of a set of guiding principles to foster the goal of providing to each child a permanent and loving home, in accordance with the human rights of children;

Believing that there has not been a coherent, human rights-based approach to the complex and multifaceted problem of the social orphan;

Have agreed as follows:

**Article 1**
States Parties shall, in order to assist in ensuring the human rights of social orphans within their territory, locate, account for, and publish information on all such children. They shall take all feasible measures to provide permanent family solutions for children living out of parental care at the earliest possible stage, taking into account the rights and interests of birth families as well as children.

**Article 2**
States Parties shall make accessible to an independent, impartial body of observers and analysts the group facilities in which these children reside. They shall allow for independent monitoring of the terms and conditions of national foster care programs devised as replacements for institutional living. They shall not obstruct such observers from gathering information on the conditions in which these children live.

**Article 3**
States Parties shall provide for a coherent, human rights-based approach to children living without parental care that will reflect international human rights norms. In particular, they will create mechanisms to expeditiously assess the life circumstances of children who come into state or other forms of non-family care and determine within the shortest reasonable time what the likelihood is of that child being reunited with his or her family, living with a willing and able extended family member, or finding a new home through domestic adoption.

**Article 4**
Where none of these domestic solutions are feasible within a reasonable period of time, but in any case not so long that the child is likely to be permanently harmed by remaining in institutional care, the child shall be provided with the possibility of finding a family through intercountry adoption, in line with the ethical procedures set out in the Hague Convention on Intercountry Adoption, or comparably transparent procedures. A reasonable period of time shall be understood by reference to the latest research on the detrimental effects on the developing brain of a lack of consistent and devoted caregivers. A child in such circumstances should not be left in paid stranger foster care in preference to adoption, whether domestic or international.

**Article 5**
States Parties shall work simultaneously to effect the following national policies: the creation of a network of social workers with expertise to assist those families capable of being reunited; to provide targeted and adequate social welfare to ensure that children are not being abandoned for reasons of poverty alone; to develop training and assistance for prospective adoptive parents within the state of origin of the social orphan, with a view to making domestic adoption a socially desirable and widely accepted option.

**Article 6**
Where it is determined that a child is unlikely to return to his or her family of origin, and that domestic adoption is also unlikely to occur in the near future, States Parties shall allow the child to be adopted internationally without creating any artificial impediments, such as numerical quotas, requirements that the child remain in a national database for long periods of time, requirements of multiple trips by prospective parents, or similar obstacles.

**Article 7**
Where children are unable to be provided with substitute families either domestically or internationally, and where aspects of their situation make it unlikely that they will be adopted, humane, family-like institutions, including foster care, should be created. These facilities should also be accessible to expert visitors representing the international community.

**Article 8**
States Parties shall in no circumstances prefer paid stranger foster care over adoption into permanent, loving, fully qualified families, particularly with respect to younger children who are likely to be able to benefit most from adoption. States Parties shall acknowledge and make part of their national policies, that for children who have a realistic option of being reunited with birth families, or finding homes through domestic or international adoption, the State should not place them in “family like” institutions or foster care for longer than is required to move them to the permanent setting.
Interview with
New FDA Chief Counsel Ralph Tyler

By James T. O’Reilly*

VETERAN observers of the Food & Drug Administration Office of Chief Counsel have long watched for subtle signals from incoming leaders of that important office. Listening to transition speeches, like reading the other tea leaves of potential directional indicators, has been a tradition for decades as each bright new lawyer has assumed the OCC mantle of chief attorney for the agency that regulates one quarter of the consumer economy. New Chief Counsel Ralph Tyler, former Maryland Commissioner of Insurance, joined FDA in January 2010. Tyler’s inaugural speech to the Food & Drug Law Institute was anything but subtle—more like a flashing highway construction arrow on the Capital Beltway: The Commissioner, as OCC’s client, makes the policy choices; OCC will protect the agency’s ability to assert its powers but won’t be driving the bus. His public upbraiding of FDA watchers who recently talked to news media about their view of a loss of OCC policymaking power leaves little doubt about the direction OCC will be taking under his stewardship.

Ralph Tyler entered the field of food and drug law without prior involvement in the FDA’s remarkably complex regulatory scheme but with a reputation for being a quick learner and taking tough stands. He is a veteran of city and state government and a former partner of a large law firm. As a longtime member of our ABA Section of Administrative Law & Regulatory Practice, he understands the administrative process very well. He agreed to share his views with the Administrative & Regulatory Law News in April 2010.

ARLN. What aspects of your public service career has been helpful to you in moving into OCC?

RT: Managing a law office as deputy attorney general and then as city solicitor were helpful in addressing the management issues. Having been a client and a regulator, as state insurance commissioner, made me appreciate the roles and the responsibilities of the Commissioner and her office.

ARLN. What role should state governments play in interaction with FDA on policy issues, such as preemption and shared inspections?

RT: OCC will do a better job of collaboration with state authorities and will respect the ability of states to do things well. I hope to increase the reach of our messages by taking advantage of state resources as well as those of FDA.

ARLN. How will the working relationship with DoJ’s Office of Consumer Litigation evolve under your leadership?

RT: OCL is our litigation counsel, offensively and defensively, and I value enormously the efforts of the Justice Department in moving our cases forward.

ARLN. What role should OCC lawyers have in directing the outcomes of FDA policy choices when statutory language is vague?

RT: OCC’s role is not to direct the outcome of policy, but to offer options and alternatives. We explain how the client’s several options can be achieved and what the pro and con factors will be.

ARLN. FDA liaison work with congressional drafting subcommittees has sometimes been faulted; 18 significant statutes impacting FDA since 1980 have had more or less effective FDA input. How do you view OCC’s role in aiding outcomes of the legislative process?

RT: We provide substantial technical assistance on legislation, which is very valuable because it is grounded in the experience of how the agency actually operates.

ARLN. The recent healthcare bill appears to move CMS and FDA closer together in dealing with a number of cost and effectiveness issues. What do you see as the top three priorities for rulemaking to respond to the changes?

RT: Biosimilars implementation; nutritional issues; and our interaction with other parts of the Department’s implementation. In parallel to this we are working on implementation of the recent tobacco statute.

ARLN. A predecessor in OCC once called the statute a “constitution” so that whatever was not forbidden

continued on page 23

* Professor of Law, University of Cincinnati College of Law; former section chair; current co-chair, Food & Drug Committee; member, Administrative & Regulatory Law News advisory board.
Free Enterprise Fund v. Public Company Accounting Oversight Board: Muddling the Law While Making New Law

Alan B. Morrison*

The Supreme Court’s 5–4 decision today invalidating a portion of the statute creating the Public Company Accounting Oversight Board extends the implied power of the President to remove officers of the United States, but does so in a back-handed manner and introduces confusion into whether thousands of persons who work for the federal government are entitled to the statutory protections against removal that are currently contained in multiple provisions of the United States Code.

Unfortunately, the statutory structure and relation of the Board to the Securities & Exchange Commission really matter, so here they go. After the various accounting and other securities fraud scandals that surfaced in the early 2000s, Congress passed Sarbanes-Oxley, one portion of which created the Board to regulate the accounting profession as applied to the securities field, modeling its structure on the bodies that regulate the stock exchanges, except that it made the Board a governmental entity, exercising government power. All five members of the Board are appointed by the Commission for terms of years (staggered) and are removable only for cause and only by the Commission, not the President. The majority opinion, written by Chief Justice Roberts, asserted that the Commission members are also removable only for cause, but as Justice Breyer pointed out in his 37-page dissent (plus 36 pages of statutory tables) the Commission’s statute does not include any “for cause” language, unlike most of the comparable agencies, although it has always been assumed that the Commissioners can be removed only for cause. (I told you this was complicated, but you have to understand the framework if you have any hope of understanding what the Court held.)

As befitting an agency that regulates a profession, the Board has the right to approve applications of accountants to practice before the Commission, issue rules, conduct investigations, and bring administrative enforcement proceedings to sanction accountants that violate its rules or those of the Commission. It is also undisputed that all Board rules must be approved by the Commission, and all of its administrative decisions are reviewable by the Commission, which has the power to reverse them, as well as to increase or decrease the Board’s level of sanctions.

The case was filed by the non-profit Free Enterprise Fund and by an accounting firm that is a member of the Fund and that was once investigated by the Board (but was not sanctioned) and is still subject to regulation by it. According to the majority opinion, their main claim was that the Board was illegally constituted because its officers are not lawfully appointed under the Appointments Clause in Article II, Section 2, clause 2. The plaintiffs alleged that, because of the Board’s extensive powers and the lack of meaningful supervision by the Commission or anyone else, the members of the Board are all principal officers who must be appointed by the President with the advice and consent of the Senate, which they clearly were not. Their alternative argument is that, if the Board is composed of inferior officers, who may be appointed by Department heads, the Commission is not a Department under that Clause and that the Commission as a whole cannot be a Department “head”—only the Chair can be. One piece of good news for those seeking some separation of powers clarity from this decision is that the majority specifically rejected the alternative arguments, with the apparent agreement of the dissent, holding that a body such as the Commission can be a Department and that the Commission as a whole can be the “head” of it under the Appointments Clause.

Instead of starting with the issue of principal versus inferior officer, the Chief Justice assumed that the Board’s members were properly appointed as inferior officers, but then took up the issue that caused Circuit Judge Kavanaugh to dissent: the absence of any direct role for the President in their removal, and the fact that even the Commission could remove them only for cause. Without going into the history of removal litigation in the High Court, even the majority conceded that there was no case that presented this two-level for cause situation, but it nonetheless took it on. It did so on the theory that it was protecting the powers of the President, even though the Solicitor General, who works for the President, filed a brief supporting the structure of the Board as a permissible judgment of Congress as to its need for independence. This was not an automatic position for the SG since in many other separation of powers cases under the Appointments Clause, that office has asked the Court to strike down many laws that infringed on the powers of the President to appoint or remove officers, in such cases as Myers, Humphrey’s Executor, Buckley, Bowsner & Morrison. One would think that if the President didn’t think he needed any help from the Court, it might have been a little reluctant to jump in, but that was not the case.

Although there is a not a word in the Constitution about removal of officers, the Court has previously found implicit in the President’s ability to assure that the laws are faithfully executed a constitutional necessity that he have some power over the retention of officers of

* Lerner Family Associate Dean for Public Interest & Public Service, George Washington University Law School. This article was originally published June 28, 2010, by the American Constitution Society. Available at http://www.acslaw.org.
Schedule of Events

Thursday August 5, 2010
2:00 p.m. – 3:30 p.m. | Federal Preemption — Recent Trends and Developments | Robert Gasaway – Partner, Kirkland & Ellis, Washington, DC | Tracy Genesen – Partner, Kirkland & Ellis, San Francisco, CA | Marc Melnick – Deputy Attorney General, California, Oakland, CA | This panel will discuss federal preemption of state law and the principles that should and do govern its application by courts. The program will focus on recent trends and developments, including judicial decisions, the ABA’s preemption task force report, and recent federal legislative proposals aimed at scaling back federal preemption of state law either in general or as applied to specific industries. Should there be a “presumption” against federal preemption of state law? Can congressional intent function effectively as the “touchstone” of preemption decision making as some courts assume? Is it realistic to expect Congress to speak with clarity as to the preemptive effects of its enactments? And why is it that when federal administrative agencies speak clearly to the preemptive effect of their regulations, they often are afforded little or no deference by courts? | Co-Sponsor: Section of Antitrust Law

3:45 p.m. – 5:15 p.m. | Antitrust and Administrative Law: The Pros and Cons of Antitrust Enforcement by the FTC | Chong S. Park – Partner, Kirkland & Ellis, Washington, DC | Hon. J. Thomas Rosch – Commissioner, Federal Trade Commission, Washington, DC | David Wales – Partner, Jones Day, Washington, DC | With increasing governmental activity in the antitrust arena, and with recent changes to the FTC’s rules for administrative litigation, questions have arisen as to advantages and disadvantages of antitrust enforcement by an “expert” administrative agency. This panel will discuss issues relating to, among other things, the administrative structure of the FTC, the role and authority of the FTC Commissioners, potential reforms, issues arising from dual enforcement of the antitrust laws by both an independent administrative agency (the FTC) and the executive branch (through the Department of Justice), and the role of the federal courts as a check to agency authority. | Program Chairs | Lore Unt – Principal Counsel for IP Litigation, FTC, Washington, DC; Vice-Chair, Antitrust and Trade Regulation Committee, Section of Administrative Law | Chong S. Park – Chair, Antitrust and Trade Regulation Committee, Section of Administrative Law | Co-Sponsor: Section of Antitrust Law

6:00 p.m. – 7:30 p.m. | Section Reception | Sponsored by Kirkland and Ellis, San Francisco | Please join us for a Reception on the 27th Floor of the Bank of America Building, with a spectacular view of the Bay Bridge and historic Alcatraz.

Thursday August 5, 2010

Friday August 6, 2010
8:30 a.m. – 10:00 a.m. | Agency Leaders: Delays in the Appointments Process and Constitutionality of the Public Company Accounting Oversight Board in the Securities Exchange Commission | William B. Gould IV – Charles A. Beardsley – Professor of Law Emeritus, Stanford University, Palo Alto, CA, Former Chairman, National Labor Relations Board | Anne Joseph O’Connell – Professor of Law, University of California, Berkeley | Kenneth Starr – President, Baylor University, Waco, TX, Former Judge, U.S. Court of Appeals for the D.C. Circuit, Former Solicitor General of the United States | Robert Gasaway, Moderator – Partner, Kirkland & Ellis, Washington, DC | This panel will explore the delay in nominating and confirming agency leaders and the impacts of the Supreme Court’s decision in Free Enterprise Fund v. Public Company Accounting Oversight Board.

10:30 – 11:30 am | Homeland Security Coordinating Committee Meeting

11:30 a.m. – 12:30 p.m. | Coordinating Committee for Veterans Benefits & Services

2:00 p.m. – 3:30 p.m. | Priorities & Perspectives on the Civil Division | Robin Conrad – Executive Vice President, National Chamber Litigation Center, U.S. Chamber of Commerce, Washington, DC | Derek A. West – Assistant Attorney General, Civil Division, Department of Justice, Washington, DC | Richard Willard – Partner, Steptoe & Johnson, Washington, DC | Former Assistant Attorney General, Civil Division, Department of Justice | Judge Martha Berzon, Moderator – U.S. Court of Appeals for the Ninth Circuit, San Francisco, CA | The program will explore the work and priorities of the Civil Division of the US Department of Justice. Derek A. “Tony” West, Assistant Attorney General, will speak on the Division’s approach to critical issues facing our Nation, such as the BP oil spill, Guantanamo detainee lawsuits, protecting consumers and taxpayers, and access to justice. Panelists will offer their unique perspectives on how the current Administration’s approach impacts the business community and citizenry. | Co-Sponsors: Section of Antitrust Law, Criminal Justice Section, Section of Dispute Resolution, Section of Individual Rights & Responsibilities

2:00 p.m. – 3:30 p.m. | Citizens United: A Unique Journey through Campaign Finance, Separating the Law from the Rhetoric | Anthony J. Corrado, Jr., Waterville, ME | The speakers will outline the tortured history of Supreme Court jurisprudence leading up to the case, the unique procedural posture of the case (involving two distinct phases for briefing and argument), and the strategy of each side before the Justices. The decision itself will be dissected, and the likely consequences will be debated. The panelists will share their unique knowledge of this historic battle before the highest court of the land. | Co-Sponsors: Section of Administrative Law and Regulatory Practice, Section of State and Local Government Law, Forum on Communications Law, Division for Public Education, Public Services Division

3:45 p.m. – 5:15 p.m. | Deferece or Abdication — Are Chevron, Vermont Yankee, and State Farm in need of new thinking? | Lauren Baer – Associate, Wilmer Hale, New York, NY | William Eskridge – ohn A. Garver Professor of Jurisprudence, Yale Law School, New Haven, CT | Marc Kesselman – Vice President and General Counsel, Frito-Lay, North American Division, New Haven, CT | The speakers will outline the tortured history of Supreme Court jurisprudence leading up to the case, the unique procedural posture of the case (involving two distinct phases for briefing and argument), and the strategy of each side before the Justices. The decision itself will be dissected, and the likely consequences will be debated. The panelists will share their unique knowledge of this historic battle before the highest court of the land. | Co-Sponsors: Section of Administrative Law and Regulatory Practice, Section of State and Local Government Law, Forum on Communications Law, Division for Public Education, Public Services Division

3:45 p.m. – 5:15 p.m. | Section Reception | Sponsored by Kirkland and Ellis, San Francisco | Please join us for a Reception on the 27th Floor of the Bank of America Building, with a spectacular view of the Bay Bridge and historic Alcatraz.
the government, and that Congress’s delegations are
lawfully implemented. Is the Due Process Clause the only
remaining restraint on agency action? Or does Chevron
“step one” accomplish that? Should courts increase the
“hard look” arbitrariness review under the APA? Should
Vermont Yankee be revisited, or amended by Congress?
Or would increased judicial review amount to a new
form of “judicial activism”?

9:30 p.m. – 10:30 p.m. | Section Hospitality Suite

Saturday August 7, 2010

7:30 a.m. – 1:30 p.m. | Section Council Meeting &
Publications Committee Meeting with Breakfast
* All Section members are welcome to attend the Council & Publications Committee Meeting. There is no charge; however, advance registration is required.

9:00 a.m. – 10:30 a.m. | 24,000 Federal
Government Legal Jobs Will Be Open This Decade:
So How Do I Get One? | Professor James T.
O’Reilly – University of Cincinnati School of Law,
Cincinnati, OH | No, it’s not a bogus sales pitch, it’s a demographic fact that older attorneys in federal service will depart and open slots for your generation’s best and brightest. At the ABA Annual Meeting, the author of the March 2010 ABA Press book, CAREERS IN ADMINISTRATIVE LAW, will highlight the hiring patterns and the job prospects in federal service, as well as the varied patterns for state and local regulatory and administrative practice. These are real jobs, not movie/TV glamour courtroom roles, and you need to understand patterns and practices before you enter the competition for these roles. Come hear an expert’s expert addressing this hot topic...or sleep in and let someone else scoop your career!

4:00 p.m. – 10:30 p.m. | Section Awards
Reception & Dinner, Wine Tasting & Tour | Join your colleagues for an exclusive tour of the Robert Mondavi Winery in Oakville, California. Transfer by motor coach to the vineyard for a private tour, reception, and hors d’oeuvres, followed by a three-course gourmet meal with appropriate wine pairings. A very special welcome will be provided by Marguerite Mondavi. We will also award Section honors and hear from several prominent CLE program participants. This event is sponsored by the Robert Mondavi Winery. The event includes transportation, tour, reception, dinner, and presentations. The per person cost is $175 and registration is limited to 55 people. We greatly appreciate the generous sponsorship of Robert Mondavi Winery, which is providing this once-in-a-lifetime event at a greatly reduced cost. Please register EARLY for this event as it will sell out quickly. Register using the form at the back of this brochure or call 202-662-1582.

Sunday August 8, 2010

8:00 a.m. – 12:00 p.m. | Section Council Meeting
with Breakfast

Registration Information

Participants must register with the ABA in order to
attend the CLE programs. Visit the ABA website and register today!

To attend the August 5 Administrative Law Section
Reception at Kirkland and Ellis, dinner and wine tour of
Mondavi Winery on August 7, or the Section Council or committee meetings, complete the registration at the end of this brochure, or register online at http://new.abanet.org/annual/default.aspx

CLE Information

Accreditation will be requested for the indicated programs from every state with mandatory continuing legal education (MCLE) requirements for its lawyers. Please be aware that each state has its own rules and regulations, including definition of “CLE.” Check with your state agency for confirmation of this program’s approval. Attorneys seeking to obtain MCLE credit in Pennsylvania are required to pay state accreditation fees directly to the state. Certificates of attendance will be available at the conclusion of the program. In order to receive CLE credit, all attorneys will be required.

Weekend Activities

ABA Tour Program | For your convenience the
American Bar Association has arranged for exclusive
group rates for tours of some of San Francisco’s most
exciting landmarks. For complete information, please
visit: https://www.cappa-graham.com/ABAtours2010.html

Golden Gate Bridge | The Golden Gate Bridge
is the essential tourist destination for visitors to San
Francisco. Stretching across the San Francisco Bay, the
Golden Gate Bridge is 1.7 miles long and it stands as one
of the longest suspension bridges in the world.

Alcatraz | Alcatraz and history go hand in hand.
Once home to some of America’s most notorious
criminals, the federal penitentiary that operated here
from 1934 to 1963 brought a dark mystique to the Rock.

California Wine Extravanza | Travel north of
San Francisco to the serene Napa and Sonoma Valleys,
both famous for producing internationally acclaimed
wines. Note: This event is not affiliated with the Section
of Administrative Law’s exclusive tour of the Mondavi
Winery and dinner.

Victorian Homes – Painted Ladies Tour | Enter San Francisco’s famous Victorian homes. Meticulously maintained and beautifully refurbished, our “Painted Ladies” provide a glimpse into the city’s unique and colorful past.

San Francisco Revealed by the City and
Bay Tour | San Francisco is known for being many
things: progressive, eccentric, exciting, breathtaking,
beautiful...the list is never ending. There is no better way
to get acquainted with all the temptations and sensory
stimulation that exciting San Francisco has to offer.

Registration is open until JULY 30, 2010 | www.abanet.org/adminlaw
ABA, Administrative Law Section, 740 15th Street, NW, Washington D.C. 20005
202-662-1582 | Fax: 202-662-1529 | E-mail: keivelm@staff.abanet.org

There is no on-site registration available for these events or CLE programs.
Cancellations are permitted until July 15, 2010. Substitutions are permitted.
All cancellations or substitutions must be by Email to keivelm@staff.abanet.org or Fax to 202-662-1529.
Standing

Standing was a preliminary issue in the Supreme Court’s important Establishment Clause case, Salazar v. Buono, — U.S. —, 130 S. Ct. —, 2010 WL 1687118 (Apr. 28, 2010), which involved a Latin cross erected on Sunrise Rock in Mojave National Preserve by private citizens in 1934 as part of a war memorial to honor American soldiers who fell in World War I. The Court emphasized that the case it was deciding challenged neither the original placement of the cross nor its continued display, but rather § 8121(a) of the Department of Defense Appropriation Act of 2004, Pub. L. 108-87, 117 Stat. 1100. The litigation began when Frank Buono, a retired employee of the National Park Service, brought suit in the U.S. District Court for the Central District of California in 2002. The district court found that Buono had standing to bring an Establishment Clause challenge and, on summary judgment, granted an injunction that “permanently forbade the Government from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve.” Buono, 2010 WL 1687118, at *6 (quoting the injunction). The U.S. Court of Appeals for the Ninth Circuit stayed the injunction to the extent that it required the Government to remove the cross, and the Government responded to the injunction by covering the cross. In 2004, the Ninth Circuit affirmed the district court’s decision, both with respect to standing and with respect to the merits. The Government did not seek certiorari.

While that appeal was pending, Congress enacted § 8121(a), which authorized the transfer of the Government’s interest in the land to the Veterans of Foreign Wars; in exchange, the Government would receive lands elsewhere in the preserve. This land-transfer statute provided that the cross property “would revert to the Government if not maintained ‘as a memorial commemorating United States participation in World War I and honoring the American veterans of that war.’” Buono, 2010 WL 1687118, at *6.

After the Ninth Circuit’s 2004 decision, Buono returned to the district court seeking to enjoin the land transfer. The trial court regarded the issue “as whether the land transfer was a bona fide attempt to comply with the injunction . . . or a sham aimed at keeping the cross in place . . . .” Id. at *20. The Ninth Circuit affirmed, and rehearing en banc was denied. This time the Government sought certiorari, which the Supreme Court granted.

In its resulting highly fractured decision, the Court, unsurprisingly perhaps, split on the standing issue as well as on the merits. Justice Kennedy, writing also for Chief Justice Roberts and in part for Justice Alito (including on the standing issue), concluded that Buono had standing. They referred not to the traditional three-part Lujan test for standing but rather asserted that “[t]o demonstrate standing, a plaintiff must have ‘alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction.’” Id. at *8 (quoting Horne v. Flores, 557 U.S. —, 129 S. Ct. 2579, 2592 (2009)). The problem arose because “Buono does not find the cross itself objectionable but instead takes offense at the presence of a religious symbol on federal land. Buono does not claim that, as a personal matter, he has been made to feel excluded or coerced . . . .” Id. However, according to Justice Kennedy, the Government was procedurally precluded from arguing standing because it had failed to seek review in the Supreme Court of the lower courts’ original decisions that Buono had standing.

In contrast, Justice Scalia, joined by Justice Thomas, concurred in the judgment disallowing the district court’s injunction against the land-transfer statute—but only because he concluded that the courts could not decide the merits of the case because Buono lacked standing to pursue the “new” injunction. Justice Scalia agreed that the issue of Buono’s original standing was not before the Court; nor was Buono’s standing to enforce the original injunction. Id. at *19 (Scalia, J., concurring). What Buono sought to enforce, however, was an expansion of the district court’s original injunction from merely prohibiting display of the cross on public land to an injunction against the cross’s display, regardless of who owned the land. As a result, “[b]ecause Buono seeks new relief, he must show (and the District Court should have ensured) the he has standing to pursue it.” Id. at *20 (Scalia, J., concurring). Moreover, Buono failed to show that blocking the transfer of the memorial to a private party would redress any injury of Buono’s. There was no guarantee that the private party would continue to display the cross, especially because the land would revert to the federal government only if it was no longer being used as a war memorial, “which does not depend on whether the cross remains.” Id. As a result, the purported injury—contin-
ued display of the cross—was speculative. Id. Moreover, Buono apparently suffered no injury at all from a cross being displayed on private land, because he was offended only by the display of the cross on government-owned land. Id. As a result, Buono lacked standing to enforce the injunction against the transfer of the land to private hands.

Justice Stevens, joined by Justices Ginsburg and Sotomayor, dissented solely on the merits. In his separate opinion on standing, id. at *34 (Breyer, J., dissenting), leaving an apparent 4-2 split on the standing issue. Given the procedurally convoluted posture of the case, however, it is unlikely that the standing debate in this case will influence many other decisions.

**Ripeness**

The Supreme Court briefly reviewed the ripeness doctrine for judicial review in *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, — U.S. —, 130 S. Ct. —, 2010 WL 1655826 (Apr. 27, 2010), a case in which shipping companies sought to vacate an arbitration award. In a 5-3 opinion authored by Justice Alito (Justice Sotomayor did not participate; Justice Ginsburg dissented, joined by Justices Stevens and Breyer), the Supreme Court reversed the U.S. Court of Appeals for the Second Circuit’s decision to uphold the arbitration award. The dissent, however, argued that the case was not ripe for review.

According to the dissent, one of the basic issues of the case was whether the arbitration clause at issue permitted class arbitration, but the arbitrators’ decision on that issue “was abstract and highly interlocutory.” Id. at *16 (Ginsburg, J., dissenting). In particular, the arbitrators did not determine whether the exact claims advanced were suitable for class resolution, what exactly the class should be, or the suitability of “opt in” procedures. Id. As a result, like any other order related to class certification, the arbitrators’ decision was not “fit” for judicial review. Id. Indeed, the dissenters emphasized, “[n]o decision of this Court, until today, has ever approved immediate judicial review of an arbitrator’s decision as preliminary as the ‘partial award’ made in this case.” Id. at *17 (Ginsburg, J., dissenting).

The majority, however, dismissed the ripeness argument in a footnote. It emphasized the basic rule that “[i]n evaluating a claim to determine whether it is ripe for judicial review, we consider both ‘the fitness of the issues for judicial decision’ and ‘the hardship of withholding court consideration.’” Id. at *7 n. 2 (quoting *Nat’l Park Hospitality Ass’n v. Dep’t of the Interior*, 538 U.S. 803, 808 (2003)). It concluded that both prongs were met, because “petitioners must now submit to class determination proceedings before arbitrators who, if petitioners are correct, have no authority to require class arbitration” and the petitioners were subject to compelled arbitration if they refused. Id. The majority also considered the ripeness question waived and refused to decide whether the Court could raise it sua sponte. Id.

**Due Process**

Due process covers a recurrent set of issues in administrative law, from the adequacy of notice to the amount and timing of process required under *Matthews v. Eldridge* balancing to various (if generally unsuccessful) arguments about substantive due process. This quarter, the U.S. Supreme Court returned to the issue of notice in *United Student Aid Funds, Inc. v. Espinosa*, — U.S. —, 130 S. Ct. 1367 (Mar. 23, 2010), a bankruptcy case.

Chapter 13 of the Bankruptcy Code makes certain government-sponsored student loan debts more difficult to discharge in bankruptcy than other kinds of debts. Indeed, discharge of these loans requires a showing that failure to discharge would pose an “undue hardship” on the debtor. 11 U.S.C. §§ 523(a)(8), 1328. Under the Federal Rules of Bankruptcy Procedure, this undue hardship determination must be made in an adversarial proceeding. However, in *United Student Aid Funds*, the Bankruptcy Court confirmed a bankruptcy plan that discharged a student loan debt without the required adversary proceeding. Although the creditor received notice of the proposed plan, it did not object to it, nor did it appeal the Bankruptcy Court’s confirmation. Years later, however, that creditor—United Student Aid Funds (United)—filed a motion with the Bankruptcy Court asking the court to rule that its prior confirmation order was void. One of the issues in the case was whether United received adequate notice in the original proceedings.

“Specifically, United argue[d] that the Bankruptcy Court violated United’s due process rights by confirming Espinosa’s plan despite Espinosa’s failure to serve the summons and complaint the Bankruptcy Rules require for the commencement of an adversary proceeding.” *United Student Aid Funds*, 130 S. Ct. at 1378.

In a unanimous opinion by Justice Thomas, the Supreme Court disagreed, distinguishing the failure to comply with a procedural rule from a violation of procedural due process. While Federal Rule of Bankruptcy Procedure 7004 did provide United with a right to a summons, complaint, and adversarial proceeding, which United could have insisted upon, “this deprivation did not amount to a violation of United’s constitutional right to due process.” Id. The *Mullane* standard for notice—“notice ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections,’” id. (quoting *Mullane v. Cent’l Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)—continued on next page
governed, and because United received actual notice of the debtor Espinosa’s plan, “[t]his more than satisfied United’s due process rights.” Id.

Federal Agency Warnings and Statutes of Limitation

A very different kind of notice problem was at issue in Merck & Co., Inc. v. Reynolds, — U.S. —, — S. Ct. —, 2010 WL 1655827 (April 27, 2010). Can a warning letter from the federal Food & Drug Administration (FDA) serve to trigger the running of the statute of limitations under the “discovery rule” in a securities fraud class action against a drug manufacturer? In a fractured 9-0 judgment (Justice Stevens concurred in part and concurred in the judgment; Justice Scalia, joined by Justice Thomas, concurred in part and concurred in the judgment) authored by Justice Breyer, the Supreme Court answered “no” in the context of the ongoing Vioxx litigation.


On September 21, 2001, the FDA’s warning letter to Merck regarding Vioxx was released to the public. In this letter, the FDA stated that “in respect to cardiovascular risks, Merck’s Vioxx marketing was ‘false, lacking in fair balance, or otherwise misleading.’” Id. at *6 (quoting the letter). The plaintiffs in this particular lawsuit filed their complaint on November 6, 2003. Merck moved to dismiss, arguing that the plaintiffs “knew or should have known” the facts constituting the violation more than two years prior, emphasizing the FDA’s warning letter and Merck’s October 2001 response to it. The district court agreed and dismissed the case, but the U.S. Court of Appeals for the Third Circuit reversed, emphasizing that these interactions did not suggest the requisite level of scienter on Merck’s part. The Supreme Court agreed. Concluding that scienter is one of the more important “facts constituting the violation,” id. at *12, and that facts indicating scienter require more than just a “materially false or misleading statement.” Id. at *13. In securities fraud cases, the Court emphasized, “the relation of factual falsity and state of mind is more context specific.” Id. Moreover, under the statutory language, mere “inquiry notice” is insufficient to start the statute of limitations running; instead, the relevant facts must actually be “discovered.” Id. Finally, as a factual matter, “[t]he FDA’s warning letter . . . shows little or nothing about the here-relevant scienter, i.e., whether Merck [acted] with fraudulent intent.” Id. at *15.

Deference


In the Conkright litigation, the administrator of Xerox Corporation’s pension plan originally used the “phantom account” method to calculate benefits for Xerox employees who left the company in the 1980s and then returned later, after receiving one lump-sum distribution. The district court upheld this approach under Firestone deference, but the U.S. Court of Appeals for the Second Circuit vacated and remanded, deeming the plan administrator’s interpretation unreasonable.

On remand, the plan administrator proposed a new approach, but the district court refused to accord it deference and instead adopted its own approach to calculating the employees’ benefits. The Second Circuit affirmed, but the Supreme Court, in a 5-3 decision by Chief Justice Roberts, reversed. (Justice Sotomayor did not participate; Justice Breyer dissented, joined by Justices Stevens and Ginsburg.). The majority concluded that its precedents regarding Firestone deference did not support the lower courts’ “one-strike-and-you’re-out” approach, id. at 1646–47, emphasizing instead that “[p]eople make mistakes.” Id. at 1644. Moreover, because Congress did not require employers to create benefit plans in ERISA, but sought only to ensure that employees received any benefits that they were entitled to once plans were created, Firestone deference helped to preserve ERISA’s “careful balancing” by allowing employers to give the plans’ administrators substantial authority to interpret and implement the plans actually created and thus to rely on the administrator’s expertise “rather than worry about unexpected and inaccurate plan interpretations that might result from de novo judicial review.” Id. at 1649. In addition, Firestone deference helps to ensure uniformity of plan administration in companies like Xerox that cover several jurisdictions.

The dissenters, in contrast, would have left the courts with more discretion in the evaluation of the administration of ERISA plans. Specifically, Justice Breyer argued that “trust law ultimately provides the best way for courts to approach the administration and interpretation of ERISA” and that trust law would “leave[] to the supervising court the decision as to how much weight to give to a plan administrator’s remedial option.” Id. at 1659-60 (Breyer, J., dissenting).
By William S. Jordan III

D.C. Circuit – Is the Information Quality Act Ready for Prime Time?

The tobacco industry can’t catch a break these days, but it always makes life interesting. In Prime Time International Co. v. Vilsack, 599 F.3d 678 (D.C. Cir. 2010), the industry lost an argument about the meaning of the Fair and Equitable Tobacco Reform Act on a fairly straightforward *Chevron* analysis, but it managed to stir up some interesting administrative law issues with its accompanying claim under the Information Quality Act. Of those, the most important is the D.C. Circuit’s implicit ruling that an agency’s decision under the IQA is final agency action and is justiciable. *Prime Time* involved a manufacturer of small cigars on whom the government imposed certain costs based upon the number of cigars it produced, as opposed to the volume of tobacco. Prime Time argued that this treated the company unfairly as compared to competitors who made bigger cigars but were also assessed on the number of “sticks.”

Prime Time lost this statutory argument, but in the course of its struggle the company relied upon the IQA to seek disclosure and correction of the information that the USDA had used in calculating the assessments. Prime Time challenged the USDA’s failure to respond to its request. The District Court held that IQA claims are not justiciable at all, but on appeal the D.C. Circuit ruled for the USDA on the alternative ground that the particular information was subject to an OMB-established exemption to the IQA’s requirements.

Since the IQA does not provide for judicial review, Prime Time’s challenge depended upon the agency’s nonresponse constituting “final agency action” under § 704 of the APA and, more generally, on the proposition that IQA claims are justiciable at all. Although the District Court had denied justiciability and final agency action, the D.C. Circuit ignored those issues and ruled on the alternative ground, implicitly holding that it had the power to consider claims under the IQA and that an agency’s nonresponse to a correction request was final agency action. The decision so disturbed the Government that it asked the court to clarify that it had not intended such an implicit result. The court denied the Government’s petition.

In reaching the merits of the IQA claim, the court emphasized that the IQA required the Director of OMB to issue guidelines to guide federal agencies in ensuring the “quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies,” and that the guidelines are to require that federal agencies “establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines.” (emphasis supplied).

In issuing the guidelines, OMB excluded “distribution limited to ... adjudicative processes” from the scope of the term “disseminated.” On that basis, the USDA determined that the information sought by Prime Time was exempt from the requirements of the IQA because the information related to the agency’s adjudicatory decision with respect to Prime Time’s product. The court granted *Chevron* deference to OMB’s interpretation of the guidelines as excluding information arising in agency adjudications.

The decision raises at least two questions. First, what justified deference to the OMB Guidelines? Although the IQA required OMB to develop the guidelines “with public and Federal agency involvement,” the statute did not require use of the legislative rulemaking process, and it did not refer to the guidelines as rules or regulations. There is also no indication that the guidelines were issued through the APA’s notice-and-comment process. Nonetheless, Congress specifically delegated to OMB the authority to develop guidelines governing agency implementation of the IQA. Under *U.S. v. Mead*, that delegation, coupled with the requirement for public and agency involvement, presumably qualifies as “some other indication of a comparable congressional intent” that courts should defer to the agency.

Second, assuming deference to OMB, why did the USDA’s particular adjudication qualify for OMB’s exception? In the preamble to the guidelines, OMB explained that, “There are well-established procedural safeguards and rights to address the quality of adjudicatory decisions and to provide persons with an opportunity to contest decisions.” But the USDA decision here does not appear to be a formal adjudication subject to the provisions of §§ 554, 556, and 557 of the APA. The court did not examine whether the USDA’s adjudicatory process involved rights or safeguards comparable to formal adjudication. The court’s reference to the APA definition of “adjudication,” 5 U.S.C. § 551(7), is not helpful because the term encompasses both formal adjudication and informal adjudication, as to which the APA imposes no comparable rights or safeguards. There seems to be a good argument that the USDA process did not qualify for the OMB-created exception.

D.C. Circuit Upholds Standing and Ripeness in Challenge to Letter Rulings Issued Against Other Parties

Teva Pharmaceuticals found itself in the unusual position of challenging positions taken by the FDA in previous letter rulings involving other companies. *Teva Pharmaceuticals USA, Inc. v. Sebelius*, 595 F.3d 1303 (D.C. Cir. 2010). The posture continued on next page
of this case was essentially the same as those in which parties have challenged informal agency statements that significantly affected their interests, e.g., Appalachian Power Co. v. EPA, 208 F.3d 1015, 1022 (D.C. Cir. 2000). The primary difference is that agency statement appeared in previous adjudications involving other companies, rather than as general statements issued to guide all relevant parties. By 2-1, the D.C. Circuit held the claim was ripe, and the full panel upheld Teva's standing.

Teva, a maker of generic drugs, received tentative FDA approval of a particular hypertension drug. That approval was to become final after the expiration of the protection provided to Merck, the holder of the patent for the brand-name drug. Teva asserted that it was then entitled to its own 180-day exclusive period by delisting its patent, which in theory meant Teva no longer had a problem. Merck tried to thwart Teva's exclusivity period by delisting its patent, which in theory meant Teva no longer qualified for the exclusivity incentive. Worse, the FDA had previously issued letter rulings against other companies in the same position in which Teva now found itself. The FDA had successfully defended those letter rulings in the district courts, and those companies had not appealed.

Teva sued, challenging the position taken in the two previous letter rulings. The FDA argued that the challenge was not ripe because the previous decisions had not involved Teva and because Teva had only “tentative” approval to market the drug. The FDA also argued that Teva did not have standing because it was challenging decisions involving other parties.

As to ripeness, the issue was purely legal, so the question was whether FDA's actions were sufficiently final with respect to Teva. The majority determined that any change from the FDA's previously stated positions was very unlikely because the agency had argued that its position was dictated by statute. The theoretical possibility that the agency might change its position was not enough to render the dispute unripe. The only issue was whether Teva was the first qualifying claimant, which the FDA did not dispute. As to hardship, the majority emphasized that it is not a hard and fast test if there are no significant agency or judicial interests that favor delay. Finding no such interests, and finding harm to Teva in the loss of first-mover advantage, the majority held the challenge was ripe.

By contrast, the dissent argued that the FDA's action was not final until it made a final decision, rather than a tentative decision, on Teva's application to market the drug, that we cannot tell what the agency will do until it acts, and that Teva would suffer no hardship because it could seek review when the Merck patent expired.

As to standing, the full court easily found traceability and redressability. It found the injury prong somewhat more difficult since the FDA had not yet acted with respect to Teva, but the “trivial uncertainty” about whether the FDA would stick to its previously stated positions was not enough to preclude standing. Indeed, in language sure to be quoted often, the court said that, “For the purpose of the classic constitutional standing analysis, it makes no difference to the ‘injury’ inquiry whether the agency adopted the policy at issue in an adjudication, a rulemaking, a guidance document, or indeed by ouija board; provided the projected sequence of events is sufficiently certain, the prospective injury flows from what the agency is going to do, not how it decided to do it.”

**Circuits Split on Nature and Application of “Good Cause” Exception to § 553 of the APA**

The Sex Offender Registration and Notification Act (SORNA), effective July 27, 2006, requires that convicted sex offenders register under the Act before traveling in interstate commerce. In enacting SORNA, Congress provided that “[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 . . . “This gave rise to a question of whether SORNA applied to all previously convicted sex offenders under its own terms, or whether the statute’s application to such sex offenders depended upon the Attorney General’s acting under this provision. Although there has been some disagreement on this issue, the Attorney General sought to avoid any uncertainty by issuing a legislative rule providing that SORNA applied to those convicted of sex offenses before SORNA was enacted.

The AG issued the rule without notice and comment and made it immediately effective, both of which require a “good cause” justification under § 553 of the APA. The AG found good cause in the need to “eliminate any possible uncertainty” about SORNA’s application and in the need avoid “immediate impairment of efforts to protect the public from sex offenders who fail to register.” Three circuits have split both internally and among themselves on the question of whether the AG has demonstrated good cause. In 2009, the Fourth Circuit, over a vehement dissent, upheld the AG’s actions. United States v. Gould, 568 F.3d 459 (4th Cir. 2009), cert. denied, — U.S. —, 130 S. Ct. 1686, — L.Ed.2d —, 2010 WL 680575 (2010). More recently, the Sixth Circuit found no good cause, United States v. Cain, 583 F.3d 408 (6th Cir. 2009), while the Eleventh Circuit disagreed, United States v. Dean, 2010 WL 1687618 (11th Cir. 2010), both decisions prompting dissents.

The judges who would find good cause generally reject the proposition that something in the nature of an emergency is necessary to establish “good cause,” and that the AG’s general assertion of a need for certainty of application of SORNA and his general assertion of the “practical danger” of the “threat of additional offenses” is enough to justify his failure to seek notice and comment. Judge Griffin of the Sixth Circuit in United States v. Cain noted that “[g]ood cause for the immediate effect of the interim rule is based upon the same public interest concern for
safety from convicted sex offenders that led Congress to enact, with immediate effect, the Adam Walsh Child Protection and Safety Act of 2006."

By contrast, the judges rejecting the “good cause” claims, notably including former Professor of Administrative Law John Rogers of the Sixth Circuit, emphasize the stringency of the “good cause” requirement. They argue that agencies may not rely upon generalized assertions of potential harm. Judge Rogers noted, for example, that “the Attorney General gave no specific evidence of actual harm to the public in his conclusory statement of reasons.” Moreover, Judge Rogers emphasized that the Attorney General had waited seven months from the effective date of the Act to issue this rule and that an agency may not rely upon its own delay as a basis for asserting good cause to issue a rule without notice and comment. Judge Rogers also emphasized that the effect of the rule in this case is to impose new criminal liability. This action is so “quintessentially legislative” that it is particularly important to apply the APA’s requirements with care.

With such clear and strong splits within and among the circuits, this issue is a good candidate for Supreme Court review. The unfortunate juxtaposition of somewhat arcane administrative law doctrine with the hot-button issue of sexual offenders threatens to distort the otherwise relatively clear and stringent requirements of the “good cause” exception.

D.C. Circuit – Congressional Policy Statement Does Not Support Ancillary Jurisdiction

Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010), a blockbuster in the communications law community, addressed two issues of broader interest in administrative law: (1) the nature of primary jurisdiction, and (2) the degree to which an agency may rely upon a congressional statement of policy in the absence of explicit statutory authority.

As Internet use expanded, Comcast took actions that interfered with or restricted the use of peer-to-peer applications. Comcast justified its actions as necessary to manage scarce network capacity, but users complained to the FCC. In response, the FCC held that it had the authority to reach these actions under the concept of ancillary authority, citing a congressional statement that “[i]t is the policy of the United States... to promote the continued development of the Internet and other interactive computer services” and “to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet.” The FCC found that Comcast’s actions violated this policy.

Challenging the FCC’s decision, Comcast argued that the FCC had no jurisdiction over its management of its Internet services. As a threshold matter, the FCC argued that Comcast was estopped from raising this issue because the company had successfully argued in a previous case that the matter should be referred to the FCC under the doctrine of primary jurisdiction. The D.C. Circuit rejected this argument, explaining that the concept of “primary jurisdiction” is different from the concept of jurisdiction to act. A matter may appropriately be referred to an agency to determine whether or not the agency has authority over the question at hand. The referral does not represent a judicial determination that the agency has jurisdiction in the sense of the power to decide the merits of a claim—the sort of jurisdiction challenged in Comcast.

The FCC’s claim of jurisdiction over Comcast’s activities hinged largely on the congressional policy statement quoted above. The FCC conceded that Congress had not expressly authorized it to act in this area (and it failed in arguments that various provisions together delegated the necessary authority). Instead, the FCC asserted that “the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities,” the accepted test for establishing ancillary jurisdiction. The FCC’s problem, however, was that this test applies when the FCC seeks to protect expressly granted “statutorily mandated responsibilities.” With no such express grants, the FCC relied upon the congressional statement of policy. The court rejected the FCC’s argument, holding that an agency may rely upon such congressional statements “in conjunction with an express delegation of authority,” but not as the basis for agency authority.

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By Scott Rafferty*

Proceedings of the Sixth Annual Administrative Law and Regulatory Practice Institute on Rulemaking

The Sixth Annual Administrative Law and Regulatory Practice Institute brought together 243 attorneys and regulatory experts on June 1, 2010, to discuss the latest developments in rulemaking and appellate advocacy. Speaking for section chair William V. Luneberg, chair-elect Jonathan Rusch welcomed participants and introduced Section Vice Chair Michael Herz of Cardozo Law School, who organized the program.

Professor Herz introduced Cass Sunstein, Administrator of the Office of Information and Regulatory Affairs (OIRA), who identified three distinctive approaches that the Obama Administration is taking toward regulation: (1) Using the best new evidence on how people really behave during the regulatory review process; (2) Promoting transparency and open government in new ways, using disclosure as a low-cost, high-impact regulatory tool; and (3) Using cost-benefit analysis as a pragmatic tool to assess and publicize the full range of consequences to the public, including fairness, distributional impacts, and intergenerational transfers.

President Obama directed OMB Director Peter Orzag to use behavioral economics and to ensure that regulatory actions take into account insights into psychology, such as procrastination, peer impacts, and salience. Default rules tend to stick, which explains the low participation in 401 (k) plans. Saving increases when it is automatic or simple. Obesity and healthy behavior can be contagious. People do respond to incentives, but information must be salient. For example, an ambient orb that displays high and low energy use led to more conscientious, and therefore more effective, attempts to conserve.

Automatic enrollment overcomes inertia, so the Affordable Care Act directs large employers to enroll employees unless they opt out. Medicaid and CHIP will also use “express lane eligibility.” The Treasury Department will use debit card to pay benefits, helping Americans who do not have bank accounts. Simplification increases salience and overcomes inertia by citizens. A series of initiatives, including the new Consumer Financial Product Agency, allow simplified disclosure that is clear and straightforward, meaningful as well as technically accurate.

Transparency and openness have (1) increased accountability, due to its disinfectant effect, (2) made information easier for citizens to find and use, and (3) enabled policymakers to benefit from dispersed knowledge within society, as Frederick Hayek proposed. Agencies have not received these initiatives as burdens, but as an opportunity that has unleashed tremendous creativity. Data.gov, being mimicked all over the world, allows the public to download data sets, leading to private applications such as flyontime.com.

Citizen participation is an indispensible method to ensure that regulation is evidence based. Over the last six months, regulatory analyses and preambles have been unprecedented both in detail and clarity.

Disclosure can provide low-cost methods to achieve regulatory objectives. The greenhouse gas reporting rule is not command-and-control, but uses disclosure to allow public tracking of emissions among similar facilities. There is increased disclosure of workplace fatalities, air passenger protection, and human rights records, as well as simplification of nutritional labels and tire and child car seat safety. The OMB/OIRA dashboard is a picture of the rulemaking apparatus, promoting accountability within the government itself.

Cost-benefit analysis is now more inclusive than it had been under the previous administration. For example, before rescinding the ban on HIV+ immigrants, OMB tabulated a wide range of beneficial and adverse effects — including the potential for reducing stigmatization, strengthening families, and attracting highly skilled workers, as well as ethical, humanitarian, international, and distributional impacts that are difficult to place in monetary equivalents.

In closing, Sunstein observed that regulation must promote and not undermine economic recovery.

Developments in Rulemaking

Jamie Conrad, Counsel, Conrad Law & Policy, introduced the panel on recent developments in rulemaking.

Michael Fitzpatrick, Assistant Administrator of OIRA, observed that the Administration’s ambitious agenda had generated many complex rules. Review times are extremely tight. OMB has reviewed 802 “significant” rules from the non-independent agencies, including 162 economically significant ones. Clinton’s OMB reviewed all regulations, but the number of economically significant rules is almost identical.

Open government will be a key legacy. A working group of OIRA, CTO Vivek Kundra, and Beth Noveck meets regularly and has met all deadlines. Each agency has senior accountability officials. There are continuous efforts to populate data.gov with useful information and to enhance the OIRA dashboard. Whatever is in the public docket room should be online.

Professor David Franklin of DePaul University spoke regarding judicial review of guidance documents that are legislative rules in disguise. Over the past 15 years, scholars have proposed a “shortcut” that would allow agencies to defer APA review of rules issued without public comment until enforcement but then deny them deference and legally binding force.

Courts are appropriately reluctant. Deregulatory rules, including safe harbors, would never be subject to review, since
there would be no subsequent enforcement. Electing notice-and-comment for guidance could make it difficult for agencies to make exceptions or revision without another comment process. Public scrutiny at notice-and-comment also serves different purposes from post-enforcement judicial review. While sloppy, the status quo has play in the joints, giving courts room to tailor notice-and-comment requirements, while allowing agencies some use of guidance documents to inform the public.

Professor Herz discussed a variety of developing issues in appellate review. He asked whether the Court really understood what Massachusetts v. EPA implies for arbitrary-and-capricious review. As Justice Scalia emphasized, Congress could have grounded criteria in the statute, but chose not to. Professor Herz suggested that it was an “anti-politics” decision, seeking to protect the technocratic expertise of the agency.

Professor Herz suggested that the “logical outgrowth” test should be grounded in foreseeability and fair notice but identified variations among the circuits as to whether it focuses on the notice, the proposed rule, or a more forgiving review of the entire regulatory dialogue. Circuits are also in conflict as to whether sex offender registry rules may take immediate effect as to past offenders, as justified by substantive importance rather than any emergency. He also suggested that the D.C. Circuit was becoming more permissive of changes in agency interpretations made without notice and comment.

Curtis Copeland, specialist at the Congressional Research Service, discussed the large number of rules that have not been submitted to Congress as required by the Congressional Review Act. Mr. Fitzpatrick said some agencies questioned GAO’s data, but confirmed that OMB will make sure that GAO has a direct regulatory contact in each agency. Mr. Copeland also observed that the Affordable Care Act has 40 rulemaking requirements and includes some very broad grants of authority. Congress could use hearings to shape rulemakings or pass resolutions of disapproval, but the most likely action is appropriations riders.

**Luncheon Address**

The lunch speaker, Chairman Paul Verkuil of the Administrative Conference of the United States (ACUS), spoke about his excitement at the reestablishment of the Conference after some 15 years in exile. He identified a number of potential research areas, including (1) agency preemption of state law, (2) regulatory negotiation, (3) the application of ethics rules to contractors and their potential involvement in inherent government functions, and (4) immigration procedures. He emphasized the opportunity for ACUS to serve as a forum to disseminate best practices among agencies and to improve management techniques. He was in the process of recruiting consultants so that projects would be in the pipeline while ACUS builds its staff and membership of 90.

**Hybrid Rulemaking**

Professor Ronald Levin of Washington University moderated the panel on formal and hybrid rulemaking. In the 1960s and 1970s, agencies displaced the use of trial-type proceedings with informal notice-and-comment proceedings. Several statutes required hybrid proceedings, but Vermont Yankee signaled a shift away from formal and hybrid rulemakings.

Professor Jeffrey Lubbers of Washington College of Law observed that, except for rate cases, Congress has all but eliminated formal rulemaking. Prior to termination in 1995, ACUS had proposed that agencies voluntarily consider hybrid rulemaking but warned against increased statutory requirements. The Magnuson-Moss Act required the FTC to use special procedures with built-in time lags, causing some rulemakings (e.g., credit practices, used cars) to last almost a decade. Where Congress has provided exemptions, the FTC has obtained public input and completed significant rulemakings within 4–7 months.

Jim Davidson, Chair of Polsinelli Shughart’s Public Policy Group, observed that the “substantial evidence” standard drove process, creating a record for judicial review. Politics, not process, explains delay.

Jonathan Snare, partner at Morgan Lewis & Bockius, discussed OSHA’s hybrid rulemaking. For health standards, OSHA must establish technological and economic feasibility of rules while ensuring that no employee suffers substantial health impairment. Formal hearings vary from one day to six months, with 30–45 day post-hearing periods for briefing and rebuttal. This process leads to increased credibility for the rule.

Jeffrey Rosen, partner at Kirkland Ellis, argued that it is time for agencies voluntarily to revive hybrid and formal rulemaking procedures because it will improve transparency and factual accuracy and provide incentives for public participation. ACUS 76–3 recommended on-the-record procedures when data are technical or costs are significant. However, Professor Levin argued that, since the 1970s, a consensus has developed that informal rulemaking provides an adequate record.

**Technology and Rulemaking**

Neil Eisner, Assistant General Counsel, Office of Regulation & Enforcement, Department of Transportation (DoT), moderated the panel on technology and rulemaking.

Professor Cynthia Farina of Cornell University reported on the progress of the Cornell eRulemaking Initiative. Regulationroom.org is working closely with DoT to provide an actively moderated discussion of selected pending rules. DoT treats the summary that it files on the last day of rulemaking as a public comment.

E-rulemaking faces obstacles: The public is ignorant about the process, unaware of relevant rulemakings, and overloaded by the volume and complexity of information.

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Carl Malamud, founder of Public.Research.Org, discussed the importance of making all primary legal materials available to the public, in digitally signed format. Equal protection is impossible without access, and yet, eight states still assert strong copyright protection over their statutes. They acquired 20 million pages of Pacer documents, leading to new court rules to redact social security numbers and other private information. Cost remains a barrier. They purchased the Federal Reporter for the last 50 years, but entering the search business would still cost $10–50 million.

Duncan Brown discussed his role as the new director of e-Rulemaking at EPA, the program manager to implement the e-Government Act. He talked about the development of regulations.gov and the Federal Document Management System for internal agency use. He noted that with regulations.gov, the public and other interested parties can make inquiries across the entire federal government, review any proceeding, and file comments. He further noted that sharing all federal resources provides every agency state-of-the-art technology.

Professor Stuart Shulman of University of Massachusetts discussed the “Public Comment Analysis Toolkit” created by Texifter, LLC, which he founded. The “Toolkit” was created to search, sort, and analyze data, such as a large volume of public comments.

Michael White, managing editor of the Federal Register, explained that GPOAccess is being retired as federal materials migrate to the Federal Digital System (FDSys). GPOAccess started in 1994, but the Internet destroyed the economic model as paper subscriptions fell off. Federal Register and CFR files are now free on data.gov, with substantial metadata to support third-party applications.

The National Archives and GPO are preparing Federal Register 2.0 as a web edition that offers citizen participation opportunities – using newspaper-like sections with broad topics, crowd sourcing (most popular lists), clean layout, and calendars. They want to digitize pre-electronic material from the beginning of the Republic. These digitized records will parse as well as natively electronic data. They use open-source code and expect that eventually XML, not PDF, will be the default format.

Apellate Advocacy

Chief Judge David Sentelle and Judge Brett Kavanaugh of the Court of Appeals for the District of Columbia Circuit discussed appellate advocacy in rulemaking cases.

Judge Kavanaugh emphasized that presentation in court really matters as to outcome. Judges are generalists. Judge Sentelle said that briefs should inform and explain the controversy before advocating. If respondents do a better job stating the case, they can gain an advantage. Have a glossary of acronyms at beginning if absolutely necessary. Lead with your best issues or counterarguments. Don’t waste time and space on issues that do not win. Minimize the number of times that you refer to “the Act,” remembering that we have three other cases on the day. Statutes are supposed to be an addendum; make sure that code citations in the brief correspond to the addendum.

Candor develops a professional reputation. Justice Scalia has influenced interpretation, which is now much more textualist. Do not improperly state what happened below. Acknowledge adverse precedents.

The standard of review is particularly important in agency cases and must be stated early in the brief. Petitioners must fit their argument into the proper framework. Respondents should not get bogged down in substance if standard of review determines the case. Judge Edwards has written a book summarizing standards of review, which the bench finds quite useful. Many cases are resolved on step one of Chevron: whether the statute speaks directly to the issue being interpreted. Arbitrary and capricious is an uphill climb, but not impossible. Look for case law beyond your agency. Agencies should consult with litigating counsel before they issue a final rule. If the agency response ignores salient points made by several commentators, the court may very likely send the rule back, even under arbitrary and capricious.

The circuit court will obviously follow whatever the Supreme Court has decided. Even strongly considered dicta are almost holy. We are bound by holdings of prior panels, but may not be as wedded to dicta. Other circuits are persuasive, but you need to make clear why their ruling applies and identify any circuit splits. If it is the 9th Circuit, you may have a difficult time persuading us.

Summary of argument is the first chance to put forth your key arguments, uninterrupted, so do not waste it. This is the first thing Judge Kavanaugh reads, and then he reviews it right before he comes out, so it frames his last thought before he hears the case.

We often do not know exactly what the petitioner is asking us to do – vacate, remand on specific issue, reopen comment period? Briefs can also leave the court mystified about how the rule works on the ground. Agency counsel always needs to have a good answer to: “What happens if you lose?”

Footnotes interrupt judges’ train of thought, even if just for references. Extensive reviews of circuit conflicts may justify a footnote. Keep substantive footnotes to a minimum, such as any ripple effect of the desired holding.

Petitioners should not let the court overlook a well-reasoned dissent. Dissenting commissioners have the same expertise, even though they are not entitled to formal deference.

Plan two different oral arguments, depending on whether the panel is hot or passive. Always answer the question the judge is asking. If you are not certain you understand, say “If I understand your question as...” Don’t say “that’s not this case,” because hypothetical questions help judges understand how far...
precedent could take the court. Listen for “yes or no” questions. You have an opportunity to address what is troubling the judge, which your opponent will use if you do not.

Argument in the alternative is a lost skill in brief-writing, and even more so in oral argument. “We think the Supreme Court means A, but we still win if it means something else.” Be wary of conceding on the fly. Avoid extreme hypotheticals. Think beforehand and argue in the alternative. “We think that it does mean that, but even if you disagree . . . This does not give away the case or sound extreme. Don’t use extended analogies. This wastes time and invites hypotheticals.

Preparation is important for oral argument. You want moots if you can get them. If your office is too small, you have to prepare yourself and engage in role-playing.

When pressed, advocates should acknowledge that they understand the difficulties suggested by a judge’s question, but then offer three responses as “lifelines.” This keeps judges off your back and shows advance preparation. Another lifeline is returning to the theme or mantra of argument. There may be more than one way to win, but wind your answer around to get back to your strongest argument. If one judge doesn’t understand, try to make eye contact with other judges.

You must know the record. Never misstate it. “Where was this point raised before the agency?” Appellate counsel may have a different formulation and approach but need to know where everything is in the record. Everyone can be this prepared.

The judges concluded with some final advice: Don’t exaggerate. Don’t say “clearly.” And don’t interrupt judges. ☑

Interview with New FDA Chief Counsel Ralph Tyler continued from page 10

to FDA could be undertaken. Do you have a similar view of the Act’s broad empowerment?

RT: Our statutes are delegations of authority to FDA; FDA implements these as advances occur in our regulated field. We start out with the statute and ask, is this action permitted? I don’t believe that OCC has a cramped view of the statute; our advice will be consistent with the statutes and with public health needs.

ARLN. FDA’s 100 lawyers in OCC have been joined by perhaps 40 others with titles like “regulatory counsel” who work directly with your client centers. What will the relationship with these lawyers be under your leadership? Is it like law firms and in-house counsel?

RT: I have no supervisory role over them, nor should I, as they report to the center directors on roles such as drafting teams for rules or guidance documents.

ARLN. Can you characterize your personal goal for OCC that will be remembered as your theme—for example, Peter Hutt’s move of FDA into rulemaking, or Dan Troy’s attempt to preempt state tort law remedies? What can our readers expect the Tyler era to be known for?

RT: I hope it will be written that OCC as a group has excelled in the practice of law and that our service to clients has been timely, effective, and centered on the needs of the clients.

ARLN. Do you have any message for regulated industries lawyers?

RT: Just as the Commissioner has said, we want, need, and expect cooperation of the lawyers who practice FDA law. We hope that they are counseling their clients to come into full compliance. Only through continuing relationships can these goals be achieved. In some cases OCC is asked to intervene on science issues beyond our competence, and we can’t do that. But we want to be known for open and accessible interaction with those attorneys who come to us with issues. ☑

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the United States, and it applied that principle to the Board. No one challenged the (assumed) limits on removal of the Commissioners, but instead the Court concluded that the second-level limits on the power of the Commission to remove Board members infringed on the President’s power to ensure that the Commission and/or the Board did their jobs properly. Having decided that the limitation on the Commission’s removal power was unconstitutional, the Court then concluded that the Board could be composed of inferior officers, rather than principal officers, because of its ruling in this case that the Commission could fire them at will, even if it did not have the power to oversee their daily operations, as the dissent believed the Commission had under the statute, making the removal issue irrelevant.

I leave to the majority opinion to defend that ruling and to explain how it sliced and diced the statute to save the Board but free up the Commission to fire its members at will, despite the clear intent of Congress not to give it that power. I also leave to the dissent to explain why the principal conclusion of the majority is in error. Instead, I want to raise a preliminary question that the majority did not discuss, ask what Congress might do as a second-best alternative, and then touch briefly on the some of the concerns expressed by the dissent that relate to how this opinion will affect agencies beyond the Board.

Before getting to the merits, the Court was faced with a claim that the plaintiffs had to exhaust their administrative remedies and could not bring this case in this form. The Court rightly rejected that contention on the ground that at least the accounting firm was objecting to being subjected to a Board that was illegally appointed and thus had no power to do anything. But that argument has much less force when the issue is not the Board’s method of appointment, but whether the plaintiffs have standing to protest that the Commission has too little power to remove Board members. It is one thing to conclude that Congress had too much power over the removal of the Comptroller General as he was then known in Bowen v. Synar, so that members of the public who were subject to his rulings could protest his lack of independence, but here the claim would have to be that the Board had too much independence and that somehow the plaintiffs would inevitably be harmed by that. Given the stringency with which the Chief Justice and others in the majority have been applying the doctrine of standing, it is quite remarkable that they expressed no concern over the right of these plaintiffs to sue on this claim, with no showing whatsoever has to how this limitation adversely affected them. Of course, if the Court had found that the Board’s members were principal officers, there would be no standing issue, but having split the baby this way, undoubtedly so that the Board’s past and future actions would remain in place, that created a standing issue that the Court chose to ignore.

What might Congress do now to fix up a regime that it clearly did not want? First, it could do nothing on the theory that the Commission will not exercise this newly awarded power except in extreme cases, that there will be none, and that, because if there are problems the Commission would have to fire at least two and probably three members to effect any change, which it will probably never do. Second, it appears from the majority opinion that if either the Commission or the President had the power to fire Board members at will, that would satisfy the majority. Thus, Congress could amend the statute so that power to fire resides with the President, who would probably have too much else to worry about besides the Board that supervisors accountants, especially since he would not get to pick their replacements. Third, Congress could give the President the power to appoint the Board (with recommendations from the Commission), but then make the Board subject to removal only for cause, by the President. In this option, the Board might also be relieved of Commission supervision of its decisions, but that might not be necessary. None of these solutions is ideal, and given the fact that Congress has just finished the financial services regulation bill and seems unlikely to want to open up these issues now, leaving well (or bad) enough alone might be the best or at least the most likely course.

The dissent of Justice Breyer has two parts: in the first, he takes issue with the majority by arguing that none of the reasons for any of the Court’s prior separation of powers cases striking down federal statutes has any application here and most point in the opposite direction. In doing so, he shows why this decision is wrong, but that does not seem to be his main concern since the statute governing the Board is unique in many ways. The problem, which Breyer explores in the second part of his dissent, is what else is subject to the majority’s newly minted Presidential (or actually Commission derived from the President) right, given the great variety of federal agencies and the ways in which their membership is established and controlled. Perhaps it did not occur to him, but he might have taken a page from the Chief Justice’s dissent in Caperton in 2009 which listed 40 questions that the opinion of Justice Kennedy in that case left open. I did not count the questions raised by Justice Breyer’s dissent, but if they did not reach that number, they came pretty close. Among the most significant is what the majority will say about administrative law judges whom no one can remove without cause and who appear to be at least inferior officers. For those who are interested in creating hypotheticals for class or a final exam, there are fertile grounds in the dissent’s two appendices, the first listing 48 statutes limiting removal of specified officers and the other listing 573 Senior Executive Service officers whose removal might be subject to this ruling. As the dissent remarked, the ruling could be limited to this statute, but it is not easy to see on what principle, or it could be broad and hence potentially quite disruptive—and the majority does not tell us which one it will be. If it is the former, it can be forgotten as just an errant decision, but if it is the latter, the administrative state of the federal government is in for a rocky and uncertain ride.
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