

## Maurer School of Law: Indiana University Digital Repository @ Maurer Law

---

Articles by Maurer Faculty

Faculty Scholarship

---


2000

# Using Cases as Case Studies for Teaching Administrative Law

John S. Applegate

*Indiana University Maurer School of Law*, [jsapple@indiana.edu](mailto:jsapple@indiana.edu)

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [Administrative Law Commons](#), and the [Legal Education Commons](#)

---

### Recommended Citation

Applegate, John S., "Using Cases as Case Studies for Teaching Administrative Law" (2000). *Articles by Maurer Faculty*. Paper 442.  
<http://www.repository.law.indiana.edu/facpub/442>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).

# USING CASES AS CASE STUDIES FOR TEACHING ADMINISTRATIVE LAW

**John S. Applegate\***

My contribution to this symposium necessarily takes a somewhat different perspective from others because, while I have taught Administrative Law many times, I do not teach it now, and there is (alas) little prospect of my doing so in the near future. Instead, I teach Environmental Law in various permutations, and so I necessarily teach "Ad Law Lite" at least once a year for my Environmental Law students who have not yet taken Administrative Law. To someone who has taught the real thing, "Ad Law Lite" is frustrating because it is so obvious how many topics and how much important detail are missed. Moreover, because so much modern administrative law has developed through environmental regulation cases, one has a continuing awareness that some of the richness of environmental law is lost when the procedural side is minimized. I have to console myself with an earnest injunction to my students to take Administrative Law as soon as possible.

This problem crystallized for me in the course of writing a chapter, *The Judicial Role in Toxics Regulation* (a more dignified, though possibly less accurate, title than "Ad Law Lite"), of a new casebook on the regulation of toxic substances and hazardous wastes.<sup>1</sup> I will describe two aspects of creating and teaching this primer on administrative law: the selection of topics and the method of presenting them. The latter—which involves using cases as case studies—is the main point of this paper, but I want to address the former as well, because it sets the stage for the method of presentation.

## I.

The content of the *Judicial Role* chapter is extremely straightforward. The first section introduces students to formal and informal rulemaking and adjudication, the basic forms of agency action under the Administrative

---

\* Professor of Law and Charles L. Whistler Faculty Fellow, Indiana University School of Law - Bloomington; B.A. 1978, Haverford College; J.D. 1981, Harvard University.

<sup>1</sup> JOHN S. APPLIGATE ET AL., *THE REGULATION OF TOXIC SUBSTANCES AND HAZARDOUS WASTES* (Foundation Press - forthcoming).

Procedure Act (APA).<sup>2</sup> (Subtleties like interpretive rules—“guidance,” in Environmental Protection Agency (EPA) parlance—are dealt with in substantive settings.) The chapter emphasizes the legislative and judicial analogies to these procedures as the basis for exploring, first, the reasons for choosing one procedure over another and, second, the development of hybrid procedures for agency decision making and judicial review. While Environmental Law relies overwhelmingly on rulemaking to establish standards and policies, important exceptions exist, the most important being the registration of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).<sup>3</sup> And, of course, the ubiquitous permit requirements involve adjudicatory procedures, albeit usually fairly informal. The dominance of rulemaking is partly historical accident (the emerging popularity of notice-and-comment rulemaking at the time that the main environmental statutes were enacted *versus* the 1947 origin of FIFRA), but it has important consequences for the operation of the statutes. Furthermore, Congress has experimented heavily with hybrid rulemaking in environmental statutes, and a solid background in the sources of the procedural elements is helpful to understanding their purpose and impact.

*Vermont Yankee Nuclear Power Corp. v. NRDC*<sup>4</sup> permits presentation of both of these points. The Nuclear Regulatory Commission (NRC) chose a mixture of rulemaking and adjudication for different parts of its overall licensing strategy, and it chose the particular mix of procedures for a combination of good (streamlining) and bad (avoiding questions to which it had no good answers) reasons. The Supreme Court’s rejection of judicially imposed hybrid procedures provides the setting for considering the costs and benefits of additional trial-like procedures and introducing the subsequent Congressional adoption of the enhanced rulemaking procedures that play such a prominent role in toxics legislation.

The second section of the chapter lays out the “methodology” of judicial review. How does judicial review work? What questions do courts ask? *Citizens to Preserve Overton Park v. Volpe*<sup>5</sup> is the obvious candidate for presenting this, because it is such a comprehensive treatment—textbook-like, really—of the review process under the APA. (It does not hurt for my purposes that *Overton Park* is an environmental law case.) *Overton Park*

---

<sup>2</sup> 5 U.S.C. §§ 551-559 (1994 & Supp. IV 1998).

<sup>3</sup> 7 U.S.C. §§ 136-136y (1999).

<sup>4</sup> 435 U.S. 519 (1978).

<sup>5</sup> 401 U.S. 402 (1971).

is followed by a brief textual description of the nature of the agency decision (fact *versus* law *versus* exercise of discretion) and of hard-look review. I saw little reason to cover judicial review of agency factual determinations of the *Universal Camera Corp. v. NLRB*<sup>6</sup> variety in the chapter, but there was no avoiding *Chevron, U.S.A., Inc. v. NRDC*.<sup>7</sup> While I toyed with the idea of describing *Chevron* in text, because it is one part of the overall *Overton Park* framework, so many of the cases that we excerpt for substantive purposes elsewhere in the casebook refer to *Chevron* that presenting the case itself seemed necessary to highlight its importance and to permit later reference. The chapter emphasizes *Chevron*'s analytical steps and the malleability of the first step.

The final section of the chapter introduces students to the wide variation in degree of deference that courts give to agency decisions. This is by far the longest part of the chapter, because it is the administrative law phenomenon that the students will see most frequently—and because it excerpts two very long cases. Borrowing from an article by Kenneth Abraham and Richard Merrill,<sup>8</sup> the chapter presents three models of judicial review of agency judgment: “deference,” represented by *Reserve Mining Co. v. EPA*,<sup>9</sup> “avoidance,” represented by *Industrial Union Dep’t, AFL-CIO v. American Petroleum Institute*<sup>10</sup> (“Benzene”); and “confrontation,” represented by *Asbestos Information Association of North America v. OSHA*.<sup>11</sup> The point, of course, is that concepts like arbitrary and capricious, and even hard-look, are far from fixed. This trio of cases provides an opportunity to explore not only the techniques and criteria for judicial evaluation of agency decisions, but also the justifications for judicial interference and the problems of relative institutional competence. Students should be prepared to see that individual

---

<sup>6</sup> 340 U.S. 474 (1951).

<sup>7</sup> 467 U.S. 837 (1984).

<sup>8</sup> See Kenneth S. Abraham & Richard A. Merrill, *Scientific Uncertainty and the Courts*, ISSUES IN SCIENCE & TECH. 93, 94 (Winter 1986). The article was itself an effort to describe judicial review to non-administrative lawyers (non-lawyers, in fact), which made it ideal for use in a primer.

<sup>9</sup> 514 F.2d 492 (8th Cir. 1975) (en banc).

<sup>10</sup> 448 U.S. 607 (1980).

<sup>11</sup> 727 F.2d 415 (5th Cir. 1984). The archetype, which Abraham and Merrill use, is *Gulf S. Insulation v. CPSC*, 701 F.2d 1137 (5th Cir. 1983), but I needed an asbestos case for reasons described below.

cases in later chapters are the products of both issues specific to a particular statutory regime and issues general to the relationship of agencies and courts.

Perhaps the most important omission from the chapter is the structural constitutional law aspect of administrative law, a topic that occupied a great deal of time in regular administrative law classes. One cannot overstate the importance of the interbranch distribution of power to a politically controversial agency like the EPA.<sup>12</sup> It is not only buffeted by winds from Capitol Hill, the White House, and the Supreme Court, but it has frequently been the battlefield (to mix metaphors) for interbranch warfare. For example, recent Congressional efforts to impose additional risk and cost analysis requirements on the EPA can be understood as the effort of Congress to rein in the executive branch, drawing support from hard-look review of health and safety regulations.<sup>13</sup> Unfortunately, important as these issues are, they would take an administrative law primer in an Environmental Law course too far afield.<sup>14</sup>

## II.

In putting together our casebook, my co-authors and I wanted to supplement the cases-and-questions method with other formats. Non-judicial (indeed, non-legal) materials are of tremendous significance in environmental regulation, and some topics are better addressed by text and problems than by excerpts from court cases. In addition, we decided to use case studies to convey a better sense of the interaction of facts, policy, and law. These general preferences would seem to apply less forcefully to the administrative law (especially the judicial review) part of the book because so much of administrative law consists of a "common law" developed from terse legislative or constitutional commands. While a textual approach could obviously be effective (I thought about excerpting one of the fine summaries of the above topics<sup>15</sup>), it would not do justice to the rich interactions between

---

<sup>12</sup> I have been told that Office of Industrial Resources Administration spends about half its time on EPA regulations, a truly impressive controversy-to-budget-size ratio.

<sup>13</sup> See generally Celia Campbell-Mohn & John S. Applegate, *Learning from NEPA: Guidelines for Responsible Risk Legislation*, 23 HARV. ENVTL. L. REV. 93 (1999) (reviewing and critiquing proposed legislation).

<sup>14</sup> Our casebook does spend a fair amount of time on the Reagan and Clinton executive orders (Nos. 12,291 and 12,866, respectively) that mandate cost-benefit analysis. Instead of emphasizing the centralization of power issues, however, we use the similarities and differences between them, and their application to a case study of air pollution control in the Los Angeles, to make substantive points about economic analysis.

<sup>15</sup> In LAKSHMAN GURUSWAMY ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER* (2d ed. 1999), the authors do exactly this in their international environmental

substance and procedure in environmental law. So, instead of abandoning cases, I expanded relevant cases to bring in substantive background; that is, I turned the cases into case studies.

I do not claim any particular novelty for this idea. All court cases are potential case studies. It is often overlooked by reformers of teaching methods that cases are often the *best* case studies because they are—

- real—though it may be difficult or time-consuming to discover, a full context exists, and it involves a genuine dispute;
- important—no matter how technical the issue, it is important enough to warrant the considerable expenditure of resources needed to bring a case to trial or appeal, that is, it makes a real difference in the real world; and
- resolved authoritatively, rightly or wrongly—one is not left wondering how a court (or agency) *would* resolve it.<sup>16</sup>

Even in basic common law courses, one regularly uses cases to explore factual and policy issues that the opinion itself addresses incompletely, and casebooks frequently include such materials in notes. Our chapter simply expands this practice.

The Judicial Role chapter created two case studies out of judicial decisions. As I explained above, *Vermont Yankee* conveniently addresses (or permits one to address) both the reasons for choosing between rulemaking and adjudication and the development of hybrid procedures for agency decision making and judicial review. Unfortunately, Justice Rehnquist's opinion is so determined to demonstrate the egregious (in his view) error of the D.C. Circuit's approach that it gives absolutely no credence to, or real explanation of, the concerns that led to the appellate court's decision. However, the D.C. Circuit's opinion explains why it regarded NRC's treatment of the radioactive waste disposal problem as cavalier to the point of irresponsibility.<sup>17</sup> And this

---

law casebook. They face the truly daunting prospect of summarizing international law for environmental law students, and so make effective use of their own text and excerpts from others' textbooks.

<sup>16</sup> I don't mean to suggest that problems or hypotheticals are never appropriate teaching tools. Quite the contrary—they are often the best way to isolate or highlight specific issues in a way that existing cases often do not.

<sup>17</sup> See *NRDC v. NRC*, 547 F.2d 633 (D.C. Cir. 1976), *rev'd*, *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978). I have learned from Peter Strauss, who was

goes a long way toward understanding the significance of the choice between rulemaking and adjudication.

The case study begins with a very brief background text and the D.C. Circuit opinion. NRC's licensing process for the Vermont Yankee plant introduces the standard bipolar APA procedures: a formal adjudication for the permit itself, and an informal (actually, hybrid) rulemaking for the generic scoring of the environmental effects of nuclear waste disposal. The scoring system produced a zero value for the environmental impacts of nuclear waste disposal, and this score was factored into the evaluation of individual permit applications. One can easily infer from Chief Judge Bazelon's opinion why NRC chose the process it did and why NRDC wanted more opportunities to challenge the agency's assertions.

Next, an excerpt from the Supreme Court's opinion succinctly lays out the basic arguments for not expanding agency procedures, and they can be debated on the basis of the materials in the case study.

The case study concludes with the part of the Supreme Court's *Baltimore Gas & Electric Co. v. NRDC*<sup>18</sup> decision that affirmed NRC's assumption of zero environmental impact for nuclear waste disposal. The opinion is a "soft glance" if ever there was one, and it confirms the enormous substantive significance of NRC's initial procedural choices. The significance of the procedural choice is heightened in this case study by the fact that history has largely vindicated NRDC's explicit (and the D.C. Circuit's implicit) position in the rulemaking that NRC did not have the waste disposal problem well in hand. To this day, there is no credible solution to nuclear waste disposition, despite (or because of) NRC's "vague assurances . . . that problems as yet unsolved will be solved."<sup>19</sup> As Judge Bazelon suspected, NRC had no clear idea how to deal with nuclear waste, a point made in the casebook's notes to *Baltimore Gas*.

The case study's notes also point out that Congress has chosen to adopt hybrid procedures in many environmental statutes. This emphasizes the scope

---

General Counsel of NRC, that the D.C. Circuit's characterization of NRC's conduct was unfair. In fact, NRC spent quite a bit of time at the hearing in question discussing the problem of nuclear waste disposal. Both the Supreme Court and D.C. Circuit opinion, therefore, also represent a valuable caution in using cases as case studies, that case reports are not infallible descriptions of events.

<sup>18</sup> 462 U.S. 87 (1983).

<sup>19</sup> *NRDC v. NRC*, 547 F.2d at 653, *rev'd*, *Vermont Yankee*, 435 U.S. 519.

of the *Vermont Yankee* holding (*i.e.*, it is limited to judicial innovation), and it sets up the later point that procedural remedies are double-edged swords. The additional procedures that NRDC wanted to use against NRC have been effectively deployed by industry against EPA.

The third section of the chapter is built around a different kind of case study. The clearest way to highlight changes in one feature of a phenomenon is to hold all of the background features constant. So, in attempting to convey the different standards and moods of judicial review, it would have been ideal to show different judicial responses to the same agency decision. Because that does not happen, as a second best I gathered cases dealing with a single toxic substance. My inspiration for this technique was a brilliant collection of slip-and-fall cases, mainly involving banana peels in various states of decay, originally assembled by William Prosser. He used them to illustrate the ideas of circumstantial evidence and burden of proof as a prelude to his casebook's treatment of *res ipsa loquitur*.<sup>20</sup>

For toxic substances, I chose asbestos. Asbestos has been regulated by just about every federal health, safety, and environmental agency under just about every federal health, safety, and environmental statute, so there are plenty of cases from which to choose three representing the deference, avoidance, and confrontation approaches. Moreover, it is one of a relatively small group of known human carcinogens—there is no real question that it causes cancer—making a judicial decision to *reject* regulatory controls all the more striking.

The case study then turns to *Reserve Mining Co. v. EPA*,<sup>21</sup> a 1975 case involving the discovery of asbestos fibers in the Duluth drinking water supply. The asbestos came from mining spoil dumped by the Reserve Mining Company into Lake Superior, and the Eighth Circuit enjoined further discharges under the Clean Water Act. *Reserve Mining* is the weakest factual case of the trio—while asbestos is clearly carcinogenic when inhaled, its effects when ingested were (and remain) uncertain. Nevertheless, the court showed great deference to EPA's belief that ingesting drinking water posed a serious hazard and upheld the requested injunction, modified to give

---

<sup>20</sup> See JOHN W. WADE ET AL., PROSSER, WADE & SCHWARTZ'S TORTS (8th ed.).

<sup>21</sup> 514 F.2d 492 (8th Cir. 1975).



Reserve Mining time to comply.<sup>22</sup> By supporting regulatory action despite significant uncertainty, *Reserve Mining* exemplifies the deference approach.<sup>23</sup>

The "avoidance" case is *Benzene*,<sup>24</sup> which, as its name indicates, is not about asbestos at all. However, *Benzene* is the only Supreme Court case that squarely addresses the unique substantive problems of regulating toxic substances. In addition, it was decided just as EPA was beginning to focus on toxic substances as a special category, so it has been extremely influential in the casebook's area of law. No respectable survey of judicial review of agency decisions on toxic substances could fail to highlight it, so neatness and consistency were sacrificed to historical accuracy.<sup>25</sup> The plurality opinion in *Benzene* rejected OSHA's regulation of this epidemiologically demonstrated carcinogen,<sup>26</sup> not by challenging OSHA's toxicological and economic conclusions directly, but by finding that OSHA's legal approach inappropriately shifted the burden of proof from itself to employers. The plurality was clearly convinced that the regulation was unwise, but its technique for expressing disapproval was aggressive statutory interpretation.

Finally, to demonstrate the "confrontation" approach, *Asbestos Information Association*<sup>27</sup> takes direct issue with the quality of the data used by OSHA to justify its emergency standard for asbestos. *Asbestos Information Association* puts the agency through its paces on each element of proof for standards relating to the inhalation of asbestos, despite the fact that this is the clearly carcinogenic route of exposure. It is in this sense the exact opposite of *Reserve Mining*: there is strong proof of potential injury, yet the court rejects the agency's particular method of addressing it.

---

<sup>22</sup> See *Reserve Mining*, 514 F.2d at 499.

<sup>23</sup> *Industrial Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974), is also available as an asbestos deference case, and it is attractive for a casebook because it contains the "frontiers of science" language that figures so heavily in the judicial approach to reviewing agency action. The facts of *Reserve Mining* are more interesting, however, so *Hodgson* and its protege, *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976), are handled in the notes.

<sup>24</sup> 448 U.S. 607 (1980).

<sup>25</sup> There is, in fact, a perfect avoidance case involving asbestos, *Corrosion Proof Fittings, Inc. v. EPA*, 947 F.2d 1201 (5th Cir. 1991), but its analysis is not based on *Benzene* in any way that would make it an adequate substitute. Instead, *Corrosion Proof* is featured in the chapter on the Toxic Substances Control Act.

<sup>26</sup> A previous chapter excerpted one of the principal epidemiological studies on which OSHA relied in regulating benzene.

<sup>27</sup> *Asbestos Info. Ass'n of N. Am. v. OSHA*, 727 F.2d 415 (5th Cir. 1984).

The central problem in regulating toxic substances is pervasive uncertainty concerning the nature and magnitude of their health effects, especially at low levels of exposure. These three cases not only demonstrate a range of options for judicial review of agency action generally, but they also demonstrate very different judicial expectations for the precision of agency justifications of the regulation of toxic substances. Furthermore, they display a roughly historical progression: the days of extreme deference to toxics controls are over, and *Asbestos Information Association* seems to represent the present, highly critical approach.

Needless to say, in case studies using series of actual cases, reality rarely permits the luxury of holding the background perfectly constant—even Prosser had to use a pizza slice case in his banana series.<sup>28</sup> My series substituted a benzene case, as noted, and it used cases that applied very different legal standards. Nevertheless, the ability to compare and contrast a limited number of cases involving similar substances allows the instructor to highlight the differences that the judicial approach (and applicable legal standard) make to the outcome of disputes.

Space limitations prevented me from making further use of the case study technique. It was very tempting to turn *Overton Park* into a fairly elaborate case study of the power of judicial review. We hint at this point with a road map that shows how the Memphis highway system was based on the Overton Park segment of I-40 and its absence leaves a major gap in the plan. Moreover, Peter Strauss has written an article on the political and social setting of the case that provides a wealth of background material and analysis.<sup>29</sup> However, the benefits and potential drawbacks of this form of citizen and judicial activism are really beyond the scope of a primer. Likewise, *Chevron* lends itself to an investigation of emissions trading and the judicial role in finding flexibility for agencies to experiment with new forms of regulation. This would also have been germane to the chapter, but the moods of judicial review seemed more important. The methodology section of the chapter needed to present the overall analytical framework for judicial review, which is better served by the treatise-like presentation of the unadorned *Overton Park* opinion and the traditional case-and-notes presentation of *Chevron*.

---

<sup>28</sup> See WADE ET AL., *supra* note 20.

<sup>29</sup> See Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251 (1992).

## III.

Finally, just as administrative law case studies can enrich an environmental law course, environmental law case studies can enrich an administrative law course. The third edition of Breyer & Stewart's casebook, for example, places a lengthy note on carcinogens and cost-benefit analysis in its coverage of the use of statutory interpretation to control agency discretion.<sup>30</sup> Environmental case law is a good source of case studies in other areas of administrative law, as well. By way of engaging in the environmentally correct practice of recycling, *Benzene* can be deployed yet again to particularize students' understanding of the advantages and disadvantages of a strong non-delegation doctrine. In his *Benzene* concurrence, Justice Rehnquist made a strong argument that the *radix malorum* of what he viewed as OSHA's extravagant regulation was Congress' failure to define the trade-off between dollars and lives that its statute required.<sup>31</sup> The plurality, hesitant to resurrect the long-buried and little-missed *Panama Refining Co. v. Ryan*<sup>32</sup> and *Schechter Poultry Corp. v. United States*,<sup>33</sup> treated the nondelegation doctrine as a canon of statutory interpretation to bolster its reinterpretation of the Occupational Safety and Health Act. The dissent, written by Justice Marshall, denounced the whole enterprise.<sup>34</sup>

Together, the principal opinions in the case suggest the issues involved in setting legislative standards for carcinogens, but a fuller explication of the relevant risk and economic analysis (emphasizing their uncertainties and limitations) would help students to see why Congress generally adopts narrative, as opposed to quantitative, legislative standards, and why it is not necessarily shirking its constitutional duties in doing so. Justice Marshall's initial draft opinion discussed risk assessment very explicitly as a way of persuading more of his colleagues that Congress' general commands and OSHA's interpretation of them were reasonable.<sup>35</sup> Supplementing *Benzene* with material on risk and cost analysis would also illustrate the extent to which

---

<sup>30</sup> STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 335-51 (4th ed. 1998).

<sup>31</sup> See *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 687-88 (1980) (Rehnquist, J., concurring).

<sup>32</sup> 293 U.S. 388 (1935).

<sup>33</sup> 295 U.S. 495 (1935).

<sup>34</sup> See *Industrial*, 448 U.S. at 688-724 (Marshall, J., dissenting).

<sup>35</sup> My source is a conversation with Sidney Shapiro, who has read the *Benzene* draft opinions among the Marshall papers in the Library of Congress.

certain kinds of regulatory standards (quantitative, multi-factorial) delegate fundamental choices to administrative agencies. This shifts power to the executive branch, which in the context of risk regulation has sparked a Congressional counter-revolution that aims to specify the analytical tools that agencies must use in implementing their authorizing statutes. As has been frequently observed, the nondelegation doctrine, alive or dead, asks us to confront basic questions of who decides and how they decide the content of regulatory controls. The recent reappearance of the nondelegation doctrine in the D.C. Circuit case overturning EPA's new ozone and particulate matter standards confirms the continuing importance of these issues.<sup>36</sup>

Cases are an excellent source of case studies. Administrative law instructors, in my observation, already tend to be very sensitive to the substantive settings of the procedural cases they use. By providing background, the context of other cases, or by mining cases for details that are often left out in the excerpting process, one can provide students with an additional, rich source of factual and policy materials and an opportunity to see regulatory disputes from the perspective of one or more of their participants. This can provide a degree of concreteness and specificity that is frequently elusive in teaching administrative law.

---

<sup>36</sup> See *American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *opinion modified on rehearing by*, 195 F.3d 4 (D.C. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3496 (U.S. Jan. 27, 2000) (No. 99-1263).

