

# ADMINISTRATIVE & REGULATORY LAW NEWS



Section of Administrative Law & Regulatory Practice

Vol. 26, No. 3

American Bar Association

Spring 2001



2001 Spring Meeting  
Sanibel Island, FL  
April 27-29

## In This Issue

Council Capsules **2** Midnight Regulations: Natural Order or Disorderly Governance **3**  
A Brief Look at Agency Policy Statements and Interpretive Rules Under the APA **4** Supreme Court News **6**  
News from the Circuits **8** News from the States **10** Spring Meeting **12** Recent Articles **14**

# Council Capsules

## A Brief Digest of Council Highlights From the 2001 Midyear Meeting In San Diego

### APA Project

Chief Reporter Paul Verkuil presented in draft form the first two black-letter statements of law generated by the Section's APA Project — one on rulemaking, the other on adjudication. After a page-by-page review of the draft statements and a number of language changes, the Council approved both statements. They may be viewed at <http://www.abanet.org/adminlaw/apa>.

Verkuil reported that the adjudication report still needed a little work but that otherwise these two sections of the project are essentially complete. He expects the draft statement on FOIA to be available for review by the Council at the spring meeting. Statements on judicial review and government management could be ready this summer in time for the annual meeting in Chicago. The overall APA Statement should be ready for final approval at the fall meeting.

In the meantime, anyone interested in commenting on the work that has been done so far may email the Section at [adminlaw@abanet.org](mailto:adminlaw@abanet.org).

### Government Development of Internet Use

Peter Strauss, vice chair of the Rulemaking Committee, delivered the committee's Recommendations on Government Development of Internet Use.

The accompanying report applauds the efforts that agencies have made to date to provide information on-line but urges that more can and should be done to promote the transparency of agency operations and public participation in rulemaking activities. The report also documents the need for the creation of a centralized office that can encourage and monitor best practices throughout the executive branch.

The five recommendations as approved by the Council for presentation to the ABA House of Delegates (with some specific steps for actualizing three omitted) read as follows:

1. The Executive Office of the President should work with agencies to assist them promoting best practices for their web pages, and facilitating the ease and predictability of citizen access to desired information.
2. Congress should support these initiatives without mandating particular technologies, or use of the Internet by agencies in a specific manner.
3. Agencies should maximize the ease and predictability of their web sites, in particular the availability and searchability of existing law and policy.
4. Agencies should encourage public participation in rulemaking and policy formulation on the Internet.
5. Given the fluid character of the Internet and its use, 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.

### Government Accountability for Information Activities

Sidney Shapiro, co-chair of the Regulatory Initiatives Committee, delivered the committee's Recommendations on Government Accountability for Information Activities.

The accompanying report explains that as agencies expand their information gathering and dissemination activities they are discovering information exchange has value as a policy tool. The report notes that neither the APA nor most organic statutes require public involvement in the design and implementation of agency information activities, even though the use of information as a policy

*continued on page 16*

## ADMINISTRATIVE & REGULATORY LAW NEWS

(ISSN 0567-9494)

Published by the ABA Section of Administrative Law and Regulatory Practice, 740 15th Street, NW, Washington, DC 20005-1002. *Editor in Chief:* William Funk, Lewis & Clark Law School, Portland, OR 97219, (503) 768-6606; FAX (503) 768-6671; e-mail: [funk@lclark.edu](mailto:funk@lclark.edu). *Associate Editor for Section News* William S. Morrow, Jr., e-mail: [wmatc@erols.com](mailto:wmatc@erols.com). *Associate Editor for News from the States* Michael Asimow, e-mail: [asimow@law.ucla.edu](mailto:asimow@law.ucla.edu). *Staff Director:* Leanne Pfautz, ABA, 740 15th Street, NW, Washington, DC 20005-1002, (202) 662-1665; FAX: (202) 662-1529; e-mail: [pfautzl@staff.abanet.org](mailto:pfautzl@staff.abanet.org).

The views expressed in the *Administrative & Regulatory Law News* are not necessarily those of the Section of Administrative Law and Regulatory Practice, the American Bar Association, or the Editors.

# Midnight Regulations: Natural Order or Disorderly Governance

By William S. Morrow, Jr.\*

Interregnum is defined by Miriam-Webster's on-line Collegiate Dictionary as:

1. the time during which a throne is vacant between two successive reigns or regimes
2. a period during which the normal functions of government or control are suspended
3. a lapse or pause in a continuous series.

Which of these best describes the time between Election Day and the swearing in of a new President? Definition one might apply in a symbolic but not literal sense. Definition three is 180 degrees off if the "continuous series" is meant to describe publication of regulations in the *Federal Register*. And number two? Well, definition two begs the question. Is the phenomenon of the acceleration in post-election rulemaking activity in an outgoing administration the natural order or suspension of orderly governance?

To answer that question, the Section sponsored a debate between former OMB Acting Deputy Director Sally Katzen and Senior Federal Circuit Judge S. Jay Plager, entitled "Midnight Regulations – Should They Be Curbed."

The entire debate on Midnight Regulations can be accessed through the What's New portion of the Section's webpage: <http://www.abanet.org/adminlaw/whatsnew/whatsnew.html>

The debate was held at the George Washington University School of Law on February 27, 2001, as part of the section's 2000-2001 Great Debate Series. Gene Scalia moderated the program and, along with Tom Susman, Ernie Gellhorn and Warren Belmar, helped organize it in cooperation with the ABA Government and Public Sector Lawyers Division. Section Chair Ron Levin handled the introductions.

\* Associate Editor for Section News; Chair, Transportation Committee; General Counsel, Washington Metropolitan Area Transit Commission

Scalia opened by noting the 50% increase in *Federal Register* pages from November 2000 through January 2001 as compared to the average number of pages published during the same period over the previous three years. He underscored the importance of the debate by recalling the "midnight appointments" of John Adams in the final days of his presidency, including the appointment of one William Marbury as justice of the peace.

Plager said he looked only at the period between the election and the succeeding January 20 and characterized the issue as whether the existence of the "midnight regulation" phenomenon—the striking increase in the number of regulations issued in the final days of a presidency—indicates a problem with government regulatory apparatus that is unique to this period. He also confined his analysis to changes in administrations likely to result in significant policy changes, which can occur even when the political party in power does not change.

Plager identified three problem areas that he believes merit attention. The first concerns efficiency. He believes the ramming of regulations on the way out and the attempt to neutralize them on the way in amounts to an enormous waste of time and effort for both administrations. He also believes presidential oversight tends to get lost in the process.

Second, he believes public virtue suffers from the rush to publish. He said the haste with which midnight regulations are pushed out the door results in "a certain amount of sloppiness" and "makes control of the regulatory apparatus appear to be a Washington game." He finds the process "unseemly."

Third, he thinks the practice of issuing midnight regulations undermines political accountability. The institutional constraints on agency heads—budgetary concerns, aversion to congressional oversight, personal performance measures, and considerations of stature—all disappear during the interregnum. The result, he said, is outgoing administrations wind up setting the agenda for the incoming administrations.

What to do? Plager proposed that organizations like the ABA could hold more meetings like this

*continued on page 18*

# A Brief Look at Agency Policy Statements and Interpretive Rules Under the APA

By William S. Morrow, Jr.\*

Policy statements. Opinion letters. Guidelines. Manuals. What do these have in common? The answer is, when issued by a federal agency, they meet the definition of a “rule” under Sec. 551(4) of the Administrative Procedure Act (APA). That section in pertinent part defines a rule as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”

These rules are not ordinarily the product of rulemaking procedures prescribed by Sec. 553 of the APA and therefore do not have legislative force, as regulations do. Yet, they almost always are intended to have some effect on someone.

What, then, do we make of these rules? What is their place in the regulatory scheme? What effect do they have on agencies, the public? What deference, if any, must courts afford them?

To answer these questions the Section of Administrative Law & Regulatory Practice assembled a panel of experts this past February at its midyear meeting in San Diego. Daniel Cohen, Chief Counsel for Regulation at the Department of Commerce, served as moderator. Panelists included, in order of appearance: Peter L. Strauss, Betts Professor of Law, Columbia Law School; Randolph J. May, Senior Fellow and Director of Communications Policy Studies at the Progress & Freedom Foundation; and William Funk, Professor of Law, Northwestern School of Law of Lewis & Clark College. Prof. Funk sat in for Robert A. Anthony, GMU Foundation Professor of Law, George Mason University School of Law, who has written extensively on the subject but could not attend the program.

## Hierarchy

Think of a pyramid. At the apex is the U.S. Constitution. Only a few pages long, it is the ultimate source of federal law as handed down by the people. At the base of the pyramid are the massive numbers of missives issued by individual agency

employees, the least authoritative instruments of agency expression to be found in administrative law. In between, in descending order of legal effect but ascending order in terms of volume, are statutes issued by legislators, rules authorized by agency heads, and rules published at staff level. The following table, developed by Prof. Strauss, illustrates this hierarchy.

Constitution	The People
Statutes	Elected Legislators
Regulations	Politically Responsible Executive Officials
Publication Rules	Staff Offices
Acts Based in Understanding	Individual Bureaucrats

In Prof. Strauss’s table, rules that have legislative effect are termed “regulations. These rules are the result of formal or informal rulemaking procedures sanctioned by the APA, typically notice and comment rulemaking under Sec. 553. Their status derives from the legislative authority to fill in statutory gaps delegated by Congress to politically accountable officials in the executive branch.

Publication rules are interpretations, policy statements, staff manuals and the like that, pursuant to Sec. 553(b), are exempt from APA rulemaking procedures but which have been published and indexed, or otherwise made known to affected parties, as prescribed by Sec. 552(a)(2). According to that section, when issued in accordance with its terms such pronouncements “may be relied on, used, or cited as precedent by an agency against a party other than an agency.”

Directives that have been issued in compliance with neither Sec. 552 nor Sec. 553 occupy the bottom tier and have no legal effect on either agencies or the public.

Prof. Anthony and Prof. Funk, as well as others, use a different terminology. “Legislative rules” are those that Congress has authorized an agency to issue for the purpose of binding private persons and which are not procedurally defective. All other

\* Associate Editor for Section News; Chair, Transportation Committee; General Counsel, Washington Metropolitan Area Transit Commission. The author thanks the panelists for their input on this article.

rules are “non-legislative” and may be divided into three categories. The first two include interpretive rules and general statements of policy, thus tracking the rulemaking exemptions in Sec. 553(b). The third category contains what Prof. Anthony calls “spurious” rules, rules that purport to bind but which were not promulgated according to statutorily prescribed rulemaking procedures — most often the notice and comment procedures in Sec. 553.

### **Binding Effect**

An important question is whether agency interpretations and policy statements can be binding on the agency. Prof. Strauss believes the language of Sec. 552(a) at least supports the idea that the agency can bind its employees: “A major function of documents issued at headquarters is to instruct staff, who are expected to obey. One would hope that a document issued at headquarters would be regarded as controlling in the field.”

Prof. Funk pointed out that the First Circuit has held an interpretative rule (as opposed to a policy statement) “binds an agency’s employees, including its ALJs, but it does not bind the agency itself.” *Warder v. Shalala*, 149 F.3d 73, 82 (1st. Cir. 1998) (citing K. DAVIS & R. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.3 at 104 (3d ed. 1996 & Supp. 1997)).

Of more interest, perhaps, is what effect publication rules have on the public. In this regard, the difference between a regulation and a publication rule, or between a valid legislative rule and a valid non-legislative rule, if you prefer, is that the former has the same effect as a statute, and the latter may only serve as precedent. But the panelists agreed that non-legislative rules can have a substantial binding effect on persons outside the agency in a practical if not legal sense.

Prof. Anthony has expressed the view that an agency can make a non-legislative rule, guidance if you will, practically binding “by routinely applying it as a fixed criterion for decision. Beyond that, the practical binding effect of an interpretive guidance is a function of the likelihood that that it will be challenged in court, and then of the likelihood that the guidance will be upheld by the court.”

Randy May drew on recent action by an official in the Occupational Safety and Health Administration (OSHA) to highlight how this works in practice. An employer had inquired whether OSHA’s statute covers employees working at home. The Director of Compliance Programs responded that the Act applied to workers in the home, making the employer responsible for periodic inspections of the premises and liable for unsafe conditions of

which the employer should have been aware.

The director’s letter subsequently was posted on OSHA’s website, bringing it into the purview of Sec. 552(a)(2) and potentially creating a non-legislative rule the agency could rely on as precedent in other cases. After considerable criticism in the media, the letter was withdrawn from the website. Statements from the Secretary of Labor indicated that the letter was only meant to serve as guidance for the requestor, not an across the board ruling.

Once the letter was posted to OSHA’s website, the industry was constrained to consider that the director had fixed the criterion for decision. But was the letter a valid guidance under Sec. 552(a)(2) or an invalid legislative rule disguised as an interpretation or policy statement?

### **Spurious Rules**

Prof. Anthony refers to procedurally invalid legislative rules as spurious rules. These are rules that create new rights and obligations but have not been tested through rulemaking proceedings and are not otherwise exempt from that process under Sec. 553. Instead, they have been published in the same manner as mere interpretations of existing statutes or regulations. Professor Strauss, while not using this classification, seemed to agree that questions of agency authority would be central.

Telling the difference between the two is often difficult, but the DC Circuit’s decision in *American Mining Congress v. Mine Safety & Health Admin.*, contains a checklist for discerning one from the other:

Accordingly, insofar as our cases can be reconciled at all, we think it almost exclusively on the basis of whether the purported interpretive rule has “legal effect”, which in turn is best ascertained by asking (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule. 995 F.2d 1106, 1112 (D.C. Cir. 1993).

So, in analyzing the OSHA letter discussed above, did the director have an adequate basis for enforcement absent the letter itself? The statute applies to

*continued on page 17*

by William Funk\*

## Court Rejects D.C. Circuit's New Delegation Doctrine

In February the Supreme Court decided the eagerly awaited case of *Whitman v. American Trucking Ass'n*, 121 S. Ct. — (2001). In that case the D.C. Circuit, per Judge Stephen Williams, had found that the Clean Air Act precluded the Environmental Protection Agency from considering the cost of implementation when setting National Ambient Air Quality Standards (NAAQS), but that EPA's interpretation of the Clean Air Act's standard for NAAQS would constitute an unconstitutional delegation of legislative authority. Finally, the D.C. Circuit also found that EPA's implementation plan for the new ozone NAAQS contravened provisions of the Clean Air Act.

The D.C. Circuit's decision, raising the specter of a renewed non-delegation doctrine, occasioned much commentary, most of it negative. The Supreme Court unanimously reversed the delegation decision. Justice Scalia's opinion for the Court was joined by all the justices except Justices Stevens and Souter, who concurred in the judgment but not the opinion. The Court did not break new ground in the delegation discussion, although its discussion is perhaps the most extensive ever. First, the Court noted that there was no authority for the novel non-delegation approach taken by the D.C. Circuit, under which an agency's interpretation of a statute could effect an unconstitutional delegation of legislative authority which could be cured by a different, more narrow interpretation. Next, the Court reiterated the standard that Congress must provide an "intelligible principle" in order to avoid an unconstitutional delegation, and the Court compared the Clean Air Act's relatively clear principle to the broad principles which the Court had previously found sufficient to avoid an unconstitutional delegation.

Beyond this familiar exposition of non-delegation doctrine, the Court elaborated that the specificity of the intelligible principle depended on the scope of the delegation. For example, the Court noted, no intelligible principle at all is required to uphold the delegation to EPA to define "country

elevators" as a category of grain elevators not subject to certain new source requirements, but "substantial guidance" is required to for rules that affect the entire national economy. The Clean Air Act's requirement that EPA set NAAQS at a level "requisite to protect the public health" comfortably fit within such substantial guidance.

In addition, Justice Scalia took pains to express the view reflected in some of his earlier non-majority opinions that the conventional statement that Congress delegates legislative powers to agencies is a misnomer. "The text [of the Constitution] permits no delegation of those powers." Rather, "Congress confers decisionmaking authority upon agencies," and when it does so, Congress must "lay down by legislative act an intelligible principle to which [the agency] is directed to conform." In other words, Congress legislates, and executive agencies execute the laws; and in order for agencies to execute the laws, those laws must contain an intelligible principle to guide the executive agencies, or else the agencies would themselves be legislating. It was this particular argument with which Justices Stevens and Souter took issue. They noted that many of the Court's cases refer to appropriate delegations of legislative power and that it blinks reality to deny that what agencies often do is legislative in character, rather than executive. Inasmuch as the functional test to determine whether a statute acceptably restrains executive discretion — does it contain an intelligible principle? — remains the same under either characterization of the non-delegation doctrine, it is not clear that there is much more than a semantic argument involved in this dispute. Justice Thomas, although he concurred in the Court's opinion on delegation as reflecting current doctrine, issued what is becoming a familiar concurrence, noting that no one had challenged the settled doctrine governing the case — here, the requirement for an intelligible principle — and suggesting that he was open to such a challenge.

A prerequisite to reaching the non-delegation issue was determining what the statute actually authorized. Accordingly, as an initial matter, the Court addressed the question whether, as industry argued, EPA was required or permitted to consider the cost of implementing NAAQS as part of the decision as to proper level at which to set the NAAQS. The D.C. Circuit had held consistently and repeatedly since 1980 that the Clean Air Act prohibited any cost consideration in setting the

\* Professor of Law, Lewis & Clark Law School; Editor-in-Chief, Administrative & Regulatory Law News.

NAAQS, and the court below had followed that line of cases. On this point the Supreme Court unanimously affirmed the D.C. Circuit's decision, although Justice Breyer, concurring in the judgment, did not join the Court's opinion on the issue. The applicable text requires EPA to set NAAQS "the attainment and maintenance of which in the judgment of the Administrator, . . . allowing an adequate margin of safety, are requisite to protect the public health." One might have thought that this language was ambiguous as to whether cost of implementation could or must be considered. Nevertheless, without mentioning *Chevron*, but after pages of statutory analysis (but, of course, no legislative history, given the author of the opinion), the Court concluded that the statute, "interpreted in its statutory and historical context and with appreciation for its importance to the CAA as a whole, unambiguously bars cost considerations from the NAAQS-setting process." Justice Breyer, taking a leaf from Justice Scalia's book, refused to join this part of the Court's opinion because it *failed* to address the legislative history, which Justice Breyer demonstrated unambiguously supported the same conclusion – that EPA cannot consider costs in setting NAAQS.

The final issue in the case involved the interplay between the provisions in the original Clean Air Act for implementing NAAQS and provisions added in the 1990 Amendments to the Act applicable to NAAQS implementation. To simplify somewhat, EPA had determined that new NAAQS could be implemented under the original implementation provisions, but the D.C. Circuit read the statute differently and held that new NAAQS must be implemented under the provisions of the 1990 Amendments. Before deciding this statutory question, however, the Court had to address two preliminary questions: was EPA's determination on this issue final agency action and was the dispute ripe for decision, inasmuch as EPA had not yet enforced its view of the implementation provisions. The Court found "final agency action" in EPA's preambular statements accompanying the final ozone NAAQS rule in which EPA stated that it had "settled" on a particular interpretation. EPA further reflected the "finality" of its decision in its subsequent refusals to reconsider its interpretation. As to ripeness, the Court applied the traditional factors of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), as further explicated in *Ohio Forestry Assn., Inc. v. Sierra Club*, 523 U.S. 726 (1998), and found that

the case was ripe because the issue was purely one of statutory construction that would not benefit from further factual development, review would not interfere with further administrative action, and the hardship to states of withholding review in light of the possible consequences of non-compliance would be substantial.

On the merits the Court did invoke *Chevron*, finding that the Clean Air Act was ambiguous as to which provisions would govern implementation of new NAAQS after the 1990 Amendments. Nevertheless, the Court said it would not defer to the agency's interpretation, because its interpretation "goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear." In short, the Court believed that neither the original provisions of the Act nor the provisions of the 1990 Amendments related to implementation of NAAQS governed absolutely. The Court found it "clear" that elements of both applied – thereby rejecting both the agency's and the D.C. Circuit's interpretations – but unclear as to how they both applied. Therefore, the Court directed that the case be remanded to the agency "to develop a reasonable interpretation of the . . . implementation provisions."

### **Court Restrictively Interprets Clean Water Act to Avoid *Lopez* Problem**

If *Whitman v. American Trucking Ass'n's* was an environmental victory, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 121 S.Ct. 675 (2001), was an overwhelming defeat. The Clean Water Act prohibits the discharge of pollutants into "navigable waters," but that term is defined as meaning "the waters of the United States." The initial issue in the case was to what extent, in light of these terms, the Clean Water Act reaches non-navigable intrastate waters. Lurking behind that issue, however, was the constitutional question whether Congress has the power under the Commerce Clause to regulate the quality of such waters.

Since at least 1986 the Corps of Engineers and the Environmental Protection Agency, the two agencies with responsibilities under the Act, have interpreted the CWA to reach non-navigable intrastate waters and wetlands if their degradation or destruction could affect interstate commerce. Such waters, the agencies maintained, were "waters of the United States" and within the Commerce Clause powers of Congress. As

*continued on page 19*

# News from the Circuits

## **Fifth Circuit joins D.C. Circuit in requiring notice-and-comment rulemaking to revise a longstanding practice or interpretation**

*Shell Offshore, Inc. v. Babbitt*, – F.3d — (5<sup>th</sup> Cir. 2001), involved an attempt by the Interior Department to change the method for calculating royalty oil for outer continental shelf (OCS) oil. Under Interior’s regulations, oil companies owning pipelines between offshore wellheads and refineries could use either the Interior Department’s formula for assessing the cost of transportation or a pipeline tariff “approved by the Federal Energy Regulatory Commission.” In 1992, however, FERC questioned its authority over OCS pipelines and began the practice of accepting without question tariffs filed on those pipelines. As a result, the Department decided not to allow the use of the FERC tariff unless FERC had affirmatively asserted jurisdiction over the pipeline. Therefore, it denied petitions from several producers to use a tariff they had recently filed with FERC. When the producers sued alleging that the Department had violated the APA by making the change without undertaking notice-and-comment rulemaking, the Department argued that the change was either the product of an adjudication or an interpretive rule. The court conceded that if Interior had initially interpreted its regulation to require FERC’s affirmative act of jurisdiction, its interpretation would be entitled to substantial deference, but, the court said, this was a change of policy. The court found that the action was not an adjudication because Interior’s decision with respect to the producers was not the result of its determination of new facts but a decision based upon a new policy. The court conceded that both Interior’s original and new interpretation might well qualify as interpretive rules, but the court cited to the D.C. Circuit’s recent decisions in *Alaska Professional Hunters Ass’n v. FAA*, 177 F.3d 1030 (D.C.Cir.1999), and *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579 (D.C.Cir.1997), in which the D.C. Circuit found that changes in longstanding interpretations or practices require notice and comment. The court said it agreed with this analysis and overturned Interior’s interpretation.

## **Third Circuit rejects EPA’s interpretation of its own regulation contained in a “legislative rule”**

Star Enterprise owns a refinery and an adjacent power plant that powers the refinery. It wants to

make major modifications to the power plant, including the installation of gas combustion generators that will burn refinery-produced gases. Prior to making the modifications, however, it sought EPA’s determination that the generators would not be subject to EPA’s New Source Performance Standards applicable to refineries because the generators would not be “in” the refinery, but adjacent to it. EPA responded with a document entitled “New Source Performance Standards Subpart J Applicability Determination for the Star Enterprise Petroleum Refinery in Delaware City, Delaware,” in which EPA determined that the generators *would* be subject to the refinery NSPS. Star sought judicial review. In *Star Enterprise v. U.S. E.P.A.*, 235 F.3d 139 (3d Cir. 2000), the court responded by first asking whether the determination document was a legislative rule or an interpretive rule, because if the rule was interpretive it would be entitled to “little or no deference,” but “[i]n contrast, [if a rule is] a legislative rule, an agency’s interpretation of its own regulation[] is ‘controlling unless plainly erroneous or inconsistent with the regulation.’” Argued before, but decided after, *Christensen v. Harris County*, 120 S.Ct. 1655 (2000), the opinion does not cite or acknowledge that case. Unfortunately, the cases the court does cite do not make the distinction the court makes. The court then held that the agency’s document was a “legislative rule” because “the rule is based on an agency’s power to exercise its judgment as to how best to implement a general statutory mandate.” The fact that the “rule” had not undergone notice and comment or any other rulemaking procedure did not occur to the court. The court then concluded, after a scrutiny that can only be called an “extremely hard look,” that EPA’s interpretation was plainly erroneous and inconsistent with the regulation, because the generators would not be “in” the refinery.

## **D.C. Circuit voids EPA rule correcting a “technical error” for failure to provide notice and comment**

In 1998 EPA adopted a major revision of its regulations governing PCBs. Responding to comments made in the rulemaking suggesting that materials contaminated with low levels of PCBs could be safely used if certain precautions were taken, EPA adopted a provision that stated: “Any person may use porous surfaces contaminated by spills of liquid PCBs at concentrations of  $\geq 10$  micrograms/100

cm<sup>2</sup> for the remainder of the useful life of the surfaces and subsurface material if the following conditions are met. . . .” However, in 1999, without notice and comment, EPA amended this provision to state: “Any person may use porous surfaces contaminated by spills of liquid PCBs at concentrations  $\geq$  50 ppm for the remainder of the useful life of the surfaces and subsurface material if the following conditions are met. . . .” EPA styled the rule a technical amendment, later explaining that the original language was the result of “an erroneous use of the Word Perfect find/replace command in the drafting of the regulation.” In *Utility Solid Waste Activities Group v. Environmental Protection Agency*, 236 F.3d 749 (D.C. Cir. 2001), the D.C. Circuit invalidated the amendment. EPA argued that it had inherent authority to make technical corrections to correct typographical and clerical errors, citing to cases involving agencies making technical corrections to orders following adjudications, which themselves relied on the power of courts to make such corrections in orders. The D.C. Circuit, however, found the analogy to adjudication misplaced, disagreeing with a decision of the Fifth Circuit that apparently had been convinced by such an argument, see *Chlorine Institute, Inc. v. OSHA*, 613 F.2d 120, 123 (5th Cir.1980). Because rules are more analogous to statutes, the D.C. Circuit looked to the method of correcting technical errors in statutes – passage of an amendment following all the constitutional requirements for new legislation. The analogy to rulemaking would then be a new rule following all the requirements for rulemaking, i.e., notice and comment. The court distinguished one of its own cases, *Edison Electric Institute v. OSHA*, 849 F.2d 611, 622 (D.C.Cir.1988), on the grounds that it had involved an enforcement statement not to enforce a regulation against persons not intended to be covered by the regulation, in order to cure the technical error in the regulation, rather than an actual amendment to the regulation. [There is a certain irony in Judge Randolph, who authored the *Utility Solid Waste* decision, distinguishing *Edison Electric’s* enforcement statement, which he characterized as a “binding pronouncement interpreting the rule,” as not requiring notice and comment, for it is Judge Randolph who also authored *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), in which he found EPA’s attempt to substantively amend its regulation through a guid-

ance document a violation of the APA’s notice-and-comment requirement.] Nor did the D.C. Circuit accept EPA’s claim that its technical amendment fit within the good cause exception to notice-and-comment rulemaking. The only plausible argument was that notice and comment would be “unnecessary,” but the court noted that “EPA’s amendment was, without doubt, something about which these members of the public [the plaintiffs in the case] were greatly interested,” thereby making notice and comment necessary.

#### **D.C. Circuit shortcircuits FCC cable rules**

Attempting to protect the competitiveness of the cable industry has gotten a little harder. Concerned with growing concentration in the cable industry, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 requiring the FCC to set horizontal and vertical limits on concentration. After a challenge to the constitutionality of the Act was turned aside in *Time Warner Entertainment Co. v. United States*, 211 F.3d 1313 (D.C. Cir. 2000), the cable “biggies” brought an action challenging on constitutional and APA grounds the FCC’s implementing rules. In *Time Warner Entertainment Co. v. Federal Communications Commission*, – F.3d – (D.C. Cir. 2001), the D.C. Circuit set aside those rules. The FCC imposed a 30% horizontal limit on the number of subscribers that one multiple cable system operator may serve; it set a 40% vertical limit on the amount of programming a cable operator may provide either through itself or affiliates. The court found that both horizontal and vertical limits interfere with the major media’s speech rights, because the horizontal limit interferes with the number of viewers to whom they can speak, and the vertical limit restricts their ability to exercise their editorial control over a portion of the content they transmit. This required “intermediate scrutiny” – a determination that the regulation advances important governmental interests and does not burden substantially more speech than necessary. The 30% limit the FCC derived by determining that in order to remain viable an average cable programmer would require at least 40% of the cable market to be open to it, and therefore the 30% limit on any one multiple cable system operator would assure that even if the two largest operators colluded to control the market, there would still remain enough of an open

*continued on page 21*

# News from the States

by Michael Asimow\*

## Interpreting Initiatives

In California, direct democracy is king. At every election the voters confront a large number of bewildering initiative proposals, each adroitly crafted to maximize its voter appeal. Many of California's social and economic problems eventually wind up in an initiative—often repeatedly. Once an initiative passes, it generally cannot be amended by the legislature to fix its ambiguities and flaws (some initiatives can be amended “to further” their purposes by supermajorities of the legislature). Only the courts can decide whether an initiative is constitutional and how to interpret its often baffling provisions. Frequently, courts interpreting the initiative have to rely on language in the voter information pamphlets. That language, of course, is oversimplified propaganda. Prop. 103, passed in 1988, rolled back auto insurance rates and created an elected Insurance Commissioner to implement it. Numerous court decisions have struggled with Prop. 103 and, thirteen years later, the struggles over its meaning and application still continue. Not long ago, Insurance Commissioner Chuck Quackenbush was forced from office as the result of extremely adverse (and quite justified) media coverage of his conduct.

Before exiting the office, Quackenbush adopted regulations under one of the provisions of Prop. 103. This provision was intended to de-emphasize the ZIP code factor in setting auto insurance rates. Insurance companies charge inner-city residents higher premiums than residents of rural areas because of the much greater risk of loss in urban areas.

Prop. 103 states that rates must be set by taking account “in decreasing order of importance” of three “mandatory” factors” (driving record, annual miles driven, and years of driving experience) and then taking further account of “other factors” to be established by regulation. Among the 16 or so “other factors” approved by the regs were two based on the insured's ZIP code (claims frequency and claims severity). The issue was how to make sure that these ZIP code-based factors were given less weight than any of the mandatory factors. At that point, the issue disappears into a bottomless sea of actuarial complexity.

Greatly oversimplified, the regulation provided

---

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

that the average weight of all 16 “other factors” must be less than the weight of any of the “mandatory factors.” Consumer groups attacked the regulation, saying that no single “other factor” could weigh as much as any “mandatory factor.” It turns out that this arcane distinction makes a big difference in rates. In *Spanish Speaking Citizens' Foundation v. Low*, 103 Cal.Rptr.2d 75 (2000), the Court of Appeals upheld the regulation. The California Supreme Court is currently considering whether to hear the case.

California doesn't follow *Chevron* but instead uses the “weak deference” approach to reviewing agency legal interpretations. Under that approach, deference is given to an agency's interpretation if the agency has a comparative interpretive advantage over the court and if the interpretation is “probably correct.” The “probably correct” heading subsumes such factors as the amount of study the agency gave to the problem and whether the interpretation was consistently maintained. Using these factors, the court upheld the regulation. It was impressed by the technical difficulty of the problem (which gave the agency a definite comparative advantage over the court), as well as by the confusing and seemingly conflicting provisions codified in Prop. 103, its “findings and declarations,” and its ballot arguments. It was also impressed by the extensive consideration given to the problem at the agency level, including an unusual hearing before an ALJ.

The *Spanish Speaking* case involves an important issue: should an agency's interpretation of an initiative be given the same level of judicial deference that is given to an agency's interpretation of a legislatively-adopted statute? In my view, it should, particularly when the agency head is an elected official and thus possesses greater constitutional stature than unelected agency heads.

However, there is a contrary argument. Perhaps agency interpretations of initiatives should receive greater judicial scrutiny than agency interpretations of statutes for two reasons. First, the governor cannot remove an elected agency head. Second, the legislature generally cannot amend an initiative, even to overturn a regulation that it disagrees with. Thus it could be argued that greater judicial oversight is needed, given that executive and legislative oversight is lacking.

These arguments would suggest that *Chevron*-style strong deference is inappropriate but I think that *Skidmore*-style weak deference normally remains a good idea. Weak deference is based on a contextual

examination of whether the agency in a particular case has a comparative institutional competence advantage over a court and whether a particular interpretation is probably correct. These factors are independent of whether the agency is subject to executive and legislative checks and balances.

Nevertheless, the circumstances of the *Spanish Speaking* case are unique. The fact that Quackenbush resigned in disgrace (in circumstances strongly suggesting a tilt in favor of insurance companies) detracts from the judicial deference that is owed to his regulatory interpretations. In addition, a staff analysis apparently contradicted key terms of the regulation but Quackenbush disagreed with that analysis. Finally, the interpretation is new, rather than long and consistently maintained, and it was not adopted contemporaneously with adoption of Prop. 103. For these reasons, if the California Supreme Court decides to hear the case, it should consider scrutinizing the ZIP-code pricing regulation more intensely than would normally be appropriate.

### **New Mexico Decisions on Admissibility of Evidence During Judicial Review of Administrative Actions<sup>1</sup>**

New Mexico's appellate courts are beginning to interpret the new statutes and court rules governing judicial review of administrative actions. (see *Adm. & Reg. Law News*, vol. 25, no. 3). An issue in two recent cases was the admissibility of evidence during the judicial review proceeding. Under the new laws that govern almost all appeals of administrative actions to the district courts, review is limited to the record from the agency proceeding below. NMSA § 39-3-1.1; NMRA Rule 1-074. A supplemental record can be filed "if anything material ... is omitted from the record on appeal by error or

accident." NMRA Rule 1-074(I). In a hearing before the State Personnel Board, five pages of a disciplinary policy were admitted into the record. On appeal to the district court, a party sought to supplement the record with the entire policy. The Court of Appeals held that the rule only allows the addition of material that was mistakenly or inadvertently omitted from the record and does not allow the addition of material that was never presented to the agency below. *Martinez v. New Mexico State Engineer Office*, 129 N.M. 413, 9 P.3d 657 (Ct. App. 2000).

A different result occurred in a case involving one of the few exceptions to the record review rule. Decisions of the New Mexico Human Rights Commission are appealed de novo to the state district court. NMSA § 28-1-13; NMRA Rule 1-076. In *Gonzales v. New Mexico Dep't of Health*, 129 N.M. 586, 11 P.3d 550 (2000), the district court, during a de novo trial, did not allow the admission of evidence about the earlier Commission proceeding or outcome. The state Supreme Court upheld the district court, finding that the introduction of the Commission decision could have "sidetracked the trial into an evaluation of the merits of that decision."

### **Recent Articles and Books**

Cheryl Rae Nyberg, STATE ADMINISTRATIVE LAW BIBLIOGRAPHY: Print and Electronic Sources (2000).

Michael Gadola and Michael Zimmer, *Administrative Law*, 46 WAYNE L. REV. 461 (2000).

Brian Caveney, Note, *More Sunshine in the Mountain State: the 1999 Amendments to the West Virginia Open Governmental Proceedings Act and Open Hospital Proceedings Act*, 102 W. VA. L. REV. 131 (1999).

Julie Ann Sebastian, *Survey of Illinois Law: Administrative Law*, 24 S. ILL. U. L.J. 661 (2000). ◆

## **Section Calendar**

2001 ABA/Section Annual Meeting  
The Drake  
Chicago, Illinois  
August 3 – 5, 2001

2001 Administrative Law Conference  
Ritz-Carlton  
Washington, DC  
November 1 – 3, 2001

2002 Midyear Meeting  
Philadelphia, PA  
February 6-9, 2002

2002 Annual Meeting  
San Francisco, CA  
August 8-12, 2002

<sup>1</sup> The information for this paragraph was provided by Bill Brancard, Chair, Public Law Section, New Mexico State Bar.

---

# Section of Administrative Law and Regulatory Practice

## 2001 Spring Meeting

Meeting Chair: Sharan Levine

Sundial Beach Resort 1451 Middle Gulf Drive

Sanibel Island, Florida 33957

Telephone: (941) 472-4151

Guest Fax: (941) 472-0554



---

### Friday, April 27

#### **The Emerging Field of International Administrative Law: Its Content and Potential**

2:00 p.m. – 4:00 p.m. • Sundial Beach Resort  
Presented by the International Law Committee

With the rapid globalization of recent years, a new field of international administrative law has emerged. A host of international agencies make a variety of rules and policies and adjudicate all kinds of issues of interest to nations and their citizens in a variety of processes. The major international agencies, the subject matter of their work, their authority and functions, and how they relate to governments, businesses and the public is poorly understood. Further, U.S. agencies are networking with comparable agencies in other nations in new international processes affecting a wide variety of regulatory matters. These networking activities and their impact on the work of US agencies and the American public are likewise poorly understood. This program will attempt to delineate the contours of this new field of international law and identify some of the most important issue of concern in the field. In addition, the program will explore how the ABA Section on Administrative Law and Regulatory Practice ought to contribute to this new field. In particular, the program will promote discussion on opportunities for new Section activities and work in this important new field of administrative law.

#### **Review of the APA project – FOIA, Government Management, and Aspects of Judicial Review**

4:00 p.m. – 5:30 p.m. • Sundial Beach Resort  
Presented by the APA Reporters

The Reporters on Openness, Government Management, and Judicial Review will discuss their drafts preparatory to presentation of the “black-letter” to the Council on Saturday. The audience will be asked to participate in the review process.

#### **Section Reception**

5:30 p.m. – 7:00 p.m. • Sundial Beach Resort

A reception will take place on the verandah if the weather permits, or indoors if the weather is inclement.

#### **Dine-Around at Area Restaurants**

7:15 p.m.

#### **Chair’s Reception**

9:30 p.m. • Sundial Beach Resort



---

## Saturday, April 28

### Section Continental Breakfast

8:00 a.m. – 9:00 a.m. • Sundial Beach Resort

### Section of Administrative Law and Regulatory Practice Council Meeting

9:00 a.m. – 11:30 a.m. • Sundial Beach Resort

### Saturday Afternoon Activities

Golf Outing

Tennis

J.N. “Ding” Darling National Wildlife Refuge  
Tour

### Section Reception and Dinner

7:00 p.m. • Sundial Beach Resort



---

## Sunday, April 29

### Publications Committee Meeting

7:30 a.m. – 9:00 a.m. • Sundial Beach Resort

### Section Continental Breakfast

8:00 a.m. – 9:00 a.m. • Sundial Beach Resort

### Section of Administrative Law and Regulatory Practice Council Meeting

9:00 a.m. – 11:30 a.m. • Sundial Beach Resort



---

## 2001 Spring Meeting Registration

Registration must be received by **Friday, April 13**, so that your name may be included in the pre-registration list given to all attendees. To register, please visit the Section website at [www.abanet.org/adminlaw/calendar](http://www.abanet.org/adminlaw/calendar)

### Hotel Reservations

The Sundial Beach Resort hotel has reserved a limited number of rooms for ABA meeting attendees. The room rate is \$220 single/double, excluding taxes. The ABA block of rooms will be held only until **Friday, March 30, 2001**. In order to reserve your room, please call the hotel directly at (941) 472-4151, identify yourself as an ABA attendee, and guarantee your reservation by credit card with one night's room deposit.

### Airline Information

For rate information or to make reservations attendees should contact the airlines directly using the ABA reference number. To meet individual needs attendees should compare all options available, including flight schedule and rates and restrictions between airline fares and ABA rates.

- American 800-433-1790 S13266
- Delta 800-241-6760 170346A
- US Airways 877-874-7687 21900057

Or contact the ABA Travel Agency, Tower Travel at 1-800-921-9190

# Recent Articles of Interest

**William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitation of Labels*. 57 WASH. & LEE L. REV. 351 (2000).** This article reconsiders federal agencies' discretion to choose between rulemaking and adjudication. It begins by laying the foundation for the rulemaking/adjudication dichotomy. It then sets forth the three major Supreme Court statements on the issue of agency discretion to choose between rulemaking and adjudication: *Chenery*, *Wyman-Gordon*, and *Bell Aerospace*. The article continues with a discussion of the lower court opinions that came later, particularly those in the Ninth Circuit, which has developed the most detailed law on this issue. The article uncovers three basic themes that courts use to reject agency decisions to proceed by adjudication: a concern about the "functional" appropriateness of agency adjudication when functionally the matter seems better suited for treatment by rulemaking; a concern about the fairness of using an adjudication to establish a new agency policy when adjudicative results normally are applied retroactively; and a concern about the agency acting inconsistently with its own initial decision to use the rulemaking process. The article concludes that the fairness concern is the only one justifying intrusive judicial review of the agency's rulemaking/adjudication choice. To the extent agency adjudicative results are usually imposed retroactively, vindication of the fairness concern sometimes will require rejection of an agency's choice to proceed by adjudication. But because functional concerns sometimes militate so strongly in favor of adjudication, vindication of the fairness concern will require allowing the agency to proceed by adjudication but to apply the results prospectively.

**Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?* 41 B.C. L. REV. 789 (2000).** There is a widely shared perception among lawyers, judges, and various public officials that government lawyers have greater responsibilities to serve the public interest than lawyers in private practice. This perception is reflected in judicial opinions, lawyer professional responsibility standards, and numerous other legal writings. Nonetheless, a number of academic critics have attacked what is described here as the "public interest serving" role for government

attorneys. This article provides a defense of the public interest serving role against its critics. While the critiques addressed are diverse, they often make the mistake of importing values from the context of private litigation into the quintessentially public context of government litigation. The article concludes by offering three examples of the most common forms of government litigation—criminal prosecutions, lawsuits against executive branch agencies, and civil enforcement proceedings—in an effort to demonstrate how the public interest serving role ought to be pursued.

**Robert Choo, *Judicial Review of Negotiated Rulemaking: Should Chevron Deference Apply?*, 52 RUTGERS L. REV. 1069 (2000).** Negotiated rulemaking or "reg neg," has emerged in certain policy areas as a prominent alternative to the traditional federal rulemaking process. Amidst the ongoing debate over the costs and benefits of this innovative approach—including the appropriate scope of judicial review of reg neg rules—courts and commentators have heretofore failed to recognize the fundamental incompatibility between *Chevron* deference and negotiated rulemaking. Judicial deference to "agency" interpretations of law is particularly inappropriate in the case of reg negs, as the rationale underlying the *Chevron* doctrine has been thoroughly vitiated.

**Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L. J. 1361 (2000).** As the twentieth century comes to a close, the National Labor Relations Board has come 180 degrees from its origins in the New Deal era. The Congress that created the Board in 1935 envisioned a body made up wholly or "impartial Government members," and consistent with this spirit, early Board appointees were drawn from government or other neutral backgrounds. President Eisenhower, however, the first Republican President since the passage of the Labor Act, quickly broke with this tradition and appointed individuals from the management side to the Board. Although such partisan appointments were originally a source of controversy, over the last half-century they have gradually become not only accepted, but the norm. Indeed, the two most recent Boards have consisted of two management and two union lawyers flanking a neutral as chair and swing vote—the very

tripartite model of the agency that had been explicitly considered and decisively rejected by the Congress that brought the Board into being. In this article, Professor Flynn traces the evolution in NLRB appointment norms and practices from 1935 to today, assesses the impact of the increased prevalence of partisan Board members on NLRB decision-making, and attempts to explain why the partisan appointees of the last fifteen years have, according to the empirical data, been so much more one-sided in their voting than were their predecessors from similar backgrounds. She concludes that this marked increase in partisan voting, which has been particularly pronounced during the Clinton years, is a product of a shift toward greater senatorial control over the appointments process at the expense of the President. She further concludes that this shift in the norms governing the NLRB appointments process, which is reflected most starkly in the rise of “packaged” appointments, is part of a more general shift in presidential appointment norms. Thus, this article places contemporary NLRB appointment practices not only in sharp juxtaposition to the practices that held sway in the act’s early years, but in the context of larger trends in the political process.

**Charles Koch, *A Community of Interest in the Due Process Calculus*, 37 HOUSTON L. REV. 635 (2000).** This article offers a new attitude for procedural due process analysis in pursuit of an approach that coordinates and thus optimizes all the various interests affected by procedural design. *Mathews* lists 3 factors for evaluating procedures and those factors have dominated procedural design since 1976. The three factors have generated two types of balancing operations. One undertakes a cost/benefit analysis of additional and/or alternative procedures. The other trades the “government’s interest” against the “private interest.” This article examines the second operation and offers an alternative to “*Mathews* balancing.” In order to improve the due process calculus, this article demonstrates that balancing the government interest against the individual interest is flawed. First, balancing should not be the dominant method for developing procedural design. More importantly, the “government’s interest” factor is best understood as including all the interests of the community. The community establishes programs to serve its individual members and

charges the government with responsibility for fairly and effectively implementing its goals. Thus, a procedural design strategy that sets the community against its individual members cannot fully realize the best for either. Recognition of a commonality leads to expansion and enhancement of the procedural design factors, including cost, effectiveness, substantive impact, community maintenance, and “acceptability” (encompassing values such as satisfaction, cultural values and tradition, dignity, and equality and consistency). These factors become points of sensitivity whereby the community interests and those of its members are coordinated, rather than traded off, in procedural design. From these points of sensitivity come new guidance for the institutions engaged in procedural design: *ex ante* designers, legislators and administrative officials, as well as *ex post* designers, judges.

**Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 STANFORD L. REV. 1 (2000).** Recent scholarship on statutory interpretation has emphasized that certain approaches to interpretation may have “instrumental” effects on lawmaking. In this article, Professor Molot argues that judicial influence over legislative behavior is not a new idea, but rather is an important component of our original constitutional structure. Examining the Founders’ ideas on language and interpretation, Professor Molot suggests that most Founders viewed law as moderately indeterminate, such that ambiguity could not be completely eliminated, but judicial interpretation was constrained by well-established canons of construction. Professor Molot posits that under the constitutional structure, these constraints on judicial interpretation also exerted a moderating influence on the legislative process. Powerless to control interpretation through political means, legislators had incentives to internalize judicial values of fairness and rationality and engage in careful deliberation and drafting. Professor Molot cautions, however, that if the judiciary was positioned by our original constitution structure to influence legislators, modern doctrines of deference may undermine the judiciary’s structural role. Judges today routinely defer to reasonable agency interpretations of ambiguous statutes and regula-

*continued on page 22*

tool calls for public involvement.

The recommendation as approved by the Council for presentation to the ABA House of Delegates reads as follows:

**RESOLVED**, the American Bar Association recommends, concerning significant agency information dissemination activities intended to promote policy goals, that

- (1) the President seek public participation by requiring agencies to list at an appropriate time such proposed activities in a widely available medium, such as the agency's website or the semiannual regulatory agenda.
- (2) agencies take into consideration public input by
  - (a) identifying proposed activities, including the industry and other sources from which the information is drawn, and by inviting the public to comment on such activities and to attend public meetings as appropriate.
  - (b) establishing and publicizing a process for the correction of factual errors.

### **Ethics 2000 Commission**

Tom Morgan, Section representative to the Ethics 2000 Commission, updated the report he delivered at the annual meeting in New York on the Commission's proposed revision of Rule 1.11. Morgan believes the revision would disproportionately burden ex-government lawyers by subjecting them to Rule 1.9, the client conflict rule governing lawyers who leave private firms and corporate legal departments.

Under Rule 1.9, a private lawyer generally can take information he or she acquired while representing a former client and use it on behalf of a new client against other members of the former client's industry. That does not work when the former client is the federal government.

Morgan reported that although he conveyed this criticism to the Commission, as directed by the Council at the annual meeting, the Commission was not dissuaded and prepared its draft report to the House of Delegates with the proposed change intact.

The Council also heard from Commission member Margaret Love and chief reporter Nancy Moore. Moore pointed out that the commission would still be accepting comments up until March 9. Love said that the proposed change to Rule 1.11 was not intended to work a substantive

change in the standard but was merely intended to eliminate confusion. She also said it was consistent with the rule in place for government attorneys licensed in the District of Columbia.

Ron Levin cautioned that if the language in Rule 1.11 is changed, there will be a presumption that the change is substantive. Morgan took issue with the representation that the DC rule is similar to the rule proposed by the commission.

Moore replied that the current rule is broken. She said case law is divided on whether only Rule 1.11 applies to former government attorneys or whether Rule 1.9 applies, as well. She also said that unlike DC's application of its rules, the commission believes its new formulation should only apply when the ex-government lawyer is in an adverse position to the government. She believes that the new rule makes this clear and that explanatory notes to the revised rule will clarify that there is no intent to disqualify based on general knowledge of how the government works.

After some deliberation, the Council approved Morgan's recommendation for no material substantive change in the wording of the rule.

### **Vice Presidential Oversight of Agency Rulemaking**

Peter Strauss delivered the draft recommendations of the Constitutional Law and Separation of Powers Committee on The Role of the Vice President in White House Oversight of Agency Regulation. The committee recommended that Vice Presidential involvement in OMB-OIRA-White House review of agency agenda and rulemaking activities be made by executive order rather than by statute, and be limited to oversight, as opposed to control.

The accompanying report noted the increasing trend over the past several administrations involving the office of the Vice President in regulatory matters. The report expresses the Committee's concern that this threatens to undermine the unitary nature of the President as chief executive. The recommendation would counter this trend by limiting the Vice President's role to oversight, thus preserving the President's exclusive constitutional role in overseeing agency affairs.

The Council took no immediate action on the report. Council members expressed reservations about adopting a recommendation in the absence of a live controversy, i.e., a bill pending before Congress that expressly assigns regulatory duties to the Vice President. They also were concerned that the recommendation might be misconstrued as a comment on a particular Vice President instead of the office. The Council urged the committee to consider sponsoring a program on this topic at an upcoming meeting. ◆

## Statements and Rules

continued from page 5

workplaces, which is a fairly broad term, but the agency apparently had never applied it to employees who work in their own homes, and in that respect the director's interpretation could be said to create a home-workplace inspection *obligation*.

Moving on to factor 3, the director is hardly in a position to invoke the *agency's* general legislative authority. Maybe the letter could be said to amend a prior legislative rule. The letter did not cite any OSHA regulation, but conducting inspections in employee residences would necessarily require a different methodology than that employed in a commercial or industrial setting. See *Appalachian Power Company v. EPA*, 208 F.3d 1015, 1027 (D.C. Cir. 2000) (test methods are substantive).

### Deference

Assuming a rule has been validly published under Sec. 552(a)(2), what deference is it due? In the 1999 term, the U.S. Supreme Court reaffirmed that publication rules interpreting statutes are due *Skidmore* deference, not *Chevron* deference.

The petitioners in *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), had sued for violations of the Fair Labor Standards Act in reliance on an opinion letter issued to their employer by the acting administrator of the Department of Labor's Wage and Hour Division. The trial court held for petitioners, and the appeals court reversed. Petitioners argued before the Supreme Court that the acting administrator's letter was due deference under the Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, which holds that a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute. 467 U.S. 837, 842-44 (1984).

Writing for the Court, Justice Thomas agreed that an agency's opinion letters might be due deference, but not the deference *Chevron* requires for an agency's regulations.

Here, . . . we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking.

Interpretations such as those in opinion letters — like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law — do not warrant *Chevron*-style deference.

Instead, interpretations contained in formats such as opinion letters are "entitled to respect"

under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations have the "power to persuade."

120 S. Ct. at 1662-63 (citations omitted).

The *Christensen* Court found the acting administrator's interpretation unpersuasive but did not elaborate. The *Skidmore* Court, however, in the course of explaining the deference due an interpretive bulletin issued by a division of the Department of Labor identified the relevant considerations.

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.*

*Skidmore*, 323 U.S. at 140 (emphasis added).

Prof. Strauss's position is that *Skidmore* deference to agency views is the appropriate measure. Prof. Funk would give policy statements (as opposed to interpretive rules) no deference at all: "Where the agency has taken an enforcement action based in some way upon a policy statement, the validity of the policy statement *vel non* should not be considered, nor should the policy statement itself be a justification for the agency action."

When it comes to interpretations of an agency's regulations, as opposed to its statute, the Court has shown a deference *greater* than that required by *Chevron*. This doctrine was first announced in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), a case concerning the deference due an interpretation of maximum price regulations issued by the administrator of the Office of Price Administration under Sec. 2(a) of the Emergency Price Control Act of 1942.

The problem in this case is to determine the highest price respondent charged for crushed stone during March, 1942, within the meaning of Maximum Price Regulation No. 188. Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. *But the ultimate*

*criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.* The legality of the result reached by this process, of course, is quite a different matter. In this case the only problem is to discover the meaning of certain portions of Maximum Price Regulation No. 188. Our only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator.

325 U.S. at 413-14 (emphasis added). See also *Auer v. Robbins*, 519 U.S. 452 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994); *Stinson v. United States*, 508 U.S. 36 (1993).

All the speakers seemed to agree that this approach is mistaken, and that *Christensen* may point the way to its reconsideration. For Prof. Strauss, “the difference between legislative and precedential effect is that precedents control the actions only of bodies lower in a hierarchy of power; it would be inconsistent with Sec. 552(a) to give publication rules controlling force over *judicial* judgments.”

Prof. Funk says giving controlling weight to such interpretations “is just wrong!” Prof. Anthony calls it “illogical and highly undemocratic.” He argues that this standard of review encourages agencies to issue vague regulations and then spell out the details later in interpretations that bypass public comment and evade meaningful review.

Returning to the OSHA-letter example, if the

letter is a valid publication rule, should a court find it persuasive? The failure to cite any OSHA regulation or interpretation of OSHA regulation robs it of some thoroughness and suggests the director did not view it as consistent with any prior guidance. Its unexpected departure from settled construction of a core term in the Act detracts from its validity.

It could only serve as precedent, in any event. Other employers would be permitted to demonstrate that their employees’ homes do not meet the definition of workplace or that their employees’ homes or the activities in their employees’ homes are materially different from those addressed in the director’s letter. And the panelists all agreed that at most, the director’s letter would be entitled to *Skidmore* deference on judicial review.

If the letter is an invalid legislative rule, it is entitled to no effect at all.

### Conclusion

Publication rules are a valid, efficient means of filling the gaps in agency regulations and proclaiming agency enforcement positions. Such rules act as non-binding precedent on the public but can exert a practical binding effect, as well. Distinguishing publication rules from invalid regulations and obtaining an understanding of the deference courts accord publication rules are both essential to the calculation of one’s chances for a successful challenge in the courts. ◆

---

## Midnight Regulations

*continued from page 3*

one and encourage administrations to do better. He suggested a more effective measure would be to have Congress pass a law prohibiting submission of final regulations during the interregnum. Or Congress might permit publication of regulations during this period but subject them to special rules, such as automatically extending them, making them subject to extension without notice and comment, attaching a presumption of irregularity to them, or denying them *Chevron* deference.

Katzen challenged the idea that it is possible to determine contemporaneously which changes in administrations are likely to result in significant policy changes. She also questioned confining the analysis to the post-election/pre-swearing period since there have been elections when the likely winner was known soon after the summer conventions.

Katzen also expressed her skepticism that regulations issued at the end of a final term should be viewed suspiciously. “Final regulations take time

to develop,” she said. She added that one of the EPA regulations issued at the end of the Clinton presidency had been under consideration since 1993, another since 1994. She also pointed out that agencies generally do not feel the pressure of deadlines until the end of a president’s term and that many if not most midnight regulations do not implicate any significant changes in policy.

She further remarked that presidents are elected for four years, not three and three quarters, that the nation expects its chief executive to continue working up until the last day, just as Congress does, and that setting the agenda for the incoming administration provides continuity. She agrees that the process can be less than tidy, but the solution in her estimation is for Congress to assume responsibility by invoking the 1996 Congressional Review Act (CRA).

On rebuttal, Plager agreed that the vast bulk of midnight regulations raise little in the way of significant policy issues but still maintained that enough of them raise significant policy concerns and affect long range matters that a problem does

exist. He also agreed that agencies most feel the pressure of deadlines when administrations are about to change but finds the timing suspicious with respect to regulations with embedded policy issues. He regards the CRA as “a non-starter.” “Congress has no incentive or interest” in reassessing the burdens it has delegated to agencies, he said. In his view, relying on Congressional review would be like putting the fox in charge of the chicken coop.

Katzen responded that agencies have a lot invested in the regulations they have taken years to develop. They want to see their efforts rewarded.

She disagreed that the CRA would make matters worse and would prefer that Congress use the front door of the CRA and not the back door of oversight hearings and riders.

Katzen said “no” to holding more conferences and “no” to banning publication of final regulations after Election Day. She did not think much of Congress imposing special rules, either.

The program closed, however, with both panelists in agreement that incoming administrations should have some opportunity to review midnight regulations even if it means amending the Administrative Procedure Act. ◆

---

## Supreme Court News

*continued from page 7*

explained by the agencies, one of the ways interstate commerce could be affected by the degradation or destruction of such waters would be by harming the habitat of migratory birds. The theory was that billions of dollars are spent on bird watching and hunting migratory birds, so that if their habitat was harmed, thereby reducing their numbers, that reduction would reduce expenditures on birdwatching and hunting, thereby substantially affecting interstate commerce. This interpretation of the statute, although never formally adopted as a regulation, has been denominated “the migratory bird rule.”

The Chief Justice, joined by Justices Kennedy, O’Connor, Thomas, and Scalia, found the “migratory bird rule” beyond the authority of the CWA. To the claim that the Court should extend *Chevron* deference to the agencies’ reasonable interpretation of an ambiguous statutory provision, the Court had two answers.

First, the Court said the statute was clear and hence no deference was due. This conclusion is difficult to fathom. While the term “navigable waters” has a relatively well-understood meaning arising out of two centuries of case law applying constitutional, common law, and other statutory provisions, the legislative history of the Clean Water Act is very clear that Congress intended to extend its jurisdiction beyond the historical reach of “navigable waters,” which is what inspired the definition of “navigable waters” as “waters of the United States,” itself a term with no pedigree. Moreover, the Court in an earlier case had recognized that the Clean Water Act extends further than the historical concept of navigable waters. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Finally, the Conference Report stated that it wished

the term to be given the “broadest possible constitutional interpretation.” Thus, and as conceded by the Court, the reach of the Act does extend beyond the conventional understanding of “navigable waters.” What would appear to be unclear, and indeed ultimately left undecided by the Court, is how far beyond that conventional understanding the terms “navigable waters” and “waters of the United States” extend.

In any case, the Court found other factors that rendered *Chevron* deference inapplicable. Here the agencies’ interpretation raised the constitutional issue whether under the Commerce Clause Congress could regulate isolated, intrastate waters because those waters provide habitat to migratory birds. This the Court characterized as an interpretation invoking “the outer limits of Congress’ power,” so that the Court requires “a clear indication that Congress intended that result.” This requirement reflects the Court’s desire not to needlessly reach constitutional issues and its assumption that Congress does not “casually authorize agencies to interpret a statute to push the limit of congressional authorization.” This is particularly true, the Court said, when the administrative interpretation “alters the federal-state framework by permitting federal encroachment upon a traditional state power” – “the States’ traditional and primary power over land and water use.” In particular, the Court suggested that there was some question as to what activities would have to be aggregated in order to have a “substantial effect” on interstate commerce — the aggregate effect on migratory birds’ habitat — itself not a regulation of economic activity — or the activities of commercial enterprises in filling waters and wetlands for economic benefit — activities, which the Court said was a “far cry” from the waters to which the statute by its terms extends.

The effect of the decision on both CWA activi-

ties and environmental law generally is not entirely clear. The final statement of the Court's holding is narrow, that the Corps' interpretation of its regulation as applied to the particular waters in the case exceeds the Corps' authority under the CWA, but in other places the Court suggests that the CWA does not extend beyond historically navigable waters and their non-navigable tributaries and streams, *see* 121 S. Ct. at 682, which might exclude, among other substantial bodies of water, the Great Salt Lake, *see Hardy Salt Co. v. Southern Pac. Transp. Co.*, 501 F.2d 1156 (10<sup>th</sup> Cir. 1974) (finding the Great Salt Lake not a navigable water within the historical meaning); *compare State of Utah By and Through Div. of Parks and Recreation v. Marsh*, 740 F.2d 799 (10<sup>th</sup> Cir. 1984) (finding Great Salt Lake subject to CWA jurisdiction because of its potential effects on commerce unrelated to navigation, including effects on bird habitat). More generally, the Court's seemingly serious concern with the constitutionality of Congress regulating the environment merely because of the cumulative environmental effects would suggest problems with other environmental laws ranging from the Clean Air Act to the Endangered Species Act. As was the case with the regulation in *SWANCC*, those laws generally prohibit persons from degrading the air or harming endangered species, but how the Commerce Clause authorizes those laws is not clear. Neither law requires the activity regulated itself be "economic" activity, although as a practical matter it usually is a business engaged in economic activity that is degrading the air or harming the species. Rather the assumption seems to have been that Congress could regulate air pollution or threats to endangered species because the aggregate effects of air pollution or making species extinct would have a substantial effect on interstate commerce. Pre-*Lopez*, such an assumption would have seemed well taken, but the Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), while they did not absolutely foreclose the aggregation of non-economic activities so as to achieve the substantial effect on interstate commerce required to justify congressional action, place that assumption in some doubt. In those cases the Court rejected an aggregation of non-economic activity (having guns near schools in *Lopez* and inflicting violence on women in *Morrison*) to achieve the constitutionally required substantial effect on interstate commerce, and the Court noted that *Wickard v. Filburn*, 317 U.S. 111 (1942), "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," did involve aggregation of economic activity.

*SWANCC*, like *Lopez* and *Morrison* as well as the Eleventh Amendment cases, involves the same 5-4 split in the Court. While 5-4 majority is a narrow margin, there are currently no signs of weakness in the majority when there is involved federal non-economic regulation that impacts states' traditional interests. Nevertheless, the Court does not seem in a hurry to reach the larger questions. It recently passed up an opportunity to assess the constitutionality of the Endangered Species Act under the Commerce Clause, *see Gibbs v. Norton*, 69 U.S.L.W. 3545 (2001), denying certiorari to *Gibbs v. Babbitt*, 214 F.3d 483 (4<sup>th</sup> Cir. 2000).

### **Court affirms Bureau of Prison discretion over early-release program and approves use of general rule to foreclose individual determinations as to certain matters**

*Lopez v. Davis*, 121 S. Ct. 714 (2001), presented a nice administrative law problem, albeit in the prison context. A statute provides that the Bureau of Prisons "may" shorten the time in custody of a person convicted of a non-violent crime by up to one year if the offender successfully undertakes a drug treatment program. The BoP adopted a rule saying that non-violent crimes did not include drug trafficking offenses when the person's sentence had been enhanced for carrying a firearm at the time of the offense. Challenges to that rule met with the uniform response from the courts of appeal saying that BoP's interpretation was inconsistent with the statute. Accordingly, BoP adopted a new rule, this time saying that BoP was exercising its discretion not to shorten the time in custody for any person convicted of drug trafficking if the person's sentence had been enhanced for carrying a firearm at the time of the offense. This rule was challenged on the basis that BoP was simply trying to avoid the effect of the earlier decisions. In a 6-3 decision, with an opinion by Justice Ginsburg joined by Justices O'Connor, Scalia, Souter, Thomas, and Breyer, the Court upheld the BoP's rule. The first question was whether the use of the word "may" in the statute granted BoP discretion to deny reductions in the time of custody to persons who met the statutory criteria for reductions, or whether "may" meant "shall." The Court clearly found the BoP's reading more persuasive, but it in addition invoked *Chevron* to defer to the BoP's reasonable interpretation of the statute. The next question was whether, granted that BoP had the power to exercise discretion in deciding which qualifying prisoners might actually be released early, the BoP had to act in individualized determinations, or whether it could make discretionary decisions by general rulemaking. It was

on this question that the Court split, with the six following standard administrative law doctrine that: “even if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority.” Citing *American Hospital Assn. v. NLRB*, 499 U.S. 606 (1991) and *Heckler v. Campbell*, 461 U.S. 458 (1983). The dissent did not contest that the BoP had discretion with respect to which qualifying prisoners to release, but the dissent believed that the statute’s specification of non-violent offenses as a generic disqualifier precluded BoP from specifying other offenses as generic disqualifiers.

An interesting sidebar to the case was an amicus argument that the BoP’s rule was invalid because it had not gone through notice and comment as required by the APA. Because this had not been argued below or raised in the petition for certiorari, the Court refused to consider the issue, but it is now before the Ninth Circuit. See *Grassi v. Hood*, CA No. 00-35275.

### **Consultations between an Indian tribe and Bureau of Indian Affairs not exempt under FOIA**

Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552 (b)(5), exempts from the Act’s disclosure requirements intra-agency or inter-agency records that would be privileged in a civil action against an agency. Among such privileges is the so-called deliberative process privilege, involving intra-agency or inter-agency communications reflecting advisory opinions, recommendations, and deliberations that are part of a process by which Government decisions and policies are formulated. Incident to a state court water rights adjudication, the Bureau of Indian Affairs had consultations with

several tribes as to what positions the BIA should take on behalf of the tribes in the state proceeding. Water users adverse to the tribes sought copies of those consultations under the FOIA. In *Department of Interior v. Klamath Water Users Protective Ass’n*, 121 S. Ct. — (2001), the Court unanimously held that these consultations were not covered by exemption 5.

The Court began by focusing on the requirement in the FOIA that documents subject to exemption 5 must be “inter-agency or intra-agency” records; that is, the records must originate with the government. Here the records originated with the tribes. The Court noted with seeming approval that several courts of appeals had allowed exemption 5 to cover documents from agency consultants, but the Court explained that the theory behind these cases was that the consultants had no interest separate from that of the agency; they were the equivalent of employees of the agency. Here, however, the tribes were self-interested parties advising the Bureau as to what actions would best serve their interests. The Bureau also argued that traditional fiduciary standards forbid a trustee to disclose information acquired as a trustee, and to require disclosure of confidential communications between tribes and the Bureau would interfere with the Bureau’s fiduciary relationship with the tribes. The Court, however, while acknowledging the harm such disclosure might have on communications between the beneficiary and the trustee, saw no basis in the FOIA for exempting such disclosure.

The case is consistent with the Court’s practice of reading the FOIA narrowly to foster government disclosure. The case is also consistent with the Court’s recent Indian jurisprudence, which has been not to create new exceptions from general laws to benefit Indians. ◆

---

## **News from the Circuits** *continued from page 9*

market to support independent programmers. The court, however, said there was no evidence, only conjecture, that large operators would engage in collusion, and this was inadequate. Even absent evidence of collusion, the FCC maintained that the statute authorized it to set concentration limits to ensure diversity, but the D.C. Circuit, invoking *Chevron* and the more recent case of *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), found that the statute clearly did not authorize the FCC to do other than prevent the “unfair” effects

of concentration. As to the 40% vertical limit, while the court allowed that there was always “some inescapable residue of arbitrariness” in any numerical limit, the FCC had not justified why it chose 40% rather than 30% or 50%.

### **Fourth Circuit says that final dismissal of mine operator’s administrative appeal is not a final order when Mine Safety and Health Administration cross-appealed and its appeal is still pending**

An ALJ in the Mine Safety and Health Review Commission found that Eagle Energy had committed a “significant and substantial” violation,

but that the violation was not an “unwarrantable failure.” Findings of significant and substantial violations and findings that violations are the result of an unwarrantable failure potentially subject the mine operator to greater penalties. Eagle sought review of the “significant and substantial” finding before the Commission; the Secretary of Labor sought review of the “not unwarrantable failure” finding. Eagle’s review was denied, and Eagle sought judicial review, although the Commission had directed review of the Secretary’s appeal, which was still pending. In *Eagle Energy, Inc. v. Secretary of Labor*, — F.3d — (4<sup>th</sup> Cir. 2001), the court dismissed Eagle’s petition for judicial review on the ground that there was no final order. The Federal Coal Mine Health and Safety Act provides for review of final

orders of the Commission, and the Act states that ALJ decisions become the final decisions of the Commission unless within 40 days the Commission has directed that it will review the decision. Eagle argued that because the Commission had denied its petition for review, the ALJ’s decision on the “significant and substantial” violation became final 40 days after the ALJ’s decision. The court, however, concluded that the ALJ’s decision included two findings; the decision was the subject of petitions for review by both Eagle and the Secretary, albeit on different points, and that review had been directed on the decision, albeit on only one point. Consequently, until the Commission completed its review of the ALJ’s decision in its whole, there was no final order available for judicial review. ▲

## Recent Articles of Interest *continued from page 15*

tions, rather than resolving ambiguity themselves. To the extent that interpretative power now resides with politically accountable agencies, rather than politically insulated judges, Professor Molot warns that we may lose an important extra-political influence over legislative deliberation and drafting.

**Sandra Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941 (2000).** This article has two goals. First, it attempts to get to the bottom of the concerns voiced in the D.C. Circuit’s *American Trucking* case and determine whether a strict nondelegation principle, or some other principle of constitutional or administrative law, best satisfies those concerns. This analysis examines the parameters of a reinvigorated nondelegation doctrine in order to identify those statutes most vulnerable to challenge and to assess whether those statutes really do present a dilemma of constitutional dimension. The second goal is to suggest a normative alternative for the review of congressional delegations to executive branch entities. This proposal draws upon well-known canons of administrative law, fashioning them into a two-tiered analysis. Under the first prong, a court faced with an ambiguous statutory provision should apply the presumption of implied delegation handed down in *Chevron*, unless, given the overall context and subject matter of the statute at issue, it is unlikely that Congress would have granted broad-sweeping powers to the executive branch. If delegation can be implied, which it

should be in the majority of cases, the court must reject nondelegation challenges, unless the delegation results in actual infringement of the core prerogatives of another branch of government. Once this constitutional threshold is met, the second prong of the proposal calls upon the court to give heightened scrutiny to the agency’s implementation of vague statutory mandates to better ensure reasoned and unbiased decision-making and accountability. In short, the proposed analytical framework attempts to synthesize two fundamental principles of judicial review—*Chevron* deference and *Overton Park* “hard look” review.

### Comparative Works

**John J. Coughlin, *A Comparison of the Administrative Law of the Catholic Church and the United States*, 34 LOY. L.A. L. REV. 81 (2000).**

**James F. Smith, *Comparing Federal Judicial Review of Administrative Court Decisions in the United States and Canada*, 73 TEMP. L. REV. 503 (2000).**

### Collections

**The Constitution Under Clinton: A Critical Assessment, 63 L. & Cont. Prob. Nos. 1 & 2 (2000).** Including: Dawn E. Johnson, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*; David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power*; Peter L. Strauss, *The President and Choices Not to Enforce*; Lori Fisler Damrosch, *The Clinton Administration and War Powers*; Walter Dellinger, *The Constitutional Separation of Powers Between the President and Congress*. ▲

# Officers, Council and Committee Chairs

## Chair

**Ronald M. Levin**  
St. Louis, MO  
314/935-6490

## Chair-Elect

**C. Boyden Gray**  
Washington, DC  
202/663-6056

## Vice Chair

**Neil R. Eisner**  
Washington, DC  
202/366-4723

## Secretary

**Cynthia A. Drew**  
Washington, DC  
202/616-7554

## Assistant Secretary

**Jonathan J. Rusch**  
Washington, DC  
202/514-0631

## Budget Officer

**Kathleen A. Buck**  
Washington, DC  
202/879-5060

## Asst Budget Officer

**David W. Roderer**  
Washington, DC  
202/974-1012

## Section Delegates

**Ernest Gellhorn**  
Washington, DC  
202/319-7104

**Ronald A. Cass**  
Boston, MA  
617/353-3112

## Immediate Past Chair

**John Hardin Young**  
Washington, DC  
703/216-0039

## Council

**Michael J. Astrue**  
Belmont, MA  
617/484-6166

**Phyllis E. Bernard**  
Oklahoma City, OK  
405/521-5181

**Steve Calkins**  
Detroit, MI  
313/577-3945

**John F. Cooney**  
Washington, DC  
202/962-4800

**David Frederick**  
Washington, DC  
202/514-1030

**H. Russell Frisby, Jr.**  
Washington, DC  
202/296-6650

**Judith S. Kaleta**  
Washington, DC  
202/493-0992

**Renee M. Landers**  
Boston, MA  
617/951-7000

**Daniel R. Ortiz**  
Charlottesville, VA  
804/924-3127

**Daniel Rodriguez**  
San Diego, CA  
619/260-4527

**Lisa A. Whitney**  
New York, NY  
212/659-5306

**Lynne K. Zusman**  
Washington, DC  
202/659-1971

## Ex Officio Members State Administrative Law

**Jim Rossi**  
Tallahassee, FL  
850/644-8308

**Executive Branch**  
**Daniel Marcus**  
Washington, DC  
202/514-9500

**Judiciary**  
**Merrick Garland**  
Washington, DC  
202/273-0376

**Legislative Branch**  
**James W. Ziglar**  
Washington, DC  
202/224-2341

**Administrative Judiciary**  
**Judith Ann Dowd**  
Washington, DC  
202/219-2557

## Administrative Process Committee Chairs

**Adjudication**  
**Alan W. Heifetz**  
Washington, DC  
202/708-5004

**John C. Keeney, Jr.**  
Washington, DC  
202/637-5750

**Constitutional Law  
and Separation of Powers**  
**Thomas O. Sargentich**  
Washington, DC  
202/274-4238

**Daniel E. Troy**  
Washington, DC  
202/719-7550

**Corporate Counsel**  
**Richard J. Wolf**  
Parsippany, NJ  
973/496-5286

**Dispute Resolution**  
**Charles E. Pou**  
Washington, DC  
202/887-1037

**Government Information  
and Right to Privacy**  
**James T. O'Reilly**  
Cincinnati, OH  
513/556-0062

**Judicial Review**  
**Mark Seidenfeld**  
Tallahassee, FL  
850/644-3059

**Legislative Process  
and Lobbying**  
**Wright H. Andrews, Jr.**  
Washington, DC  
202/347-6875

**Ratemaking**  
**Steven A. Augustino**  
Washington, DC  
202/955-9600

## Regulatory Initiatives

**Jonathan J. Rusch**  
Washington, DC  
202/514-0631

**Sidney A. Shapiro**  
Lawrence, KS  
785/864-9222

**Regulatory Policy**  
**Robert W. Hahn**  
Washington, DC  
202/862-5909

**Cass R. Sunstein**  
Chicago, IL  
773/702-9498

**Rulemaking**  
**Daniel R. Cohen**  
Washington, DC  
202/482-4144

**State Administrative Law**  
**Michael R. Asimow**  
Los Angeles, CA  
310/825-1086

**Edward J. Schoenbaum, Jr.**  
Springfield, IL  
217/524-7836

## Government Functions Committees

**Agriculture**  
**Robert G. Hibbert**  
Washington, DC  
202/756-8216

**Philip C. Olsson**  
Washington, DC  
202/518-6366

**Antitrust and  
Trade Regulation**  
**William H. Page**  
Jackson, MS  
601/925-7143

**Banking and  
Financial Services**  
**Anne E. Dewey**  
Washington, DC  
202/414-3803

**David W. Roderer**  
Washington, DC  
202/974-1012

**Benefits**  
**Jodi B. Levine**  
Oklahoma City, OK  
405/231-4451

**Rudolph N. Patterson**  
Macon, GA  
912/745-1651

**Beverage Alcohol Practice**  
**Stephen Diamond**  
Coral Gables, FL  
305/284-2259

**James L. Webster**  
Chicago, IL  
312/587-8800

**Communications**  
**Helgi C. Walker**  
Washington, DC  
202/418-2000

**Consumer Products Regulation**  
**David H. Baker**  
Washington, DC  
202/973-2709

**Peter L. Winik**  
Washington, DC  
202/637-2224

**Criminal Process**  
**David L. Douglass**  
Washington, DC  
202/778-3026

**Stephen M. Ryan**  
Washington, DC  
202/463-4349

**Defense and  
National Security**  
**Thomas E. Crocker, Jr.**  
Washington, DC  
202/756-3318

**Education**  
**Martin Michaelson**  
Washington, DC  
202/637-5745

**Elections**  
**Trevor Potter**  
Washington, DC  
202/719-4273

**Jamin B. Raskin**  
Washington, DC  
202/274-4011

**Joseph E. Sandler**  
Washington, DC  
202/543-7680

**Energy**  
**Kenneth G. Hurwitz**  
Washington, DC  
202/962-4850

**Environmental and  
Natural Resources**  
**James O. Neet, Jr.**  
Kansas City, MO  
816/474-6550

**Wendy Wagner**  
Cleveland, OH  
216/368-3303

**Food and Drug**  
**Scott Bass**  
Washington, DC  
202/736-8684

**Nick Littlefield**  
Boston, MA  
617/832-1105

**Government Operations  
& Personnel**  
**Joel P. Bennett**  
Washington, DC  
202/625-1970

**Lynne K. Zusman**  
Washington, DC  
202/659-1971

**Health and  
Human Service**  
**H. Stephen Brown**  
Memphis, TN  
901/767-1234

**Michael Malinowski**  
Wilmington, DE  
302/477-2120

**Housing and  
Urban Development**  
**Otto J. Hetzel**  
Bethesda, MD  
202/321-1500

## Immigration and Naturalization

**Hiroshi Motomura**  
Boulder, CO  
303/492-7008

**Anna W. Shavers**  
Lincoln, NE  
402/472-2194

**Insurance**  
**Janet E. Belkin**  
New York, NY  
212/815-9267

**Intellectual Property**  
**Kenneth Corsello**  
Washington, DC  
202/220-4310

**International Law**  
**Charles H. Koch, Jr.**  
Williamsburg, VA  
757/221-3835

**Kathleen E. Kunzer**  
Arlington, VA  
703/741-5177

**International Trade & Customs**  
**Lindsay Meyer**  
Washington, DC  
202/962-4800

**Labor & Employment Law**  
**Nancy E. Shallow**  
Detroit, MI  
313/877-7337

**Ombudsman**  
**Sharan Lee Levine**  
Kalamazoo, MI  
616/382-0444

**Postal Matters**  
**William B. Baker**  
Washington, DC  
202/719-7255

**Public Contracts and Procurement**  
**Charles D. Ablard**  
Washington, DC  
202/789-8787

**John W. Chierichella**  
Washington, DC  
202/639-7140

**Securities, Commodities  
and Exchanges**  
**Timothy R. Donovan**  
Chicago, IL  
312/923-2871

**Alan L. Dye**  
Washington, DC  
202/637-5737

**Transportation**  
**William S. Morrow, Jr.**  
Washington, DC  
202/331-1671

**Treasury, Revenue and Tax**  
**James R. Hagerty**  
Washington, DC  
202/778-3037

**Veterans Affairs**  
**Michael P. Horan**  
Washington, DC  
202/416-7792

**James W. Stewart**  
Washington, DC  
202/554-3501

**Barton F. Stichman**  
Washington, DC  
202/265-8305

**NEW!** *Federal Administrative Dispute Resolution Deskbook (PC 5010030)*

Marshall J. Breger, editor. Gerald S. Schatz and Deborah Schick Laufer, co-editors.  
2001, 764 pages; \$89.95 Administrative Law and Regulatory Practice Section members/\$109.95 non-members

A guide to the full range of alternative dispute resolution processes within the federal government. The *Deskbook* demonstrates the various ways in which the agencies are utilizing alternative dispute resolution to change the face of federal practice.

**NEW!** *Federal Administrative Procedure Sourcebook, Third Edition (PC 5010024)*

William F. Funk, Jeffrey S. Lubbers, and Charles Pou, Jr., editors.  
2000; 1,003 pages; \$49.95 Administrative Law and Regulatory Practice Section members/\$79.95 non-members

Completely updated and expanded, this single volume gives you the most important statutes governing administrative law and regulatory practice ... right at your fingertips. Using this guide, you'll have access to and explanations of many of the laws broadly applicable to federal agency officials. It contains all the significant statutes, Executive Orders, memoranda, and other materials relating to the major aspects of administrative law and regulatory practice. In addition to the primary sources, this volume includes pertinent legislative history, numerous citations to related sources, and the editors' insightful commentary on each of the source documents.

**NEW!** *The Realists' Guide to Redistricting: Avoiding the Legal Pitfalls (PC 5010025)*

By J. Gerald Hebert, Donald B. Verrilli, Jr., Paul M. Smith, and Sam Hirsch.  
2000; 68 pages; \$19.95 Section members/\$29.95 non-members

Understand the fundamentals of redistricting law. Issues covered include (1) "one person, one vote," (2) the constitutional limits on partisan gerrymandering, (3) the Voting Rights Act, and (4) the constitutional limits on racial gerrymandering (the so-called "Shaw doctrine").

*A Guide to Federal Agency Rulemaking, Third Edition (PC 5400001)*

By Jeffrey S. Lubbers  
1998; 456 pages; \$54.95 Section members/\$84.95 non-members

An indispensable guide for anyone developing or drafting federal agency rules, wanting to understand the rulemaking process, and improving an action's outcome. This book is a time-saving reference for the latest case law, the most recent legislation affecting rulemaking, and developments in the Clinton Administration.

To order any of these Section publications, call the ABA Service Center at 800/285-2221, fax 312/988-5568 or check the following web site: <http://www.ababooks.org>. For information on buying any title in bulk and receiving additional savings, please call Robert Roen at 312-988-6064.

## ADMINISTRATIVE & REGULATORY LAW NEWS

Volume 26, Number 3, Spring 2001

Published by the Section of  
Administrative Law and Regulatory Practice  
American Bar Association  
750 N. Lake Shore Drive  
Chicago, IL 60611-4497



Nonprofit Org.  
U.S. Postage  
PAID  
American Bar  
Association  
61025