

ADMINISTRATIVE & REGULATORY LAW NEWS



Section of Administrative Law & Regulatory Practice

Vol. 26, No. 2

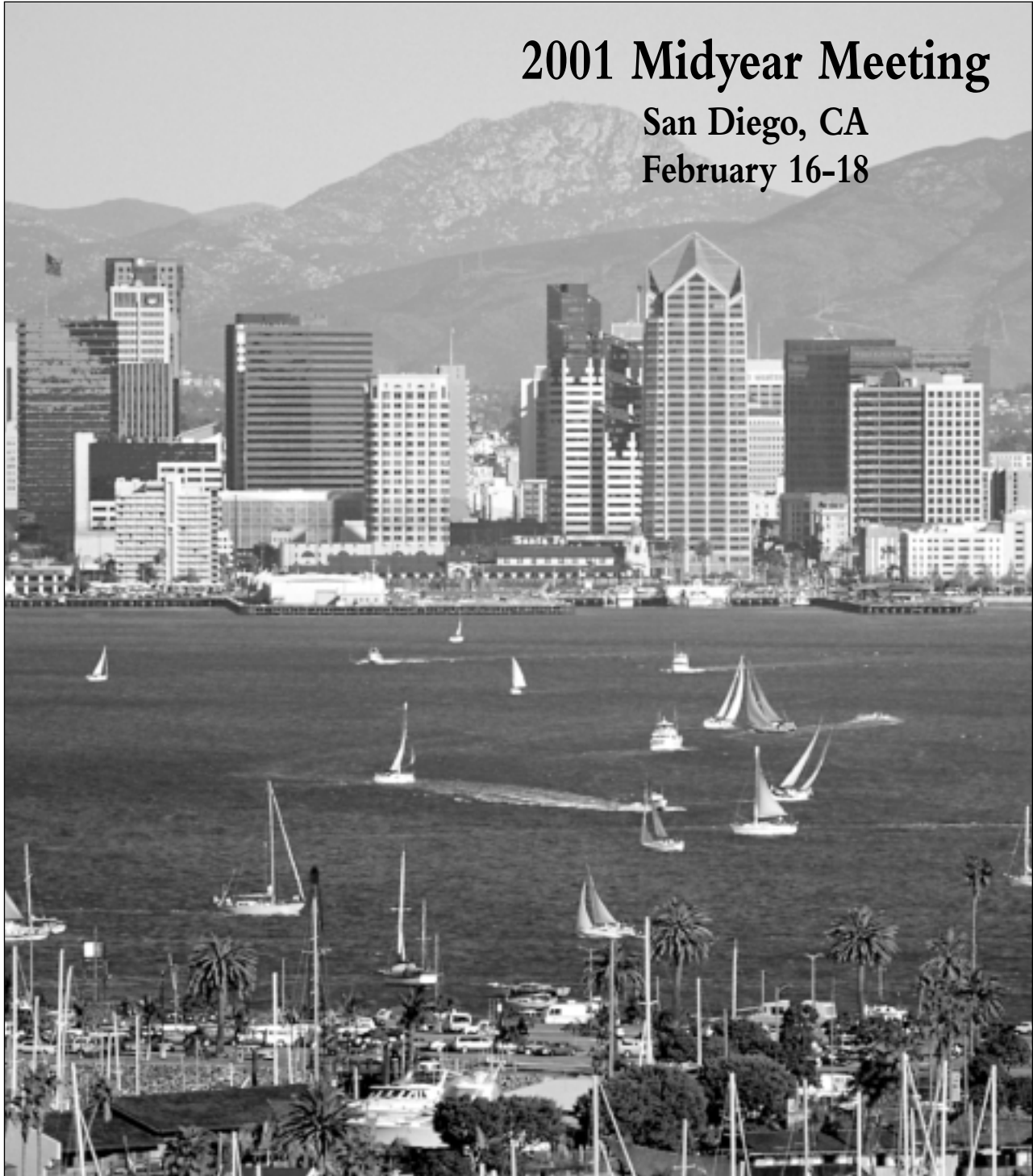
American Bar Association

Winter 2001

2001 Midyear Meeting

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February 16-18



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Chair's Message



Ron Levin

Nonpartisan in Action

The recent post-election turmoil in Florida brought the practice of public law — which is to say, administrative law broadly defined — into exceptionally dramatic prominence. One should not be surprised that officers of our Section were to be found in the thick of the action. During much of November, an observer could have noticed senior leaders of the Section on both sides of the partisan divide — with our Chair-Elect acting as a spokesman for the Bush campaign, our Last Retiring Chair organizing the Gore campaign's recount challenge, and a recent Section Delegate arguing the Bush cause in the Supreme Court and other federal courts. Still other Section members — including, naturally, leaders of our Election Law Committee — were also active on various sides during the election campaign, or as nonaligned commentators.

None of these activities directly concerned the ABA or the Section, of course. I mention them only in order to observe that, despite the competing allegiances that many of us bring to public law, we also agree on quite a bit about the needs of administrative government. These points of agreement became particularly evident in the deliberations leading up to the Section's Report to the President-Elect, which the Council approved in October.

As is detailed elsewhere in this issue, the report contains a series of recommendations to the new President for improvement of the federal administrative process. Remember in this connection that, although no one could have foreseen just how close the election would prove to be, there was considerable uncertainty as to the outcome of the presidential race (and, for that matter, where control of Congress would rest) throughout the fall campaign. This uncertainty provided a particularly auspicious occasion for us to ask serious questions about the policies that we would want the next President to pursue, regardless of who it turned out to be. Longstanding positions that the Section and the ABA have adopted during both Republican and

Democratic administrations provided a helpful foundation for these discussions. But our mutual commitment to the goal of good government was critical as well.

To be more specific, the Council agreed unanimously on the need to reform the appointments process, through simplification of disclosure forms and curtailment of the use of "holds" to delay confirmation in the Senate. We agreed that the incoming President should maintain and make effective use of centralized oversight of regulations — a process that certainly has been controversial in the past. We agreed that the rulemaking process needs streamlining, because it has become too encrusted with analytical requirements prescribed in numerous statutes and executive orders. And we agreed on the need for revival of the Administrative Conference of the United States or a similar entity.

Our Section prides itself on its commitment to promoting policies that will result in fair and effective governance in the long run, no matter who holds power in the short run. Our Report to the President-Elect will, I think, be regarded as a particularly successful example of our ability to follow through on this commitment.

Of course, production of the report required not only good will but also hard work. The Section is indebted above all to Professor Tom Sargentich, who bore the brunt of the drafting duties for the report. Some two dozen Section veterans contributed ideas and advice as an Ad Hoc Committee

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ADMINISTRATIVE & REGULATORY LAW NEWS

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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. *Associate Editor for Section News:* William S. Morrow, Jr., e-mail: wmatc@erols.com. *Associate Editor for News from the States:* Michael Asimow, e-mail: 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.

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.

Recommendations to the President-Elect on Improving the Administrative Process

by Tom Sargentich*

Last year the Section's leadership conceived a way to highlight at the critical time of transition between administrations the Section's views on ways to improve the administrative process.

Past chair Jack Young appointed an *ad hoc* committee to help shape a report and recommendations. He asked me to be the reporter.

The first step was to review past pronouncements by the Section. The idea was to prepare recommendations reflecting positions that the Section already had adopted—or ones that were plainly consistent with such positions.

Such a report is not the place for controversial initiatives to be aired as an initial matter. Such an approach could well preclude agreement within the Section, especially given the restricted time frame involved. Moreover, the aim was to develop mainstream, bipartisan recommendations that could be implemented whether the new President was the nominee of the Democratic or Republican party.

I began drafting the report and recommendations after the Summer 2000 annual meeting in New York. Conversations with the incoming and outgoing Section chairs quickly highlighted four main areas of concern—which correspond to the

four recommendations ultimately adopted.

First, the report stresses the desirability of expedition in nominating and appointing senior administrators. Although this subject is to be studied

separately by a Section committee, it seemed well-suited to a report for the President-Elect. The process of choosing the heads of agencies has encountered numerous pitfalls during and after recent transitions. By voicing concern about appointments, the Section would be joining other organizations—such as the Brookings Institution and the Heritage Foundation—that are supporting improvements in the appointment system.

Second, a review of Section recommendations during the past decade reveals recurrent interest in improving the agency rule making process. The challenge in this context was to select the major themes to emphasize. After exchanges (usually by e-mail) with the *ad hoc* committee, three themes stood out. First, the Section was on record as supporting carefully-executed centralized executive oversight of significant agency rules. In addition, the Section had expressed concern about the “ossification” of rule making that can attend the imposition of multiple sets of analytical requirements on rule makers. Furthermore, many

in the Section expressed concern about the need to harness modern information technology in the

Section Recommendations to President-Elect

The President-Elect should:

1. seek reform of the cumbersome process for investigating, nominating, and confirming senior executive branch officers by (a) expediting the identification and nomination of qualified candidates, (b) promoting simplified disclosure requirements and forms, and (c) working to reduce delays and inaction in the confirmation process.
2. promote coordination, efficiency, and openness in agency rulemaking by (a) overseeing a carefully-executed process of centralized review of significant agency regulations; (b) directing Administration officials to work with Congress to streamline and consolidate analytical requirements; and (c) taking the lead in promoting the use of modern technologies to facilitate public awareness and participation.
3. instruct his transition team and political appointees to make extensive use of the knowledge and expertise of career civil servants, thereby improving policy development and fostering the recruitment and retention of highly qualified employees.
4. take steps to re-establish a governmental entity that will systematically promote improvements in the administrative process.

* Chair, Faculty Board of the Administrative Law Review; Professor of Law, Washington College of Law of American University.

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Council Capsules

A Brief Digest of Council Highlights From the 2000 Administrative Law Conference

Chairman's Report

Section Chair Ron Levin thanked Boyden Gray, Leonard Leo, David Frederick, and Tom Susman for arranging the Fall Meeting dinner. He complimented the Annual Developments panel on a job well done and noted that twenty committee reports had been received and that several more were expected by the end of the year. He reported that in his experience the October 4th debate between Ted Olson and Walter Dellinger concerning the effect of the presidential election on the Supreme Court was one of the most entertaining and intellectually stimulating programs ever presented by the section. [See "Olson v. Dellinger: Predicting Winners & Losers in the Post-Election Court," elsewhere in this issue]. Chairman Levin thanked Tom Susman for moderating and Justice Scalia and Ernest Gellhorn for helping Tom arrange it. He said that a webstream audio recording of the debate may be downloaded from the section webpage.



Annual Developments panel. From left: Bill Funk, Dan Cohen, Bernard Bell, Jeff Lubbers, William Jordan

Delegates' Report

Section Delegate Ron Cass reported on three matters. He said the House of Delegates has adopted the section's recommendation (proposed by the Veterans Affairs Committee) that Congress expand the Federal Circuit's jurisdiction to include review of questions of law not based on statutes or regulations when deciding appeals from the Court of Appeals for Veterans Claims. He also said the House voted to ban multidisciplinary practice. Finally, he said the House adopted, over the section's objection, a resolution from the ABA Judicial

Division that urges Congress to amend the APA by adding a default rule requiring formal hearings in adjudication proceedings unless the statute being applied expressly states otherwise.



Digital Democracy panel: L to R: Dan Cohen, Sally Katzen, Paul Noe, Susan Marshall, Michael White

Publications Committee Report

Committee Chair Randy May reported that sufficient funds have been set aside to print and distribute this year's *Annual Developments* book as a section membership benefit. Acting Budget Officer Leonard Leo agreed that doing so would not break this year's budget but questioned whether this should be a permanent policy. After receiving the advice of the council, the Chair referred the matter to the committee. May also reported that both the *Federal Administrative Procedure Sourcebook* and the *Realists' Guide to Redistricting* are available from Amazon.Com. He thanked the authors for their hard work on these books and said that plans are underway for marketing. He said the *ADR Deskbook* should be out in November and that a couple of monographs are in development. He stressed the need to get more materials on the web and asked that program chairs produce some of their program materials in electronic format.

Harmonization Recommendation

Sidney Shapiro delivered the Regulatory Initiatives Committee's Revised Report and Recommendation on Harmonization. The recommendation urges the president to seek more effective public participation in agency harmonization efforts. The report notes that two major trade agreements, NAFTA and GATT, have "spurred a global effort"

to “conform domestic regulations with uniform global standards.” The recommendation focuses on “agency efforts to harmonize domestic and foreign regulations through international negotiations” and encourages agencies to “take into consideration public input” when undertaking such efforts.



FCC panel: Helgi Walker.

Shapiro, co-chair of the committee, explained that agencies are currently engaging in a wide variety of harmonization efforts through bilateral and multilateral negotiations and that it is the committee’s position that these efforts would benefit from public input. He said that comments received at the rulemaking stage ordinarily come too late in the process to influence agency negotiations. Also, comments received after negotiations have concluded may not be actionable because of commitments made by the agency at the bargaining table.

Shapiro said that in light of these considerations, the committee believes it would be a matter of good practice for agencies to engage the public at the beginning and middle of the harmonization process, rather than at the end. The recommendation proposes several methods by which agencies might accomplish this, including listing significant harmonization activities in annual regulatory agendas, preparing required impact statements at or near the time harmonization activities occur, periodically inviting public comment, referring harmonization issues to advisory committees where appropriate, and establishing a public docket of harmonization documents that would otherwise be available under FOIA.

Shapiro noted that some agencies are already moving in this direction, such as the National Highway Traffic Safety Administration, which has adopted a policy statement informing the public it intends to undertake all the recommendations the committee has made except a commitment as to the timing of regulatory impact statements. He predicted that harmonization will increase in importance over the next few years and become a burgeoning area of practice.

Council member Michael J. Astrue expressed his concern that the recommendation as proposed did not give adequate consideration to the full range of harmonization activities taking place across all agencies. He pointed out the practical difficulties of trying to conduct international negotiations in a complicated environment, where even defining the agenda sets off nationalistic feelings and internal political tensions. He suggested that perhaps the recommendation should be limited to negotiations under NAFTA and GATT, or at least recognize that while the recommended practices generally are desirable, sometimes there are exceptions. For example, agencies should not be forced to air discussions involving matters of sovereignty.

Section Vice Chair Neil Eisner and council member Steve Calkins offered some amendments to soften the recommendation’s mandatory provisions. The council approved the recommendation as amended.



Mental Disability Discrimination panel. L to R: Christopher J. Kuczynski, Eric Siegel, Joel P. Bennett

Ombudsman Recommendation

Phil Harter delivered a status report on the Ombudsman Committee’s recommendation urging adoption of uniform practice standards for ombudsmen. The recommendation was approved by the council at the Spring Meeting but was subsequently deferred at the Annual Meeting in response to concerns raised by the Labor and Employment Law Section and the Commission on Legal Problems of the Elderly. The Ombudsman Committee has met with both groups since then. Proposed changes were negotiated with the Labor and Employment Law Section, and a new section will probably be added to address the concerns of advocates for the elderly. The Committee hopes to have a revised version available for presentation to the House of Delegates

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2000 Administrative Law Conference



Michael Asimow, David Roderer, Jack Young, Cynthia Drew



Jeff Lubbers, Ed Schoenbaum, Phillip Fleming



John Duffy, Ernie Gellhorn, Don DeLuc



*Neil Eisner, Sid Shapiro, Jodi Levine,
Ruth Kleinfeld, Anna Shavers*



*Science, Agencies & the Courts
panel: E. Donald Elliott*



Dan Rodriquez, Michael Herz, Peter Strauss, Mark Seidenfeld

2000 Administrative Law Conference



Lynne Zusman, Steve Calkins



Labor Law Update panel: Gary M. Buff, David A. Grant, Ellen Vargas



Bill Funk, Warren Belmar, Phil Harter, Ron Cass



Judge Felter, Ed Schoenbaum, Jim O'Reilly



Immigration Reorganization panel: Hiroshi Motomura, Fred Gordon, Ben Johnson, Susan F. Martin, Charles Adkins-Blanch, Anna W. Shavers

Supreme Court News

by William Funk*

As this issue of the *News* goes to press, the Supreme Court has not decided any administrative or regulatory law cases, although several are awaiting decision. Of course, the most notable decision was ***Bush v. Gore***, 121 S.Ct. 525 (2000), not an administrative or regulatory law case, in which, however, as the Chair's Message indicates, several of our Section members were active and as to which others were involved in national commentary. It should be noted, though, that many of the issues addressed by the various Florida state courts in the aftermath of the election involved *state* administrative law. *Bush* in its two iterations before the Supreme Court variously dealt with Article II of the Constitution, Section 5 of Title 3 of the United States Code (providing a "safe harbor" for state determinations of contests over electoral votes by December 12), and the Equal Protection and Due Process Clauses of the 14th Amendment. Ultimately, the Court in a per curiam opinion held that the failure to provide uniform standards for the recounting of contested ballots throughout Florida violated Equal Protection and, because there was inadequate time to both set such standards and complete a recount and any subsequent challenges to it prior to the date the Florida Supreme Court had suggested was the deadline for the recount, reversed the Florida Supreme Court's order of a recount. While seven justices found equal protection problems with the non-uniform standards for the recount, only five supported the "remedy" of denying the recount altogether. Two justices found no legal problem with the recount and two justices would have allowed the Florida Supreme Court to cure the problem. Three justices (Chief Justice Rehnquist, joined by Justices Scalia and Thomas) believed that in addition to the Equal Protection violation the recount ordered by the Florida Supreme Court violated Article II, Section 1, clause 2, which provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," electors for President and Vice President. Everyone was agreed that the Florida legislature had directed the appointment of electors in accordance with Florida's election laws. In the view of the three concurring justices, however, the Florida Supreme Court's

interpretation of Florida's election laws was clearly erroneous. Consequently, in those justices' view, the ordered recount violated Florida's election laws and accordingly Article II as well, because it would result in an appointment of electors in a manner other than as directed by the Florida legislature.

We will leave to others (likely, many others) to comment at length on the various opinions and how they are or are not consistent with the Constitution, the law, or the Court's precedents. Nevertheless, it seems clear that while the vast majority of Americans accept the Supreme Court's judgment as legitimately the final judgment, a very substantial minority harbors severe doubt not only as to the correctness of the decision but as to its fidelity to neutral principles. That the Court split 5-4, along the traditional liberal/conservative fault line, is probably a major contributing factor. Some have suggested that the Court has irreparably harmed its standing as the most respected institution of government. To this observer, this seems an unlikely outcome. No doubt some embittered Democrats will now view the Court as Democrats viewed it in 1936, as opposed to how liberal Democrats viewed it through the 1970s. On the other hand, no doubt some hitherto embittered Republicans, especially pro-life Republicans, now see the Court as the harbinger of the New Millennium both figuratively as well as literally. In short, what goes around comes around.

Whether it is the New Millennium or the Apocalypse Now seems to depend on one's ideological or political perspective, and cases currently before the Supreme Court may clarify whether dramatic changes are in the offing in the field of regulatory law.

The most notorious case is ***American Trucking Associations, Inc. v. Browner*** and ***Browner v. American Trucking Associations, Inc.***, reported below at 175 F.3d 1027 (D.C. Cir. 1999). In that case the D.C. Circuit overturned two new National Ambient Air Quality Standards adopted by EPA because EPA's interpretation of the Clean Air Act would constitute an unlawful delegation of legislative authority by Congress. This novel approach to the Nondelegation Doctrine, found only once before in another opinion by *American Trucking's* author, Judge Stephen Williams, which allows for the agency to cure the problem by re-interpreting the Act in a different manner, did not seem to find favor with the Justices at oral argument on November 7. However, the Court also accepted certiorari on the question whether the Clean Air Act's provision relating

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

to the National Ambient Air Quality Standards requires EPA to engage in a cost-benefit analysis in setting those standards. For almost thirty years the ruling lower court case law has been that those standards are to be set on the basis of public health without regard to cost, and the Court rejected a similar plea by industry for a mandatory cost-benefit analysis in the Occupational Safety and Health Administration's standards. See *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490 (1981). At oral argument the justices did not seem inclined to disturb this line of precedent. Instead, the issue seemed more to be whether EPA's standards met the garden-variety "arbitrary and capricious" test.

However, as many commentators remind us, the expressions at oral argument are an uncertain basis for predicting Supreme Court outcomes. Were the Court to adopt either of the challenger's positions, it would suggest a major change in the Court's attitude to government regulation.

Another environmental case, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999), also poses a fundamental challenge to government regulation. In this case, the Corps of Engineers and EPA assert Clean Water Act jurisdiction over isolated wetlands which are neither navigable themselves nor connected to other navigable waters. The Act by its terms regulates "navigable waters," but that term is defined to mean "waters of the United States," which the legislative history indicates was intended to include all waters subject to Congress's Commerce Clause powers. The Corps and EPA maintain that isolated wetlands which support migratory bird habitat are within Congress's Commerce Clause power because hunters and birdwatchers of migratory birds have a significant effect on commerce. Although most circuit courts have accepted this argument, the Fourth Circuit rejected it, see *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), and Justice Thomas in a dissent from a denial of certiorari in an earlier case suggested concerns with

it. Again, in recent years, the Court has increasingly scrutinized claims of congressional power under the Commerce Clause and has struck down both the Gun Free School Zones Act and the civil portion of the Violence Against Women Act as not supported by the Commerce Clause. In those cases the Court was fairly clear that it is not rolling back the Commerce Clause with respect to regulation of economic activity, but environmental regulation may not fall within that rubric. While the object of environmental regulation is usually economic activity, such as the development of undeveloped land in *SWANNC v. Corps of Engineers*, the purpose of the regulation is not

to further the economy but to protect the environment. Therefore, *SWANNC v. Corps of Engineers* could provide an important opportunity for the Court to clarify the extent of its new limits on Congress's Commerce Clause powers. The case was heard on October 31, and the comments of the justices suggest that they may duck this opportunity by interpreting the Act not to reach waters whose effect on commerce does not relate to navigation. Such a restrictive interpretation of the Act would be supported by the canon of construction to interpret statutes to avoid constitutional questions.

In addition to the potential blockbusters of federal regulation, the Court is also hearing a number of more routine administrative law cases. One involves once more the Federal Circuit's sometimes unique approach to administrative law. See *United States v. Haggard Apparel Co.*, 526 U.S. 380 (1999) (holding that contrary to Federal Circuit's opinion, *Chevron* applies to the Federal Circuit); *Dickinson v. Zurko*, 527 U.S. 150 (1999) (reversing Federal Circuit's decision that the APA's standard of judicial review did not apply to Federal Circuit review of decisions of Patent and Trademark Office). In *United States v. Mead*, 185 F.3d 1304 (Fed. Cir. 1999), the Federal Circuit was called

to further the economy but to protect the environment. Therefore, *SWANNC v. Corps of Engineers* could provide an important opportunity for the Court to clarify the extent of its new limits on Congress's Commerce Clause powers. The case was heard on October 31, and the comments of the justices suggest that they may duck this opportunity by interpreting the Act not to reach waters whose effect on commerce does not relate to navigation. Such a restrictive interpretation of the Act would be supported by the canon of construction to interpret statutes to avoid constitutional questions.

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Among those notables at the Fall Meeting Dinner in Recognition of Solicitor Generals were, left to right: top, Kenneth W. Starr, Walter Dellinger, Seth Waxman, John Hardin Young, Drew S. Days III; bottom, Ronald M. Levin, Charles Fried, Justice Stephen Breyer, C. Boyden Gray.

Section of Administrative Law and Regulatory Practice 2001 Midyear Meeting

Meeting Chair: Dean Daniel B. Rodriguez
San Diego Hilton Beach and Tennis Resort
1775 East Mission Bay Drive
San Diego, CA 92109
Telephone: (619) 276-4010

We are grateful to the University of San Diego School of Law
for their sponsorship of the Midyear Meeting

Thursday, February 15

APA Reporters Meeting

1:00 p.m. – 5:00 p.m.

Friday, February 16

APA Reporters Meeting

8:00 a.m. – 12:00 p.m.

Veterans, Stress Disorders and Adjudication Problems: Should Changes Be Made to Help PTSD Survivors?

9:00 a.m. – 11:30 a.m.

This panel will examine serious problems in the adjudication of claims for disability compensation for posttraumatic stress disorder by the U.S. Department of Veterans Affairs. Experts in the field will discuss VA regulations under which the existence of PTSD is determined and its severity evaluated. In addition, the panel will consider what constitutes a complete examination report, both within the meaning of VA regulations and the American Psychiatric Association Diagnostic & Statistical Manual of Mental Disorders, and how the processing of these claims can be improved.

Moderator: *James T. O'Reilly*, University of Cincinnati, Cincinnati, OH

Panelists:

- *Kenneth Carpenter*, Carpenter Chartered, Topeka, KS
- *Richard B. Frank*, Member, Board of Veterans' Appeals, Washington, DC
- *Thomas McLaughlin*, Deputy Assistant General Counsel, Department of Veterans Affairs, Washington, DC
- *Ronald L. Smith*, Chief Appellate Counsel, Disabled American Veterans, Washington, DC

What Lessons Does the Florida Election Counting Imbrogio Have for the Future?

10:30 a.m. – 12:00 p.m.

The Florida voting and recount procedures, and the legal challenges they produced, raise a large number of important election law, administrative procedure, and constitutional issues. This panel discussion will attempt to identify lessons learned from the Florida statutes, their interpretation by local vote counters, and the decisions of the courts. This panel discussion will be a step in the Elections Committee's consideration of recommendations to the Section for possible proposal to the ABA. This panel will not concentrate on "replaying" the contest, but rather on what recommendations for procedural changes on a national basis are necessary.

Panelists:

- *Trevor Potter*, Former FEC Chair, Washington, DC
- *Joseph E. Sandler*, Democratic National Committee Counsel, Washington, DC
- *Jamin Raskin*, American University Washington College of Law, Washington, DC
- *David E. Cardwell*, Holland & Knight LLP, Orlando, FL

Project to Review the Administrative Procedure Act

3:00 p.m. – 5:00 p.m.

Most of the sections of the Statement of Administrative Law for our APA Project have now been produced. This session will be devoted to a review of the entire project. The audience will be asked to participate in the draft review process. The Draft Papers for the Project to Review the Administrative Procedure Act can be found at the following website: <http://www.abanet.org/admin-law/apa/home.html>

Section Reception

5:00 p.m. – 6:30 p.m.



Saturday, February 17

Section Continental Breakfast

8:00 a.m. – 8:30 a.m.

Section of Administrative Law and Regulatory Practice Council Meeting

8:30 a.m. – 10:00 a.m.

Interpretative Rules: What do they Mean?

10:00 a.m. – 11:30 a.m.

In *Christensen v. Harris County*, the Supreme Court determined that *Chevron*-style deference did not apply to non-binding agency interpretative statements. However, the Court's opinion in this case raised more questions than it settled. When is an agency interpretative statement binding or non-binding, and what makes it so? Under the APA, can an agency interpretative statement ever be anything but non-binding? Assuming an agency interpretative rule is non-binding on the public, can it still be binding on the agency? If it is, does that change the analysis under *Christensen*? A panel of experts on rule-making will address these and many other questions to provide the answers the Supreme Court did not.

Moderator: *Daniel Cohen*, U.S. Department of Commerce, Washington, DC

Panelists:

- *Peter L. Strauss*, Columbia University School of Law, New York, NY
- *Robert A. Anthony*, George Mason University School of Law, Arlington, VA
- *Randolph J. May*, The Progress and Freedom Foundation, Washington, DC



Generic Versions of Biotechnology Drugs: Legal Developments and Political Challenges

2:00 p.m. – 5:00 p.m.

The Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Act) balances the interests between brandname drug and generic drug industries. As biopharmaceutical patents expire in the coming years, controversy and uncertainty pressure industry and the government to address the unique issues surrounding generic biologics. This program will discuss the history behind Hatch-Waxman, patent market exclusivity, the unique issues regarding biotechnology products, impact of generic biologic approvals on the health-care industry, evolving case law focusing on the FTC and antitrust concerns, the emerging regulatory policy and congressional sentiment.

SATURDAY AFTERNOON ACTIVITIES

Section Golf Outing Round Robin Tennis Tournament Old Town San Diego

12:30 p.m. – 4:30 p.m.

(Transportation will be provided - minimum of 12 required)

As the birthplace of California, Old Town San Diego reflects the rich and colorful history of early California. Daily shows, dining, artisans, and a wealth of beautiful shops give Old Town its festive air. Transportation is scheduled to leave the San Diego Hilton at 12:30 for Old Town San Diego. After the outing, the charter bus will return members to the San Diego Hilton. Old Town San Diego is about ten minutes away from the San Diego Hilton. Tickets are priced at \$20.

Section Reception and Dinner

7:00 p.m.

Join fellow Section Members for dinner at the World-Famous San Diego Zoo. Over drinks, members will be able to experience an up-close encounter with exotic animals and have a chance to talk with their trainers. Dinner will be served in the Treetops Room. Transportation is scheduled to leave the San Diego Hilton at 6:30 p.m.

Sunday, February 18

Publications Committee Meeting

7:45 a.m. – 9:00 a.m.

Section Continental Breakfast

8:00 a.m. – 9:00 a.m.

Section of Administrative Law and Regulatory Practice Council Meeting

9:00 a.m. – 11:30 a.m.

Complete 2001 Midyear Meeting information can be found at:
<http://www.abanet.org/adminlaw/home.html>

News from the Circuits

Eighth Circuit Takes Back Ruling That it Is Unconstitutional to Render Decisions Without Precedential Effect

In *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), a panel of the Eighth Circuit held that Circuit Rule 28A(i), which states that unpublished decisions are not precedential, was unconstitutional because to decide a case without that decision being precedent would be inconsistent with the judicial function under Article III of the Constitution. Inasmuch as virtually every circuit has a similar rule, this decision received much attention. In the case, a taxpayer had filed for a refund but the government asserted that the claim was not timely, citing an unpublished decision of the Eighth Circuit squarely on point. The taxpayer argued that the court should ignore the unpublished decision because under the circuit rule it was not precedent. The panel, however, found the circuit rule unconstitutional and, therefore, felt bound to give effect to the earlier Eighth Circuit decision. The taxpayer filed a petition for rehearing en banc. On rehearing en banc the full circuit vacated the earlier decision as moot, inasmuch as the government had paid the taxpayer her refund and had formally acquiesced to her interpretation of the law, contrary to the Eighth Circuit's earlier decision but consistent with a Second Circuit decision. *Anastasoff v. United States*, — F.3d — (8th Cir. 2000). In so ruling, the Eighth Circuit did not answer the question everyone had been anticipating, stating instead: “[t]he constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit.”

Purported Guidance Document Improperly Issued Legislative Rule

In *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), EPA had issued a document called “Periodic Monitoring Guidance for Title V Operating Permits Program,” which was supposed to provide guidance to states as to what monitoring requirements EPA would require in order to approve State Implementation Plans under the Clean Air Act. The guidance was adopted without notice and comment. Polluters challenged this guidance document, alleging that it in effect amended existing regulations by imposing a more stringent monitoring requirement than existed in the present regulations.

The first issue was whether the guidance document was reviewable at all. EPA maintained that it

was not a “final” agency action, because it had no binding effect on anyone. The court noted that only legislative rules can have legally binding effect but that other kinds of documents “can, as a practical matter, have a binding effect.” The court stated, in what is fast becoming a highly quoted sentence:

If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes “binding.”

The now traditional test for “finality” is whether the document is the “consummation of the agency's decisionmaking process” and whether it determines rights or obligations or otherwise will have legal consequences. Here, the guidance document was the consummation of four years of EPA consideration and two sets of drafts. Moreover, despite “boilerplate” language contained in the guidance to the effect that it was solely guidance, did not represent final agency action, and could not be relied upon to create any right, the court found the guidance to be “marching orders” to the states that would create obligations, if not rights, citing articles by two Section members — Professors Peter Strauss and Robert Anthony.

Having found the Guidance reviewable, the court turned to its validity. It stated: “It is well-established that an agency may not escape notice and comment requirements by labeling a major substantive legal addition to a rule a mere interpretation.” The court found that the Guidance purported to interpret the Title V regulations in a manner they could not support and instead in effect imposed a new requirement on States to set stricter monitoring than existing regulations required. Accordingly, the court set aside the Guidance and enjoined states from requiring monitoring on the basis of it.

Fourth Circuit Splits Circuits in Holding That EEOC Regulation Conflicts with Statute

The federal statute governing complaints to the Equal Employment Opportunity Commission states that charges are to “in writing under oath or affirmation and shall contain such information and be in such form as the [EEOC] requires,” but it also generally requires that the charge be filed within 180

days of the alleged unlawful employment practice, with a possible extension up to 300 days. 42 U.S.C. § 2000e-5. The EEOC adopted a regulation providing that a charge is adequate if there is a “written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of.” The regulation also provides that a charge can be “amended to cure technical defects or omissions, including failure to verify the charge...,” and that these amendments will relate back in time to the date the charge was first received. In *Edelman v. Lynchburg College*, 228 F.3d 503 (4th Cir. 2000), the charging party did not verify (state under oath) the charge until after the 300 day period. Pursuant to its regulations, the EEOC related the verification back to the time of the original charge, but the court held that the regulation was inconsistent with the statute, which required the oath to be under oath and to be filed within 300 days. The court said it was applying the principles of *Chevron v. NRDC* by finding that the statute was unambiguous, an opinion shared by the Eighth Circuit, although the court noted that the Fifth, Seventh, Ninth, and Tenth Circuits have upheld the EEOC’s regulation, presumably finding the statute ambiguous.

Nader Loses Challenge to FEC Regulation Allowing Corporations to Sponsor Presidential Debates

The Federal Election Campaign Act bars corporate contributions “in connection with” any federal election, but it creates an exception for donations for “non-partisan registration and get-out-the-vote campaigns.” Two Federal Election Commission regulations allow corporations to make donations to qualified nonprofit, nonpartisan organizations for putting on presidential debates. In *Becker v. Federal Election Commission*, 230 F.3d 381 (1st Cir. 2000), Nader challenged these regulations. The first question was his standing, but the court accepted his

claim that it would be against his principles to participate in a debate funded by corporate sources. On the merits, Nader argued that the ban on contributions was unambiguous, and the exception did not apply to presidential debates. The court held, however, that the statute was ambiguous, and that under *Chevron v. NRDC* the FEC’s interpretation allowing funding of the presidential debates was reasonable because the educational purpose of the debate is similar to the purpose underlying nonpartisan voter registration and get-out-the-vote campaigns.

Federal Circuit Says Agency Regulation Cannot Overturn Case Law, Splitting Circuits

Before 1978 the Internal Revenue Service allowed U.S. corporations to claim a foreign tax credit for

the full amount of taxes paid to a foreign country on certain interest earned in that country, but first in a Revenue Ruling in 1978 and then in a Treasury regulation in 1980, the IRS changed its position and limited the taxes eligible for a foreign tax credit. In *Bankers Trust New York Corp. v. United States*, 225 F.3d 1368 (Fed. Cir. 2000), a corporation chal-

lenged this limitation of its foreign tax credit, claiming that it was inconsistent with two Court of Claims cases in 1972 and 1974. The government argued that under *Chevron v. NRDC* the statutory provision was ambiguous and its interpretation of the statute was reasonable. Indeed, subsequent to the events in the case, Congress enacted the regulation into law. The Federal Circuit, however, said that it was inconsistent with the principles of separation of powers to allow an executive agency to issue a regulation inconsistent with existing judicial precedent. It noted that the Supreme Court had in essence reached the same conclusion with respect to its precedents in several cases. While recognizing that the Seventh and Eighth Circuits had upheld the regulation, the court said that it would leave resolution of the split to the Supreme Court. ◆

Mary Lawton Government Service Award



From left: Chair Ron Levin, Awardee Jodie Bernstein, Neil Eisner and John Cooney of the Award Committee.

Olson v. Dellinger: Predicting Winners & Losers in the Post-Election Court

By William S. Morrow, Jr.*

On October 4, 2000, one month prior to one of the closest presidential elections in this nation's history, two of the country's leading Supreme Court litigators, Ted Olson and Walter Dellinger, squared off over the effect the election would have on the direction of the Court. Neither could have predicted the critical roles that they and the Court would play in determining who would be our next president, and now their remarks must be filtered through the prism created by the events in Florida and the historical tie in the Senate.

The debate was moderated by former Section Chair Thomas M. Susman. Section Chair Ron Levin delivered opening and closing remarks.

Dellinger began by cautioning that predicting the course of the Court is a hazardous occupation, even in the short-run.

He noted the similarity of the current debate as to whether Gov. Bush if elected to the White House would appoint justices to overrule *Roe v. Wade* with the Lincoln-Douglas debates in 1858, when Douglas used the occasion to question whether Lincoln if elected to the Senate would approve the appointment of justices to overrule *Dred Scott* — the issue of free choice, the freedom of a frontier territory to choose slavery or not versus the freedom of a woman to choose reproduction or not, being the common element.

Dellinger believes some categories of cases are relatively easy to predict. Abortion, civil rights, and executive power cases likely would break one way or the other depending on who is elected. Commerce Clause doctrine is mostly settled. (But Dellinger is a little surprised at the lack of *stare decisis* here).

Other categories are not so predictable. In the area of criminal rights, it is Scalia and Thomas who are the most innovative. In *Apprendi v. New Jersey*, for example, Scalia and Thomas joined Stevens, Souter and Ginsburg in holding that a factual determination leading to an increased sentence must be made by a jury beyond a reasonable doubt. Rehnquist, O'Connor, Kennedy and Breyer, whom Dellinger dubs the Court's pragmatists, dissented.

In freedom of speech cases, Justice Thomas is the one who most often sides with the claimant. Breyer does just the opposite.

On freedom of religion, Dellinger thinks the Court is "exactly where it should be." In particular, he thinks O'Connor has the right take on this: "Government prayer is bad. Private prayer is good."

Dellinger's concern when it comes to abortion is not just that a Bush appointee might vote to overrule *Roe v. Wade*, but also that a Bush appointee might apply the undue burden test in *Casey* to strike down regulations that place an undue burden on the affluent while upholding regulations that place a burden on the poor, thus creating a two-tier system of reproductive rights.

Olson opened with a similar caution. He said that making predictions about the Court is "like flyfishing for butterflies." You can predict there will be some movement right and some movement left, but beyond that it is really difficult to say. Just the same, he said he did not agree with media predictions that Gov. Bush would only appoint from the far right and that Vice President Gore would only nominate from the middle.

Olson half-heartedly questioned the likelihood of a justice leaving the bench during the next presidential term. Five of fifteen chief justices were older when they retired than Rehnquist is now, and as anyone who has faced the Court recently can testify, these judges are hale and hearty. Olson did allow, however, that Jimmy Carter was the only full-term president not to have appointed at least one justice while in office — and most appointed more.

Olson said the type of justice the candidates will be seeking must be factored into the equation. Gore has said he would consider appointees who view the Constitution as a living document. Bush has said he would favor strict constructionists like Scalia and Thomas, but Olson does not believe that a Bush addition to the Court would necessarily bring about the demise of *Roe v. Wade*. There may be some chipping away, but only that. He also does not think the outcomes of future death penalty cases, or criminal cases in general, are likely to turn on which candidate gets elected.

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

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APA Project: Paper Ballots

By William S. Morrow, Jr.★

The election will be held in February. No, I am not referring to the Florida race. (*Is it over yet?*). The election I am talking about will be held at the section's Mid-Year meeting in San Diego, CA, where APA project papers drafted to date will be on parade.

Project reporters have been working hard since the summer of 1999 on individual papers covering a variety of administrative law topics, which, when finished, will be assembled into a comprehensive statement of federal administrative law.

The drafts have been sorted into five categories: Adjudication, Governmental Management, Openness, Judicial Review, and Rulemaking, and posted for public comment on the section's website at www.abanet.org/adminlaw/apa/home.html.

The reporters are a who's who of administrative law academics and practitioners headed up by Paul R. Verkuil, Dean of the Benjamin N. Cardozo School of Law.

The reporters assembled at the 2000 Administrative Law Conference in Washington, DC, this past October to deliver a project status report and to receive comments on the course of the project. Paul Verkuil reported that the combined number of pages had reached 285 and that the project was on track for review in February, with publication of a final statement possible by the end of next year.

Much of the discussion on what course the project should take concerned the format of the finished product and whether the section should adopt the statement as its own or simply publish it as the work of the individual reporters.

Section Chair Ron Levin suggested one approach might be to present black letter statements to the council for debate, followed by amendment and adoption. Commentary and prescriptive statements of the law could be appended with or without section endorsement as the council pleases.

Adjudication co-reporter Michael Asimow suggested the section consider publishing five free standing books, one for each project category, instead of one book covering all five. Publication could commence sooner that way. For example, the adjudication papers are more fully developed at this stage than some of the papers in other categories and, therefore, should be ready for printing

sooner. But some members were concerned that publishing separate volumes might diminish the project's overall stature.



L to R: Bill Funk, Tom Susman, David Vladeck, Peter Strauss, Michael Asimow, Ron Levin, Paul Verkuil

Another concern expressed at the meeting was whether and how the statement would be updated. One suggestion was to draw from the section's *Annual Developments* publication, but the differences between the two publications in terms of organizational layout could make that impractical.

Toward the end of meeting, the talk returned to consideration of when and how to present recommendations for reform, which is precisely what makes this project so intriguing and separates it from other administrative law reference works.

The case for including them with the descriptive portion of the statement is that divorcing one from the other limits the impact of each. The descriptive enjoys added value as a predicate for reform. The prescriptive pales in isolation. Plus, anyone who has witnessed the legislative process knows how difficult passing reforms can be if they are not attached to some non-controversial bill.

On the other hand, as Paul Verkuil cautioned, the failure to publish something by the end of the year could rob the project of critical momentum, putting the entire statement at risk. While he does not want to see the reporters' best work wind up on the cutting room floor, neither does he relish the prospect of holding up publication of a descriptive statement for three to five years while the council mulls the more controversial prescriptive elements.

The Mid-Year Meeting no doubt will reprise some of these competing themes. Participants will be aided by a 25-40 page statement of black letter law distilled from the reporters' papers. If previous sessions are any guide, we can all look forward to a vigorous exchange of ideas.

There will be, however, no recounts. ◆

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

News from the States

by Michael Asimow*

On Leading a Horse to Water

When due process calls for a hearing, a court must decide precisely what protections are required. It does so through a rather unpredictable balancing of factors under *Mathews v. Eldridge*, 424 U.S. 319 (1976). Indeed, California constitutional law may be even more indeterminate than federal law, since the court must also consider the dignitary interest of the private party. *Saleby v. State Bar*, 702 P.2d 525 (Cal. 1985). The due process balancing act is quite labor intensive for both counsel and judges.

A provision of California's new APA was designed to avoid the need for due process balancing. Under Gov't Code §11410.10, if an evidentiary hearing is required by the federal or state constitution, the administrative law bill of rights comes into play. The bill of rights contains an array of baseline procedural protections.

In *Golden Day Schools v. Department of Education*, 99 Cal.Rptr.2d 917 (Ct. App. 2000), a state agency debarred Golden Day Schools from contracting with the state for three years, based on various fiscal irregularities. The agency provided a hearing before a five-person panel but one member (Ostapeck) was the investigator who had originally decided that Golden's reports were unacceptable. Golden immediately objected to Ostapeck's participation.

The California Court of Appeal decided that the state's debarment decision deprived Golden of liberty; hence federal due process applied. Working through a *Mathews* balancing act, it concluded that Ostapeck could not serve as a decisionmaker since he had previously played an investigating and prosecuting role. As a result, he would be judging his own decision. Unlike cases like *Withrow v. Larkin*, 421 U.S. 35 (1975), Ostapeck was not an agency head and there was no legal reason why he had to serve on the hearing panel.

But—not so fast! Why didn't the court refer to §11410.10 and to California's administrative law bill of rights? A specific statute in the bill of rights prohibits anyone from serving as an adjudicative decisionmaker who has served as an investigator, prosecutor, or advocate in the proceeding. Gov't C. §11425.30(a)(1). It was squarely on point. By referring to the statute, the court would have

avoided the need to engage in *Mathews* balancing. The client could have avoided paying for scads of constitutional research and lengthy briefs. And the court could have used the case as the first opportunity to construe and apply the recently adopted statutory provisions.

The answer appears to be—everybody missed it. But they shouldn't have. Golden was represented by a mega-huge Los Angeles law firm which is normally expected to perform thorough research. The state agency was represented by its general counsel who is supposed to have a passing acquaintance with state law. The judge was one of the most experienced and respected appellate judges in California. The judge employs a permanent paid staff of research attorneys. But nobody thought to look at the state's APA.

All this is a sobering lesson to administrative law reformers. You can design and implement excellent procedural protections, but of what use are they if the lawyers and judges who must apply them don't know they exist?

Mississippi Flirts with Administrative Law Reform¹

In Mississippi, the new Governor, Ronnie Musgrove, is considering whether to appoint a task force to continue the work of the previous administrative law reform efforts or a smaller study committee comprised mostly of agency representatives. The bill that was introduced last year will be reintroduced this year by Representative Cecil Brown in the Mississippi House. Currently uncertain about a Senate sponsor. Last year a draft executive order was prepared for the Governor and included many representatives from State Agencies. However, Governor Musgrove may be more interested in a smaller study committee. The state agencies have largely opposed any administrative law reform effort.

North Carolina Strengthens Hands of ALJs²

What happens when agency heads substitute their own findings of fact or conclusions of law for those of an ALJ? How does this affect judicial review? This has always been a sore point in administrative law.

¹ The information in this paragraph was provided by Robert N. Davis, Professor of Law, University of Mississippi Law School.

² The information in this paragraph was provided by Fred Morrison, ALJ, North Carolina Office of Administrative Hearings.

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

By legislation passed in Summer, 2000, North Carolina radically strengthened the position of ALJs vis a vis the agency heads. The legislation requires the agency heads to accept the fact findings of ALJs unless they are clearly contrary to the preponderance of the evidence. This requirement includes but is not limited to findings made on the basis of witness credibility or demeanor. The heads must make a detailed statement of reasons if they substitute their own findings for those of the ALJ.

On judicial review, the court is instructed to decide the case de novo on the record when the agency heads have failed to adopt the ALJs decision. This provision comes into play even though the agency heads disagreed with the ALJs *legal analysis*. In such cases, the court is to give no deference to the findings of fact or conclusions of law made by the agency heads.

The North Carolina statute also requires ALJs to comply with the Model Code of Judicial Conduct for State ALJs recently adopted by the National Conference of Administrative Law Judges.

The revisions to the North Carolina law will go far toward neutering the agency heads in adjudicatory cases. It creates very substantial disincentives for the heads to change the ALJ decision in any respect. Indeed, it is hard to see why the legislature did not cut the agency heads out of the game entirely and allow the party who disagrees with an ALJ decision to go straight to court.

Recent Articles

Thomas D. Bixby, *Comment: Participatory Rulemaking in State Government: A Managed Care Success Story*, 65 MO. L. REV. 707 (2000).

Stephen Coate and Timothy Besley, *Elected versus Appointed Regulators: Theory and Evidence*, available from the SSRN Electronic Paper Collection: http://papers.ssrn.com/paper.taf?abstract_id=219393

Aric J. Garza, *Resolving Public Policy Disputes in Texas Without Litigation: the Case for Use of Alternative Dispute Resolution by Governmental Entities*, 31 ST. MARY'S L.J. 987 (2000).

F. Andrew Hanssen, *Independent Courts and Administrative Agencies: an Empirical Analysis of the States*, 16 J.L. ECON. & ORG. 534 (2000).

Alice D. Keane, *Administrative Law*, 50 SYRACUSE L. REV. 315 (2000).

Morris M. Kleiner and Robert T. Kudrle, *Does Regulation Affect Economic Outcomes? The Case of Dentistry*, available from the SSRN Electronic Paper Collection:

http://papers.ssrn.com/paper.taf?abstract_id=202391

Salvatore Massa, *The Standards of Review for Agency Interpretations of Statutes in Wisconsin*, 83 MARQ. L. REV. 597 (2000).

Lee E. Miller, *Open Meetings and Open Records Laws: a Primer for Colorado Water Conservancy Districts*, 3 U. DENV. WATER L. REV. 273 (2000).

Michael Sherman, *How Free Is Free Enough? Public University Presidential Searches, University Autonomy, and State Open Meeting Acts*, 26 J.C. & U.L. 665-700 (2000).

Annual Survey of Pennsylvania Administrative Law: *Administrative Law Progress in 1998: Survey of Selected Court Decisions*, 8 WIDENER J. PUB. L. 601 (1999).

Symposium: *Approaching the Millennium: Are Pennsylvania's Administrative Procedure Statutes Still Doing the Job?* 8 WIDENER J. PUB. L. 195 (1999). John L. Gedid, *the Confusing Legislative and Judicial Treatment of Adjudication in Pennsylvania Administrative Law*; Michael Asimow, *Speed Bumps on the Road to Administrative Law Reform in California and Pennsylvania*; Jim Rossi, "Statutory Nondelegation": *Learning from Florida's Recent Experience in Administrative Procedure Reform*; Steven P. Croley, *State Administrative Law Reform: Recent Experience in Michigan*; Robert C. Power, *Rulemaking Developments*. ◆

Chair's Message *continued from page 2*

on Administrative Transition, and a Committee on Style handled the final edit. The Section's staff came through, as usual, with strong logistical support. And, to emphasize that our conclusions did not depend on knowing who would be in power, everyone involved in the project worked diligently to ensure that the document would be ready for transmission to the President-Elect on the day after

the election. Obviously, we were far from prescient in our assumption that we could identify the primary addressee of the report immediately. But we like to think that the larger perspectives of the report reflect greater vision.

In the political environment that lies ahead, marked by a narrowly won Presidency and a closely divided Congress, society will have a special need for the nonpartisan perspective that our report reflects and that it is the continuing aspiration of the Section to provide. ◆

Recent Articles of Interest

Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 UC DAVIS L. REV. (2000). In *Christensen v. Harris County*, decided last Term, the Supreme Court for the first time expressly held that it would not grant *Chevron* deference to an agency's informal interpretation of a statute. Three years earlier, however, the Court had held that *Seminole Rock* deference, which closely resembles *Chevron*, could be granted to an agency's informal interpretation of its own regulation. There are suggestions, in *Christensen* and in another case from last Term, that the Court will resolve this conflict by holding that no informal interpretations can receive *Chevron*-style deference. Yet if the Court so held, it would effectively overrule *Seminole Rock*, for only a fraction of the cases implicating this doctrine involve formal regulatory interpretations. Although *Seminole Rock*, unlike *Chevron*, has thus far received little attention or criticism from judges and scholars, the conflict created by *Christensen* portends a reevaluation of the doctrine. This article defends *Seminole Rock* against claims that it gives agencies too great an incentive to promulgate vague regulations, violates the Administrative Procedure Act, and is incompatible with the constitutional principle of separation of powers. Rejecting *Seminole Rock* would not only impose substantial costs on regulated entities and on the courts without necessarily yielding clearer or better regulations, but would also undermine *Chevron's* allocation of interpretive authority to administrative agencies by returning much of that authority to the courts. To protect *Chevron's* distribution of authority, thereby leaving agencies and not courts with responsibility for assessing the wisdom of competing policy choices, the Supreme Court should limit *Christensen* to cases involving *Chevron* and should continue to review informal interpretations of regulations under *Seminole Rock*.

David Driesen, *Getting Our Priorities Straight: One Strand of the Regulatory Reform Debate*, Document: Available from the SSRN Electronic Paper Collection:
http://papers.ssrn.com/paper.taf?abstract_id=245638. This article seeks to clarify the conceptual basis for the claim that regulatory priori-

ties are seriously askew, a claim that has played a prominent role in the ongoing regulatory reform debate. It develops a theoretical framework clarifying the meaning of priority setting. It claims that the regulatory reform debate has paid little attention to the information most obviously relevant to determining whether serious priority setting defects exist. And regulatory reformers' principal recommendation for improving priority setting, increased use of cost-benefit analysis in regulatory proceedings, has, at best, a tenuous connection with priority setting. Regulatory reformers have conflated concerns about excessively stringent regulation with concerns about setting priorities. This article clarifies the relationship between these concerns.

Michael J. Gerhardt, *Federal Environmental Regulation in a Post-Lopez World: Some Questions and Answers*, 30 ENVTL. L. REP. (ENVTL. L. INST.) 10,980 (2000). In the span of just a few years, the U.S. Supreme Court has brought the venerable constitutional concept of federalism back to life with a vengeance. In the 1999 Term alone, the Rehnquist Court struck down three federal laws for violating basic principles of federalism and narrowly construed a fourth to avoid any conflict with those precepts. Not since the conflict between Congress and the Court in the 1930s has the Court been as active as it has been in recent years in enforcing federalism-based limitations on congressional power. This article assesses the implications of the Court's recent federalism decisions for environmental law generally and for the federal government's controversial wetlands regulations in particular. It reviews the Court's most recent decisions on congressional authority under the Commerce Clause and examines the Court's recent rulings on the scope of congressional authority under Section 5 of the Fourteenth Amendment. The author concludes that even if the federal government lacks authority under the Commerce Clause or Section 5 to protect the environment in certain ways (such as through the challenged "migratory bird rule"), Congress has other authorities to enact its preferred regulations. Nothing in the Court's recent federalism decisions forecloses the Congress from using other powers, such as the authorities it derives from its treaty and spending powers and the property clause, to fashion environmental laws it deems necessary.

Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 WILLIAM & MARY L. REV. (2001). This Article addresses critically the implications of the U.S. Supreme Court's recent decision in *Christensen v. Harris County*, 120 S.Ct. 1655 (2000), for standards of judicial review of agency interpretations of law. *Christensen* is a notable case in the administrative law area because it purports to clarify application of the deference doctrine first articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). By reviving this doctrine, the case narrows application of the predominant approach to deference articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), thus reducing the level of deference in many appeals involving administrative agency interpretations of law. This Article addresses the deference debate in this context, criticizing *Christensen*, especially Justice Thomas' majority opinion. The Article argues that the majority did not properly apply *Skidmore*, and that the Court's decision invites ad hocery by lower courts in their review of agency legal interpretations. It concludes that conceptualizing *Skidmore* within the architecture of *Chevron's* step two – not as an alternative to the application of *Chevron* – will best promote goals of accountability, uniformity, and flexibility.

David B. Spence and Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEORGETOWN L. J. 97 (2000). In this article, the authors challenge the widely-held views that (i) the public choice model of legal scholarship is necessarily hostile to the idea of agency autonomy, and (ii) delegation of policymaking authority to agencies is inconsistent with democratic theory, or at the very least, counter-majoritarian. Spence and Cross construct an argument in favor of delegation to administrative agencies using the language and tools of economic analysis. They begin by posing a hypothetical question: given the choice, to whom would voters prefer to delegate policymaking authority, their elected representatives or administrative agencies? The authors then suggest that, consistent with principal-agent models of delegation, voters would prefer to delegate authority to the decision-maker who is most likely to do what they (voters) would do if they had the time and resources necessary to devote to

the problem. Using a simple public choice model, Spence and Cross then suggest that *direct* electoral accountability is at least as much of an impediment to, as it is a guarantor of, good policymaking. That is, voters often prefer delegation to agencies because voters suspect that politicians' decisions are more likely than agencies' decisions to be infected by self-interest. Consequently, voters estimate that agencies will do a better job of representing them – that is, of making the choices that the voters would have made if the voters were fully informed. In this sense, then, broad delegations of authority are consistent with American democratic theory and the spirit of our Constitutional design, which has always sought to insulate policymakers from direct political pressures. Furthermore, agencies do not exert power unchecked, and voters know this. In fact, politicians are more like to attempt to exert control over agencies, and more like to be successful, when agencies deviate from voter preferences. Using their public choice model, the authors then go on to argue that delegation is consistent with the letter of our Constitutional design, and that it is necessary, desirable and unavoidable.

Lawrence E. Susskind and Joshua Secunda, *The Risks and the Advantages of Agency Discretion: Evidence From EPA's Project XL*, 17 UCLA J. ENV. L. & POLICY (1999).

Criticism of the administrative state seems to have increased exponentially over the past two decades, particularly with regard to environmental regulation. Many commentators assert that the "command and control" approach to enforcement is now anachronistic. Further, it has been characterized as "ossified", likely to discourage innovation, a disincentive to continuous environmental improvement, economically inefficient, a violation of free market principles, and undemocratic. Many commentators urge some form of "regulatory reinvention" or reform. Their unanimity ends, however, when it comes to which adaptations to adopt. Since 1995, the U.S. Environmental Protection Agency has struggled to implement its own reforms, including Project XL. Through Project XL, (which stands for "Excellence in Leadership"), EPA is exploring more flexible approaches to encourage collaborative, problem-solving, outcome-oriented compliance with federal and state

standards. In doing so, EPA has experimented with regulatory models that are based on “adaptive management” theory. As it turns out, this theory is very much at odds with the enforcement philosophy upon which EPA was founded. The constraints of formal discretion, as typically set out in various government enforcement policy guidances, are well known. However, EPA’s innovative technology/compliance initiatives are, essentially, discrete adaptive management experiments. As such, they represent Agency attempts to encourage innovative schemes that stretch or even contradict established Agency “dicta”. These initiatives require bureaucrats to reanalyze regulatory intent in ways they have never before considered. Thus, the question: how do agencies behave when making judgments on projects for which no internal guidance yet exists? The article examines the role that “informal discretion” has played in programs like Project XL and the Common Sense Initiative, and the degree to which the concept has been stretched in attempting to negotiate these projects with the private sector. The article also suggests that a more aggressively flexible approach to administrative discretion may be vital to EPA’s attempts to garner further innovative proposals from the regulated community. Finally, the article

discusses the degree to which “informal discretion” might invite regulators to re-conceive established regulatory safeguards that now, in their view, make the implementation of innovative compliance technologies and regulatory schemes practically impossible.

Symposia

Executive Privilege and the Clinton Presidency, 8 WILLIAM & MARY BILL OF RIGHTS J., No. 3, April, 2000. Iain R. McPhie, Introduction; Mark J. Rozell, *Restoring Balance to the Debate over Executive Privilege: a Response to Berger*; Louis J. Fisher, *Invoking Executive Privilege: Navigating Ticklish Political Waters*; Neil Kinkopf, *Executive Privilege: the Clinton Administration in the Courts*; Jonathan L. Entin, *Executive Privilege and Interbranch Comity after Clinton*; Neal Katyal, *The Public and Private Lives of Presidents*.

Thirtieth Annual Administrative Law Issue: Governance of the Internet, 50 DUKE L.J. 5-260 (2000). James Boyle, *A Nondelegation Doctrine for the Digital Age?*; Michael A. Froomkin, *Wrong Turns in Cyberspace: Using ICANN To Route the APA and the Constitution*; Jonathan Weinberg, *ICANN and the Problem of Legitimacy*. ◆

Olson v. Dellinger

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Federalism is a different story. Olson thinks Commerce Clause cases and cases arising under the Tenth and Eleventh Amendments, as well as Section 5 of the Fourteenth Amendment, would be affected by which candidate wins the White House. The recent trend of the Court has been to slightly shift the balance of power to the States. Bush appointees might be expected to continue this trend but perhaps not Gore appointees.

Olson said discrimination cases and First Amendment cases also could swing one way or the other depending on which candidate wins, given the current “fragile majorities” and recent 5/4 decisions.

In rebuttal, Dellinger questioned how much stock can be placed in either candidate’s professed standard for choosing justices. He thinks each candidate’s formulation “leaves something to be desired.” Bush’s strict constructionist/limited role standard is misleading given who he reveres. Scalia has a record of striking down Acts of Congress and

looking beyond the text. On the other hand, Gore makes Dellinger a little nervous with his evolving document perspective. This can easily become an excuse for simply applying one’s personal views.

Dellinger thinks the only Commerce Clause cases that are difficult to call are the non-commercial cases.

Olson used his rebuttal time to defend Scalia and Thomas as only doing what they say they try to do — construe text as it is written. He disagrees with Dellinger that invalidating laws equals activism.

In closing, Dellinger observed that the current Court is an extremely confident one “that sees itself at the center of the Constitutional universe.” He is concerned that the Court has imposed a lot of restrictions on Congress and is now moving on to the president, citing the line-item-veto case and the FDA tobacco case as examples.

Olson, on the other hand, predicts that either candidate’s nominees are likely to respect executive power.

Of course, now that we see how close the election turned out and how narrow the majorities in Congress have become, these erudite gentlemen might well be thinking all bets are off. ◆

upon to review a determination by the Customs Service that spiral-bound and ring-bound day planners were “diaries, notebooks and address books, bound,” a category under the tariff regulations that results in a higher duty than would apply if the day planners were not within that category. The Federal Circuit began its analysis by stating that the tariff regulations, having been adopted by notice and comment rulemaking, were law, so the meaning of the regulations was a question of law to be determined by the court, and no deference was to be shown to the agency’s ruling on the subject, because the ruling was not itself a regulation and had not gone through the process of notice and comment. However, if the Federal Circuit were to apply normal administrative law doctrine, the Customs ruling as to the meaning of its own regulations probably should be given deference under *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), although this line of cases has been criticized by commentators after *Christensen v. Harris County*, 120 S.Ct. 1655 (2000), held that informal agency interpretations of statutes would only be subject to “weak” *Skidmore* deference, not “strong” *Chevron* deference. Alternatively, the court could have followed the line of cases beginning with *NLRB v. Hearst*, 322 U.S. 111 (1944), which applied deference to agency application of the law to particular facts in proceedings before the agency. However, the Federal Circuit appeared unaware of these cases. It seems likely that the Court will again require the Federal Circuit to follow traditional administrative law requirements, and it may actually clarify what they are when an agency informally interprets its own regulations.

Not that the Federal Circuit is alone in not deferring to agency interpretations, as is evident in *National Labor Relations Board v. Kentucky River Community Care Inc.*, 193 F.3d 444 (6th Cir. 1999), which the Court is also considering. There the NLRB had held that registered nurses in a residential mental health facility were “employees” and not “supervisors.” The Sixth Circuit overturned that decision both because the NLRB had assigned the burden to the employer to prove the nurses were supervisors, rather than having itself meet the burden of proving the nurses were employees, and because on the facts the court held the nurses were supervisors.

Title VI of the Civil Rights Act of 1964 has been

the weapon of choice recently for persons seeking to challenge the racially disparate effects of a number of different state government actions. Title VI bars racial and national origin discrimination in programs receiving federal financial assistance, and typically the agencies dispensing the funds have implementing regulations enforcing Title VI. State defendants, however, have raised a number of defenses. In *Alexander v. Sandoval*, 197 F.3d 484 (11th Cir. 1999), the state argued that the Eleventh Amendment bars the action, Title VI does not create a private right of action under agency implementing regulations, and English-only laws cannot as a matter of law violate Title VI. The Eleventh Circuit affirmed a district court decision for the plaintiffs, overruling all these defenses. The scope of the Eleventh Amendment has been a major issue in the Supreme Court in recent years, but this case would seem to fall squarely within at least two of the exceptions to the bar against suits against states – waiver as a consequence of receipt of federal money in light of the terms of Title VI and the doctrine of *Ex Parte Young*, which essentially allows injunctive suits against state officers alleged to violate federal rights. As to the private right of action, the Supreme Court has held that Title VI itself creates a private right of action for its enforcement, but the question whether agency implementing regulations that prohibit state actions that have a disparate impact on particular races or national origin groups also may be enforced through private rights of action, as opposed to agency enforcement of its regulations against fund recipients, has not been definitively settled by the Supreme Court. Generally, the Court has held that Title VI only prohibits intentional racial or national origin discrimination, not disparate impact effects. At the same time, the Court has also held that agencies in their Title VI regulations may act prophylactically by banning disparate impacts, but the Court has not clearly held that private persons, although they may bring private suits under Title VI itself, may bring private suits under agency regulations. The distinction is critical because it is usually impossible to show intentional discrimination on the basis of race or national origin, but it is often possible to show that a state government action, such as an English-only requirement, has disparate impacts on the basis of race or national origin. In the Fourteenth Amendment context, the Court has recently been very strict as to the limits of Congress’s prophylactic power to address discrimination. This case may provide an opportunity either to extend that strictness to agencies’ implied power acting under undoubted Congressional power to condition federal spending or

to distinguish the Fourteenth Amendment cases from cases involving federal spending. The way things are going, however, the former seems more likely.

The Eleventh Amendment is the only issue on the table in *University of Alabama Board of Trustees v. Garrett*, 193 F.3d 1214 (11th Cir. 1999), in which a suit for damages was brought against the University of Alabama alleging a violation of the Americans with Disabilities Act. That act clearly authorizes suits against states, but in light of the Court's recent cases, especially *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), which held that the Age Discrimination in Employment Act could not constitutionally override a state's sovereign immunity, the constitutionality of that authorization is in extreme doubt.

A prisoner case, *Lopez v. Davis*, 186 F.3d 1092 (8th Cir. 1999), raises an issue of the Bureau of Prison's exercise of discretion by rulemaking. A federal statute provides that the sentence of a federal prisoner convicted of a nonviolent crime who has successfully completed a substance abuse program "may be reduced by the Bureau of Prisons." The BoP adopted regulations providing that prisoners convicted of "a felony ... [t]hat involved the carrying, possession, or use of a firearm or other dangerous weapon" are not eligible for early release. The question is whether the BoP can under the statute make a class-based determination that all prisoners convicted of felonies involving the firearms, even though classed "nonviolent" crimes, may be excluded from the sentence reduction program. Black letter administrative law allows agencies to make class-based determinations by rule, deciding issues ordinarily determined on a case-by-case basis in adjudication. See, e.g., *Heckler v. Campbell*, 461 U.S. 458 (1983). The Eighth Circuit decision upholding application of the agency's regulation, however, merely recites *Chevron* as a basis for deference to the

agency's decision, rather than assessing whether the generalization reflected by the agency's rule is reasonable in light of the statutory scheme. Here, the purpose of the statute is to create an incentive for prisoners to successfully complete drug rehabilitation programs by offering them sentence reductions, but it is available only to prisoners convicted of nonviolent crimes. Earlier, the BoP had apparently excluded from the program persons convicted of crimes involving firearms, because those crimes, even if technically nonviolent, should be treated more like violent crimes. This approach met resistance from courts, see, e.g., *Martin v. Gerlinski*, 133 F.3d 1076 (8th Cir. 1998). Accordingly, the BoP mandated the same result as an exercise of its discretion.

Another prison case involves the exhaustion of administrative remedies. In *Booth v. Churner*, 206 F.3d 289 (3^d Cir. 2000), a state prisoner sued for damages under 42 U.S.C. § 1983 alleging use of excessive force against him by prison officials. The Prison Litigation Reform Act requires prisoners bringing actions "with respect to prison conditions" to exhaust "such administrative remedies as are available." All were agreed that the state offered no administrative remedy that would include money damages. Nevertheless, the court held that futility was no excuse for failure to have exhausted administrative remedies in light of the clear statutory mandate requiring exhaustion and therefore dismissed the case. Since *Darby v. Cisneros*, 509 U.S. 137 (1993), which held that the APA's Section 704 was a statutory exhaustion provision, there has been a question as to what extent common-law exceptions to the common-law exhaustion requirement would apply to statutory exhaustion requirements. *Booth* may address this issue, but it may also avoid it by concluding that when administrative remedies cannot provide the relief requested, it is not an "available" administrative remedy. ◆

Recommendations *continued from page 3*

service of openness and participation in governmental decision making.

The third theme involves the need to recruit and retain outstanding civil servants. This area proved to be the one in which the Council, at its October meeting in Washington, DC, voted to drop a specific proposal. The proposal would have urged the President-Elect to foster the participation of federal lawyers in professional organizations and *pro bono* activities. After spirited discussion, this particular urging was deleted, although the general concern about upholding the important role of the civil service was retained.

The fourth theme concentrates on the importance of the ongoing study of the administrative process by government officials, private lawyers, and academics. The deliberative structure of the former Administrative Conference of the U.S. provides the model for organizing such study.

These four sets of themes—dealing with appointments, rulemaking, the civil service, and ongoing deliberation about the administrative process—can fairly be said to reflect "mainstream" concerns. They do not beg the question whether "more" or "less" governmental regulation is desirable. Nor do they presuppose what sorts of regulation, if any, may be preferable in a particular context. ◆

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757/221-3835

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International Trade & Customs
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Labor & Employment Law
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Detroit, MI
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Barton F. Stichman
Washington, DC
202/265-8305

Council Capsules *continued from page 5*

at the Midyear Meeting, but it is not clear that final negotiations will be concluded in time.

ADR Confidentiality Project

Science, Agencies & the Courts panel. L to R: Richard J. Pierce, Jr., Thomas O. McGarity, Alan Charles Raul, Wendy Wagner, E. Donald Elliott.

Karen D. Powell, chair of the Public Contracts Committee of the Dispute Resolution Section presented the report of the Ad Hoc Committee on Federal ADR Confidentiality (a joint project of the Sections of Administrative Law, Dispute Resolution and Public Contract Law). She reported that the Federal ADR Council was seeking comments on its federal ADR confidentiality guidelines and noted that the deadline was rapidly approaching. She said that the Ad Hoc Committee was encouraging its constituents to submit substantive comments.

Daniel Marcus, ex officio council member and DOJ representative, said the Federal ADR Council would consider comments filed by Thanksgiving. He said he would suggest to the ADR Council that the final version note it is subject to revision. He added that the ADR Council would benefit from the input of those who are familiar with the legislative history of the Administrative

Dispute Resolution Act of 1996.

The Chair asked the Dispute Resolution Committee to prepare comments. The Chair asked the Ad Hoc Committee to continue its work and its collaborative effort with the Dispute Resolution and Public Contract Law Sections.

Presentation of Plaques to Authors

Chairman Levin presented plaques to Sam Hirsch co-author of the *Realists' Guide to Redistricting*, and to William F. Funk and Jeffrey S. Lubbers, co-authors of the *Federal Administrative Procedure Sourcebook*, honoring them for their contributions to the section's publications program. The Chair noted that similar plaques will be sent to J. Gerald Hebert, Donald B. Verrilli, Jr., and Paul M. Smith, the other authors of the *Realists' Guide*, and to Charles Pou, Jr., the other author of the *Sourcebook*.

Corporate Counsel Committee Program

Council member Lisa A. Whitney said that the Corporate Counsel Committee intends to conduct a program addressing regulatory problems of interest to corporate counsel. The program would produce three one-day seminars in the New York metropolitan area during 2001 and would be co-sponsored by the American Corporate Counsel Association. Three major firms are willing to act as hosts. If successful, the program could be expanded to other locations. ◆

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