REMARKS ON THE PRESENTATIONS BY PROFESSORS SHAPIRO AND LEVIN

MARY M. SCHROEDER†

I welcomed the invitation to join this program with alacrity because I have great respect for Duke University. I also have enormous respect for Ab Mikva, as a jurist, lawyer, congressperson, and friend. He is also a fellow graduate of the University of Chicago Law School, and one who shares my occasional skepticism about the economic philosophy with which the school has come to be associated.[1]

I recall having breakfast with Ab many years ago when he was on the D.C. Circuit. Ab told me I was too young to be a circuit judge and that I would soon find it boring. Let me take this opportunity as the Chief Judge of the Ninth Circuit to make clear that this job is never boring.

SHAPIRO ESSAY: OUTSOURCING GOVERNMENT REGULATION[2]

The thesis, as I understand it, is that an agency will adopt the regulation that costs it the least to promulgate. This is driven by the assumption that the administrators are motivated by the desire to save money. I don't buy into the thesis. To the extent that I have studied economic models a bit, my understanding is that private industry wants to use the least expensive means of operation in order to reap profits and beat the competition.

Now why would the Food and Drug Administration (FDA) or Federal Trade Commission (FTC) want to make a profit? How could they make a profit? And, if they were not interested in making profits, then why would they engage in an analysis of which regulation

---

† Chief Judge, United States Court of Appeals for the Ninth Circuit.

1. For a discussion of economically and non-economically minded University of Chicago alumni on the federal bench, see Abner J. Mikva, *The Law School's Fair Image*, 70 U. CHI. L. REV. 259, 262 (2003).

2. 53 DUKE L.J. 388 (2003).

is cheaper to promulgate? It seems to me what the agency might do, and probably should do, is determine which regulation is cheaper to administer. But, I must say more cynically, what is more likely is that the agency will opt for the regulation that is the least expensive for the regulated industry to follow. To me, that is the most intractable problem of administrative law: the tendency of agencies to become the captives of the industries they regulate. It is also why Article III judges—the Federal Circuit, of course, excepted—have never favored, and have generally opposed, specialized federal courts. It is because of the fear that such courts will become captive to the industries they serve. For example, some have argued there is too close a relationship between the patent bar, the patent office, and the Federal Circuit.[3] So I agree absolutely that economic interests are heavily implicated in regulatory decisions. The question is whose economic interests? I would submit it too often is not the regulators' interests or the taxpayers' interests, but the interests of those being regulated. In my view, outsourcing would make the problem patent, not latent. That, to me, would not be much of an improvement.

LEVIN ARTICLE: "VACATION" AT SEA[4]

A major thesis, as I understand it, is that courts should have the authority to remand a regulation without vacating it in limited cases where the equities warrant it. Professor Levin makes a very good point that if a court holds that a regulation was improperly promulgated, but nevertheless keeps it in place, it is in effect approving retroactive rulemaking. Such a holding also effectively denies relief to the party that challenged the regulation. He advocates leaving the regulation in place in those circumstances where the equities warrant it and cautions courts to balance the equities carefully. I agree.

I was on the panel in *Western Oil & Gas Association v. EPA*,[5] where the court remanded without vacating.[6] In *Western Oil*, the court held that the Environmental Protection Agency (EPA) failed to comply with the notice and comment provisions of the Administrative

3. *See, e.g.*, Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 26–30 (1989) (evaluating criticism that the Federal Circuit has a pro-patent bias).

4. 53 DUKE L.J. 291 (2003).

5. 633 F.2d 803 (9th Cir. 1980).

6. *Id.* at 812–13.

Procedure Act (APA) when it designated certain areas as nonattainment areas under the Clean Air Act.[7] The panel remanded the case to the EPA to comply with the APA, but decided to leave the designations in place.[8] We concluded that remand without vacation was appropriate (1) to avoid thwarting the operation of the Clean Air Act while the proper deliberation occurred, (2) to avoid undesirable consequences that the court could not predict, and (3) to minimize the court's intrusion into complex environmental regulation.[9] I do not think Professor Levin would seriously disagree that doing so was appropriate in this case.

Where I have a little more difficulty with the Article is that, as I understand it, Professor Levin also advocates vacating the regulation when the regulation violates substantive provisions of the governing statute. That raises a very difficult problem of how courts should determine whether the regulation violates a statute. It is often not clear.

A case in point that Professor Levin cites is *United States v. Oakland Cannabis Buyers' Cooperative*.[10] There the Supreme Court reversed a decision of a Ninth Circuit Court of Appeals panel of which I was a member. The panel was reviewing an injunction issued by a district judge in California, barring the distribution of marijuana by an Oakland cooperative to persons suffering from cancer.[11] We upheld the overall injunction but instructed the district court to make an equitable exception for persons for whom marijuana was a "medical necessity."[12] We said that courts have general equitable powers to tailor injunctions, and that this statute did not say Congress intended to do away with that equitable discretion with respect to injunctions dealing with marijuana.[13]

The Supreme Court turned our reading of the statute on its head and said that because Congress did not include a medical necessity exception, the courts have no discretion to create one, even in the exercise of equitable discretion to tailor injunctions to the needs of a specific situation.[14] Professor Levin cites the Supreme Court case as

7. *Id.* at 812.
8. *Id.* at 813.
9. *Id*.
10. 532 U.S. 483 (2001).
11. United States v. Oakland Cannabis Buyers' Coop., 190 F.3d 1109, 1111 (9th Cir. 1999).
12. *Id.* at 1115.
13. *Id.* at 1114.
14. *Oakland Cannabis*, 532 U.S. at 496–97.

an example of when courts must vacate a regulation because it is contrary to the statute the agency, or in this case, the court, is enforcing.[15] We thought in *Oakland Cannabis* that providing for a medical necessity exception was not contrary to the statute because Congress had not said that courts could not act in their usual way in fashioning equitable relief.[16] We thought we were doing justice and following congressional will. The Supreme Court took the opposite view and said that since Congress did not specifically authorize an exception, our injunction was contrary to the Act.

So my question to Professor Levin would be: Do you have an easy way to determine whether a regulation is contrary to the statute? In *Oakland Cannabis*, we thought that we had done a very sensible thing that was in accord with congressional wishes because Congress wanted to take into account exigencies that might develop through medical research. Courts can take such exigencies into account in fashioning equitable remedies, but Congress must write in general terms and with reference only to the situation it perceives at the time of drafting the statute.

I still think our court's decision was fully justified in that case. In my view, Congress meant to ban the distribution of marijuana for use to get high, not to bar its distribution to relieve the suffering of the terminally ill. More recently, in *Conant v. Walters*,[17] we held that an injunction to protect the First Amendment rights of doctors to discuss and recommend medical use of marijuana was proper. This medical marijuana case was greeted as a sensible decision.[18]

So, overall, I agree with Professor Levin that courts should have the discretion to remand without vacating a regulation, particularly when the flaw in the regulation's enactment was not related to the agency's legal authority to adopt such a regulation. I just do not agree with the suggestion that such legal issues of agency authority are very easy when they involve highly charged questions of statutory interpretation.

---

15. *See* Levin, *supra* note 4, at 339–42.

16. *Oakland Cannabis*, 190 F.3d at 114.

17. 309 F.3d 629 (9th Cir. 2002), *cert. denied*, 124 S. Ct. 387 (2003).

18. For discussion of this case and some of the immediate reactions to the decision, see, e.g., Adam Liptak, *Medical Marijuana Wins a Court Victory*, N.Y. TIMES, Oct. 30, 2002, at A20; Pamela A. MacLean, *Circuit Backs Doctors Who Prescribe Pot*, S.F. DAILY J., Oct. 30, 2002, at A1.