Clarence Thomas and Administrative Law

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When Justice Souter was nominated to the Supreme Court, despite his more than 200 written opinions, he was considered a judicial unknown, especially with respect to administrative law. And it would be no insult to Justice Souter to say that his service in the New Hampshire Attorney General's office and as both a trial and appellate state court judge gave him virtually no exposure to federal administrative law.

Clarence Thomas, on the other hand, may have more administrative law expertise than any justice, with the possible exception of Justice Scalia. He has served both in a traditional executive branch agency (Assistant Secretary of Education for Civil Rights) and on a multi-member commission, the Equal Employment Opportunity Commission (EEOC). He was chairman of the EEOC for eight years, so he is well acquainted with the political and judicial constraints under which agencies labor.

Even in his short stint on the D.C. Circuit, Judge Thomas has made a mark on administrative law. For example, his one dissent and two concurrences involved administrative law cases. In *Tennessee Gas Pipeline Co. v. FERC*, 926 F.2d 1206 (1991), Judge Stephen Williams wrote the opinion, in which Judge Wald concurred, finding for the second time that a FERC determined rate of return on equity for a gas pipeline deviated from FERC precedent without a reasoned explanation. Accordingly, the court remanded the case to FERC. While Judge Thomas concurred wholeheartedly in the finding of FERC's unreasonableness, he concurred "only reluctantly" with the relief afforded. The pipeline had requested that the court itself establish the rate of return rather than remanding for a second time. Judge Thomas, unlike the majority, took this request seriously in light of FERC's recalcitrance and delay, referring to *Greyhound Corp. v. ICC*, 668 F.2d 1354 (D.C. Cir. 1981), in which the court directed the outcome rather than remand for a second time on the same issue. Ultimately, however, he concluded that "Greyhound inevitably entails some judicial usurpation of agency authority[, and so] must be reserved for truly extraordinary situations."

In *Cross-Sound Ferry v. ICC*, 934 F.2d 327 (1991), the court unanimously upheld, against a competitor's challenge, the ICC's determination that certain water carrier services provided by Viking Starship were exempt ferry services under the Interstate Commerce Act. The majority also ruled that the ICC

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had not violated the National Environmental Policy Act (NEPA) or the Coastal Zone Management Act (CZMA) by not considering environmental effects in making that determination. Judge Thomas, however, wrote separately to argue that the competitor did not have Article III standing to raise the NEPA or CZMA issues. He conceded that the competitor would be harmed by the ICC's determination that Viking was exempt from ICC regulation, but he indicated that, even if the ICC considered environmental effects, the ICC still would have been unable to exercise jurisdiction over Viking, so the competitor could not obtain relief. The majority found the standing issue difficult, because the law was not clear in its view that the ICC could not exercise jurisdiction over Viking in order to protect the environment. On the other hand, the majority found the merits of the NEPA and CZMA claims simple, so relying on certain precedents, it believed it could decide the merits against the competitor without resolving the standing issue. Judge Thomas strongly disagreed with the majority on this approach and on its reading of precedent, writing a scholarly essay on the absolute nature of the requirement to resolve jurisdictional issues prior to the merits.

In his dissent, *Doe v. Sullivan*, ___ F.2d ___ (1991), Judge Thomas again reflected his strict construction of jurisdictional requirements. In this case, the Food and Drug Administration had enacted a rule allowing the military to apply for a waiver of certain requirements applicable to the investigational use of drugs if combat conditions justified their use. The rule was adopted in response to hostilities in the Middle East, and a waiver was granted to the use of certain unapproved drugs as antidotes to possible Iraqi gas attacks. A soldier serving in the Gulf challenged the rule and waiver. By the time the case reached the Court of Appeals, however, the war was over and the waiver had been terminated. Nonetheless, the majority addressed the facial attack on the rule, upholding the rule, because the rule was capable of being used again but evading review. Judge Thomas dissented, believing the case moot and not to fit within the category of exceptional cases where the completed action is likely to be repeated but evade review.

In one of his last opinions, Judge Thomas rejected NEPA claims brought by a citizens' group against the Federal Aviation Administration's (FAA) approval of an expansion of the Toledo, Ohio, airport. See *Citizens Against Burlington v. Busey*, ___ F.2d ___ (1991). The opinion reflects substantial hostility to judicially imposed delays of agency action because of NEPA violations, saying "Just as NEPA is not a green Magna Carta, federal judges are not the barons at Runnymede."
There were a number of problems with the Environmental Impact Statement (EIS) prepared for the FAA. First, the FAA had violated the Council on Environmental Quality’s regulations by allowing the person seeking the approval to select the contractor who prepared the EIS, and the contractor failed to compete properly the conflict of interest forms. The court, however, said these were harmless errors, or at least not a basis for invalidating the EIS. Second, EPA, which is responsible for reviewing EISs, had found fault with some of the methodology of the EIS. The court, however, said the FAA, not EPA, was responsible for the EIS, so the court accepted the FAA’s conclusion that the methodology was proper, even though the FAA acceded to EPA’s complaints and agreed to change its methodology in the future. Third, the EIS only evaluated two alternatives—a no action alternative and the alternative sought by the permit applicant—despite the legal requirement to consider all “feasible” alternatives. The majority did not believe the FAA needed to consider the alternative of expanding other airports, because that was not a “feasible” alternative available to the applicant, the Toledo Airport Authority, or to the FAA, which could only approve or disapprove applications presented to it.

This crabbed interpretation of the FAA’s duty to evaluate alternatives, which the majority conceded was inconsistent with Van Abbema v. Fornell, 807 F.2d 633 (7th Cir. 1986), aroused Judge Buckley to dissent. To observers sympathetic to the use of NEPA to challenge governmental permit actions, the case is disheartening because all the evidence suggested that the FAA had not seriously considered the environment at all, with the EIS merely a paper exercise delegated to others.

Judge Thomas also appeared to reflect conservative credentials in New York Times Co. v. NASA, 920 F.2d 1002 (1990), an en banc FOIA case seeking a copy of the recording of the last words of the Challenger astronauts. There the court split 6-5 upholding the FOI denial, with the majority made up entirely of post-1981 appointments and the dissent made up entirely of pre-1981 appointments.

In his other cases, Judge Thomas did not appear to subject agency action to any "hard look." In two different coal mining cases, for example, Judge Thomas wrote opinions upholding the Department of Labor’s actions: in one modifying a mandatory safety standard for coal mines over the objection of the union, International Union, UMW v. FMSHA, 931 F.2d 908 (1991); in the other citing as an "operator" of a mine an elevator company that serviced coal mine elevators under contract, Otis Elevator Co. v. Secretary of Labor, 921 F.2d
1285 (1990). In *Buongiorno v. Sullivan*, 912 F.2d 504 (1990), Judge Thomas rejected a facial challenge to an HHS regulation governing the circumstances under which HHS will waive the service or repayment obligations of a scholarship recipient under the National Health Service Corps. The challenge asserted that the HHS regulation incorrectly interpreted the governing statute. Judge Thomas applied *Chevron* and concluded that "whether or not the Secretary's interpretation is 'particularly compelling,' we hold that it is not 'patently inconsistent with the statutory scheme.'" Finally, in *Rederi v. FMC*, ___ F.2d ___ (1991), Judge Thomas upheld that the FMC's action, because its interpretation of ambiguous terms in a contract was not unreasonable.