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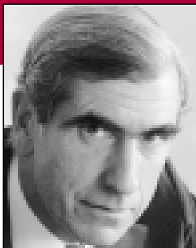
Chair's Message



C. Boyden Gray

Dear Section Members and Colleagues:

I hope that you will be able to attend our Fall Meeting — the 200l Administrative Law Conference. It is scheduled for Thursday, Friday and Saturday morning, November 1-3, 200l, at the new (and currently real) Ritz-Carlton Hotel in Washington, D.C. Note that the Fall Meeting is later than usual, and that it is at the new Ritz, not the old one (now called the Westin), where the Section has periodically held its meeting in the past.

Several important developments over the past year promise to make this an interesting and educational session.

First, the Supreme Court's *American Trucking* decision, which has implications for both Administrative and Environmental law, will be reviewed both as part of the Annual Review of Developments and as part of a separate panel on the role of cost-benefit analysis at EPA after ATA. The panel on ATA is designed to complement Cass Sunstein's cost-benefit panel at Chicago and to complement as well the panel on centralized review of rulemaking pursuant to executive orders that include a cost-benefit component.

Second, the Supreme Court's decision in *Mead* has equally serious implications for Administrative Law, and will also be reviewed twice — at the Developments session and again at the Saturday's Council meeting.

Finally, the convergence of mounting political pressure for a prescription drug benefit bill and the shrinking surplus spells serious difficulty for enacting a drug benefit bill. Two panels over the course of the day Friday will explore an array of issues affecting the pricing of drugs, from patent policy to financing issues to the time it takes to approve new drugs, which affects their cost.

The Fall Meeting dinner, which has traditionally been held on Thursday evening (November l this year) and which has honored those government officials with a special interest in issues affecting the Section, will this year honor the current and former heads of OMB's Office of Information and Regulatory affairs (OIRA). Given the recent Supreme Court rulings noted above and the panels this weekend that will explore issues overseen by OIRA, the dinner will be especially timely. Jim Tozzi, who served in a career capacity at OIRA longer than any other senior career official, and who has therefore observed more OIRA Administrators than most, has promised to put in a cameo appearance, perhaps bringing along some Dixieland music entertainment, and to offer observations on the conduct of the office over the years. As Cass Sunstein's upcoming book on cost-benefit suggests, the role of cost-benefit analysis is growing, not diminishing, in the wake of *American Trucking*. This kind of analysis is also going to become more critical to health care, where the new drugs and biologics that are now being developed will perhaps be more costly than the therapies they are going to replace but will also achieve much larger savings in hospital and related costs than their predecessors. This theme of cost-benefit tradeoffs will be explored thoroughly at the Fall meeting and at subsequent meetings.

I hope we can have a good turnout — the various panels and the dinner should prove to be both educational and entertaining.

Member News

Daniel Troy, former Council Member and partner at Wiley, Rein & Fielding, has been appointed Chief Counsel to the Food and Drug Administration.

Peter Strauss, former Section Chair and Betts Professor of Law at Columbia University School of Law, will present the Daniel J. Meador Lecture at the University of Alabama in November. The subject of his speech will be: Tribunals or Courts? Federal Judges and Common Law Powers

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Annual Scholarship Award

On Friday, August 3, the Section presented its Annual Scholarship Award to Cass R. Sunstein, the Karl N. Llewellyn Distinguished Professor of the University of Chicago Law School and Department of Political Science. During the past year, Professor Sunstein added two outstanding articles to his already prodigious contribution to the best of the literature on administrative law and regulation.

The first of these, entitled *Is the Clean Air Act Constitutional?*, appeared in the Michigan Law Review (98 Mich. L. Rev. 303 [1999]). It takes off from the invocation by the Court of Appeals for the District of Columbia Circuit of what Professor Sunstein describes as "a genuinely new nondelegation" doctrine as the basis for decision in *American Trucking Ass'ns* v. *EPA*, 175 F.3d 1027 (1999), *rev'd sub nom. Whitman v. American Trucking Ass'ns.*, 121 S. Ct. 903 (2001). The article is a singular combination of analysis, informed criticism and prescription for law reform. It also combines a trenchant discussion of administrative law issues, ranging from delegation to the "ossification" of rulemaking and the appropriate rigor of judicial review, with an equally surefooted discussion of how, substantively, the EPA should regulate air quality in the 21st Century. It recommends that the EPA (with nudging from courts if need be) should cabin its discretion and justify its decisions by comparing the identified benefits of its chosen standard with those to be obtained with both a higher and a lower standard and explaining why it chose the standard it did. Professor Sunstein argues that his proposal would improve the EPA's performance and accountability without unduly constraining its ability to respond effectively and creatively to the problems with which it deals. With that kind of improved performance by the EPA (and other agencies dealing with comparable issues), Professor Sunstein believes any revival of the nondelegation doctrine would be "altogether unnecessary."

The other article, *Informational Regulation and Informational Standing:* Akins *and Beyond*, published in the University of Pennsylvania Law Review (147 U. PA. L. REV. 613 [1999]), was also sparked by a recent decision, this one a decision of the Supreme Court. In *FEC* v. *Akins*, 118 S. Ct. 1777 (1998), the Supreme Court considered the enforcement of a registration and disclosure requirement of the Federal Election Campaign Act by a citizen suit. Professor Sunstein sees the statutory provision as an example of what he calls "informational regulation," statutes requiring disclosures of several sorts – warnings on labels or in advertisements, reports on conditions or activities thought to threaten some interest, and reports on the effects of governmental or private actions proposed or taken. He gives us a useful taxonomy of these, distinguishing, for example, compelled disclosures meant to affect market responses from those meant to affect political responses, such as the requirement at issue in *Akins* itself. Professor Sunstein goes on to discuss the standing issue decided in *Akins* and commends the decision for indicating that, at least in cases where Congress creates a right to information, it and not the courts can authoritatively decide who has standing to enforce the right. He explores with his customary acumen and clarity the implications of the *Akins* opinion for standing issues in other types of regulatory cases.

L to R Section Chair Ron Levin, Cass Sunstein and Scholarship Award Committee Chair Dan Ortiz.

The Supreme Court rejected the nondelegation innovation of *American Trucking*, but Professor Sunstein's treatment of that question and the issue of how the EPA should regulate will inform what is bound to be a continuing debate. Similarly, although the law of standing will probably remain a vexing uncertainty, Professor Sunstein has suggested a way toward rationalization that, again, will illuminate the continuing discussion.

Re-reading *Smiley*: What Constitutes An "Official Agency Position"?

by Eric H. Singer★

A shift in an agency's interpretation of a statute that the agency fails to acknowledge or explain is unlawful. But if that is elementary doctrine, what exactly are the threshold formats in which an agency's interpretation must first appear before an unexplained switch from that interpretation can be deemed unlawful? Undoubtedly, an agency decision that is based on one set of facts and that contradicts, without justification, an agency interpretation contained in an earlier formal adjudication based on the same or substantially similar facts will be successfully challenged as arbitrary. Far less certain is whether earlier interpretations contained in more casual formats like agency opinion letters and memoranda are sufficiently "official" such that unexplained deviations from *them* might be viewed as unlawful as well.

That these more casual formats "do not warrant *Chevron*-style deference, " as decided in *Christensen v. Harris County*, 529 U.S. 576, 586 (2000), is a separate matter. Regardless of how much deference they may qualify for, they can still prove "official" for purposes of judging whether an unexplained shift away from any interpretation they may contain is permissible under *State Farm*. The only question is: "When?"

"Official Agency Position"

The Supreme Court's decision in *Smiley v. Citibank, N.A.*, 517 U.S. 735 (1996), now five years old, sheds some important light on this question, although that light is obscured by that case's broader application of *Chevron*. The question in *Smiley* was whether section 30 of the National Bank Act of 1864, 12 U.S.C. § 85, authorized national banks to charge late payment credit card fees, as distinguished from "interest," that were lawful in the bank's home state but prohibited in the state where the cardholders reside. The statute spoke to "interest" only, not to late fees. As the related litigation against the national banks coursed its way through the divided state courts below, the Office of the Comptroller of the Currency (OCC), pursuant to notice and comment, proposed and later adopted regulations indicating that the term "interest" did encompass credit-card late fees.

Petitioner argued against according the OCC rule *Chevron* deference on several grounds, two of which bear noting here. The first was that the interpretation contained in the rule was prompted by litigation, including the very suit before the Court. Writing for a unanimous Court, Justice Scalia found that did not matter, because the interpretation was, at the end of the day, embodied in a regulation:

> Of course we deny deference to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice . . . . The *deliberateness* of such positions, if not indeed their *authoritativeness*, is suspect. But we have before us here a full- dress regulation, issued by the Comptroller himself and adopted pursuant to the notice- and-comment procedures of the Administrative Procedure Act designed to assure due deliberation . . . *Id.* at 741 (emphasis added) (internal citations and quotations omitted).

Second, Petitioner argued against *Chevron* deference because the OCC regulation deviated with the Comptroller's prior letter interpretations on the credit card late fee charge matter. The Court instructed, following *State Farm*, that only sudden and unexplained change may prove invalid, but not change *per se*. In any event, and most important, the Court rejected Petitioner's view that the OCC's regulations represented a change *at all*.

In the Court's more precise words, "[W]e do not think anything which can be accurately described as a change of *official agency position* has occurred here." *Id.* at 742 (emphasis added). The OCC regulation, the Court believed, faithfully reflected other, and more recent, OCC interpretative letters and OCC positions "taken in amicus curiae briefs in litigation pending in many state and Federal courts." *Id.*

The Court's statement carries at least two, related implications. They are not shocking, but they are not unimportant either. First, documents like interpretative correspondence and *amicus curiae* briefs *must* constitute "official agency position" before the courts can consider whether an agency has irrationally embraced other interpretations. Second, such "lesser" formats *can*, in principle, constitute "official agency position." In *Smiley*, the ones the Court looked to *did* constitute official agency position; those to which the Petitioner referred did not.

Deliberateness and Authority

But by what standards are courts to determine whether

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these informal formats *do* constitute "official agency position"? The Court's rejection of Petitioner's arguments against *Chevron* deference, noted above, implies a broad, two-dimensional framework.

Petitioner in *Smiley* introduced two older OCC letters in support of her view that the new OCC regulation was impermissibly inconsistent with past interpretations: 1) a 1964 letter from the Comptroller to the President's Committee on Consumer Interests and 2) a 1988 opinion letter from the OCC's Deputy Chief Counsel for Policy. The opinion letter was in response to an inquiry from the Iowa Attorney General's office, which had concluded that late fees provided for in credit card agreements with certain banks violated Iowa usury laws.

According to the Court, neither of these interpretations passed muster as "official agency position." Neither statement, the Court stated,

> was sufficient in and of itself to establish binding agency policy – the former because it was *too informal* and the latter because it only *purported to represent the position of the Deputy Chief Counsel* in response to an inquiry concerning *particular* banks.

Id. (emphasis added).

The Court's language and analysis suggest that two central elements determine whether an agency's interpretation constitutes an "official agency position": deliberateness and authoritativeness. These are the very elements that the Court found *lacking* in these letters. And these are also the very same elements, which, because of their presence, made the OCC's regulation so bulletproof from Petitioner's first contention that it was just an opportunistic litigation position in disguise.

First, the format in which an interpretation is embedded *is* significant in and of itself, inasmuch as it reflects the extent of deliberation that the agency has exercised regarding its interpretation. Recall that a "full-dress regulation," adopted pursuant to notice and comment, maximizes agency deliberation, as the Court stated in *Smiley*. However, dress that is too "informal," like the 1964 letter, as the Court termed it, suggests that the agency may not have deliberated thoroughly enough on its position to be considered "official," even though the letter was signed by the Comptroller himself

Second, *Smiley* noted that whether agency interpretation in lesser formats constitutes official agency position turns on the dimension of *authoritativeness*. The Court did not elaborate, but suggested, through example, that courts would be wise to look at three possible sub-elements: 1) the institutional decision-making or interpretive authority of the document's author; 2) indicia that the views expressed are the agency's, not the author's alone; and 3) indicia that the views expressed apply generally. Thus, the letter from OCC's Deputy General Counsel fell short on this dimension apparently because it emanated from only the Deputy Chief Counsel, not the Chief Counsel or a relevant higher-ranking officer; because it, admittedly, professed to be only "my position," not that of the agency's; and because, addressed as it was to an Iowa audience, it did not even purport to express a view of general or national applicability. Similarly, the Court reaffirmed that "agency litigation positions that are wholly unsupported by regulations, rulings, or administrative practice" are suspiciously non-authoritative, presumably because agency trial counsel do not necessarily speak for the agency's higher ranking decision-makers in charge of daily policy and conduct.

Precedents

As of August 2001, only one lower court has cited to or quoted *Smiley* for its apparent proposition that official agency position must be gauged along the axes of deliberateness and authoritativeness. *See Dunbar v. Glickman*, 90 F.3d 681, 687 n. 11 (2d Cir. 1996) ("undated, unsigned, two-sentence fragment" in a regional USDA office's question-and-answer document could not stand for official USDA policy, which was better "expressed in its regulations and in the other offiical documents in the record").

Still, *Smiley's* implicit approach is consistent with earlier lower court decisions. *New York State Dep't of Social Servs. v. Bowen*, 835 F.2d 360 (D.C. Cir. 1987), offers one early example. There, the Court concluded that New York State could not complain about an apparently unexplained switch in a Department of Health and Human Services (HHS) interpretation because, as in *Smiley*, the Court could not properly say there had been an earlier "official agency position" to begin with. New York contended that pre-1981 internal memoranda within HHS and letters from a HHS regional office "officially interpreted" a statutory scheme to allow for federal reimbursement of the state's foster care services costs. *Id.* at 364. The Court roundly rejected these sources as too informal to constitute official HHS interpretation, viewing one memorandum in particular as informal "in the extreme," in that it "contained no statement of the statutory or regulatory basis for its stated conclusion." *Id.* at 365. This was in stark contrast to what the Court *did* view as the official HHS interpretation articulated in 1981 and contained in an "Action Transmittal," which disallowed reimbursement:

> The 1981 interpretation was predicated on a lengthy memorandum setting forth a thorough analysis of the arguments for and against each position . . . After reviewing the various interpretive options, the Acting Commissioner of Social Security opted in favor of the now- challenged interpretation, which was then forwarded to the

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Council Capsules

A Brief Digest of Council Highlights From the 2001 Annual Meeting In Chicago

Report of the Chair-Elect

Section Chair-Elect Boyden Gray announced his priorities for the coming year. First and foremost is finishing the APA Project. This will involve more discussion about whether the section should issue recommendations.

He believes the section should encourage discussion of comparative law issues and consider whether ACUS might be reconstituted, particularly with an outward look toward growing trade problems with Europe. He mentioned that DOJ's antitrust division may be planning to address the genetically modified food issue and thinks this raises procedural issues that should not be ignored. He also would like the section to explore separation of powers issues with respect to independent agencies.

Gray will make membership a priority during the coming year, especially student membership. He expects the fall meeting to offer broad coverage of market incentives and cost benefit issues and anticipates hosting a dinner at that meeting honoring current and former OIRA chiefs.

APA Project

The descriptive phase of the APA Project came to a conclusion in Chicago with the council's approval (subject to suggested revisions) of the remaining four blackletter statements of law on: Availability of Judicial Review; Scope of Review; Standing; and Government Management of the Administrative Process. These statements, together with the earlier approved statements on Adjudication, Rulemaking, and FOIA, may be viewed at http://www.abanet.org/adminlaw/apa.

Publications Committee Chair Randy May confirmed that the next step will be to publish the blackletter statements in the Administrative Law Review. Then, the most likely plan is to break the supporting material into separate books: one on adjudication, one on FOIA and one combining everything else. Afterward, the section could package them in various combinations for purposes of sale.

Publications

Committee Chair Randy May reported on the status of current books and future books in the pipeline. May reported that the marketing of current books in print is going well and that the committee will put some emphasis in particular on marketing the ADR desk book that came out last February by targeting specific groups in the dispute resolution area.

As for books in the pipeline, May reported that Eleanor Kinney's book on Medicare coverage would likely be ready to go to press in September. May said Michael Malinowski has agreed to author a book on biotech regulations. Malinowski's book is due in August of 2002. A revised book on the Sunshine Act is also due in August of 2002.

May also noted it appears that Cass Sunstein will produce a book on cost benefit analysis tentatively called "The Cost Benefit State." This will be an important book that will raise the profile of the section's publications program, enabling the section to expand its list of authors.

Ethics 2000

Tom Morgan, Section vice chair-to-be and delegate to the Ethics 2000 Commission's Board of Advisors, updated the report he delivered at the winter meeting in San Diego concerning the Commission's proposed revision of Rule 1.11, the conflict of interest rule that applies to former government lawyers. Under the Commission's proposal, Rule 1.11 would have incorporated all of Rule 1.9, the private sector counterpart to Rule 1.11. Thus, ex-government lawyers would be barred from work not only on the "same" matters in which they personally and substantially participated while in the government – the rule today – but in connection with all "substantially related" matters as well.

As reported previously, the section authorized Morgan to oppose the proposed revision on the ground it would excessively burden ex-government lawyers. (*See Council Capsules*, ADMINISTRATIVE & REGULATORY LAW NEWS, Spring 2001). For example, under the "substantially related" test, a private lawyer sometimes cannot represent a private client in the same general type of case on which she worked for a previous client; if the same rule applied to government lawyers, little of their government experience could be used at all when they moved to the private sector.

Morgan reported that, after further discussion with Commission members, the Commission agreed to drop from Rule 1.11 any reference to "substantially related" matters. In exchange, the Section agreed to an additional sentence in the Rule 1.11 Comments explaining that even whether matters are the "same" can be ambiguous, and that, consistent with federal Office of Government Ethics guidelines, "in determining whether two particular matters are the same, a lawyer should consider the extent to which the matter involves the

same basic facts, the same or related parties and the time elapsed."

Morgan expects Rule 1.11 to be approved without further amendment at the mid-year meeting in Philadelphia next February.

EMS Resolution

Section Secretary Cynthia Drew presented the recommendation and report of the Standing Committee on Environmental Law urging the ABA House of Delegates to adopt a resolution concerning environmental management systems (EMS).

The report explains that an EMS is intended to systematically identify, manage and meet (or exceed) an organization's environmental obligations and that EMS-based programs are voluntary measures meant to serve not as substitutes but as complements to traditional monitoring and enforcement techniques.

The resolution as approved by the council for section co-sponsorship reads as follows:

RESOLVED: That the American Bar Association recommends that federal, state, local and territorial departments and agencies responsible for environmental protection adopt and implement legal and policy incentives designed to support and encourage businesses, governmental agencies and other entities subject to environmental regulation to implement voluntary environmental management systems ("EMS").

FURTHER RESOLVED: That the American Bar Association encourages federal, state, local and territorial departments and agencies as well as businesses, governmental agencies and other entities subject to environmental regulation to recognize and champion EMS as an increasingly important means of enhancing compliance assurance and environmental stewardship supplementing existing and future environmental control regulations and enforcement.

Election Law Resolution

Trevor Potter, Elections Committee co-chair and section liaison to the Standing Committee on Election Law, presented the standing committee's recommendation and report urging the ABA House of Delegates to adopt a resolution concerning election administration guidelines. The resolution establishes state election guidelines regarding such matters as voter education and registration, absentee voting, voter verification and vote counting. Potter described the guidelines as a bipartisan effort involving the general counsels of both the Republican and Democratic National Committees and believes them to be consistent with the best practices identified in other similar reports.

The resolution as approved by the council for section co-sponsorship reads as follows:

RESOLVED: that the American Bar Association adopts the *Election Administration Guidelines*, dated August 2001, and recommends that all election officials ensure the integrity of the election process through the adoption, use and enforcement of these Guidelines.

FURTHER RESOLVED: that the American Bar Association urges that federal, state, local and territorial governments engage in the study of election administration, in order to improve and modernize voting procedures and the administration of elections, and that such study be appropriately funded.

The council also approved for section co-sponsorship the following related resolution concerning use of military facilities for elections:

RESOLVED: that the American Bar Association urges Congress to authorize the Department of Defense to permit buildings located on military installations and reserve component facilities to be used as polling places in federal, state, local and territorial elections for public office, where suitable alternative non-Department of Defense facilities do not exist.

Four Section Resolutions Pass House

The section was the principal sponsor of four resolutions that passed the ABA House. Two passed in substantially the form approved by the section. *See* Harmonization Recommendation, *Council Capsules*, ADMINISTRATIVE & REGULATORY LAW NEWS, Summer 2001; Government Accountability for Information Activities, *Council Capsules*, ADMINISTRATIVE & REGULATORY LAW NEWS, Spring 2001).

The other two, one concerning federal agency websites and one concerning ombuds standards, were approved as follows.

AGENCY WEBSITES

RESOLVED, that the American Bar Association urges the Administration to promote best practices for federal agency websites and to facilitate the ease and predictability of citizen access to desired information by supporting: a) a centralized office to encourage and monitor best practices relating to agency Internet use; and b) modernization of computer systems used for public and internal access to government information.

FURTHER RESOLVED, that Congress should support these initiatives without mandating particular

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Supreme Court News

by William Funk★

"One of the Most Significant Opinions Ever Rendered"?

In the last month of the term, the Supreme Court issued its opinion in ***United States v. Mead***, 121 S. Ct. 2164 (2001), what many believe is a blockbuster administrative law decision. Justice Scalia, not a master of understatement, called it "one of the most significant opinions ever rendered by the Court dealing with judicial review of administrative action." 121 S.Ct. At 2189 (Scalia, J., dissenting). *Mead* was a case from the Federal Circuit, like several of the judicial review of agency action cases that have come before the Court in recent years. With its background in patent law, contract claims against the United States, and international trade law, the Federal Circuit inherited a body of law of judicial review of specialized agencies that had developed outside the mainstream of administrative law centered on the APA. Attempts by the Federal Circuit to maintain that unique position have been unavailing, as the Supreme Court has consistently required it to follow traditional APA judicial review canons. *See, e.g., United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999) (court should use *Chevron* analysis with respect to Custom's regulations interpreting statute); *Dickinson v. Zurko*, 527 U.S. 150 (1999) (findings of fact made by Board of Patent Appeals governed by APA's "substantial evidence" or "arbitrary and capricious" standard, not "clearly erroneous" standard). In *Mead*, the Federal Circuit again seemed to deviate from the norm, refusing to accord any deference whatsoever to a Customs "ruling letter" that classified looseleaf day planners as bound diaries.

In a decision presaged by *Christensen v. Harris County*, 529 U.S. 576 (2000), the Court held that while the ruling letter was not entitled to *Chevron* deference, it was entitled to *Skidmore* deference. Last term in *Christensen*, with virtually no discussion, the Court had found that the interpretive letter in that case did not warrant *Chevron* deference; instead it was entitled to the respect described in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Christensen* resolved a debate that had been raging in the circuits over whether *Chevron* applied whenever an agency interpreted an ambiguous statute or whether it only applied when the agency interpreted a statute in a particular type of proceeding or format, such as notice-and-comment rulemaking. In *Christensen*, the Court seemed to make clear that interpretations of statutes made in notice-and-comment rulemaking or formal adjudication were entitled to *Chevron* deference, but interpretations contained in interpretive rules, policy statements, agency manuals, and enforcement guidelines all were not. It left unclear, however, how other types of agency interpretations, especially those made in informal adjudications, would be treated.

In *Mead*, whatever it was, the ruling letter was not a formal adjudication and it had not been issued after notice-and-comment. At the same time, the Customs' ruling letter was different from the Wage and Hour Administrator's letter in *Christensen*. The Customs' ruling letter, under Customs' statutes and regulations, *decided* what tariff was applicable to the items; it was a decision binding upon both the agency and the importer of the particular goods. Thus, the ruling letter appears to be adjudicatory in nature. Unlike the Customs Director, who has statutory authority to make tariff classifications – that is, to decide upon entry what tariff applies to an item being imported – the Wage and Hour Administrator does not have the statutory authority to decide what employment requires payment of minimum wages and maximum hours, either in general by means of regulations or in particular by deciding particular cases. The Administrator, like the Department of Justice under the Sherman Antitrust Act, is simply a person who can go to court to enforce the law. Nevertheless, the Administrator's opinion as to what the law requires and prohibits is obviously worthy of attention by those subject to the law because it is likely to be predictive of when the Administrator will seek enforcement, and under *Skidmore* it is worthy of attention by the courts as the expression by a person with some familiarity with the law, even if it does not qualify for strong deference. The Administrator's letter, accordingly, would seem to be interpretive only, and in APA terms an interpretive rule, rather than an adjudication. Thus, *Mead*, an adjudication case, fell into the issue left open in *Christensen*.

To resolve the case, the Court engaged in one of its more elaborate discussions of the nature of the *Chevron* doctrine. The Court noted it had "long recognized" deference to agency interpretations of a statutory scheme the agency is entrusted to administer, but that the measure of that deference "has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." Such an approach, the Court acknowledged, produced "a spectrum of judicial

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responses, from great respect at one end to near indifference at the other." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), however, identified a different and additional reason for judicial deference – legislative delegation of interpretive authority. This might be explicit, or it might be implicit from "the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law." A "very good indicator" of such implicit delegation, the Court said, is "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings." And, "it is fair to assume generally that Congress contemplates administrative action with the force of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." The Court gave as examples of such procedures notice-and-comment rulemaking and "formal adjudication." Nevertheless, the Court admitted that the absence of such procedures is not determinative, for "we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."

Turning to the Customs' ruling letter, the Court found that it did not qualify for *Chevron* deference. First, the Court said that the statute gives "no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law." Although the statute authorizes Customs to establish procedures for issuing "binding rulings," the Court believed that this reference did not "bespeak the legislative type of activity that would naturally bind more than the parties to the ruling." And even if such rulings were precedent, "precedential value alone does not add up to *Chevron* entitlement; interpretive rules may sometimes function as precedents, and they enjoy no *Chevron* status as a class." In addition, the Court said that the provisions governing review of Customs' classifications in the Court of International Trade did not evidence any congressional intent for those classifications to merit deference.

Having found that *Chevron* was inapt, the Court explained that *Chevron*, with its basis for deference, had not eliminated the underpinnings for other forms of deference such as *Skidmore*. Here, "where the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in the case," the Customs' ruling "may at least seek a respect proportional to its 'power to persuade'" as provided in *Skidmore*. Because neither of the lower courts had considered *Skidmore*, the Court remanded the case for them to apply it in the first instance.

Justice Scalia was the lone dissenter, repeating an argument he has made before, once when he concurred in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991), and again when he concurred in *Christensen*, both times taking issue with the Court there applying *Skidmore* deference rather than *Chevron* deference. According to Justice Scalia, *Chevron* was based upon a presumption that when Congress left a statute administered by an agency ambiguous, it intended that ambiguity to be resolved by the agency rather than the courts. This presumption in Justice Scalia's view was applicable no matter what type of proceeding generated the agency's interpretation. Thus, whether the agency had rulemaking authority, had exercised rulemaking authority, or had used notice and comment were all irrelevant. So long as the agency's interpretation was "authoritative," that is, reflected the view of the "agency" as opposed to merely some employee's view, that interpretation should be accorded *Chevron* deference.

As a descriptive matter the decision in *Mead* is neither an "avulsive change" to the *Chevron* doctrine, as claimed by Justice Scalia, nor completely consistent with all the *Chevron* cases, as claimed by the Court. The disorder in the lower courts prior to *Christensen* as to the applicability of *Chevron* to informal but authoritative agency interpretations was precisely the result of the Court's inconsistency on the subject. There were cases that strongly suggested that interpretations not contained in legislative rules meant the agency's interpretations did not qualify for *Chevron* deference, *see, e.g., Stinson v. United States*, 508 U.S. 36 (1993) (denying *Chevron* deference to a U.S. Sentencing Commission "commentary" because "[c]ommentary, unlike a legislative rule, is not the product of delegated authority for rulemaking"). At the same time there were cases in which the Court cited to *Chevron* and granted deference to agency interpretations contained in informal agency statements, *see, e.g., NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) (*Chevron* deference given to letter of the Comptroller of the Currency).

As a normative matter the right interpretation of *Chevron* is whatever the Court believes will have the most salutary effects. After all, *Chevron* itself is neither commanded nor suggested by the APA (and as Justice Scalia notes, nowhere does *Chevron* cite to the APA), but instead *Chevron* rests on the judicial fiction that Congress

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News from the States

by Michael Asimow★

Slamming on the Brakes in North Carolina

The North Carolina APA provided that contract disputes between units of the state and HMOs would be resolved through hearings before a central panel ALJ. In May, 2001, the Senior ALJ rendered a decision that permitted an HMO to withdraw from its contract to provide health insurance to state employees. *Wellpath Inc. v. NC Teachers and State Employees Major Medical Plan.*

After the ALJs decision in the *Wellpath* case, the state legislature enacted Senate Bill 828 which removed this type of contract dispute from the APA. The bill was explicitly applicable to cases pending on the date of enactment. Evidently, the legislature sought to end the *Wellpath* case before it was finally decided, thus removing the dispute from the administrative process and throwing it into court.

Some might question the constitutionality of this legislation. One might argue that the legislature can change the law prospectively, but it should not be permitted to meddle in a specific case pending when the law is enacted. Such action could appear to thrust the legislature into a judicial role in violation of basic separation of powers principles.

Due Process in Clemency Hearings[1]

A governor's decision to grant or deny clemency to a death row prisoner is an administrative process to which at least some due process constraints apply. *See Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998).* In *Woodard*, Justice O'Connor's concurring opinion, plus the dissenting opinions, provided five votes for this proposition. Justice O'Connor concluded that "some minimal procedural safeguards apply to clemency proceedings," and "judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the state arbitrarily denied a prisoner any access to its clemency process."

In *Bacon v. Lee*, 549 S.E.2d 840 2001), the North Carolina Supreme Court held that the governor is not disqualified from deciding a clemency petition even though the Governor had previously served as Attorney General and was counsel of record during most of Bacon's post-conviction proceedings. Normally, of course, due process would be offended if a judge had previously served as prosecutor in the same case. However, the Court determined that the minimal due process requirements applicable to clemency proceedings were not offended by this combination of functions. Clemency proceedings are wholly different from judicial proceedings. Bacon's petition had not been decided by flipping a coin or in some other arbitrary manner and he had been given full access to the procedure. Moreover, the Court thought that disqualification of the governor in this situation would offend the state's separation of powers. Finally, even if all this were wrong, the rule of necessity applies—the Governor is the only official with power to make clemency decisions. Consequently, the Governor could act even if he would otherwise be disqualified because he had served as a prosecutor.

Political Controversy in Rulemaking—The Expert Panel Approach in Washington[2]

In May, 2000, the Washington Department of Labor and Industries promulgated so-called ergonomics rules to protect employees from certain kinds of work-related injuries. When they can be feasibly avoided, preventing such injuries as back strain, carpel tunnel syndrome and tendonitis could affect the health of 50,000 Washington employees annually, and could save more than $1 billion annually in direct costs (e.g., medical expenses, lost wages) and indirect costs (e.g., lost productivity, additional training, etc.).

The rules were controversial in Washington as they had been at the federal level. Business and labor had predictably and understandably different views of their value and effectiveness. As the rules were promulgated, the Governor directed the establishment of a diverse and representative panel to examine the problems of rule enforcement. Among the issues the Governor asked the panel to consider were whether effective educational materials were widely available, whether the rules were understandable by those affected by them, and whether the Department's enforcement polices were fair and consistent.

The panel (styled the "Blue Ribbon Panel on Ergonomics") has eleven members, drawn from around the country and representing business, labor, medicine,

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★ Professor of Law, UCLA Law School; Co-Chair, State Administrative Law Committee; Reporter for Adjudication, APA Project.

[1] Information for this article provided by North Carolina ALJ Fred Morrison.

[2] The information in this article was provided by Professor William Andersen, University of Washington School of Law.

Recent Articles of Interest

William W. Buzbee and Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. forthcoming (2001). In reviewing the constitutionality of federal legislation, the United States Supreme Court recently has scrutinized the underlying "legislative record." Since 1995, the United States Supreme Court has invalidated six federal statutes based at least in part on its scrutiny of the underlying legislative materials. *Board of Trustees of the University of Alabama v. Garrett* represented the full emergence of this rigorous judicial scrutiny, which the authors term "legislative record review." In *Garrett*, the Court broke with seventy years of precedent by striking down legislation based solely on the inadequacy of the record developed by Congress. Before *Garrett*, some commentators had noted and even endorsed the Court's new approach to judicial review of legislation. These scholars, however, had failed to explore the flaw at the center of legislative record review. The authors argue that, the very concept of "the legislative record" as employed by the Court is a fiction. The nature of the legislative process belies the existence of comprehensive explanatory materials. The notion of a legislative record as used by the Court constitutes an inappropriate importation from different institutional settings of the expectation that a written record will justify a legal judgment. With reference to the insights of administrative law and its agency record review jurisprudence, the authors argue that reliance on the concept of a legislative record is unworkable and illegitimate. In defiance of separation of powers principles, legislative record review actually embodies more rigorous judicial scrutiny than commonly employed even in "hard look" review of administrative action. The Court's new parsing of legislative statements and submissions is also in substantial tension with typical textualist rejection of recourse to legislative history. Having identified the flaws at the heart of legislative record review, the Article then traces its origins to judicial suspicion of congressional motives. The adoption of this mode of review reveals a newly ascendant judicial distrust of Congress. While courts certainly have a role in reviewing the basis of congressional action, the Article argues that this kind of review of ostensible factual predicates constitutes an unnecessary and ill-defined intrusion into the constitutionally conferred powers of Congress.

Jonathan Z. Cannon, *EPA and Congress (1994-2000): Who's Been Yanking Whose Chain?*, 31 Envtl. L. Rep. (Envtl. L. Inst.) 10,942 (2001). This article discusses the dynamic between U.S. EPA and Congress that emerged in the wake of the 1994 congressional elections. The account centers around the crucial showdown between EPA, backed ultimately by the White House, and the 104th Congress over legislative proposals for substantial statutory reforms and for substantial cuts in the Agency's budget. In describing how EPA, in large measure, "prevailed," the author contends the events demonstrate the importance of two phenomena. The first is the competition between the two major political parties for control of environmental policy. The author describes this struggle, suggests why it is likely to be more complex in the future, and speculates on how it might be expected to play out in the Bush Administration. The second phenomenon is the role of federal agencies in defining the public debate on legislative issues and in influencing the outcome of that debate. The events during the 104th Congress demonstrate, according to the author, that agencies may play an important role in shaping the preferences of the public and ensuring that those preferences are reflected in the policies adopted (or rejected) by elected officials. In some circumstances, at least, agencies may help ensure the political accountability of Congress and the president, not simply the reverse, as is commonly understood. The article concludes with an examination of the implications of this possibility, including concerns about undue influence of agencies on the legislative process.

Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENV. L. J. 386 (2000). For many years, advocates of negotiated rulemaking have advanced enthusiastic claims about how negotiated rulemaking would reduce litigation and shorten the rulemaking process. In an earlier study, Coglianese tested these claims by assessing the effectiveness of negotiated rulemaking against existing rulemaking processes. He found that negotiated rulemaking neither saves time nor reduces litigation. Recently, Philip Harter, a longtime advocate of negotiated rulemaking, criticized that study and asserted that negotiated rulemaking has succeeded remarkably in achieving its goals. Harter criticized the way Coglianese measured the length of the rulemaking process, claimed that he failed to appreciate differences in litigation, and suggested that his results did not matter in any case since negotiated rulemaking has resulted in rules that are demonstrably better than rules developed through conventional regulatory practices. In this article, Coglianese responds to Harter's continued defense of negotiated rulemaking, attempting to show why none

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Washington, DC Convention & Tourism Corporation

2001 Administrative Law Conference

Chair: C. Boyden Gray

The Ritz Carlton Hotel
1150 22nd Street, NW
Washington, DC 20037
Telephone: (202) 835-0500

Thursday, November 1, 2001

Veterans and Long Term Post Traumatic Stress Disorder

8:30 a.m. – 10:00 a.m.
British military historian Ben Shephard's newest book "A War of Nerves" traces the medical, historical and military significance of veterans' claims for post traumatic stress disorder from the "shell-shock" era of World War I trenches through Vietnam and the present. Shephard's presentation will include an overview of his findings and conclusions reached after extensive research concerning this controversial and often misunderstood mental disorder.

ADR & Adjudication at the Federal Level: Friend or Foe?

9:30 a.m. – 11:30 a.m.
An overview of the use of Alternate Dispute Resolution and Administrative Law Judges and Administrative Judges in federal agencies, including settlement judges. What programs have been successful? Where do we go from here? An exceptional six-member panel of experts will discuss these matters.

Current Constitutional Issues in Federal and State Campaign Finance Law

10:00-11:30 a.m.
Discussion of the legal and constitutional issues raised by the McCain/Feingold legislation and Section 527 disclosure provisions, and status of related litigation.

The Price of Telecommunications Competition: Debating the Supreme Courts TELRIC Appeal

10:00 a.m. – 12 p.m.
On October 10, the Supreme Court will have heard arguments on challenges to the way the FCC set the prices that new competitors must pay to use portions of the incumbent local telephone companies' networks. This program will analyze the issues raised by the "TELRIC" pricing standard, including its effect on an incumbent's recovery of historical investments, the development of telephone competition and the rates that consumers will pay. (Co-sponsored by the Competitive Telecommunications Association).

Should VA Disability Adjudications be Subject to Formal APA Adjudication and Traditional Judicial Review

10:30 a.m.– 12:30 p.m.
In *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985), the Supreme Court protected Congress' choice of an informal and nonadversarial adjudicatory process for disability determinations by the Veterans Administration. In 1988, Congress broadened judicial review of VA rulings, but retained much of the traditional preclusion of review. This program will address the benefits and detriments of these choices by comparing disability adjudication by the VA and the Social Security Administration (SSA). Speakers will address procedural reform at the VA including whether Congress should abolish the current system and replace it with formal APA adjudication and traditional judicial review.

Avoiding the Appearance of Impropriety

12:30 p.m. – 2:30 p.m.
(Federal Bar Building)
This session will address the appearance of impropriety as it relates to the administrative judiciary. This will be a highly interactive program. It will look at the issue from the viewpoint of the Judge, the litigant and the public.

Centralized Executive Review of Regulatory Policymaking: the President, the Vice President and Agencies

12:30 p.m.- 2:30 p.m.
This program will examine presidential-level review of regulatory policy making in the executive branch. It is time for a comprehensive evaluation of the normative foundation of centralized regulatory review. What purposes does it serve? Why is it important? Does the President have the power to direct agencies to take specific action, or should statutes be read to delegate decisional power only to the agency heads? Also, what are relevant differences in this regard between executive and independent agencies? And is there any reason to consider extending such review to policies made in agency adjudications?

Disclose This: New Privacy Controls will Challenge Regulators and Regulated Alike

12:45 p.m. – 2:45 p.m.
Major displacements of long-standing assumptions about privacy law have transformed the world of privacy. What once was a tiny esoteric backwater is now a booming area for administrative lawyers. Health care rules allowed to go into operation will have nationwide costs and system-wide impacts on medicine and providers. Financial privacy changes roll out amid international calls for even bolder steps to protect individuals. The low-visibility 1974 Privacy Act might finally be

energized by a Congress that wants to "do something." A panel of experts will share views and predictions.

Criminal Prosecution for Violations of Civil Regulatory Statutes and Acts
12:30 p.m. – 2:30 p.m.
In recent years, prosecutors have been using alleged violations of civil regulatory statutes and rules as the predicate for criminal prosecution. This trend poses new challenges for attorneys advising clients concerning proposed conduct and transactions as well as those representing clients under investigations for alleged violations of regulatory offenses.

In the Aftermath of American Trucking Association: The Future Role of Cost-Benefit Analysis and Market Mechanisms
1:00 p.m. - 2:30 p.m.
The implications of the Supreme Court's recent *American Trucking* decision — for both administrative and environmental law — will be the focus of a panel examining the future role of cost-benefit analysis and market mechanisms. Topics will include how risk analysis is a surrogate for cost-benefit analysis and what practical mechanisms such as trading could be pursued.

Annual Developments in Administrative Law
3:00 p.m. – 5:30 p.m.
This program will provide a roundup of the most important administrative law events of the past twelve months. Speakers representing several of the Section's administrative process committees will summarize the latest developments in their respective fields of expertise.

Section Reception and Dinner Honoring Past Administrators of the Office of Information and Regulatory Affairs.
(Reception, 7:00 pm; Dinner 7:40 pm)

Friday, November 2

Prescription Drug Pricing and Coverage
9 a.m. – 12:00 p.m., 2:30 p.m. – 5:00 p.m.
Innovation in drug development is revolutionizing health care. Nevertheless, innovation in drug development also is increasing the costs of and dependency upon pharmaceuticals, which now are widely cited as driving the rising costs of health care. Those most dependent upon pharmaceuticals, the elderly and chronically ill, have been inundated with drug cost increases in recent years, and those costs continue to rise. Medicare reform and drug coverage were dominant themes in the 2000 Presidential election. Bipartisan support for reform has encompassed a multitude of proposals to achieve objectives such as universal coverage and a choice of health care plans. This forum will consist of complementary morning and afternoon sessions. The morning session will address legislative and regulatory initiatives, federal and state, to introduce a prescription drug benefit and otherwise reform Medicare and affect drug pricing. The afternoon session will provide thoughtful commentary that explores the potential impact of the proposed legislative and regulatory changes addressed in Session I on drug development, health care finance (i.e., assess implications for Medicare, Medicaid, and Social Security), and consumers most directly affected by rising pharmaceutical prices—i.e., the elderly and terminally ill.

Awards Luncheon
12:30 p.m. - 2:00 p.m.
Presentation of the Award for Annual Scholarship to Jody Freeman of the University of California Los Angeles and the Mary C. Lawton Award for Outstanding Government Service to Stanley "Skip" Pruss, the Assistant Attorney General in Charge of the Consumer Protection Division for the State of Michigan.

Reception
5:30 p.m. – 7:30 p.m.
The Dumbarton House.

Saturday, November 3

Section of Administrative Law and Regulatory Practice Council Meeting
8:30 a.m. – 10:30 a.m.

United States v. Mead Corp.; How Much Deference is Due?
10:30 a.m. – 12:30 p.m.
On June 18, 2001, the United States Supreme Court issued its opinion in *United States v. Mead Corp.*, in which it made major pronouncements as to the applicability of *Chevron v. NRDC* and the continued applicability of *Skidmore v. Swift & Co.* Justice Scalia in dissent called the case "one of the most significant opinions ever rendered by the Court dealing with the judicial review of administrative action." What does the *Mead* decision mean for judicial review of agency actions? How will courts determine whether *Chevron* or *Skidmore* deference is applicable? What is the difference between *Chevron* and *Skidmore* deference? Is Justice Scalia correct? These and other questions will be addressed by a panel of experts in rulemaking and judicial review.

2001 Adminstrative Law Conference Registration Information

Complete 2001 Administrative Law Conference information and registration can be found at: www.abanet.org/adminlaw/calendar.html

The Section Nominations Process

Who is on the Nominating Committee and how were they chosen?

The Committee consists of three people chosen by the incoming Chair pursuant to the bylaws. The Committee traditionally has been chaired by a past chair with the other two members consisting of a former council member and a newer member to the section to ensure a breath of experience. The members of the Nominating Committee are:

John Hardin (Jack) Young
Sandler Reiff & Young, P.C.
50 E Street, SE
Washington, DC
202-479-1111
young@sandlerreiff.com

Judy Kaleta
U.S. Department of Transportation
Room 10428
400 Seventh Street, SW
Washington, DC 20590
judy.kaleta@rspa.dot.gov
202-493-0992

Steve Vieux
Federal Trade Commission
Room S 3005
601 Pennsylvania Avenue, NW
Washington, DC 20580
svieux@ftc.gov
202-326-2306

What is the mission of the Nominating Committee?

After talking to and consulting with Section members, the Nominating Committee recommends individuals for council and officer positions within the section. It also recommends, when requested by the incoming chair, individuals to be considered from the executive, legislative and judicial branches, as well as from the administrative judiciary, to serve in representative positions on the council.

What is the nominating process?

The Committee meets throughout the year and is visible during each of the Section's four meetings. The Committee solicits suggestions from all segments of the section. At the fall Administrative Law Conference, the Nominating Committee will circulate nomination forms and all three Committee members will meet with any individual interested in being considered for nomination or wishing to nominate someone else. Also in the fall, the Committee will also publish its first announcement in the Section's magazine and mail and email information about the Committee's activities to all Section members.

The Nominating Committee will again meet at the Mid-year meeting with anyone interested in being nominated or nominating a member of the section. Immediately following the mid-year meeting the Committee will publish information in the Section's magazine and mail and email all section members again requesting nominations.

After the mid-year, the Nominating Committee begins it deliberative process leading to its final report at the Spring Meeting.

For what positions is the Nominating Committee seeking recommendations?

The Nominating Committee will nominate individuals for the following positions: Vice Chair, 4 Council positions, and 1 member of the House of Delegates.

Who is the Committee generally looking for?

The Nominating Committee is seeking to nominate individuals who are strongly committed to the mission of the section and who have shown past leadership in the section. The Committee seeks diversity. The Committee is interested in lawyers in private practice, government, corporations and academia that are willing to commit to the management demands of the Section. Officers and Council members must be willing to attend Section meetings.

Re-reading *Smiley*

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> Office of General Counsel for review and approval. The Commissioner of Social Security duly informed the Secretary of HHS in writing of his position. Finally, and most importantly, the interpretation was thereafter memorialized in an Action Transmittal, which we are informed is one of the established vehicles for the formal memorialization and communication of official agency policy.

Id. at 365-66.

Even agency counsel's litigating position, the D.C. Circuit has suggested, can constitute "official agency position" — provided that position was also expressly embraced by the agency head and done so under the agency's "usual procedures" (or their equivalent) for arriving at agency interpretations so as to assure normal deliberation. In *Federal Labor Relations Authority v. Dep't of Treasury*, 884 F.2d 1446 (D.C. Cir. 1989), the Court ruled that the Office of Personnel Management's (OPM) *amicus* brief embodied the agency's official interpretation of the Privacy Act's "routine use" exception to non- disclosure of personnel information. The Court ruled that it did so, first, because OPM's director "explicitly adopted the view of the amicus brief." *Id.* at 1455. Second, the Court was assured that the Director's adoption reflected normal deliberation. The agency's "interpretive process" in that case – with the OPM legal staff preparing the brief, and the Director reviewing it and adopting it in a letter to the Assistant Attorney General as the OPM's official interpretation — "*was [no] . . . less thorough, less formal or less open than it would normally be.*" *Id.* (emphasis added).

Similarly, although *Smiley* did not articulate the elementsof authoritativeness, the Court's implicit emphasis on rank, on recognized interpretive powers of the issuing decision-makers, and on institutionality was hardly new — either for itself or for the lower courts. *See, e.g., Miller v. Youakim*, 440 U.S. 125, 146 n.25 (1979) (where correspondence by regional Assistant General Counsel for HEW was not approved by HEW General Counsel or by any national HEW office, it could not be treated as agency's official interpretation); *Marine Engineers' Beneficial Ass'n No. 13 v. NLRB*, 202 F.2d 546, 550 (3d Cir. 1953) ("interpretation given by an individual member of a Board or by its attorney is not . . . to be taken as that official kind of interpretation to which courts must pay attention").

Connection to Finality

Finally, *Smiley's* implicit focus on deliberateness and authoritativeness in evaluating an "official agency position" squares neatly with older, perhaps less remembered doctrine on finality. The touchstone is Judge Leventhal's comprehensive opinion in *National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971). After an initial exchange of letters with the Department of Labor's (DOL) Wage and Hour Division, counsel for an association of coin- operated laundries challenged an interpretation contained in an opinion letter, signed by the division's Administrator, stating that those laundries' employees were subject to the minimum wage requirements of the Fair Labor Standards Act ("FSLA"), 29 U.S.C. § 201 *et seq*. The government moved to dismiss, in part because it maintained the letter was too "informal" a vehicle for its interpretation to be considered "final," hence reviewable, under the APA.

The D.C. Circuit decided that was not the case. Finality had to be predicated, in part, on "authoritative determination." Here, although the Administrator may technically have been a subordinate official within DOL, his voice had to be taken as sufficiently authoritative, because, under FSLA case law, good-faith reliance on letter opinions from the Administrator could provide employers with a defense against liability. *Id.* at 700.

The Court also acknowledged that finality had to be predicated to some extent on formality, too, because the latter signaled the thoroughness of agency *deliberativeness*:

> [A] ruling made without that kind of assurance of deliberativeness that is presented by a hearing, or a structured controversy, may be the kind of ruling that is more truly subject to reconsideration.
>
> ***
>
> The matter of formality in the agency process helps show that the agency action involved is the product of the agency's process for assuring deliberation for this kind of action . . . .

Id. at 701-02.

But in the case before it, no one even challenged that the agency staff and outside counsel had been afforded an opportunity to consider and exchange their views thoroughly. Moreover, a strong mark of careful agency consideration was that the letter at issue was one of the few thousand, out of several hundred thousand answers to inquiries, that the Administrator had signed himself. Here, then, "informality in the communication [did] not negative the substance of what has been done and the reality that it is the 'final' such action of the agency." *Id.* at 702. In short, notwithstanding alleged informality, the letter bore all the indicia of authoritativeness and deliberation the court needed to consider it final – the same markers of "official agency position" in *Smiley*.

Conclusion

Smiley offers an implicit and simple (and, some might

argue, oversimple) framework for the courts to determine if and when an interpretation contained in an informal agency formats constitutes "official agency position": How authoritative is it, if at all? What quality of deliberation, if any, took place in the channels from which it emerged? Lower courts may wish to adopt the framework explicitly and articulate it further when they decide challenges that an agency has, suddenly and without explanation, deviated from an interpretation contained in those formats. The framework may make eminent sense as a starting point, because it parallels that set forth by Judge Leventhal for deciding whether interpretations contained in such formats would be final and reviewable in the first place.

Council Capsules *continued from page 7*

technologies, or use of the Internet by agencies in a specific manner.

FURTHER RESOLVED, that federal agencies should explore means to maximize the availability and searchability of existing law and policy on their websites. Departments comprising several agencies should work with those agencies to assure the predictability of site content, and uniformity in the search mechanisms made available by: a) including organizational charts and personnel directories to facilitate public understanding and access. b) including in their own searchable data bases their governing statutes, all agency rules and regulations, and all important policies, interpretations, and other like matters on which members of the public are likely to request; c) posting materials where practicable in a form directly accessible to electronic searching by the search engine they provide, and organize internal web pages and data in a way that permits ready use by citizens dealing with the agency easily; d) assuring the possibility of sophisticated as well as simple searches; e) minimizing the need to refer out to other data-bases, for example the GPO's, and providing prominent notice of any need to do so, with appropriate links and help; and f) providing ready access, in downloadable format, to forms whose use is required by the agency.

FURTHER RESOLVED, that federal agencies should encourage public participation in rulemaking and policy formulation on the Internet by: a) making the agency's periodic Unified Regulatory Agenda prominently available and searchable on the agency's own site; b) providing a means for interested persons to enroll for electronic notification of further developments in a matter, beginning with its announcement in the Unified Regulatory Agenda; c) posting notices of proposed rulemaking on the agency's own site, and providing opportunities for electronic comment there; d) posting required analyses, public comments, and other constituent elements of a rulemaking docket on the agency's web site as far as practicable in readily searchable form at least in rulemakings likely to draft substantial public interest; and e) posting guidance documents and other matters not requiring notice and comment rulemaking procedures, and providing opportunities to seek revision or further information.

FURTHER RESOLVED, that given the fluid character of the Internet and its use, federal agencies should consider means by which the possibility of access to important materials placed on the Internet can be preserved, once those materials are no longer posted there.

OMBUDS STANDARDS

RESOLVED, that the American Bar Association supports the greater use of "ombuds" to receive, review, and resolve complaints involving public and private entities.

FURTHER RESOLVED, that the American Bar Association endorses the Standards for the Establishment and Operation of Ombuds Offices dated August 2001.

Supreme Court News *continued from page 9*

intended to delegate to agencies the power to resolve certain ambiguities. The Court's opinion in *Mead*, which seems to lay some emphasis on the actual textual bases for perceiving such an intent, perhaps reduces the fictional basis of *Chevron* somewhat compared to Justice Scalia's dogmatic presumption of such an intent whenever ambiguity is found. However, it achieves this at the cost of simplicity. Bright-line tests are easy to administer; an across-the-board presumption of a delegation to an agency to make an interpretation whenever its statute is ambiguous is easy to administer, a point that Justice Scalia hammers home in his dissent. The Court's test, which Justice Scalia derides as "th'ol' 'totality of the circumstances' test," necessarily results in the indeterminancy that accrues to such a test. The extent of the indeterminancy is unclear. While the Court seems to acknowledge that even rules adopted after notice and comment do not *necessarily* qualify for *Chevron* deference, at the same time it seems to suggest that such rules are highly likely to qualify for *Chevron* deference, and only unique

circumstances would overcome the presumption of a delegation in these circumstances. Such an acknowledgment might invite new challenges, but the fact is that even absent such an acknowledgment, litigants have already argued that *Chevron* does not apply in certain circumstances even to interpretations contained in notice-and- comment rulemakings and that their cases fit those circumstances. Similarly, while the Court also acknowledges that informal interpretations *might* qualify for *Chevron* deference if the circumstances suggest that Congress intended such informal interpretations to receive such deference, *Christensen* and *Mead* also suggest that this would be the rare case. The problem remains in the context of adjudications. The Court has consistently said that "formal adjudications" receive *Chevron* deference on the same basis as notice-and-comment rulemakings, but it is not precisely clear what the Court meant by a "formal adjudication." Normally, such a term would refer to adjudication performed under APA sections 554, 556, and 557, but the Court included an INS case in its list of cases cited as receiving *Chevron* deference because they involved "formal adjudication," and that case did not involve "formal adjudication" under the APA, although immigration deportation proceedings are hardly "informal." Thus, it would seem that any highly formalized adjudication will have a strong presumption in favor of *Chevron* deference, which one might note is hardly new, inasmuch as it simply reproduces the venerable *Hearst* doctrine, *see National Labor Relations Board v. Hearst*, 322 U.S. 111 (1944).

The difficulty with these conclusions is that it is unclear how the amount of procedure afforded an agency decision equates with the likelihood that Congress intended the agency's decision to have "the force of law" requisite to command *Chevron* deference. After all, some rules are not required to go through notice-and-comment in order to have legislative effect. Moreover, the Court's analysis of the failings of the adjudication in *Mead* to qualify for *Chevron* deference raise questions as to why even formal adjudications should receive such deference. That is, the Court seems to say that something more than binding effect on the parties to the decision and precedential effect as to nonparties is necessary for *Chevron* deference to apply, but these are the only effects of even a "formal adjudication" under the APA. In short, the Court failed to articulate a good rationale to explain why formal adjudications should presumptively receive *Chevron* deference and non-formal adjudications presumptively should not.

Although this was not the first instance in which Justice Scalia has dissented from the Court's continued use of *Skidmore* and its limited use of *Chevron*, in *Mead* the Court finally made the effort to respond to his critique. The Court noted that there is a "great variety of ways in which the laws invest the Government's administrative arms with discretion," and underlying the dispute between Justice Scalia and the Court is a choice of "how to take account of the great range of its variety."

> If the primary objective is to simplify the judicial process. . . , then the diversity of statutes . . . must be declared irrelevant or minimized. If, on the other hand, it is simply implausible that Congress intended such a broad range of statutory authority to produce only two varieties of administrative action, demanding either *Chevron* deference or none at all, then the breadth of the spectrum of possible agency action must be taken into account. Justice Scalia's first priority over the years has been to limit and simplify. The Court's choice has been to tailor deference to variety. . . . We think, in sum, that Justice Scalia's efforts to simplify ultimately run afoul of Congress's indications that different statutes present different reasons for considering respect for the exercise of administrative authority or deference to it.

As stated earlier, the Court's approach in *Mead* makes the application of *Chevron* less a presumption founded on a legal fiction and more an exercise of judicial interpretation of the particular statutes to ensure that they reflect a congressional intent that the agency's interpretations should have the force of law. At the same time, Justice Scalia is surely right that a test that respects the variety of statutes will mean less predictability as to the effect of agency interpretations of those statutes and consequently more litigation. The initial question will be how robust the presumption of *Chevron* applicability is with respect to notice-and-comment rulemaking and formal adjudication and how robust the presumption of non-*Chevron* applicability is with respect to interpretive rules, policy statements, agency manuals, and enforcement guidelines. That is, will courts give short shrift to attempts to counter these presumptions in light of the Court's decisions prior to *Mead*, or will the language in *Mead* invite serious consideration of attempts to rebut those presumptions in particular cases? The second question will be the response of lower courts to the Court's treatment of the informal adjudication in *Mead*. Will they focus on the concept that binding parties and establishing precedent is not enough to qualify for *Chevron* deference, essentially creating a high presumption against *Chevron* deference to informal adjudications, or will they focus on the amount of procedure provided by the agency or required by statute to conduct the adjudication? If the latter, the likelihood of producing consistent outcomes across statutes seems slight, with courts making determinations essentially on Justice Stewart's infamous basis for deciding what was obscene, that he knew it when he saw it.

News from the States *continued from page 10*

education and law. The group has had several meetings, hearing broadly from Department witnesses and from the affected public. A final report will be published after the first of next year.

It has often been noted that when a legislature gives an administrative agency a divisive political issue without clearly resolving it, the political questions do not disappear. The venue for the battle just changes—skirmishes now occur in the course of agency rulemaking rather than in the halls of the legislature. Some believe that is good—the decision will be made by people with subject matter expertise. Some have the opposite view—that serious political controversy just slows down and complicates ("ossifies" in the current jargon) an already sluggish administrative process. This panel is a reflection of one current view that a representative panel of outside "experts" might permit facing the political decision in the most acceptable way.

Recent Articles

Timothy P. McCormack, Comment, *Expert Testimony and Professional Licensing Boards: What Is Good, What Is Necessary, and the Myth of the Majority-minority Split,* 53 ME. L. REV. 139-188 (2001).

Alexander J. Gonzales, *Administrative Law*, 32 TEX. TECH. L. REV. 439-565 (2001).

Recent Articles of Interest *continued from page 11*

of Harter's criticisms undercuts the findings of the original research. Coglianese asserts that Harter disregarded basic standards for empirical research in the arguments he advanced and that Harter failed to provide any credible evidence to support his present claim that negotiated rulemaking has resulted in rules that are better than those developed through conventional processes.

Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 31 ENVTL. L. REP. (Envtl. L. Inst.) 10,811 (July 2001). Proponents of regulatory negotiation ("reg neg") contend that it improves rule quality, reduces transaction costs, and increases legitimacy, while some critics, in particular Cary Coglianese, argue that reg neg fails to deliver on its promise to save time and reduce litigation rates. This article discusses a two-phase empirical study of U.S. EPA negotiated rulemakings conducted by Cornelius Kerwin and Laura Langbein. Kerwin and Langbein found, in contrast to Coglianese, that reg neg generates more learning, better quality rules, and higher satisfaction compared to conventional rulemaking. At the same time, stakeholder influence on the agency remained about the same using either approach. Accordingly, the authors recommend more frequent use of reg neg, accompanied by further comparative and empirical study for the purposes of establishing regulatory standards and resolving implementation and compliance issues. Specifically, all participants in the study–whether associated with businesses, environmental groups, or government agencies–reacted more favorably to their experience with negotiated rules than did participants in conventional rulemaking. Kerwin & Langbein found that negotiation of rules reduced conflict between the regulator and regulated entities, and was no less fair to regulated entities than conventional rulemaking. Moreover, the researchers concluded that reg neg is a superior process for generating information, facilitating learning, and building trust. Most significantly, consensus-based negotiation increased legitimacy (acceptability of the regulation to those involved in its development). This "legitimacy benefit" was observed independently of the types of rules chosen for conventional versus negotiated rulemaking, and independently of differences among the participants, including their affiliation. The authors recommend that, given that EPA did not initiate a single reg neg during the Clinton Administration, the Bush Administration should adopt a different course. They suggest that agencies commit greater resources to reg neg as general matter, with greater financial and technical support for smaller, poorer participants. In addition, agencies should maintain negotiating committees through rule promulgation, and perhaps through implementation, rather than disbanding them upon reaching consensus. Likewise, agencies should consider adding a professional economist or policy analyst with skills in assessing consumer or voters' willingness to pay for environmental public goods, in order to suggest options, such as performance standards, or other market solutions that the negotiating committee might not otherwise consider. Finally, the authors propose additional empirical study of reg neg, compared to conventional rulemaking, with particular focus on comparing enforcement of and compliance with comparable environmental rules, as well as studies comparing the compliance of parties who participate in reg neg to those who are affected but did not participate.

William Funk, *Exhaustion of Administrative Remedies – New Dimensions Since* Darby, 18 Pace Env. L. Rev. 1 (2000). In this article, Professor Funk first summarizes the law of exhaustion of administrative remedies prior to the Supreme Court's groundbreaking decision in *Darby v. Cisneros* and then describes that decision and the Court's rationale for it. He notes that both litigants and agencies have been slow to recognize the effect of *Darby*, so that some agency regulations may still suffer the same flaws as those of the agency in *Darby*. Professor Funk next addresses the questions that *Darby* did not answer or which it raised and the responses of lower courts. Some of these questions have been resolved and some not, leaving the lower courts split or confused, but for the most part courts have not been applying the rationale of *Darby* beyond its particular holding. Finally, Professor Funk discusses the Supreme Court's recent decision on issue exhaustion, *Sims v. Apfel*.

Mark Geistfeld, *Reconciling Cost-Benefit Analysis with the Principle That Safety Matters More Than Money*, 76 N.Y.U. L. Rev. 114 (2001). Some health and safety laws emphasize safety over cost considerations by invoking the principle that safety matters more than money. Other laws rely on cost-benefit analysis (CBA) that equates safety and money. In this article, Professor Geistfeld argues that, despite their apparent inconsistency, the two regulatory approaches can be reconciled. He first explains why the safety principle most plausibly stands for a distributive claim that in the context of nonconsensual risk impositions, the safety interests of potential victims deserve greater weight than the ordinary economic interests of potential injurers. Although this claim seems to be inconsistent with CBA, Professor Geistfeld analyzes cost-benefit tort rules to demonstrate how potential victims are inadequately compensated for certain types of nonconsensual risks threatening death, an inequity that can be quantified with cost-benefit methodology. He shows that the inequity is defensibly remedied by altering the duty of care to give safety interests greater weight than economic interests (the weighting sanctioned by the safety principle), which ultimately yields a well-defined decision rule that modifies CBA for certain types of nonconsensual risks threatening serious physical injury. Subsequently, he contends that modified CBA (1) satisfies the requirements of modern welfare economics, (2) can accommodate a wide range of normative concerns, and (3) closely conforms to important tort practices, suggesting that it implements a version of the safety principle closely corresponding to the version adopted by the tort system. Finally, Professor Geistfeld concludes that the value of modified CBA is illustrated by the structure it gives to the precautionary principle, a vague regulatory approach based on the safety principle that has become increasingly important and controversial in international law.

Dennis D. Hirsch, *Project XL and the Special Case: The EPA's Untold Success Story*. 26 Col. J. Env. L. forthcoming (2001). In 1995, the Environmental Protection Agency introduced Project XL, its lead regulatory reinvention initiative. At the time, the agency explained that the program would experiment with new regulatory methods and, in addition, would promote common sense approaches to environmental problems. This article begins by demonstrating that, as implemented, these two objectives are quite distinct. Some XL projects, properly labeled "experimental," test out fundamentally new regulatory strategies. Others, the "special case" projects, address specific situations where regulations break down and fail to make sense. The commentary on Project XL, much of it critical, has focused on the program's experimental dimension. This article examines the special case side. It draws on the theory of the special case, a set of ideas developed in jurisprudence and case law, to argue that this aspect of the program could play an important role in sustaining the environmental regulatory system. The theory of the special case posits that those who draft rules generally cannot foresee all their applications. Most rules will accordingly result in a small number of regulatory bad fits that cause great and unintended hardship, inequity or inefficiency. Administrative officials must be given authority to make exceptions in these special cases and to substitute a more tailored set of requirements. Otherwise, the bad fits will engender such resentment that they may undermine public support for the regulatory system as a whole. This article argues that EPA is engaging in this type of regulatory tailoring in the XL special case projects. Like any other system of general rules, environmental regulations inevitably yield some unintended bad fits. These are often held up as "evidence" that the entire environmental regulatory system defies common sense. Project XL's special case dimension functions as a regulatory safety valve that alleviates the pressure generated by bad fits and thereby shores up the system as a whole. The article recommends that EPA expand Project XL's special case dimension so that it can more fully serve its safety valve function. By contrast, it suggests that the agency narrow the experimental side to better focus on a core set of promising innovations, and that it run this aspect of the program more like a true experiment with intensive monitoring, evaluation and public participation. Doing so would address many of the principal criticisms of Project XL and would allow the both the experimental and special case sides of the program to achieve their full potential.

Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001). This Article examines a recent and dramatic transformation in the relationship between the President (and his staff) and the administrative state. Professor Kagan argues that President Clinton, building on a foundation President Reagan laid, increasingly made the regulatory activity of the executive branch agencies into an extension of his own policy and political agenda. He did so primarily by exercising directive authority over these agencies and asserting personal ownership of their regulatory activity — demonstrating in the process, against conventional wisdom, that enhanced presidential control over administration can serve pro-regulatory objectives. Professor Kagan offers a broad though not unlimited defense of the resulting system of "presidential administration" against legal and political objections. This form of controlling agency action, she argues, comports with law because, contrary to the prevailing view, Congress generally should be understood to have left authority in the President to direct executive branch officials in the exercise of their delegated discretion. In addition, and relatedly, this form of controlling agency action advances core values of accountability and effectiveness, given notable features of the contemporary administrative and political systems. In comparison with other forms of control over administration, which continue to operate, presidential administration renders the bureaucratic sphere more transparent and responsive to the public and more capable of injecting energy as well as competence into the regulatory process. Professor Kagan concludes this Article by considering ways in which courts might promote presidential administration in its most beneficial form and scope, discussing in particular potential modifications to the nondelegation doctrine and to the *Chevron* and *State Farm* judicial review doctrines.

James A. Lofton, *Enviromental Enforcement: The Impact of Cultural Values and Attitudes on Social Regulation*, 31 Envtl. L. Rep. (Envtl. L. Inst.) 10,906 (Aug. 2001). The U.S. EPA is the nation's largest regulatory agency, with 18,000 employees and a FY 2001 budget of $7.8 billion. In recent years, EPA has been under considerable criticism for being too heavy-handed–too agressive, too quick to sue, and too adversarial with those it regulates. In contrast to the enforcement program in the U.S., the United Kingdom has a long tradition of working cooperatively with British industry in social regulation including environmental compliance. This article examines how the American and British versions of regulatory compliance assurance and enforcement evolved and shows that cultural, social, and historical differences account for both the divergences in the systems and the efficacy of the system in each country. In general, American regulatory policy has been more ambitious, but has produced greater resistance from business. British regulatory authorities demand less, but because their demands are perceived as reasonable, industry is more likely to comply with them. However, traditional business opposition to regulation, particularly but not exclusively environmental regulation, in the United States has more to do with politics than the way that regulators interact with the regulated community. The author contends that the British approach is workable in the U.S. only if businesses are first convinced of the legitimacy and value of regulation; costs must be internalized, and corporate actors must be convinced to take a more far-sighted view. In the environmental arena, the concepts of sustainable development and or integration of environmental concern with social and economic policies must be embraced. As has begun to happen in Great Britain, programs must be implemented to convince businesses and society in general that environmental and economic values are not mutually exclusive.

Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 Fed. Comm. L. J. 427 (2001). This Article argues that the congressional delegation of public interest authority to the FCC likely violates the nondelegation doctrine that inheres in the constitutional separation of powers scheme and that, even if the courts do not hold the public interest delegation unconstitutional, Congress should revise the Communications Act to set forth more specific guidance for the FCC. In today's environment of "convergence," in which competition is flourishing across communications sectors, Congress should not shirk its responsibility to establish fundamental policy for an industry that contributes so much to the overall health of our economy. This Article argues that Congress should not wait to be compelled by the courts to replace the public interest standard with more specific guidance to the FCC, guidance which hopefully will provide an unmistakable roadmap toward a deregulatory end game consistent with a competitive marketplace.

Richard Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. Rev. forthcoming (2001). The article examines whether the ideological divisions on the United States Court of Appeals for the District of Columbia Circuit

are affected by changes in the composition of political branches: the two houses of Congress and the Presidency. Thus, it seeks to empirically test the plausibility of positive political economy models of adjudication, which posit that judges act in an ideologically "strategic" manner. The data set developed for this study consists of all cases decided by the D.C. Circuit, between 1970 and 1996, challenging the health-and-safety decisions of twenty federal agencies. The empirical analysis undertaken here reveals strong, statistically significant evidence of ideological voting. Most strikingly, challengers seeking more stringent health-and-safety regulation prevailed in 50.3% of the cases before majority-Democratic panels but in only 27.8% of the cases before majority-Republican panels. This difference is significant at a 99% confidence level. There is no statistically significant evidence, however, that these ideological differences are affected by the party controlling the two chambers of Congress or the Presidency. The results can be interpreted in one of two ways. First, they might be seen as supporting the attitudinal model's view that the ideological voting on the D.C. Circuit is sincere, rather than strategic. Second, it is possible that the judges are in fact voting strategically, but that they believe that the possibility of legislative reversal is so small that their interests would not be furthered by departing from sincere ideological voting. Under this account, judges act in what might be termed a "super-strategic" manner: they pay attention to the possibility that Congress will thwart their ideological interests but at the same time understand that the probability of reversal is small. Either way, the empirical findings have important relevance for the understanding of the administrative state. For example, under either interpretation judicial review of administrative action does not bring administrative preferences closer to the current congressional majorities, as posited in the strategic models.

Symposia

Symposium: Legal Ethics for Government Lawyers: Straight Talk for Tough Times, 9 WIDENER J. PUB. L. 199-353 (2000). Geoffrey C. Hazard, Jr., *Conflicts of Interest in Representation of Public Agencies in Civil Matters*; Anna P. Hemingway, *The Government Attorney's Conflicting Obligations*; Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*; Robert E. Rodes, Jr., *Government Lawyers*; James W. Diehm, *The Government's Duty to "Seek Justice" in Civil Cases*; Thomas L. Shaffer, *More's Skill*; Randy Lee, *Robert Bolt's A Man for All Seasons and the Art of Discerning Integrity*; Mary Kate Kearney, A *Lawyer's Call to Integrity: A Response*; Louise L. Hill, *The Professional Responsibility of Lawyers.*

Symposium: [Administrative Law]. 28 FLA. ST. U. L. REV. 1-469 (2000). J.B. Ruhl, *The Coevolution of Administrative Law with Everything Else*; Steven P. Croley, *Public Interested Regulation*; Cynthia Farina, *Faith, Hope, and Rationality: Or, Public Choice and the Perils of Occam's Razor*; Elizabeth Garrett, *Interest Groups and Public Interested Regulation*; Jody Freeman, *The Contracting State*; Mark Seidenfeld, *An Apology for Administrative Law in the Contracting State*; Matthew D. Adler, *Beyond Efficiency and Procedure: A Welfarist Theory of Regulation*; Rob Atkinson, *The Reformed Welfare State as the Radical Humanist Republic: An Enthusiastic (If Qualifed) Endorsement of Matthew Adler's Beyond Efficiency and Procedure*; Daniel B. Rodriguez, *Regulatory Incrementalism and Moral Choices: a Comment on Adlerian Welfarism*; Linda R. Cohen and Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*; Daniel J. Gifford, *Why Does a Conservative Court Rule in Favor of a Liberal Government? The Cohen-Spitzer Analysis and the Constitutional Scheme*; Jim Rossi, *Does the Solicitor General Advantage Thwart the Rule of Law in the Administrative State?*

Citizen Suits and the Future of Standing the 21st Century: From Lujan to Laidlaw and Beyond, 11 DUKE ENVTL. L. & POL'Y F. 193-387 (2001). Gene R. Nichol, *The Impossibility of* Lujan's *Project*; Richard J. Pierce, Jr., *Issues Raised by* Friends of the Earth v. Laidlaw Environmental Services*: Access to the Courts for Environmental Plaintiffs*; William Buzbee, *Standing and the Statutory Universe*; John D. Echeverria, *Critiquing* Laidlaw*: Congressional Power to Confer Standing and the Irrelevance of Mootness Doctrine to Civil Penalties*; Maxwell Stearns, *From* Lujan *to* Laidlaw*: A Preliminary Model of Environmental Standing.*

Power of the Presidency, 28 N. Ky. L. Rev. 474-639 (2001). George Stephanopoulos and George Will, *The Power of the Presidency*; Martin J. Sweet, *Assessing Presidential Power: A Historical New Institutional and Legal Perspective*; Richard J. Dougherty, *Thomas Jefferson and the Rule of Law: Executive Power and American Constitutionalism*; Darnell L. Weeden, *A Post-impeachment Indictment of the Independent Counsel Statute*; L. Anthony Sutin, *The Presidential Powers of Josiah Bartlett*; Colleen J. Shogan, *The Moralist and the Cavalier: the Political Rhetoric of Washington and Jefferson*; Douglas G. Smith, *Separation of Powers and the Constitutional Text*; William R. Casto, *Pacificus and Helvidius Reconsidered*.

D.C. Circuit Review, August 1998-July 1999, Administrative Law, 68 GEO. WASH. L. REV. 582-597 (2000).

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The Ritz-Carlton
Philadelphia, Pennsylvania
February 1-3, 2002

2002 ABA
Section Spring Meeting
The Jefferson
Richmond, Virginia
April 19-21, 2002

2002 ABA
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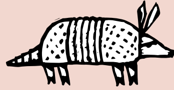

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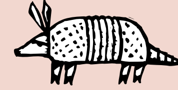

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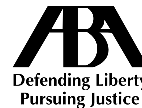

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