

Yes, I *Do* Love the ListServ

By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina

Hello... I should start off by paying homage to my good friend Kelly Addy for taking such good care of this column for the past few years. Kelly's insight on ListServ issues was always welcome, as was his sage advice.

In case you missed it, Kelly was the Deputy City Attorney for the City of Billings, Montana, for many years, and also is an ordinated Methodist minister. He has retired, and the Bishop had the wisdom to give Kelly his own congregation full-time. And what an assignment! Kelly is now the Pastor at Big Fork United Methodist Church in Bigfork, Montana. Bigfork is situated at the edge of Glacier National Park, one of the most beautiful places in the United States. As Kelly said in parting, "I'm headed off to work full-time in the place where I used to go to get away from it all." Congratulations Kelly, and thanks for your years on the ListServ column, and for being a valued and trusted colleague.

Now, it is my turn and although many of you on the ListServ have certainly had the occasion to hear from me in type (rather abundantly), I feel it only appropriate to formally introduce myself. I am Brad Cunningham, Municipal Attorney for the Town of Lexington, South Carolina. We are a small city of about 22,000 which sits 10 miles west of Columbia, site of the State Capitol. I attended the University of South Carolina in Columbia for undergraduate (B.S. – Finance) and Law School. (J.D.) These degrees were granted 12 years apart and came sandwiched around a stint in the banking business in Myrtle Beach, South Carolina. I think the law is a passion, and I was never able to put it out of my mind, so I embarked upon law school at 34 years of age.

After only three years in the private practice of Real Estate Law, I was fortunate enough to land the Municipal Attorney job here in Lexington and have never regretted the change. Our City is of course a Municipal Corporation, and being the Municipal Attorney makes me a Corporate In-House Counsel like my late father, Robert G. Cunningham Jr. He is the greatest single influence and inspiration not only in my career, but also in my personal life. I only wish he were around to share this part of my life, but alas, he passed away in 1996 at the age of 61, and never even was around to see me go to law school.

My involvement in the International Municipal Lawyers Association consists of serving as the IMLA State Chair for South Carolina, and working with the Disaster Preparedness Committee. And, of course, I make frequent use of the IMLA ListServ and the Water Cooler, serving as a co-moderator for the Water Cooler.

I began involvement with IMLA very early in my career in Municipal Law, and one of the first things I did was join the. My impression of the ListServ is that it is like having a quick word of advice from a law firm of several hundred attorneys at your fingertips. It is much as though we are members of a large "electronic law firm." One of the first great successes on my job was a direct result of the IMLA ListServ.

Many of you will remember a Cable TV class action suit which came about several years ago. I might not have known about the suit, but for my participation in IMLA and the ListServ. After careful consideration, I decided to opt in.... Not too much later I received a letter and a check for around $55,000. I don't get to contribute to the budget that often, so I took it into the Town Administrator's office. I presented it to him and said "I guess this covers my costs for the IMLA membership and conferences." His eyes almost popped out, and he said "We get to keep this?"

You have to understand that at the time, we were only about half as large as we are now, with a corresponding smaller size to our annual budget. That meant a huge chunk to the legal department budget, and helped to confirm my plans to stay active in IMLA through the ListServ and conferences. I cannot put a price on what IMLA has meant to me, but certainly this helped me get off to a great start.

We are a fraternity, of sorts, and I like to think that we are the best in the country at what we do in our special little corner of the legal world. The ListServ has not only brought us together professionally as we share a common bond, but often it also has reminded us of the other common bonds we share – husband/wife, parent/child, teacher/student and onward... So, an often overlooked value of the ListServ is what we do after the law is "applied" or what we do once the proverbial clock is punched and we get out from behind the desk. Do we stop being lawyers? The obvious answer is no, but we do (in many cases) have to live with and according to the decisions we make and the laws we interpret in guiding our municipal leaders. Advice in doing that is a secondary benefit of belonging to the ListServ.

For example, here in South Carolina, we live in hurricane territory. There is plenty of advice available on the ListServ about negotiating the FEMA maze and other rules and emergency legal procedures we need to follow. But, we also share real life experiences and advice in the aftermath of these types of emergencies and how they affect our personal lives. When some of us find ourselves without power after a hurricane, others of us are able to send suggestions on meals to be prepared out of a box, ways to

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Bradford T. Cunningham has served as the Municipal Attorney for the Town of Lexington, South Carolina since 2002. He is Past President of the South Carolina Municipal Lawyer's Association and IMLA State Chair for South Carolina, and received IMLA's Joseph I. Curtin Award for Distinguished Public Service in 2014. He earned both a B.S. in Finance and his J.D. from the University of South Carolina. He is licensed to practice law in South Carolina and Georgia, and worked in banking before earning his law degree. At night, Brad is a sportscaster for a local radio station.

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istrative agencies to impose onerous regulations on businesses and governments without fundamental procedural safeguards. And while it was a less than ideal position in this case to side with the seemingly predatory guarantor, the legal issues in this case are compelling. From a practical standpoint, *Auer* deference provides a perverse incentive for administrative agencies to draft vague regulations or effectively rewrite their regulations without going through notice and comment rulemaking, under the guise of merely "interpreting" those regulations, knowing that reviewing courts must in nearly all instances give those "interpretations" binding effect—even when they are announced for the first time in an amicus brief, as in this case.

Not only are local governments burdened through litigation by agencies that interpret their regulations in this manner, but local governments also often regulate in the same space as those agencies so they have an interest in those agencies providing clarity in their regulations so that local regulations do not inadvertently conflict with federal regulations and risk preemption. IMLA's amicus brief also points out the additional problems *Auer* deference creates for state and local governments when an agency authoritatively interprets its regulations for the first time via an amicus brief as it did here because such deference results in the possibility that local governments would need to scour court decisions to ensure that a filing by an agency did not authoritatively interpret a regulation in a way that is inconsistent with state or local law, thus preempting it.

This is a case that seems ripe for consideration by the Court. Four Justices must vote to grant certiorari and up until Justice Scalia's recent passing, that seemed like a fairly certain proposition. Now it is perhaps less clear, though there is certainly still strong support from the Court's more conservative Justices for the overturning of *Auer*. According to sitting members of the Court, as well as the author of *Auer,* the late Justice Scalia:

Auer deference undermines courts' "obligation to provide a judicial check on the other branches" but also "subjects regulated parties to precisely the abuses that the Framers sought to prevent." *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring in the judgment).

Auer deference also raises "understandable concern about the aggrandizement of the power of administrative agencies." *Id.* at 1210 (Alito, J., concurring in part and concurring in the judgment).

"The opinion… raises serious questions about the principle set forth in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410 (1945), and *Auer* v. *Robbins*, 519 U. S. 452 (1997). It may be appropriate to reconsider that principle in an appropriate case." *Decker v. Nw. Envtl. Def. Ctr.,* 133 S. Ct. 1326 (2013) (Roberts, C.J., concurring in part and dissenting in part).

As the author of *Auer* himself has explained, "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring); *see also Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1213 (2015) (Scalia, J., concurring in the judgment) ("I would therefore restore the balance originally struck by the [Administrative Procedure Act] . . . by abandoning *Auer* and applying the Act as written.").

It is worth noting that regarding this particular sympathetic plaintiff, at least one of the judges on the Seventh Circuit panel believed there was an independent basis to hold that the guarantor was prohibited from assessing collection costs against the student without relying on *Auer* deference. Thus, even if *Auer* is overturned, it seems that this particular student could still prevail.

Birchfield v. North Dakota

There are three consolidated cases before the Supreme Court involving the question of whether, in the absence of a warrant, a state may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood. The cases are: *Birchfield v. North Dakota, Bernard v. Minnesota,* and *Beylund v. North Dakota*. For the purposes of this article, *Birchfield v. North Dakota* is summarized. Relevant to all three cases is that for decades, "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to [blood-alcohol] testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Missouri v. McNeely*, 133 S.Ct. 1552, 1566 (2013).

In this case, Birchfield drove his car into a ditch and when an officer arrived on the scene he believed Birchfield was intoxicated. Birchfield failed a field sobriety test and a preliminary breath test showed a blood alcohol level of .254. The officer placed him under arrest and thereafter, Birchfield refused to submit to a chemical test. Such a refusal is a violation of North Dakota law and Birchfield was therefore charged with a refusal to submit to a chemical test, which is a class B misdemeanor.

Under N.D.C.C. § 39-20-01(1), an individual who drives "is deemed to have given consent, and shall consent, subject to the provisions of this chapter, to a chemical test" which may only be administered after placing the individual under arrest. N.D.C.C. § 39-08-01 provides that a person may not drive a vehicle if that person refuses to submit to a chemical test to determine the alcohol concentration in his/her blood and any such refusal is a criminal offense.

Birchfield claimed that the statute criminalizing the refusal to submit to a chemical test violates the Fourth Amendment. Relevant to this case is the Supreme Court's decision in *Missouri v. McNeely*, which held that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." Additionally, in *Camara v. San Francisco*, 387 U.S. 523 (1967), which involved a city ordinance that allowed the warrantless inspection of

property, the Court held there could be a violation of the Fourth Amendment even if no search was conducted. The North Dakota Supreme Court distinguished *Camara* noting that implied consent laws only authorize chemical testing where an officer has probable cause to believe the defendant is under the influence and has already arrested the defendant.

The North Dakota Supreme Court held that the criminal refusal statute satisfies the general reasonableness requirement of the Fourth Amendment. In so holding, the North Dakota Supreme Court discussed a number of court decisions from around the country that have similarly held that these implied consent statutes do not violate the Fourth Amendment.

As noted, all 50 states have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the state, to consent to a blood alcohol concentration test if they are arrested or detained on suspicion of drunk driving. Typically, these laws also provide for the immediate suspension/ revocation of the motorist's license if the motorist refuses to take the test. Local governments have a clear interest in preventing drunk driving and ensuring there are consequences for those that endanger the public by driving while intoxicated.

IMLA joined the State and Local Legal Center's amicus brief in this case, arguing that these laws do not impermissibly burden motorists' Fourth Amendment rights given that consent is a well-accepted exception to the warrant requirement of the Fourth Amendment. The petitioners argue that even if a state can constitutionally require advance consent, the state cannot impose criminal penalties for drivers who accept that condition and then later renege on that consent. IMLA's amicus brief points out the flaw in the petitioner's logic with the following hypothetical:

> Citizen A and Citizen B both apply for driver's licenses. Neither is willing to submit to a Breathalyzer if he is pulled over by an officer who has probable cause to believe that he is driving drunk. Citizen A is forthright about this, and the State therefore denies him a driver's license. Citizen B, by contrast, stays mum and receives a license. Citizen A and Citizen B meet at a bar and have several cocktails. Both make the wrongheaded decision to drive home instead of taking Uber. Both are pulled over. Both – knowing that they are certain to fail – refuse to take Breathalyzers. Both evade a conviction for driving under the influence because the police were unable to secure the key evidence needed for a conviction.
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> No one would dispute that Citizen A could be criminally punished for a criminal offense of driving without a license. But under petitioner's view, Citizen B cannot be criminally punished for refusing to take the Breathalyzer test. Instead, the State would be limited to suspending Citizen B's license. That puts Citizen B in a *better* position than Citizen A, because Citizen B is in the same position *after* his decision to drive drunk (*i.e.*, he no longer has a license) that Citizen A was in *before* he decided to drive drunk (*i.e.*, without a license). In effect, petitioners' rule creates an incentive for residents to accept a government benefit when they have no intention of complying with the State's constitutionally permitted reciprocal condition, knowing that if they are caught the worst that will happen to them is that they will lose a privilege they should not have received in the first place.

This case has some parallels with another case IMLA recently filed an amicus brief in at the petition stage, involving the issue of whether a government may revoke the license of a licensee who refuses to answer questions related to the license (the case was *Michigan Gaming Control Board v. Moody*). In that case IMLA argued that for example, if extended to the building code, would we allow a licensee to continue building if we approached the licensee and asked for proof regarding the content of the concrete in the footers and they refused to answer? The issue is analogous here. Should a person, who has been given the privilege (not the right) to hold a license to operate a motor vehicle refuse to submit to a chemical test to test for the presence of alcohol, the government should have the ability to revoke that person's license and exact the same level of punishment they would have been able to if the person was convicted of the offense (in this case driving under the influence of alcohol).

To learn more about IMLA's amicus activity, including a complete list of all cases in which we filed amicus briefs please visit our website at www.imla.org/legal-advocacy or contact Amanda Kellar at akellar@imla.org. ML

